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The Conflict of Laws: A Comparative Study. Volume Four Property: Bills and Notes: Inheritance: Trusts: Application of Foreign Law: Intertemporal Relations

Ernst Rabel

MICHIGAN LEGAL STUDIES

THE CONFLICT OF LAWS

A Comparative Study

PUBLISHED UNDER THE AUSPICES OF THE UNIVERSITY OF MICHIGAN LAW SCHOOL (WHICH, HOWEVER, ASSUMES NO RESPONSIBILITY FOR THE VIEWS EXPRESSED) WITH THE AID OF FUNDS DERIVED FROM GIFTS TO THE UNIVERSITY OF MICHIGAN BY WILLIAM W. COOK.

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by

ERNST RABEL

VOLUME FOUR

Property: Bills and Notes: Inheritance: Trusts:
Application of Foreign Law: Intertemporal Relations

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EDITORIAL NOTE: With this fourth and final volume, the monumental survey of existing systems of conflicts law, initiated by the late Ernst Rabel in 1939 under the auspices of the American Law Institute but conducted after 1942 through the generous sponsorship of the University of Michigan Law School, is completed. It is most fortunate that, despite the fact that the present volume was prepared in various institutions during the years immediately preceding the author's death on September 7, 1955, he not only finished but also revised the proofs of the text; the various tables were later compiled at Ann Arbor.

As in the case of the preceding volumes, the research embodied in the present volume was made possible by the continued and substantial support made available by the University of Michigan Law School out of the W. W. Cook Trust funds, complemented by a generous gift of the James Foundation, provided through the good offices of the Harvard Law School.

Among the many at the University of Michigan and elsewhere who assisted in the preparation of this volume, the editor is under special obligation to Dr. Dietrich Schindler for painstaking assistance in the collection and verification of the basic materials and to Mrs. Evelyn Bianchi for the detailed preparation of the manuscript, as well as to Mrs. A. Duncan Whitaker who compiled the tables and Dr. Giuseppe Bisconti who collated the index. *Finis coronat opus.*

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List of Abbreviations

Abh.	Abhandlungen.
A.C.	Appeal Cases, English Law Reports, 1891–.
Ala.	Alabama Reports.
Allen	Allen, Massachusetts Supreme Court Reports, vols. 83–96.
All E.R.	All England Law Reports, Annotated.
Allg. BGB.	Allgemeines Bürgerliches Gesetzbuch (Austria).
Allg. HGB.	Allgemeines Handelsgesetzbuch (Austria).
Allg. L.R.	Allgemeines Landrecht (Prussia).
A.L.R.	American Law Reports, Annotated.
A.L.R.(2d)	American Law Reports, Annotated, Second Series.
Am. Dec.	American Decisions (Select Cases).
Am. J. Comp. L.	American Journal of Comparative Law.
Am. J. Int. Law	American Journal of International Law.
Am. Jur.	American Jurisprudence, San Francisco, New York, 1936–.
Am. Marit. Cas.	American Maritime Cases.
Am. Rep.	American Reports.
Anales Jud.	Anales Judiciales de la Corte Suprema de Justicia (Peru).
Annali Giur.	Annali di giurisprudenza.
Ann. Survey Am. L.	Annual Survey of American Law, New York University School of Law.
Annuaire	Annuaire de l'Institut de droit international.
Annuario Dir. Comp.	Annuario di diritto comparato e di studi legislativi.
App.	Cour d'appel; corte d'appello.
App. Cas.	Appeal Cases, English Law Reports, 1876–1890.
App. Div.	New York Supreme Court, Appellate Division Reports.
Arch. Civ. Pr.	Archiv für die civilistische Praxis (Germany).

Arch. f. bürg. R.	Archiv für bürgerliches Recht, Berlin.
Ariz.	Arizona Reports.
Ark.	Arkansas Reports.
Atl.	Atlantic Reporter, National Reporter System (United States).
Atl. (2d)	Atlantic Reporter, National Reporter System, Second Series.
Aust. Dig.	Australian Digest, 1947–.
Barb. S.C.	Barbour's Supreme Court Reports, New York, 67 vols.
Bay. ObLG.	Bayerisches Oberstes Landesgericht.
Bay. ObLGZ.	Sammlung von Entscheidungen des Bayerischen Obersten Landesgerichts in Zivilsachen.
Bay. Z.	Zeitschrift für Rechtspflege in Bayern (1905-1934).
BBl.	Bundesblatt der Schweizerischen Eidgenossenschaft.
B.C.R.	British Columbia Reports.
BEA	Bills of Exchange Act (British, 1882).
Beav.	Beavan, English Rolls Court Reports.
Beitr. Ausl. Pr.	Beiträge zum ausländischen und internationalen Privatrecht, 1928–.
BG.	Bundesgericht (Switzerland).
BGB.	Bürgerliches Gesetzbuch (Germany).
BGE.	Entscheidungen des Schweizerischen Bundesgerichtes. Amtliche Sammlung.
Bligh	Bligh, English House of Lords Reports, New Series, 11 vols.
Bl. Zü. R.	Blätter für zürcherische Rechtsprechung.
Bolze	Die Praxis des Reichsgerichts. Herausgegeben von Bolze (Germany).
Boston U.L. Rev.	Boston University Law Review.
Brit. Y.B.Int. Law	British Year Book of International Law.
Bro. P.C.	Brown's Cases in Parliament.
Bull. Inst. Int.	Bulletin de l'Institut Intermédiaire International.
Burr.	Burrow, English King's Bench Reports.
BW.	Burgerlijk Wetboek (the Netherlands).
C. A.	Court of Appeals.

Cal.	California Reports.
Cal. (2d)	California Reports, Second Series.
Cal. App.	California Appeals Reports.
Cal. App. (2d)	California Appeals Reports, Second Series.
Calif. L. Rev.	California Law Review.
Cambr. L.J.	Cambridge Law Journal.
Cám. civ. cap.	Cámara civil de la capital (Argentina).
Can. Abridgement	Canadian Abridgement, a digest of decisions of the Provincial and Dominion Courts.
Can. Bar Rev.	Canadian Bar Review (Toronto).
Can. Ex.	Reports of the Exchequer Court of Canada.
Cass.	Cour de cassation; Corte di cassazione.
Cass. civ.	Chambre civile de la cour de cassation.
Cass. crim.	Chambre criminelle de la cour de cassation.
Cass. req.	Chambre des requêtes de la cour de cassation.
C.B.	Common Bench Reports, Court of Common Pleas (Manning, Granger & Scott).
C.C.	Civil Code; code civil; código civil.
C.C.A.	Circuit Court of Appeals (United States).
C.C.A. (2d)	Circuit Court of Appeals, Second Series.
C. Civ. Prac.	Court of Civil Practice.
C. Civ. Proc.	Code of Civil Procedure, sometimes referred to as C. Proc. Civ. or C.P.C.
C. Com.	Commercial code, code de commerce, código de comercio.
C. com. indigène	Code de commerce indigène (Egypt).
C. com. mixte	Code de commerce mixte (Egypt).
Ch.	Chancery Division, English Law Reports, 1891–.
Ch. D.	Chancery Division, English Law Reports, 1876–1890.
China, Int. Priv. Law	Law of August 5, 1918.
Coll. leg.	Colección legislativa de España, 1898–.
Commission de Réforme de C. C. Travaux	Commission de réforme du code civil, Paris, Recueil Sirey, 1947.
Chi. Kent. L. Rev.	Chicago-Kent Law Review.
C.J.	Corpus Juris (United States).

C.J.S.	Corpus Juris Secundum (United States) and Supplement.
Cl. & Fin.	Clark & Finelly's Reports (House of Lords) 1831–1846.
C.L.R.	Commonwealth Law Reports (Australia).
Clunet	Journal du droit international. Fondé par Clunet, continué par André-Prudhomme.
C. marit.	Code maritime.
C. Obl.	Code of Obligations, Obligationenrecht (Switzerland) (See Swiss C. Obl.).
Código Bustamante	See Bustamante Code in the Table of Statutes.
Col. L. Rev.	Colorado Law Review.
Colo.	Colorado Reports.
Colo. App.	Colorado Appeals Reports.
Comptes rendus	International Conference for the Unification of the Laws on Bills of Exchange etc. 1930. League of Nations Document No. C. 360. M. 151, 1930 II.
Conf. U.D.F.	Conférence pour L'unification du Droit Fluvial, 1931.
Conn.	Connecticut Reports.
Corn. L.Q.	Cornell Law Quarterly.
Cow.	Cowen, New York Reports, 9 vols.
C.P.C.	Code of civil procedure.
C.P.Div.	Common Pleas Division, English Law Reports, 1875–1880, 5 vols.
Cranch	Cranch, United States Supreme Court Reports, vols. 5–13.
Cr. & J.	Crompton & Jervis, English Reports, 1830–1832.
Cursos Monográficos, Acad. Interamer.	Cursos Monográficos, Inter-American Academy of comparative and international law, Havana, 1948–.
Czechoslovakia, Int. Priv. Law	Law of March 11, 1948 (Czechoslovakian Collection of Laws no. 19, of April 10, 1948).
D.	Dalloz, Recueil périodique et critique de jurisprudence, de législation et de doctrine (France).
Dal.	Dallas' United States Supreme Court Reports.

D.C.	District of Columbia.
D.C.Md.	District Court of Maryland.
D.C.N.Y.	District Court of New York.
Del.	Delaware Reports.
Deutsche Recht.	Deutsche Rechtswissenschaft, 1936–.
D.H.	Dalloz, Recueil hebdomadaire de jurisprudence (France).
Digest of Rep. Cas.	Digest of Reports of Cases (Malay States).
Digesto Italiano	Il Digesto Italiano, 24 v. in 49; Torino, 1884-1921.
Dir. Marit.	Il diritto marittimo. Revista bimestrale di dottrina, giurisprudenza, legislazione italiana e straniera.
Disp. Prel.	Disposizioni preliminari; disposiciones preliminares; disposição preliminar.
D.L.R.	Dominion Law Reports (Canada).
Doc. Prépar.	International Conference for the Unification of the Laws on Bills of Exchange, Promissory Notes and Cheques, 1930. Preparatory Documents, 1929 I. 28. League of Nations Doc. No. c. 234. M. 83. 1929 II.
D.P.R.	Revista de derecho, legislación y jurisprudencia del colegio de abogados de Puerto Rico, 1935–.
Drew.	Drewry, English Vice Chancellor's Reports, 4 vols.
East	East's King's Bench Reports, 16 vols. (England).
EG.BGB.	Einführungsgesetz zum Bürgerlichen Gesetzbuch (Germany).
Els. L.Z.	Juristische Zeitschrift für Elsass-Lothringen.
Eng. Re.	English Reports (Full reprint).
Eng. Rep.	Moak, English Reports (American reprint).
Entsch.	Entscheidungen des königlichen geheimen Obertribunals, 1837-1879 (Prussia).
ER.	The English Reports, Full Reprint.
Exch.	The Exchequer Reports (England) 1847–1856.
Ex. C. R.	Exchequer Court Reports (Canada).
F.	Fraser, Scotch Sessions Cases, 5th Series.

F. (2d)	Federal Reporter, Second Series (United States).
Fed.	Federal Reporter (United States).
Fed. Cas.	Federal Cases (United States).
Festschrift f. Fritzsche	Fragen des Verfahrens- und Kollisionsrechtes; Festschrift zum 70. Geburtstag von Professor Dr. Hans Fritzsche, Zürich, 1952.
Festschrift f. Raape	Festschrift für Leo Raape zu seinem Siebzigsten Geburtstag, 14 Juni 1948. Hrsg. von Hans Peter Ipsen. Hamburg, Rechts-und Staatswissenschaftlicher Verlag. 1948.
Festschrift f. Rabel	Festschrift für Ernst Rabel, Tübingen, 1954.
Foreign Law Series no. 4	Administration of estates with respect to assets abroad in England, United States of America, France. Paris, Librairie du Recueil Sirey; New York, 1935.
Foro. Ital.	Il foro italiano.
Foro. Lomb.	Foro della Lombardia.
F. Supp.	Federal Supplement (United States).
Ga.	Georgia Reports.
Ga. App.	Georgia Appeals Reports.
Gac. For.	Gaceta del Foro (Argentina).
Gaz. Pal.	Gazette du Palais (France).
Gaz. Trib.	Gazette des Tribunaux (France).
Gen. Conv.	Geneva Convention.
Geo. L. J.	Georgetown Law Journal (Wash., D. C.).
Geo. Wash. L. Rev.	George Washington Law Review.
Giur. Comp. D. Com.	Giurisprudenza comparata di diritto commerciale, marittimo, aeronautico, industriale e d'autore.
Giur. Comp. DIP.	Giurisprudenza comparata di diritto internazionale privato.
Giur. Comp. Dir. Civ.	Giurisprudenza comparata di diritto civile.
Giur. Ital.	Giurisprudenza italiana.
Gl. U.	Sammlung von zivilrechtlichen Entscheidungen des Obersten Gerichtshofes, begründet von Glaser und Unger (Austria).
Gray	Gray's Massachusetts Reports, vols. 67–82.

Gruchot's Beiträge	Beiträge zur Erläuterung des deutschen Rechts, begründet von Dr. J. A. Gruchot.
Grünhut's Zschr.	Zeitschrift für das Privat-und Öffentliche Recht der Gegenwart, herausgegeben von Dr. C. S. Grünhut (Austria).
Hagg. Eccl.	Haggard, English Ecclesiastical Reports, 4 vols.
Handelsg.	Handelsgericht.
Hans. GZ.	Hanseatische Gerichtszeitung. (See also Hans. RGZ.).
Hans. RGZ.	Hanseatische Rechts- und Gerichts-Zeitschrift.
Hare	Hare, English Reports, 1841–1853.
Harv. L. Rev.	Harvard Law Review.
Haw.	Hawaiian Reports, 1847/56.
HBe.	Hamburgische Gerichts-Juristen.
Hbl.	Hauptblatt.
H. Bl.	H. Blackstone, English Law Reports, 1788–1796.
H.D.	Högsta domstolen (Sweden).
Hem. & Mill.	Hemming & Miller, English Law Reports, 1862–1865.
HGB.	Handelsgesetzbuch (Germany).
H.L.Cas.	House of Lords Cases (Clark), 11 vols. (England).
H. & N.	Hurlstone & Norman, English Exchequer Reports, 7 vols.
Hopk.	Hopkins New York Chancery Reports.
Houst.	Houston, Delaware Reports, vols. 6–14.
How. Pr.	Howard, New York Practice Reports, 67 vols.
H.R.	Hooge Raad (the Netherlands).
H.R.R.	Höchstrichterliche Rechtsprechung (Germany).
Humph.	Humphrey's Tennessee Reports.
Ill.	Illinois Reports.
Ill. App.	Illinois Appeals Reports.
Ill. L. Rev.	Illinois Law Review.
Ind.	Indiana Reports.
Int. Bar. Ass.	International Bar Association.
Int. Civ. Law	International Civil Law.

Int. & Comp. L.Q.	International and Comparative Law Qarterly, 1952–.
Interamer. Bar. Ass.	Interamerican Bar Association.
Int. Priv. Law	International Private Law.
Introd. Law	Introductory Law.
Iowa	Iowa Reports.
Iowa L. Rev.	Iowa Law Review.
IPR.	Internationales Privatrecht.
IPRspr.	Die Deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts. Beilage der Zeitschrift für ausländisches und internationales Privatrecht (Z. ausl. PR.).
I.R.	Irish Law Reports.
Ir. R. Eq.	The Irish Reports, Equity Series, 1857–1878.
J. Air L. and Comm.	Journal of air law and commerce, 1930–.
Japan, Priv. Int. Law	Law of June 15, 1898.
J. Bl.	Juristische Blätter (Austria).
J. Comp. L.	Journal of Comparative Legislation and International Law, 53 vols., 1897–1951.
J. C.P.	Juris-Classeurs (Périodique), La Semaine Juridique.
J. d. Tr.	Journal des Tribunaux (Belgium).
Jh. Jb.	Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts (Germany).
JKG.	Jahrbuch für Entscheidungen des Kammergerichts (Germany).
Johns.	Johnson's New York Cases, 3 vols.
J. Trib.	Journal des Tribunaux, Bruxelles, 1882–.
Jur. Arg.	Revista de jurisprudencia argentina (Buenos Aires); doctrina— legislación— jurisprudencia.
JW.	Juristische Wochenschrift (Germany).
Kan.	Kansas Reports.
K.B.	English Law Reports, King's Bench.
KG.	Kammergericht (Germany).
K.&J.	Kay & Johnson, English Vice-Chancellors' Reports.
Ky.	Kentucky Reports.
La.	Louisiana Reports.
La. Ann.	Louisiana Annual Reports.

La. App.	Louisiana Appeals Reports.
La. L. Rev.	Louisiana Law Review.
L. Ed.	Lawyer's Edition, United States Supreme Court Reports.
Leipz. Z.	Leipziger Zeitschrift für Deutsches Recht.
L.J.	Law Journal Reports (England).
L. of Nat. Tr. S.	League of Nations Treaty Series, 205 vols., 1920–1946.
L.Q.R.	Law Quarterly Review (England).
L.R.A.	Lawyer's Reports, Annotated (United States).
L.R.A.(N.S.)	Lawyer's Reports, Annotated, New Series (United States).
L.R.Ch.	English Law Reports, Chancery Appeal Cases, 1866–1875.
L.R.Eq.	Law Reports, Equity Cases (England).
L.R.I.	The Law Reports (Ireland) 1878–1893.
L.R.P.&D.	English Law Reports, Probate and Divorce, 3 vols.
L.R.Q.B.	Law Reports, Queen's Bench (England 1891–).
Madd.	Maddock, Reports, English Chancery, 6 vols.
Man. L.R.	Manitoba Law Review (Canada).
Martens Recueil	Nouveau Recueil général des traités et autres actes relatifs aux rapports de droit international. Publication de l'Institut de Droit Public Comparé et de Droit des Gens à Berlin.
Mart.(La.)	Martin's Louisiana Reports, 12 vols.
Mart. N.S.	Martin's Louisiana Reports, New Series, 1823–1830.
Mass.	Massachusetts Reports.
McLean	McLean's United States Circuit Court Reports.
Md.	Maryland Reports.
Me.	Maine Reports.
Metcalf	Metcalf's Massachusetts Reports, vols. 42–54.
Mich.	Michigan Reports.
Mich. L. Rev.	Michigan Law Review.

McKinney's Cons. L. Ann.	William M. McKinney's The consolidated laws of New York, annotated, 1916.
Minn. L. Rev.	Minnesota Law Review.
Misc.	Miscellaneous Reports (New York).
Miss.	Mississippi Reports.
Mod. L. Rev.	Modern Law Review.
Mo.	Missouri Reports.
Mo. App.	Missouri Appeals Reports.
Monitore	Monitore dei Tribunali. Sometimes referred to as Mon. Trib.
Mont.	Montana Reports.
Moo. P.C.C.	Moore, English Privy Council Cases, 15 vols. (England).
NAG.	Bundesgesetz betreffend die zivilrechtlichen Verhältnisse der Niedergelassenen und Aufenthalter (Switzerland).
National Conference Handbook	Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings (United States).
N.C.	North Carolina Reports.
N.E.	Northeastern Reporter, National Reporter System (United States).
N.E. (2d)	Northeastern Reporter, National Reporter System, Second Series.
Neb.	Nebraska Reports.
N.F.	"Neue Folge," meaning new series, to indicate the beginning of new numbering in periodicals, collections of court reports, *et cetera* in the German language.
N.H.	New Hampshire Reports.
NIL	Uniform Negotiable Instruments Law (United States).
N.J.	Nederlandsche Jurisprudentie.
NJA.	Nytt Juridiskt Arkiv (Sweden).
N. J. Eq.	New Jersey Equity Reports.
N.J.L.	New Jersey Law Reports.
N. Jur. Woch.	Neue Juristische Wochenschrift (Germany, 1947–.).
North Car. L. Rev.	North Carolina Law Review.
Nouv. Revue	Nouvelle revue de droit international privé.

N.S.	New series, if added to court reports, periodicals, *et cetera.*
N.S.Am. L. Reg.	American Law Register, New Series.
N.S.Wales St. Rep.	The State Reports of New South Wales (Australia).
N.W.	Northwestern Reporter, National Reporter System (United States).
N.W.(2d)	Northwestern Reporter, National Reporter System, Second Series.
N.Y.	New York Court of Appeals Reports.
N.Y.L.J.	New York Law Journal.
N.Y.S.	New York Supplement Reports, National Reporter System (United States).
N.Y.S.(2d)	New York Supplement, National Reporter System, Second Series.
N.Y. St. Rep.	New York State Reporter.
N.Y.U.L.Q.Rev.	New York University Law Quarterly Review.
N.Z.L.R.	New Zealand Law Reports.
N.Z.L.Rev.	New Zealand Law Review.
O.A.G.	United States Opinions of the Attorneys General.
Oberapp. Ger.	Oberappellationsgericht.
Ob. Trib.	Obertribunal (Prussia).
OGH.	Oberster Gerichtshof (Austria).
Ohio St.	Ohio State Reports.
O.J.Z.	Österreichische Juristen-Zeitung (Austria).
Okla.	Oklahoma Reports.
OLG	Oberlandesgericht (Germany and Austria).
O. H. Ct.	Ontario High Court of Justice (Canada).
Ont. L.R.	Ontario Law Reports (Canada).
O.W.N.	The Ontario Weekly Notes (Canada).
P.	English Law Reports, Probate Division.
Pa.	Pennsylvania Reports.
Pac.	Pacific Reporter, National Reporter System (United States).
Pac. (2d)	Pacific Reporter, National Reporter System, Second Series.
Paige	Paige's Chancery Reports (New York), 11 vols., 1883.

Pas. Belg.	Pasicrisie belge. Recueil géneral de la jurisprudence des cours et tribunaux de Belgique.
Pas. Lux.	Pasicrisie Luxembourgeoise, Recueil de la jurisprudence luxembourgeoise en matière civile, commerciale, criminelle, de droit public, fiscal, administratif et notarial, 1881–.
Pa. St.	Pennsylvania State Reports.
Pa. Super. Ct.	Pennsylvania Superior Court Reports.
P.D.	Probate Division, English Law Reports.
Perm. Ct. Int. Justice Publ.	Permanent court of International Justice Publications, Hague.
Pet.	Peter's United States Supreme Court Reports, vols. 26–41.
Phila.	Philadelphia Reports, 20 vols.
Pick.	Pickering, Massachusetts Reports, vols. 18–41.
Poland, Priv. Int. Law	Law of August 2, 1926.
Pr. A.L.R.	Preussisches Allgemeines Landrecht.
Praxis	Die Praxis des Bundesgerichts (Switzerland).
Priv. Ges.	Privatrechtliches Gesetzbuch (Zürich).
Puchelts Z. franz. C.R.	Zeitschrift für französisches Civilrecht (Puchelt ed.).
P. Wms.	Williams (Peere), English Chancery Reports, 3 vols.
Q.B.	Queen's Bench, English Law Reports, 1891–.
Q.B.D.	English Law Reports, Queen's Bench Division, 1876–1890.
Que. Q.B.	Queen's Bench Reports, Quebec.
Rb.	Rechtbank (the Netherlands).
Rechtsk. WB.	Rechtskundig Weekblad (Belgium).
Recueil (des cours)	Recueil des cours de l'Académie de droit international de la Haye.
Recueil Niboyet et Goulé	J. P. Niboyet et P. Goulé, Recueil des textes usuels de droit international, 2 vols., 1929.
Recueil trib. arb. mixtes	Recueil des décisions des tribunaux arbitraux mixtes.
Répert.	See Bibliography.
Rev. Arg. Der. Int.	Revista argentina de derecho internacional.

Rev. Autran	Revue internationale du droit maritime. Fondée et publié par F.C. Autran. Paris, 1885–.
Rev. Ciencias Jur. Santa Fé	Revista de ciencias jurídicas y sociales de la Universidad nacional del littoral . . . Santa Fé, República Argentina, 1922.
Rev. Crit.	Revue critique de droit international.
Rev. Der. Jur. y Ciencias	Revista de derecho y ciencias sociales.
Rev. Espan. D. Int.	Revista española de derecho internacional, 1948–.
Rev. Fac. Der.	Revista, Facultad de Derecho (Mexico).
Rev. franç. de droit aérien	Revue française de droit aérien . . . Paris, Recueil Sirey, 1947.
Rev. Hell.	Revue Hellénique de Droit International (Greece).
Rev. Jur. Un. P.R.	Revista Jurídica de la Universidad de Puerto Rico. 10 vols., San Juan, 1932–1941.
Rev. St.	Revised Statutes.
Revue	Revue de droit international privé. Fondée par A. Darras.
Revue Algérienne	Revue Algérienne, Tunisienne et Marocaine de législation et de jurisprudence, 1925–.
Revue Dor.	Revue de droit maritime comparé. Fondée par Leopold Dor. Paris, 1923.
Revue Dr. Int. (Bruxelles)	Revue de droit international et de législation comparée. Fondée par Rolin Jacquemyns, Asser et Westlake.
Revue Dr. Int. Marit.	Revue internationale du droit maritime, Paris, 1885–1922. (Usually cited as Revue Autran).
Revue Trim. D. Civ.	Revue trimestrielle de droit civil (Paris).
RG.	Reichsgericht (Germany).
RGZ.	Entscheidungen des Reichsgerichts in Zivilsachen (Germany).
Rhein. Arch.	Rheinisches Archiv für Zivil- und Strafrecht.
Rhein Z. f. Zivil- u. Prozessrecht	Rheinische Zeitschrift für Zivil- und Prozessrecht des In- und Auslandes.
R.I.	Rhode Island Reports.
Riv. Dir. Com.	Rivista di diritto commerciale.

Riv. Dir. Proc.	Rivista di diritto processuale civile.
Rivista	Rivista di diritto internazionale.
Rivista u. di G.D.	Rivista universal di Giurisprudenza e Dottrina.
Riv. Trim. dir. e proc. civ.	Rivista trimestrale di diritto e procedura civile.
Rocky Mt. L. Rev.	Rocky Mountain Law Review.
ROHG.	Reichsoberhandelsgericht (Germany).
ROHGE.	Entscheidungen des Reichsoberhandelsgerichtes (Germany).
ROLG.	Die Rechtsprechung der Oberlandesgerichte auf dem Gebiete des Zivilrechts (Germany).
R.P.N.B.	Revue Pratique du Notariat Belge, 1875–.
R.R.	Revised Reports (England).
Russ.	Russell, English Chancery Reports.
S.	Sirey, Recueil général des lois et des arrêts (France).
Sächs. Ann.	Annalen des sächsischen Oberlandesgerichts.
S.A.L. R.	South African Law Reports.
Sask. App.	Saskatchewan Appeals Reports (Canada).
S. Car.	South Carolina Reports.
Schweiz. Jahrb. I.R.	Schweizerisches Jahrbuch für internationales Recht, Zürich, 1944–.
Schweiz. Jur Zeit.	Schweizeriche Juristenzeitung (Switzerland).
Sc. L.T.	Scots Law Times (Edinburgh).
Scot. J.	Scottish Jurist, Edinburgh.
Scot. L. Rep.	Scottish Law Reporter.
S.C.R.	Supreme Court Reports (Canada).
S. Ct.	Supreme Court Reporter, National Reporter System (United States); Supreme Court; Suprema Corte.
S. D.	South Dakota Reports.
S.E.	Southeastern Reporter, National Reporter System (United States).
S.E.(2d)	Southeastern Reporter, National Reporter System, Second Series.
Segundo Congreso, Rep. Arg.	Segundo Congreso Sudamericano de Derecho Internacional Privado, Montevideo 1939–1940, ed. República Argentina, Ministerio

	de Relaciones Exteriores y Culto, Buenos Aires 1940.
Sem. Int. de droit	Travaux de la Semaine internationale de droit, Paris, 1937.
Sess. Cas.	Sessions Cases (English King's Bench Reports); Scotch Court of Session Cases.
Seuff. Arch.	J. A. Seufferts Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten.
S.H.T.	SØ-OG Handelsretstidende (Denmark).
Sim.	Simons, English Vice-Chancery Reports, 17 vols.
SJZ	Schweizerische Juristen Zeitung.
So.	Southern Reporter, National Reporter System (United States).
So. (2d)	Southern Reporter, National Reporter System, Second Series.
Spinks Ecc. & Ad.	Spinks, Ecclesiastical & Admiralty Reports, 1853–1855.
Stat.	United States Statutes at Large.
St. Johns L. Rev.	St. John's Law Review.
Striethorst	Archiv für Rechtsfälle die zur Entscheidung des königlichen Obertribunals gelangt sind, 1851–1880. Herausgegeben von Striethorst (Prussia).
S.W.	Southwestern Reporter, National Reporter System (United States).
S.W.(2d)	Southwestern Reporter, National Reporter System, Second Series.
Swabey	Swabey, English Admiralty Reports.
Swiss C. Obl.	Das Obligationenrecht, Bundesgesetz betreffend die Ergänzung des schweizerischen Zivilgesetzbuches March 30, 1911.
Swiss Off. Coll.	Offizielle Sammlung der das schweizerische Staatsrecht betreffenden Aktenstücke; Bundesgesetze, Verträge, und Verordnungen, seit der Einführung der neuen Bundesverfassung vom 12 Sept. 1848. 11 vols., Bern, 1849-1874.

Sw. & Tr.	Swabey & Tristram, English Probate and Divorce Reports.
SZ.	Sammlung der Entscheidungen des Österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen. Veröffentlicht von seinen Mitgliedern (Austria).
TAM	Tribunal Arbitral Mixte.
Tenn.	Tennessee Reports.
Tex.	Texas Reports.
Tex. L. Rev.	Texas Law Review.
Tex. Sup.	Texas Supplement to vol. 25, Texas Reports.
Thailand, Priv. Int. Law	Law of 1939.
T.L.R.	Times Law Reports (England).
T.P.D.	Transvaal provincial division, South African Law Reports.
Trib.	Tribunal.
Trib. civ.	Tribunal civil (France).
Trib. com.	Tribunal de commerce (France).
T.S.	Tribunal Supremo.
T. sup.	Tribunal supérieur (France).
Tul. L. Rev.	Tulane Law Review.
U.C.C.	Uniform Commercial Code (United States).
U.C.Q.B.	Upper Canada, Queen's Bench Reports.
U.F.R.	Ugeskrift for Retsvaesen (Denmark).
U. of Ill. L. Forum.	University of Illinois Law Forum, 1949.
U.L.A.	Uniform Laws, Annotated (United States).
U.N.Publ.	United Nations Publication.
U. of Pa. L. Rev.	University of Pennsylvania Law Review.
U.S.	United States Reports.
U.S. Av. R.	United States Aviation Reports.
U.S.C.A.	Code of the Laws of the United States of America, Annotated.
U.S. Treaty Ser.	United States Treaty Series.
Utah	Utah Reports.
Vanderbilt L. R.	Vanderbilt Law Review.
V. & B.	Vesey & Beames, English Law Reports, 1812–1814.
Va.	Virginia Reports.
Va. L. Rev.	Virginia Law Review.

Ves.	Vesey, Senior, English Chancery Reports, 2 vols.
Ves. Jun.	Vesey, Junior, English Law Reports, 1789–1815.
Vict.	The Victorian Statutes (Victoria, Australia).
Vict. L. R.	Victorian Law Reports (Australia).
Vt.	Vermont Reports.
W.	Weekblad van het Recht (the Netherlands).
Wall.	Wallace, United States Supreme Court Reports, vols. 68–90.
Warn. Rspr.	Die Rechtsprechung des Reichsgerichts auf dem Gebiete des Zivilrechts, herausgegeben von O. Warneyer (Germany).
Wash.	Washington State Reports.
Wend.	Wendell, New York Reports, 26 vols.
Wheaton	Wheaton's United States Supreme Court Reports.
Wis.	Wisconsin Reports.
Wisc. L. Rev.	Wisconsin Law Review.
W. N.	English Law Reports, Weekly Notes.
W. O.	Wechselordnung (Germany, Austria).
W.P.N.R.	Weekblad voor Privaatrecht Notaris-ambt en Registratie, 1870–.
W. Va.	West Virginia Reports.
W.W.R.	Western Weekly Reports (Canada).
W.W.R.(N.S.)	Western Weekly Reports, New Series.
Wyo.	Wyoming Reports.
Yale L. J.	Yale Law Journal.
Z. ausl. Pr.	Zeitschrift für ausländisches und internationales Privatrecht. Begründet von Ernst Rabel.
ZBJV	Zeitschrift des bernischen Juristenvereins.
Z. f. Rechtspflege B.	Zeitschrift für Rechtspflege in Bayern.
Z. f. Ostrecht	Zeitschrift für Ostrecht. (See also Z. Osteurop. R.).
Z. Int. R.	Niemeyer's Zeitschrift für internationales Recht.
Z. osteurop. R.	Zeitschrift für osteuropäisches Recht. (In 1927 merged with Ostrecht into Zeitschrift

	für Ostrecht. Continued since 1934 as Zeitschrift für osteuropäisches Recht. See also Z. f. Ostrecht.)
Z. Handelsr.	Zeitschrift für das gesamte Handelsrecht und Konkursrecht.
ZPO.	Zivilprozessordnung (Germany and Austria).
Z. Savigny Stift. Rom. Abt.	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung.
Z. Schweiz. R.	Zeitschrift für schweizerisches Recht.
Z. Ziv. Proz.	Zeitschrift für deutschen Zivilprozess.

PART ELEVEN

PROPERTY

CHAPTER 54

Tangible Property

I. REAL RIGHTS

1. Concept of Proprietary Rights

FROM time to time, the basic distinction between proprietary or real rights *(jura in re)* and relative, particularly obligatory, rights has been subjected to severe sociological, economical, or logical criticism.[1] To name only a few of the distinguished iconoclasts in this topic, Adolf Wagner,[2] Vinding Kruse,[3] and Hohfeld [4] may be mentioned. These arguments, which have impressed

[1] I have treated this subject repeatedly; for a broad recent exposition, see HANS PETER, Wandlungen der Eigentumsordnung und der Eigentumslehre seit dem 19. Jahrhundert (Aarau 1949).

[2] ADOLF WAGNER, 3 Grundlegung der politischen Ökonomie (1894).

[3] FR. VINDING KRUSE, The Right of Property (1929), translated from the Danish into German I (1931) 185, into English (1939) 131; USSING, "Le transfer de la propriété en droit danois," 4 Rev. Int. Dr. Comp.

Most recently, the Scandinavian doctrines have been lucidly presented by GOTTHEINER, Eigentumsübergang beim Kauf beweglicher Sachen, 18 Z. ausl. PR. (1953, published May, 1954) 356. With respect to the consequences in the conflicts field, the most challenging point lies in the rule, especially distinct in Denmark, that the creditors of the seller are barred from attaching or seizing in bankruptcy proceedings articles that have been sold without any formality of payment or delivery. While the authors deny a distinction between obligatory and proprietary rights, at least inter partes, it would seem under the usual categories that the obligation concluded between seller and buyer has an effect as to those persons deriving their rights from the seller, an effect of relative relationship *in rem,* i.e., diminishing the ownership of the seller, a phenomenon that occurs not infrequently in other situations elsewhere. Should this effect be respected in another country to which, e.g., the sold object were removed without delivery or other new events? This offers an interesting problem which, however, needs fuller investigation than is possible here.

[4] HOHFELD, Fundamental Legal Conceptions (1923) 74 ff.

some of the writers on conflicts law,[5] should be examined in the light of comparative legal history as well as of technical needs.

In both Roman and English legal history, a clear distinction has been made between actions *in rem,* claiming directly against a thing, and actions *in personam,* directed against a person. In the republican Roman procedure *per legis actionem in rem,* as has become certain beyond any doubt, the claimant seized the thing *(vindicatio),* and only when another claimant raised opposition, thereby acquiring the role of defendant,[6] did the law suit commence. In the classic Greek and early Germanic procedures, there were analogous configurations. All such primitive actions were directed against an object rather than a subject; this "obligatio" was literally the binding of a person with a rope, and *agere in personam* meant seizure of a man. All actions were originally tort actions; when the *vindicatio* of a slave or an ox was opposed by a *contravindicatio,* the issue was which claim was wrongful.[7]

Thus, there was no fundamental difference in the thinking of Greece, republican Rome, and medieval Europe about the essence of real and obligatory rights, whenever they were distinguished from the corresponding actions. Real rights, in Germanic and English law, are correctly described as bundles of rights (or better, faculties) in various quantities, essentially connected with possession (seisin, *Gewere*) and, at least in the case of immovables, endowed with effect as against third persons only through

[5] Under the spell of Hohfeld, FALCONBRIDGE, Conflict of Laws 527, speaks of the "misleading expression *jus in rem,*" as suggesting an "untenable theory" or "futile" attempt to distinguish rights *"in personam,"* and sums up: "All rights are personal" (index, 726).

[6] WLASSAK, "Der Gerichtsmagistrat im gesetzlichen Spruchverfahren," 25 Z. Savigny Stift., Rom. Abt. (1904) 81 at 160.

[7] RABEL, "Δίκη ἐξούλης und Verwandtes," 36 Z. Savigny Stift., Rom. Abt. (1915) 340, 386.

additional publicity. These ancient ideas permeated the feudal law; remainders are outstanding in the common law. Germanic concepts also have some bearing on the Scandinavian customary law. Right and possession were neatly separated by the Roman jurists, who crystallized a learned concept of dominium, which is a power over a physical thing, "absolute," i.e., effective against everyone, and unlimited in principle, but upon which public and private law have imposed more or less considerable restrictions. But once the common lawyers had disengaged tort and contract as well as property and debt, the Roman concept was plainly helpful as a means of further clarification.

In the broad European development of concepts, the distinction is fundamental. An action *in personam,* as the term denotes, is directed against one or several persons indicated in the source of the right claimed by the plaintiff. An action *in rem* opposes anyone who disputes the plaintiff's right; out of a real right, an indefinite number of claims may arise against persons as yet unascertained. Disregard of these simple phenomena necessarily creates difficulties in connection with such doctrines as limitation of actions, adverse possession, or *res judicata.*

Full ownership in a corporeal thing and lesser rights such as easements and encumbrances, *jura in re aliena,* are tools of our profession, indispensable for the technical language of an advanced jurisprudence. Conflicts law has to use such terms. They represent clear and practical concepts which do not prejudice the contents of the rules, domestic or international.

2. Objects of Real Rights

In all systems, ownership in a thing and the thing itself have long been designated by the same word, such as the Germanic *"eigen"* and the English "property." The divi-

sions made by Roman jurists, *res mancipi* and *nec mancipi, res corporales* and *incorporales, species* and *genus, res in nostro patrimonio* (or *commercio*) and *extra patrimonium,* for the most part are conceived as distinguishing legal rules rather than their objects. Why should our own terminology now be confined either to the things or the rights in them? Attacking the usual language, Cook has claimed that tangible physical objects should always be called land and chattels, and as such be characterized as immovable or movable, while interests in them should be termed realty, real estate, or real property and personalty or personal property.[8] Such strained language is unnecessary for lawyers who understand the traditional ambiguity; it is misleading precisely in interpreting the legal rules distinguishing movables and immovables, which primarily refer to rights and not the objects of rights.

The objects of true real rights, however, are mere tangible, physical things, whereas rights in real rights, in debts, in intangible goods such as industrial property, are constructions, as also are rights in aggregate units *(universitates rerum).* We confine our discussion in the present chapter strictly to the narrow class of real rights in individual (isolated) tangible physical things. It does not seem important whether they are termed rights or interests.[9] They include legal and beneficial ownership as conceived by the common law. Equitable interests are but somewhat weaker real rights, [10] in contrast to mere obligations such

[8] COOK, "Immovables and the Law of the Situs," 52 Harv. L. Rev. (1939) 1246, 1250 ff., reprinted in Legal Bases, Ch. 10, followed by FALCONBRIDGE, Conflict of Laws 433, 436.

[9] *Cf.* Restatement, Introductory Note to §208.

[10] For a consequence of the distinction in conflicts law see *Re* Hole (Manitoba K.B.) [1948] 4 D.L.R. 419. The right to the purchase price, in the absence of a lien, was personal property, situated in Manitoba where the seller was domiciled, the document executed, and the price payable, although the sale concerned Saskatchewan land.

as the right of a buyer to whom neither title nor constructive possession has passed.[11]

Accordingly, we shall have to limit our main discussion to particular assignments of property, that is, individual transfers *inter vivos,* excluding all general assignments. Only the problem of characterization will make it necessary to enlarge the outlook.

II. The Statutist Doctrine

The local situation of immovable property and the transfer of its ownership has a very large significance, extending to taxation, jurisdiction, succession, administration of estates, social policy, and measures against enemy property. In this field, old concepts are deeply rooted.

1. *Lex Situs*

As historical research has shown,[12] the long life of the *statutum reale,* or in the modern version, *lex rei sitae, lex situs,* was prepared in the early middle ages by gradually increasing emphasis on territorial power, in opposition to the original principle that law is an order of personal groups, tribes, cities, and peoples. In the first development, reaching back into the Roman provincial organization, possession of the soil became the subject of tributes and taxation. Thereafter, jurisdictional power and competency on territorial basis were strongly promoted by the feudal system. From the thirteenth century, the territorial rule in-

[11] Insofar as equitable interests are not effective against everyone, they resemble the category of relative real rights which has been developed in German theory. Furthermore, modern theory begins to study more profoundly the effects of obligations on third parties, *cf.* Wilburg, "Gläubigerordnung und Streitverfolgung," 71 Juristische Blätter (1949) 29-33. There is great need for comparative research concerning the problems respecting equitable interests as sketched in the literature collected by Wolff, P.I.L. (ed. 2) 583.

[12] Neumeyer, 2 Gemeinrechtliche Entwicklung 33 ff., 89 ff.; Meijers, Bijdrage 58 ff.

cluded land and increasingly also chattels. The result was the conception that the territorial law governs not only persons *(statuta personalia)*, but also things situated in the territory *(statuta realia)*.

2. Movables Follow the Person

(a) *Theoretical basis.* The Italian, French, and Dutch commentators drew a fundamental distinction between immovable and movable assets:[13] immovables are subject to the law of the place where they are situated, but *mobilia personam sequuntur* or *mobilia ossibus inhaerent,* that is, movables are governed by the law of the owner's domicil. The French *coutûmes* adopted this rule instead of the feudal absolute *lex situs.*

It is doubtful, however, whether the rule was a remainder of the ancient personality of law[14] or originated as a presumption that chattels are situated where their owner is (particularly used by Bartolus in the matter of seizure.)[15] In the prime of the statutist doctrine and in French literature of the nineteenth century, the authors, though they agreed on the rule *mobilia sequuntur personam,* always remained divided on its basis.[16] It is true that most of them believed that movables have no situs—"personalty has no locality," it was said in England: one line of authority deduced the rule from the personal law of the owner or of the possessor;[17] another from the fiction that they are at the

[13] 2 LAINÉ 228 ff.

[14] Thus MEIJERS, 49 Recueil (1934) III 588, 638.

[15] FREYRIA, La loi applicable aux successions mobilières (Thèse, Lille 944) 48 ff.

[16] 2 LAINÉ 233; WEISS, 4 Traité 169 ff., as of 1912.

[17] D'ARGENTRÉ, Comm. ad patrias Britonum leges (1621) art. 218 glossa 6, no. 30: Sed de mobilibus alia censura est, quoniam per omnia ex conditione personarum legem accipiunt, et situm habere negantur, nisi affixa et cohaerentia, nec loco contineri dicuntur, propter habilitationem motionis et translationis. Quare statutum de bonis mobilibus vere personale est et loco domicilii

place of his domicil.[18] The first, applying the *statutum personale,* which had the influential support of D'Argentré and Pothier, was used in France in modern times to support the proposition that succession to movables should be governed by the national law of the deceased, as supplanting the law of his domicil. The second view, including movable property under the *statuta realia,* by fiction considered domicil as the territorial contact of property. This view finally prevailed in English and American law, and, since 1939, the traditional domiciliary law has also been definitely restored in the French conflicts system relating to inheritance.

Some French writers insist on speaking of two territorial laws of succession, those of situs and of domicil. But the domiciliary law of succession also may well be conceived as an application of the personal law.

(b) *Scope of the rule* respecting particular assets *("uti singuli").* The statutists also were not in accord whether the slogan *"mobilia personam sequuntur"* included individual transactions, such as sale, gift, or pledge of isolated chattels, so that in all cases immovables would be governed

judicium sumit et quodcumque judex domicilii de eo statuit ubique locum obtinet; *id.* art. 447, glossa 2; and l.1 C. de Summa Trinitate, a.o. Among the authors following him were BURGUNDUS, (see WEISS *l.c.;* FREYRIA *l.c.* 79 against LAINÉ), BOUHIER, POTHIER, and STORY §§ 379ff. Historical justifications have been proposed by MEIJERS, 49 Recueil (1934) III 638; NIBOYET, S. 1940.1.49; *contra* FREYRIA 109 ff.

[18] DUMOULIN, Obs. sur l'art. 41 du ch. 11 titre XII de la coutûme d'Auvergne: Fallit si habet bona alibi sita ubi potest amplius legare, quia reliquum capietur in bonis alibi sitis scilicet immobilibus: quia ex quo habet domicilium, mobilia censentur hic esse. This theory was perfected by RODENBURG, De jure quod oritur ex statutorum diversitate, tit. I, cap. II, tit. II, cap. II, no. 6, and particularly by JAN VOET, Commentarius ad Pandectas, liber I. tit IV, pars II (De Statutis) no. XI. Other adherents were BOULLENOIS, MERLIN, FOELIX, and in Germany GAILL and HERTIUS. DUMOULIN'S approach has been considered of historic merit by LAINÉ, 2 Introd. 246; PILLET, 1 Traité 694; *contra* FREYRIA 103 ff.

by the *lex situs* and movables by the law of the owner's domicil. The rule has been expressed in such generality in the Prussian and Austrian Codes and very distinctly hinted at in the French Code.[19] It appeared later in other jurisdictions, including Quebec.[20] English decisions have accepted this principle since 1790.[21] Lord Loughborough in 1791 called it "a clear proposition, not only of the law of England, but of every country in the world where the law has the semblance of science." [22] Story expressly defended the application of domiciliary law to all transfers *inter vivos* of personalty because of its general utility; this doctrine "could not fail to recommend itself to all nations by its simplicity, its convenience, and its enlarged policy." [23]

A narrower theory, however, was favored by many statutists. Only for the purpose of succession and marital property was the necessity commonly felt that movables scattered in several jurisdictions should be subjected to a common regulation. In France, on the eve of the Civil Code, the writers applied the maxim merely to "universal" assignments, only if the assets were situated in the same state as the decedent.[24] Also in Germany this restricted

[19] Prussia: Allg. Landrecht, Einleitung §§ 28, 32, 36.
Austria: Allg. BGB. § 300.
France: C.C. art. 3 par. 2: "Les immeubles, même ceux possédés par des étrangers, sont régis par la loi française." This provision, by its contrast to par. 3 and its clear history, expresses the old theory according to almost all non-French observers.
Similar: Bolivia C.C. art. 3.

[20] Quebec: C.C. (1866) art. 6, par. 2.
Puerto Rico: C.C. art. 10 (referring to the national law of the owner).
The Netherlands: Law of May 15, 1829, art. 7 (as the French).
Spain: C.C. art. 10.
Cuba: C.C. art. 10.
Mexico: C.C. (1928) art. 14.

[21] Bruce v. Bruce (1790) 6 Bro. P.C. 566.

[22] Sill v. Worswick (1791) 1 H. Bl. 665, 690; Somerville v. Somerville (1801) 5 Ves. jun. 750 ff.; Bayley, J. in *In re* Ewin (1830) 1 Cr. & J. 151, 156.

[23] STORY § 379.

[24] DELAUME, Les conflits de lois à la veille du Code Civil (Paris 1947) 184.

theory appeared clearly in the eighteenth century, and later was given prominence by Savigny.[25]

The interpreters of the Prussian, French, and Austrian Codes have given their legal texts forced constructions to comply with this reduction of the movable-rule to general assignments.[26]

The Italian Code of 1865 retained the national law of the owner to govern movables but only as a subsidiary device: "except for the contrary provisions of the law of the country where they are found." [27] The Italian literature prevailingly endeavored to minimize even the tenuous rule thus remaining.[28] But the section of the Field Code, adopted in four states in this country, has appropriated this formula, "really not the happiest one," [29] by stating that "Where the law of the place at which movables are situated does not provide otherwise, movables follow the person of the owner and are governed by the law of his domicil." [30]

Of the Spanish provision, it is recognized that, in copying the Italian text, it has omitted by error the essential restriction just mentioned. In regard to movables situated in

[25] Codex Maximilianeus Bavaricus civilis (1756) I 2 § 17; SAVIGNY 176 ff. § 366; Zürich: Priv. Ges. Art. 2; Greece: C.C. (1856) art. 5 par 1. WÄCHTER, 24 Arch. civ. Pr. 293.

[26] Prussia: DERNBURG, 1 Preuss. Priv. R. § 38 II; FÖRSTER-ECCIUS, 1 Preuss. Priv. R. ed. 7 (1896) 59 ff.; 1 BAR 605.

France: NIBOYET, Acquisition 38; 4 WEISS 195.

Austria: 1 EHRENZWEIG I 97 § 26; WALKER in 1 Klang's Komm. 234; OGH. (Feb. 8, 1928) 10 SZ. 57 n. 26.

On Quebec: see 3 JOHNSON 217 ff.

[27] Disp. prel. art. 7 par. 1.

[28] *Cf.* 1 FIORE § 93; DIENA, 2 Principi 36 ff., 223 ff., and in Revue 1911, 563; CAVAGLIERI 159; App. Milano (March 30, 1909) Clunet 1910, 1323.

[29] PACIFICI-MAZZONI, 1 Istituzioni di Dir. civ. Ital. (ed. 5 by Venzi 1925) 471 n. (g).

[30] California: C.C. (1949) § 946.

Idaho: Code (1947) 67-1101.

Montana: Rev. Codes (1935) § 6803.

North Dakota: Revised Code of 1943 § 47-0701.

Spain, public policy corrects most of the effects, but there remain unfortunate possible consequences.[31]

The same change of mind occurred in the Anglo-American doctrine during the last century. In England, it is true, the old doctrine [32] in its generalized variant applying the domiciliary law to all transactions involving movables, has been tenacious, and some decisions, loosely formulated, created confusion between the three connecting factors: situs, actus, and domicil. This has given rise to three theories and continues to preoccupy the textbook writers who usually take pains to show how impractical the old doctrine is.[33] Some recent authors even treat the matter at great length as an open problem.[34] In the United States, similar discussions occur,[35] but in the American courts the last decisions following Story's view were rendered half a century ago,[36] and

[31] See TRÍAS DE BES, Der. Int. Priv. 52 f.; AUDINET, Clunet 1891, 1115; NIBOYET, Acquisition 43.

[32] Sill v. Worswick (1791) 1 H. Bl. 665, 690, per Lord Loughborough; *In re* Ewin (1830) 1 Cr. & J. 151, 156 per Bayley, J.

[33] WESTLAKE 189 ff; DICEY (ed. 5) 620, rule 154 (ed. 6) 561 ff.; SCHMITTHOFF 182; WOLFF, Priv. Int. L. § 490 ff.; MORRIS, 22 Brit. Yearbook Int. Law (1945) 232; WORTLEY, Recueil 1947 II at 75.

It seems sometimes also that a foreign title acquired by the *lex situs* to choses in possession is merely recognized in the form of a presumption of validity of title, such as the presumption of the correctness of foreign judgments.

[34] CHESHIRE (ed. 4) 430 ff.; GRAVESON, The Conflict of Laws (ed. 2) 199-215. Cheshire and Wortley advocated the *lex loci* theory in a committee of the Seventh Hague Conference on Int. Priv. Law against a great majority. A new theory by Morris in DICEY, (ed. 6) 559 ff. and MORRIS, Cases (ed. 2) 277, 289, claiming the *"lex actus"* as proper law, seems practically to agree with *lex situs,* respecting tangible things with constant situs.

However, the present doctrine has been evidently expressed by Lord Maugham, then judge *in re Anziani* [1930] 1 Ch. 407, 420, when he announced:

"I do not think that anybody can doubt that with regard to the transfer of goods, the law applicable must be the law of the country where the movable is situate. Business could not be carried on if that were not so."

[35] E.g., 11 Am. Jur. "Conflict of Laws" § 65.

[36] See for the decisions reaching to Crapo v. Kelly (1872) 16 Wall. (83 U.S.) 610, 622, and Whitney v. Dodge (1894) 105 Cal. 192, 38 Pac. 636, STUMBERG (ed. 1) 357 ff. In New York, the shift from the owner's domicil

the dominant opinion has been contrary for much longer.[37]

At present, in transactions *inter vivos,* individual chattels are subjected in principle to the domiciliary law of the owner only by the above-mentioned sporadic provisions. Among them, the Spanish rule alone states that movables are generally governed by the personal, here the national, law of the owner; and this is regretted. The older Italian formulation of the domiciliary rule followed in the Field Code is practically devoid of meaning.

(c) *Exceptional function of the rule.* Savigny, enouncing the control of tangible movables by the *lex rei sitae,* nevertheless left a place for the *lex domicilii,* in the case of movables, such as articles of personal use or chattels touching a territory merely temporarily, which have no permanent situation.[38] Under the influence of his authority, the Argentine Code recognizes the *lex situs* only as follows:

> "movables permanently situated and which are held without the intention of removing them, are governed by the laws of the place where they are located; but movables which the owner always carries with him, or which are for his personal use, whether he be in his domicile or not, as well as those which are kept to be sold or carried to another place, are governed by the laws of the domicile of the owner." [39]

To illustrate a permanent location, Vélez Freitas in his annotations mentions Savigny's example of a library in the owner's house. Decisions have added bank deposits,[40] instru-

and the place of the transaction to the place where the movables are, seems to have occurred as late as 1930, according to Restatement, New York Ann. V. 188, Introd. Note.

[37] 1 WHARTON 674 §§ 297 ff. The first decisions against the domiciliary law involved a ship and a cargo not to be found at the owner's domicil, as STUMBERG (ed. 2) 391 notes.

[38] SAVIGNY 178 (transl. 179) § 366, *cf.* below Ch. 57 n. 1.

[39] Argentina: C.C. art. 11.

[40] *Cf.,* Cám. civ. 2a Cap. (June 22, 1925) 57 Gac. Foro 99, 16 Jur. Arg. 189.

ments payable to bearer,[41] and mortgage certificates,[42] while other decisions have declared the contrary.[43]

The Brazilian law has been analogous;[44] the reform of 1942 retains the law of the owner's domicil for

> "the movables which he carries or which are destined to be transported to other places." [45]

Modern theory, to be discussed later, recognizes some such cases not warranting the normal rule of *lex situs,* but does not apply the personal law.[46]

In the aftermath of all this, the Código Bustamante establishes a presumption that movables are normally situated at the residence of the owner or possessor,[47]—an arbitrary fiction.[48]

(d) *Obsolete remainders* of the "mobilia maxim," thrown out of the law of property, are sometimes cited in special connections. In particular, this "misleading maxim" has

[41] Cám. civ. 1a Cap. (Feb. 6, 1928) 27 Jur. Arg. 33.

[42] Cám. civ. 2a Cap. (Oct. 10, 1930) 95 Gac. Foro 90. Cám. Civ. 1 Cap. (Dec. 30, 1941) W. Sanford v. E. Sanford, Ley t. 25 p. 372, except in Rev. Arg. Dir. Int. (1943) 385. For other cases see BAGUÉ 95 ff.

[43] WALDEYER, Sucesiónes Argentino-Aleman de intestato, Jur. Arg. 1951-I Doctrina 53 f.

[44] Brazil, former Introductory Law of 1917, art. 10:

"Property, movable or immovable, is subject to the law of the place where situated; those movables, however, that serve his personal use or which he has always with him, or which are intended for transportation to other places, remain under the personal law of the owner.

"Unique Paragraph. Movables the situation of which changes during a real action concerning them, continue subject to the law of the place in which they were at the beginning of the suit."

[45] Introductory Law of 1942 to the C.C., art. 8 § 1. *Cf.,* Uruguay: C.C. art. 5 par. 2, extending the *lex situs:* "also to the movables which are permanently in the Republic." On the difficulties which make the *lex rei sitae* almost always the most certain rule, see TENORIO § 548.

[46] *Infra* 33.

[47] Código Bustamante, art. 111, followed by Brazil: L. Intr. Art. 8 § 2.

[48] WOLFF, Priv. Int. L. (ed. 2) 510 n. 2; see the controversy on the meaning between 2 SERPA LOPEZ § 229 and TENORIO § 373.

often been attributed to the law of insolvency, but has no standing there and appears now to be finally discredited.[49]

3. Characterization of Movables and Immovables

The practical importance of distinguishing movables and immovables for conflicts purposes has been narrowed, since the conflicts rules of almost all countries have adopted the *lex situs* for individual movables and many systems have abandoned the distinction altogether, subjecting the whole estate to one rule of succession or marital property. Nevertheless, what law determines "movability," is a question preliminary to frequent issues of jurisdiction, enforcement, bankruptcy, taxation, and others. The problem also has retained considerable bearing on the general controversy about characterization. It may therefore be treated here at some length.

The traditional principle that the *lex situs* determines whether a thing or interest is immovable, still prevails [50] but has been challenged by a recent and growing group of writers with their creed that the *lex fori* does everything. Moreover, the application of the principle by the English and American courts has produced certain peculiar points, introducing a scarcely noticed third theory.

(a) *The traditional characterization.* The principle that the *lex situs* determines whether an interest is movable, still enjoys such world-wide prevalence that documentation is unnecessary.[51] The practical purpose of this auxiliary rule

[49] NADELMANN, "The National Bankruptcy Act and the Conflict of Laws," 59 Harv. L. Rev. (1946) 1029 ff.; RAEBURN, "Application of the Maxim *Mobilia Sequuntur Personam* to Bankruptcy in Private International Law," 26 Brit. Y.B. (1949) 177, 189.

[50] In 1931 Gutzwiller named only Niboyet as opposed.

[51] Examples outside the common law:

France: Cass. Civ. (April 5, 1887) S. 1889 1. 387: "la question de savoir si certains biens sont meubles ou immeubles ne peut être résolue que par la loi du pays où ils se trouvent;" (Aug. 5, 1887) D. 1888 1. 65, BEALE, 2

is obvious. It is still the Anglo-American conflicts law that a decedent leaves separate estates in the jurisdictions where they are situated and in addition an estate composed of the movables situated anywhere. Frictions in the application of this system can be avoided only if the question what is movable is answered in all jurisdictions by the same method, that is, in accord with the law of the place where the thing is situated.

But to understand the historical idea of the entire institution, which is still so strong in so many countries, we have again [52] to go back to the meaning of the *statuta realia,* as it has slowly developed. A piece of land has a *status* as has an individual. The object of law is land or an individual; a statute is a *statutum reale* or *personale,* the objects of doubtful classification being collected in the *statuta mixta.* The land is an individual object of rights, automatically—not by any reference from a foreign conflicts rule—subject to the power of the feudal superior and subject to donation, sale, acquisition of marital interest, legacy, or intestate succession. There is no tie between the lands of one man in several territories. Hence, every sovereign determines the legal rules exclusively governing the fate of the land, and quite naturally also which things situated in the same territory go with the land—such as serfs, herds, easements in neighboring lots, especially the objects affording continuous use as "heritage," i.e., investment—and which do not, such as Bouteiller enumerates as *chatels* or *cateux:* barns, stables, and trees not bearing fruit.[53] Moreover, owing to the Ger-

Cases 6 (Russian mining concessions); Cour Paris (Feb. 14, 1938) Nouv. Revue 1938, 380 (shares in an American mining royalty).

Italy: Trib. Como, assigned by Cass. Roma, (Nov. 7, 1899) 2 Rivista di diritto internaz. e di legislaz. comp. (Napoli, 1899) 556, 559 f., *cf.,* RENAULT 1 *id.* (1898) 97 (Russian circus concession). Cód. Bustamante, art. 112, 113.

[52] *Cf., supra* Vol. I, 328, concerning marital property.

[53] BOUTEILLER, Somme rural, I, tit. 74 (ed. 1603 p. 429).

manic idea of property, various possessory rights may exist simultaneously: those of the king, the barons, and the lower vassals, or of the knight and the serfs. All these possessions and the respective present or future rights are naturally included in the concept of immovable right.

On the other hand, in the opinion of Dumoulin and his followers, which has been adopted by the interpreters of the French Civil Code, the last domicil of the deceased governs the inheritance in all movables, not as the personal statute but as the fictitious situation of the things.[54] This position again required the law at the true situation to determine what are movables; if the local statute classified a thing under the *statute real,* the domicil had nothing further to say.

The old writers give sufficient illustrations.[55] Boullenois borrows from another author the case of a testator, domiciled in Paris, who left a hereditament in Normandy. Fruits and grains were deemed to be movables under the Coutûmes of Normandy from the day of *Saint-Jean,* but under the Coutûme of Paris only when they were cut. The right opinion looks to the situs to determine the rights not only of the legatees but also of the heirs among themselves:

The domicil affords the rule of the distribution, and for this reason everything reputed to be movable at any place must be distributed according to the law of the domicil; but it does not regulate the nature and the quality of the property.[56] Bouhier determines immobilization of movables serving an estate by the owner "under the Coutûme where these estates are situated" and knows that all writers are of the same opinion.[57] Conversely, the situs decides whether

[54] 2 LAINÉ 233 ff., 261, and for the last French doctrine before the Code, DELAUME, Les Conflits de Lois á la veille du Code Civil (1947) 180, 316.

[55] The following is taken from the admirable report by 2 LAINÉ 256 ff.

[56] BOULLENOIS, I Personnalité et réalité des lois 841, quoting Basnage against Béraut.

[57] BOUHIER, Observations sur la coutume de Bourgogne, ch. 21 No. 173.

immovables in the natural meaning are assimilated to movables, as buildings *(cateux)* in Artois, Lille, and Saint-Pol,[58] and even, whether and to what extent the heir to whom they devolve must support the *debts* burdening the movables.[59]

Very clearly all of this doctrine has been adopted by Story:

"So that the question, in all these cases, is not so much what are or ought to be deemed, *ex sua natura,* movables or not, as what are deemed so by the law of the place where they are situated. If they are there deemed part of the land, or annexed (as the common law would say) to the soil or freehold, they must be so treated in every place in which any controversy shall arise respecting their nature and character. In other words, in order to ascertain what is immovable or real property, or not, we must resort to the *lex loci rei sitae.*" [60]

This passage has been quoted time and again, but evidently not always with perception of its full meaning.

(b) *The common-law rule.* The Continental rule was applied in the first half of the nineteenth century in England and the United States without difficulty.[61] A problem arose when chattels real were to be subordinated to movables or immovables. Considering that terms of years had been kept outside the feudal system and were still ranked with movables in the "personalty," [62] that is, the

[58] 2 LAINÉ 258.

[59] 2 LAINÉ 259.

[60] STORY § 447.

[61] England: A series of decisions dealing with the character of Scotch heritable bonds, immovable under Scotch law: Johnstone v. Baker (Ch. 1817) 4 Madd. 474 note; Jerningham v. Herbert (Ch. 1828) 4 Russ. 388, 391; Allen v. Anderson (Ch. 1846) 5 Hare 163; *cf. In re* Fitzgerald [1904] 1 Ch. 573; Train v. Train [1899] 2 Sess. Cas. 146.

United States: Chapman v. Robertson (N.Y. 1837) 6 Paige 627, 31 Am. Dec. 264; McCollum v. Smith (1838) 19 Tenn. 342, 33 Am. Dec. 147; Minor v. Cardwell (1866) 37 Mo. 350

[62] On the important reasons, see particularly 2 POLLOCK AND MAITLAND 570 ff.; *cf.,* HOLDSWORTH, 3 Legal History 182 ff. Not much credence is due to a theory deriving the phenomenon from the undisputed fact that the

assets not included in the succession by the heir, it would have been possible to argue that leaseholds in English land of a French deceased would follow the law of the French domicil. But the English courts decided otherwise. In fact, the memory of Sir Edward Coke's statement was vivid:

"Now goods or chattels are either personal or real . . . Real, because they concern the realty, as terms for years of land or tenements, wardships, the interest of tenant by statute staple, by statute merchant, by elegit and such like." [63]

The courts, therefore, did not hesitate to classify a leasehold, though personalty in the view of English law, along with real property as immovable for the purpose of applying the international rule of characterization. The consequence in the law of succession, however, until the reform of 1925-1926,[64] was that the movables of a decedent domiciled abroad formed one inheritance, while his lands and leaseholds in England constituted two further masses subject to different principles of transfer and liability for debts.[65]

These decisions on leaseholds go back to 1873; [66] however, it is most interesting that New York and Maryland have

original purpose of English "real actions" was to provide recovery in kind. This theory, by T. CYPR. WILLIAMS, "The Terms Real and Personal in English Law," 4 L.Q.R. (1888) 394, has been followed by HERBERT TIFFANY, 1 Real Property (1939, 3d ed. by Basil Jones) 5 § 3; but see 2 POLLOCK AND MAITLAND 181.

[63] 1 Coke on Littleton 118b.

[64] The distinction has retained its significance, when realty and personalty is disposed of separately by will and for tax purposes. SNELL, Principles of Equity (1939, 22nd ed.) 267.

[65] See as to heritable bonds, Drummond v. Drummond, quoted by Sir William Grant, M.R. in Brodie v. Barry (1813) 2 V. & B. 127, 132.

[66] England: Freke v. Lord Carbery *per* Lord Chanc. Selbourne (1873) L.R. 16 Eq. 461, 466; Duncan v. Lawson (1889) 41 L.R. Ch. D. 394; and others, see DICEY (ed. 6) 525 n. 24.

Ireland: In the Goods of Gentili (1875) Ir. R. 9 Eq. 541. DeFogassieras v. Duport (1881) 11 LRI 123.

United States: Restatement § 208, Special Note.

subordinated leaseholds as personalty to the decedent's domiciliary law.[67] The most frequent cases concerning chattels real have been testamentary trusts whereby land should be sold (equitable conversion) and the proceeds used in favor of certain persons. In municipal Anglo-American law, the equitable interest of the beneficiary so created is personalty. But for the purpose of conflicts law the courts have stressed the immovable nature of the land when not yet sold or reconverted at the death of the beneficiary, [68] and depending on construction of a British legal provision, even beyond this time limit.[69]

Mortgage. Another particularly important example, in addition to rent charges,[70] is the right of a mortgagee in land.

Mortgage as a "right *in re*" is naturally an immovable. This is recognized in all jurisdictions. The French Civil Code aroused doubts in this respect, since article 526 enumerating *droits réels* fails to mention the *hypothèque;* the corresponding characterization of the latter as movable by

[67] Despard v. Churchill (1873) 53 N.Y. 192 (Californian law for New York leasehold), *cf.,* Restatement New York Ann. § 208; Craig v. Craig (1922) 140 Md. 322, 117 Atl. 756.

[68] Following the lead of the Irish judge Andrews in Murray v. Champernowne (1901) 2 I.R. 232; *In re* Berchtold (1923) 1 Ch. 192.

Canada, Sask.: *Re* Burke [1928] 1 D.L.R. 318.

United States: Clarke v. Clarke (1899) 178 U.S. 186; Ford v. Ford (1888) 70 Wis. 19, 33 N.W. 188; Norris v. Loyd (1918) 183 Iowa 1056, 168 N.W. 557; *cf.,* Paul's Estate (1931) 303 Pa. 330, 154 Atl. 503. A wrong turn was taken in McCaughna v. Bilhorn (1935) 10 Cal. App. (2d) 674, 52 Pac. (2d) 1025, where, as a first step, the land was construed as personalty; see Note, 50 Harv. L. Rev. (1937) at 1152.

[69] See s. 22, ss. 5, Settled Land Act, 1882, 45 & 46 Vict., c. 38; *In re* Cutliffe's Will Trust [1940] 1 Ch. 565, noted 54 Harv. L. Rev. (1940) 134, criticized by FALCONBRIDGE, 18 Can. Bar Rev. (1940) 568-573 and Conflict of Laws 515, but *contra* CHESHIRE (ed. 4) 425; and in particular *Re* A.S. Creek [1936] N.S. Wales St. Rep. 186. On a strange result see DICEY (ed. 6) 527, comment on *In re* Middleton's Settl. [1947] Ch. 583 (C.A.).

[70] Chatfield v. Berchteldt (1872) L.R. 7 Ch. App. 192; *In re* Anziani [1930] 1 Ch. 407, 424.

older writers [71] has continuously misled German authors.[72] Yet the present French civil law writers declare article 526 to be incomplete and "certainly susceptible of generalization." [73]

The debt, secured by mortgage, in itself, is, of course, a movable, and its validity is governed by the international private law of obligations.[74] However, whenever the economic value of a mortgage is involved,—and this counts decisively in the distribution of inheritance—a sane view will include the debt in the assets of the mortgagee, and subject both to the *lex situs*. Anglo-American courts have not doubted this conception,[75] except in isolated Canadian cases and decisions of New Zealand and Australia, all of which mistakenly have applied precedents respecting taxation rather than conflicts law.[76] A holographic will executed in Louisiana, therefore, cannot dispose of a mortgage interest in Ontario.[77]

[71] See, e.g., BOUHIER, Obs. sur la coutûme de Bourgogne, ch. 25 §§ 9, 19; 29 § 36.

[72] KAHN, 1 Abhandl. 81 took this from LAURENT 7 Dr. Civ. 208 § 152, followed by LEWALD 175; WOLFF, Priv. Int. L. § 482, ill. p. 512, and others. But Laurent emphasized nevertheless the Belgian contrary characterization and advocated the *lex situs* for determining whether a hypothec is immovable, or whether there is a chattel mortgage (449 § 385).

[73] COLIN ET CAPITANT 1 (ed. 11) 747 § 931; PICARD in 3 PLANIOL ET RIPERT (ed. 2, 1952) § 93.

[74] This is also recognized in the United States, 2 BEALE 946 n. 2 s. 225.1; 11 Am. J. 337 § 39.

[75] England: Johnstone v. Baker (1817) 4 Madd. 474 n; and other old decisions, see CHESHIRE (ed. 4) 422; *In re* Hoyles [1911] 1 Ch. D. 179, as construed by Maugham, J., in *In re* Anziani (1930) 1 Ch. D. 407, 423.

United States: It is true that Restatement § 245 omits to repeat § 225.

Australia: *Re* Donnelly (1927) 28 N. S. Wales St. Rep. 34.

Canada: *Re* Gauthier [1944] 3 D.L.R. 401.

Scotland: see ALEX. DONALDSON, 4 Int. L. Q. (1951) 100-102.

[76] Canada: cases following Dalrymple Estate, Hogg v. Prev. Tax Commission [1941] 3 W.W.R. 605; [1941] 4 D.L.R.; 501 see FALCONBRIDGE, Conflicts of Laws 480 ff., 492 ff.

New Zealand: *Re* O'Neill [1922] N.Z.L.R. 468.

Australia: *Re* McClelland v. Trustees, Executors and Agency [1936] 55 C.L.R. 483; *Re* Young [1942] Vict. L.R. 4; see DICEY (ed. 6) 525 n. 26.

[77] *Re* Landry and Steinhoff [1941] O.R. 67, [1941] 1 D.L.R. 699.

The same result seems certain in French conflicts law; as early as 1837, the Court of Cassation defined the scope of the *lex situs,* according to article 3, paragraph 2, C.C., to "embrace in its generality all rights of ownership and other real rights, claimed on these [French] immovables." [78] It is true that express confirmation by the writers is scarce.[79] Similarly, *les situs* applies in Quebec,[80] Austria,[81] Brazil,[82] and probably commonly.

Only in Germany are the authors unsure, due to an article in the Civil Code (§ 1551, paragraph 2), prescribing that in a marital community of acquests and gains a hypothec is to be counted among the movables belonging to the community property. Although this rule has been said to contain a conflicts rule,[83] it would seem to be applicable only as a part of German substantive law and perhaps merely to the mentioned species of community property. There is authority for considering a hypothec and a land charge as subject to *lex situs.*[84]

[78] Cass. civ. (March 14, 1837) P. 1837.1.211, S. 1837.1.195.

[79] It has been given by BARTIN, 3 Principes 197 for the "constitution of the right *in re* itself," as contrasted with the contract. But we understand to the same effect LEREBOURS-PIGEONNIÈRE (ed. 5) 464 § 353; BATIFFOL, Traité § 537.

[80] 3 JOHNSON 308, 331.

[81] WALKER 339. In domestic Austrian law the contrary view is followed in 1 Klang's Komm. 1178.

[82] OCTAVIO RODRIGO, Dicionario de Direito Internacional Privado (1933) 54. On Cuban hypotheses see Fair v. Commissioner of Internal Revenue, (C.C.A. 3, 1937), 91 F. (2d) 218.

[83] M. WOLFF, D. IPR (ed. 3) 171 applies this rule to foreign land of either spouse. In his first edition, 106 § 30, this legal characterization seemed to be used for all regimes of matrimonial property but only to be referred to German land.

[84] RG. (Dec. 7, 1921) 103 RGZ. 259 invoked the situs of mortgaged land only as an additional criterion for the purpose of jurisdiction over the mortgage right. Yet KG (Dec. 21, 1935) JW 1936, 2466, at 2469, Nouv. Rev. 1937 98 (*supra* Vol. I, p. 531 n. 55) infers therefrom that a mortgage is a right in land subject to *lex situs* and concludes a fortiori that a land charge (Rentenschuld, BGB. § 1199) abstracted from any obligation by the German legislation—although movable according to § 1551—is likewise characterized, and an object of foreign "special provisions" on land reserved in EG. art. 28. Also RAAPE D. IPR. (ed. 3) 407 expresses the same view as our text.

If so, the German treatment of a German hypothec in a German-governed marital case would resemble the Anglo-American solution in succession cases. As soon as a British or American court finds that a mortgage on English, Canadian, or American land is an asset in a succession, it applies the law of the situs; but since under the substantive law involved mortgage is personalty, it may be treated differently from real estate law. The differences have been largely reduced in England since the land law reform of 1925[85] and in most American states. Nevertheless, it is still stated, at least in case a testator has established different dispositions for realty and personalty, that the mortgaged premises and the thereby secured debts are "personal assets in the hands of an executor or administrator, to be administered and accounted for as such," viz., administered and distributed as personalty, although rules of administration for real property apply in case of sale and other dispositions.[86]

It must be taken in this sense when it is said that English law looks primarily at the debt, not the charge.[87]

It should be noted that the courts in these cases have been compelled to create a new category of interests. The statutist rule rests on the automatic separation of immovables by the individual territorial organization; what is immovable in Austria is immovable in the meaning of any inheritance law, and subject to the normal Austrian succession in land. What, then, is the criterion for selecting English or American immovables that are not "real property"?

[85] WILLIAMS, Executor. (ed. 13, 1953) 303 § 527; *supra* n. 64.

[86] Restatement § 225 ff.; Ohio Gen. C. Ann. (Page 1938), § 10509.68; Wisconsin St., 1951 § 312.10; Minnesota St. 1947, § 525.38. Model Probate Code § 127.

[87] MONSARRAT AND MAW, The Administration in England of Estates of Foreigners, etc., Foreign Law Series No. 4, (1935) 271 (rather misleading for foreigners).

The English courts have obscured their position by explaining that they had to make a concession to international comity and therefore determine the question in conformity with the Continental division of movables and immovables. An English judge, taking this motivation too seriously, concluded that with respect to mortgages situated in Ontario, no such resort to categories other than personal and real property was needed.[88] He has been criticized because there should not be in England different systems for common-law countries and for the rest of the world.[89] But the result was obviously right, although it should not have been based on terminology and alleged concessions, but simply on the fact that characterization in Ontario was identical with the English in all points.

What the English courts really intended, in using (as they had done before) the continental distinction of immovables and movables and applying it to chattels real, was rather unfavorable to the alien laws. English leaseholds of a French deceased were excluded from the French succession, although they could not be treated as devolving to the heir, and had to form a third object of successions. Since the land laws of 1925, of course, inheritance to chattels real and movables differs only in minor respects.

The clearly formulated view of Beale, shared by many writers, is also misleading:

"Leasehold interests"—"are immovable, since they are interests in land and cannot be removed from the power of the land prevailing at the *situs* of the land." (If positive law decides otherwise, it does so only after it has been found applicable under the Conflict of Laws principle.)[90]

[88] Farwell, L.J., in *In re* Hoyles [1911] 1 Ch. 179.

[89] ROBERTSON, Characterization 200 f.

[90] 2 BEALE 932 f., but 937 § 209.1 recognizes correctly that the *lex situs* decides the question whether land to be converted into personalty is a "movable."

Thus, the criterion would be natural irremovability, reviving the original distinction of the Romans between *res immobiles* and *res quae moventur aut sese movent.*[91] This, however, contradicts Story and would never conform to the old rule, established upon the legal concept of an immovable interest that varies from territory to territory. And it does not suffice.

In fact, the characterization of equitable conversion has proved a matter of statutory interpretation, and has accordingly been made dependent on the *lex situs.*[92]

Illustration. A testator, dying domiciled in Illinois, established a trust of California land to be sold and the proceeds to be applied to the purposes of the trust. The will, holographic, was bad in Illinois but valid in California. Since California shares the theory that the interest of the beneficiary was in the land, the will was valid.[93]

The same is true, as a matter of course, for the classification of fixtures which, for all purposes—including eminent domain, mortgage, conditional sale, bankruptcy, and taxation—are judged according to the local rules of their situation.[94] Modern laws, it is true, tend to emphasize

[91] ROBERTSON, Characterization 206, 211, on this assumption, suggests "that the nature of tangible property as movable or immovable should be determined by the objective test of what the property in fact is."

[92] Bates v. Decree of Judge of Probate (1932) 131 Me. 176, 183; Restatement § 209; Iowa Annot. §209 cites two decisions for but one against *lex fori;* New York Annot. § 209: "Unsettled." *Cf.,* GOODRICH (ed. 3) 509 § 166.

[93] McCaughna v. Bilhorn (1935) 10 Cal. App. (2d) 674, 52 Pac. (2d) 1025, noted 49 Harv. L. Rev. (1936) 994, 50 *id.* 1152 (not quite justifiedly critical).

[94] E.g., Coxe, C.J., in Bergh v. Herring-Hall-Marvin Safe Co. (C.C.A. 2, 1905) 136 Fed. 368, 370; Triumph Electric Co. v. Patterson (1914) 211 Fed. 244 (conditional seller against a real estate mortgagee); Manufacturer's Bank and Trust Co. of St. Louis v. Lauchli (1941) 118 F. (2d) 607 (conditional sale); Gardner, C.J. in U.S. v. Becktold Co. (C.C.A. Mo. 1942) 129 F. (2d.) 473 (for what equipment must the federal Government condemning a building compensate?). See, for instance, the extension of realty in Nebraska, Joiner v. Pound (1948) 149 Neb. 321, 31 N.W. (2d) 100.

physical movability more than use in defining fixtures.[95]

British and American courts, therefore, have not generally deviated from the universal exclusive characterization of immovables by the *lex situs*. They have had to modify a long-accepted property categorization into a more natural conception of certain interests, producing surprising results for foreign courts applying the common-law principles of inheritance. But this development also has evolved within the national law and may and does vary among the common-law jurisdictions.

(c) *The lex fori theory.* Bartin, one of the two inventors of "qualification" according to the *lex fori,* initially recognized as an exception the distinction of movables and immovables in view of the indisputable advantage of determination by the *lex situs*.[96] Niboyet has opposed even this isolated exception.[97] More recently, both these writers and an increasing number of others[98] have compromised on a doctrine proposed long ago by the German writers Bar, Stobbe, and Kahn:[99] where the choice of law refers to the *lex situs,* the applicable internal law of the situation should distinguish as it pleases. But when a conflicts rule of the forum or a foreign conflicts rule applied by renvoi distinguishes between movables and immovables, the *lex fori* or the foreign domestic rule, respectively, characterizes the nature to be attributed to property.

[95] PICARD in 3 PLANIOL ET RIPERT (ed. 2, 1952) § 64, states that present French law stresses merely movability. The German practice (BGB §§ 93-97) is more complicated.

[96] BARTIN, Études 52 sub II.

[97] NIBOYET, Manuel § 418, and 2 Répert. 411 n. 27.

[98] BARTIN, 1 Principes 236 § 88; MELCHIOR 144 § 101; LEWALD 175 f.; NIBOYET, 3 Traité 365 § 957; 4 *id.* 216 § 1153; M. WOLFF, D. IPR. (ed. 3) 56; WOLFF, P.I.L. (ed. 2) 512: (contrary to 4 Rechtsvergl. Handw. 390); BATIFFOL, Traité 319 § 298; 2 SCHNITZER (ed. 3) 513. It would seem that the position of FALCONBRIDGE's Conflicts of Laws 435-445 is different. Against NIBOYET, LEREBOURS-PIGEONNIERE 273 § 256.

[99] KAHN, 1 Abh. 82, agreeing in part with the theory of 1 BAR 622; STOBBE I § 32, 63.

Our problem lies with the second part of this theory, namely, the interpretation of the conflicts rules which commonly, except in a few treatises, do not specify what they mean by distinguishing movables and immovables. This omission is very easily explained. Before the new learned assault, nobody doubted that the *lex situs* decides this question; the treaties have sometimes expressly said so. The new theory itself seems to leave a broad avenue for a renvoi from the *forum* to the *situs*.

Why must the *lex fori* qualify in the first instance? Usually, no other justification is offered than a brief reference to the self-constituted theory of *lex fori* qualification.

Niboyet adds his endeavor to protect domestic conceptions from corruption:

"If, to ascertain whether property situated outside France is movable or immovable, we consult the law of the situation, we depend on a foreign law for the operation of our own system of solving conflicts. If it proclaims immovable property that in France would be movable, this is enough to exclude French law, applicable to succession in movables, and inversely. There is, hence, an effacement that nothing justifies and a contradiction with the very foundation of the entire theory of qualifications. . . . It is inadmissible that the foreign law should consider things movable which for us are not so . . ." [100]

These lines are reproduced to show with what narrow-minded arguments the development of conflicts law, or for that matter, of any international order, has to cope. To satisfy the mentality of the distinguished, though ill-advised, adversaries of the old rule, we may, in their own style, advance a triple battery of "arguments," historical, logical, and practical.

History: what justification is there to reverse a century-old rule, one of very few that are universally recognized,

[100] NIBOYET, 3 Traité 365-6, 366-7.

a rule adjusting the differences between the various systems, once of feudal states and now of national laws? The very principle of *lex situs,* which no one appears to wish destroyed, is inevitably connected with the auxiliary rule in question. When a French court leaves the devolution of English land to English law, it means immovables recognized as such in England. Otherwise, there would be an English succession to movables, considered immovable in France, and a French succession to interests situated in England and there considered immovable. Such a jumble was unheard of in the old times.

Logic: Why is it so plain that a reference to the English law of immovables may concern things which are not immovables in England? What logic requires, furthermore, that an English immovable must be held a movable because, if *French,* a like thing would be so considered?

Practicability: The writers here discussed have induced the German Reichsgericht to render the first decision ever made in their favor;[101] it is now constantly invoked as support.

A Czechoslovakian national dying with domicil in his country left a factory in Saxony, Germany. Under the Austrian Civil Code, § 300, then in force in Czechoslovakia, immovables are devised and distributed according to the law of their situation. The court concedes that the Austrian literature construes this as leaving characterization to the *situs;* this would be the German law. But it prefers to look for the Czechoslovakian determination, approves the finding of the lower court that under the Czechoslovakian law (for some not reported reason) the German factory is a movable, and attributes it to the foreign succession.

[101] RG. (July 5, 1934), 145 RGZ 85, IPR spr. 1934, 13, Nouv. Revue 1935, 82, with an excellent criticism by Mezger of the specious arguments by which the court has been diverted from previous better solutions.

Granted for the sake of argument that a Czechoslovakian factory would be a movable under the analogous circumstances in Czechoslovakia[102]—why should § 300 A.BGB. not be construed as referring to the *lex situs* to determine its character—as the Austrian and world tradition has assumed? What sense, also, does it make to consider a German factory left by a Czechoslovakian citizen as a movable, although it would be an immovable when belonging to a German? And what should an American court do to accommodate this situation? Here, the primary rule subjects the factory situated in Germany to *German* inheritance law. The entire meaning of the principle would be shattered.

Suppose an English leasehold in a German succession. Must the German court declare the English interest movable because, there being no such type in Germany, a German lease is movable? Should the English court for this reason renounce English inheritance law for immovables? It will do nothing of the sort, and harmony is destroyed once more, for the sake of scholastic speculations.

In fact, a Hungarian author declares that a Hungarian court should treat an English lease as movable and an English court a Hungarian lease as immovable.[103] Correctly, on the other hand, in Austria, where a lease of land may be transformed into a real right by public recording, the *lex situs* is recognized as decisive.[104]

If a mortgage in Michigan for the purpose of German marital property really should be regarded in Germany as movable, the mortgagee's interest is most certainly an immovable for any American court.

It is submitted that the old rule, practiced in England and the United States, is superior in all respects.

[102] See *contra* STUBENRAUCH, 1 Comm. (ed. 8) 371 n. 2; but KLANG'S Komm. 1178 is very vague.

[103] ARATO, 17 Z. ausl. PR. (1952) 10.

[104] BOLLA 85.

III. *Lex Rei Sitae*

1. The Rule

It is at present the universal principle, manifested in abundant decisions and recognized by all writers, that the creation, modification, and termination of rights in individual tangible physical things are determined by the law of the place where the thing is physically situated.[105] The rule relates to the physical things in which the real right in question exists. The law of the place of "the keys of a house, the stones of a dry wall and the detached or duplicate por-

[105] Legal Provisions:
Quebec: C.C. art. 6.
Brazil: Ley Introd. art. 10.
Czechoslovakia: Int. Priv. Law, § 36.
China: Int. Priv. Law, art. 22.
Egypt: C.C. art. 18.
Greece: C.C. art. 27.
Italy: C.C. (1942) Disp. Prel. art. 22.
Japan: Int. Priv. Law, art. 10.
Liechtenstein: C.C., Property Law, art. 11.
Poland: Int. Priv. Law, art. 6.
Syria: C.C. art. 19.
U.S.S.R.: (interstate) S. Ct. Ruling (Feb. 10, 1931), 2 GSOVSKI 13 No. 2.
Argentina, Paraguay, Brazil, Uruguay with the restrictions *supra* n. 39, 44.
Treaty of Montevideo (1889) art. 26, (1940) art. 33.
Código Bustamante, art. 105, 112, 113.
By Practice:
England: Westlake (ed. 1, 1859) c. VIII; Cammell v. Sewell (1858) 3 H. & N. 617; (1860) 5 H. & N. 728, Exchequer Chamber, and prevailing opinion at present.
Austria: OGH. (Feb. 8, 1926) 10 SZ. 57 No. 26.
Belgium: POULLET, §§ 265, 268 f.
France: Cass. req. (March 19, 1872) D. 1874.1.465, S. 1872.1.238; (May 24, 1933) S. 1935.1.257.
Germany: ROHG. (Sept. 5, 1873) 11 ROHGE. 22 N. 7; RG. (Oct. 20, 1882) 8 RGZ. 110; (Feb. 15, 1884) 11 RGZ. 52, Clunet 1886, 608 and constantly; RG. (Oct. 8, 1921) 103 RGZ. 30, 31 (movables); RG. (Oct. 18, 1935) 149 RGZ. 93 (immovables).
The Netherlands: Hooge Raad (June 22, 1934) W. 12815, N.J. 1934, 1493; 1 VAN HASSELT 140, *cf.*, 134.
Switzerland: BG. (Jan. 21, 1910) 36 BGE. II 6; (June 6, 1912) 38 BGE. II 166; (June 26, 1912) 38 BGE. II 198 and constantly. For Swiss immovables belonging to a Swiss national domiciled abroad the special provision, art. 28 NAG. refers to the law and tribunal of his canton of origin as opposed to the *lex situs*, but the result is at present simply Swiss property law.

tions of machines,"[106] not the place of the house, wall, or the machine, is decisive for the characterization of fixtures;[107] whether an easement exists depends on the law of the place where the land to be charged is.

The rule, furthermore, is primarily concerned only with the problems of property law, not of obligations. Opposition by a few very isolated scholars has never carried much weight. A new theory, dividing the cases between the *lex situs* and a *"lex actus,"* established by the English writer Cheshire, must be likewise rejected.[108]

The quasi unanimity in this field is easily understandable, since here sheer territorialism is assumed even in the most modern systems. In the relevant part, the American Restatement, with its strong and consistent emphasis on the legislative and judicial power of the state where the land or chattel is situated, expresses a universal doctrine. Contrary to a confusing reference to party autonomy, still appearing in the Chilean code,[109] the parties cannot determine the applicable law.

The supporting reasons are no longer speculations on the status of things nor on sovereignty as was still the fashion in the nineteenth century, with occasional remainders in backward theory. No more is the idea, popular with certain French authors, that the "organization of the property régime" is necessarily exclusive and its territorial expression in law must be a *"loi de police et de sûreté,"* unconditionally imperative, entirely acceptable. As a consequence of

[106] 10 Encyclopedia Britannica, Fixtures (ed. 11, 1910-1911) 451, cited by FALCONBRIDGE, Conflict of Laws n. (9.).

[107] 2 ZITELMANN 303.

[108] CHESHIRE (ed. 3) 563 (somewhat corrected in ed. 4, 435 ff.) asserts that the *lex situs* is not the appropriate system in every case, but the proper law for the transaction postulated by him is not neatly distinguished from the assignment or other transfer, *supra* Vol. III, p. 78. Cheshire's theory is continued by SCHMITTHOFF (ed. 1) 190, *cf.*, 185. An exhaustive refutation is now given by the editors of DICEY (ed. 6) 561 ff.

[109] Chile: C.C. art. 16: an exception to *lex situs* is made if the contract determines otherwise, but as a subexception Chilean law applies where the contract should have effect in Chile.

this idea, it has been recently asserted that in a French court a contract made abroad, transferring land situated in France, is void, if a *"cause"* in the French meaning is missing, or if the property is inalienable under French law.[110] But if so, it would be due to the conflicts rule rather than to an automatic effect of an imperative territorialism. The only necessary effect of the French territorial law is that of excluding foreign transfers from enforcement. Whether an obligatory sales contract or even an assignment of the ownership has some effect in foreign countries, should not be a concern of French territorial law; French *public* law is certainly not interested at all in foreign obligatory contracts, French *domestic private* law merely has to deny effect in France to the contract and to the transfer, while it is the province of French and foreign *conflicts* law to state that the French regulation deserves preference with respect to the property, though not *necessarily* the contract, aspect of the transaction.

For conflicts law, however, it may well suffice that an old and unchallenged tradition has resulted in a universal principle, natural in view of the physical and economic integration of the property in the territory and affording the easiest available certainty to the state of the situation, to all interested parties, and to prospective successors and creditors.

Justifications of the principle by individual writers have produced an inclination to admit exceptions in situations where the reason alleged by the individual writer for the *lex situs* does not apply, as for instance, in the case of voyaging goods. The *lex situs,* however, would lose much of its practical reliability if it were subjected to any exceptions at all, especially if it allowed party autonomy as has repeat-

[110] NIBOYET, 4 Traité 199, 255.

edly been suggested. That there is no law at the place where the thing is—as in the waves of an ocean—or that this place is unknown, or casual and temporary, constitute no exceptions to the rule, but instances where it cannot be reasonably applied in fact. And that transfer of title may be deferred or conditioned purely according to the intention of the parties, is a part of Anglo-American and Latin domestic laws, but not of their conflicts rules.

If the law of the place of situation forms an ordinary conflicts rule (though universally applied and therefore most precious), no mystery inherent in "laws of surety and police" is implied. The municipal systems mutually concede, by the conflicts rule, exclusive control of private rights in the immovables and movables situated in their territories, on the understanding that the effects of private transactions complying with the actual law of the situation are recognized so long as the location lasts and, when the location of movables changes, so long as the new location does not require a modification of the legal condition.

Our task is much simplified by this statement, since we may attribute to the *lex situs* indiscriminately all the domestic rules regarding the existence of rights of private law in immovables and movables, whether these rules, in the last resort are intended to serve public or private interests. At a later juncture, of course, we shall have to survey the conflicts rules regarding territorial change of the locality of tangible movables.

"Situation." It must be noted that movables have not always been deemed "situated" for the purpose of conflicts law wherever they may be found at a certain moment. Occasionally, temporary location has been considered immaterial so as to favor a foreign situs;[111] removal to another

[111] *Infra* Ch. 56.

state without the consent of the owner has been ignored in the United States;[112] and ships and travelling goods are objects of a comprehensive controversy.[113]

While, for the application of the ordinary conflicts principles regarding a tangible chattel, Savigny and his school required that it should have a permanent location, the word "permanent" should not be taken literally. Neither do we require more than a merely physical location.[114]

2. Property and Contract

Transfer of title. Speaking of the scope of conflict rules on contract, and especially sales of goods, we have had the opportunity to state that at present, almost unanimously, transfer of title is sharply distinguished from promises to transfer title.[115] This distinction is also made in countries where property can be transferred through mere consent as at common law and in the large family of systems following the French Civil Code. The contract containing the promise is governed by its specific law,—for instance, the law stipulated by the parties or the law of the place where the parties are domiciled and contract. But the problems regarding transfer of property,—such as those of the time when, or the conditions under which, the transfer becomes effective; of whether acquisition from a nonowner has effects, and, in the common-law system, of the capacity to alienate and acquire—depend on the law where the thing is at the critical time.

Transfer of movables. While the contractual part of a

[112] *Infra* Ch. 56.

[113] *Infra* Ch. 57.

[114] RAAPE, D. IPR. (ed. 3) 372, against Niboyet.

[115] See Vol. III, p. 76 ff.; and on the relationship between marital property law and *lex situs;* Vol. I pp. 335-343. Add, e.g., Scotland: 13 Encyclopaedia of the Law of Scotland 130; DONALDSON, 4 Int. L. Q. 1951, 106, and about the frequent confusions, also see CAEMMERER, 12 Z. ausl. PR. (1939) 675, 698.

transaction respecting movables is commonly recognized, the part governed by the *lex situs* has been often overlooked and, in recent times, doubted by some courts and writers. Imagining that in English or French law property passed by "contract," they would extend the proper law of the contract beyond its obligatory effects. Thus, Cheshire contends that if two Englishmen make a contract in London, whereby goods lying in Paris are sold, English law determines not only whether the goods are fit and merchantable but also whether the transaction is formally valid and whether a right of property has passed to the buyer; a title to goods claimed to have been derived from one of the parties to a transfer must be determined by the *lex actus* of the original transfer.[116] No proof is adduced for this mixture of obligation and ownership.

The question has been more thoroughly investigated with respect to the Code Napoléon. Bufnoir[117] recalled and Josel Kohler [118] in an erudite study confirmed how, starting from Celsus' construction of the *constitutum possessorium*,[119] practitioners have continuously worked to replace the transfer of physical possession as part of a conveyance by less cumbersome formalities and finally by mere consent. The Postglossators, the Italian and French documents, the great wealth of French *coutûmes* and from the sixteenth century authors such as Tiraquellus[120] and Ricard,[121] drew attention to various contractual clauses in deeds, such as the clauses of usufruct, lease, *precarium, constitutum simplex,* or simply the *"clause de dessaisine saisine."* These clauses early became *"de style"* and were presumed to be implied when they

[116] CHESHIRE (ed. 4) 437.
[117] BUFNOIR, Propriété et Contrat (1900) 39 ff., especially 42, 45.
[118] JOSEPH KOHLER, Vertrag und Übergabe, 18 Archiv. f. bürg. R. (1900) 1.
[119] Dig. 41, 2, 18 pr.
[120] TIRAQUELLUS, De iure constituti, IV limitatio 31; KOHLER *loc. cit.* 37.
[121] RICARD, Traité des donations entre vifs et testamentaires, part 1, ch. IV, sect. II, dist. 1 § 917 ff. (ed. 1783) p. 235. KOHLER *loc. cit.* 38.

were missing. The Code, after different projects, adopted the traditional conception. Immovables as well as movables are considered transferred when a contract of sale, exchange, or donation is made and the parties do not indicate that they postpone the transfer of the title. Literally, the text of article 1138, setting the transfer on the time for which it is promised, says just this;[122] the current construction also reaches the same result. The clauses of divestment and vestment, substituting the effective surrender of possession, have always been a part of the conveyance, not of the obligatory contract. The same is obvious for their legal implication.

The consequences for their classification in conflicts law are now realized in France.[123] Passing of title depends on the respective agreement of the parties, which regards the property, not the obligation, but is ordinarily to be ascertained from the clauses or circumstances of the contract.[124] If no other clue emerges, title passes instantly by virtue of the implied clause, or better, the subsidiary legal rule. All this is naturally governed by *lex rei sitae,* which must prevail in case it is different from the law governing the obligatory contract, as may happen even in case of sale of immovables.

Also under the light of rational analysis, the effect of a party agreement on the passing of title is a question of property and not of obligation. Therefore, we may disregard the opposite view, even though English judges may have erroneously adhered to it, which has not been proved.

Lease of land in Roman and modern German law is a

[122] BUFNOIR, *supra* n. 117; DESBOIS, Clunet 1931 at 292; ARMINJON, 2 Précis (ed. 2) 116 § 28; PICARD in 3 PLANIOL ET RIPERT (ed. 2) 628 § 620.

[123] NIBOYET, Acquisition (1923) 124 ff. and repeatedly since; PILLET, 1 Traité §§ 33, 352; 359-366; PICARD, *loc. cit.*

[124] Recently, GORÉ, 45 Revue Trim. D. Civ. (1947) 161, discusses the French opinions for the various situations involved, but seems to tread on thin ice.

mere contract producing obligations;[125] this is also true of French law, although the tenants of commercial premises and of rural land have been protected in various respects.[126] At common law, however, leasehold, conceived as an estate, a real right created by a conveyance, in strict opposition to contract, [127] constitutes a *jus in re.* Correspondingly, lease on the Continent is subject to the conflicts rules concerning contracts, whereas at common law the law of the situs alone is traditionally called in to function, and this is the rule of the United States, as alleged by Beale.[128] In this matter, it is the contractual element of the agreement that was neglected.

However, American courts have stressed the contractual character of those party obligations that do not touch the use of the premises.[129] The duty to pay rent and damages for anticipated breach of contract by the tenant was early recognized as an exception to the prevalence of *lex situs.*[130] Thus, rights *in rem* under a lease are governed by *lex situs,*

[125] BGB. §§ 535, 581.

[126] See in particular the laws on *propriété commerciale,* last décr. July 1, 1939; and the postwar legislation, Ord. of Oct. 17, 1945 and Law, April 13, 1946, on rural leases.

[127] See BURBY, Real Property 143; WILLISTON, 53 Harv. L. Rev. (1940). 896.

[128] 2 BEALE § 222.1. Of his seven citations, however, two are against him; in four, situs and place of contracting were identical, as Beale concedes p. 1216 when talking of obligations; only in Galleher v. O'Grady (1917) 78 N.H. 343, 100 Atl. 549, *lex situs* is applied without mentioning the place of contracting; in this case the issue was the existence of the (principal) debt to pay rent after a partial eviction, clearly a contractual problem.

The same simple application of the law of the situation occurs again in Hotz v. Fed. Reserve Bank of Kansas City (1939) 108 F. (2d) 216. In Richardson v. Neblett, 122 Miss. 723, 84 So. 695, 10 A.L.R. 272, the problem is different, viz. whether a domiciliary administrator of an estate may collect rent as personal property. See also recently McCrow v. Simpson (1944) 141 F. (2d) 789.

[129] 15 A.L.R. (2d) 1199-1209.

[130] 1 WHARTON, Ch. VII and § 276 ff.; BURBY, *loc. cit.;* 15 A.L.R. (2d) 1203.

but as far as payments and mutual rights under covenants are concerned, *lex loci contractus* applies.[131]

Similarly, when a landlord in Chicago leased local premises to a shoe store firm of Baltimore which became bankrupt, the federal judge held that although any rights *in rem* created by the lease were governed by the *lex situs* (Illinois), any rights *in personam* created by virtue of its covenants were subject to the law of the place of contracting (Maryland).[132]

Hence, the "contract" also covers the landlord's failure to make repairs, covenants to pay taxes, rights of warranty for fitness, etc.[133]

However, this does not exclude situs as a subsidiary contact in cases not distinguished by party choice of law[134] or special circumstances. Such a special case occurs where both parties have their domicil in one state, in which they also negotiate and conclude the lease; the law of this state applies even though the object be foreign land.[135] On the other hand, when the lease is "made" or "executed" or "delivered" in the state where the land lies, American courts have not hesitated to apply the law of that state,[136]

[131] *In re* Barnett (1926) 12 F. (2d) 70, 77, cert. den. 273 U.S. 699, not mentioned by Beale; here the second Circuit Court reversed the decision cited by 2 BEALE 943, n. 7 in favor of *lex situs* (12 Fed. (2d) 70); followed in U.S. v. Warren R. Co. (1952) 127 F. (2d) 136 with respect to "the contractual rights and obligations created by the leases."

[132] *In re* Newark Shoe Stores, Inc. (D. C. Md. 1933) 2 F. Supp. 384.

[133] 15 A.L.R. (2d) 1205 ff.

[134] France: Trib. Seine (June 1, 1926) Clunet 1927, 400; See also DONNEDIEU DE VABRES 629 on the presumption that the parties had the *lex situs* in mind.

Germany: RG. (Jan. 29, 1901) 12 Z. int. R. 113.

[135] 2 FRANKENSTEIN 332 against RG (Oct. 14, 1897) JW. 1897, 581 Nr. 57. *Contra* Austria: OGH. (Oct. 11, 1934) 16 S.Z. No. 210.

[136] Amer. Realty Co., Inc., v. Eastern Tire and Rubber Co. (1931) 274 Mass. 297; Bondy v. Harvey (1933) 62 F. (2d) 521; Franzen v. G. R. Kinney Co. (1935) 218 Wis. 53.

even though one party signs elsewhere.[137] In a recent *obiter dictum,* it is true, the place of contracting was preferred to that of the land, but this would have been a meager ground; the decision finally was rested upon an express and clear clause of the contract.[138] In Eurpose, *lex situs* furnishes the subsidiary rule[139] in the same manner as for sales of immovables, although the situs may be confused with the place of contracting.

Conditional sales. It needs only a brief reminder that the usual conditional sale combines two distinguishable transactions, a sales contract and a conditional transfer of the title. The mistake of subjecting both elements to a contractual test such as the law of the place of contracting occurs in American courts[140] and abroad.[141]

Co-ownership likewise, in any of its forms, as a real right is subject to *lex situs,* in distinction to the contract for creation of the right.[142]

[137] Cassidy's Lt. v. Rowan (1917) 163 N.Y. Supp. 1079, 51 C.J.S. 810 § 205 n. 44. The Canadian corporation signed in Canada but received the completed instrument ("delivered") in New York.

[138] Lee Wilson & Co. v. Fleming (1941) 203 Ark. 417.

[139] England: St. Pierre v. South American Stores [1937] 1 All Eng. Rep. 206—C.A.: owners in Paris, tenants in England, law of Chile applied as *lex situs.*

Austria: OGH. (Oct. 11, 1934) 10 Z. ausl. PR. (1936) 790.

France: Cass. civ. (May 31, 1932) D. 1933.1.171, S. 1933.1.17, Clunet 1933, 347; and Cass. req. (Nov. 2, 1937) Nouv. Revue 1937, 766 referring to the same case, invoke submission, party agreement, and *lex loci contractus,* but all coincide with the situs; *cf.,* NIBOYET, Revue 1929, 592 ff.

Germany: RG (Nov. 11, 1891) 3 Z. int. R. 157; (Oct. 14, 1897) JW. 1897, 581 No. 57; (Apr. 29, 1901) JW. 1901 452; (Dec. 7, 1920) 101 RGZ. 64; 2 BAR 108; NUSSBAUM D. IPR. 232.

Poland: Int. Priv. Law. art. 8 (2).

Anglo-German Mixed Arb. Trib. (Jan. 21, 1927) Seemann v. Oswald, 6 Recueil trib. arb. mixtes 655.

Switzerland: 2 MEILI 77; 2 SCHNITZER (ed. 3) 621.

[140] *Supra,* Vol. III p. 82; 87 A.L.R. (1933) 1309; 148 A.L.R. (1944) 375. *Cf.,* 15 A.L.R. (2d) (1950) 1314 ff.; STUMBERG, "Security Interests," 27 Iowa Law Rev. (1942) at 532 ff.

[141] Even 2 FRANKENSTEIN 65, who stresses the importance of *lex situs,* declares that reservation of property belongs to the obligatory contract. See 2 GOLDSCHMIDT 166 ff. against Cód. Bustamante, art. 118 ff.; 2 BUSTAMANTE (ed. 3) 113 § 931.

[142] 2 ZITELMANN 330, *cf.* 363; NIBOYET, 4 Traité 231 §1156.

3. Right of Stoppage *in Transitu*

This right of an unpaid seller, as developed in England since 1690 and stated in the Sales of Goods Act, 1893, results in a lien in case of the buyer's insolvency.[143] The seller does not cancel the sales contract: he simply recovers possession. But in most systems, bankruptcy of the buyer is required; in certain systems, goods may be recovered although transportation to the buyer has been completed before the commencement of bankruptcy, or even after it; and particulars vary especially with respect to the rights of a bona fide holder of a document or title, who has purchased from the buyer. In addition, there are different theories within the same system:

The nature of this right of recovery is very controversial everywhere; some consider it a right *in rem* (cancelling the transfer?) making possible to sue a third acquirer not protected by good faith; others recognize but an obligatory claim unsuitable against third acquirers. Some teach that the claim is intended to retransfer the goods to the seller; the demand of separation would dissolve the sales contract as an effect of non-payment. Others assert that the sales contract is not affected; the claim would merely result in the retransfer of the goods, the re-establishment of things as they would have been without the delivery, so as to put the seller again into a position to exercise his right of retention; not ownership but possession would be revindicated.[144]

Since the systems differ so widely and especially on the proprietary or merely contractual character of the right, the entire solution evidently must be left to the law indicated by the territorial situation of the goods. This, it would seem, points to the law of the place where the goods are at the time of stoppage.[145]

[143] §§ 44-46; United States, Uniform Sales Act, §§ 57-59.
[144] DÖLLE, "Konkurs," Rechtsvergleichendes Handwörterbuch, 137.
[145] *Infra* 100.

In *Inglis* v. *Usherwood*[146] stoppage was obviously permissible according to Russian law, as against the English law of the buyer's domicil, since the contract was made in Russia between the seller and the buyer's local agent and the goods were still in the Russian port of departure. The decision, therefore, has been regarded as reconcilable with the *lex situs* theory in general, although it is not conclusive for it.[147] No case better in point seems to be known.

Illustration. Cheshire, to demonstrate his singular theory of *lex actus,* submitted the following example:

"An English merchant, by a contract made in London, sells to a Swedish buyer copper stored in a warehouse in Antwerp. He draws on the buyer for the price and transmits the bill of exchange and the bill of lading to the buyer to secure acceptance. The buyer destroys the bill of exchange, but delivers the bill of lading to X in Stockholm without receiving value from him. The seller stops the copper in transit before it reaches Stockholm. Let us further suppose that the stoppage is unlawful by Swedish law." [148]

Supposing with Cheshire that the sales contract is under English law, we cannot take for granted, nevertheless, that "the right to stop the goods is an incident of the original transaction." This would be true for English law; but whether English contracts law is applicable to the right of stoppage, and furthermore to the conflict between the seller and the holder of the bill of lading, cannot be simply decided under the law of the sales contract. If the stoppage is localized in Sweden, stoppage in itself is certainly permissible so long as the goods have not reached the buyer.[149]

[146] (1801) 1 East 515.

[147] Against CHESHIRE'S ed. 3 579 see editor of DICEY (ed. 6) 561-562.

[148] CHESHIRE (ed. 3) 581. I have to note, however, in the proofs, that this passage is omitted in Cheshire's fourth edition.

[149] Sweden: Sales Law § 39.

But of course, the right of the seller has no effect against bona fide purchasers having acquired under Swedish law.[150] English law has nothing directly to say about all this, although it does decide what the effect on the contract is.

The following chapters will first deal with the application of the principle to rights in immovables and in movables insofar as they are thought to remain in one jurisdiction (Chapter 55). Thereafter, the problems raised by removal of a chattel to another jurisdiction, that is, by the change of *lex situs,* will require separate discussion (Chapter 56).

[150] Sweden: Marit. Law § 166; 1 TORE ALMÉN, Skand. Kaufrecht, 653, Anhang zu §§ 39-41, n. 21-28b.

CHAPTER 55

Scope of *Lex Situs*

I. CREATION OF REAL RIGHTS BY TRANSACTION

1. Capacity to Dispose and Acquire

THE Anglo-American doctrine has maintained the full dominance of the situs over the capacity of the parties. The *lex situs* determines the ability to convey and to accept or hold an interest in land [1] as well as in a chattel. But the reference of this principle to *movables* has not been so firm, either in England where opinions are divided in the absence of authority, or even in this country.[2] Story held with the great majority of authors of his time that since movables were subject to the personal law of the owner, capacity was also governed by the law of the domicil.[3]

[1] Immovables (constant practice): Birthwhistle v. Vardill (1840) 7 Cl. & Fin. 895; Bank of Africa Ltd. v. Cohen (1909) 2 Ch. 129, 135, 143; on objectionable grounds, see DICEY (ed. 6) 531; CLARENCE SMITH, 1 Int. & Comp. L.Q. (1952) at 470; CHESHIRE (ed. 4) 551.

Scotland: Ogilvy v. Ogilvy's Trustees (1927) Sc.L.T. 83; Black v. Black's Trustees (1950) Sc.L.T. (Notes) 32; DONALDSON, 4 Int. L.Q. (1951) 102.

Canada: Landry v. Lachapelle [1937] 2 D.L.R. 504.

United States: Restatement § 216; 2 BEALE 941 § 216.1; GOODRICH (ed. 3) 148, 474; CLARENCE SMITH, "Capacity in the Conflict of Laws," 1 Int. & Comp. L.Q. (1952) 447, 468.

[2] Movables: United States: Restatement § 255; *cf.*, 2 BEALE § 333.3, 340.1; GOODRICH § 154 n. 83.

England: For *lex situs* also as to movables, WESTLAKE § 150, *cf.*, § 165; FOOTE 279, *cf.*, 251.

For the law of the domicil, except for gifts and commercial transactions, DICEY (ed. 5) 606, rule 151; M. WOLFF, Priv. Int. Law 523 § 499 (generally); (Scotch) Black case *supra:* Lord Mackintosh held a trust settlement of a married woman domiciled in Transvaal invalid under Transvaal law respecting movables everywhere.

[3] STORY §§ 367, 368; 1 FOELIX §§ 61, 87, 92, 93; see CLARENCE SMITH (*supra* n. 1) on Louisiana, Ohio and New Hampshire (*infra* n. 9).

On the Continent, the broad expanse of *lex situs* in transactions involving land has been followed occasionally, notably in France.[4] The present doctrine, however, is entirely fixed in favor of the personal law, that is, the national or domiciliary law.[5] This view is so strong also in Latin America that a provision of the Argentine Code, literally taken from Story, has been explained away.[6]

Apart from the problems concerning corporations,[7] the question has lost much of its practical importance by the emancipation of married women. It is still encountered under numerous systems when a married woman encumbers her land for the benefit of her husband,[8] and of course with respect to the disabilities of lunatics and minors.

In no system is importance attached in principle either to the place where an instrument of conveyance is executed,[9]

[4] France: See on and against the older decisions involved, PRUDHOMME, "De l'application de la loi de l'étranger 'réputé absent' par sa jurisdiction nationale aux immeubles situés en France," Clunet 1932, 53, commenting on Trib. Civ. Seine (April 24, 1931) *ibid.* 83, which opened a path to the personal law.

Austria: WALKER 135 n. 55 cites a similar decision, OGH. (Oct. 20, 1924).

Greece: Cass. (1952 Nr. 323) 5 Rev. Hell. 310: a stock corporation possessed land in Lesbos, now Greek; its right was denied not because it was an alien but because under the former Ottoman law of situs a stock corporation had no capacity to have possessory rights in land.

[5] Louisiana: Augusta Ins. & Banking Co. v. Morton (1848) 3 La. Ann. 417.

France: Cass. Civ. (April 13, 1932) D. 1932.1.89 note Basdevant, S. 1932.1.361 note Audinet, Revue 1932, 549.

Germany: EG.BGB. art. 7.

Switzerland: C.C. Final Disp. art. 7b par. 2: national law governs capacity to dispose of foreign land, whereas for Swiss land capacity according to Swiss law suffices.

[6] Argentina: C.C. art. 10, see the literature in 2 ROMERO DEL PRADO, Manual 255 ff.; this author himself, 272, seems to interpret "capacity of acquisition" as meaning the ability of the thing to be an object of property.

[7] See Vol. II, p. 73.

[8] *Cf.*, Restatement § 225 comment (b); GOODRICH 391; DIENA, Dir. reali 287 § 82.

[9] But see Proctor v. Frost (1938) 89 N.H. 304, 197 Atl. 813; *cf.*, COOK, Legal Bases 274; GRISWOLD, 51 Harv. L. Rev. (1938) 1206; a mortgage on New Hampshire land by a married woman securing her husband's debt is declared valid against the law of the situs according to Massachusetts law, with emphasis on the place of execution, although the court could have better invoked her domicil in Massachusetts; see Note 51 Harv. L. Rev. (1938) 1444. Cook has inspired the editors of DICEY (ed. 6) 531 to original suggestions.

or to the place where the obligatory contract is made, or to any contact of its performance. Civil law, however, has the well-known exceptions enabling foreigners to contract in the forum with the capacity they would have under the domestic law. In Germany, this exception allows a foreigner to dispose of his German immovables or of his movables situated anywhere, though not of his foreign immovables.[10]

Some modern writers, once more, seem dissatisfied, each with the rule of his own country. Cook declared the law of the situs undesirable and seemed inclined towards the law of the domicil,[11] while Niboyet advocates the *lex situs*.[12] Recalling the assumption that the American conflicts rule on capacity to contract is sound in reference to business matters [13] and that for sales contracts respecting land a subsidiary rule should refer to the *lex situs*,[14] it seems consistent to prefer the *lex situs*.

This result cannot be based on a renvoi. Repeatedly scholars have attempted to trace the *lex situs* to a renvoi from the law of the domicil, or vice versa to derive the personal law from a concession by the *lex situs*. Both assumptions are historically unfounded, since both personal and real statutes were the elements of the statutist doctrines. Nevertheless, we may accept determination of capacity by the law of the situation much more easily if at the same time we admit that capacity may alternatively be granted by the law of the domicil, on the basis of a renvoi by the *lex situs*.

[10] Germany: EG.BGB., art. 7 par. 3; RAAPE, D. IPR. 373 f., illustrates. A Hungarian (then held minor at 22 years) sells a painting hanging in Budapest and transfers ownership by contract in Germany; after having brought the chattel to Germany, he tries without success to plead minority.

[11] COOK, 52 Harv. L. Rev. at 1269 n. 48.

[12] NIBOYET, 4 Traité 205 § 1148; 385 § 1196; 5 *id.* 508 § 1531.

[13] *Supra*, Vol. I, p. 195.

[14] *Supra*, Vol. III, p. 104.

2. Form

(a) *Exclusive lex situs.* In the older civilian doctrine,[15] the Anglo-American,[16] and a German-influenced group, [17] *lex situs* exclusively governs the formalities of transactions creating, modifying, or terminating real rights, as opposed to the contract promising a transfer.[18] Hence, compliance with the law where the conveyance is made or a deed delivered is not primarily sufficient. The rule *locus regit actum* is not applicable in this opinion. Accordingly,[19] the courts put it up to the foreign law of the situation, irrespective of the *lex fori,* to prescribe registration,[20] or execution of a mortgage before a court.[21]

In the United States, however, the statutes in a number of states respecting their own land, in turn, recognize a conveyance executed in another state under the form used there,[22] and thus restore to a degree the idea of *locus regit*

[15] Prussian A.L.R., Einleitung § 115, *cf.,* FOERSTER ECCIUS, Pr. PR. 1 (ed. 5) 60 n. 29; 2 FIORE §§ 831-833; DIENA, Dir. reali 152.

[16] England: Adams v. Clutterbuck (1883) 10 Q.B.D. 403; *In re* Hernando (1884) 27 Ch. 284.

United States: Restatement §§ 217, 256.

[17] Czechoslovakia: Priv. Int. Law art. 7, 36.

Germany: EG.BGB. art. 11 par. 2; BGB. §§ 313, 925, *cf.,* 1 BAR 615; 2 ZITELMANN 336; RG. JW. 1928, 2454; KG. (1925) 44 ROLG. 152.

Greece: C.C. art. 12.

Italy: Disp. Prel. (1942) art. 26 par. 2.

Japan: Priv. Int. Law art. 8 par. 3.

Montenegro: Code on Property (1888), art. 799.

Poland: Priv. Int. Law, art. 6, no. 3 (mentioning only immovables).

Also: Montevideo Treaty, art. 26, (1940) art. 32. Cód. Bustamante, art. 140 (semble).

[18] *Supra,* Vol. III, p. 108.

[19] Doe dem. Seebkristo v. East India Co. (1856) 10 Moore P.C.C. 140, sometimes cited as permitting oral transfer, is based on the Hindu law of the grantor rather than the coinciding *lex situs.*

[20] Hicks v. Powell (1869) L.R. 4 Ch. 741; Norton v. Florence Land & Public Works Co. (1877) 7 Ch. 332.

[21] Waterhouse v. Stansfield (1851) 9 Hare 234; (1852) 10 Hare 254.

[22] Restatement (immovables): § 217, comment d.; on the laws extending their compulsory force even to the obligatory contract, see Vol. III, 109.

The states of the Union having such statutes as of 1911 have been noted

actum. In this case a true renvoi is created. The Restatement expressly points to these statutes as an exceptional permission of renvoi with respect to land.[23] They are much less frequent, however, than the analogous concessions respecting formal validity of wills. The civilian laws of this group are more rigorous; the German Code directly excludes the principle of *locus regit actum.*[24]

(b) *The French-influenced group,* however, directly applies the maxim, *locus regit actum,* except when the provisions of the situs are intended to protect third persons or, what is sometimes synonymous, serve the general social interest.[25] It has been concluded that two Italian nationals, by a marriage settlement in England without a public official, may transfer Italian land, and that two foreign nationals may so transact anywhere outside Italy in the form of their national law, in both cases contrary to the municipal Italian rules. On the other hand, by a special express provision of the French code [26] and those following,[27] a mortgage on domestic property cannot be created

by LORENZEN, 20 Yale L.J. (1911) at 433, and see cases in GOODRICH 454 n. 5.

Ontario: *Re* Mills [1912] 3 D.L.R. 614, 3 O.W.N. 1036.

To the same effect among the member states, Cód. Bustamante, art. 136.

[23] Restatement § 8 (1).

[24] EG.BGB. art. 11 par. 2. See also, e.g., the old application of arts. 7 and 10 of the Dutch "General Provisions," Hof Gelderland (May 6, 1856) W. 1765: Dutch law as to Dutch immovables does not admit renvoi.

[25] France: WEISS, 4 Traité 205 and *cit.*

Italy: DIENA, Dir. reali 89 and *cit.* n. 1; 292, 319; but see App. Milano (March 30, 1909) Clunet 1910, 1323 (pledge in France of goods situated in Italy).

[26] France: C.C. art. 2128; followed in The Netherlands, C.C. art. 1218, and the Dutch colonies.

[27] Luxemburg: C.C. art. 2188 and Monaco: C.C. art. 1966.

Netherlands: C.C. art. 1218.

Haiti: C.C. art. 1895.

Dominican Rep.: C.C. art. 2128.

in a foreign country, a rule considered anachronistic and not to be enlarged by analogy.[28]

(c) *Irrespective of the contrast* of doctrines just indicated, whenever at the situs measures of publication—recording in land register, transcriptions or inscriptions, title publication, etc.—are required, they can only be effectuated in the country and district of the thing.[29] The *Código Bustamante,* article 136, states that provisions establishing and regulating registers of property and imposing them as necessary as respects third persons, are "of international public order." More clearly said, according to the universal force of *lex situs,* these provisions are essential for the recognition of real rights in any court.

Another consideration is exemplified by a Swiss decision; a German certificate of mortgage, a negotiable paper, was ineffectually transferred in Switzerland; to transfer the mortgage, the parties should have observed the formalities described in the German code.[30]

[28] In 1894 DIENA, Dir. reali 291 n. 5 cited much literature to this effect; see esp. VALÉRY in Clunet 1928, 926; BEVILAQUA (ed. 3) 346 and §§ 34, 36. The French provision is rejected, e.g., in:
Belgium: Mortgage Law of Dec. 16, 1851, art. 77.
Italy: C.C. (1865) art. 1990; (1942) art. 2837.
Argentina: C.C. art. 3129.
Bolivia: C.C. art. 1475.
Brazil: TENÓRIO 407 § 544 calls the French provision absurd.
Chile: C.C. art. 2411.
Colombia: C.C. art. 2436.
Ecuador: C.C. art. 2430.
El Salvador: C.C. art. 740.
Nicaragua: C.C. art. 3823.
Portugal: C.C. art. 964.
Uruguay: C.C. art. 2324, C.Com. art. 768.

[29] Italy: Disp. Prel. art. 26, par. 2. Of course, an exception is made, e.g., for automobiles registered in Italy under the D.L. March 15, 1927, n. 436/Law Feb. 19, 1928, n. 510, further disposal of which needs inscription in Italy to have effect against third persons in Italy. MORELLI, Elementi 140; BALLADORE PALLIERE DIP 162.

[30] App. Bern (Nov. 19, 1936) 73 ZBJV (1937) 620.

3. Structure of the Right

As the speaker for the unanimous Supreme Court of the United States said in 1869, the law of the situs of land conveniently determines "descent, alienation, and transfer, and . . . the effect and construction of conveyances." [31] Except inheritance and marital property, the same broad rule obtains with respect to all other tangibles.

Hence, the doctrine of all countries agrees [32] that the *lex situs* determines:

whether only certain enumerated proprietary interests are admitted, as in the Austrian and German system *(numerus clausus)*, or parties may create new kinds of interests, as is permitted in common law and is controversial in France;[33]

what intrinsic requirements exist for conveyances, releases, adverse possession, prescription, attachment, etc. This includes also the requisites of consent, delivery of an instrument or a chattel, and good cause *(justus titulus)*, good faith, and other elements of acquisition from a non-owner;[34]

the nature of the interest created;[35]

the construction of a deed, with due consideration of the intention and knowledge of the draftsmen;[36]

whether creditors of the conveyor may attack an alienation outside of bankruptcy proceedings.[37]

[31] Mr. Justice Miller in McGoon v. Scales (U.S. 1869) 9 Wall. 23, 27.

[32] See, for instance, the American cases cited by GOODRICH, "Two States and Real Estate," 89 U. of Pa. L. Rev. (1941) 418; and the German cases in NUSSBAUM, D.IPR. 304.

[33] PICARD in 3 PLANIOL ET RIPERT 54, § 48.

Spain: no *numerus clausus*, according to the dominant opinion, but *contra* Fed. Puis Peña, Tratado der. cio Español III vol. 1 (1951) 20.

[34] Corresponding with Restatement §§ 215, 257.

[35] Restatement §§ 221, 258.

[36] Restatement § 214; but see Taylor v. Taylor (1945) 310 Mich. 541, 17 N.W. (2d) 745, 157 A.L.R., for primary regard to the intention of the parties.

[37] Restatement § 218, comment f.

Illustrations. (i) Floating charges are invalid in Scotland; this covers documents situated in Scotland embodying a part of the charge and the entire encumbrance if the company has its registered office in Scotland.[38]

(ii) In Germany the owner of real property may have a mortgage on his own land, in Switzerland an "open rank" for a mortgage to be given by him, in Austria a right to dispose of a mortgage discharged by him.[39] No applications for registering a different type are accepted.

4. Place

As a rule, the requirements of the *lex situs* may be complied with at any place [40] by an act, which, on the other hand, may mean nothing under the law of such place. This is particularly true of the transfer of movables.[41] Goods stored in Chicago may be transferred by sales contract under common law; the contract may be made anywhere. Thus a transfer of goods stored in Argentina was validly made in New York, without interference by the New York statutory requirement of an inventory for bulk merchandise sales;[42] and goods stored in Brazil were validly transferred in Germany.[43] In both cases the Latin-American laws of property were satisfied by an implied *constitutum possessorium.*[44]

Foreign judgments. Of course, the forum will not recognize a foreign judgment adjudging an interest in an im-

[38] Shop Fronts (Great Britain) Ltd. in Liqu., per Lord Birnam (1950), see DONALDSON, 4 Int. L.Q. (1951) 109.

[39] BGB. § 1163; ZGB. art. 813; Öst. ABGB. § 469 and in case of cancelling the mortgage, a priority for three years III Teilnovelle § 37.

[40] See against former teaching by SAVIGNY 187 f. and 1 BAR 633: 2 FIORE § 832; DIENA, Diritti reali 167; NIBOYET, Acquisition 292.

[41] OLG. Hamburg (May 18, 1894) 5 Z. int. R. 286.

Austria: OLG. Wien (July 15, 1948) Ö.J.Z. 1948, No. 654, Ob. Rückstattungs-Kommission (Feb. 12, 1949) *id.* 1949, No. 355.

[42] Royal Baking Powder Co. v. Hessey (C.C.A. 4, Md. 1935) 76 F. (2d) 645, 648, cert. den. 296 U.S. 595 (Lowendahl v. Hessey).

[43] RG. (Sept. 16, 1911) Bay. Z. 1912, 45.

[44] Argentina: C.C. arts. 2602, 2387.

Brazil: C.C. arts. 675, 620.

movable or movable as of the time when the things were situated in the forum.[45]

II. Special Applications of *Lex Situs*

1. Remedies

Civil law sharply distinguishes right and possession. But also possession, as a legally defined factual situation with determinated legal conditions and effects, is a matter of *lex situs*.[46] Civilian authors, therefore, say that *lex situs* rather than the law governing inheritance decides whether possession ends with death or is a subject of succession,[47]—a point, however, that needs inquiry—and that *lex situs* rather than *lex fori* determines whether possession may be recovered.[48] Certainly, the *lex situs* governs not only the remedies based on ownership or minor interests but, in principle, also the remedies based on possession as such, that is, older or superior possession. At common law, the same result follows as a matter of course from the nature of a real right as a right to possession.

The conflicts situation, however, is overshadowed by the jurisdiction of the court of the situs. "No real action or action to recover possession of a tangible thing, whether land or chattel, can be maintained outside the state where the land or chattel is situated." [49] A similar exclusivity

[45] Canada: Chassy v. May (1921) 68 D.L.R. 427, affirming 29 B.C.R. 83: a judgment in the United States adjudging an interest of a free minor in Canada has no effect; the plaintiff invoking it is not a bona fide purchaser and acquires no title.

[46] Greece: C.C. art. 27.
Italy: Disp. Prel. art. 12.
Egypt: C.C. art. 18.
Poland: P.I.L. § 6 (1).
For the unanimous continental literature, see, e.g., 2 Frankenstein 81; Niboyet, 4 Traité 229 § 1155.

[47] 2 Zitelmann 951. See *infra* Ch. 65.

[48] 1 Bar 626.

[49] Restatement § 613; 3 Beale 1652; Goodrich (ed. 3) 169 ff.

of jurisdictions exists universally by old tradition [50] for actions based on rights in immovables.[51]

As a natural consequence of this attitude, in actions derived from real rights, at least those respecting land, the local court applies its domestic law on a large scale.

Nevertheless, the matter is not quite clear. It would seem that a more exact statement might be as follows:

At common law, *lex fori* applies in the threefold function as procedural law, *lex situs,* and *lex delicti commissi.* (1) As far as remedies are considered a part of procedural law—which traditionally goes a long way—the actions relating to property are subject to the domestic law of the court having jurisdiction *in rem,* irrespective of the whereabouts or residence of the owner. (2) The existence of possession and of real rights depends on the substantive law of the forum, *qua lex situs.* And (3) trespass or dispossession or conversion by severing crops, lumber, minerals, etc., from the land, are governed by the same system as *lex delicti commissi.* (In addition, only recently somewhat challenged,[52] trespass to land produces merely a "local action," exclusively bound to personal jurisdiction at the situs, although the action is merely for damages.) In fact, there does not seem to exist any authority either in England or the United States for the application of a law other than that (of the municipal law) of the situs, to determine the conditions and effects of a real action. Also, respecting

[50] Not by attraction from choice of law, as arguments upon the codes assume, esp. the French literature, lastly BATIFFOL, Traité 700 and citations n. 1. Originally, jurisdiction *in rem* was even the basis for the principle of *lex situs.*

[51] E.g. France: C. Proc. Civ. art. 59 par. 5.
Germany: ZPO. § 24.
Italy: C.P.C. art. 21 par. 1.
Argentina: C.P.C. art. 5.
Brazil: C.P.C. art. 136.

[52] Judicial abandon of the theory in Minnesota and Arkansas: see note, 6 Vanderbilt L. Rev. (1953) 786-789.

such claims as to recover damages for mesne profits, which can be sued upon separately,[53] no doubt about the applicable law has been expressed, to my knowledge; probably the land has always been found to be the place of the wrong. Among the remedies for disturbance and deprivation of the enjoyment of movables, detinue must be separated from trespass and conversion. Presumably, detinue is always considered a part of the procedural law of the forum. More adequately, the same result would be based on the cause of action which is unlawful refusal of restitution, to be localized at the court. Trespass and conversion have retained the character of tort. Here, it may happen that the place of wrong is different from the situs at the time of the action.

The Continental literature, however, differentiates several groups of actions. According to the Romanistic tradition, in a long development from the second century A.D., the petition of recovery *(rei vindicatio)* by which an owner sues a possessing nonowner, covers various claims, distinguishable in conflicts law.[54] As the German Civil Code distinctly expresses the large range of vindication,[55] the owner's action may be analysed as comprising three groups of claims:

(1) The tangible thing and, according to circumstances, the tangible proceeds still existing in their specific form [56] are the direct subject of the proprietary right and clearly governed by *lex situs*.

(2) Proceeds and gains converted into the property of

[53] England: Common Law Procedure Act, 1852, s. 214.

United States: Restatement §222; the case cited *contra* in Illinois Annotations, p. 71, MacDonald v. Dexter, 234 Ill. 517, 85 N.E. 209, has a different subject.

[54] Fundamental, 2 ZITELMANN 237, 303.

[55] BGB. § 985.

[56] §§ 987 par. 1, 990.

the possessor [57] are recoverable by claims derived by law from the objective violation of ownership, but of the nature of obligations; their measure is determined by analogy to unjust enrichment.

(3) Damages for delay in restitution, or compensation for omitted earning of proceeds, or for destruction, deterioration, or other impossibility of restitution by fault,[58] are objects of other obligations *ex lege*.

The claims under (2) and (3), though included in the complex scope of one action *in rem*, are not necessarily governed by *lex situs*. Some writers have applied the tests adopted for extra-contractual obligations.[59] Zitelmann resorted to a renvoi by the personal law of the debtor to *lex situs*.[60] *Lex situs* is right, but for another reason.[61]

As we have found,[62] claims for unjust enrichment should be governed by the law of the underlying relationship, and this is the law of the situs when claims for profit are raised separately as a consequence of transformations such as innocent conversion. These demands are based upon the property right and included in the enlarged scope of the action *in rem*. Convenience, not necessity, directs us to the *lex situs*.

A concurring tort action, of course, is subject to the law of the place of the wrong.

Finally, an analogous rule is commendable for counterclaims of the defendant, which he may be able to oppose to the action for recovery, or which, in some systems, he

[57] §§ 987 par. 1, 988, 993.
[58] §§ 987 par. 2, 989, 990.
[59] 2 FRANKENSTEIN 29; M. WOLFF, IPR. (ed. 3) 179.
[60] 2 ZITELMANN 240.
[61] RAAPE IPR. 382 reaches the same result through emphasis on the identical life relation on which both claims are based.
[62] Vol. III, p. 372 ff.

may use in a separate action, particularly on the ground of expenses incurred for the object of the claim.[63]

In sum, the *lex situs* may well be universally recognized as determining the remedies based on a violation of real rights.

2. Documents of Title

Certain commodity papers contributing to the transfer of title in goods are treated legally in different ways in the several systems. These regard not only the requisites for their recognition but also their effects in the twofold respect: whether the document legally represents the goods, and whether it is negotiable on order or on the bearer. In the English,[64] American,[65] and German [66] jurisdictions, bills of lading,[67] warehouse receipts, air bills, and delivery orders are "documents of title" (German: *Traditionspapiere*), with the meaning that under certain conditions transfer of the paper transfers the ownership in the goods. The French law denies this effect, although practically the transfer of property rights through consent produces similar effects, when parties use such instruments.[68]

What law, however, determines whether issue or endorsement and delivery of the document by themselves transfer the ownership in the goods? And whether by the

[63] 2 FIORE § 788; 2 ZITELMANN 252; DIENA, Dir. reali 337; 2 FRANKENSTEIN 90; GUTZWILLER 1596.

[64] England: (not negotiable); Bowen, L.J., in Sanders v. Maclean (1883) 11 Q.B.D. 327, 341 C.A.: "During this period of transit and voyage, the bill of lading by the law merchant is universally recognized as its symbol."

[65] Uniform Warehouse Receipts Act. s. 40, 41; Uniform Bills of Lading Act §§ 31, 32; Federal Bills of Lading Act §§ 30, 31; the entire doctrine is unified in the proposed Uniform Commercial Code, s. 7-502.

[66] Germany: Com. C. § 364.

[67] Other functions of bills of lading have been discussed in Vol. III, p. 273 ff.

[68] RIPERT, 2 Droit Marit. § 1910; *cf.*, LYON-CAEN ET RENAULT, 5 Traité §§ 714, 715; RG. (May 7, 1880) 1 RGZ. 415 (Rhineland law).

acquisition of the instrument the holder acquires more right than his predecessor had?

In one view, the law governing the obligation of delivering the goods also governs the quality of the instrument in which the obligation is formally laid down. In the case of a bill of lading, the law of the port of destination has been advocated, under the influence of the German approach.[69] Probably the same result would find sympathy by many friends of *lex loci solutionis*.

But by far the dominant opinion, adopted by the Restatement, predicates that:

"Whether the title to a chattel is embodied in a document is determined by the law of the place where the chattel is at the time when the document is issued." [70]

Illustration. Goods were stored in a bonded warehouse in Scotland; the owner endorsed and delivered in England the warrants as security. The pledgee lost his case to an arresting creditor of the owner. Although under English law the warrant would have represented the goods, under Scotch law, the warehouse keeper should have been notified of the pledge.[71]

Only this view is consistent with the all-inclusive scope of the *lex situs*. It is at the same time in harmony with the advisable choice of law for the contract of transportation, based on the port where the bill of lading is issued.

[69] WOLFF, IPR. (ed. 3) 174. In the Seventh Hague Conference of I.P.L., 1951, (Actes p. 106), Prof. ALTEN (Norway) contended that a bill of lading may be said to embody the claim against the carrier but not the goods. It would not be a universally acceptable proposition that the instrument cannot embody the *property* in the goods.

[70] Restatement § 261 (1).

England: Inglis v. Robertson [1898] A.C. 616, by clear implication, see CHESHIRE (ed. 3) 584; HELLENDALL, 17 Can. Bar Rev. (1939) at 21.

France: NIBOYET, Acquisition 185; 4 Traité 622.

Germany: RG. (Dec. 8, 1927) 119 RGZ. 215 (semble), *cf.*, NUSSBAUM D.IPR. 312 f.

Netherlands: VAN BRAKEL 187 § 143.

[71] Inglis v. Robertson [1898] A.C. 616. Closely analogous, Hallgarten v. Oldham (Mass. 1893) *infra* n. 77.

It must be warned, however, that complications are possible. Transfer of goods *may* be effected through transfer and endorsement of documents, according to the law of the place where the goods are at the time of the issue of the documents. But not even in Germany, where this doctrine is most developed, is transfer disregarding the document excluded.[72] Great doubts, moreover, are caused in common law and French-influenced law by the rôle attributed to the intention of the parties. Does title pass on shipment of the goods to the carrier or on the arrival of the bill of lading to the buyer, bank, or agent? We have encountered this question before.[73] Also the various trade clauses provoke uncertainty.[74] In the normal overseas sale C.I.F., it may be recalled, the American law presumes that the seller contemplates giving up his title by shipping, and preserving merely a "security title," [75] a theory not generally shared.

At this junction, other questions are prominent. If the paper is endowed with the ability of transferring ownership by the law of the place where it is issued, is this law determinative of all subsequent transfers? [76] Or is it true that quite as the *lex situs* of the goods at the time of the issue determines the initial character of the document, the law of the place where the goods are at the time of their ulterior transfer determines the function of the endorse-

[72] RG. (Dec. 8, 1927) 119 RGZ. 215, 217: assignment of claim for possession.

[73] Vol. III, p. 64.

[74] *Cf.*, GORÉ, 45 Rev. Trim. D. Civ. (1947) 169 ff.

[75] The correct American doctrine has now been shortly formulated in opposition to the strange language of the Uniform Commercial Code (Section 2-505 and 2-509) by WILLISTON, "The Law of Sales in the Proposed Uniform Commercial Code," 63 Harv. L. Rev. (1950) 561, 581 ff. The problem, being substantive, will be discussed in another work.

[76] RAAPE, IPR. 377 ff.

ment?[77] The latter theory would gravely impair the usefulness of negotiable instruments and probably has never been adopted in practice. Once a bill embodies the title by the *lex situs* of the goods, it serves internationally until its end. Merely the contract of transfer of a bill as a piece of paper and the form and effect of endorsement must be sanctioned by the law of the place where the paper is situated at that moment.

However, a profound discussion of the nature of bills of lading has been occasioned in Germany by the case where the carrier involuntarily loses possession of the goods or fraudulently alienates them. The courts and the majority of writers assume that the translative effect of the bill depends on the constructive possession of the goods that the holder exercises through the carrier. Deprived of this material power, the holder is limited to the obligatory claim against the carrier and a claim against the possessing third party.[78] Presumably, most systems agree on the result. In any case, despite its theoretical underground, this conception would seem to pertain to the law governing possession of the paper at the time of each transfer.

3. Easements

Restatement § 222. "The creation, transfer and termination of non-possessory interests in land are determined

[77] 2 FRANKENSTEIN 58 restricts the ubiquitous force of the paper to its obligatory effects; HELLENDALL at 23 invokes Holmes, J., in Hallgarten v. Oldham (1883) 135 Mass. 1, 46 Am. Rep. 433. But the decision deals with goods stored in a Boston warehouse at all material times and correctly subjects the effect of the endorsement of the warehouse receipt to Massachusetts law. The problem in question did not turn up.

HELLENDALL 25 n. 44 also cites NIBOYET, Acquisition 195, who does not express the same opinion and in 4 Traité 622 expressly denies it; and BARTIN, 3 Principes 236.

[78] KARL AUGUST ECKHARDT, "Die Traditionswirkung des Konossements," in Rechtswiss. Beiträge zum 25. j. bestehen der Handelshochschule Berlin (1931) 62.

by the law of the state where the land is." Such interests are "easement, profits and licenses in land." Since the interest diminishes the powers of the owner, the law of the servient land is naturally competent to impose the burden.

This, again, is a universal principle and includes contractual as well as legal charges.[79] An illustration of the latter by a Louisiana case has been discussed earlier.[80]

Is this unquestionable rule inappropriate for the purpose, residential or agricultural, for which servitudes are created?[81] No. The needs of the restriction must be recognized by the state of the situation of the land upon which the use shall rest. A view requiring that both laws agree to the restriction[82] is certainly inacceptable.

The scope of the rule includes the permissibility of the charge, the conditions of its creation;[83] its extinction by lapse of time, destruction, or merger of ownership; its transfer, etc. *Lex situs* must also govern legal obligations with which a real interest is burdened, irrespective of tort, such as when a usufructuary has to give security to the owner, or must indemnize him for proceeds unlawfully derived or for illicit changes of the object.[84]

Equally, the *lex situs,* and not the *lex fori,* decides whether an obligation is personal to an individual landowner or runs with the land;[85] whether, vice versa, the

[79] France: Cass. (April 20, 1891) Clunet 1892, 200; DIENA, Dir. reali 203 § 57; 2 FIORE § 853; VALÉRY § 616; WEISS, 4 Traité 230 f.; 2 FRANKENSTEIN 98; GUTZWILLER 1599 c; NIBOYET, Revue Droit Int. (Bruxelles) 1933, 471; MATOS 424; BATIFFOL, Traité 515 § 512.

But see the singular provisions of Código Bustamante arts. 131 ff.

[80] Caldwell v. Gore (1932) 175 La. 501, 143 So. 387, 144 So. 151; *supra* Vol. II, 330.

[81] BATIFFOL, Traité 516 n. 1 § 512.

[82] 2 ZITELMANN 328, 565 n. 258; WOLFF, D. IPR (ed. 3) 180, n. 11. *Contra,* 2 FRANKENSTEIN 98 n. 20; *supra* Vol. II, p. 331.

[83] E.g., whether immovables are created "by destination."

[84] GUTZWILLER 1599.

[85] Restatement § 222, comment b. *Cf. supra,* Vol. III, 110 ff.

successive owners of the serving land have the duty of positive acting, as, for instance, of maintaining a wall or an aqueduct in good repair; and whether a liability to pay money or furnish labor (surviving in modernized form from the old institutions of tithe and peasants socage in many present laws) is merely due as a land charge [86] or implies a personal liability of the successive owner.

4. Encumbrances

(a) *In general.* The authors of Article 9 of the American Uniform Commercial Code have had the felicitous idea of largely unifying, for the purpose of their rules, almost all types of transactions creating collateral rights in chattels as security for debts. Irrespective of their juristic forms, chattel mortgage, trust receipt, conditional sale, bailment-lease in goods and documents, are thus joined in the category of security transactions, superseding the present uniform laws covering parts of the ground. The Code further includes security by accounts and contracts rights. In conflicts law, we ought rather to deal, as with one class, with all transactions providing security by tangible movables.

Whether the creditor immediately acquires possession need not be distinguished fundamentally. But intangibles are different.

Again, the law of the place of the material situation effectively determines the existence of real rights. In the case of any security for a debt, it is universally agreed that *lex situs* decides whether a real right must be accessory to a debt, which it is not in all juristic types of security. The *lex situs,* it is recognized, does not necessarily govern the debt. The debt may be under a different law stipulated by the parties or judicially selected. Also a promise to create or transfer a mortgage may have its own law.

[86] Restatement § 231.

Illustration. A Belgian debtor secured his debt to another Belgian by an act in Belgium, pledging goods which he had in France in custody of a third person. The Belgian court rightly applied Belgian law to the debt, and French law to the pledge and its sale. (French law, by the way, recognizes a pledge made abroad, in contrast to a hypothec.)[87] It had been argued that the creditor possessed the goods through the bailee and the goods were therefore to be considered situated in Belgium. The court rejected this fiction.[88]

Nevertheless, although the obligations may follow a distinct law, when we look for a typical subsidiary rule, contracts promising to convey a charge on land ought to be subjected to the law of obligation prevailing at the situs,[89] quite as other contracts "relating" to land. This is particularly persuasive when the buyer of land assumes the personal debt underlying a mortgage.[90]

(b) *In particular.* The *lex situs* includes the following incidents:[91]

on what objects a pledge may exist;[92]

what is a real right of security; the nature of legal or equitable right, a mortgage, pledge, or lien; or, in other words, the validity and effect of such right;[93]

[87] See also NIBOYET, 4 Traité 453.

[88] Trib. com. Bruxelles (Jan. 29, 1930) Clunet 1931, 452.

[89] France: BATIFFOL, Traité 517.

Germany: KG. (Dec. 21, 1935) JW. 1936, 2466 at 2469 (*supra* ch. 54 n. 83) respecting the personal debt although not very clearly reasoning.

Italy: CAVAGLIERI, Dir. Int. Priv. 165.

[90] Austria: OGH. (June 26, 1930) JW. 1931, 635 (personal debt secured by mortgage on German land and assumed by the vendee of the land as sole debtor; applicability of the German law on revalorization).

Germany: RG. (Jan. 12, 1887) 4 BOLZE Nr. 22, cited by NUSSBAUM 300 n. 5. On necessary application of *lex situs* to the assignment of the debt according to BGB. § 1154, see M. WOLFF, Sachenrecht § 159.

Brazil: BEVILAQUA 346.

[91] See Restatement, statements cited in the following notes, and for liens § 230 and charges § 231.

[92] RG. (Dec. 7, 1921) 103 RGZ. 259.

[93] Restatement §§ 225, 255, 265, 279.

the assignment of such interest and whether a mortgage may be transferred without the debt secured;[94]

the defenses of the owner, as, e.g., referring the creditor to other securities;[95]

the power to redeem mortgaged land, after a foreclosure sale and after limitation of action for the mortgage debt has run;[96]

the discharge of mortgages: whether payment after the maturity of the debt suffices; which satisfaction is needed; whether an attaching creditor may discharge the mortgage.[97]

On these lines it should be settled that any foreign type of security is to be recognized, except in the narrow field of public policy. A "bailment and lease contract" of Pennsylvania must not be construed in Georgia as a sale with reservation of title.[98]

The situation is different when the goods are in the forum and the transaction occurs abroad. The title of three cars, deposited in France, was conveyed by a French company as security for a loan by a Dutch firm, in a transaction in Germany in the German style of a fiduciary transfer of ownership *(Sicherungsübereignung)*, and German law was expressly stipulated. The French Supreme Court rejected the creditor's claim of ownership in the debtor's bankruptcy, because the acquisition by the creditor of the

[94] Restatement § 226.

[95] Austria: Inversely OGH. (Dec. 4, 1906) 43 Gl. U. 612 Nr. 3586 allows an Austrian debtor to refer the creditor to a Swiss mortgage according to Swiss law, which is questionable except where the entire debt was governed by Swiss law.

[96] Restatement § 228.

[97] Restatement § 229.

Austrian OGH. (Jan. 26, 1904) 41 Gl. U. 47, Nr. 2586: who bears the costs of a receipt required for canceling the incumbrance in the land register?

[98] In Motors Mortgage Corporation v. Purchase-Money Note Co. (1928) 38 Ga. App. 222, 143 S.E. 459, this was done merely in the absence of proof of the Pennsylvania law, to satisfy the common law.

cars without judicial formalities would run counter to the prohibition of a *lex commissoria* in contracts of pledge, imposed by the French *lex situs*.[99] The decision has raised a complicated dispute [100] and is questionable. But on the one hand, the foreign transaction, except for the sanction, was recognized as creating a real interest, and on the other hand, the law of the country where the goods are situated at the time of the transaction is indeed entitled to restrict its sanction to those foreign types that correspond to the transactions admitted in the forum. Here, for once, the usual process of assimilation to domestic types is not objectionable.

(c) *Satisfaction.* In the civilian codes, the chapters of conventional securities contain provisions defining their purpose in the case of default. They say whether the creditor may claim possession of a land or chattel serving as security without physical apprehension; appropriate the thing against the debt *(lex commissoria);* appropriate it for a price judicially foreordained; have the thing sold in public auction under or without court supervision, etc. Do these provisions and the analogous customary rules belong to the substantive real relationship or to procedure? The Restatement subjects method and effect of foreclosure, with or without judicial proceedings, to the *lex situs*.[101] The substantive characterization is commonly recognized, but this has sometimes been derived from the obligatory relationship between pledgor and pledgee rather than from the effects of the real interest; therefore *lex loci contractus* would have applied. This is inexact.[102] An obligation,

[99] Cass. req. (May 24, 1933) S. 1935.1.257, Rev. Crit. 1934, 142, Clunet 1935, 381.

[100] See the various arguments by NIBOYET, Rev. Crit. 1934, 143; 4 Traité 454; BATIFFOL, Rev. Crit. 1934, 631; S. 1935.1.257; LIGEROPOULOS, 8 Répert. 520 No. 28 ff.

[101] Restatement §§ 227, 228.

[102] *Cf. infra,* Chapter 56.

whether resting on the pledge contract or on the law, creates merely a "shall," not a "can." *Lex situs* governs these questions with the force of public policy and procedural compulsion, and controls the binding force of the contract and what a former *lex situs* may have permitted. This is evidently the American doctrine,[103] although in one opinion the law of the contract governs the right to redeem a security.[104]

Lex commissoria has been usually prohibited since the Emperor Constantine and therefore is void at the situs as well as, by public policy, in other courts.[105]

(d) *Liens.* There is an abundant and sometimes obscure variety of obligations and real encumbrances going under the names of liens, privileges, and rights of retention. As a principle, it is settled that the *lex situs* decides whether a right has the character of a real interest.[106] An author said even that "it is the *lex rei sitae* that decides and decides alone whether an alien is admitted or not to avail himself of (the privilege) and there is no account of either the law of the state to which the parties belong or that presiding at the origin of the obligation."[107] However, the *lex situs* must not *create* the right, it has merely to control its qualification. As the Institute of International

[103] Annot. 64 L.R.A. 354.

[104] Annot. 57 A.L.R. 707.

[105] OAG. Rostock, Dec. 17, 1857, 19 Seuff. Arch. 651 No. 107; DIENA, Dir. reali 315 § 93.

[106] Restatement § 279 (despite ambiguous drafting); *Cf.* 2 Beale § 230.1.
Belgium: Trib. com. Antwerp (May 10, 1899) Clunet 1900; 1012.
England: London & Provincial Leather Processes Ltd. v. Hudson [1939] 2 K.B. 734.
France: NIBOYET, Acquisition 237.
Germany: 81 RGZ. 283; NUSSBAUM 314 f.; 2 FRANKENSTEIN 91. The liens of innkeepers (BGB. § 704), forwarding agents, warehouses, and carriers (HGB. §§ 410, 421, 440) are legal pledges.
Italy: DIENA, Dir. reali 336; *id.* 3 Dir. Com. Int. 549.
Switzerland: BG. (June 6, 1912) 38 BGE. II 163, 166; (May 13, 1914) 40 BGE. II 203, 208.

[107] WEISS, 4 Traité 267.

Law once formulated the principle, the *lex situs* has the function "to limit or exclude . . . the effects of privileges established by the law governing the legal relationship to which the privilege is attached." [108]

Hence, a privilege, granted at the forum for debts of a certain kind, extends to foreign-governed debts of the same or a comparable kind. But in the most recent French literature, it has been asserted that the priority of enforcement, accorded by the French Civil Code to the fee of a physician who treated a deceased person in his last illness, is not allowed to a Belgian physician whose claim is under the identical Belgian law.[109] The French draft on private international law, article 52, submits privileges to the law of the place where they are exercised by seizure or otherwise.[110] This, except for maritime law, is a step backward.

The Berne Convention on rail transport of goods has adopted an international statutory recognition of the liens of rail carriers. The French text speaks of *"gage,"* which means pledge, but corresponds with a common-law general lien by operation of law. In (my) translation:

Article 21 § 1. The railroad has the right of a lienor upon the goods for the total debt indicated in article 20. These rights subsist so long as the goods are in the possession of the railroad or a third person holding them on its behalf.

[108] Institute of Int. Law, Madrid (1910), 24 Annuaire 394 art. 3, Revue 1911, 573.

France: Trib. com. Seine (Sept. 6, 1906) Clunet 1907, 366; NIBOYET, Acquisition 216.

Germany: RG. (Jan. 10, 1911) 24 Z. Int. R. 322, 324; 2 FRANKENSTEIN 90, 91, 231.

[109] Belg. Trib. Liège (Nov. 14, 1907) Clunet 1908, 565; BARTIN, 3 Principes 257 § 428; NIBOYET, 4 Traité §§ 1183, 1219, especially p. 467, who also insists that a foreign lien must be *identical* with a French type, 472 § 1222.

[110] LOUIS-LUCAS, Rev. crit. 1952, at 59 ff., proposes the law of the obligation to which the lien attaches.

§ 2. The effects of the lien are governed by the laws and regulations of the state where delivery is made.[111]

5. Limitation of Actions

An action to recover land in Manitoba is barred by lapse of time according to the statute of the province of Manitoba, irrespective of the fact that the land patents had been signed in Ottawa.[112] With respect to land, this application of the *lex situs* is naturally universal,[113] since the judicial jurisdiction is generally likewise localized.

Movables, however, though following the *lex situs,* are subject to the principles concerning the change of situs.[114]

III. Intangibles

The old controversy about the situs of debts has its parallel in the question whether "intangible things," *"biens incorporels,"* in general are governed by a law of the place where they would be deemed situated. When the exclusive rights of authors and inventors matured to recognition, it helped them to be labeled literary, artistic, or industrial property, names still in misleading use in many countries.

A more perspicacious analysis has taught, long since, that debts have no situs and lack the all-purpose contact that tangible things have. Copyright and patent rights belong to the large group of rights in incorporeal objects that have been termed *absolute* rights in the German pandectistic theory. They are analogous to rights in tangible objects insofar as they contain dominance over an object and produce actions against any person violating

[111] Convention of Berne of October 23, 1923, art. 25, 77 League of Nations 367 ff., Hudson, 2 Int. Legislation at 1433; Rome draft of Nov. 23, 1933, art. 25, Hudson, 6 Int. Legislation at 548.

[112] Oliver v. The King (1921) 59 D.L.R. 211, 21 Can. Ex. 49.

[113] Treaty Montevideo (1889 and 1940) art. 52; Cód. Bustamante art. 230.

[114] *Infra* Ch. 56; Shelby v. Guy (1826) 11 Wheaton 361; Raape, IPR. (ed. 3) 382; Cód. Bustamante art. 231: the law of the place where the prescription is achieved; Bustamante, 2 DIP. §§ 1303-6; 2 Vico 244.

it. But because the object is imagined rather than real—the work of the mind, the new procedure or product of industrial expertness—it cannot be localized.[115] Furthermore, when these exclusive faculties were created, they were not endowed with the unlimited scope and duration of the age-old rights *in re*. By a compromise between the protection and promotion of the creative human mind and the interests of national culture or economy, the modern laws of copyright, patents, designs, and models, define with more or less generosity the exclusive field of the privilege and its period of time.

On the ground of these facts, the rights in question have been commonly conceived as purely national creatures of territorial sovereignty. Progress in international courtesy has merely been accomplished by extending the enjoyment of this territorial right to foreign subjects, an achievement in the field of the condition of aliens.[116] The vehicles were the treaties, except for two decisions of the Tribunal de la Seine according foreigners the enjoyment of the French copyright laws without a treaty.[117]

In France, however, a theory has been set forth, rejecting the traditional view and contending that intellectual property is as good an object of conflict of laws as any chattel. This implies that the rights are not confined to a territory but are universal, so to speak, of transitory rather than local enforcement. Bartin, undertaking to establish a conflicts rule, speaks of the law of the place of the first publication as *lex rei sitae*.[118] This theory even claims

[115] Vol. III, p. 75, dealing with the contract to transfer it.

[116] See Vol. II, p. 295. This view has been expounded in an excellent article by BOUCHER, Clunet 1932, 26.

[117] (Feb. 14, 1931) Clunet 1932, 113; (Dec. 6, 1933) Clunet 1934, 907, Revue crit. 1934, 420.

[118] BARTIN, 3 Principes 71, 73.

validity for the existing laws.[119] The facts, however, refute this view radically.

If a conflicts rule governed, for instance, copyright, which is not so necessarily territorial as patents and their kind, a French book would enjoy French copyright in the United States. Nothing is farther from the truth. No state allows other than a domestically acquired copyright to be invoked against counterfeiting. The United States, of course, in addition requires special reservations and deposits for such acquisition.

That the international copyright conventions have to select a local contact for extraterritorial protection of authors is true. They have preferred, in case of publication, the place of the first publication to the nationality or the domicil of the author. The reason is certainly not that the manuscript or original is situated there,[120] but the fact that publication is the entry of the work of thought into the external reality.

The Berne Convention takes from the place of publication the condition that the law at this place confers copyright in its own territory, not because this law should govern abroad but because the other states see no cause to protect a work not protected even in its country of origin. And the duration of the right according to the same law is the maximum granted by the other countries, for the same reason and not because the law of origin has a positive extraterritorial effect.

We may, hence, dismiss this subject from the conflict of laws.

The Berne Convention declares in the case of nonpublished works that the country of which the author is a sub-

[119] Thus, most eloquent, BATIFFOL, Traité 531 ff.
[120] As BARTIN, *supra* n. 117 suggests.

ject is the country of origin.[121] This conforms to the conception that the right to publish or of priority is a right of personalty and subject to the personal law.[122]

Aggregates. Commercial enterprises and agricultural estates have been increasingly recognized as units of partially independent existence in the commercial and procedural literature, and form also the subject of various laws. Nevertheless, neither has the recognition become clear and comprehensive enough nor have conflicts rules been prepared giving preference to such parts of enterprises as goodwill or real leasehold right so as to create an exception to the *lex situs* of the immovables or movables with which the enterprise is connected.

[121] Convention of Berne, art. 9, of Berlin and Rome, art. 4. HUDSON, 4 Int. Legislation at 2468.

[122] *Supra,* Vol. I, p. 102.

Chapter 56

Removal of Chattels

I. Principles

AFTER considerable international discussion in the civil law countries, agreement has been reached on the basic principles suitable to movables changing their position. The American doctrine is consistent with these principles, although the courts are not always conscious of rules transcending "comity." The English opinions seem slowly to accept the same standards.

For the sake of simplicity, acquisition of real rights will be primarily envisaged; but modification and termination of such rights follow the same principles.

A chattel, subject to real rights in one territory (X), is moved to another territory (Y), hence to a new *lex situs*. The situations are conveniently distinguished by the authors, according to the criterion whether a transaction intending the acquisition of a right prior to removal of the chattel has been completed in the jurisdiction of X, with success or without success, or has been left uncompleted when it is moved to Y.

1. Successfully Completed Acts

Real rights in a movable, validly created under the law of one state, X, persist with extraterritorial effect after the movable has been transported into another state, Y. It does not matter that the same right could not have been created in Y, whose law has more exacting conditions.[1]

[1] Waechter, 25 Arch. Civ. Prax. 387; Diena, Diritti Reali 163 ff.; Niboyet, Acquisition 81 and 4 Traité § 1194.
England: Cammell v. Sewell (1860) 5 H. & N. 728, Lorenzen, Cases

When, for instance, title in a piano, exhibited in a showroom in New York, passes to a buyer by consent, the ownership of the buyer remains intact if the piano is brought to Argentina, the law of which requires delivery for transfer of title. Recognition is given as well in the United States as in Argentina and in third countries.[2]

A German farmer once bought a horse in Mainz where French law was in force; when the horse arrived on the Rhine bridge, it hit a passerby. He was liable for the injury as owner, even though the horse had already reached the territory of Roman law.[3]

Thus, the universally recognized working of the law of the situation, most remarkable in itself, is extended to the period of time subsequent to that situation. The effects of the former *lex situs* include formalities, consent, and all other intrinsic requirements of conveyances, except, in the civil law courts, capacity of the parties.[4]

Recognition, however, does not include the capacity or incapacity of the chattel to be transferred when it is removed to another jurisdiction. Although the domestic law of the situs determines for its own purposes whether a thing is alienable at all *(in commercio)* and the specific person who may acquire, other jurisdictions are not committed to recognition. Thus, slaves serving on an estate in Kentucky and considered immovable were held to lose this

(ed. 4) 613; Embiricos v. Anglo-Austrian Bank [1905] 1 K.B. 677; DICEY (ed. 5) 608; FALCONBRIDGE, 81 U. of Pa. L. Rev. (1933) at 820.

United States: Rabun v. Rabun (1860) 15 La. Ann. 471; Sleeper v. Pennsylvania R.R. Co. (1882) 100 Pa. 259; GOODRICH (ed. 3) 475 n. 88.

France: App. Rouen (Jan. 28, 1878) S. 1878.2.54.

Germany: OLG. Hamburg (Nov. 11, 1892) 49 Seuff. Arch. 208 No. 118 (although speaking of *lex loci contractus* instead of *lex situs*); OLG. Hamburg (May 18, 1894) 5 Z. Int. R. (1895) 286; and subsequent common practice.

Greece: App. Patras (1904) 16 Themis 347, Clunet 1907, 1197.

[2] See cases cited by GOODRICH 475 n. 87.

To analogous effect: RG. (Sept. 16, 1911) Bay. Z. 1912, 45.

[3] OLG. Darmstadt (Dec. 31, 1897) 29 Puchelt's Z. franz. C.R. 688.

[4] Switzerland: App. Bern (June 22, 1926) 62 ZBJV. (1926) 474.

character when brought to Missouri.[5] The analogous decision of a French court that a Spanish church chalice, *res sacra* and "extra commercium" in Spain, and carried to France, where Baron Pichon, a collector, purchased it, was transferable,[6] has won notoriety in the conflicts literature. The modern cases of "nationalization" and confiscation, however, have been the subject of fundamental controversy far beyond the realm of private international law.

Ordinarily, when we apply a foreign law to an act we also apply subsequent changes in this law. But can *lex situs* X, having created a property right, abolish it subsequently although the chattel meanwhile has been removed from X? This is claimed for the French annulment of acquisitions during the German occupation of chattels later deported from France, notwithstanding the expectation that other states would not recognize such destroying effect.[7] Primordial political reasons may justify exorbitant exceptions. The rule must be that the power of *lex situs* is exclusively exercised during the period in which the thing is situated in the territory.

Indeed, the power of the actual situs is unlimited. Normally, it modifies the incidents of the right, replacing the creating law, for instance, as to the legal restrictions to the exercise of ownership, or the period of time allowed to an usufruct. It decides whether a pledgee is entitled to self-appropriation of a pledge in case of default of redemption, although this is not merely a procedural question, etc.[8]

But though the new law is sovereign, international life requires restraint. That the present situs should not rec-

[5] Minor v. Cardwell (1866) 37 Mo. 350, 356, 90 Am. Dec. 390.
[6] Trib. civ. Seine (April 17, 1885) Clunet 1886, 593.
[7] NIBOYET, 4 Traité 372 f., § 1193 n. 1.
[8] *Supra* Ch. 55, p. 17.
France: BATIFFOL, Note to Cass. req. (May 24, 1933) S. 1935.1.257.

ognize foreign-created rights when their kind is unknown to the forum, is untenable as a general proposition. Even where the types of admitted real interests are exclusively enumerated and regulated, as in Germany, the consequence is merely that foreign created rights are assimilated to domestic categories.

Nonrecognition generally is to be encountered only on the ground of repugnance to specific institutions, as when the transaction lacks necessary publicity or is usurious in the eyes of the forum. This is public policy in its ordinary aspect.[9]

Defenses. Since an interest acquired in X has international effect, equal effect must be attributed to certain restrictions and objections acquired under a law which at the time was the *lex situs.* This is normally the time when the defendant acquired possession. If such defenses are based on substantive grounds under the law of the place where the defendant acquired the object and the defense thus was created opposable to every holder of the interest, they are protected everywhere.[10]

An outstanding example is the right of a bona fide purchaser to reimbursement of the price paid by him, under rules going back to the thirteenth century,[11] and adopted in the former Prussian *Landrecht,* the French and many other codes, including that of Louisiana.[12] There is also a cor-

[9] *Infra* II.

[10] RG. (Nov. 14, 1891) 28 RGZ. 109, 111 (place of pledging); App. Bern (June 22, 1926) 62 ZBJV.474 (action of the dispossessed owner of securities against the purchaser); DIENA, Dir. Reali 167; 1 MEILI 395; NIBOYET, Acquisition 297 n.; 2 FRANKENSTEIN 71, n. 106.

Egypt: C.C. art. 18.

Czechoslovakia: Priv. Int. L. § 39.

[11] For France, see PICARD in 3 PLANIOL ET RIPERT (1952) 393 § 394 n. 3.

[12] Prussia: A.L.R. part. 1, Title 15, § 26, French C.C. art. 2280; Louisiana C.C. (1870) art. 3507; Netherlands B. W. art. 637; Italy former C.C. (1865) art. 709; Switzerland C.C. art. 934 par. 2. *Cf.,* Austria: ABGB. § 331.

responding rule in England and New York.[13] The French provision allows the owner of a "stolen" or lost movable to sue a possessor who purchases at a fair or market or in a public sale or from a merchant dealing with similar goods, provided that he reimburses the price paid. The German courts have construed this provision as granting a substantive right, though it can be used merely as a dilatory defense. This construction is reasonable. Whereas some laws permit the owner in such cases to recover without compensation, and others do not allow any recovery, the solution in question is a compromise of old date. This defense ought to be placed on the same plane of property rights as the results of the more extreme provisions.

Therefore, since the purchaser of a stolen car in a French public sale does not acquire ownership (before completing adverse possession in three years, article 2279 paragraph 2) but acquires a counterclaim for recovery of the price against an action by the owner, he may assert it in any country.[14] It does not matter under what law the plaintiff acquired his title (unless he acquired title afterwards in good faith free from previous encumbrances), or whether the *lex fori* includes a similar provision.

It has been held, however, in an old German case that the possessor cannot transfer his protected position when he conveys the chattel to a third person in a state permitting the owner unconditional recovery.[15] This is in-

[13] Viz., where an apparently authorized selling agent transfers title through a commodity paper:

New York: Factor's Act, Pers. Prop. L. s. 43, ss. 3: nothing shall prevent the true owner of a merchandise from demanding or receiving merchandise upon prepayment of the money advanced.

[14] Common opinions: OLG. Hamburg (Jan. 19, 1894) 49 Seuff. Arch. 386 No. 229: a diamond pin stolen in the domain of the Prussian Code which permits unconditional recovery, was sold to a bona fide purchaser in Hamburg requiring compensation of expenses; Hamburg law applied. Accord: 1 BAR 633 f.; KOSTERS 715; 1 MEILI 396; WALKER 365; see DUDEN 43.

[15] RG. (March 19, 1898) 41 RGZ. 152, Clunet 1900, 635; approved by LEWALD 183 § 243, but *contra* RAAPE IPR. 384 referring to BGB. § 986.

acceptable. The owner, in the case involved, lost possession of securities by theft in Hamburg. The securities were sold in Paris between bankers; hence, the owner could recover them only against payment of compensation. Should the same owner acquire more rights by a new change of hands between other persons, this time in Germany, only because German substantive law allows full recovery of stolen goods? This result is inconsistent with the undisputed transferability of ownership acquired in one country to successors in other countries. Under all the laws mentioned, the right to reimbursement ought to be conceived as a proprietary right exercisable as a defense.

2. Defective Acts

If an acquisition was attempted in X but failed to be effective through absence of a required element, the deficiency cannot be cured merely by removal of the chattel to another territory.

Illustrations. (i) To vary a well-known American case,[16] a diamond entrusted to a broker in New Jersey and there pledged by the latter to an innocent purchaser, is not effectively pledged. The result is not changed if the stone is brought to New York, under whose Factors' Act an innocent pledgee prevails over the owner.

(ii) In the old English case of *Inglis* v. *Usherwood*,[17] delivery on board a chartered ship in the port of lading, Petersburg, under English law would have been equivalent to delivery to the English buyer. But under the Russian *lex situs*, the transfer was cancelled by repossession of the goods in the port. The English court recognized this after the goods had been landed in England.

[16] Charles T. Dougherty Co. v. Krimke (1929) 105 N.J. Law 470, 144 Atl. 617, LORENZEN, Cases (ed. 4) 616, mistakenly decided the case by extending New York law to a pledge in New Jersey, *cf.*, 38 Yale L.J. (1929) 988; STUMBERG (ed. 2) 394; GOODRICH (ed. 3) 477.

[17] (1801) 1 East 515.

(iii) Acquisition in Berlin of securities to bearer by a banker operating as commission agent made him the owner, although under the law of Hanover the principal domiciled there would have directly acquired title.[18]

By consequence, mere removal to another state also does not help the creditors of the acquirer.

The scope of this rule, however, will be better tested in connection with the effects of the new *lex situs*.

3. Events in the Second Territory

The law of the second situs, state Y, determines the effect of new events, such as a sale, a pledge, adverse possession, seizure, and legal liens.[19]

Illustrations. (i) In the English leading case of *Cammell* v. *Sewell*[20] the title acquired by sale of the cargo on board a Russian ship by the master in a Norwegian port, the actual situs, was sufficient to defeat the English owners, suing for conversion, although the sale would not have been valid in England.

(ii) Horses were sold by a conditional sale in Hesse, under German common law, and validly acquired by an innocent purchaser while situated in Prussia.[21] Instruments to bearer, stolen in Germany, were sold at the London stock exchange and validly acquired by English law.[22] Most American courts decide in the same manner.[23]

(iii) Under Austrian law the cars of an Austrian railroad were included in a mortgage (immobilized, "hypothecated"), but while, in Bavaria, unless such mortgage was recorded, they could be seized as independent movables,

[18] RG. (Feb. 15, 1884) 11 RGZ. 52.

[19] Switzerland: BG. (June 26, 1912) 38 BGE. II 194, 198: lien of the Swiss carrier on goods sent from London and Brussels.

[20] Cammell v. Sewell (1860) 5 H. & N. 728, 157 Eng. Rep. 1371.

[21] OLG. Frankfurt (July 5, 1890) 4 Z. int. R. (1894) 148.

[22] RG. (Oct. 6, 1897) JW. 1897, 573.

[23] See *infra*.

subject only to rights of pledge.[24] Seizure by a creditor was therefore allowed.

An example of a special situation has been furnished by the persistence of the common law hostility against security arrangements where the creditor is deprived of possession. Thus, a horse was mortgaged in Maryland by recordation without delivery of possession, third persons being charged with knowledge of the incumbrance. But brought to Pennsylvania, the horse was acquired by a bona fide purchaser, because under the law of this state chattel mortgages were ineffective against third persons.[25] Conversely, title was retained in a conditional sale in Pennsylvania of a safe and valid only between the parties. But when the safe was subsequently removed to New Jersey, under the law of the new situs, the title of the owner became superior to the right of a thereafter attaching creditor of the buyer.[26] The creditor's objection in this case is interesting, as it seems theoretically well to describe the plaintiff's title as originating in Pennsylvania in the character of a right too weak to resist a judgment and execution or claims of other new acquisitions. But the court replied elegantly; also under this original law the buyer had no right to sell and make title to a purchaser under all circumstances. In fact, acquisition of rights defeating the reserved title depended on the *lex situs* of the time of acquisition, that is, New Jersey law. The law of Pennsylvania subsequently has become the same, although under the Uniform Act conditional sales and under a special

[24] Bay. ObLG. (Nov. 11, 1882) 38 Seuff. Arch. 213; analogous Oberapp. Ger. Köln (Jan. 4, 1834) 19 Rhein. Arch. 234, see ROBERTSON, Characterization 211; OLG. Karlsruhe (Dec. 12, 1892) 25 Puchelt's Z. französ. Civilrecht 46: cabs "immobilized" and mortgaged in Basle, validly seized in Baden by the owner's creditor.

[25] MacCabe v. Blymyre (1872) 9 Phila. 615.

[26] Marvin Safe Co. v. Norton (1886) 48 N.J. Law 410, 7 Atl. 418. Similarly about a bailment Cooper v. Phil. Worsted Co. (1905) 68 N. J. Eq. 622, 60 Atl. 352 (under different name).

act [27] chattel mortgages were effective when recorded in the state, and therefore the courts no longer consider chattel mortgages repugnant to the domestic public policy.[28]

An excellent exception to the effect of the second situs has been established in various American cases. When a chattel is removed to another jurisdiction by force or fraud in favor of a creditor so that he may attach the chattel at the new location, this situs is disregarded and jurisdiction denied.[29] The Ontario court similarly has released a seizure obtained by a creditor who cunningly induced a friend to bring a boat from the Detroit side of the bordering river to Windsor.[30]

It does not seem, however, to be a basic idea of the American decisions that consent of the owner to a removal, as such, exposes him to the effect of disposals by other persons in another state. This would amount to a waiver where no such intention can be presumed.[31] What the courts in increasing cases have done, is to stigmatize wrongful removals, assuredly also in pursuance of the common law attitude protecting titles. This current is openly displayed when recordation in Y is omitted (*infra,* III, 4).

4. Incomplete Legal Situations

More controversy is encountered in the cases where an act in X has not ripened either to failure or to success.

[27] Act of July 15, 1936, First Ex. Sess. P.L. 47 (21 P.S. § 842).

[28] Kephart, J., in McCurdy's Est. (1931) 303 Pa. 453, 154 Atl. 707; Baldridge, J., in Personal Finance Comp. of New York v. General Finance Co. (1938) 133 Pa. Super. Ct. 582, 587.

[29] Timmons v. Garrison (Tenn. 1843) 4 Humph. 148; Deyo v. Jennison (Mass. 1865) 10 Allen 410; Sea-Gate Tire & Rubber Co. v. Moseley (1933) 161 Okla. 256, 18 Pac. (2d) 276 (all dealing with deceit); *cf.,* the English decision Hooper v. Gumm (1867) L.R. 2 Ch. App. 282, concealment of the mortgage by the mortgagee.

[30] Canada: Houghton v. May (1910) 22 Ont. L. R. 434, aff'd 23 *id.* 252.

[31] But GOODRICH (ed. 3) 483, 487 f., criticizing the role given to the consent, and also MORRIS, 22 Br. Y. Int. L. 245, expound different points of view.

The most discussed instance is sale and dispatch of goods from a country, where delivery is required to pass the title —Argentina, Germany, Switzerland—to another jurisdiction considering consent sufficient to do so—United States, France, Italy. Does title pass on the border? Before the first World War, German shippers sent goods to English buyers, and the goods arrived in England but, whether lost or seized, were never received by the consignees. Had the title passed? Two opposite opinions have been advanced.

(a) Since the requirements for transfer of ownership are unfulfilled so long as the goods are in territory X, the seller remains the owner until in Y a new act, such as an agreement or adverse possession, complying with the law of Y, transfers the title, without regard to what happened in X.[32] For adherents of the vested rights theory, it is obvious that no such right existed in X.

The Anglo-German Mixed Arbitral Tribunal gave this logically indisputable conclusion an unnatural twist in contending that the intention of transfer required by the English Sales of Goods Act was missing, because German merchants had contrary intentions suggested by the German code.[33] This is a fictitious assumption of an intention, extending German legal conceptions of property questions to English territory, whereas the merchant mind is notoriously indifferent to these questions.[34]

(b) In the contrary view, the facts existing at the moment when the situs changes are evaluated under the

[32] BARTIN, 3 Principes 233; DESBOIS, Clunet 1931, 309 at 315 requires that the title must be based on the *lex situs* as of the time of its alleged acquisition; NIBOYET, 9 Répert. 231, Nr. 57; 104 Traité 374 (requiring a new sale in France); FALCONBRIDGE, Conflict of Laws 390.

[33] E. Lüttges & Co. v. Ormiston & Glass, Ltd. (1926) 6 Recueil trib. arb. mixtes 564; Büsse v. British Manufacturing Stationery Co. (1927) 7 *id.* 345.

[34] RABEL AND RAISER, 3 Z. ausl. PR. (1929) 62, 67; RAAPE, IPR. 381, 394 n. 36. An anticritique by HELLENDALL, "Res in Transitu, etc.," 17 Can. Bar Rev. (1939) 7 at 17 misses the point.

new law.[35] A sales contract and goods dispatched in Germany, at the moment when the goods cross the frontier to France become sufficient operating facts to exercise the same effect as if they had occurred in France or England.[36] However, the justification of this result varies somewhat.[37] Either the rule of article 2279: *En fait de meubles, possession vaut titre,* is interpreted as protecting the transaction between the possessor and a purchaser in good faith; this transaction is construed from the facts that took place abroad. Or the great principle of article 2279 is understood broadly to protect possession as such, rather than the transaction, against the claim of ownership; hence the buyer, as soon as he possesses through the railway or the forwarding agent, acquires title.

Conforming to the latter variant, when a chattel is innocently purchased from a nonowner in England where no title is acquired, and thereafter imported into France, the purchaser may now enjoy the French usucapion of three years (article 2279 paragraph 2).[38] It seems surprising that article 2279 should operate without regard to article 1138. But it does have its peculiar history.[39] Yet respecting conflicts law, both opinions are inexact, because the entire question is exclusively concerned with the municipal

[35] OLG. Zweibrücken (July 13, 1898) 10 Z. int. R. 220, S. 1901.4.25; RG. (May 7, 1880) 1 RGZ. 415; 2 ZITELMANN 337.

[36] DIENA, Diritti Reali 175 ff.; 2 FIORE § 818; 4 WEISS 212; 8 LYON-CAEN ET RENAULT § 1291; see cases in NIBOYET, Acquisition 397 ff.; and *id.* 9 Répert. 230 §§ 49, 51; 2 FRANKENSTEIN 69.

[37] LEWALD 187, § 248; RAAPE, IPR. (ed. 3) 393 f. (apparently in contrast to p. 381); BATIFFOL, Traité 511 n. 1.

[38] Cass. civ. (March 14, 1939) S. 1939.1.182; LEREBOURS-PIGEONNIÈRE § 355; SURVILLE § 174; BATIFFOL, Traité 510.

[39] See the valuable study by WALTER MERK, "Die Entwicklung der Fahrnisverfolgung im französischen Recht," 7 Rhein. Z. f. Zivil. u. Prozessrecht (1914) 81, 173, at 218 ff.

law of the new situs.[40] In conflicts law, the second situs has to work with its own system and with the facts occurring during its own reign. True, it must not be required that all party declarations should be faithfully recited on the territory of Y as if a void sales contract were to be cured. We understand well what the parties intend. But as the ways of the law go, this continued intention ought to be in some manner manifested. Receipt by the buyer's forwarding agent or by the railway, if considered the buyer's agent, suffice for this purpose.[41]

II. Local Public Policy

1. New York

While we shall have to note remarkable exceptions accorded by American courts to foreign-created security interests (*infra* III), exceptional favor has been shown sporadically to the law of the forum. In litigation between citizens of New York, the New York Court of Appeals has restored property rights when chattels were removed from the forum without the owner's consent and the rights were lost abroad under the foreign law.[42]

In *Edgerly* v. *Bush*,[43] two horses were mortgaged in New York State, then taken by the mortgagor to Quebec and sold by a trader to a bona fide purchaser who, as the

[40] *Contra:* Batiffol, Traité §§ 505, 506, who bases his position on his theory that our problem should be solved in analogy to a (questionable) intertemporal doctrine distinguishing between the regime of subjective rights (which is the new statute) and the procedure of acquiring these rights (governed by the old statute). *Cf. infra* n. 53.

[41] Rabel-Raiser, 3 Z. ausl. PR. 67; in this conclusion followed by Hellendall, *supra* n. 34 at 18.

[42] Beale, "Jurisdiction over Title of Absent Owner in a Chattel," 40 Harv. L. Rev. (1927) 805 against the Edgerly case. Note, "Jurisdiction over Movable Property Brought into a State Without the Owner's Consent," 24 Harv. L. Rev. (1911) 567.

[43] Edgerly v. Bush (1880) 81 N.Y. 199.

court understood it,[44] acquired title according to Quebec law. When the horses were sold another time to the defendant, a resident of New York, but remained in Canada, the mortgagee sued with success for conversion. The court recognized that the defendant acquired title in Canada although he knew of the mortgage, but as the property was taken out without the consent of the plaintiff, the foreign rule was overcome by the domestic policy.

Wylie v. *Speyer* [45] was suggested by the preceding decision. Railway bonds were stolen from the plaintiff's New York bank deposit; coupons from them were bought after maturity validly at a German stock exchange by the bank of Speyer & Co., who sent them to their New York affiliate for collection. Under New York law the coupons, acquired after maturity, were ordinary property to which the court declared the law of the forum applicable as against the former German *lex situs*.

The arguments employed in the two decisions have been refuted by Beale and Goodrich.[46] The first decision was the more shocking as the chattels had remained outside New York and even in the very jurisdiction in which the recognized acquisition had occurred. The Restatement has refrained from formulating a general preference of older rights in case of removal without the consent of the entitled person, although it adopted such rules in favor of chattel mortgage and conditional sale.[47] But it apparently discourages the state into which the chattel is brought without

[44] Wrongly, see Quebec C.C. art. 1489 and FALCONBRIDGE, Conflict of Laws 381 n. (f).

[45] Wylie v. Speyer (N.Y. 1881) 62 How. Pr. 107. GOODRICH (ed. 3) 479, n. 102 observes that in both cases the court maintained the domiciliary law of the owner and did not mention the removal without the consent of the owner.

[46] GOODRICH *supra* n. 45.

[47] Restatement §§ 268, 275.

the consent of the owner from taking "jurisdiction," [48] which is a very strange idea.

Neither in England nor Canada, nor in any civilian country, have such unprincipled singularities been known.[49] It seems promising that these decisions have not been followed, although the New York court has not yet clearly abandoned its special favor for its domiciliaries. What would become of the universal rules, included in the *lex situs,* if every court were to protect only its own citizens, flouting rights acquired abroad?

2. France

A law of 1872 bars the acquisition of lost or "stolen" instruments to bearer, registered in a *"bulletin des oppositions,"* under the assumption that the mere fact of publication in the bulletin destroys any purchaser's good faith. The courts have applied this exclusion of bona fide purchase in the widest sphere, even to foreign-created securities and to foreign thefts or losses. Registered instruments are therefore always recoverable in France, irrespective of any interest created abroad at a temporary situs.[50]

This ruthless practice, fully inconsistent with the cherished doctrine of vested rights, has been analyzed and severely criticized in the older French literature and in other countries.[51] Present French writers tend to excuse this defiance of international order as a legitimate exercise

[48] Restatement § 49, Caveat and Comment to Caveat.

[49] FALCONBRIDGE, Conflict of Laws 384 f.

[50] French Laws of June 15, 1872, Feb. 8, 1902, March 8, 1912, and special laws concerning losses during the wars. Banknotes and French governmental securities, excepting railway bonds, are excluded (art. 16). The bar to circulation does not affect separate coupons of interest or dividend (art. 2 par. 7, of 1872).

[51] LYON-CAEN, 19 Annuaire Inst. Int. Law (1902) 159; PILLET, 1 Traité 778 § 375 and Principes 564 § 314; DUDEN, "Der Rechtserwerb vom Nichtberechtigten," 8 Beitr. Ausl. PR. 92 ff. and in 8 Z. ausl. PR. (1934) 642.

of territorial power.[52] After several other lame explanations, a distinguished author asserts that the intertemporal principles serve as analogy and that the question is one of domestic rather than of conflicts law.[53] I must disagree on both counts. It is certainly a conflicts problem whether foreign-acquired rights are to be enforced against domestic interests; and respect for an intervening foreign law may be due even though an analogous new domestic regulation was and ought to be deprived of retroactive force.

In Germany [54] and Switzerland,[55] the courts have stated that a banker acts with gross negligence if he fails to organize and supervise a continuous and exact list of lost or stolen securities notified by the police or other authorities. But for international needs it is not helpful to dictate to the world. What is required is a reliable network of international notification. Although at present bank deposits and safes operate as preventives of theft, an international convention for co-operation is recommendable.

III. Security Interests[56]

The American courts agree with the civil law doctrine on the principles described above, but have developed some special rules respecting conditional sales and chattel mortgages. This requires a discussion of the security interests in tangibles, in which we include all legal forms of transactions intended to procure security to a creditor for satisfaction of his claim by providing him with a true real right in a tangible movable thing.

The transactions creating such rights also comprise obliga-

[52] Niboyet, 4 Traité 432.
[53] Batiffol, Traité 512, *cf. supra* n. 40.
[54] 37 RGZ. 71; 41 *id.* 207; 28 *id.* 109.
[55] BG. (Nov. 24, 1899) 25 BGE. II 840, 846 f.; Trib. com. Bern (Sept. 17, 1946) 83 ZBJV. (1947) 79.
[56] See *supra* Ch. 55, III.

tions and are connected with procedural steps. Nevertheless, primary importance prevailingly attaches to the measure of recognition a security enjoys at a new situs as respects attaching creditors and bona fide purchasers.

Using the American statutory terminology,[57] we may speak of "creditor" and "debtor" to indicate generally the parties to a security agreement.

The fact that in American law no certain line divides mortgages and pledges from privileges in execution and therefore "title" and "lien" doctrines are in strife, has increased the uncertainty in this field. The draft of a Uniform Commercial Code—"Secured Transactions"—claims to be independent of this controversy. Whether or not this draft deals exclusively with true "interests in goods," these must be here our primary object. The so-called liens, hence, are included, if under the competent law they are real rights. But this restriction does not seem very important respecting liens created in the United States. Here it may be assumed that liens are presumptively real interests.

At the outset, it should be remembered that under all circumstances a security interest must have been validly created under its *lex situs* of the time.[58] Reservation of title in Louisiana,[59] or if not recorded in Switzerland,[60] is void; hence, the buyer's title is considered absolute also after removal to another jurisdiction.[61] Moreover, it may be important whether in the state where it is originally created, e.g., a conditional sale protects the seller against bona fide

[57] Uniform Conditional Sales Act, § 58. The Draft, Uniform Commercial Code, 9-105 ss. 1, d. i, etc., speaks of "secured party" and "debtor."

[58] Restatement §§ 272, 280, comments. See *supra* 70 ff.

[59] Motors Securities Co. v. Duck (1939) 198 Ark. 647, 130 S.W. (2d) 3.

[60] Swiss C.C. art. 715; *cf. infra* n. 89.

[61] A different theory once obtained in Germany with respect to a prohibition by the law of Oldenburg, RG. (Feb. 28, 1893) JW. 1893, 207; (July 7, 1899) *id.* 1899, 581.

purchasers or an execution creditor (as in the great majority of American states) or not (as in Illinois [62]).

1. Normal Principles

A validly established interest persists despite any change of situs, but the new situs governs new acquisitions by third persons, detrimental to that interest. A purchaser in good faith or (in the Romanistic tradition) a buyer at a public auction, if protected by the property law of Y, prevails over the creditor invoking the law of X, according to universal conflicts law. As a rule, in Continental laws attaching creditors of the debtor or purchasers in bad faith have no more rights than the debtor; the prior creditor's real right is superior.[63] However, state Y may accord priority to certain liens acquired at the new situs over the old title.[64]

Thus, in civil law jurisdictions, state Y applies its own rules on the acquisition of real rights on its own territory. If these rules confer on a bona fide purchaser a title free from previous charges, a foreign security interest perishes exactly like a domestic one.[65]

At common law, the general conflicts rule leaves state Y equally free to determine priority,[66] but in the American courts conflicts law and municipal law are mingled through an interpretation of the internal statutes, which produces

[62] Western Union Cold Storage Co. v. Banker's National Bank (1898) 176 Ill. 260, 52 N.E. 30.

[63] FALCONBRIDGE, Conflict of Laws 405.

[64] E.g., Universal Credit Co. v. Marks (Md. 1932) 163 Atl. 810, *cf.*, 87 A.L.R. at 1312.

[65] Germany: OLG. Frankfurt (July 5, 1890) 4 Z. int. R. (1894) 148 (horses sold conditionally in Hesse, but sold in Prussia; the bona fide purchaser wins).

The Netherlands: Hof Amsterdam (May 8, 1930) W. 12150, aff'd., HR. (March 27, 1931) W. 12311, N.J. 1931, 701 (instruments mortgaged in Holland but sold abroad, foreign purchaser wins).

[66] Restatement §§ 269, 276; MORRIS, 22 B.Y. Int. L. at 238 ff.

varying results. Two currents have been in opposition. It is the "traditional policy of the common law to protect the owner rather than the innocent purchaser." [67] Hence, sometimes we find attaching creditors of the buyer—who enjoy publicity rights—and bona fide purchasers, despite the property law of Y, subordinated to the foreign-created security right.[68] On the other hand, there exists authority to the effect that an attaching creditor is preferred over a vendor, bailor, conditional vendor, or mortgagee, if the law of the situs of the chattel at the time so provides.[69]

In view of the prevailing confusion, it should be remembered that all these tendencies are to be regarded as exceptions to the rule that (1) the law of X creating a security interest is respected in Y, subject to the extent that (2) *new* events exercise their influence according to the *general* law of property of Y. To stress this rule is important, if for no other reason, because decisions in Y conforming to this rule are assured interstate and international force. Not every fancy solution of a court of Y would be entitled to recognition, and we know of retaliation even in an American sister state.[70]

[67] FALCONBRIDGE, Conflict of Laws 383.

[68] This seems to be the basis of the doctrine respecting removal without consent, *infra* sub 4. But Olivier v. Townes (La. 1824) 2 Mart. N.S. (La.) 93 is no support, as Stumberg (ed. 1) 359, 361 seems to think. The Louisiana court failed to recognize the sale of a ship on the high seas which was correctly perfected without delivery, because the court unjustifiedly applied Louisiana property law. It did not decide that Louisiana creditors have precedence over foreign vested rights.

[69] STUMBERG (ed. 1) 361, black letters. The text of ed. 2 has been changed at page 393 to make clear that this is a minority view. For a more detailed survey, see STUMBERG, "Chattel Security Transactions and the Conflict of Laws," 27 Iowa L. Rev. (1942) 528.

[70] Retaliating against the former rule of Texas (*infra* n. 81), Union Securities Co. v. Adams (1925) 33 Wyo. 45, 236 Pac. 513, 50 A.L.R. 23; Forgan v. Bainbridge (1928) 34 Ariz. 408, 274 Pac. 155 much criticized, see GOODRICH (ed. 3) 487 § 158. *Contra,* Arkansas, Hinton v. Bond Discount Co. (1949) 214 Ark. 718, 218 S.W. (2d) 75 refused to retaliate, as also New Mexico and Louisiana. See 13 A.L.R. (2d) at 1319.

Approaching the restrictions on the two parts of this rule, the first objection to the extraterritorial effect of the interest conferred by X may be based on disapproval in Y of the law of X.

2. Public Policy

Foreign security rights have been disregarded because their creation under the law of X did not comply with the publicity requirements of Y. Thus, recognition has been denied to mortgaging [71] or retaining of title [72] without surrender of physical possession to the mortgagee or a third person. Also, the new situs has been said to reject a rule of X that the pledgee retains his right when he loses possession against his will.[73] General legal hypothecs of the former German common law and of French law have been refused enforcement in other territories where mortgages must be charged upon specific objects.[74] Emphasis in such decisions is due to a strongly felt public policy rather than to the mere *lex situs,* which in itself must not defeat the foreign-created right.[75]

It so happens, by the inscrutable wisdom of national lawmaking, that Louisiana rejects conditional sales executed

[71] England: Liverpool Marine Credit Co. v. Hunter (1867) L.R. 4 Eq. 62, (1868) L.R. 3 Ch. App. 479 H.L.: English mortgages on a ship ineffective in Louisiana.

France: Cass. req. (March 19, 1872) D. 1874.1.465, S. 1872.1.238; (May 24, 1933) Rev. Crit. (1934) 142.

Austria: A.BGB. §§ 451, 452.

[72] Germany before the Civil Code: RG. (Nov. 25, 1895) 6 Z. int. R. 424; OLG. Braunschweig (Sept. 20, 1894) *ibid.* 510.

[73] French C.C. art. 2076 extinguishes a pledge in every case where the creditor loses the pledge; German C.C. § 1253 par. 1 only where the creditor voluntarily returns it.

[74] Oberapp. Ger. Jena (July 7, 1853) 16 Seuff Arch. 1; Prussia: Ob. Trib. (April 8, 1875) 31 *id.* 257 No. 194.

[75] 1 WHARTON 709, § 317 b.

Germany: RG. (Feb. 28, 1893) JW. 1893, 207, 3 Z. int. R. 622.

The Netherlands: Rb. Maastricht (June 26, 1930) W. 12354, N.J. 1931, 8.

in the forum [76]—seller's credit—but the Supreme Court and recent legislation permit chattel mortgages—banker's credit—while Switzerland after much struggle has admitted reservation of title under recording, but strictly disapproves of trust receipts ("Sicherungs-Übereignung"), though recently with weakening vigor.[77]

Under no policy should a court deny recognition in principle to a foreign incumbrance on movables brought to the forum, merely because the type is alien to the domestic law, as has occurred in a few American decisions.[78]

3. Recording

The precarious legal situation of a chattel on which a mortgage or a vendor's title has been validly constituted, is intended to be stabilized by the machinery of public recording. This protection, of course, ought to cease when a dealer, especially of an automobile, is permitted by his mortgagee or conditional seller, to resell. The American courts try to cope with this complication, either by assuming that in such case recording of the reserved right is not constructive notice to a purchaser for value or its effect is counteracted by estoppel or waiver.[79] In other cases, difficulties arise where recordation is required at the new situs

[76] Louisiana: Barber Asphalt Paving Co. v. St. Louis Cypress Co. (1908) 121 La. 152, 46 So. 193. Conditional sales executed in other states are recognized; see Note 13 A.L.R. (2d) 1325. A similar tendency is ascribed to the Supreme Court of Colorado by MACDONALD, "Enforcement of Foreign Conditional Sales in Colorado," 6 Rocky Mt. L. Rev. (1934) 221, 222.

[77] Switzerland: The Federal Tribunal has recently—BG. (July 5, 1946) 72 BGE. II 235, 35, Praxis 1946, No. 146—made it clear that a fiduciary transfer to a creditor, well-known also in that country, is a good title for ownership, and what it objects to is merely transfer without real surrender of possession, or, perhaps even merely transfer by *constitutum possessorium*, as GUHL, 183, Z. Bern J.V. 489 suggests; see also OFTINGER, Zürcher Komm. Abt. IV (1952) 2(c).

[78] See 2 BEALE § 273.1 n. 3.

[79] See 136 A.L.R. (1942) 821, under III discussing the effect on creditors of the dealer.

but the creditor does not comply with the formalities. In the strictest view, the situs applies its ordinary requirement to all chattels situated in the forum irrespective of their original location.[80] In the United States formerly the courts of Texas drew this consequence,[81] and other states, notably Colorado,[82] showed or show an analogous attitude [83] which, once, was eloquently expounded by the Supreme Court of the United States.[84] Statutes in increasing number expressly announce that all chattels brought into the state must be recorded to preserve previous security titles.[85] Since a French law of 1934, automobiles must be registered in France with their foreign-created

[80] This is also the effect of not utilizing the very strong protection afforded by registration in Peru L. 6565 of March 12, 1929, on which see DELGADO, Compendio (1938) 41.

[81] Texas: Consolidated Garage Co. v. Chambers (1921) 111 Tex. 293, 231 S.W. 1072, 1074 (conditional sale, Cal.); Farmer v. Evans (1921) 111 Tex. 283, 233 S.W. 101 (chattel mortgage, Okla.). But contrary, exempting foreign executed and recorded mortgage liens from the Texan Certificate of Title Law: Bank of Atlanta v. Fretz (Tex., Sup. Ct. 1950) 226 S.W. (2d) 843.

[82] Colorado: Commercial Credit Co. v. Higbee (1933) 92 Colo. 346, 20 Pac. (2d) 543 (domestic attaching creditor preferred over a Californian conditional vendor); American Equitable Assurance Co. v. Hall Cadillac Co. (1935) 93 Colo. 186, 24 Pac. (2d) 980; Castle v. Commercial Investment Trust Corp. (1937) 100 Colo. 191, 66 Pac. (2d) 804 (local buyer against foreign conditional vendor). See MACDONALD, Conditional Sales, 6 Rocky Mt. L. Rev. (1934) 221.

[83] Alabama: Pulaski Mule Co. v. Haley & Koonce (1914) 187 Ala. 533.
Maryland: Universal Credit Co. v. Marks (1932) 164 Md. 130, 163 Atl. 810 (conditional sales).
Mississippi: Patterson v. Universal C.I.T. Credit Corp. (Miss. 1948) 37 So. (2d) 306.

[84] Hervey v. Rhode Island Locomotive Works (1876) 93 U.S. 664, LORENZEN, Cases 685.

[85] 13 A.L.R. (2d) 1320; 1341 adding Kentucky, North Carolina and West Virginia. On New Mexico Law 1947, see Cheatham Cases (1951) 613 n. 2. These statutes oppose the inclination of many courts to exempt conditional sellers' rights from the duty of recording; see HONNOLD, Cases and Materials on Sales and Sales Financing (1954) 408.
But see despite the Michigan Statute Comp. L. 1948 § 566, 140, St. Ann. (1953) § 26929, the majority in Metro-Plan v. Kotcher-Turner Inc. (1941) 296 Mich. 400, 296 N.W. 304.

pledges or title conditions, lest they be considered free of charges.[86]

The Uniform Conditional Sales Act, however, allows ten days after the entry of the chattel in Y for recording of the rights acquired in X.[87] When this period elapses, subsequent recording still provides priority over later charges.[88]

The Swiss view is similar. A reservation of title *(Eigentumsvorbehalt)* must be recorded at the domicil of the purchaser and is maintained in case the latter changes his domicil, only if recorded again at the new place.[89] No such delay is actually granted in case the object is imported by a Swiss purchaser. Thus, a conditional sale made in Germany informally, under German law, is ineffective as soon as the car enters Switzerland. It has been said that if the movable returns to Germany, the reserved title revives, although conflicting interests created in the meantime enjoy priority.[90] This would be an unwarranted breach of principle. The efficacy of the *lex situs* should not be split and limited to territorial effects.

In all these cases, the right of the debtor is deemed ab-

[86] Law of December 29, 1934, D. 1936.4.898; NIBOYET, Rev. crit. 1935, 545; LEREBOURS-PIGEONNIÈRE (ed. 5) 467 § 355 n. 1. If a chattel mortgage registered in France is lost abroad to a purchaser in good faith, it does not revive according to the just opinion of NIBOYET, *l.c.; Contra,* LEREBOURS-PIGEONNIÈRE, *l.c.* (note omitted in ed. 6), followed by BATIFFOL, Traité 511 par. 505 n. 2.

[87] Sec. 14; *cf.,* BOGERT, 2a U.L.A. 129.

[88] Bent v. H.W. Weaver, Inc. (1928) 106 W. Va. 164, 145 S.E. 594; White v. E.C. McKallor Drug Co. (1933) 239 App. Div. 210, 268 N.Y.S. 371.

[89] Swiss C.C. art. 715; BG. (Jan. 21, 1910) 36 BGE. II 1; (March 30, 1916) 42 BGE. III 173; App. Bern (Dec. 12, 1913) 50 ZBJV. 560.

Liechtenstein: C.C., Property, art. 175.

[90] BATIFFOL, Traité 511 n. 2; 2 SCHNITZER (ed. 3) 520. By an analogous conclusion, in case of an automobile, hypothecs registered in France under the law of Dec. 29, 1934, are said to have precedence over pledges subsequently created abroad if the car returns to France; LEREBOURS-PIGEONNIÈRE (ed. 5) 467 n. 1. *Contra,* M. WOLFF, Sachenrecht § 159, in case a product of a land included in a hypothec in X is removed to Y where it becomes free from the incumbrance; it remains so when returning to Y.

solute for the benefit of new purchasers and attaching creditors.[91]

Interesting American decisions except a chattel, mortgaged[92] or bought under conditional sale,[93] from the requirement of recordation if it is only temporarily present in the forum. One might say, the chattel is treated as a *res in transitu.* But a much more intensive exception to all these systems exists in the United States in the following case.

4. Removal Without the Creditor's Consent

Outside of the United States, no example is known in which the domestic formalities of Y for security interests are differently construed for domestic and foreign-created security interests.[94] This, however, happens in the great majority of American courts, and has been proclaimed by the Restatement and a few statutes. If the removal to Y is wrongful against the creditor, he maintains his rights even without the prescribed registration in Y.[95] If the creditor has consented to the removal, in the prevailing opinion, the new *lex situs* exercises its normal effect, that

[91] *Supra* n. 61.

[92] Flora v. Julesburg (1920) 69 Colo. 238, 193 Pac. 545; as noted *supra* n. 76, MACDONALD observes that the Colorado Court favors chattel mortgages, in contrast to reservation of title.

[93] Universal C.I.T. Credit Corp. v. Walters (1949) 230 N.C. 443, 53 S.E. (2d) 520, 10 A.L.R. (2d) 758. See 13 A.L.R. (2d) 1346.

[94] FALCONBRIDGE, Conflict of Laws 384 f.

[95] Edgerly v. Bush (1880) 81 N.Y. 199; Restatement §§ 268, comment c, 275; Mich. Comp. Stat. 1948, § 566, 140a; Virginia Code 1950, § 55-99; GOODRICH § 157; Note, 87 A.L.R. 1314; 13 A.L.R. (2d) 1318. BEALE, "Jurisdiction over Title of Absent Owner in a Chattel," 40 Harv. L. Rev. (1927) 805, and the Restatement, Caveat to §49 and Comment, even assert that under common law a state does not exercise jurisdiction over a chattel brought into the state without the consent of the owner. See *contra* Note, 37 Yale L.J. (1928) 966, and *cf.*, Note, 41 Harv. L. Rev. (1928) 779; WATSON, 7 Tul. L. Rev. (1933) 451, 452; GOODRICH § 156; FALCONBRIDGE, Conflict of Laws 381. For Louisiana see DAINOW, 13 La. L. Rev. (1953) at 235.

is, "any dealings with the chattel in the second state" [96] create the same effect as under domestic law. A small group of abnormal decisions destroying the interest in the case of consent to removal is erroneous.[97] Consent could have such effect only if it were a waiver.

The highest New York court has invoked common law against its own statutory provision for registration.[98] An automobile was bought in California, brought without the consent of the seller to New York, and sold there to an innocent purchaser. The court explained that in California the seller still had a right superior to a subsequent bona fide purchaser from the buyer, and that this law agreed with the New York common law. Conforming to the ancient rules of narrow statutory construction, the court restricted the recording statute so as not to affect common law and the right acquired in California. This was based on the text of the Uniform Conditional Sales Act, but the futility of the reasoning makes it clear that the traditional superiority of the legitimate owner is favored, although the result is directly opposed to the abnormal preference for domiciliaries of New York.

The American exceptional favor for foreign-created conditional titles and mortgages is unique. It seems to me that it belongs to the considerable group of tolerance rules arising in the American interstate sphere;[99] as such it is a remarkable phenomenon. So long as no uniform law for the nation organizes a reasonable system of measures by which a creditor can safeguard himself with ordinary diligence, the courts are anxious to protect legitimate credit against

[96] Restatement §§ 269, 276.

[97] GOODRICH (ed. 3) 483. *Cf. supra* n. 31.

[98] Lehman, J., in Goetschius v. Brightman (1927) 245 N.Y. 186, 156 N.E. 660.

[99] See Vol. I, 340 (married women's capacity); II, 412, 427 (usury), 565 (Sunday contracts), III, 177 (liquor sales).

dishonest frustration unknown to the creditor. Their remedy, however, endangers quite similarly legitimate interests of other persons dealing in good faith and unable to guess the origin of the transferor's possession. That they may believe themselves well protected by the recording statute of the forum makes the legislative situation still worse.

5. The Concept of the First Situs

In a line of American decisions, the principles are modified by submitting a conditional sale not to the *lex situs* of the goods at the time of the contract but to the law of the place whereto the parties intend the goods to be sent by the seller. The alleged reason is ordinarily that the transaction is not completed until delivery,[100] by analogy to the theory of the last act completing a contract and fixing the place of contracting.[101] But the conditional agreement occurs while the goods are not yet delivered; delivery, on the other hand, does not transfer the title until payment. Any analogy to the unfortunate theory of the last act is thereby excluded.

However, a court tending to confuse in the conflicts field property and contracts theories and mingling *lex situs* and *lex contractus,* approaches nevertheless the correct result when it identifies delivery to the carrier in X for shipment to Y with "performance" and applies the law of X as the state of both contracting and performance.[102] The situs

[100] See 2 BEALE 1002 n. 4.

[101] Knowles Loom Works v. Vacher (1895) 57 N.J. Law 490, 31 Atl. 306; GOODRICH 484.

[102] E.g., Marvin Safe Comp. v. Joshua Norton (1886) *supra* n. 26, at 48 N.J. Law 415. The problem of stating at what phase a conditional sales contract is "executed" is serious, for instance, in the case of bankruptcy or insolvency of either party, a question much discussed in Germany. See RÜHL, "Die Vergleichsordnung und der Verkauf unter Eigentumsvorbehalt," 56 Zeitschr. f. Deutschen Zivilprozess (1931) 154, who found no help in foreign laws, p. 165.

of the thing at the time of the contract should simply be respected, without opportunistic exceptions.

It is true that Stumberg has suggested that the place where the chattel in the contemplation of the parties is to be habitually used, should be considered the most substantial connection of both obligation and security.[103] This, however, is an unnecessary exception to the settled significance of the situs, substituting to a certain territorial place an uncertain place dependent on party intention.

American legislation. Evidently conflicts law has very inadequately dealt with the problems of credit by sellers and bankers within the states of the United States, not to speak of international relationships, once more to be qualified as desperate. In the case of automobiles sold by conditional reservation of title in the United States, even the domestic situation of retail dealers between the wholesale dealers or manufacturers retaining title but allowing sales and the buying public is a source of contradictory judicial opinions.[104] With a view to the interstate complications,

[103] STUMBERG, "Chattel Security Transactions and the Conflict of Laws," 27 Iowa L. Rev. (1942) 528, 536 and n. 11.

[104] Note, "Record of Chattel Mortgage on, or Conditional Sale of an Automobile," 136 A.L.R. (1942) 821; see also Note, 88 U. of Pa. L. Rev. (1940) 367.

And see on the doubts relating to liens, FALCONBRIDGE, Conflict of Laws 401; *cf.*, BEALE, 33 Harv. L. Rev. (1919) 815 f. and now in particular HONNOLD, Cases (*supra* n. 84) 573, who states the usual preference given the conditional seller over the repairman, at least where the seller retained the certificate of title. The decision in Willys-Overland Co. v. Evans (1919) 104 Kan. 623, 180 Pac. 235, emphasizes the local policy of protecting the workman repairing a transient car. What about the carrier's lien confronting a conditional seller's title? The Uniform Commercial Code refrains from a provision (sec. 9-104c), although it gives priority to the lien acquired for services of material (sec. 9-310) in the line of the decisions, and by generalizing privileges accorded in the Uniform Trust Receipts Act. The German courts recognize the priority of a carrier's or forwarding agent's lien acquired in good faith (on the current transportation only) over a conditional seller's title. See KARL JOSEF PARTSCH, Zurückbehaltungsrecht (Diss., Würzburg 1938) 47.

No doubt, a carrier assuming transportation in Y has as extensive a

the Uniform Conditional Sales Act and the special state statutes on recording and certificates of automobiles have tried at least four different methods for reconciling the legitimate interests of an unpaid seller and an innocent purchaser. But in a recent study it has been demonstrated that the "skip-state" operator, buying a car on a down payment in X and reselling it for full value in Y or Z, is blooming despite all these laws.[105] Evidently, the proposal in the Uniform Commercial Code prolonging the time for recording at the new situs from ten days to four months [106] would be a strangely one-sided reform. Only consistent regulation, with stricter supervision of recording and reciprocal official information, as Leary proposes, would furnish an adequate remedy.

On the international plane, neither the present attempts nor the advocated reforms provide a serious hope of reconciliation.

Effective universal help is merely available in the sphere of facts rather than that of the rules. Careful methods of issuing certificates of registration, a duty of careful investigation of the secondary seller's title by the buyer, and conscientious inquiries by the responsible officers in execution sales, may help to educate all concerned and minimize the conflicts.

statutory or conventional lien as state Y grants him. But if the carrier loads the goods in X and delivers them in Y, which law decides on his right and priority in the absence of interstate and international regulations?

[105] LEARY, "Horse and Buggy Lien Law and Migratory Automobiles," 96 U. of Pa. L. Rev. (1948) 455. See also the survey of recent court decisions on the dubious effect of certificates of title of motor vehicles "showing or not showing liens," 13 A.L.R. (2d) at 1326-1329.

[106] October 1949 Revision, sec. 8-109, CCU. sec. 9-103(3). The text speaks merely of two jurisdictions involved: that "in which it was last situated" and "this state." The number of states possibly involved is, of course, unlimited.

IV. Adverse Possession

If a title is acquired by completed adverse possession under the law of the *lex situs*,[107]—or a permanent defense against any aggressor or certain persons—it is recognized wherever the chattel is subsequently brought.[108] The older literature, however, split into a variety of opinions respecting the case where the period of acquisition by lapse of time has merely begun to run in X and a new *lex situs*, Y, prescribes a different period.[109] The Restatement takes up one of these old and long refuted ideas.[110] From the conception of the statute real, it was deduced that each of several subsequent situations should be considered as effecting a part of the acquisition. In one view, hence, the necessary period of possession should have been computed in proportion to the several spaces of time during which the chattel has been possessed under the several territorial laws.[111] Instead of this impossible method, the Restatement proposes the application of the longest period required by any one of the states in which the chattel has been. Confessedly,[112] no American decision has authorized this arbitrary solution.

An unfinished period as such does not generate any effect. In the only view consistent with the principles, therefore,

[107] It would seem that a minor effect of adverse possession, as occurs in common law respecting land, must be characterized as extinctive limitation of action. The English Limitation Act, 1939, Sec. 3(1)(2), now recognizes extinction of the title.

[108] Universally settled. Restatement par. 259 comment a; Goodrich (ed. 3) 478 n. 98. In England it is said that "positive or acquisitive prescription" that transfers ownership goes to the substance of a transaction, Cheshire (ed. 4) 641 f.

[109] See Savigny 186; 1 Wharton 821 f.; 1 Bar 637 § 237; Arminjon, "L'usucapion, etc.," 1 Mélanges Pillet 19; Niboyet, 10 Répert. 289.

[110] Restatement § 259, comment b.

[111] 1 Meili 397.

[112] Restatement, Tentative Draft No. 3 (1927) § 279, Special Note.

the law of the last situs decides exclusively. This opinion is universally dominant.[113]

Illustration. If X requires four years and Y three years, the Restatement requires four years,[114] and the prevailing opinion three years.[115]

The prevailing theory must be followed to the extent that the factual requirements for adverse possession are indicated by the property law of the last situs. At the same time, it will ordinarily be true that a time of possession exercised under a previous *lex situs* is good enough to satisfy the last law, so that the past periods of possession may be counted in the required period. Consequently, acquisition may be completed at the crossing of the frontier if Y has a shorter period than X.[116]

In a more precise elaboration of this reference to previous law, where no acquisitive prescription in stolen chattels is permitted in X, it has been said that adverse possession under the law of Y, not knowing such restriction, merely runs from the removal to Y.[117] Also suspension and interruption are governed by the new law.[118]

[113] E.g., SAVIGNY 186; 1 WHARTON 821; DIENA, Dir. Reali 136, 174; *cf.*, 23 Annuaire (1910) 246; 2 FIORE § 818; 2 ZITELMANN 347; WEISS, 4 Traité 208, 212; NIBOYET, Acquisition 329; 2 FRANKENSTEIN 78; 2 SCHNITZER (ed. 3) 522.

Japan: Int. Priv. Law, art. 10 (semble);
Liechtenstein: C.C., Property Law, art. 13, par. 1.
Rumania: C.C. art. 33;
Nicaragua: C.C. art. VI 18, 19;
Montevideo Treaty, art. 55;
Código Bustamante, arts, 227 f.

[114] Expressly so, Restatement illustration, § 259, comment b.

[115] See also WATSON JR., "The Doctrine of Adverse Possession," 7 Tul. L. Rev. (1933) 451, 454.

[116] DIENA, Dir. Reali 171, 175; 2 ZITELMANN 348; DESPAGNET 1186 § 420; (order public territorial); SURVILLE § 174; VALÉRY 896 § 622; 2 FRANKENSTEIN 79; 2 ALCORTA 469 f.; MATOS 422 § 302.

[117] WEISS, 4 Traité 212; M. WOLFF, IPR. (ed. 2) 156. The application to France depends on the controversial interpretation of C.C. art. 2279.

[118] See 2 ROMERO DEL PRADO, Manual 281 on the civil law reference to the personal law for determining capacity to sue.

In a weak middle solution, advanced in the Austrian draft and adopted in Poland, the possessor has an option between the old and new laws of situs.[119]

The dominant opinion is no doubt preferable.

[119] Poland: Int. Priv. Law, art. 6 par. 2; Czechoslovakia: Int. Priv. Law § 49.

CHAPTER 57

Ambulatory Chattels

I. GOODS IN TRANSIT

IN accordance with Savigny's theory,[1] a well-considered doctrine assumes that the reasons for allowing the law of the situation to decide on the rights in a thing presuppose a stable localization and do not include "chattels in transportation" *(res in transitu)*.

In order that a tangible movable should be subject to the law of a territory, it must have a permanent location, its place of destination. This relationship is missing if a chattel from the viewpoint of its destination touches a territory but temporarily, such as merchandise dispatched, the baggage of a traveler, land and water vehicles and vessels.[2] Before carriage, goods sold are no longer included in this exceptional group;[3] these are discussed above.[4] The question is what law governs when ownership is transferred during the time a chattel is in transit.

Despite the many opinions expressed on this subject, it would seem that the doubt inherent in this question should be further reduced in scope. Goods in transit, if stopped intentionally at a specified place for a sufficient period, may be seized;[5] they may also become subject to a lien of the carrier. There is no doubt that *lex situs* applies in such

[1] SAVIGNY § 366 (tr. Guthrie) 179; ROHG., (Apr. 26, 1872) 6 ROHGE. 80, No. 14, 28 Seuff. Arch. No. 2.

[2] REGELSBERGER, Pandekten 172.

[3] Thanks to NIBOYET, Acquisition 70. They still appear in Brazil: Lei Introd. 1942, art. 8 § 1, but ESPINOLA, Lei Introd. 470 § 210 seems to restrict the new version of the article to chattels of uncertain situation.

[4] *Supra* 40.

[5] NIBOYET, 4 Traité 622; VALÉRY 898; 2 FRANKENSTEIN 50.

cases. Moreover, in maritime transportation, goods are regularly transferred through endorsement of the bill of lading, the law of the place of the document prescribing the requisites of transfer of the paper. Transactions affecting a ship or aircraft are commonly considered to be governed by the law of the flag.[6]

The needed emergency solution, hence, is restricted to chattels during interstate rail or truck transportation, when their temporary place is casual or unknown to the parties. This group, however, includes transshipment. Writers have advocated the domicil of the owner,[7] the ordinary *lex situs*,[8] the law of the contract,[9] and strangely, choice of law by the parties;[10] the two last opinions, deserting the principle of real rights, are prejudicial to third persons.[11] The law of the place of destination [12] or delivery is especially favored,[13] justifiedly insofar as it is the first securely foreseeable point and evidently preferred by the courts when they are thus enabled to apply their own law.[14]

[6] BATIFFOL, Traité 508, 509 § 503; for aircraft, LEMOINE, Traité de droit aérien (1947) 175 *contra* RIESE, Rev. franç. droit aérien (1951) 131, 143.

[7] SAVIGNY (Guthrie) 185; 1 WHARTON § 301; WESTLAKE, 14 Revue Dr. Int. (Bruxelles) 287; 2 FIORE § 834;

Argentina: C.C. art. 11.

Brazil: Lei Introd. 1942, art. 8.

Siam: Priv. Int. L. art. 16(2).

[8] 1 BAR 608; NUSSBAUM, D. IPR. 311.

[9] Cases cited by 1 WHARTON 736; *cf.*, CHESHIRE (ed. 2) 438. ASSER ET RIVIER 99; WEISS, 4 Traité 205.

[10] M. WOLFF, IPR. (ed. 3) 174.

[11] HELLENDALL, "Res in Transitu in the Conflict of Laws," 17 Can. Bar Rev. (1939) 7, 33.

[12] SURVILLE ET ARTHUYS 232 § 176; NIBOYET, Acquisition 107; 2 FRANKENSTEIN 54; LEWALD 191; decisions and authors cited 9 Répert. 236, Nos. 108 ff.; LEREBOURS-PIGEONNIERE § 355; 2 SCHNITZER (ed. 3) 526; BATIFFOL, Traité 507 § 502.

Germany: RG. (Sept. 16, 1911) Recht 1911 No. 3476, Z. f. Rechtspflege in Bayern 1912, 45: stones sent from Brazil on their way to Germany.

Treaty of Montevideo on Int. Civ. Law (1889) art. 28 (cargo on high seas).

[13] Int. Law Ass. Oxford draft 1932, art. 4.

[14] RABEL-RAISER, 3 Z. ausl. PR. 64 f. For the same reason, BARTIN, 3 Principes 231.

Such an idea may account for the provision in the draft of a Uniform Chattel Mortgage Act § 43, 3, that chattel mortgages should normally be registered at the place of situation, but:

"Where at the time a mortgage is given, goods covered thereby are in transit or are intended to be and within a reasonable time actually are put in transit, such goods are to be taken for purposes of this section as located at the place of destination." [15]

While the place of destination of goods transported is not usually also the place of their permanent location, this solution may suffice to cover the gap in which fall the narrow group of cases indicated above. A subcommittee of the Seventh Hague Conference discussed a more complicated solution on the basis of the laws of the place whence the goods are sent and where they are delivered;[16] the committee did not agree on this point.

II. Rights in Ships in General [17]

1. Present Theories

A confusing variety of opinions on the subject of real interests in seagoing vessels is not surprising in view of the unlimited, even chaotic, condition of the maritime laws, but it contrasts with the dearth of conclusive judicial authority. The older doctrine treated ships like any other chattels, referring to the law of the temporary situation whenever one could be ascertained.[18] Voluntary transfer

[15] Handbook of the National Conference of Commissioners on Uniform State Laws (1926) at 440.

[16] Actes de la Septième Conférence 1951, p. 92 art. 5, 101 art. 5. For the place of dispatch, also Arminjon, 2 Précis (ed. 2) 126 § 31; Balladoro Pallieri, DIP. 220; Monaco, Efficacia 213 § 115.

[17] Hellendall, supra n. 11, at 109 ff.; Niboyet, 4 Traité 476 ff., 538 ff.; Abraham, Die Schiffshypothek im deutschen und ausländischen Recht (Überseestudien, Heft 20), (1950) 302 ff.

[18] RG. (Feb. 5, 1913) 81 RGZ. 283; and still in England, The Jupiter No. 3 [1927] P. 122; in France, Trib. civ. Tarascon (March 27, 1931) Clunet 1932, 423.

of a ship while it was on the seas did not suggest a special conflicts rule but was allowed to take place by consent without delivery, as it is still provided (although now requiring registration), even in Germany,[19] as an exception to the principle of tradition.

This doctrine is not so improper as often believed, insofar as the rules prevailing for the removal of a chattel are certainly applicable in principle also to ships. For instance, the old case of *Hooper* v. *Gumm* would have to be decided likewise today under analogous circumstances. A mortgage was validly constituted in the United States under American law without being registered in the ship's papers. The vessel was then sold in England for value to a purchaser without notice. The mortgage would have been recognized and held superior to the English purchaser but for the estoppel, incurred by the mortgagee consenting to the concealment of his mortgage.[20] A maritime hypothec validly created in Rotterdam was subordinated to a subsequent mortgage acquired by an innocent mortgagee when the vessel was registered in Germany.[21]

The basic conception of vessels as objects of rights, however, has changed. On the one hand, registration has obtained an ever increasing importance. On the other hand, the modern literature continuously emphasizes the special nature of ships,[22] and declares the principle that all transactions affecting interests in a ship are governed by the law of the place of registration, and its representative, the law of the flag.[23]

[19] Germany: Law on Ship Registration, (Nov. 15, 1940) § 2 par. 1, for registered ocean vessels; C. Com. § 474 for nonregistered ocean vessels.

[20] (1867) L.R. 2 Ch. 282.

[21] RG. (June 14, 1911) 77 RGZ. 1.

[22] France: Cass. civ. (June 24, 1912) S. 1912.1.433: ships are taken out of the group of regular movables.

[23] United States: 1 WHARTON 784 § 356.
England: WESTLAKE § 150; DICEY (ed. 5) 996.

However, neither principle satisfies all needs. The writers, therefore, make tentative distinctions, according as the ship is on the high seas or in territorial waters;[24] transactions occur in the country of registration or abroad;[25] or there is title transfer, creation of liens, or seizure.[26] Occasionally, there has been resort to the *lex loci contractus* or *actus,* or even to the intention of the parties,[27] disregarding situs and flag. Certain courts disregard everything but their own law.

The courts are largely uncertain or vague. It is claimed that English courts apply the law of the flag [28] as well as the *lex situs,* at least if the ship is not on the sea.[29] German courts are often believed by foreign writers to adhere to the *lex situs* [30] and by recent German authors to follow the law of the flag.[31] In the United States, a foreign

France: The great majority of all writers sustain the general rule of the law of the flag. LYON-CAEN, Clunet 1877, 479; NIBOYET, Acquisition 114; *id.,* Manuel 646; PILLET, 1 Traité 742; RIPERT, 1 Droit Marit. (ed. 3) 502 § 436; VALÉRY 1315; LEREBOURS-PIGEONNIÈRE (ed. 6) 241 § 229; NIBOYET, 10 Répert. 11 No. 27. *Contra:* Weiss, 4 Traité 310 ff.

Germany: Citations in MELCHIOR 493 n. 1; LEWALD 192; M. WOLFF, IPR. (ed. 3) 174; NUSSBAUM 313.

Italy: C. Navig. art. 6; ownership, the other real rights and the rights of security in vessels and aircraft, as well as the form of publicity for the acts of creating, transferring, and extinguishing such rights, are regulated by the national law of the vessel or aircraft.

Portugal: C. Com. art. 488.

Institute of Int. Law, 8 Annuaire (1885) 126.

[24] WHARTON AND WESTLAKE, *l.c.,* MELCHIOR 492 f.; 2 FRANKENSTEIN 475; HELLENDALL, *supra* n. 11, 111.

[25] HELLENDALL, *supra* n. 11, 115.

[26] NUSSBAUM, D. IPR. 314; LEWALD 192 f.

[27] United States: See decisions *infra* n. 34.

The Netherlands: App. Den Haag (June 30, 1916) W. 10085, Clunet 1921, 280.

Germany: LEWALD 193 f.; Obergericht für die Britische Zone (July 7, 1949) 2 N. Jur. Woch. 784.

[28] E.g., WESTLAKE 202 § 150: the personal law of the owner.

[29] HELLENDALL, *supra* n. 11.

[30] E.g., NIBOYET, 10 Répert. 16 No. 70; GRIFFITH PRICE, The Law of Maritime Liens (1940) 213.

[31] LEWALD, NUSSBAUM, M. WOLFF, *supra* n. 23.

authority apparently has found total inconsistency.[32] Assuredly, the only known decision of the Supreme Court in 1873 [33] recognized assignment of a ship forming part of an insolvent estate to the assignee in insolvency under the law of Massachusetts, the state of both the domicil of the owner and the port of registration. Similar coincidences occur in other cases.[34] It may be conceded that the decisions neglect the scope of the problem and are not too well-considered. But they can be reconciled.

River boats. Despite the frequent assertion that fluvial navigation is an internal subject for the country of navigation,[35] its principles have been laid down in a European convention of 1930, providing satisfactory rules on the basis of registration in one country.[36] This accomplishment suggests a basis for improvement as respects maritime vessels.

Distinguishing the various situations, we may discover somewhat more agreement in this important and never constructively summarized international matter.

In the first place, it is agreed that the law of the place

[32] NOLDE, 22 Revue Dor. (1930) 36.

[33] Crapo v. Kelly (1873) 16 Wall. (83 U.S.) 610, 630, 638.

[34] In Koster v. Merritt (1864) 32 Conn. 246, the situs coincided with the *locus actus.*

Lex loci actus was asserted in Thuret v. Jenkins (1820) 7 Mart. (La.) 318, but the ship was also registered at that place. In Southern Bank v. Wood (1859) 14 La. Ann. 554 and Moore v. Willett (1862) 35 Barb. S.C. 663, the *locus actus* was also the residence or domicil of the ship owner. This has been noted by HELLENDALL, *supra* n. 11, 117.

[35] Germany: Prussian Ob. Trib. (Nov. 13, 1868) 24 Seuff. Arch. No. 102; ROHG. (April 26, 1872) 6 ROHGE. No. 14. But the German delegation proposed at the Geneva Conference (*infra* n. 36) the principle of *lex situs,* see Vogels, 5 Z. ausl. PR. (1931) 311.

The Netherlands: Rb. den Bosch (March 7, 1919) W. 10497, N.J. 1919, 461.

[36] Convention of Geneva, 1930, on the registration of inland vessels, rights *in rem* over such vessels, and other cognate questions. L. of N. Off. Publ. 1931, VIII, 2-5, Conf. U.D.F. 57-60; HUDSON, 5 Internat. Legislation No. 276; comment by NIBOYET, Revue Dr. Int. (Bruxelles, 1931) 303 and in 4 Traité 569 ff.

of registration exclusively decides whether a ship is sea-going.[37]

We shall deal presently with ownership and mortgage, created by agreement, in ships. The conflicts rules concerning ship mortgages were doubtful for a long time, quite as their operation was precarious. But most countries have introduced ship mortgage legislation in increasing detail, and in the Brussels Convention of 1926 (*infra* n. 54), a unitary law, that of the flag, has been established for mortgages, hypothecations, and other similar charges. Since then, there has been a common and growing inclination to apply to ship mortgages the same principles as apply to ownership. The great hopes with which these reforms were adopted, however, are acutely impaired by the absence of international uniform preference of liens in ships. Although foreign ship mortgages are readily recognized, their enforcement depends on the competition of other more or less privileged actions against the ship, which must be discussed separately (*infra* III, 2).

2. Situations: (a) The ship is in home waters

As long as a vessel finds itself in the country where it is also registered, the law of this country clearly governs the real rights.[38]

(b) The ship is on the high seas

Voluntary alienations. Probably all laws intend to impose compulsorily observance of their own respective provisions on domestically registered vessels. Thus, registration and other formalities of the home port especially are required for sales, conveyances, and mortgages. This is

[37] 1 VAN HASSELT 357.

[38] This is the case envisaged by British Merchant Shipping Act, 1894, s. 24.

certain for numerous countries.[39] Any transfer within the country is included. A transfer made in another country, at least to a national of the home country, without complying with the formalities would either be held entirely invalid or ineffective against third purchasers in good faith registering in the home state.[40]

However, if the vessel is not registered in the country where the transfer occurs, the law of the flag is indispensable to avoid an impossible legal situation in third jurisdictions.[41] The home port is, moreover, the one to which the ship will regularly return and where it takes more than a casual or temporary stay.[42]

Nevertheless, the question exists whether mortgages may also be established and transferred under the local law of a foreign port with full effect, without registration at the

[39] United States: Ship Mortgage Act of June 5, 1920, c. 250, § 30, subsec. c. 41 Stat. 1000, 46 U.S.C.A. 614 § 921.

England: British Merchant Shipping Act, s. 1 and 265.

France: Laws of July 10, 1885, art. 33, July 5, 1917, requiring registration in France for mortgages constituted abroad on French ships; WEISS, 4 Traité 310 ff.; NIBOYET, 4 Traité 498 § 1229.

Germany: Now: Law on Ship Registration (Nov. 15, 1940) § 1 par. 2 (acquisition and loss of ownership in a vessel entered in a German ship register is determined by the German law). Previously: OLG. Düsseldorf (Nov. 23, 1909) 108 Rhein. Arch. 187, aff'd, RG. (June 14, 1911) 77 RGZ. 1; BAR, Int. Handelsr. 423. An express statutory rule for mortgages is missing, ABRAHAM (*supra* n. 17) 305.

[40] France: Cass. civ. (June 24, 1912) S. 1912.1.433, Clunet 1913, 147.

Germany: 77 RGZ. 1, *supra* n. 38; under § 1, par. 2 of the Ship Registration Law; WÜSTENDÖRFER, Neuzeitl. Seehandelsrecht (1947) 75, states that the case of a transfer abroad to a foreigner is doubtful.

[41] United States: Crapo v. Kelly (1872) 16 Wall. (83 U.S.) 610, concurrent opinion by Mr. Justice Clifford at 639: "as if the ship was moored at her wharf."

Scotland: Schultz v. Robinson and Niven (Court of Session, 1861) 24 Sess. Cas. 120: Prussian ship sold by a bill of sale while on the high seas; title passed under Prussian law, although under Scottish law entry in the beil brief would have been necessary. Applicable in English courts, according to DICEY (ed. 5) 997.

France: Common opinion, *supra* n. 23.

Germany: WÜSTENDÖRFER, *supra* n. 40, p. 75.

Italy: C. Navig. art. 6, 13.

[42] 2 FRANKENSTEIN 471.

home port. The negative answer will follow from later discussion.

(c) The ship is in foreign waters.

Involuntary assignments. Despite occasional deviations,[43] it may be assumed that attachments, seizures, and judgments *in rem* by a legitimate territorial authority, accompanied by sale of a vessel, are internationally recognized.[44] A justifiable exception has been made in the country of registration, when the foreign court disregards a previous transaction valid by the law of the forum;[45] this exception should even enjoy extraterritorial force.

Unjustifiedly, however, the French Court of Cassation, in its only decision in point, has proclaimed that a mortgage in a French vessel cannot be purged by a foreign sale of the ship, but only by application of the French procedure, that is, in a French court.[46]

Voluntary alienation. Transfer of title and mortgaging

[43] England: The Segredo, otherwise "Eliza Cornish" (1853) 1 Spinks Ecc. & Ad. 36: British ship, because of unseaworthiness sold under the law of Fayal; sale not recognized under "general maritime law;" but the decision is overruled by Cammell v. Sewell (1860) 5 H. & N. 728, as interpreted in subsequent cases. See HELLENDALL, *supra* n. 11, 114 f. against DICEY (ed. 5) 999.

[44] United States: Olivier v. Townes (La. 1824) 2 Mart. (N.S.) 93; Green v. Van Buskirk (1866) 5 Wall. (72 U.S.) 307, (1868) 7 Wall. 139; dictum in Crapo v. Kelly (1872) 16 Wall. 610, 622 respecting assignment and insolvency; *cf.*, KUHN, Comp. Com. 240.

England: Cammell v. Sewell (1860) 5 H. & N. 728; Castrique v. Imrie (1870) L.R. 4 H.L. 414, per Lord Blackburn: British ship sold upon a competent foreign judgment; The Jupiter No. 3 [1927] P. 122.

The Netherlands: 1 VAN HASSELT 359.

[45] England: Simpson v. Fogo (1863) 1 Hem. & Mill. 195 repudiates a judgment of the Supreme Court of Louisiana for the sale of a British ship; the Louisiana court had discarded a mortgage given on the high seas valid under English law.

[46] France: Cass. civ. (June 24, 1912) S. 1912.1.433 rejects a judicial sale of a French ship in England, because an attaching French maritime lien could not be extinguished without French formalities. The case is thus decided contrarily to the House of Lords in Castrique v. Imrie, *supra* n. 44, and to the German decision, LG. Schwerin (Jan. 10, 1910) Leipz. Z. 1911, 52.

is the center of controversy. If a ship lies in a foreign port, should such contract comply with, and the effect be governed by the local law,[47] or the law of the flag (place of registration)? [48]

A compromise attempted by Dutch courts points primarily to the "personal law" of the ship, i.e., of the port of registration, but concedes minor consideration to the nationality of the transferor and the place of the transaction.[49] However, in the only decision of the Dutch Supreme Court, registration of a sale and conveyance in Belgium was respected, although the ship was being built in a Dutch dockyard, with the result of preferring the foreign buyer to domestic creditors.[50]

French doctrine inclines to the largest scope of the law of the flag, advocated by the authors. Nevertheless, certain decisions have repudiated formless transfer of ownership of a British ship from one Englishman to another, because the French requirement of publicity was not satis-

[47] England: Hooper v. Gumm (1867) L.R. 2 Ch. 282, with respect to a mortgage on an American ship registered in the United States, *cf.*, CHESHIRE (ed. 3) 591. *Cf.* The Jupiter No. 3 [1927] P. 122; Russian flag immaterial for subjection to Soviet nationalization.

France: WEISS, 4 Traité 310 ff. against the dominant opinion.

The Netherlands: H.R. (Jan. 22, 1934) *infra* n. 50.

Colombia: C. com. marit. arts. 15, 19, 34. 1 RESTREPO-HERNANDEZ 159 § 365.

[48] England: DICEY (ed. 5) 996: "the balance of reason is in favor of making the law of the country to which the ship belongs decisive as to voluntary transfers of ships."

France: See *supra* n. 22.

Germany: Law of the flag of foreign ships, WÜSTENDÖRFER, *supra* n. 39 at 75.

Italy: C. Navig. art. 6.

The Netherlands: VAN BRAKEL 189 § 146.

Spain: C. Com. arts. 17, 573, and Regulation of the Mercantil Register, arts. 149, 152; with primary effect of private law, GARRIGUES, 2 Curso de Der. Merc. (1940) 626 f.; *cf.*, 1 GAMECHOGOICOECHEA, 2 Trat. de Derecho Marítimo Español (without year) 59 ff. For mortgages, C.C. art. 1875 and Law of August 21, 1893, art. 14, GARRIGUES, *ib.* 622.

[49] 1 VAN HASSELT 357.

[50] H.R. (June 22, 1934) W. 12815, N.J. 1934, 1493, 1 VAN HASSELT 426.

fied.[51] Niboyet also contends that for the same reason sales of German vessels in France should comply with French publicity requirements, whereas German courts should observe French law in disposing of French vessels.[52] This goes too far. But it is a well-known valid argument in favor of the law of the place of registration that third parties should be informed by a decent record at the home port. Indeed, the Convention of Geneva of December 9, 1930, generally speaking of all voluntary transfers of fluvial vessels, provides:

Voluntary transfer *inter vivos* of the rights of ownership in a vessel shall be governed by the law of the country of registration if that law requires as a condition for the transfer, or at least for the effect of this transfer as to third persons, either the inscription in a register for the publicity of the rights, or the transfer of possession to the acquirer.[53]

Voluntary securities. The same idea that sufficient public registration in the home port is required in principle, underlies the Brussels Convention of 1926 for the Unification of Certain Rules of Law relating to Maritime Mortgages, and Liens,[54] the first significant step toward a firm international recognition of rights in vessels. Yet this convention has been adopted neither by the Anglo-American nor

[51] App. Rouen (July 31, 1876) Clunet 1877, 428, simulation suspected without proof; Trib. Saint-Malo June 27, 885) Clunet 1886, 196; approved by NIBOYET, Acquisition 514 and 4 Traité 501 n. 1. *Contra:* LYON-CAEN, Clunet 1877, 481.

Also the German Reichsgericht once rejected a Russian hypothec filed with the ship documents only, RG. (Oct. 2, 1912) 80 RGZ. 129, *contra,* 2 FRANKENSTEIN 478.

[52] NIBOYET, 10 Répert. 12 Nos. 39, 43.

[53] *Supra* n. 35, art. 20 (1).

[54] Convention pour l'unification de certaines règles de droit relatives aux privilèges et hypothèques maritimes, signée à Bruxelles, le 10 avril 1926, 120 L. of N. Treaty Series No. 2765; HUDSON, 3 Int. Legislation No. 155; BENEDICT, 6 American Admiralty 78; 2 Recueil Niboyet et Goulé 464. In force among 17 states. Comments: RIPERT, Précis de droit maritime 153; BRUNETTI, 1 Dir. marittimo 561; SMEESTERS and WINKELMOLEN, 1 Dr. marit. et dr. fluvial 50.

the Central European countries, although France participates in it.

Voluntary securities obligating the ship may be of two classes. Loans secured by bottomry in cases of proved emergency during a voyage are evidently recognized, if they comply with the local law. The case has become rare, but should a real emergency occur requiring such a loan without giving the shipowner an opportunity to act at home, recognition is due.[55]

Longer standing credit is provided by means of ship mortgages (hypothecs). Recognition of a foreign ship mortgage, or any conventional conveyance of real security in ships, now is universal as an institution, since the great majority of states interested in seafaring have introduced this type of rights into their municipal laws. The governing law cannot yet be said to be clearly settled everywhere. But it would seem that the principle of the Brussels Convention is actually followed, to the effect that a mortgage complying with the law of the port of registration of the vessel is likely to be recognized not only in France [56] but in any country,[57] although no holding squarely in point

[55] DICEY (ed. 6) 666.

[56] See NIBOYET, 4 Traité 538 ff.

[57] England: Hooper v. Gumm (1887) L.R. 2 Ch. 282; American mortgage, not recognized because the action was defeated by estoppel; The Colorado [1923] P. 102: French mortgage; The Zigurds [1932] P. 113: Latvian equitable assignment.

Germany: Oberapp. G. Oldenburg (May 18, 1861) 17 Seuff. Arch. Nr. 111: Hanover mortgage; RG. (Feb. 9, 1900) 45 RGZ. 276, 278: Dutch mortgage; "No doubt, the vessel at the time of the creation of the mortgage, belonged to an owner domiciled in Holland from where the vessel was also managed."

Italy: C. Navig. art. 6; formerly Cass. Turin (Dec. 10, 1906) 22 Revue Autran 714: English mortgage; recognized despite the Italian prohibition of forfeiture *(pactum commissorium)*.

The Netherlands: VAN OPSTALL, Scheepshypotheek, (Thesis, Leiden 1932) 305.

Norway: Law of May 31, 1929.

Portugal: C. Com. art. 488.

Sweden: Law of May 18, 1928.

exists in the United States.[58]

That mortgagees registered at one port lose their priority, where registration is transferred to another country and purchasers or creditors are recorded in the new register,[59] accords with the general principles.

Other events. Illustration. On a German ship, leaving New York and sailing in the harbor between New York and New Jersey, a steward found in a stateroom a roll of banknotes. The German court defined the rights of the finder under the identical laws of New York and New Jersey. If the discovery had been made later on the high seas, German law would have been applied.[60]

Conclusion. International law concedes many and important prerogatives to the state whose flag a ship flies. Prevailing opinion even recognizes a real right under public international law of the state in whose ports private ships are registered.[61] In accordance with this fact, the existing laws and conventions and the general impression conveyed by the literature allow a reasonable way out of the present unsettled doctrine. The law of the flag is indispensable during the time a vessel is on the high seas. It is the most suitable law for the creation and transfer of real rights by voluntary private transactions also when the ship is in foreign territorial waters. In view of the advantages of the publicity obtained by central registration in the home port and of the considerations of public policy familiar to

[58] United States: The Secundus (D.C.N.Y. 1927) 15 F. (2d) 713, 1927 Am. Marit. Cas. 641, contains only an indication that a French preferred mortgage would receive the preference given to it by French law, ROBINSON, Admiralty 435 *in fine.*

[59] RG. (June 14, 1911), Ned. Scheepsverband M. v. Coblenzer Volksbank, 77 RGZ. 1. On recognition of unregistered foreign mortgages, see ABRAHAM (*supra* n. 17) 313.

[60] OLG. Hamburg (May 14, 1904) Hans. GZ. 1904, Beiblatt no. 122, citing 2 BAR 609, 614.

[61] This theory has been eruditely supported against adversaries by UBERTAZZI, Studi sui diritti reali nell'ordine internazionale, Milano 1949.

some countries, it is highly advisable for such voluntary transactions to give normally exclusive force to the law of the place of registration.

On the other hand, the law of the port where the ship lies must have competence to regulate involuntary assignments and in emergency cases securities established by special agreement.

III. Maritime Liens (Privileges by Law)

Anglo-American admiralty law recognizes charges upon ships for services done to the ship or injury caused by it, accruing by law and enforceable by an action *in rem*. English writers in the nineteenth century developed various theories as to the nature of these liens, among which that of Marsden [62] was adopted in the English courts. This so-called "procedural theory" regards the lien as "a form of proceeding to compel an appearance" by the owner of the vessel. In consequence, the vessel is not liable if the owner is not personally liable, and if he is, his responsibility is unlimited.[63] The American courts since 1809 have followed the "personification theory," later expounded by Holmes,[64] regarding the ship as liable, and alone liable, without personal obligation of the owner; this lien remains "indelible" irrespective of a change of ownership.[65]

The theory of Holmes and of the American courts corresponds with the medieval institution of *"fortune de mer,"* one of the applications of pure liability of a thing *(Sachhaftung)*. The premise of the procedural theory that

[62] Marsden, "Two Points of Admiralty Law," 2 Law Q. Rev. (1886) 357; *id.* Select Pleas in the Court of Admiralty, vol. 1 (London 1894).

[63] Hebert, "The Origin and Nature of Maritime Liens," 4 Tul. L. Rev. (1930) 381, 385.

[64] Holmes, Common Law 25 ff.; The City of Athens (1949) 83 F. Supp. 67, 1949 Am. Mar. Cas. 582, aff. (C.C.A. 4, 1949) 177 F. (2d) 961, 1950 Am. Marit. Cas. 282.

[65] Mayers, Admiralty Law and Practice 8.

the owner is personally liable cannot be maintained in case of a new owner.[66] And practically, to dispense with the idea of a proprietary right, as the procedural theory now pretends, or to merge maritime liens with the obscure category of actions *in rem,* confuses the international situation which requires recognition of foreign-created rights, even though foreign privileges of priority may be rejected.

The Continental laws in part rest upon the same foundation of the ship's obligation, as in particular does the German system, but, including the common law, there are at least five different systems of allowing privileged rights in the case of a judicial sale of a vessel. They are based upon heterogeneous ideas, granted to very different classes of creditors, and differ greatly in regulating the rank for satisfaction by the proceeds of the sale.[67] The task of finding suitable conflicts rules for this matter, after strenuous efforts, was given up by the numerous successive international conferences. In the 1920's, unification of the substantive rules was believed easier. But the resultant unifications by both the Brussels Convention on liens and mortgages of 1926 and the Geneva Convention on ships registration of 1930 had to leave a multitude of minor liens to the pleasure of the *lex fori.*[68]

The Brussels Convention, however, for the limited domain of its member states, enumerates five types of privileged liens enjoying priority over registered mortgages, while the national laws may grant other liens rank-

[66] The Bold Buccleugh (1851) 7 Moo. P. C. C. 267.

[67] See in the first place, RIPERT, 2 Droit Marit. (ed. 3) 119 ff. §§ 1157-1160; for the Anglo-American laws, ROBINSON, Admiralty 363 ff., 434 § 62; GRIFFITH PRICE, The Law of Maritime Liens (London 1940) with comparative surveys which seem somewhat questionable; for Germany, WÜSTENDÖRFER, Neuzeitliches Seehandelsrecht (1947) 118 ff.

[68] PLAISANT, Les règles de conflit de lois dans les Traités (1946) 141; also with comment on the effects of bankruptcy on the choice of law according to the existing conventions.

ing after those first two groups.[69] Among other provisions, a somewhat vague uniform rule is established, requiring preliminary notice of "a sale" to the register office, in order that privileges should be extinguished by the sale.

Jurisdiction to enforce foreign-created liens may at times be absent, particularly in English courts. But this is a rare case in other countries and scarcely occurs in the United States.

Recognition and priority must be strictly separated in regard to liens; the question of rank affects also conventional securities.

1. Recognition of foreign-created liens

The great majority of the decisions refer to those liens which arise by force of law from services rendered to the vessel.

(a) *Repair and supply.* It is perfectly settled that persons acquiring a lien on the ship or the cargo by furnishing repairs or "necessaries" under the law of the place where the services are rendered are protected in other countries.[70] In the usual conflicts terms, the applicable law is characterized as *lex loci contractus* or as *lex situs*.[71] The law

[69] Brussels Convention, cited *supra* n. 54, art. 2, liens privileged in cases of certain expenses, employment, salvage, etc., accidents of navigation, and necessary contracts of the master.

[70] United States: Mills v. The Scotia (D.C.N.Y. 1888) 35 Fed. 907, 909, "the law of the place of transaction;" 1 WHARTON §§ 322, 358.

Canada: Sir Douglas Hazen, L.J.A., in Marquis v. The Astoria [1931] Ex. C.R. 195, 199: "where the services are rendered" quoting The Scotia; and since, usual formula in Canada; the remarkable decision, Harney v. Terry [1948] 1 D.L.R. 728 uses the term *lex loci contractus.*

Scotland: Constant v. Klompus (1912) 50 Scot. L. Rep. 27. For more details see GRIFFITH PRICE, 57 L.Q.L.R. (1941) 409.

[71] United States: The Graf Klot Trautvetter (1881) 8 Fed. 833; The Olga (1887) 32 Fed. 329; The Scotia (1888) 35 Fed. 907; The Kaiser Wilhelm II (1916) 230 Fed. 717; The Woudrichem (1921) 278 Fed. 568; The City of Atlanta (1924) 17 F. (2d) 308, 1924 Am. Marit. Cas. 1305, 9 Revue Dor (1925) 396: *(lex loci contractus);* The Northern Star (1925) 1925 Am. Marit. Cas. 1135, 12 Revue Dor (1925) 238.

of the flag has been sharply rejected in this country.[72]

Illustration. Necessaries were supplied to an American ship in Boston. American law grants a maritime lien, while in Canada merely a statutory lien of much minor importance exists. Canadian courts, nevertheless, recognize the American lien, arguing that otherwise they would promote fraudulent removal of lien-bound American ships to Canadian ports.[73]

Italian conflicts law applies the law of the flag also to maritime privileges.[74] Therefore, two American decisions have resorted to renvoi. When a German ship had taken bunker coal in an Italian port, the Italian reference led to German law, under which no lien existed, because the supplier knew that the charterer rather than the owner had to pay.[75] This clear and reasonable adoption of the theory

England: The Colorado [1923] P. 102.

Scotland: Constant v. Klompus (1912) 50 Scot. L. Rep. 27.

Canada: Sup. Ct. in The Strandhill v. Walter W. Hodder Co. [1926] S.C.R. 680, 4 D.L.R. 801; Harney v. M.V. "Terry" (Ex. Ct. of Can. 1947) [1948] 1 D.L.R. 728.

France: Trib. civ. Tarascon (March 27, 1931) Clunet 1932, 423, where the editor protests that the fictitious situation of a ship is the place of its matriculation.

Germany: RG. (Feb. 10, 1913) [The Colorado] Warn. Repr. 1913, 302 No. 254, citing 1 BAR 613, 651; EMIL BOYENS, 1 Das deutsche Seerecht (1897) § 22e; OLG. Stettin (Sept. 29, 1931) IPRspr. 1932, 120 No. 55.

Greece: App. Athens (1933 No. 1095) Clunet 1934, 1053; it is true that the flag coincided with the place of the accident.

The Netherlands: 1 VAN HASSELT 359.

But see also *infra* n. 85.

[72] United States: The Kaiser Wilhelm II, *supra* n. 71.

[73] See the citations *supra* n. 70, Canada.

[74] Italy: Now, likewise, Dis. Prel. C. Navig. arts. 6, 13.

[75] Cilento v. S.S. Rickmers (1924) 1924 Am. Marit. Cas. 971, 8 Revue Dor 198, applying §§ 486, 531 of the German Commercial Code. Under similar facts, Società Anon. Ricardo Ganlino v. S.S. Coastwise (1923) 1923 Am. Marit. Cas. 942, 6 Revue Dor. 357. On knowledge of the supplier, see the analogous provisions of the American Ship Mortgage Act of June 5, 1920, 46 U.S.C.A. §§ 971-973; see, e.g., The Kongo (1946) 155 F. (2d) 492, 174 F. (2d) 67, 1946 Am. Marit. Cas. 1200; Univ. Nat'l Bank v. Home (1946) 65 F. Supp. 94, 1946 Am. Marit. Cas. 585.

of renvoi seems to have escaped the attention of the many writers clinging to the unfortunate Talmadge case.[76]

A foreign writer believed, in 1930, that the American decisions on the subject commonly adopted American maritime law.[77] This does not square with the decisions.[78]

(b) *Wages of master and crew.* A decision by the famous admiralty Judge Brown, of 1887, held that even the priority of liens arising for the wages of crew and master ("those on board") "among themselves" should be determined by the law of the flag, although the rank of liens arising from the contracts concluded by the master followed the law of the place of contracting.[79] An old English case concerning the wages of a master of a foreign vessel was decided under the *lex fori*.[80] More recently in *The Tagus* (1903), the Argentine law of the flag was applied, but the privilege of the master was extended, by British law of the forum, from the last voyage to all back salary.[81] Recently, however, the Canadian Court of Exchequer in a learned judgment applied the general theory that liens follow, according to their contractual or delictual occasion, the law governing the contract or the tort.[82] Claims for wages of master and crew consequently fall under the law of the flag.

[76] See, ultimately, Note, 48 Mich. L. Rev. (1950) 702.

[77] BARON NOLDE, 22 Revue Dor (1930) at 50 f.

[78] See also PRICE (*supra* n. 29, 67) 212. In The Hoxie (1923) 1923 Am. Marit. Cas. 937, the supplier was deemed to be an American mother company of the Danish firm; in The Lydia (1924) 1924 Am. Marit. Cas. 1001, the court recognizing foreign liens as arising under general maritime law explained that English law was not pleaded and that the decision was based on conversion in the United States; in The Coastwise (1923) 1923 Am. Marit. Cas. 942, American law was applied as law of the flag by renvoi from Italian law, *supra* n. 75. Other cases must be explained by historical development, as especially in respect to priority, *cf., infra* n. 88.

[79] The Olga (1887) 32 Fed. 329; The Angela Maria (1888) 35 Fed. 430; The Belvidere (1898) 90 Fed. 106.

[80] The Milford (1858) Swabey 362.

[81] The Tagus [1903] P. 44.

[82] Harney v. M.V. "Terry" (1947) [1948] 1 D.L.R. 728.

(c) *Injury.* Under the same theory, emphasizing the substantive character of the problem, *lex loci delicti* applies in tort cases. A stevedore, injured through the fault of those in charge of unloading chemicals from a Norwegian ship in Victoria, British Columbia, was denied recovery in the United States, because no maritime lien existed in the Canadian province.[83] In the case of collision on the high seas where no place of wrong exists, American courts apply the Act of March 30, 1920, concerning "Death on the High Seas by Wrongful Act." [84]

(d) *Carrier's default.* Still in the same order of ideas, passengers, mistakenly left ashore by a Rumanian steamer, were allowed to sue *in rem* against the vessel only after the law of Rumania was found to justify such action, since that country was the place where the contract of carriage was entered and the voyage was to be ended.[85]

With respect to the existence of a right to sue *in rem* against the vessel, based on a lien, the fairly settled present English, Canadian, German, and American doctrines thus may be summarized as follows: The law of the flag is resorted to insofar as wages of seamen are concerned and as a substitute for the ordinary applicable territorial law, in the case of events on the high seas. Normally, a lien, presupposing a contract, is connected with the port where the ship is situated at the time of the contract, and a lien protecting a tort claim with the territorial waters in which the wrong was committed.

[83] The Cuzco (1915) 225 Fed. 169, The Apurimac (1925) 1925 Am. Marit. Cas. 604, 11 Revue Dor 224: American law was preferred to the Peruvian law of the flag, respecting injury to a seaman aboard a Peruvian vessel in an American port, caused by the vessel's unseaworthiness, following The Scotland (1881) 105 U.S. 24; Koziol v. Fylgia, 1953 Am. Marit. Cas. 220: injury on the high seas, Swedish law of the flag.

[84] The Buenos Aires (C.C.A. 2 1924) 5 F. (2d) 425.

[85] The Constantinople (D.C.N.Y. 1935) 15 F. (2d) 97, as commented upon by ROBINSON, Admiralty 439.

These, indeed, are the firmest connections available in this matter. Whether the lien or privilege is recognized in the domestic law of the forum is entirely immaterial.[86] Over this point, it is true, isolated decisions, particularly older ones, have stumbled. And French objections on the ground of public policy may be possible.[87]

2. Priority

In a line of older American decisions, the application of foreign law to mortgages and liens was extended to the question of their precedence in the distribution of the proceeds in an executory sale.[88] Such generosity is no longer displayed anywhere in the world. Eminent writers have urged in vain uniform treatment of recognition and priority of liens, now basing their doctrine, in contrast to the former emphasis on the situs as of the time of the creation of the right, rather on an all-embracing dominance of the law of the flag.[89]

Quite commonly the priority between mortgages and liens and among liens is determined according to the law of the forum.[90] For justification, it is ordinarily contended that,

[86] See, e.g., the Canadian decisions *supra* n. 70, and the Reichsgericht (Feb. 10, 1913) cited *ibid.*, against OLG. Rostock (July 7, 109) 65 Seuff. Arch. No. 34.

[87] *Cf.*, NIBOYET, 4 Traité 547 ff.; RIPERT, 2 Droit Marit. (ed. 3) §§ 1161 ff.

[88] The Velox (1884) 21 Fed. 479; The Olga (1887) 32 Fed. 329; The Angela Maria (1888) 35 Fed. 430; The Belvidere (1898) 90 Fed. 106.

[89] Particularly forceful, RIPERT, 2 Droit Marit. 124 ff. §§ 1161-1164.

[90] United States: Brown, J., in The Scotia (1888) 35 Fed. 907, 911, citing STORY §§ 323, 423 b, d.; The Oconee (1922) 280 Fed. 927; ROBINSON, Admiralty § 62; Note, 26 Harv. L. Rev. (1913) 358.

England: WESTLAKE § 351; The Colorado [1923] P. 102.

Canada: Sir Douglas Hazen, L.J.A., in Marquis v. The Astoria [1931] Ex. C.R. 195, 199.

Scotland: Robert Clark v. Bowring & Comp. (1908) S.C. 1168, rejecting the claim of an American firm for monies paid in New York.

France: see for citations, RIPERT, 2 Droit Marit. 131 § 1168.

Denmark: Comm. and Admir. Court (March 21, 1939) U.F.R. 1939, 589; (Jan. 3, 1950) S.H.T. 1950, 46; Clunet 1954, 502.

Germany: RG. (Nov. 25, 1890) 1 Z. int. R. 365; (Feb. 9, 1900) 45 RGZ. 276, 281, 10 Z. int. R. 472; (Feb. 5, 1913) 81 RGZ. 283; and others; 2 BAR. 199.

Netherlands: H.R. (June 15, 1917) W. 10139, N.J. 1917; 812.

although foreign-created rights are recognized, their rank is a matter of procedure. This is an untenable assertion.[91] Enforcement presupposes a substantive quality of the right to be enforced. It should also not be believed that executive sales proceedings, frequent as they are, furnish the only situation in which the order of the rights is important. Clearly, priority pertains to the substantive part of the law.

Nevertheless, this does not decide the conflicts problem. When courts and writers have considered the advantages and disadvantages of *lex fori* and the law of the flag, there are arguments for either. The resort to the domestic law of the casually competent court rewards the shrewdest creditor choosing the place of attachment. Where the law of the flag determines the existence of the right, its coexistence with the *lex fori,* governing the priority, is a source of conflicts.[92] The judicial sale, for instance, purges rights, irrespective of the law of the flag. On the other hand, it must be conceded that unity of treatment for rights originating all over the world under disparate laws can be guaranteed by the *lex fori* as well as by the law of the flag which would logically require (and has been said to establish) a total subjection of all these rights to the unitary law of the home state. In this matter, the law of the forum agrees too well with the usual conceptions of admiralty judges, to be erased for reasons of theoretical elegance, or even convenience.

It can be better understood than in other matters, that a court would think as a Dutch judge has said, in pondering the virtues of the law of the forum and the law of the flag for distributing proceeds of an executive sale of a vessel: A Dutch judge cannot be forced to recognize privileges of

[91] 2 FRANKENSTEIN 491.
[92] NIBOYET, 10 Répert. 17 No. 84, 18 No. 93.

enforcement not existent in our country to the detriment of our own subjects.[93]

Normally, and in this matter with better foundation than ordinarily, the courts analyze foreign rights and equalize them with a type provided from those available in the domestic law.[94] It may happen that a French ship mortgage thereby gains a better position in England than at home,[95] and a Dutch ship mortgage has a preference over liens in Germany which it does not have in the Netherlands,[96] which shows an unhappy method of comparative research by legislators.

Again, if the law of the forum is not explained by a non-existent procedural character of priority, it may rather be based on the emergency function of this device, an idea that may have practical consequences. The older American cases, mentioned before, applied the various foreign laws governing the individual rights. This, in application to recognition, though not to priority, is also the dominant attitude of the present courts, as demonstrated above. It follows that whenever these laws produce identical results of rank, they should prevail over the *lex fori*. In fact, such an exception has been made by the Dutch district court of Rotterdam. When the laws governing the competing

[93] Rb. Rotterdam (Dec. 2, 1927) W. 11817, N.J. 1928, 127, 1 VAN HASSELT 399.

[94] United States: The Graf Klot Trautvetter (1881) 8 Fed. 833.
England: The Zigurds [1932] P. 113.
Canada: Harney v. M.V. "Terry" (1947) [1948] 1 D.L.R. 728.
Germany: RG. (Jan. 20, 1913) 57 Gruchots Beitrage 1037; OLG. Hamburg (Jan. 30, 1894) and (Feb. 25, 1899) Hans. GZ. 1894, Hbl. No. 32 and Hans. GZ. 1899, Hbl. No. 65; FRANKENSTEIN 493 n. 90.
The Netherlands: Rb. Rotterdam (Jan. 20, 1937) W. 1937, no. 879; Hof den Haag (Feb. 5, 1937) W. 1937 no. 875.

[95] The Colorado [1923] P. 102.

[96] RG. (Feb. 2, 1900) 45 RGZ. 276, with the curious observation, p. 283, that the Dutch mortgage is not lesser in value because there the privileges are of prior rank; does, thus, the mortgage gain "in value" if invoked in Germany?

claims, such as a mortgage contracted in Norway and an English lien for supply, agree on their rank, the *lex fori* is disregarded.[97] Thus, the emergency function of the domestic law of the court is perceived and adequately limited. Assuredly, the court for this purpose had to solve a difficult task of comparison.

IV. Rights in Aircraft

1. Municipal Laws

Although the national statutes relating to rights in air vehicles, despite some growth, are comparatively few, they have gone in different directions, making the sorely needed unification very difficult. A convention of 1948 had to be reduced for the most part to uniform rules stating requirements for extraterritorial recognition. Even so, of the nineteen signatories, the United States is the only major power that thus far has ratified the Convention.[98]

The cardinal differences [99] turn around the nature of airplanes as simple chattels or special objects of rights; the existence and function of registers for private law purposes; the types of security for financing the acquisition of rights;[100] and the treatment of the valuable engines, accessories, and spare parts.

[97] Rb. Rotterdam (May 5, 1924) W. 11245, N.J. 1925, 907, 1 VAN HASSELT 381; accord, same court (Feb. 23, 1928) W. 11822, N.J. 928, 778, 1 VAN HASSELT 402, *cf.*, p. 359.

[98] Convention on Rights in Aircraft, Geneva, June 19, 1948, 1948 U.S. Av. R. 554; 4 Schweiz. Jahrb. Int. R. (1947/48) 297, ratified by the United States and Pakistan; ratifications by Chile and Mexico were declared inacceptable by the United States because of their reservations.

[99] See especially LEMOINE, Traité de droit aérien (Paris 1952); OTTO RIESE, Luftfahrsrecht (Stuttgart 1949); A. RABUT, Le transfer de propriété des aéronefs, Rev. franç. de droit aérien (1950) 10; GAY DE MONTELLA, Principios de derecho aeronautico (Buenos Aires 1950); MOLINA, Nociones de derecho aeronautico (Tucumàn 1951); SHAWCROSS AND BEAUMONT, On Air Law (London 1951); M. DE JONGLART, Traité élémentaire de droit aérien (Paris 1952).

[100] See especially WILBERFORCE, "The International Recognition of Rights in Aircraft," 2 Int. L. Q. (1948) 421.

In a development analogous to that of maritime law, aerovehicles are still regarded in some countries as ordinary chattels subject to *lex situs*,[101] but the corresponding modes of transfer of title and constitution of rights in aircraft are progressively being replaced by registration, not requiring a transfer of possession.[102] The Convention of 1948, though not in force, exercises some influence in this respect. Very few states, however, have a register specially designed for private law transactions; the others use the register of immatriculation, created for purposes of public law and police, if they have such. Also in the United States the register of the Civil Aeronautic Authority serves for recording title and security transactions,[103] although particular state statutes provide for recording of liens.[104]

Effect of Recording. The American federal statute expressly states that registration with the Civil Aeronautic Board, though mandatory for the operation of an aircraft, does not furnish conclusive evidence of ownership in a law suit.[105] It has been held, in consequence, that a conditional sale without registration is not void.[106] A comprehensive decision [107] explains that recording with the Civil

[101] England: SHAWCROSS AND BEAUMONT, *l.c.* § 507A.
Switzerland: BGes. Dec. 21, 1948; GULDIMANN, 10 NF. Z. Schw. R. 19 ff.; RIESE ET LACOUR, Précis de droit aérien (Paris 1951).

[102] France: LEMOINE, *l.c.*, 173 states that airplanes are *meubles par nature*, but deviate in seven points from the principle; likewise:
Italy: C. Navig. art. 861 concerning title; but arts. 1022-1037 regulate the hypothec completely.
Cf., Uruguay: Law Dec. 3, 1942 § 8.

[103] Civil Aeronautics Act (June 23, 1938) 49 U.S.C. §§ 521, 522, 1948 U.S. Av. R. 554, 577; Act June 19, 1948, on recordation of ownership of aircraft, aircraft engines, and spare parts, 49 U.S.C. § 523, 1948 U.S. Av. R. 578.

[104] *Infra* 118.

[105] 49 U.S.C. § 521(b).

[106] Bishop v. B. S. Evans East Point Inc. (1949) 80 Ga. App. 324, 56 S.E. (2d) 134.

[107] Jack Marshall v. Bardin (Kansas 1950) 216 P. (2d) 812, 1950 U. S. Av. 292.

Aeronautic Board is only necessary "to enable the purchaser to operate the aircraft legally or to deal with the title as by a new sale or pledge;" that is, the protection is given to persons "who have dealt on the faith of the recorded title and to whom it would be a fraud to give effect to unrecorded titles to their detriment." Hence, an attachment obtained by a money creditor of the recorded owner who had sold the plane by an unrecorded sale, was disapproved. As, however, this creditor was also said to have had knowledge of the sale, the theory of the case is difficult to define.

Recording is considered an essential requisite of a purchase in Italy,[108] Spain, and other countries;[109] much debated, this view seems finally to prevail also in France.[110]

Likewise parallel to the progress in maritime law, the creation of true rights *in re* has been reached in various forms through the medium of registration: hypothec,[111] chattel mortgage, conditional sale or hire purchase, equipment trust, and fleet mortgages. On the other hand, these types have very different characteristics, and more than any others, the question of separate security transactions concerning accessories has divided the views. While motors

[108] Italy: former law Aug. 20, 1923, art. 7; Cod. Navig. art. 865: For the effects provided for by the Civil Code, the acts, constitutive, translative, or extinctive of title or other rights *in re* aeromobiles, or quotas thereof, are made public by transcription in the national aeronautic register, etc.

[109] Spain: see *supra* n. 48.

Uruguay: Law Dec. 3, 1942.

Venezuela: Law July 14, 1941.

[110] France: Law May 31, 1924, arts. 11 and 12: *"L'inscription au régistre vaut titre,"* is interpreted very differently, but RIPERT, 1 Dr. Marit. (ed. 3) § 430, states filing brings certainty as one in the German *Grundbuch,* followed by RABUT, *l.c.* 16; JONGLART, *l.c.* 94 § 84.

[111] HOFSTETTER, L'Hypothèque aérienne (thèse Lausanne 1950).

France: Law of May 31, 1924, art. 14, prescribes analogy to the fluvial hypothèque (Loi of July 5, 1917), a much criticized solution, see LE GOFF, *l.c.* 541 § 1075.

Italy: C. Navig. arts. 1022 ff.

permanently connected with planes are incapable in many civil law countries of forming an independent object of security,[112] the American statute admits liens on aircraft engines, propellers, appliances, and spare parts by mere recording.[113] This contrast seems to be among those fatal to unification.

2. Conflicts Rules

The Convention of 1948, by making international recognition dependent on recording, intended to encourage the establishment of registers of any kind, if only available to record private rights. The eligible types of rights for which this protection was provided were enumerated in a broad catalogue. But the text failed to define the validity of the acquisition of the rights. It is therefore controversial what law governs the conditions and effects of the conveyance as contrasted with the conditions of recording.

The question has been discussed in connection with the problem of the nationality of aircraft which was doubtful[114] but is increasingly fixed by the immatriculation. Nevertheless, in conflict law the significance of *situs* or flag,[115] as well as of the place of contracting or of the parties' intention,[116] are not favored. While the American delegate to the 1948 Convention, Calkins, thinks the courts would prefer the law of the place where the plane is habitually held,[117] the question must be regarded as unsettled. Evidently the necessary experience is not yet available.

[112] But see for Germany § 93 BGB.; RIESE, Luftfahrsrecht 259.
[113] 49 U.S.C. §§ 522, 523.
[114] LE GOFF, Traité de droit aérien (1934) 183 § 339.
[115] RIESE, Luftrecht 280; RIESE ET LACOUR 121 § 128.
[116] WILBERFORCE, *l.c.* 426.
[117] CALKINS, "Creation of International Recognition of Title and Security Rights in Aircraft," 15 J. Air L. and Comm. (1948) 156, 160, citing N.W. Airlines v. Minnesota (1943) 322 U.S. 292 .

A peculiar situation exists in the United States in the federal-state relation.

Recording with the Civil Aeronautic Board is insufficient to create recognition of a chattel mortgage in New York, where compliance with the local lien law is indispensable.[118] A state lien is also needed when a chattel mortgage has been defectively described at the federal level.[119] On the other hand, a chattel mortgage recorded under the federal regulation has been held to enjoy priority over a state lien for repair.[120]

[118] Aviation Credit Corp. v. Gardiner (N.Y. Sup. Ct. 1940) 4 Misc. 798, 22 N.Y. S. (2d) 37, 1948 U.S. Av. R. 633. This would be changed by U.C.C. sec. 9-302, 2(a).

[119] United States v. United Aircraft Corp. (1948) 80 F. Supp. 52, 1948 U.S. Av. R. 473.

[120] Veterans and Express Co. (1948) 76 F. Supp. 684, 1948 U.S. Av. R. 178.

PART TWELVE

BILLS AND NOTES

CHAPTER 58

Principles

I. SOURCES

THE law of bills and notes has developed in the law merchant through many centuries. Although it has not everywhere been so responsive to mercantile habits and conceptions in such relatively [1] high degree as in the English courts, after they absorbed cases involving negotiable instruments from the merchant courts, the special requirements of commercial needs are observed in all jurisdictions.[2] Most important of all, formal, simple, and reliable documentation of obligations is the primary characteristic. And, of course, as one of the oldest means of international commerce, bills and notes should satisfy this requirement also during their travels through several countries. Unfortunately, usage and legislation, producing different rules, have impeded the unity of purpose. Conflicts law, at least, could have been expected to provide a clear and easy co-ordination of the national differences. The unification of conflicts law, however, that was obtained in Geneva, after long and intensive labor at the most successful of all international commercial conferences, is limited as respects both territorial domain and material problems.

[1] Even the English courts, as is well known, submitted the merchant practice respecting bills of exchange to such common-law doctrines as that of consideration.

[2] Argentina: C.Com. art. 738 expressly mentions in connection with the laws also the commercial usages of the place where the instrument is executed.

1. The Written Laws

(a) *Communities.* The Montevideo Treaty of International Private Law of 1889 established a series of conflicts rules relating to negotiable instruments,[3] which were substantially reproduced in the Código Bustamante.[4]

The Hague Uniform Regulation of 1910-1912, predecessor of the Hague Convention of 1930, was adopted as law in Yugoslavia, Turkey, Ecuador, Guatemala, Nicaragua, and Venezuela.

The uniform conflicts rules stipulated in Geneva in 1930 for bills of exchange and promissory notes—cited hereafter as *Geneva Rules* [5]—and in 1931 for checks have been ratified by eighteen states, including Soviet Russia and Japan, but no American country.[6] The core of this legal community consists of the two groups developed either on the French system or on the German *Wechselordnung* of 1848. The influence of the latter enactment, one of the most outstanding legislative works of all times, has been fortified by the German and Italian literature. German and Italian doctrine, in fact, is the natural counterpart of the common-law decisions in this matter,

The Anglo-American group, although without an international agreement, is fairly united by the substantive rules of the British Bills of Exchange Act, 1882,[7] and the Uni-

[3] Argentina and four other states: See Vol. I, p. 29.

[4] Fifteen Latin-American states, see Vol. I, p. 32 ff., but without much visible effect on the practice. A comprehensive comment is offered by José Antonio Cordido Freytes, Les conflits en matière de lettre de change dans la Convention de La Havane (thèse Paris 1954).

[5] The substantive Geneva treaty on bills of exchange and promissory notes will be cited as *Geneva Convention.*

[6] Austria (1932), Belgium (1932), Denmark (1932), Danzig (1935), Finland (1932), France (1936), Germany (1933), Greece (1931), Italy (1932), Japan (1932), Monaco (1934), Netherlands (1932), Norway (1932), Poland (1936), Portugal (1934), Sweden (1932), Switzerland (1932), U.S.S.R. (1936).

[7] The Bills of Exchange Act, 1882, 45 and 46 Vict. Ch. 61.

form Negotiable Instrument Act, in which all states of the United States, Alaska, Hawaii, Puerto Rico, Colombia, Panama, and the Philippines participate. The conflicts rules, however, contained in the British Act (section 72), unhappily drafted, were omitted in the American Act and are replaced in this country by a confusing set of largely uncertain maxims.

If, hence, the two groups of the common-law and the Geneva Rules have to be in the forefront of our discussion, nevertheless the fragmentary character of these principal materials must be kept in mind. Even the Geneva Rules, though more complete than the provisions on conflict of laws in the Hague Uniform Law of 1912,[8] are greatly disappointing because of their restricted scope. The Convention on the substantive law itself is incomplete. The Conflicts Rules have more omissions. Particularly, there is no provision on the essential requirements of validity of the contracts involved; on negotiability of the instruments; on the transfer of obligations by indorsement; on identification of a person as holder. Neither do they determine the law governing the duties of the holder; the procedures of enforcement and of annulling titles lost or destroyed; the conflicts respecting "provision" (cover); accommodation bills; or the effect of limitation of action or preclusion impairing the rights of the holder.

The effects of the obligations are more fully treated in the English Act and the Latin-American treaties, which, however, in other respects are even more fragmentary.

(b) *Isolated laws.* Outside the conventions, some countries of the former French-Latin group have remained isolated, such as Albania, Dominican Republic, Honduras,

[8] They were restricted to form and capacity; on similar laws see 1 MEYER 643; TRUMPLER 154.

Mexico,[9] Spain, and of the former German group Bulgaria, Hungary, Rumania, and Czechoslovakia. The impact of the present Soviet law is unknown to the writer.

(c) *Scope.* The scope of the special conflicts matter seems to coincide with the extent of the law of negotiable instruments. The Anglo-American acts include "bills of exchange, cheques and promissory notes." The comparable older Continental laws were merely concerned with drafts *(lettre de change, cambiale, gezogener Wechsel)* and notes *(billet à ordre, vaglia* or *pagheró, eigener Wechsel).* More recently, separate enactments codified the rules on checks.

To use correct language, we are forced to restrict our principal survey to bills of exchange and notes, or even to bills alone, although on most subjects the rules are the same in the larger categories. Some special problems of checks will be examined thereafter.

2. Main Differences of Internal Law

Opposite principles remain between the Anglo-American laws and the Continental groups, which are principally represented by the Geneva Conventions. We find ourselves today in essentially the same situation as Lorenzen (p. 20 ff.) described in 1919, after the Hague but before the Geneva unification.[10] It is therefore appropriate to follow his lead in enumerating what now remain as major substantial differences.

[9] Mexico: General ley de títulos y operaciónes de crédito, 1932.

[10] See for full analysis HUDSON AND FELLER, 44 Harv. L. Rev. (1931) 333; WIGNY, Revue Dr. Int. (Bruxelles) 1931, 805; ASCARELLI, Actes Congr. Rome, 303-311.

Anglo-American Group	*Continental Laws*
Elasticity of form	Rigorous formalism
Promise of interest allowed	Geneva: only if the bill is after sight
England: bill cannot be in a certain foreign currency (*contra* United States)	Contra
Bill to bearer admitted	Not admitted
Consideration necessary	Contra
Conditional indorsement allowed	Contra
Indorsement after maturity equivalent to bill at sight	Merely an assignment
Reasonable time of presentation for acceptance	Fixed periods, Geneva art. 34: one year
Time for deliberation 24 hours	Geneva art. 24: the following day
Acceptance not dated in bills at sight may be completed by holder	Geneva art. 25 al. 2: the holder must make protest
Partial acceptance not allowed	Contra
Indorsements following a spurious signature invalid	Contra

3. Special and General Law

The special statutes on bills of exchange, etc., do not exhaust the requirements and effects of the obligations or "contracts" of which they speak. The uniform rules are supplemented by the national special rules on negotiable instruments called for by the broad reservations and gaps left by the Geneva Convention and to a much smaller ex-

tent by the Uniform Negotiable Instruments Law.[11] And there is a large domain, which varies and sometimes is very large, left to the general law of contract. Accordingly, we must evidently divorce the conflicts rules of the special matter from the general conflicts rules, so often applied by so many courts to "contracts" in general, although we also have to co-ordinate the two groups. In this respect, lack of thought is manifest in almost all systems.

Terminology. To obtain a clearer view of this subject, distinctive language will be indispensable. It does not exist in the common-law sphere, but it does in the Continental doctrines. German theory significantly speaks of *Wechselerklärung, Wechselrechtssatz,* and *Wechselanspruch,* contrasting these with the declarations, rules, and claims of the "general" or "common" law. Likewise, Italians and French lawyers use the adjectives *cambiario* and *cambial* respectively, in opposition to what is outside, *extracambiario.*[12]

It is proposed that the terms *cambial* and *extracambial* may be employed to indicate a necessary and greatly, though not entirely, neglected distinction also in American law.[13] The obligations created by the acts of issue, indorsement, acceptance, etc., are often governed by the special "cambial" law as far as its limits are defined by the special conflicts

[11] See, e.g., City of New Port Richey v. Fidelity & Deposit Co. (1939) 105 F. (2d) 348.

[12] See the elegant definition by ANGELONI, La Cambiale 38: These obligations are literal and complete in the sense that their content is exclusively determined on the basis of what results from the instrument which must suffice for itself. *Cf.,* the Mexican thesis by ALMANZA, *infra* n. 47, 18; and see now Mexico: S.C., Amparo, Julio 4, 1952, 2 Rev. Fac. Der. (1952) 254 no. 8, using Ley de Títulos y Operaciones de Crédito, art. 5, to distinguish the *relación subjacente* from the literal obligation.

[13] The effect of the distinction is well expressed, for instance, in Alcock v. Smith [1892] 1 Ch. 238 speaking of an obligation: "This is not a question arising on the bill as a piece of paper or chattel."

rules. If a relationship, however, is *"extracambial,"* as certainly should be recognized, e.g., in the case of the relationship underlying a writing on the bill, the special conflicts rules generally will not be competent, although there may be doubts and questions. (*Infra* II, 4).

Another concept, difficult to do without, is what the Italian writers understand by *"letteralità"* and the Germans have emphasized by their theory that the obligations flowing from the bill are essentially conditioned by their written form: *obligation by the writing,* "scriptural" obligation. Despite theoretical differences in the various systems, it is not true that Anglo-American law ignores the role of writing. This may most clearly be perceived when a bona fide holder for value is attributed just what the writing in the bill assures to him.

These two new terms, *cambial* and *written* obligation, may suffice to facilitate our language.[14]

II. The Role of Theory

1. Municipal Theories

Anglo-American writers seem commonly satisfied with the language of the Acts speaking of the "contracts" appearing on negotiable instruments. (BEA s. 27 (1); NIL s. 16), without analyzing the elements of these transactions. German and Italian literature, on the contrary, abounds in controversies and constructions respecting either the foundation or the nature of the special law on bills and notes.[15] So much industry and cleverness has been expended

[14] A further differentiation was made by older writers such as Grünhut, I 1; Karl Lehmann, Lehrbuch Hand. R. (ed. 2) 613, 646, calling cambial private law, *Wechselzivilrecht,* those parts of the general law to which the law of bills refers without incorporating them, e.g., capacity, form, effects of contract. However, no effect on the formation of conflicts rules has ever been suggested.

[15] For a complete though short review see Mossa, Cambiale 27-125.

in this field that a reaction was due. The draftsmen of the Geneva Convention on the substantive law were very anxious not to be influenced by any theory, and insisted on being motivated exclusively by reasons of expediency.[16] Some commentators, therefore, declare it unnecessary to continue the old disputes.[17] Other scholars, however, investigate the Convention in search of its theoretical basis, yet the variety of their conclusions somewhat defies their efforts.

Whatever the truth of this matter may be, our study of the *conflicts* rules ought to start from a twofold statement.

On the one hand, not only the Geneva product but virtually all present statutes do not purport to express any theoretical foundation. Their history in the law merchant is too old to depend on modern dogmatism. What supports them is mercantile convenience, mixed with lawyers' techniques, and, in the conflicts sphere, guided or misguided by the well-known mechanical rules.

On the other hand, contempt of theories is to be avoided, insofar as they explain legislative half-thought by discovering the rational underground. It would be difficult, indeed, to determine the most decisive local connections, established by an international bill of exchange, if we lacked clarity about the nature of the acts composing such a bill. This will appear conducive to a study of the different connecting factors such as delivery in common law and signature in civil law, the nature and extent of defenses, limitation of action, relationship between principal and guaranteeing debtors, etc.

Theories were wrong in claiming that they explain the

[16] Conventions on bills, annex II art. 16; on checks, annex II art. 19.

[17] For information, see especially CAMILLO TROJANI, Teorie Cambiarie e legge uniforme (Roma 1936); HEINZ WIERS, Wechselannahme und Theorien im neuen Wechselgesetz, Kölner Rechtswiss. Abh. N.F. Heft 19 (Mannheim-Berlin-Leipzig 1935).

entire peculiarity of negotiable instruments, covering the relationships of drawer, acceptor, indorsers, and indorsees. We must recognize likewise that the legal ideas behind the particular, municipal or conflicts, rules are not mysterious theories of the kind of the popular doctrine discovering behind the favor granted to the good faith of a holder an effect of the appearance that his endorser was the right creditor (theory of apparent right, *Rechtsscheintheorie*). But every single rule has a purpose that must be clarified and justified by a legal idea, as part of a system. This is theory enough. In this connection three problems may be considered in the first instance.

2. The Cambial Contracts

The original concept of a contract based on a bill was coined by the old lawyers in view of the function served by bills of exchange at the time. The contract between the issuer and the recipient of the order to pay was a written delegation of a debt, saving the effective transportation of a sum of money, to be paid at a distant place. The French Ordinance of 1673 was accordingly interpreted by Pothier,[18] who was followed by more recent authors. This contract included both the delegation or assignment of a debt agreed upon against consideration *(valuta)* and the delivery of the instrument as performance of the issue. Yet it was also possible to distinguish these two elements as *pactum de cambiando* and issue against *valuta,* a distinction often made in former German works. The French rule that the cover, the debt of the drawer against the drawee, is assigned by the bill is another derivative of the delegation.

In the common law, the contracts written in the bill are

[18] POTHIER, Traité du contrat de change, Oeuvres de Pothier (1847) vol. 4, p. 473 ff.

cornerstones of the legal system of bills. But what do they mean? Lorenzen [19] regretfully defines this contract as the ordinary concept expressed by this word, without regard to the important fact that the obligation arises from the form of the bill rather than from mere agreement; this contract should not be burdened at all by the requirement of consideration.

Our question is this: Does the "contract" as the word is used in the acts still mean the ancient contract of delegation? If I am not mistaken, the answer should be negative, and what is meant is the pre-existent agreement presupposed before any formal contract is executed. It is the agreement between the immediate parties that the bill should be delivered with the signature of one party; hence, delivery of the bill, in correspondence with, "in order to give effect" to,[20] that agreement completes the transaction. This, of course, is simple language, neutral in itself to more searching analysis. But it does not justify the common notion of a "contract" including the entire legal transaction between the parties in question. Hence, the constantly urged opposition between the common-law emphasis on delivery as last act of the "contract" and the civil-law stress on the signature does not appear a priori quite convincing.

On the Continent, quite a number of theories underlie a "contract" to assume cambial obligations. This is a different concept. What the parties agree upon by this contract has primarily nothing to do with their basic relationship such as sale, payment, or gift, but is limited either to unilateral issue of the bill or to issue plus delivery. Be-

[19] LORENZEN 29.

[20] National Exchange Bank v. Rock Granite Co. (1911) 155 N.C. 43, 70 S.E. 1002: In view of the rule that a contract is executed where "the same becomes a binding agreement," the courts hold that the liability of an indorser is controlled by the laws of the state in which the note is indorsed and delivered.

tween these two variants there was much controversy; recently, however, the theory, once proposed by Einert, regarding the unilateral "creation" of the instrument by the drawer as the source of the obligation has lost most of its following. There is a marked tendency among leading writers toward a combination of the written declaration by drawer or indorser, with a contract between him and the payee or indorsee, respectively, concluded by the delivery of the bill (German *Begebungsvertrag*). The German Reichsgericht has adopted this theory with respect to issuance and indorsement, though not acceptance.[21] It has been contended that this is also the best foundation for the rules of the Geneva Convention.[22] But even if this is correct, which must not be examined here, it should not imply in any case that all states, members of the Convention, have agreed on the high degree of abstractness ascribed to the German obligation written in a bill of exchange. This leads us to a problem not yet considered in the conflicts literature.

3. Influence of Underlying Relationships

To define the problem, a few facts of the municipal systems ought to be borne in mind.

The problem scarcely regards the provisions of all legal systems whereby either "a bona fide holder," or "a holder in due course for value" is protected against the defenses that his debtor may draw from his underlying relationship with another cambial debtor. The position of this privileged holder is independent of the ground on which prior holders acquired their own positions. This phenomenon

[21] RG. JW. 1928, 231; 134 RGZ. 33; formerly this theory was also applied to the obligation of the acceptor, 24 RGZ. 87; but this was abandoned, delivery not being required. 74 RGZ. 353, *cf.*, 134 *id.* 34.

[22] Hence, the German Reichsgericht maintains its twofold theory, s. last note; 162 RGZ. 338; PRIESE-REBENTROST 4, 7.

is analogous to many other situations where a bona fide purchaser is protected. Particulars of requirements vary, but no fundamental divergence of views is in issue.

If, however, we set aside this case, most important in practice but exceptional in the organization of the law of bills, there is a basic difference of degree in which the bill is detached from the underlying relation. The German law of negotiable instruments has elaborated a rigorous separation of the obligation flowing from the writing on the bill and the "cause" or legal ground of the undertaking. The debt arises from the signature and is enforceable even though fraud, error, duress, or dissent mar the underlying agreement,[23] as is apparent when the holder sues his own indorser who fails to appear in court. The defect must be alleged and proved by the defendant. This is essentially the reborn classical Roman law of *stipulatio* and *exceptio doli* or *exceptio pacti.* In the French system, the writing produces but a presumption of the validity of the written obligation. Common law does not even recognize this much, although it is very difficult to ascertain its exact conception. Without doubt, basically the efficacy of every obligation in the bill presupposes the fulfillment of all requirements for validity and enforceability of contracts.

This conceptional divergence has its principal importance in procedural situations such as nonappearance of the defendant, summary procedure on instruments or privileges of enforcement, traditional in civil-law countries, but is not devoid of substantive effects.

What, then, ought to be our approach to the following simple cases?

[23] The Reichsgericht (March 20, 1941) 166 RGZ. 306, overruling its own former practice, stated that the debtor cannot oppose defenses of his indorser to a bona fide holder even though the latter is also creditor of the underlying debt.

In a lawsuit in Germany, the holder—for some reason not a holder in due course—sues on a bill issued in Chicago and indorsed to him in Frankfurt, Germany. The defendant drawer, an American in Chicago, pleads usury in the contract between him and the payee. Or the signature of a French drawer, defendant against a subsequent indorsee, upon an indorsement made in Germany, is attacked in a German court under evidence of fraud. Are these defenses to be construed under German *lex fori?* Under this law, this would mean the existence of a full right arising from the writing and of a mere defense based on unjust enrichment or on the tort of a collusive conspiration. Under Illinois law, there would be no obligation, nor under French law, after rebuttal of the presumption. Is the German conception even applicable in all countries, because the rights of the holder are acquired under German law *ex scriptura?*

No! Such approach would be detrimental to international circulation by exaggerating the power of local laws at the cost of the law under which the issue occurred. In other words, the law of Illinois or France, governing the validity and effect of the drawer's obligation, also determines what influence its own general law of contracts should have on the cambial obligation. Merely in favor of a privileged bona fide holder, a very large exception frees him from restrictions of prior holders, and, as we shall see, even models for him a new law of acquisition.

A similar case occurs when an English drawer proves that no valuable consideration has been given either between drawer and drawee or between indorser and the present holder. The holder has no right at common law. In the exaggerated German system, he has a claim which must be repelled by a defense strongly controversial in the literature.[24]

[24] ULMER, Festgabe für Heck (133 Arch. Civ. Prax 1931) 213-215.

Generally, it may be submitted that the influence of the underlying transaction on the obligation based on the bill is governed by the same law governing this obligation. This trivial result points to an important method. The special conflicts rules are deemed to refer to so much of the ordinary law of obligations of the decisive place as the domestic law of this place prescribes. This principle will help answer our next question.

4. Scope of the Cambial Rights

"Extracambial" (general law) obligations are naturally controlled by their own laws rather than by the law of the place of issue or indorsement or payment, the preferred contacts of cambial conflicts rules. A sale of goods produces obligations governed, e.g., by the law of the seller's domicil. If the buyer accepts a trade bill of exchange, he enters into an obligation under the law of the place where he has to pay, which is normally his own domicil. The seller may transfer both his debts to the same person, e.g., his discount bank, and the causes may be joined in a law suit. But the causes of action remain different.

The questions whether the drawer has to furnish the funds to the drawee,[25] and whether the drawee is bound to honor the bill by acceptance and payment, depend merely on the underlying relationship between drawer and drawee, such as bank account, letter of credit, confirmed documentary credit, or other credit arrangement. Most

[25] ARMINJON ET CARRY § 453; ARMINJON, DIP. Com. 339 § 178; G. ARANGIO-RUIZ § 85 against the older opinion of French Cass. civ. (Feb. 6, 1900) Clunet 1900, 605; DIENA, 3 Tratt. § 217; OTTOLENGHI § 55; PILLET, 2 Traité 845; CAVAGLIERI, Dir. Int. Com. 373; WEISS, 4 Traité 460.

On the question whether the provision is transferred and by which act, see Geneva Rules art. 6, vol. 3, p. 442; *cf.*, ARMINJON, DIP. Com. 341 § 180; otherwise DICEY (ed. 6) 683. And see on various connected problems HUPKA, Wechselr. 272.

authors apply the law of the drawee's domicil.[26] More correctly, Arminjon invokes the law of the contract existing between drawer and drawee.[27] That holders do not know whether there is a duty to accept, is certainly a disadvantage, but not one caused by conflicts law.

Illustrations. (i) A bill issued in Germany, payable in Switzerland, was attacked by the acceptor on the ground of immoral consideration. German law governed the cambial requirements, but Swiss law was applied to determine whether good morals were offended.[28]

(ii) A bill of exchange was issued and accepted in the state of Monaco and payable in Rouen, France; the defense of the acceptors against the action of the holder was that the bill was given for payment of a sales price higher than the amount of the bill, to evade the tax laws, and that the debt depended on a certain condition. The Tribunal of Rouen allowed the action under the alleged law of Monaco. In correct application of the Geneva Rules, not the law of Monaco, but French law as *lex loci solutionis* governed, under which only a rebuttable presumption obtains for the existence of cover and the French provision avoiding a debt for fiscal fraud was inapplicable to a Monaco transaction. The alleged unfulfilled condition belonged to the extracambial relationship, effective between the original parties, though not against a holder in good faith.[29]

(iii) A buyer paid a part of the price by indorsing a promissory note of a third person which was not honored. The court in Puerto Rico denied recourse of the seller against the buyer (C.C. 1170, derived from Spanish C.C. art. 1170) on the theory that NIL abolished such claim. In reality, recourse in the underlying relationship is not affected by the cambial law.[30]

[26] 4 LYON-CAEN ET RENAULT § 646; DIENA, 3 Tratt. 118 ff. § 227.

[27] ARMINJON ET CARRY § 438, p. 498 n. 1, 2; ARMINJON, DIP. Com. 326 § 171; against other opinions, *cf.*, LORENZEN 148 n. 313—law of the place of presentment; DICEY (ed. 6) 683.

[28] App. Zürich (Sept. 17, 1929) 29 Bl. Zü. R. 298 No. 123.

[29] Trib. com. Rouen (June 17, 1949), Roganne v. Quevillon, S.1950.2.41, Clunet 1950, 554, with critical notes.

[30] Paris v. Canely (1952) 73 D.P.R. 403; Note, 22 Rev. Jur. Un. P.R. (1953) 43.

Two doubtful cases have been dealt with by the Geneva Conflicts Rules. One regards the so-called claim for unjust enrichment recognized by law where an extinguished bill is excluded as a cause of action. This claim is construed in Germany as a residue of the "cambial" claim.[31] The other case is that of a French bill dishonored and lacking cover, so that the holder has no extracambial hold on the drawee, but under French law still enjoys a claim on the ground of the bill against the drawer, even though he lost his recourse through negligence.[32]

The Geneva treaty leaves both these cases to be determined by the law of the place of issue, although merely with force within the territory of this law.[33] This is an arbitrary and unsatisfactory escape.[34]

Cover. The Hague and Geneva Conferences proved unable to unify the conspicuous diversity of the laws concerning the assignment of cover ("provision").[35] By express statement, it was left to the national laws to decide whether the drawer has to provide cover at maturity and whether the holder has "special rights" in the cover.[36] Conflicts rule 6 adds the provision that:

"The question whether there has been an assignment

[31] See STAUB-STRANZ, art. 89 n. 2, and other comments to the *Wechselordnung*. See also ARMINJON, DIP. Com. 380 § 209.

[32] France: C. Com. art. 116, par. 6.

[33] Hague Convention, art. 6; Geneva Convention, annex II art. 15.

[34] For other subjects on the fringe of the law of bills see MONACO 17.

[35] *Supra* Vol. III, p. 415 f., 441 ff. The particular laws are described by JOAQUIN VIJIL TARDON, La provision de la lettre de change (Paris/Lausanne 1939) and the problems surveyed by ERNST E. HIRSCH, Der Rechtsbegriff Provision—im französischen und internationalen Wechselrecht (Marburg 1930).

[36] Annexe II to the Geneva Convention, art. 16. The legislators, thus, though inserting the assignments into the formal cambial law, separated them from the Convention. In this spirit, Italy used separate legislation to introduce transfer of the underlying debt of the drawee in special cases, although requiring a formal clause on the instrument. See MOSSA, Cambiale 179 § 51; ANGELONI, Cambiale 765; R.D. Sept. 21, 1933 Nr. 1345, L. Jan. 15, 1934 n. 48, art. 1 on bills secured through assignment of debts derived from supply of merchandise.

to the holder of the debt which has given rise to the issue of the instrument, is determined by the law of the place where the instrument was issued."

The complex of problems thus excluded from the uniform set of rules, once prevailingly considered as of cambial nature, is of uncertain delimitation as respects the general, "civil," law.[37] It would seem settled, however, that *lex loci contractus* governs the conditions of the transfer (e.g., whether there is an assignable debt or what is "cover"), the form of the transfer (by a written clause or by the force of law, that is, the fact of the issue), and at what time the assignment occurs (at issue, or at the time of the drawer's bankruptcy or at maturity).[38] It results also from the long debates that the relationship between the holder and the drawee as well as the holder's preference over the creditors of the drawer depends on the law of the place of the issue.[39] However, the rights and duties existing between the drawer and the drawee remain in the sphere mentioned above governed by the law of their contract.

The draftsmen chose the law of the issue against the strongly advocated minority view that the law of the place of payment is most directly concerned.[40] In the law of checks, in fact, the latter contact was adopted. This controversy and the further question whether the effect of the issue of a bill on the assignment of cover is really a cambial matter (as we think is the case), may explain a curious proposition by the editors of Dicey.[41] They char-

[37] *Cf., supra* n. 25 and see the recent writings: ARMINJON ET CARRY § 453; ARMINJON, DIP. Com. §§ 178-180; G. ARANGIO-RUIZ § 85 where the partly different views of older writers are cited.

[38] HUPKA 273; ARMINJON, DIP. Com. 339 § 178.

[39] STAUB-STRANZ, art. 95 n. 5 and cited German writers.

[40] This was still the proposal of PERCEROU in the Conference, Comptes rendus 364.

[41] DICEY (ed. 6) 683 *in fine.*

acterize this problem as one not pertaining to the bill but to assignment and conclude that "a cheque drawn and issued in Scotland" (where cover is deemed to be assigned) on a London bank should not operate as an assignment of the drawer's balance in England. This solution is inacceptable in the member states of the Geneva Convention as well as in the United States. Speaking of checks, the *lex loci solutionis* would be quite reasonable, but only with respect to cambial effects. As the English Act now stands, it presumably prescribes the *lex loci contractus;*[42] and an assignment of a simple debt ought to be governed by the law of the place of transfer rather than by the law of the debtor.[43]

Again, if in the absence of any assignment by cambial law, the parties to the issue of a bill make an accessory special contract of equitable assignment, this, of course, reenters into the noncambial sphere; and this is true notwithstanding the duty of diligence, which the payee or holder must observe where the bill is not paid.[44]

Enforcement Privileges. The old *instrumenta guarantigiata* permitted the creditor immediate enforcement without preceding law suit for judicial ascertainment and condemnation. Such privileges still exist, particularly for enforcing a claim upon bills of exchange. In German law, there is no doubt about the procedural nature of this faculty of the creditor.[45] In Italy, however, the decisions were divided on the characterization of the effects of a bill en-

[42] BEA sec. 72 (2); the second paragraph on inland bills in this case is not applicable because of sec. 53.

[43] *Supra* Vol. III, p. 433 f., 415 f.

[44] England: Banner v. Johnston (1871) L.R. 5 H.L. 157; Ex parte Dever *in re* Suse (1884) 13 Q.B.D. 766.

United States: 6 C.J.S., Assignments § 60, esp. p. 1112 relating to checks.

[45] RG. 9 RGZ. 430 and JW. 1906, 716, n. 15. Once, it is true, SALPIUS, 19 Z. Handelsr. (1874) 1, 64, had to refute a theory connecting the law of protest and notification with the executive force of bills.

abling the holder to enforce without judgment. The majority considered the executive effect of the bill as a material quality of the obligation, controlled by the law of the place of the issue, hence accessible also to foreign bills.[46] Learned opinion,[47] sanctioned by the Supreme Court, correctly emphasized the procedural nature of the problem, calling for the law of the forum.[48] Hence, foreign bills sufficient as such under their law of issue should have enjoyed the privilege. The legislation of 1933, however, has restricted this consequence to bills so enforceable under their law of issue.[49]

In the United States, clauses permitting the creditor to confess for the debtor, in order to reach at once a confession judgment, are prohibited in most, but not all, jurisdictions. An unsettled controversy has brought up the most diverse answers to the question which law applies.[50]

III. Private Autonomy

Prevailing judicial authority in the United States [51] as well as in Europe [52] has taken it for granted that the free-

[46] App. Venezia (Feb. 23, 1928) Rivista 1929, 273; (May 16, 1930) *id.* 1931, 544; Cass. Ital. (Nov. 23, 1934) Foro Ital. 1935 I 17; App. Napoli (Dec. 8, 1935) Rivista 1938, 185; *cf.*, De Nova, Revue Crit. 1950, 362, n. 16.

[47] Chiovenda, Principii di diritto processuale civile (ed. 4, 1928) 130, 253; L. Mortara, Manuale della procedura civile (1926) vol. 2 § 790; D'Amelio, Scritti 271; Bosco, Rivista 1929, 278; Baldoni, *id.* 1931, 548; Monaco, 3 Giur. Comp. DIP. 44; Cavaglieri in Banco, Borsa e Titoli di Credito 1942 I 130 ff.

Mexico: C. Com. art. 1391, IV: H.R. Almanza, Los Conflictos internacionales de leyes en materia de Titulos de credito (Thesis, Mexico 1940) 23, criticizes the lack of reciprocity.

[48] Cass. Ital. (June 17, 1929) Foro Ital. 30 I 101; App. Milano (July 16, 1932) Foro Lomb. 1933, 464 cited by Cavaglieri, Dir. Int. Com. 400.

[49] Decree of Dec. 14, 1933, no. 1669 (Bills of Exchange Law) art. 63; Morelli, Dir. Proc. Civ. Int. 25 § 12.

[50] Beutel-Brannan (ed. 7) 290 ff., § 5 (2); Note, 13 A.L.R. (2d) 1312 (1950); Dean, Ann. Survey Am. L. (1950) 48.

[51] Story § 317; 2 Wharton §§ 447 ff.

[52] Surville § 484; 2 Frankenstein 426; Haudek 15, 43; Raiser 22 ff., 34 ff., 42; Kessler 141-143; Arminjon, DIP. Com. 297 § 150.

dom of the parties, in the limits as it exists in the various countries, extends to bills and notes. The American decisions, from early beginnings in Massachusetts, applied the intended law of the contract, although this law was variably identified. It has frequently been argued in this country and abroad that the law of the place of drawing or endorsing governs because intended by the parties to the issue or to an indorsement, or that the place of payment is decisive because it is contemplated when a note is made or acceptance is declared or even in other cases.[53] In an important practical application, an intentionally wrong indication of a place of issue in a bill of exchange has been recognized as valid for the reason that the parties may thus determine the applicable law. The Código Bustamante in its primary rule of the matter declares for the law intended by the parties.[54]

All these borrowings from freedom of contract are unnecessary. Hypothetic intention is now replaced by objective criteria;[55] a false date presents a problem of its own.[56] Assuredly, no positive law prohibits express agreements to select a law;[57] to have effect, however, within the cambial relation, the agreement would have to be written in the bill,[58] such as "Pay according to the law of Panama;" and such a clause seems to be extremely rare.

Without a clear direction by the instrument's wording, the nature of negotiable papers is repugnant to party agree-

[53] SALPIUS *op. cit.* n. 26, 17, taught that the place of payment is intended by the parties to govern the acts necessary for exercising and preserving recourse; RENAUD, Wechselrecht, followed this view, but changed it later (ed. 5, § 8).

[54] Cód. Bust. a. 264 ff. ("a falta de convenio"), criticized by CORDIDO FREYTES (*supra* n. 4) 40 f., 93, 96, 98.

[55] *Supra* Vol. II, 436 ff.

[56] *Infra* Ch. 61.

[57] France: Paris (Aug. 18, 1856) D. 1857.1.39; (June 17, 1899) S. 1900.1.225. Germany: RG. (Jan. 15, 1894) 32 RGZ. 115.

[58] See the excellent argument of RAISER 51 ff.

ments outside the writing. Clauses not visible on the face of the instrument can have no effect except between the parties to the agreement. To accord private autonomy where it does not belong compromises its necessary functions elsewhere.

The editors of Dicey's sixth edition to the same effect oppose the traditional doctrine of the proper law in matters of negotiable instruments.[59]

This is also the case of the times allowed by the laws for presentment, protest, and notice. Modifications of the periods of time or of the sanctions, allowed in certain limits, must be indicated in the bill to affect third parties.

Another matter is interpretation of the cambial declarations. As the Italian Supreme Court puts it, neither the principle of *letteralità* nor even that of formalism prevents an interpretation of the declarations according to their true meaning. Thus, which of several signatures was that of the drawer, should be ascertained from the instrument but with the aid of all circumstances.[60]

IV. The Bill and the Accessory Obligations

1. Principles.

(a) *The principle of the basic bill.* Section 3 (1) of the British Act defines the formal requirements of a bill. It must contain the person who shall pay, the payee, the sum to be paid, the time of maturity, and the place of payment. Observance of these requirements is a condition for the existence of any right to be based on the bill; they are the common basis of the obligations of drawer and

[59] Dicey (ed. 6) 681; M. Wolff, Priv. Int. Law § 468; Wigny, Revue Dr. Int. (Bruxelles) 1931, 811; Arminjon, DIP. Com. 298 § 150; 2 Percerou et Bouteron 179 § 210.

[60] Italy: Cass. (Jan. 15, 1940) Riv. Dir. Com. 1940 II 237, 8 Giur. Comp. D. Com. n. 31.

acceptor as well as of all indorsers and other obligors. The German name for this basis is *Grundwechsel.* Its substance is analyzed as a mandate by the drawer to the drawee to pay, or in a note, the promise of the maker to pay. English expressions are "the bill," "the instrument," "the order or promise to pay." In more pregnant language, Lorenzen speaks of the *original contract* in contrast to the *"acceding"* contracts. In conflicts law the basic bill is doubtless subject to one, "the single" law, whereas the supervenient writings produce obligations either submitted to several laws or forming the subject of profound doubts. Again, consciousness of these contrasting concepts saves notable error and confusion. How could one so ignore the fundamental concepts as to advocate the law of each indorsement for determining the maturity of the bill!

The American courts properly oppose the place of issue to that of payment, although all other contacts should not be excluded a priori.

> "The drawer of such a bill does not contract to pay the money in the foreign place on which it is drawn but only guarantees its acceptance and payment in that place by the drawee . . . His contract is regarded as made at the place where the bill is drawn," with the conclusion that "the necessity of making a demand and protest and the circumstances under which the same may be required or dispensed with are incidents of the original contract which are governed by the law of the place where the bill is drawn rather than of the place where it is payable. They constitute implied conditions upon which the liability of the drawer is to attach according to the *lex loci contractus.*" [61]

(b) *The principle of independence.* The great majority of the courts in all countries have shown a remarkable unity

[61] Amsinck v. Rogers (1907) 189 N.Y. 252, 82 N.E. 134, 12 L.R.A. (N.S.) 875.

in establishing the leading idea that the various obligations arising from declarations on the bill are governed by several laws, each by its own independent law.[62] In the United States, this principle has been stressed from the beginning in early Massachusetts decisions [63] and carried out more consistently than in English law.[64] The statutes and conventions have all followed the same path, despite mounting opposition.

The reasons for this attitude are plain. Historically, the principle is connected with the rule, *locus regit actum,* working separately in every contract documented in the bill. It is argued, as usual, that a signer intends to be bound so far as the law of the place of contracting goes. "The law of the place of contracting and independence of contracts in a bill stay and fall together." [65] More impressive, a bank discounting a bill or a creditor taking it in lieu of payment does not want to inquire into foreign laws controlling anterior written obligations.[66] The courts seek to protect a resident of the forum as well as to avoid foreign laws.

2. Difficulties

The coexistence of the single law of the bill and the several independent laws of the accessory obligations is the most potent cause of disunity. In view of the disconcerting divisions that arose in American decisions, a unitary law once postulated by Pothier [67] has been sought with

[62] On this subject see in the first place LORENZEN'S book and RAISER 58 ff., both with comparative research.

[63] 2 WHARTON §§ 449 ff.; 1 DANIEL §§ 895 ff. The only clear deviation, in Shanklin v. Cooper (Ind. 1846) 8 Blackf. 41, was overruled in Hunt v. Standart (1860) 15 Ind. 33, 77 Am. Dec. 79.

[64] RAISER 41.

[65] GUTTERIDGE 16 (ser. 3) J. Comp. L. at 67.

[66] Both RAISER 59 and STUMBERG 255 ff. emphasize this point.

[67] See 1 DANIEL § 901; MINOR 396; Committee of Legal Experts of the League of Nations, Doc. prépar. 8.

particular energy in this country, aiming at "interdependence" rather than "independence." [68] But the law of the place of payment, most frequently resorted to in this effort, too evidently failed to help as a general criterion.

The Geneva Rules disregarded the countercurrents to the dominance of the two principles, and merely established certain exceptions in favor of a single law. Severe criticism attaches at least to one of these exceptions, while others have been missed.

The great problem remains almost as it was posited by Lorenzen in 1919: What questions are attributable to the law governing the bill as a whole and what questions ought to have their own law? This will be the subject of all following discussions. Clearly, the idea of independent obligations is naturally limited by the basic requirements for the validity of all obligations in the bill. We should not forget that the law thereby applicable includes construction and general rules.

Examples of settled solutions. (i) A bill is issued in France without indicating a time for payment and circulates in England. French law governing the original contract also determines the manner in which the day of payment should be filled in.[69]

(ii) Where the amount of the sum is written in figures and letters contradicting each other, the law of the issue determines which amount is decisive.[70]

(iii) If the bill is "payable to P," the law of the place of issue determines whether it is payable to order (BEA, s. 8, 34) or non-negotiable (NIL, s. 8).[71]

[68] POTHIER, Contrat de change § 155 (for protest); 2 BAR 169; 2 BROCHER 314; PILLET, 2 Traité 856 ff.
[69] *Infra* Ch. 61, IV.
[70] ARMINJON ET CARRY 489 § 432.
[71] FALCONBRIDGE, Conflict of Laws 283.

(iv) Whether a drawee may pay upon a forged indorsement and whether, therefore, the drawer is liberated, is determined by the law of the place of payment as that governing the position of the drawee.[72]

[72] Caras v. Thalmann (1910) 123 N.Y.S. 97, *infra* Ch. 62.

CHAPTER 59

Formal Requirements

I. FORM AND SUBSTANCE

1. Essential Requirements

The traditional Continental doctrine is so accustomed to distinguish between formal and intrinsic requirements of acts and between validity and effects of obligations, that the writers unhesitatingly extend these notions to the law of bills and notes. In this spirit the Geneva conflicts rules establish different rules for "form" (article 3) and "effects" (article 4), although they entirely fail to mention the material requirements.

English and American authors reject any distinction between formal and material validity,[1] although it is controversial whether the English statutory rule on validity and "interpretation" includes "effects."

At the same time, Anglo-American law generally is less rigorous in establishing invalidity of obligations for lack of written expression. They do not require, for instance, the indication of the paper as bill of exchange, of the date or place of the issue;[2] in the United States, however, the order clause is essential,[3] unless the paper is payable to bearer.

The true situation has been explained by a number of

[1] LORENZEN 99 f. and in 30 Yale L. J. 565; BEALE, 23 Harv. L. Rev. 1; GUTTERIDGE, 16 (Ser. 3) J. Comp. L. 62-66.

[2] BEA s. 3; NIL s. 1 and 6 against Gen. Conv. art. 1 and 2.

[3] NIL sec. 1 (4) against BEA art. 8 (4); Gen. Conv. art. 11. For other points of comparison see WIGNY, Revue Dr. Int. (Bruxelles) 1931 at 805.

authors.[4] All essential formal requirements involve the necessity of a written word or clause in the bill and at the same time are an integral part and condition of the content of the contract. The statutes enumerate them exhaustively. A more appropriate category than form is that of "extrinsic" requirements, contrasted with "intrinsic" conditions, such as cause or consideration and consent.[5]

"Form," thus, is not a satisfactory category of conflicts rules on negotiable instruments. The rules using this term are extended by interpretation to broader concepts. But the only adequate and also the widest concept is that used by the American courts: *validity* of the contract, which includes "form and substance."

Yet, such outstanding statutes as the British Act and the Geneva Rules employ narrower language and provoke doubtful interpretations.

2. Narrow Enactments

Sections 72(1) and (2) BEA subject both "form" and "interpretation" of drawing, indorsing, etc., to "the law of the place where such contract is made." An active controversy whether "interpretation" includes validity on material grounds is still going on.[6] Chalmers advocated broad construction.[7] Recently, however, new doubts have arisen from the desire to apply the law of the place of payment to the bill in general.[8] On the platform of the dominant doctrine, Chalmers' construction is certainly right.

[4] DESPAGNET 988; OTTOLENGHI 81; LORENZEN 100; 2 FRANKENSTEIN 422; VEITH, 4 Rechtsvergleichendes Handwörterbuch 493.

[5] G. ARANGIO-RUIZ 183 ff.

[6] BEALE, 23 Harv. L. Rev. 1; NIBOYET, Manuel 657 n. 4; GUTTERIDGE 16 (Ser. 3) J. Comp. L. 62.

[7] CHALMERS (ed. 11) 236.

[8] FALCONBRIDGE, Conflict 283; DICEY (ed. 6) 691, advocating the law of the place of payment.

Article 3, paragraph 1 of the Geneva Rules runs as follows:

"The form of any contract arising out of a bill of exchange or promissory note is regulated by the laws of the territory in which the contract has been signed."

Article 2 deals with capacity and article 4 with effects; both apply, in principle, the same *lex loci actus*. Nothing is said about other requirements of validity. This defect must be, and commonly is, cured by extensive construction as in the British Act. Since the law of the place of signature governs "form," capacity, and "effects," intrinsic validity cannot escape the same law. This result creates a partial uniformity with American practice and lessens considerably the importance of the concept of form.

Nevertheless, the following survey is forced by the existing legal situation to proceed from "form" to "material validity" to "effects." Not only are the obligations of an acceptor and a maker governed by special laws under various rules, but the enacted laws have piled up distinctions and exceptions just in regard to formalities.

Concept of Form. In this matter, the contention, maintained by this writer, is commonly accepted that conflicts law must have an autonomous concept of form, viz., the external expression of a transaction.[9] To the same effect, the English leading case, *Guaranty Trust* v. *Hannay,* has subordinated to the rule on "form" the question whether a chain of indorsements is interrupted by an agent signing for the payee or an indorsee, without indicating that he is an agent.[10]

[9] *Supra* Vol. II, p. 497.

[10] Guaranty Trust Co. of New York v. Hannay [1918] 1 K.B. 43, [1918] 2 K.B. 623. *Cf.,* Koechlin et Cie. v. Kestenbaum [1927] 1 K.B. 616, 897, per Bankes, L.J., 899 per Sargant, L.J., and comment by the editors of DICEY (ed. 6) 685.

3. Scope of Form

Although a sound construction of the statutory and conventional provisions may be satisfied with certain analogies to the rules on "form," their direct application goes rather far into the province of the substantive function of essential form requirements. The rule, referring formalities to the law of the place of acting, has been applied, e.g., to the questions:

Whether the instrument is complete in form [11]

Whether a contract in a bill is unconditional [12]

Whether a clause indicating the consideration ("Valuta clause") is essential,[13] or

Whether an indorsement in blank is admitted,[14] and

Whether acceptance may be declared orally, according to one decision of the United States Supreme Court,[15] which is contradicted by another decision [16]—

What law determines the treatment of an incomplete declaration, which, however, complies with the formal essential of the law of the issue? [17] For instance, a bill is issued in the United States and sent to France to be filled in when an indorser is found. In one view, American law should prescribe how the instrument should be completed, because no new contract is made by the agent in France.[18]

[11] Editors of DICEY (ed. 6) 685 n. 77 find this "illogic but convenient," but I do not see why it is not a necessary incident of the *lex loci*.

[12] Guaranty Trust Co. of New York v. Hannay, *supra* n. 8, found no conflict because the bill was not conditional under both laws; Koechlin v. Kestenbaum, *supra* n. 8.

[13] NORBERTO PIÑERO, La Letra de Cambio (Buenos Aires 1932) 193.

[14] Admitted in the common law and Argentina, prohibited in the Geneva Convention and most civil-law jurisdictions.

[15] Scudder v. The Union National Bank of Chicago (1875) 91 U.S. 406.

[16] Hall v. Cordell (1891) 142 U.S. 116. Both decisions use fictitious assumptions of party intention.

[17] See the exhaustive comment by LORENZEN 88-90. American courts have dealt with very few problems concerning pure form. See 2 BEALE 1185 § 336.1.

[18] Thus, applying art. 3 of the Geneva Rules, ARMINJON, DIP. Com. 301 § 152.

Under another view, French law decides, since the local law is better suited to regulate the formal requirements.[19] But since a bill carrying a blank permissible under the law of the issue is a valid instrument, the first view is correct. Only where the bill is deemed to be issued in the second country should it be considered subject to the place where it is completed.

Likewise, the law of the issue determines whether undesirable additions to the normal initial context of a bill should be taken as not written or make the bill void.[20]

II. Locus Regit Actum

In a notable unanimity of principles, *all laws* agree that the "form" of an act contained in a bill or note is subject to the law of the place where this act is done.

1. Imperative Function

In this matter, *lex loci actus* has commonly preserved its imperative force.[21] But, curiously, French courts, from the beginning of this century, developed the tendency to convert the principle to its general modern role as merely permissive, creating an option between *lex loci* and the national law of the parties.[22] Under the Geneva Rules, now in force, there can scarcely be a doubt, also in France, that the parties may not choose their national law. Only the provisions reserving the application of the national law to the states have the power of derogating from the law of the place of the act. The domiciliary law is entirely excluded.

[19] *Cf.*, Arminjon et Carry 472, and Gen. Conv. art. 13 par. 2.

[20] On the difference, Swiss BG. (Feb. 28, 1930) 65 BGE. II 66; *cf.*, 74 RGZ. 339; RG. Jur. Woch. 1935, 1778 against the case of 21 ROHGE. 169.

[21] Diena, 3 Tratt. 22 §§ 209-212.

[22] Diena *ib.* p. 33. *Cf.*, *supra* Ch. 55 and Ch. 58, III.

2. Where is the act done?

The problem is old. The statutists usually discussed the case where a bill of exchange signed by the drawer or indorser in one place is sent to the payee or indorsee staying in another place. Jan Voet solved it as follows:

"Quia vero, in quibusdam circa cambiorum jura variant leges et consuetudines variarum regionum, notandum est, in decidendis circa haec controversiis spectandas esse leges loci illius, ad quem litterae cambii destinatae, et in quo vel acceptatae, sunt, vel acceptari debuerunt, non item loci unde missae; cum illic contractus intelligatur celebratus, ubi implementum eius destinatum est." [23]

This doctrine was fully adopted in England. Sending and receiving the document completing the act constitute the test of the applicable law. On the Continent, the contrary doctrine prevailed. The signer assumes his obligation by the signature itself, which in some systems may also dispossess him of the title.[24] These antagonistic theories have been perpetuated with certain modifications.

(a) *The Common-Law Doctrine.* According to the British Act [25] and established American practice,[26] the applicable law is determined by the place where a bill is delivered by the drawer, or indorser, with his signature.

Delivery is legally defined as

"transfer of possession, actual or constructive, from one person to another." [27]

Leaving out, for the moment, the acceptor, who is treated differently, what reason is given for this important rule?

The statutes themselves seem clearly to indicate that delivery is essential inasmuch as it "completes" the act.[28]

[23] Comm. ad Pand. L. XXIII, tit. II § 10.
[24] DIENA, 3 Tratt. 25 n. 1.
[25] BEA sec. 21; NIL s. 16. Canada: BEA ss. 2, 31, 32, 39, 40, 41, 178.
[26] Ludlow v. Bingham (1799) 4 Dal. 47; Restatement § 312.
[27] BEA s. 2; NIL s. 191.
[28] BEA s. 21; NIL s. 16: completions to the act.

The latter proposition is literally true; if a bill is signed on a Sunday and delivered on Monday, it is not deemed to fall under the Sunday statutes.[29] Hence, the theory that the place of the final act in the course of concluding a contract determines the law applicable to the contract, has been applied here—this is Beale's teaching.[30]

Not believing in the soundness of this theory, I think that it does not even do justice to the common-law doctrine.[31] However, at this juncture, it is important to note the large qualifications of the principle.

Where the signer is authorized to send the bill by mail, it is remembered that the English postal regulations prevent the sender from reclaiming a posted bill; therefore, the place where the signer mails the letter is deemed to be the place of delivery.[32] (This theory is not readily applicable to foreign mail in case the sender of a letter may retrieve it from the post.)[33] In the absence of authorization and of estoppel, the decisive place would be where the postman hands out the paper.[34] But this case is quite rare. In domestic business, it may be taken as the rule that the "contract" is completed by a unilateral act quite as ordinary

[29] In re Estate of Martens (1939) 226 Iowa 162, 223 N.W. 885.

[30] The definition by 2 BEALE 1047 f. of delivery as the final act making the contract binding is corrected by FALCONBRIDGE 276 f.: the issue is completed by the delivery, but the binding force depends upon the applicable law. However, our problem is why common law has derived this rule from the binding force of delivery.

[31] *Infra* Ch. 61.

[32] England: Ex p. Cote In re Deveze (1873) L.R., 9 Ch. App. 27, 31 f., per Mellish, L.J.; Kleinworth v. Comptoir National d'Escompte [1894] 2 Q.B. 157; Thairlwall v. Great Northern Railway [1910] 2 K.B. 509 CHALMERS (ed. 12) 52 n. 1.

United States: Trego v. Cunningham's Est. (1915) 267 Ill. 367, 108 N.E. 350. Restatement § 314.

[33] In re Deveze (1873) L.R. Ch. App. 27, 31 f.; C.A. in Chancery, per Mellish, L.J.

[34] Lysaght v. Bryan (1850) 9 C.B. 46, 137 E.R. 808.

contracts are concluded by mailing acceptance,[35] and this also in the United States, despite modified postal rules.[36] This act, theoretically, is independent of the transfer of ownership; but again, the transfer of title will usually coincide with acceptance according to the intention of the parties. As delivery may be constructive, it can be effected by what is called in civil law *constitutum possessorium*.[37]

Since signing and sending, thus, occur at the same place, the result approaches closely the Continental legal situation. Yet, this is not all. According to the statutes, a valid and intentional delivery is presumed when a signer is no longer in possession of the bill;[38] and the same is "conclusively presumed" in favor of a holder in due course.[39] A holder in due course is not required to deliver the original bill to the payee in order to exercise his indorsement rights.[40] "Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement." [41] Finally, an indorsement is presumed to be made at the place where the instrument is dated.[42] Although the last provision no longer fits the circumstances, the other rules are of high practical value, notably the non-

[35] It may also be recalled that an insurance policy indicating that it is signed, sealed, and delivered may be kept by the insurance company for the disposition of the insured and is then deemed to have been delivered. Xenos v. Wickham (1867) L.R. 2 H.L. at 312. This has been generalized for deeds.

[36] Dick v. U.S. (1949) 82 F. Supp. 326, for this reason rebelled against the mailbox theory, but see Note, 34 Minn. L. Rev. 140-142.

[37] Pennington v. Crossley & Sons (1897) 13 T.L.R. 513.

United States: 6 C.J.S. 513 n. 63, cited with approval by Seawell, J., in Everett v. Carolina Mortg. Co. (1939) 214 N.C. 778, 1 S.E. (2d) 109, 113.

[38] NIL s. 16 i.f. BEA s. 21 (3).

[39] NIL s. 16 sent. 3; BEA s. 21 (2) i.f.

[40] City of New Port Richey v. Fidelity and Deposit Co. of Md. (Fla. 1939) 105 F. (2d) 348, 350.

[41] NIL s. 11; BEA s. 13(1).

[42] NIL s. 46. See also Chemical Nat. Bank of N.Y. v. Kellogg (1905) 183 N.Y. 92, 75 N.E. 1103.

rebuttable presumption in favor of the bona fide holder. American courts also have held that the place at which an instrument is dated is deemed prima facie to be the place of delivery [43] and that this presumption is conclusive for the benefit of a holder in due course.[44]

(b) *The Civil-Law Doctrine.* The place where the signature is written has been selected on the Continent because it is said to be easily identified either by the writing or by other evidence. This practical motive inspired the draftsmen of the Geneva Rules, who definitely were unwilling to subscribe to any theory of unilateral creation of obligations. But, again, is this reason convincing? The answer largely depends on the solution of the question: whether the "place of the signature" means the true place where it has been executed or the place where the instrument says that the signature was made.

Locus verus or locus scriptus? This is an old and unfortunately still controversial problem. Pothier wrote that the absence of a date or an error in it cannot be held against the drawer or the acceptor, no more than the omission of the place where the bill is written.[45] Yet modern prevailing opinion clings to the place of signature in its true form and denies that ignorance of a holder should be protected when he believes in a falsely alleged place.[46] To be sure,

[43] LORENZEN 84 citing Lennig v. Ralston (1854) 23 Pa. Sta. 137; Second National Bank v. Smoot (D.C. 1876) 2 MACARTHUR 371; Parks v. Evans (Del. 1879) 5 Houst. 576.

[44] Towne v. Rice (1877) 122 Mass. 67; LORENZEN 85 n. 95.

[45] POTHIER, Contrat d'échange (4 BUGNET 486) § 36.

[46] Austria: OGH. (Oct. 6, 1905) 19 Z. int. R. 285; BETTELHEIM 109.

France: App. Colmar (March 11, 1933) Rev. Crit. 1934, 138; and Note NIBOYET.

Germany: (formerly) OLG. Nürnberg (May 6, 1925) JW. 1926 384; check issued in Germany, dated at New York; the presumption that the issue was in New York is adopted but held rebutted by the fact that the check, as early as four days after issue, was negotiated in Germany. BAR, Int. Hand. R. 384; M. WOLFF, Festgabe für Wieland (1934) 457; STAUB-STRANZ 85 n. 3, 91 n. 15.

Italy: DIENA, 3 Tratt. 26.

there is a rebuttable presumption that the place written is the true place.[47]

A contrary opinion which originated in Germany maintains, however, that the written place enjoys preference, whenever its law subjects the debtor to a stronger liability.[48] Certain authors of this group restrict this view to the protection and choice of bona fide holders. A justification has often been sought in the general freedom of the parties to select the applicable law by choosing an appropriate place and indicating it as the place of signature.

At present, on the ground of the Geneva Rules, the dominant opinion follows the impressive majority of the commission drafting the Geneva Rules who gave unmistakable approval to the strict requirement of the real place.[49] Diena was particularly eager in advocating this rigor. Although the presumption in favor of the written place is conceded,[50] no holder enjoys a defense against the proof that the signature was affixed at a place not visible on the bill.[51] Where the fictitious character of the indication is evident on the face of the instrument, the court

[47] 23 RGZ. 500. It is presumed that a merchant signs a bill at his business place, a private person at his domicil.

[48] Germany: ROHG. (May 11, 1872) 6 ROHGE. 125; RG. (Jan. 15, 1894) 32 RGZ. 115, 117; 91 *id.* 130 (with respect to bills issued "abroad"); KG. (May 22, 1916) 35 ROLG. 2; and constant practice of the 13th division. IPRspr. 1931 96; 1932 95 and 101; 1933 46; JW. 1932 754, and see *supra* n. 8. 2 BAR 182; 2 GRÜNHUT 579 n. 35; 1 MEYER 651; 2 *id.* 368; 2 FRANKENSTEIN 426; NUSSBAUM 319; ULMER, Wertpapiere 286.

Italy: MOSSA IX 3 Annuario Dir. Comp. 367 ff.; MONACO 109.

Switzerland: BG. (April 6, 1900) 26 BGE. II 258; (April 3, 1912) 33 BGE. II 135; (July 7, 1914) 40 BGE. II 407.

[49] A German proposal in favor of the written place was rejected, Comptes rendus 352, 430.

[50] PRIESE-REBENTROST, Art. 92 n. 2. MONACO 108: the literal wording has preference over the not mentioned reality.

[51] ARMINJON ET CARRY 474; G. ARANGIO-RUIZ 149 ff.

has to note it ex officio.[52] However, not everyone shares this view.[53]

In case a written place or date is missing, some laws, such as the Geneva Convention (article 1) with respect to the drawer's or acceptor's signature, declare the obligation inexistent. Where this is not the law,[54] it is commonly assumed [55] that the place of the signing may be proved by means of evidence allowed at the forum. If no evidence is presented, much favor is shown for the law of the domicil of the obligor,[56] because this place is usually known to the parties or is easily ascertainable. It is also normally just the place where the signature is expected to happen.

Delivery in municipal civil law. Our comparison would be entirely defective, if we were not to appreciate the forceful European debates about the role that delivery, that is transfer of the title in the paper, exercises in the law of negotiable instruments. Without accepting every shade of any of the various doctrines, it seems, indeed, almost obvious that a normal creation or transfer of a bill is composed of three acts: agreement, signature, and delivery, of which the first in the Germany theory is extracambial. Some authorities lay all the weight on the contract of delivery *(Begebungsvertrag)*. But even theories starting from the idea that the main part of the entire transaction is the unilateral act of signing, at present consider delivery among the essential elements. Thus, in the view of a

[52] App. Colmar (May 11, 1933) Rev. Crit. 1934, 138.

[53] See *infra* n. 61. The Kammergericht upheld its practice, *supra* n. 41; (Nov. 4, 1935) JW. 1936, 2102, *contra:* RILK, *ibid.;* KNUR UND HAMMERSCHLAG, Kommentar zum Wechselgesetz (1949) art. 92 n. 1. See HUPKA 253, RAISER 57; ULMER, Wertpapiere 285 agrees in principle but gives the holder a choice to qualify his claim in accordance with the real place of signature, apparently the result of GRÜNHUT, *supra* n. 41.

[54] BEA s. 4, 12; NIL s. 129, 13; Portuguese C. Com. art. 282.

[55] See MONACO 111 f.

[56] SALPIUS, 19 Z. Handelsr. (1874) 11; 2 BAR 182; 2 MEYER 368; BETTELHEIM 110; RAISER 55.

leader of scholarly research, the unilateral act of signature creates the cambial obligation only under the legal condition that the contract of delivery of the instrument follows. The full legal effect is brought about by the two connected acts.[57] Of course, in the case of a bona fide holder, the contract of delivery is complemented by the protection of *bona fides*.

Rationale. The Anglo-American modifications of the axiomatic function of delivery obviate largely the disadvantages connected with the fact that the place of delivery is never visible on the bill. But the principle is defeated by the exceptions, and the reliance of conflicts rules on presumptions and fictions also is a sign of an unsound theory.

On the other hand, the German theory gives the signature exclusive importance, in contradiction to the necessity of delivering the bill for any normal purpose. Moreover, the insistence on the real place of signing, ultimately deriving from a credence in the magic power of *lex loci actus*, is palpably wrong, while granting a choice of position to a bona fide holder merely shows that the main rule is inept. It seems that the draftsmen of the Geneva Rules drew an exaggerated conclusion from what they thought might be a *fraude à la loi* in the case of a minor who fakes a place where he would be of full age; in the case of formalities, such fear of fraud in business matters is even more unrealistic than with respect to capacity.

The damage done thereby to international circulation of bills cannot possibly be repaired by excepting the case where the signer is supposed to have advisedly submitted to the

[57] ULMER, Wertpapiere 41 ff., 53. The impressive Italian literature reaches a similar conclusion. The act of creation, whether conceived as a factual act (MOSSA, CARNELUTTI, RAVA) or as a legal transaction (ASCARELLI), combines with the act of transfer or issue (emission), consisting of delivery and acceptance; see the summary by G. ARANGIO-RUIZ, 133 f.

law of the written place. Even if party autonomy were to be recognized in the law of negotiable instruments (which is a wrong theory) uncertainty of proof and arbitrariness of its judicial admission are unsound elements. Likewise the idea of estoppel, adduced in some American decisions against others,[58] is a precarious corrective. Whether the misled holder may sue the signer of an instrument with a false date by action in tort,[59] a poor substitute,[60] depends too much on the circumstances to be a real help. The only way out is the frank statement that, at least in the case of a bona fide holder, the written place alone is what counts; this has been judiciously advocated even under the equivocal text of the Geneva Rules, in defiance of the draftsmen, especially Diena.[61]

3. Conclusions

In a considered review of the Geneva debates, Gutteridge [62] connects the test of delivery with the commercial requirement that the paper should be in the hands of the payee or indorsee, and prefers it for instruments to bearer (where all systems agree), for giving a paper in escrow, and for documents in C.I.F. contracts and bankers commercial credit. With respect to the ordinary instruments to order, Gutteridge considers that the problem, restricted to the liabilities of drawer and indorser and to circulation outside territorial limits, could be solved in either way, especially because usages may be changed to increase the cases where signature and delivery coincide.

[58] Watson v. Boston Woven Cordage Co. (1894) 26 N.Y.S. 1101; Chemical Natl. Bank v. Kellogg (1905) 183 N.Y. 92, 75 N.E. 1103; *Contra:* Basilea v. Spagnuolo (N.J. 1910) 77 Atl. 531.

[59] M. WOLFF, Festgabe für Wieland (1934) 459 ff.

[60] MONACO 102.

[61] WIGNY, Rev. Dr. Int. (Bruxelles) 1931, 804: Quod non est in cambio, non est in mundo; HUPKA 250; RAISER 57 ff.; VEITH, 4 Rechtsvergleichendes Handwörterbuch 509; MONACO 105 ff. § 30.

[62] GUTTERIDGE 16 (ser. 3) J. Comp. L. at 71. M. WOLFF, Priv. Int. L. § 464 goes over to the delivery test. See also DICEY (ed. 6) 688 n. 4.

In my opinion, both systems suffer from theoretical prejudices and should make place for a more earthy conception. Delivery, taken as the "final act," and signature, taken as the exclusive creative force of the obligations, are both incompetent to govern. To restrict their pretended scopes, rebuttable and unrebuttable presumptions are inadequate.

In the case of a place written in the bill, a bill intended to circulate—and there is really no limit to the territory where a negotiable instrument may circulate—it is difficult to understand why this date should not indicate the place of contracting in the meaning of conflicts rules. The true main ground on which the contracts arise and the basis for the peculiar working of a bill, is the writing. It is definitely the only practical answer to the much ventilated problem of *locus verus* v. *locus scriptus,* that whenever a place is indicated on the bill, this place determines the applicable law. That immediate parties are always subject to the defenses inherent in their underlying relationships and third persons may be liable for tort are self-evident counter-instances rather than the basic rule in the matter.

In the absence of a writing in the bill indicating the place to which the conflicts rule looks, the common-law approach is superior for a very conclusive reason. As will be noted more explicitly, when the transfer of cambial rights is to be examined, the mechanism of negotiable instruments at common law has preserved a similar structure for title and obligation, appealing to business men. In contrast to the German and Geneva systems, the incidents of obligation and property in the life of a bill of exchange are intimately connected. One act, delivery of the instrument, transfers obligatory rights as well as title. There is no difference between them as respects, for instance, good

faith. There need not be any subtle difference where a bill is mailed to the cambial successor. Thus, not as the "last act" in creating the *obligation* but as the act effectuating the domination of the bill by the grantee in respect of both obligation and title, delivery is naturally the right contact for choice of law. Since the transfer of title depends on the *lex situs,* Anglo-American courts sometimes have naively but with adequate results submitted also the obligation to the law of the situation of the paper.[63]

The difficulties of evidence, conspicuous in the learned discussions, are minimized by this approach. Where the paper actually was at the moment of a contested transfer, rather than where the signature was made, is not so hard to discover. To ascertain the situs of a tangible thing at a given date, usually causes so little concern that we scarcely hear of it in international property law.

Of course, the acts transferring title are different in the various systems. This difficulty would be removed if the Romanistic doctrine requiring *traditio* for the transfer of tangible things were abandoned in this application. Not only would international harmony be achieved, but within the Central European systems themselves obligation and title would no longer be governed by incongruous rules.

Interpersonal law. A check was issued by an Englishman in Shanghai upon a local branch of an American bank corporation, at a time when Great Britain and the United States enjoyed extraterritorial jurisdiction through their own courts in Shanghai.[64] Should the law of the place of payment be identified with the Chinese Law of Bills of Exchange and Checks? It seemed evident that it was the Negotiable Instruments Act of the American state in which the bank was incorporated, that governed.

[63] See for more detail, *infra* Ch. 61.
[64] See my report and opinion, 6 Z. ausl. PR. 336-341.

III. Exceptions to the Principle

1. British Law

By proviso in Section 72 (1) (b),

"Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold or become parties to it in the United Kingdom."

This proviso is intended to make negotiability in England independent of defects attached by the foreign law of its origin. The parties must have negotiated in England and the lawsuits occur in England, and probably the action must be for payment. Favor is not granted to inland transactions as such but only to those from which an actual recourse between domiciliaries arises. These two features approach the provision to two exceptional Continental rules presently to be quoted.

2. Geneva Rules

(a) *Article 3, paragraph 2,* inspired by the German legislation of 1848, after stating the law of the place of signature, continues:

"Nevertheless, where the obligations subscribed in a bill of exchange or a promissory note are invalid according to the provisions of the preceding paragraph but conform to the law where a subsequent obligation is subscribed, the irregularity of the first obligations does not affect the validity of the subsequent obligation."

The 1940 draft of the Montevideo Commercial Treaty, article 26, follows this example.

Thus, the original bill may be void under the basic law, or an indorsement invalid under the law of its place of

signature, but subsequent contracts are valid, if they comply with the formal requirements of the place where they are written, and this validity is recognized in all member states, inclusive of the country of issue. Such contracts may be acceptance, indorsements, aval, or intervention for honor, all regularly presupposing a valid basic bill.

On the other hand, the exception is not limited to an instrument invalid on the ground of formalities. The issue or preceding indorsement may be invalid for any cause under its own law, although not under the law of the subsequent contract.

The provision also does not require that the holder should inquire into the foreign law and be in good faith about it. The purpose is to favor circulation in all cases.

This paragraph, therefore, disregards the principles of the convention in several respects. But were this exception the only one, it might possibly be defended as a forceful addition to the independence of indorsements and other accessory contracts in the interest of convenience. It is the same tendency that impells the American courts to establish each contract on its own conditions.

Unfortunately, paragraph 2 is accompanied by a second exception. Together they destroy whatever fabric the Rules may claim.

(b) *Geneva Rules, article 3, paragraph 3,* states under the influence of another old German rule, but by mistake even enlarging this questionable provision,[65]

[65] See HUPKA 246 ff. A German proposal intended only to reproduce art. 85 sent. 3 of the German Wechselordnung of 1908 (also Swiss C.O. of 1881 art. 823 par. 3, Austria W.O. of 1850 art. 85 par. 3) referring to engagements entered by a national (German) toward a national (German) abroad. This is a (misplaced) application of the *lex patriae communis.* But in Asser's formulation adopted in the Rules, the national may transact with any national or foreigner, only the enforcement being restricted to nationals. However, Germany, Switzerland, and Austria have used the reservation to its full extent.

"Every contracting State has the faculty to prescribe that the obligations assumed in bills of exchange and promissory notes by one of its subjects abroad shall be valid with respect to another of its subjects within its territory, provided that they are clothed in the form of the national law."

It is not required (as it was in article 85 of the German Act) that the subject of the enacting state should have transacted with another subject of the state. On the other hand, under the former German law, supervening contracts with a foreigner, or even between foreigners, were regarded as valid in Germany if they conformed to the law of the German place of contracting, whereas now in regard to a foreigner the law of the place of contracting operates with the ordinary restrictions.

This second exception comes near to the British special rule for foreign bills. Both are indefensible nationalistic residues.[66] Yet paragraph 3 has been welcomed as good law for emigrants.[67]

The practical significance of these rules may be illustrated:

(i) A bill of exchange drawn in England by *A* and delivered to *B*, payable to the bearer, is valid everywhere by the law of the place of contracting. If issued in Italy it would be void under the same principle; but *B* nevertheless would win his recourse against *A*, if he sues in England according to proviso (b), though not in the United States nor in any other country outside those following the Bills of Exchange Act.

Had *B* indorsed the bill issued in Italy to *C* in Italy, and *C* to *D* in England, mailing it from Italy, the case would

[66] DIENA, 3 Tratt. 78; e.g., protectionism not inspired by a neat, precise, well-determined principle. To the same effect GUTTERIDGE 16 (ser. 3) J. Comp. L. at 64, who, however, does not seem to include the English proviso in his regret; HIRSCH, JW. 1930, 1341; ARMINJON, DIP. Com. 292 § 147.

[67] *Cf.*, MONACO 132 and cited authors.

seem outside of proviso (b). Again, if *C* is an Italian national and indorses the bill to another Italian, effect is given in Italy under the Geneva Rule 3, paragraph 3, and the Italian Bills of Exchange Act.

(ii) A bill issued in Germany not containing the word "Wechsel" or a corresponding word in a foreign language used in the bill, was void under the old law and is so under the Geneva Rules (art. 1, no. 1). If it is indorsed in England to a firm carrying on business in England, the holder may sue in England under proviso (b), though the drawer could not.[68] Supposing the English indorsee indorses the bill to *D* in the United States, *D* cannot sue anywhere, unless the court were to change over to the law of the place of payment, as is, regrettably, possible in the United States.

In any case, the liability of the drawer or indorser depends on what the other party chooses to do.[69] And discriminations are made according to criteria not in conformity with the standards of equality of a freely circulating commercial paper. The worst consequence, of course, is that a debtor can be sued who has no recourse left against previous warrantors; but this happens also on the mere ground of the principle of independence.

[68] DICEY (ed. 6) 687, Ill. 4.
[69] GUTTERIDGE 16 (ser. 3) J. Comp. L. at 64.

Chapter 60

Validity in General

I. Intrinsic Requirements

THE existing statutes contain only fragmentary conflicts rules, if any, on the subject of essential validity of the contracts in negotiable instruments.[1] There is, however, agreement on the proposition that formal and material validity ought to be subject to the same law.[2] This law also determines what ordinary requirements of contracts are to be modified or abandoned in order to promote the easy negotiation of bills, and what municipal rules are to supplement the special cambial rules.[3]

1. Capacity

The general conflicts rules concerning capacity of contracting are normally also applied to the capacity of signing bills and notes.[4] Capacity thus is governed by the personal law (of nationality or domicil) or the "law of the place of contracting" (better the law of the contract), or a mixed system. In England, the habitual hesitation recurs.[5] Ameri-

[1] Generally speaking, *lex loci contractus* is applied in Argentina, C. Com. art. 738, see 4 Vico 105 § 106; Mexico, law of Aug. 26, 1932, on titles and operations of credit, art. 252-254.

[2] Beale, 23 Harv. L. Rev. 1; Lorenzen 99 ff. and in 30 Yale L.J. 565; Gutteridge, 16 (Ser. 3) J. Comp. L. 62.

[3] *Supra* Ch. 58, pp. 133-134. On the cases: Hugo Fischer, "The Law Governing Capacity with Regard to Bills of Exchange," 14 Mod. L. Rev. (1951) 144, 151.

[4] For a survey see 1 Meyer 646; Veith, 4 Rechtsvergl. Handwörterbuch 491 ff. In Argentina (C. Com. art. 938, *cf.*, 4 Vico § 109), Brazil (Ley Introd. 1942 art. 9, par. 1); in Chile (C.C. art. 14, 15) and many other Latin-American countries, the domicil governs with the reservations for the domestic national law discussed in Vol. I, p. 117 ff.

[5] For domicil Westlake, for *lex loci contractus* Dicey (ed. 6) 682 n. 58.

can courts seldom have resorted to the domiciliary law; they employ the *lex loci contractus*.[6] Thus, a married woman domiciled in Michigan and signing in Michigan a mortgage and note as security for her husband, was not allowed by the Michigan court to raise the defense of coverture or a defense of misrepresentation, according to Michigan law, because the note was delivered to a bank in Ohio.[7]

The Geneva Rules, ignoring the experience of the common law, have established a system no one can ever defend.

In the first place, the Rules base their main provision (article 2, paragraph 1) on the nationality principle, unsuited for such an eminently international commercial matter. A decisive motive was the fear of "fraude à la loi," that eternal preoccupation of older European writers.[8] Else a minor might go to a country where he is regarded as of full age—this was a familiar argument. But what practical importance has such a possibility, and "how can an English banker have all the national laws on capacity in his head?" [9]

The next consequence had to be admission of *renvoi,* to the heartfelt grief of its foes:

> "If this national law declared competent the law of another country, this latter law applies." (Art. 2, par. 1, sent. 2).

An attempt to restrict this unwelcome addition was made by interpreting the reference as meaning exclusively the internal law of the country referred to.[10] This would, illogically, exclude *"Weiterverweisung."*

[6] LORENZEN 63.
[7] State of Ohio, ex rel. Fulton v. Purse (1935) 273 Mich. 507.
[8] DIENA, 3 Tratt. 52; 2 GRUNHUT 570 n. 6; 2 MEILI 327.
[9] GUTTERIDGE, *l.c.* 61.
[10] DIENA, Comptes rendus 347; HUPKA 238; ARMINJON, DIP. Com. 283. An analogous argument in HIRSCH, JW. 1939, 1338.

Illustrations. (i) (Hupka's example of a vicious circle.) An Englishman domiciled in England issues a bill of exchange in Buenos Aires. England refers to Argentine law as *lex loci contractus;* and allegedly Argentina would refer back to England as the domicil. The latter assertion agrees with the usual radical arguments *ad absurdum* but is totally inadequate. There is in fact no further reference. The English conflicts rule itself must be construed, without any help of the Geneva Rules, to refer to the substantive Argentine law. Certainly, England has in this case no reason to make Argentina arbiter of the choice of law. *Lex loci contractus* governs because of the presumption (right or wrong) that the parties know it best. Even the English domicil is not considered in England an obstacle to applying the foreign *lex loci actus.*

(ii) A national of Chile, domiciled in New York, indorses a bill in France. Although Chile refers to the domicil, it would not make sense to apply New York law while the New York courts apply French law. A reference to the *domicil* means entire abandonment to the law at the domicil.

Also the objections that renvoi complicates the task of the judge [11] and needs lawyers to apply it,[12] have no more force here than in general.

Corporations and other legal bodies are not mentioned in the Geneva Rules.[13] Without doubt, their capacity is determined by their personal law, that is, in the eyes of the member states, the law of the principal seat. An American court will evidently apply the law of the state of incorporation; it would not apply the law of the place of acting.[14]

Exceptions. Article 3, paragraph 2, states:

"If, however, the obligations entered into by means of a bill of exchange or promissory note are not valid accord-

[11] G. ARANGIO-RUIZ 178.
[12] GUTTERIDGE, *l.c.* 60.
[13] ASSER, Comptes rendus 347 ff.
[14] *Supra,* Vol. II, 4, 27 ff.

ing to the provisions of the preceding paragraph, but are in conformity with the laws of the territory in which a subsequent contract has been entered into, the circumstance that the previous contracts are irregular in form does not invalidate the subsequent contract."

A signature is valid if given in a territory where the signer would have capacity. This was already conceded by many laws [15] as a needed qualification of the personal law. The exception is more generous than in the French *Lizardi* case and the analogous provisions; also a foreign *lex loci contractus* is a recognized source of capacity.[16]

Yet, again, another proviso, paragraph 3, allows each member state to exclude for its own courts the exception of paragraph 2, if a national of this state has contracted abroad. Thus the Rules turn away from their course and discriminate among territories and nationalities. "The validity of the contract varies according to the court." [17]

Conclusion. The awkward and cumbersome legislation of Geneva has been deservedly criticized.[18] A better solution is furnished by the American practice. The law governing a contract in a bill must also determine the requirements of capacity. Domicil would not be a better test than nationality. The parties cannot be required to examine more than one law to ascertain the value of a signature.

However, the best rule is more liberal. As generally for

[15] Belgium: Law of May 20, 1872, art. 3.
France: C. Com. art. 114.
Germany: WO. (1908) art. 3.
Great Britain: BEA sec. 22.
Scandinavia: Law of 1880, art. 88.
Switzerland: C. Obl. (1911) art. 721.

[16] *Supra,* Vol. I, 188.

[17] MONACO 46; ARANGIO-RUIZ 178.

[18] See, e.g., HUPKA, and G. ARANGIO-RUIZ, *l.c.;* WIGNY, Revue Dr. Int. (Bruxelles, 1931) 784 ff.

contractual obligations,[19] capacity under the personal law deserves to be considered as an optional basis of validity. Although once Lord Esher thought that a "minor," though capable under his domiciliary law, cannot be made liable on a bill in England,[20] the optional validity according to either *lex loci contractus* or *lex domicilii* is winning adherents.[21] Security of commerce, harmed by an unlimited importance of the personal law, is fostered by its auxiliary consideration.

2. Consent

There is no doubt that, like all other "essential requirements," consent to signature and delivery, as distinguished from the "contract giving rise to the issue," is governed by the law of the place of execution.[22]

3. Consideration

The requirement of consideration was introduced into the law of bills of exchange when the common-law courts had assumed jurisdiction over this matter.[23] But the doctrine was modified in several respects;[24] notably, valuable consideration in this field need not come from the promisee,[25] and its existence is presumed.[26] However, the principle was applied in the case of illegality in *Moulis* v. *Owen*,[27] where a foreign check was considered governed by English law because payable in England and its purpose to cover play at baccarat was regarded illicit under English

[19] *Supra* Vol. I, and more recently CHESHIRE, International Contracts. A related proposal is made by FRANKENSTEIN, Projet d'un Code Européen de Droit internat. privé (Leyden, 1950) art. 58 ff.

[20] *In re* Soltykoff [1891] 1 Q.B. 413.

[21] LORENZEN 80.

[22] The former German Wechselordnung, article 85, included this point in 'ts term "essential requirements."

[23] ULMER, Festgabe für Heck (133 Arch. Civ. Prax.) 178.

[24] See LORENZEN 28 n. 72.

[25] BEA sec. 27; NIL sec. 25.

[26] BEA sec. 30; NIL sec. 24.

[27] [1907] 1 K.B. 746. *Cf.*, Lord Mansfield in Robinson v. Bland (1760) 2 Burr. 1077; FALCONBRIDGE, Conflict 311; DICEY (ed. 6) 682, 691.

law; this invalidity of the loan comprised all accessory obligations. The latter may be void also under their own *lex loci contractus*.[28]

In no case is failure of consideration a defense against a holder in due course.[29]

Illustration. In American municipal law, it is controversial whether the maker of a note which he entrusted to a fiduciary payee may set up the defense of failure of consideration against a holder who purchased from the payee in breach of trust and with knowledge thereof.[30] No such defense is given against a holder in good faith.

For conflicts law, there is no reason why lack of consideration, though a defect under the original applicable law, should be strong enough to break the position of a bona fide holder protected by the law of his purchase.

The exceptional option of the most favorable law granted by American courts to creditors attacked on the ground of usury has been discussed before.[31]

Another means to avoid the defense of failure of consideration was sought by the Supreme Court of the United States, when it resorted to the Louisiana law of the place of payment instead of the New York law of the place of delivery,[32] in order to effect the presumed intention of the parties, an inadvisable method of dealing with conflicts rules.

4. Other Incidents

The law of each contract also governs the permissibility of stipulations of interest and conditional indorsements,

[28] Canada: Story v. McKay (1888) 15 O.R. 169; FALCONBRIDGE, Conflict 316.
[29] England: BEA sec. 29 (3).
United States: NIL sec. 28, 58.
France: ARMINJON ET CARRY 475 § 417.
Italy: MONACO 121 ff.
[30] See BRITTON (1943) 487 ff.; PALMER, 48 Mich. L. Rev. (1950) 255, 261.
[31] *Supra* Vol. II, 408.
[32] Pritchard v. Norton (1882) 106 U.S. 124.

mostly identified with questions of form, and, of course, the necessity of delivery of the instrument.

II. Acceptance

The contract of acceptance normally shares the principles of the law of bills of exchange. It consists of presentment for acceptance and the acceptance necessarily written in the bill, plus return, i.e., delivery of the bill. In case of acceptance before issue, the acceptor writes his signature, which again becomes effective by delivery, though this is delivery by the drawer to the payee.

An "anomalous" [33] provision of the American Negotiable Instruments Act,[34] however, allows any form of declaration effective by notification [35] without delivery. On the other hand, the Geneva Convention permits a drawee who wrote his acceptance on the bill to revoke it until he returns the instrument.[36] According to what seems to me the better construction, it is not the unilateral act of the drawer that forms the acceptance (as was the theory of the German Reichsgericht),[37] but the written acceptance plus either return on presentment or delivery to the payee.[38]

Revocation, thus, merely strikes down an incomplete act.

It may be asked whether these requirements of acceptance should not be governed by the law of the place where the bill is returned (delivered) or signed. In fact, the Bill of Exchange Act (art. 72 (1)) expressly treats the form of acceptance on the same footing as the other contracts and calls for the law of the place where the acceptance "contract" is made. But when an American drawee notifies

[33] Hudson and Feller, 44 Harv. L. Rev. (1931) at 356.
[34] NIL sec. 134, 135.
[35] BEA sec. 2; NIL sec. 191.
[36] Geneva Conv. art. 29.
[37] 24 RGZ. 90; 77 *ib.* 141.
[38] Ulmer, Wertpapiere 207; Angeloni 173 § 118.

acceptance by letter sent to Japan without signing the bill, and the recipient takes the bill for value "on the face thereof," the contract is presumably "made" in the United States and therefore binds the drawee, while in the inverse case a Japanese drawee would not be bound wherever the contract would have to be concluded. For this reason and the sake of simplicity, it may be a better solution to extend the law of the place of *payment* to the questions of validity. We shall see that it is now greatly preferred over the law of the drawee's domicil and of the acceptance itself, as respects the effects of acceptance.[39]

III. Special Contracts

1. Accommodation Paper

The English Act (s. 28) and the American Act (s. 29) recognize the liability, to a holder for value, of a party signing as a maker, drawer, acceptor, or indorser, without receiving value and for the purpose of lending his name. The courts hold that an accommodation paper has no legal inception until it is received for value, so as to allow the accommodator until then to revoke his signature.[40] Hence, the conflicts requirement of delivery is not fulfilled until the accommodated party delivers the paper to a holder for a value, and this act determines the law applicable to the issue.[41]

This conflicts problem does not exist in civil law. If someone signs a bill in the interest of another person, though with the understanding between the two that the promisor should not bear a burden, he enters into a serious

[39] *Infra* Ch. 62, I.

[40] Fox v. Cortner (1921) 145 Tenn. 482, 492, 239 S.W. 1069; Dean v. Lyde (1931) 223 Ala. 394, 136 So. 857.

[41] Welsh Co. v. Gilette (Wis. 1911) 130 N.W. 879; Stubbs v. Colt (1887) 30 Fed. 417; 2 Beale 1059.

obligation. Any third holder may avail himself of it, even if he knew of the agreement.[42]

The common-law tradition, indeed, rests upon a confusion, familiar to former jurisprudence, between simulation, which does not bind, and a serious declaration to be bound to any party to the bill except the accommodated person. The Uniform Commercial Code, section 3-415, gives a considered new regulation qualifying the accommodation party as a surety; this sets him in conflicts law at the side of the avalist, presently to be discussed.

2. Aval

The act of guaranteeing an obligation in a bill or note, unknown to the common law of England, is now recognized in all statutes.[43] It is also uniformly agreed that this act has its own law. Most older writers justify such independence by drawing an analogy with the law applicable to suretyship,[44] while the Montevideo Treaty of 1889 upon the same analogy but following the ancient approach to suretyship applies the law governing the "guaranteed obligation." [45]

Nevertheless, an *aval* is not conditioned by the intrinsic validity of the principal debt nor is it restricted to the amount due on the latter.[46]

In consequence, it is now agreed that the admissibility

[42] France: App. Caen (May 30, 1899) D. 1900.2.508; Req. (March 11, 1935) D.H. 210, S. 1935.1.175; 1 PERCEROU ET BOUTERON 36 § 41. On the dangerous position of French banks taking in *"effets de complaisance"* without most strictly examining whether the drawer is really a creditor of the drawee and therefore lacking "bonne foi" and action against the acceptor, see HAMEL, 2 Banques et opérations de banque 750 ff.; *id.*, "L'unification de droit en matières d'instruments negociables" (Int. Bar. Ass., 3rd Int. conf., London, 1950) printed 1950, The Hague, p. 320.

Germany: RG. (Feb. 24, 1928) 120 RGZ. 207; STAUB-STRANZ, art. 17 n. 26.

[43] LORENZEN 32-34.

[44] 4 LYON-CAEN ET RENAULT § 655; STAUB-STRANZ (ed. 6, 1909) art. 86 n. 8.

[45] Montevideo Treaty Com. (1889) art. 31.

[46] 2 GRÜNHUT 579 n. 33; DIENA, 3 Tratt. § 231; 2 MEYER 374; WEISS, 4 Traité 461; LORENZEN 174 n. 420; ARMINJON ET CARRY § 445.

and form of an *aval* are determined by the law of the place where it is "given," that is, signed or delivered, respectively.[47] An Italian decision added a presumption, rebuttable only by the document, that the *aval* is written at the place of the issue of the bill.[48] Another Italian decision,[49] however, examining the question of form, rejected the law of the American state where the *avalist* attached his signature, in favor of the law of Italy to which he sent the bill and where the drawer signed subsequently;[49] insofar as this solution was based on the certain rule that the *aval* did not take effect until the bill was issued, the conclusion was objectionable because form and effect are indistinguishable.[50] But the result agrees with the presumable American conception of the role of delivery in such a case.

3. Acceptance for Honor

In the same manner as for *aval,* it is a constant conclusion that the contract of an acceptor for honor—the now rare "intervention"—is an independent transaction, subject to the law of its own place of making.[51]

In old cases of special contracts, the same conflicts rules respecting form, capacity, and material validity are used as for issue and indorsement.

[47] Montevideo Treaty Com. Terr. (1940) art. 23; *cf.,* ARGAÑA, in Segundo Congreso, Rep. Arg. 223; 4 VICO 95 § 95; Cód. Bustamante, art. 268; Geneva Rules, art. 4, par. 2; MONACO, Rivista (1942) 288 n.l.

[48] Italy: App. Milano (Nov. 25, 1929) Mon. Trib. (1930) 184.

[49] Cass. Ital. (Jan. 14, 1941) Foro Ital. 1941 II. 1055.

[50] MONACO, Rivista (1942) 286.

[51] Treaty of Montevideo, Com. art. 32; Geneva Rules, art. 4, par. 2; DIENA, 3 Tratt. 159; LORENZEN 174; RAISER 89; ARMINJON, DIP. Com. 330 § 174.

CHAPTER 61

Circulation

I. THE CHAIN OF HOLDERS

WE shall consider here the position of the payee and subsequent indorsees. Under the universal approach, the sequence of holders is disintegrated or dissected into as many links subjected to different laws as there are jurisdictions containing places of contracting. The law of the place where an indorsement occurs governs the transfer of the rights included in the bill.[1] Such division, in addition to the various other connecting factors used in the conflicts law of bills, is bound to raise problems of classification. They have been regarded under three aspects:

The rights inherent in the possession of the bill;

The rights acquired by the formal succession against third persons;

And the relationship between a single indorsement and the basic bill.

1. The Effect of Possession: "legitimation"

While little Anglo-American authority seems available,[2]

[1] England: BEA sec. 72 (2) according to the prevailing meaning of "interpretation."
United States: LORENZEN 139.
France: WEISS, 4 Traité 443.
Germany: 2 BAR § 306.
Italy: DIENA, 3 Tratt. 94 § 222.
Geneva Rules, art. 4, par. 2, speaking of "the effects of the obligations produced by the signatures . . .;" Treaty of Montevideo, Com. L., art. 29; Cód. Bustamante, art. 226.

[2] Note, 95 A.L.R. (1935) 658.

it is agreed on the Continent that an indorsement has a threefold function:

(a) The possessor of the bill who is either named or covered by a blank indorsement has the ostensible power of indorsing the bill in the eyes of the indorsees;

(b) The indorsee possessing the bill has the power to present the bill to the drawer or acceptor;

(c) Under the same circumstances, the drawee is entitled to pay to the indorsee with liberating effect.

In conflicts law, these problems are generally included in the broader questions concerning the rights of the holder. According to the principle of independence, the individual legal systems prescribe the particulars. Thus, the law of each place of indorsement determines whether an indorser is a reliable transferor, while in the relation between indorsee and drawee the unsettled rivalry of the place of indorsement with the place of payment persists.

2. Translative Function of Indorsement

Again, the Continental doctrine distinguishes three effects of indorsement:[3]

(a) Indorsement transfers the right flowing from the bill against acceptor or maker;

(b) It procures the indorsee the position as holder "in due course" or "in good faith" respectively;

(c) It makes the indorser liable for warranty.

Moreover, however, indorsement completed by delivery transfers "title," meaning ownership in the paper of the instrument. (The expression should not be used otherwise, and notably should not include the debt.)

Taken as an isolated act of transferring tangible property, this conveyance is naturally subject to the law of the

[3] LUIZ M. RAMIREZ B., "Capacity under the Negotiable Instruments Laws of the Americas," 43 Mich. L. Rev. (1944) 559 ff.; JACOBI, Wertpapiere 249 ff.; STAUB-STRANZ, 56 n. 19; RILK (1933) 2; 11 ROHGZ. 250.

place where the instrument is situated. Anglo-American law, however, consistently connects both title and obligation; they are transferred by the same act of delivery. Correctly, therefore, English decisions in modern times have determined the entire translative effect of indorsement as a unit, although sometimes, with undue emphasis on the property aspect, speaking only of the *lex situs* for chattels.[4]

Elsewhere, the same approach is adopted for bills payable to bearer [5] or issued or indorsed in blank. But in bills to order, Continental doctrine holds it possible that at the place of signature an indorsement may create effective creditor rights, although at the place of delivery property in the bill is not effectively acquired.[6]

In fact, the divorce of obligation and title is old in German legislation and now also persists on the basis of the Geneva Convention, which treats merely the obligation and not the title. On the one hand, the particular rules on bills develop the doctrine of the holder in good faith; on the other hand, the laws of property provide for the protection of a purchaser in good faith of movables. It is characteristic that not even the concept of good faith is the same; in German law ignorance of a defect by gross negligence counts as bad faith in acquiring title to a chattel, but as good faith in acquiring rights against acceptor and indorsees.[7] Hence, opinions are divided in cases where title and obligation seem to part ways. In the prevail-

[4] Alcock v. Smith [1892] 1 Ch. 238; Embiricos v. Anglo-Austrian Bank [1904] 2 K.B. 870; [1905] 1 K.B. 677; Koechlin v. Kestenbaum [1927] 1 K.B. 616, 889; Guaranty Trust Co. of New York v. Hannay [1918] 1 K.B. 43; [1918] 2 K.B. 623. On the problems of title see BRITTON, Bills and Notes (1943) 734 ff.

[5] See authors cited by 2 FRANKENSTEIN 110; RAISER 102 ff.

[6] ULMER, Festgabe für Heck (133 Arch. Civ. Prax.) 192; DUDEN, Eigentumserwerb 68; WOLFF, Priv. Int. L. (ed. 2) 551; German W.O. (1908) art. 74, 82; Geneva Convention, art. 16, 17.

[7] German W.O. (1908) art. 74, 82; Geneva Conv. art. 16, 17; German BGB. § 932.

ing view, the right accruing from the bill follows the right in the bill, which agrees with the true content of the common-law principle. Minority opinions, however, hold that the title passes by the indorsement itself.[8]

There can be no doubt that the commercial view represented in the Anglo-American rules excels by its unity and simplicity. All translative effects of the transaction are simultaneously derived from the law of the place where the instrument is situated at the time of delivery.

3. The Doubtful Scope of the Principle of Independence

There does not exist a visible guiding idea for defining classification of problems that fall under the scope of the individual law of the place of an endorsement, rather than under some other conflicts rule respecting particular incidents of the bill of exchange. Even worse, no general agreement exists about the relative weight to give the law under which the obligation of a signer *(A)* is entered into and the law under which a subsequent signature *(of B)* confers rights *(to C)* against the precedent obligor *(A)*.

Our main materials consist in isolated groups of judicially treated topics and the respective comments or equally sporadic literary problems. Accordingly, we have to look for the desirable legal rules through the study of particular situations.

Only one general application of the several laws principle, although even this with qualifications, seems to be universally admitted, viz. the rule that the obligation of *warranty* is governed by the law of each indorsement.[9] This law determines the time, place, and currency of the

[8] RAISER 109 denies application of BGB. § 952 whereby an instrument follows the creditor's right. ULMER, *l.c.* 192 ff., would apply § 952 "to a certain degree."

[9] United States cases cited by LORENZEN 122 n. 232; RAISER 59; KESSLER 138.

warranty, as well as the requirements and extent of the liability. It includes the permissibility of conditional obligations (commonly ineffective)[10] and of partial indorsements (commonly void);[11] and the questions whether the indorser's liability is subsidiary to that of the drawer or *in solidum* for all warrantors,[12] whether the recourse must run through the entire chain or may jump to remote indorsers,[13] etc.

Where acceptance is refused, the law of the place of indorsement determines whether the holder may resort to the guarantors for payment [14] or security;[15] it decides also whether release of the principal debtor has effects on the secondary obligors.[16]

Hence, the law of the basic bill, though determining the primary obligations, does not affect the liabilities of recourse.

But that we have not reached a complete solution is shown by the next following doubt concerning classification.

II. Which Law of Indorsement Prevails in Determining the Rights of Holders?

This is a curious aspect of the principle of independence. Suppose *A* indorses to *B* in state *X*, and *B* indorses to *C*

[10] Permitted in BEA sec. 33; NIL sec. 39; prohibited in Geneva Convention, art. 12, par. 1.

[11] Not permitted by BEA sec. 32 (2); NIL sec. 32; Geneva Convention, art. 12, par. 2.

[12] Williams v. Wade (Mass. 1840) 1 Metcalf 82; Arangio-Ruiz 252 and cit. in n. 1.

[13] United States, whether previous suit against maker or acceptor is necessary: Williams v. Wade (Mass. 1840) 1 Metcalf 82; Trabue v. Short (1866) 18 La. Ann. 257; Weil v. Sturgis (Ky. 1901) 63 S.W. 602; 2 Wharton § 452 ff.

Diena, 3 Tratt. § 222.

[14] Geneva Convention, art. 43; BEA sec. 43; NIL sec. 151.

[15] Former German W.O. art. 25; French C. Com. (1807) art. 120; 1 Meyer 464; now Egypt: C. Com. mixte art. 125; C. indigène 119.

[16] Spies v. National City Bank (1903) 174 N.Y. 222, 66 N.E. 736, 61 L.R.A. 193 a.o.

in state *Y*. The two laws define differently the position of indorsees, for instance, as to protection of good faith against defenses of duress, fraud, mistakes, lack of consideration, lack of delivery. *A* seems to obligate himself just to what the law of the first indorsement compels him, no less and no more. However, *C* acquires rights under the law of the second indorsement, rights that may be larger or narrower than what *B* acquired. The analogous question arises if *A* is the drawer and *B*, the payee, indorses to *C* in another jurisdiction. In other words: is the obligation of *A* definitively fixed by the law of *X* or is it subsequently modified by the law of *Y*?

This problem has been discussed incompletely in several applications, two of which follow:

1. Defenses of Warrantor

Continental writers have believed that the American courts in the matter of defenses almost always look to the law of the particular obligor.[17] But in the United States no substantial authority exists on the question, since almost[18] all decisions to which we may resort concern the obligation of primary obligors upon promissory notes. Yet we may submit that American courts are prepared to go along with the English comments on the Bill of Exchange Act, Section 72(2), and the prevailing Continental opinion. According to these, in any case, it is the law of the place of the indorsement by which the individual holder *acquires*

[17] See HUPKA 264.

[18] LORENZEN 134 n. 264 cites Ory v. Winter (La. 1826) 4 Mart. N.S. 277, for the proposition that when a party contracts under the law allowing him a certain defense, he is protected against a holder who is a holder in due course under the law of his contract. But the reasoning of LORENZEN 141 ff. seems to evaluate grounds pro and contra and to arrive at a contrary result. The majority of the cases, increased by Stout v. American Natl. Bank and Trust Co. (Miss. 1942) 7 So. (2d) 824, apply *lex loci contractus* and seem to think of the place where the holder purchased the bill.

his position that decides on the admissibility of defenses against him.[19]

This law, thus, on the one hand determines what requirements the holder in due course (or bona fide holder) must fulfill, e.g., whether bad faith requires positive knowledge of a defect of title [20] or also includes "dishonesty," [21] lack of "honest, credible confidence," [22] or requires "knowingly acting to the detriment of the debtor." [23] The latter formula has been understood as excluding any consideration of negligence; the holder is protected except when he acts with direct or indirect intention.[24] Also the burden of proof is subject to this law.[25]

On the other hand, all defenses that law *X* may concede to *A* are cut off against a holder privileged under the law of his own acquisition.[26] This very remarkable result is justified in the Continental literature by the necessity to protect the holder in the interest of undisturbed circulation. The indiscriminate language of the Geneva Rules, article 4, paragraph 2, in stating the principle of independence certainly encourages a corresponding solution.[27]

That American practice favors the same view may be inferred from one decision holding "that a transfer of personal property which is valid by the law of the place where such transfer is made is insufficient to pass a valid title to

[19] RAISER 91; HUPKA 263 ff.; QUASSOWSKI ALBRECHT 94; ULMER, Wertpapiere 287. The wording of Unif. Com. Code, s. 3-305, seems to confirm the same view with respect to the numerous differences of American statutes.

[20] NIL sec. 56; *cf.*, BEA sec. 2.

[21] NIL sec. 59; BEA sec. 90.

[22] Hurst v. Lee (1911) 143 App. Div. 614, 127 N.Y.S. 1040; "Good faith means honesty in fact in the conduct or transaction concerned," Unif. Com. Code, s. 1-201 Nr. 19.

[23] Geneva Conv. art. 17.

[24] Comptes rendus 133, 291 ff.; HUPKA 52 n. 2.

[25] Compare BEA sec. 30, par. 2; NIL sec. 59, sent. 1, with Geneva Conv. art. 17 (the debtor must prove the dishonesty of the holder).

[26] BEA sec. 30, par. 2; NIL sec. 59.

[27] RAISER 104; ARMINJON ET CARRY 478 § 422.

it," so as to protect a holder in due course of a note against the defense of the maker based on fraud.[28] With greater clarity the same conclusion seems to follow from the leading American decision on forged indorsements, to be discussed presently.

A doubt, however, is revealed precisely by a case discussed in the United States. Payee *A*, taking with notice of fraud committed against the maker, negotiates the note to *B* who is immune against the defense of fraud, but afterwards *A* reacquires the instrument. American courts and now the Draft of a Commercial Code hold *A* subject to the defense.[29] If *A* takes in the United States without knowledge but without due inquiry into a suspicious situation and negotiates the note in Germany, where negligence is no bar to the protection of the holder, no American court, evidently, will admit his claim. It might be argued even under the Geneva Convention that if *A* has acted "sciemment au détriment du débiteur," his claim should be dismissed, whatever his credentials may be. The case recalls the model case of collusion used in Geneva.

Results, hence, seem identical all around. American courts would not need resort to public policy to obviate undesirable situations.

A special instance of such effort to promote smooth circulation has developed in the case of forged signatures.

2. Spurious Signatures

Under the Anglo-American acts, signatures forged or attached in the name of a person without his authorization

[28] Brook v. Vannest (1895) 58 N.J.L. 162, 33 Atl. 382; LORENZEN 140; RAISER adds Fogarty v. Neal (1923) 201 Ky. 85, 255 S.W. 1049 in referring to the special case of spouses between themselves.

[29] Berenson v. Conant (1913) 214 Mass. 127, 101 N.E. 60; CHAFEE, "The Reacquisition of a Negotiable Instrument by a Prior Party," 21 Col. L. Rev. (1921) 538, 542; Uniform Com. Code, 3-201(1).

are inoperative. No right can be acquired "through or under that signature." [30] The law recognizes exceptions in the case of estoppel and ratification by the person whose signature is not genuine or unauthorized. Other rules mitigate the result, such as the English statute allowing bankers to pay in good faith drafts without verifying the indorsements,[31] and the judicial practice shifting the damage from a paying bank upon the true owner.[32]

In the civil-law countries, on the contrary, a bona fide holder may base his claim on any genuine signature, for using part of a merely formally uninterrupted chain of indorsements. According to article 16, paragraph 2, of the Geneva Convention:

"Where a person has been dispossessed of a bill of exchange by any event whatever, the holder, justifying his claim (by an uninterrupted sequence of endorsements), is not liable to surrender the bill, unless he has acquired it in bad faith or has committed a gross fault in acquiring it."

This contrast of legislation much debated in the fruitless efforts for a universal bills of exchange law and, in fact, of doubtful solution,[33] could also have disturbed conflicts law. It is gratifying to see how the courts, though reasoning on various formal principles, yet have bridged the gap, distinctly favoring easy circulation and protection of discounting banks.

[30] England: BEA s. 24; Canada: BEA s. 49; U.S.: NIL s. 23.

[31] BEA s. 60.

[32] NIL s. 15; Uniform Comm. C., s. 3-115 and 3-406; to obviate City Nat. Bank of Galveston v. American Express Co. (Tex. 1929) 16 S.W. (2d) 278, *cf.*, Palmer, 48 Mich. L. Rev. 266. On the thoughtful American practice concerning the question who should bear the damages, the bank or the owner, see BRITTON §§ 142, 146. In a recent decision, in Strickland Transportation Co. v. First State Bank of Memphis (Tex. Sup. 1948) 214 S.W. (2d) 934, ann. 27 Tex. L. Rev. (1949) 713, the court by majority vote assumed that the damage caused by the faithlessness of the forging agent should fall on the person who employed him.

[33] *Cf.*, HUDSON AND FELLER, 44 Harv. L. Rev. (1931) at 354.

The English Court of Appeal, in *Embiricos* v. *Anglo-Austrian Bank* [34] argued on the basis of the principle of independence, although this also could have been used for an opposite decision. However, it recognized the civil-law rule with respect to a check payable in England.

The clerk of the payee *A* stole a check on a London bank, already indorsed to *B,* forged *B*'s indorsement, and discounted the check with a Viennese bank. The bank, again, indorsed the check to London and received payment. When the payee sued the London bank for a second payment his action was dismissed. The bank in Vienna was authorized by the Austrian law to discount the apparently regular instrument in good faith.

To this extent, in the relationship between a holder and the drawee, it is universally settled that the law of the place where an indorsement is made—as in the *Embiricos* case, the Austrian law—determines the justification of the indorsee's title and, hence,[35] of the drawee's right to pay to him.

There arose grave doubt, however, about the recourse against precedent indorsers and the drawer. Could the Viennese bank, or its indorsee who cashed the check, in the absence of payment, recover from the payee or the drawer? In his opinion, Vaughan Williams, L.J., by an obiter dictum, held it "convenient, as well from a legal as from a commercial point of view, that it should be established that the title by such an indorsement is good as against the original parties to a negotiable instrument." He considered that otherwise, even though the indorsement abroad was valid to legalize the possession by the indorsee claiming under the foreign law, yet he would be guilty of a conversion if he obtained payment from an original party to the negotiable instrument from which he could not have

[34] [1905] 1 K.B. 677.

[35] That is, under the law of the place of payment (*infra,* Ch. 62 n. 30), referring to the law of the indorsement.

recovered by process of law.[36] An analogous decision has been rendered in New York.[37]

A corresponding general rule to bind American parties issuing, accepting, or indorsing a bill has been proposed by Lorenzen.[38] The Supreme Court of the United States took a broad view, but on technically different grounds. This time, the *lex situs* was invoked as the chief basis of the decision.

The Supreme Court held, indeed, that the right of a holder against the drawer as well as the drawee is governed by the law of the place where the indorsed bill is delivered to the holder.

A check was drawn by the United States Veterans Bureau to the Federal Reserve Bank of New York on the Treasury of the U.S. The check was payable to L. Makanja in Yugoslavia and mailed to him, but failed to reach him. Somebody forged his signature and an attestation by the city and sold it to the Merkur Bank in Zagreb (Croatia), whence it came to the Guaranty Trust Company to which it was paid by the Federal Reserve Bank of New York as fiscal agent of the U.S.[39]

The decision is squarely built on the conflicts rule for transfer of chattels. The bank in Yugoslavia acquired the title under its last situs, by the effect of good faith. The court, in this view, was influenced by the consideration that the owner of the paper, the Government, by mailing the check consented to negotiation in Yugoslavia. From these antecedents, the trust company acquired the check and the right to enforce the obligation it represents, as an incident of the transfer of a chattel.

[36] *Ibid.* at 684.

[37] Casper v. Kühne (1913) 159 App. Div. 389, 144 N.Y.S. 502; payment in good faith by the drawee bank in Vienna.

[38] LORENZEN 139.

[39] United States v. Guaranty Trust Co. of New York (1934) 293 U.S. 340, 95 A.L.R. 651; STEFFEN, Cases 390.

It is very difficult to follow this sequence of ideas, since a check to order is not an ordinary chattel. The result in the instant case was right, but the reasoning expressed a not quite satisfactory theory.

Mr. Justice Brandeis, speaking for the court and intent on combating the theory of the defendant government, explained that the holder in the case had, indeed, more than a title in a valueless paper, derived from the local *lex situs;* the situation was likened to that of a transferee without indorsement or an indorsee after maturity, that is, the holder was not owner of "the debt," but he had the right to collect the proceeds such as the payee would have. This construction unnecessarily separates title and debt. Why was the holder not also the owner of the debt as well as of the paper? If the Yugoslavian law was seriously applied, the discount bank did acquire "the debt," not meaning of course the underlying relationship between the payee and the drawer, or that between the drawer and the drawee, but "the debt" flowing from the instrument, the scriptural rights. It is illogical and unsound to convert this effect into a conception that neither corresponds to Yugoslavian nor to American law. For assuming that the foreign bank became a regular holder in good faith, so as to cut off the objection of previous forged signatures, his successors in due course enjoyed his privileges and were not in a hybrid and possibly precarious position.

It is an important requirement that title and cambial debt both be considered in full, and at the same time kept together as often as possible.

In France the principle of independence was understood to require that English parties should not be made liable contrary to their own law (of contracting), except on the ground that the latter contravenes public policy.[40] Yet the

[40] ARMINJON ET CARRY 507 § 448.

only English and American opinions rendered so far approve such liability even in their own courts. The same view has been taken by the German writers, because the recourse must be continued to reach the original parties. They contend that the drawer has no interest in the person who avails himself of the recourse.[41] In any case, the courts do feel the necessity of bridging the gaps threatening the value of international bills of exchange.

Liability of Agent. According to the English and American Acts,[42] an agent "signing for or on behalf of a principal or in representative capacity" is not liable on the instrument "if he was duly authorized." Otherwise, he is personally liable. The same is stated in the Geneva Convention, article 8. Are these incidents of the signature?

Arminjon proposed first to consult the *lex fori* on the "preliminary question" whether the relationship is to be characterized as *"cambiaire"* or not;[43] in the affirmative, the agent would have to use the forms of the *lex loci contractus,* and his own obligation would be determined by the bill of exchange law. The detour seems unnecessary. The laws of bills of exchange expressly incorporate the liability of unauthorized agents, correctly so, since his relationship to third parties is governed by the law of the contract that he concludes (Vol. III, p. 141). Indeed, by reimbursing the holder he enters into the cambial rights quite as the principal would.[44]

[41] STAUB-STRANZ 744 n. 24; KESSLER 152 n. 36; RAISER 105.

[42] *Supra* n. 28.

[43] ARMINJON ET CARRY 491 § 433 with some distinctions; ARMINJON, DIP. Com. 320 § 165.

[44] Whether there should be an analogy in the case where an authorized agent signed with the name of his principal without his own name and finally pays the bill, is questioned by ULMER, Wertpapiere 179.

III. *"Lex Loci Contractus"* of the Single Obligation or Law of the Original Contract?

1. Negotiability

The ability of a paper to be transferred by indorsement or delivery depends on compliance with formal requirements. It might simply be regarded as an incident of form. But American courts distinguish negotiability from form, and various considerations have been introduced into the problem.

(a) *In English and Continental laws,*[45] it is plainly recognized that the law of the place of issue governs the *original contract* also with regard to the questions whether the payee may transfer the instrument to order, in blank, or to bearer. A bill of exchange drawn and delivered in England and payable in Paris was negotiable and indorsable anywhere without the clause "or order" as former French law required, and is endorsable now although not named "bill of exchange," as the Geneva law adopted in France requires. Conversely, a bill issued in a country of the Geneva Convention is negotiable everywhere, if designated as bill of exchange (article 1), though clauses required elsewhere are lacking.

It is furthermore settled that *accessory contracts,* such as indorsements or *avals,* enjoy the negotiability of the original bill. An indorser therefore cannot restrict his signature by prohibiting subsequent indorsements (Gen. Conv., art. 15, par. 2).

But where the drawer himself uses the clause "not to order," [46] or for that matter when the law of the first is-

[45] 2 Diena, Principi 312; 3 Trattato 95 § 222; Ottolenghi 211 § 84; Raiser 99; Hupka 265.

[46] Generally allowed, see Diena, 3 Tratt. 94 n. 1; Geneva Conv. art. 11, par. 2.

sue excludes negotiability in the absence of a clause "to order," [47] the municipal enactments and doctrines are divided. Among them, the view that non-negotiability extends to all further contracts [48] has been adopted in the British Act, section 8(1) and the Geneva Convention, article 11, paragraph 2:

> If the drawer has inserted in the bill the words 'not to order' or an equivalent clause, the bill can only be transferred in the form and with the effects of an ordinary assignment.

Other laws, however, pursuing the principle of independence as conceived in municipal law, restrict the effect of the clause to its signer, even though he is the drawer; the bill, hence, reacquires its full force in the hands of any holder.[49]

The conflicts problem appears where, under the first group of laws, now under the Geneva Convention, the drawer, according to his law, excludes subsequent negotiations, which nevertheless occur in a country denying the absolute effect of the clause. The municipal doctrines have influenced the decisions. Leading writers belonging to the jurisdictions of the second group extending their municipal conception to the conflicts rule have invoked the independence of subsequent indorsements as governed by their own laws of contracting.[50] Against this view, a scholarly

[47] Egypt, Code Com. mixte art. 110; Code C. Com. indigène art. 105 (following a former provision of the French (Com.).

[48] France: Cass. (Dec. 11, 1849) S. 1850.1.121, D. 1850.1.47;
Germany: former Wechselordnung art. 9, 15;
Scandinavia: Bills of Exchange Act (1880) art. 9, 15; Swiss C. Obl. art. 727, 733;
Hungary: Bills of Exchange Law (1876) art. 8, 13.

[49] Italy: former law: VIVANTE, 4 Trattato Dir. Com. § 1617; actual Bills of Exchange Law, 1933, art. 15, 19.

[50] Italy: DIENA, 3 Trattato 97 § 222; BONELLI 230; OTTOLENGHI § 84 (but see § 57); G. ARANGIO-RUIZ 254 § 98;
France: ARMINJON ET CARRY 507 § 449.
Germany: STAUB-STRANZ 739-740 n. 16.

opinion considers the drawer's declaration to be an integral or at least prominent part of the original contract, binding on all participant parties, throughout the circulation of the bill.[51]

But the defenders of the independence principle [52] again may point to its adoption, without an exception for the clause "not to order," in the Geneva Rules (article 4, paragraph 2). Also certain of the draftsmen have denied that a bill could be made non-negotiable from birth forever.[53]

On the other hand, it is clear that accessory parties may end initial negotiability by appropriately restricting their signatures.[54]

(b) *United States.* Also in the United States it is controversial what law governs negotiability. Lorenzen [55] and the Restatement (§ 336) have well perceived that in principle negotiability is an incident of the basic contract, governed by the law of the place of the first issue. Only a small minority of the decisions, however, follow this course.[56] Beale says that most decisions contain "as usual no square holding." [57] Wharton thought that the courts decided according to individual incidents rather than principles.[58] Favor for one party has certainly influenced some

[51] 2 BAR 166 n. 143; RAISER 99; HIRSCH, JW. 1932, 709; HUPKA 265; KESSLER 138.
France: VALÉRY § 923; ARMINJON, DIP. Com. 336 § 177.
[52] STAUB-STRANZ, art. 93, n. 16; HUPKA 26 (5).
[53] RAISER 111.
[54] RAISER 101 consistently denies this possibility as excluded by the original contract.
[55] LORENZEN 129 ff.; Popp v. Exchange Bank, noted 11 Calif. L. Rev. 114 (1923).
[56] Carnegie v. Morrison (Mass. 1841) 2 Metcalf 381; Swift & Co. v. Bankers Trust Co. (1939) 280 N.Y. 135, 19 N.E. (2d) 992.
[57] 2 BEALE 1186 § 336.1; *cf.*, Notes, 61 L.R.A. 193, 205; 19 L.R.A. (N.S.) 665; See also BEUTEL-BRENNAN 971 § 66 with comment on Mackintosh v. Gibbs (1909) 79 N.J.L. 40, 74 Atl. 708; add (1911) 81 N.J.L. 577, 80 Atl. 554.
[58] 2 WHARTON 966, *cf.*, LORENZEN 130.

holdings.[59] According to Stumberg's analysis, in the case of a maker or an acceptor, the weight of authority favors the law of the place of payment, although for secondary obligations the decided tendency goes toward the separate laws of the places of drawing or indorsing. But authority exists for the proposition that if a check is drawn in Mexico and payable in New York, its negotiability depends on the law of Mexico, because the check is a bill of exchange.[60]

Application of the independent laws is often advocated by the usual formalistic arguments. The law of the place of payment is not explained at all. But, as the next topic will show, it is regarded as the alternative to plurality of laws which is not attractive in itself with respect to the primary obligation.

(c) *Conclusion.* If we want a simple and coherent law we cannot disregard the initial role of a bill if issued as a negotiable instrument. Any indorser may eliminate its effect for himself by an express clause. But he should not be able to restrict the characteristic quality of the paper with respect to subsequent parties who sign without restriction. This quality is an immediate effect of compliance with the formal requirements of the original contract.[61]

Where, however, an instrument is non-negotiable under its original law, it accords with the modern compromises respecting form and capacity to allow subsequent additions altering the nature of the instrument as respects the parties involved thereafter.[62]

2. Indorsement after Maturity

Indorsement after maturity has "a most diversified effect in the different countries." [63] This is also true of indorse-

[59] See, e.g., Nicholas v. Porter (1867) 2 W. Va. 13, 94 Am. Dec. 501.

[60] Hennelotter v. De Orvananos (1921) 114 Misc. 333, 186 N.Y.S. 488 and *supra* n. 50.

[61] Everything on this point has been said by LORENZEN 100.

[62] LORENZEN 132 seemed to be of the same opinion.

[63] LORENZEN 32.

ments after protest or after the time for protest has elapsed. However, the great tendency has been in all these cases to treat the indorsee as an ordinary assignee.[64] Conflicts do arise where duly protested bills give rise to this situation, as formerly in Germany,[65] or conversely these events do not impair the indorsement, as formerly in France.[66]

The reason for the infirmity of the indorsee's position is not a defect of title, but the end of the normal life of the instrument. This gives no reason to exclude the individual laws in just this case.[67]

IV. Single Law of Indorsement or Law of the Place of Payment?

1. Amount of Damages in Recourse

In this matter there has been no doubt respecting the substantive nature of the extent of recovery due in case of recourse on a dishonored bill.[68] In England formerly, the "several laws" doctrine applied to the rate of interest,[69] and related questions,[70] but the Bills of Exchange Act, section 57(2), states that in the case of a bill dishonored abroad, the last holder or a warrantor may choose between the English measure of damages and the amount of re-exchange with interest. A decision has given the same right to a foreign drawer against an English acceptor.[71] Otherwise, foreign parties seem to be restricted to the Eng-

[64] BEA sec. 10 (2); NIL sec. 7, par. 3.
Geneva Conv., art. 20.
[65] Former Germon W.O. art. 16.
[66] Former French doctrine, 4 Lyon-Caen et Renault § 135.
[67] See Raiser 107.
[68] In re Gillespie, ex p. Robarts (1886) 18 Q.B. 286; Re Commercial Bank of S. Australia (1887) 36 Ch. D. 522; Dicey (ed. 6) 702 n. 84.
[69] Gibbs v. Freemont (1853) 9 Exch. 25.
[70] Cooper v. Earl of Waldegrave (1840) 2 Beav. 282; Chalmers 238.
[71] In re Gillespie, *supra* n. 62.

lish provisions in an English court.[72] Hence, apart from re-exchange, which has little importance at present, the acknowledgment of the substantive character of damages does not help much.

American courts, speaking of *lex loci contractus* [73] or of *lex loci* of "performance," [74] have applied the law of each single contract; the maker of a note and the acceptor, of course, remaining subject to the law of the place of the payment of the instrument.[75] The German law and discussions preceding the uniform Geneva Convention were dominated by the idea that in the event of recourse the amount of the bill and the original addition of interest and costs ought to be successively increased by new interest and costs.[76] This system of "plural return costs" is mitigated by a right of every party liable to offer payment and require that the bill shall be given up to him.[77] With this system of substantive law, accentuating by itself the independence of the single laws with international effect, it is only a step to the similar conflicts system, accounting for the additional costs according to the single laws.

It would seem, indeed, that, once the single law doctrine obtains at all, it has the relatively best case in this very question which is really such as would be contemplated by a bank discounting a payee's check.[78]

2. Defenses of Acceptor or Maker

The analogous rivalry of conflicts rules involving the position of the primary obligors belongs to the next chapter.

[72] DICEY (ed. 6) 703; LORENZEN 168.

[73] Slacum v. Pomery (U.S. 1810) 6 Cranch 221, 3 L. Ed. 205; Bank of Illinois v. Brady (1843) 3 McLean 268, Fed. Cas. no. 888.

[74] Peck v. Mayo (1842) 14 Vt. 33, 39 Am. Dec. 205, and cases cited by LORENZEN 169 n. 401-403. But see Mullen v. Morris (1845) 2 Pa. St. 85: place of payment of the bill, i.e., New York, for indorser of Pennsylvania *(semble)*.

[75] Scofield v. Day (N.Y. 1822) 20 Johns. 102: English law for a note payable in England.

[76] Geneva Conv., art. 48, 49; *cf.*, former German W.O. art. 50, 51.

[77] Geneva Conv., art. 50; W.O. art. 48.

[78] See LORENZEN's conclusion 173; RAISER 65 ff.

CHAPTER 62

Payment and Recourse

I. PAYMENT

PAYMENT here means the fulfillment of the primary cambial debt, by the drawee or maker. The law applicable to this relationship is primarily concerned with the obligation of a maker or an acceptor to a holder, but also includes such incidents as the offer of partial payment and certain other questions, the scope of which is sometimes much enlarged.

1. The Applicable Law

Matters respecting payment are commonly controlled by the law of the place where the bill is payable. Thus, the Geneva Rules (article 4, paragraph 1) state that

"The effects of the obligations of the acceptor of a bill of exchange or maker of a promissory note are determined by the law of the place where the instrument is payable."

This rule contrasts with the effect given in the Geneva Rules to the law of the place of signature in the case of other parties.[1]

Story and the weight of American judicial authority [2] agree with this rule.

The former German doctrine, true to the principle of the law of the place of performance, tended rather to the

[1] This contrast, notwithstanding some variance as to the exact point of reference (*infra* n. 3) was stated early in Germany: 1 ROHG. E. 289; 14 *id.* 258; 1 RGZ. 125; 6 *id.* 24; 7 *id.* 22; 107 *id.* 46; STAUB-STRANZ, art. 93 n. 6; see also Swiss BG. (Jan. 24, 1878) 5 BGE. 19.

[2] STORY 478 § 333; Heller v. Goslin (1900) 65 N.Y.S. 232; Midland Steel Co. v. Citizens Natl. Bank (1904) 72 N.E. 290; Egley v. Bennett (Ind. 1923) 139 N.E. 385; Montana v. Worthington (1912) 162 Mo. 508, 142 S.W. 1082.

place which, as a subsidiary rule, was identified with the domicil of the debtor.[3] The same contact or the place where the acceptance is made, have also been urged on the ground of general theories.[4] Also, the English Bills of Exchange Act, section 72(2), submits "interpretation" of acceptance, like that of other acts, to the law of the place "where such contract is made." This embarrasses the modern commentators,[5] and has been expressly rejected in the United States;[6] the place of payment may be or may not be that where acceptance occurs.[7]

Place of payment named ("domiciled draft"). Where a place of payment, different from the domicil of the drawee, is named in the bill, this has always been regarded as the surest expression of the intention that the law of this place should govern the obligation of the acceptor.[8] The place for performing the duties as a guarantor, of course, is not affected by this consideration.

Absence of Place of Payment. Where there is no ascertainable place of payment, as in the case of a bill payable to bearer or in blank, a substitute is needed. The place of issue may serve for the obligation of the maker and that of the drawee's domicil for his duty.[9] But cer-

[3] 2 RGZ. 13; 6 *id.* 24; 7 *id.* 21; etc. 107 *id.* 44, 46.

[4] E.g., STORY 478 § 333.

[5] CHALMERS, Bills of Exchange, thought that the mistake could be corrected; WESTLAKE § 229 ignored the provision; DICEY (ed. 6) 690 doubts whether the law can be helped.

The Act of India, s. 134, a year older, has a different rule, likewise unsatisfactory in the opinion of an Indian comment, see DICEY, *l.c.*

[6] By an ancient decision, Grimshaw v. Bender (1809) 6 Mass. 157. The place of acceptance was used, e.g., in Briggs v. Latham (1887) 36 Kansas 255, 13 Pac. 393.

[7] Rouquette v. Overman (1875) L.R. 10 Q.B. 525: place of acceptance or place named for payment; Hall v. Cordell (1891) 142 U.S. 116; etc.

[8] United States: Brown v. Gates (1903) 97 N.W. 221, 98 N.W. 205: a very persuasive evidence of the intention of the parties.

[9] Geneva Convention on Bills, art. 2 (3) (4), on Checks art. 2 (2)-(4) and reservation 3 (allowing the place of creation, used in Italy and Greece).

tainty is achieved by the laws prescribing that the place of payment be indicated in the bill.[10]

2. The Scope of the Law of Payment

(a) *Modalities of payment.* The normal application of the law of the place of performance is natural also here. The law of the place of payment, in such capacity, determines the means of payment:[11] local or foreign currency; meaning of "pounds" or "francs," [12] or of money in the old days of markets and fairs; holidays and hours to be observed;[13] the days of grace;[14] and anticipation or deferment of the payment.[15]

(b) *Time of maturity.* The periphery of "modalities" has been gradually stretched, which in this field corresponds to the special needs. The Geneva Convention, article 37, to end much controversy, expressly prefers the calendar at the place of payment to that of the place of issue. The English Act covers this solution broadly with respect to the "due date," [16] and other statutes agree.[17] The *lex loci solutionis* is commonly preferred to the *lex loci contractus.*[18]

[10] Hague Uniform Law, art. 1 no. 5; Geneva Conv., art 1 no. 5.

[11] Caras v. Thalmann (1910) 138 App. Div. 297, 123 N.Y.S. 97; Geneva Conv., art. 41 par. 2 (usages of the place of payment); Montevideo Treaty Com. Terr. (1940) art. 30 par. 3.

[12] 2 BAR 164; 1 FIORE 223; 2 ROLIN 543; LORENZEN 163 n. 371; Adelaide Electric Supply Co. Ltd. v. Prudential Assurance Co. Ltd. [1934] A.C. 122, 151, per Lord Wright, *supra* Vol. II, p. 464; but see Bonython v. Commonwealth of Australia [1950] 66 T.L.R., Pt. 2, 969, 978.

[13] LORENZEN 144, n. 291, citing the international literature.

[14] United States: Cockburn v. Kinsley (1913) 25 Colo. App. 89, 135 Pac. 1112; Second Natl. Bank of Richmond v. Smith (1903) 118 Wis. 18, 94 N.W. 664; other cases: STUMBERG 264. LORENZEN 144 n. 292, with many citations of Continental authors.

[15] England: Rouquette v. Overmann (1875) L.R. 10 Q.B. 525 (moratory).

[16] Sec. 72 (5).

[17] Switzerland: C.Obl. art. 1092.

[18] France: ARMINJON, DIP. Com. 348 n. 1 citing opponents, cited 347 n. 1; *cf.* ARMINJON ET CARRY 517 § 548 on the French controversy.

Germany: STAUB-STRANZ art. 93 n. 8.

Italy: FIORE § 328; DIENA, 3 Trattato § 233.

Illustration. Are "three months after date" calendar months or ninety days? The Portuguese law of the place of payment decides.[19] "Thirty days after date" in a seller's draft, drawn in the United States and accepted in England, the steamer with the goods arriving earlier than foreseen: English law applies.[20]

(c) *Part payment.* Although the Anglo-American acts allow the holder an option to receive or refuse partial acceptance by the drawee or partial payment,[21] the Geneva Convention states that the holder must receive it.[22] The Geneva Rules, article 7, apply the law of the place of payment to this question.[23]

The same must be true of a conditional acceptance.[24] If the laws of the place of indorsement were applied, an American could be made liable by a holder having refused part payment but would not be able to sue his Italian indorser.

(d) *Amortization.* In conformity with the universal view,[25] the Geneva Rules add to the scope of the *lex loci solutionis* the "measures to be taken in case of loss or theft of a bill of exchange or promissory note." "Loss" includes destruction [26] and the "measures" include restitution following such measures.[27]

(e) *Excuses and discharge.* Finally, the same law determines the excuses for delaying or not performing pay-

[19] OLG. Hamburg (May 28, 1895) 5 Z. int. R. 570, Clunet 1897, 386, aff'd. RG. (Dec. 11, 1895) 36 RGZ. 126, 6 Z. int. R. 166, 429, Clunet 1897, 827.

[20] Hammond, Snyder & Co. v. American Express (1908) 107 Md. 295, 68 Atl. 496.

[21] BEA s. 44 (1); NIL s. 142;—a bad rule, HUDSON AND FELLER, 44 Harv. L. Rev. (1931) at 357.

[22] Geneva Conv., art. 39.

[23] Likewise LORENZEN 163 f.

[24] ARMINJON ET CARRY 498 § 438.
Treaty of Montevideo, Com. Terr., art. 30 par. 4.

[25] VEITH 526.

[26] Comptes rendus, 157 § 203 i.f.

[27] *Id.* 366.

ment.[28] And as the law of the place of payment predicates what amount is due on the bill, it also decides whether the entire bill is discharged by payment, release, setoff, or other event,[29] and therefore also whether an acceptor is discharged by payment on a forged instrument or has to pay again to satisfy the bill (not his underlying relationship to the drawer).[30]

3. Enlargements of Scope

(a) The British Act, Section 72(2), subjecting all "interpretation" of any cambial act to the law of the place of payment, however this vague provision may be construed, by far exceeds the reasonable scope of this law.

(b) In the United States, many decisions sound as if the law of the place of payment governed the total obligation of the maker of a promissory note. It is said to govern "execution, construction, and validity." However, there is no reason why the *validity* of issue should be judged from the viewpoint of the place of performance.[31] More thoughtful courts have restricted the scope of this law to the incidents of performance itself.[32] Also the obligation created by the issue of a check must not be determined by that law,[33] as the Geneva Rules on Checks correctly state.[34] In the present system, it is unavoidable that validity of drawing and making be subject to the law of the place where signature and delivery to the payee occur.

[28] For U.S. see STUMBERG 263.

[29] BEA secs. 59, 60. DICEY (ed. 6) 694 f.

[30] E.g., Casper v. Kühne (1913) 159 App. Div. 389, 144 N.Y.S. 501, Austrian law of the drawee bank.

[31] This criticism seems to be shared in 11 Am. Jur. (1938) 437. Most decisions allege "intention," in a purely fictitious manner.

[32] Brabston v. Gibson (1850) 9 How. (U.S.) 263; Bank of U.S. v. Daniel (1838) 12 Pet. (U.S.) 32.

[33] *Contra:* Moulis v. Owen [1907] 1 K.B. 746- C.A.

[34] Geneva Rules concerning checks, art. 2 par. 2.

Acceptance, it is true, is "independent" of issue. Its place has been identified either with the locality of the declaration of acceptance, or, as in the United States, simply with the place where payment is due.[35]

II. The Steps to Preserve Recourse

1. Survey of Theories

(a) *Controversy.* Are presentment of the bill, protest, and notice of default to be governed by the law of the first issue as the basic law of the bill? Or by the law of every single indorsement, in virtue of the principle of independence? Or by the law of the place of payment as a unitary law in matters not directly connected with issue?

There have been controversies on these questions for a long time in various countries.[36] The European discussion originated in connection with the French moratory law of 1870, which under the pressure of war postponed the maturity of bills and the time for presentment and protest. Brilliant expert opinions brought no agreement on the international effect of the French law.[37] Very comprehensive debates in the preparation of the Hague and the Geneva conflicts rules were no more fortunate. Neither are the rules reasonably settled, nor even the problems completely envisaged.

The ideas underlying the substantive rules requiring the holder to take certain measures are approximately uniform, with just one exception. In the Anglo-American laws, the holder is expected to exercise *diligence;* negligence in per-

[35] *Supra* Ch. 59.

[36] We owe an excellent report to Lorenzen 158 ff. An almost forgotten but historically important and profound contribution was made by von Salpius, "Anwendung ausländischen Rechtes auf den Wechselregress," 19 Z. Handels R. (1874) 1.

[37] See *infra* 219.

forming this duty deprives him of his recourse. Continental laws agree in the main but usually add the consideration that the holder loses his right by force of law. Thus, it seems that Anglo-American lawyers base the duty on the contract between the holder and his indorser, whereas Continental doctrines, though also emphasizing contractual aspects, at the same time have in mind a legal effect of inaction equivalent to estoppel,[38] operating without any fault of the holder. This contract is now mitigated by the fact that the Geneva Convention concedes the excuse of *vis major*. Nevertheless, the principles are sufficiently different to have inspired different points of view in the conflicts field.

In the United States, the principle of independence, fostered by isolated contractual privity, dominates in surprising strength.[39] In the Continental doctrine, the same powerful current [40] encounters opposite tendencies with such uncertain results that the comments on the Geneva rules still hesitate where to draw the line between the principle of independence sanctioned in article 4 and the law of the place of payment invoked in article 8.[41]

In general, the law of the place of payment has an unchallenged role in certain parts of the matter and a controversial one respecting other incidents.

(b) *Statutes*. The only statutes apparently attempting a comprehensive conflicts rule have given enigmatic directives.

The British Bills of Exchange Act, section 72(3), following some leading precedents,[42] subjects all duties of the

[38] Very instructive: HUPKA 149; ULMER 187.

[39] See the cases in 2 WHARTON § 452b; 1 DANIEL (ed. 6) § 909; LORENZEN 148 n. 317; RAISER 40 n. 3.

[40] 2 MEYER 373 for documentation.

[41] *Infra*.

[42] Rothschild v. Currie (1841) 1 Q.B. 43; Hirschfield v. Smith (1866) L.R. 1 C.P. 340, quoted by LORENZEN 152-154.

holder to "the law of the place where the act is done or the bill is dishonoured." Since the text only mentions the place where the act is *done,* without adding "or to be done," the courts have refused to apply the provision to the question whether, e.g., an act of presentment is required at all.[43] Among many other doubts, it is even queried whether the law includes other indorsees than the last holder.[44]

In the Geneva Rules, article 8 speaks of the form of protest and other necessary acts, submitting it to the law of the place of acting (*infra* 3), but the text fails to say what law decides whether an act is necessary for the conservation of rights. No help is afforded by the preparatory materials.

We shall first discuss a problem that is quite commonly treated as an incident of the independent laws, viz. the necessity of the various measures in question; thereafter the problems generally considered subject to the law of the place of performance—time and manner of these measures; and finally the problems of doubtful classification.

2. Necessity of Preserving Steps

Not only the vastly dominating American practice,[45]

[43] Bank Polski v. Mulder & Co. [1941] 2 K.B. 266, [1941] 2 All E.R. 647, per Tucker J.; Cornelius v. Banque Franco-Serbe [1941] 2 All E.R. 728, 732 per Stable J.; on the reasoning see the critical comment by MANN, 5 Mod. L. Rev. (1941/42) 251, and CHESHIRE (ed. 4) 254.

[44] WESTLAKE § 232: no; *contra:* DICEY (ed. 6) 698.

[45] 11 Am. Jur. 444 n. 2; Aymar v. Sheldon (N.Y. 1834) 12 Wend. 439, 27 Am. Dec. 137; Musson v. Lake (1845) 4 How. (U.S.) 262. Among more recent decisions, see, e.g.:

Liability of drawer: Casper v. Kuhne (1913) 79 Misc. 411, 140 N.Y.S. 86, aff'd. 144 N.Y.S. 502; Ellenbogen v. State Bank (1922) 119 Misc. 711, 197 N.Y.S. 278; Mazukiewicz v. Hanover Nat. Bank of City of New York (1925) 240 N.Y. 317, 148 N.E. 535; Bank of Nova Scotia v. San Miguel (C.C.A. 1st 1952) 106 F. (2d) 950.

Liability of indorser: Briggs v. Latham (1887) 36 Kan. 255, 13 Pac. 393; Guernsey v. Imperial Bank of Canada (C.C.A. 8th 1911) 188 Fed. 300.

but also the majority of Continental courts [46] and the writers [47] profess that "necessity" and "sufficiency" of presentment, protest, and notice are subject to the several independent laws. The justification of this rule is sought in "logic"; where the obligation of the indorsers is made dependent on a protest, this is a condition precedent of the guaranty to be governed by the law controlling this obligagation.

A contrary opinion, however, objects that no valid reason exists for compelling the holder to observe the laws under which the *previous* engagements occurred.[48] The result is application of the law of the place of payment, quite as the British Bills of Exchange Act, section 72(3) predicates.

A related rule has been introduced into the Uniform Commercial Code, section 4-102, but only for actions taken by a bank in the course of collection. The place of the bank, however, though a better contact than the place of the indorser, is not of such practicability as that of the place of payment.

The commentators on the Geneva Rules split into the

[46] France: Trib. Com. Seine (April 6, 1875) Clunet 1876, 103.
Germany: 9 ROHGE. 203; RG. (May 27, 1913) Leipz. Z. 1913, 674.
Italy: Cass. Firenze (Apr. 8, 1895) S. 1896.4.7.

[47] 2 MEYER 373; RAISER 20 n. 2, 3; 72 n. 3; VEITH 517 f.
England: WESTLAKE § 232.
U.S.: STORY § 360; 2 WHARTON 986 § 452 b, d.; LORENZEN 148-150; DANIEL (ed. 6) § 909.
Austria: BETTELHEIM 157 f., 162 f.; 2 GRÜNHUT 581; CANSTEIN 182.
France: DESPAGNET 994 § 345; VALÉRY 1288; SURVILLE § 497; WEISS, 2 Traité 444; AUDINET 618, 620.
Germany: 2 BAR § 306; 2 GRÜNHUT 581; 19 ROHG. 203; 9 RGZ. 430; STAUB-STRANZ (ed. 10) art. 86, n. 9; KGJW. 1932, 754.
Italy: DIENA, 3 Tratt. 169, 2 Principii 327; OTTOLENGHI 366; BOSCO, Rivista 1928, 97, 106.
Switzerland: 2 MEILI 347 § 192.

[48] England: FOOTE (ed. 5) 460; DICEY (ed. 6) 698; CHESHIRE (ed. 4) 253.
Germany: 2 FRANKENSTEIN 434; NUSSBAUM 324 f.
Italy: SRAFFA, Riv. Dir. Com. 1927, 1. 255; CAVAGLIERI, Dir. Int. Com. 392 f.; App. Napoli (May 2, 1924) Rivista 1925, 101 (promissory note).

same two views. Either they trust the broad language of article 4, stating the principle of independence,[49] or they construe article 8, establishing the law of the place of payment, extensively.[50]

A third view looking to the place of issue [51] has no attraction. The consequences may be illustrated:

(i) A bill issued and payable in the United States (or England) to P is indorsed in the United States (or England) to A and by A in Germany to B. Since under German law protest is a condition of recourse, B omitting the levy of protest loses his right against A. This is still true under the Geneva Convention, article 44, paragraph 3, for bills payable on a fixed day or in a fixed period after date or sight and otherwise, where the protest is not made within a year (article 34). However, under American (or English or Mexican) law concerning an inland bill which does not need to be protested,[52] A has, without protest, recourse against P and P against the drawer.[53]

(ii) A commercial order was drawn in New York on a firm in Vienna, Austria, to the order of plaintiff. Protest in Vienna was omitted as unnecessary because the instrument was not a true check. Under New York law, however, it was a foreign bill and protest was required. The liability of the drawer is denied,—correctly under the law of the drawer, wrongly under that of the place of payment.

If it may be allowed to doubt whether the issue warrants an exception to the several laws principle—as Lorenzen did—the presence of both conflicts rules in the same world is one disadvantage too many.

The decision in favor of the *lex loci contractus* is ordinarily believed easier with respect to notification. The duty

[49] HUPKA 256 f.
[50] ARMINJON, DIP. Com. 359 § 193.
[51] Institute of International Law, 8 Annuaire 122, resolution IV.
[52] BEA sec. 51 (2); NIL sec. 152; Mexico: Ley de Titulos, art. 145.
[53] RABEL, 6 Z. ausl. PR. 325, 332; KESSLER 151, 157; HUPKA 257 n. 1.

of the holder is now regulated with less difference but not quite similarly by the Anglo-American Acts which prescribe notices to the drawer and every indorser, and the Hague and Geneva Conventions requiring notice to the drawer and the precedent indorser who has to communicate with his own indorser.[54] The writers think that with good reason an American indorser may expect notice from the last holder.[55]

Illustration. A indorsed in England a bill payable in Spain, and B indorsed in Spain to C where no notice was required. C gave notice to B twelve days after dishonor, B at once to A. The English court allowed recourse by B against A;[56] indeed, B could not act earlier.[57]

It is difficult to see why even in such questions a world law could not provide unity.

3. Form and Time

(a) *Form.* The Geneva Rules, article 8, expressly state that

"the form . . . of protest as well as the form of the other measures necessary for the exercise or preservation of rights concerning bills of exchange or promissory notes, are regulated by the laws of the country in which the protest must be drawn up or the measures in question taken."

The same rule is established for all "duties" of the holder in the British Act, section 72(3),[58] for the duty of levying protest in the laws of the German group before the Geneva

[54] BEA sec. 48; NIL sec. 89; Hague Unif. Law art. 44; Geneva Conv. art. 45.

[55] To this effect recently ARMINJON, DIP. Com. 361.

[56] Horne v. Rouquette (1878) 3 Q.B.D. 514-C.A.

[57] "How could the English indorsee have given what would have been timely notice from the point of view of English domestic law, if his own knowledge of the dishonour depended on the compliance with Spanish law?" DICEY's editors (ed. 6) 698 ask.

[58] DICEY (ed. 6) 698.

Rules,[59] in the Latin-American codes and treaties,[60] and is familiar to the literature.[61] A prominent American decision [62] shares this view, speaking of the "days of grace, the manner of making the protest and the person by whom protest should be made," as equally subject to the law of the place of payment. We may take it that the former contrary opinions respecting time and form of notification are to be regarded as obsolete.[63] The law or custom of the place where the bill is payable governs, as it is often said.

What is "form"? Agreement seems to exist that here, once more, form is a broad term, really a misleading name, including external expression of presentment, protest, or notification or "noting," but also the officers, manner, time of day, and locality involved. The British Act happily avoids this term. It appears that even such questions as follows are included in the "mode of presentment":[64]

Whether a mere possessor who is not the owner of the bill may present it and levy protest in his own name;[65]

Whether upon a presentment for acceptance the drawee

[59] 1 MEYER 659. Germany: former WO. art. 86; 2 GRÜNHUT 577.

[60] Montevideo Treaty Com. art. 26.

Cód. Bustamante, art. 270.

Chile: C. C. art. 17 par. 2, involving "effects" of an instrument, applied by Sup. Ct in Bco. Germanico de la America del Sur v. Lizarralde (Aug. 18, 1928) 26 Rev. Der. Jur. y Ciencias Soc. 1929 I, 474, 481, to the form of protest in Buenos Aires; it was a bill of exchange, indorsed in Chile upon a person domiciled in Argentina.

Mexico: Ley de titulos 1, (1932) art. 256, calls this law *lex fori*.

[61] STUMBERG, 253; PILLET, 2 Traité 841, 848.

[62] Amsinck v. Rogers (1907) 189 N.Y. 252, 82 N.E. 134; Wooley v. Lyon (1886) 117 Ill. 244, 6 N.E. 885; *cf.* Gleason v. Thayer (1913) 87 Conn. 248, 87 Atl. 790.

[63] See LORENZEN 151 n. 329; add Sec. Natl. Bank of Richmond v. Smith (1903) 118 Wis. 18, 94 N.W. 664.

[64] LORENZEN 148, par. 1.

[65] He may, according to Geneva Conv. art. 16 if he shows an uninterrupted series of indorsements.

may revoke his acceptance written on the bill, as the Geneva Convention allows him until he returns the bill.[66]

"Sufficiency of notice" is an ambiguous term occurring in American decisions, to be located between "necessity" and "manner." If the holder has given a reasonable notice to the defendant according to the law of his contract, it would seem that any other possible requirement regards either "time" or "mode," both of which belong to the place of payment.

Renvoi. One American case applying the law of the place of payment is known as admitting renvoi.[67] A promissory note was made and indorsed in Illinois and payable in Canada. It was dishonored, and the notice complied with the Canadian but not with Illinois law. Judge Sanborn, directly adducing the Canadian law of the place of payment to "time and manner of giving notice," argued *ad abundantiam* that even though Illinois law were to apply, it would refer to Canadian law. This decision has unnecessarily been criticized with the usual arguments against renvoi.[68]

(b) *Time.* In the United States, the time for presentment and protest is by prevailing authority determined under the law of the place of payment.[69] For the time and manner of giving notice some old decisions applied the independent laws of the several contracts,[70] but more recently the single law of the place of payment obtains.[71]

In agreement with the universal view,[72] article 8 of the Geneva Rules also follows the law of the place of pay-

[66] Geneva Conv. art. 29.
[67] Guernsey v. Imperial Bank of Canada (1911) 188 Fed. 300, 301.
[68] LORENZEN 175 f.; *cf.* RAISER 39.
[69] 10 C.J.S. 498 § 66 n. 59.
[70] 10 C.J.S. 499 n. 64, 65. For the old cases on presentment, *cf.* RAISER 72.
[71] Guernsey v. Imperial Bank of Canada (1911) 188 Fed. 300, 305.
[72] LORENZEN 154.

ment for protest. The time for presentment and particularly notice continues as a subject of controversy.[73]

The several laws doctrine produces a disorderly chain of recourse in which an indorsee may be liable to his creditor and unable to recover from his debtor.[74] Under the Geneva Rules the extensive interpretation of article 8, to cover presentment and notification, has been urged, not only as a requirement of harmony[75] but also because the local law of the place of payment is the only one known to the persons charged with cashing the bill.[76]

At least, respecting the time for presentment, all courts should follow this argument, especially, but not only, where the basic bill indicates a certain date for presentment or maturity.[77] The place of payment is also here preferable to that where presentment is due.[78]

Reasonable time. The Anglo-American Acts prescribe a reasonable time: for acceptance of a bill payable after sight (the time running from the issue) (NIL § 144); for presentment and protest of a bill payable at demand (from the issue or the last negotiation) (NIL §§ 71, 155); and for the liability of the drawer of a check (from the issue of the check) (NIL § 186).[79] Moreover, an old practice is frequently continued whereby a check must be sent for presentment the day after receipt. These are

[73] VEITH 500.

[74] Despite a Yugoslavian proposal and a monitum by the Northern states, see HUPKA 255 n. 3.

[75] RABEL *l.c.;* RAISER 74, 78; VEITH 518; HUPKA 256.

[76] KESSLER 156; but the dominant opinion takes, with regret, the independence principle as prescribed; see RAISER 80; QUASSOWSKI-ALBRECHT art. 97, n. 6; HUPKA 256, all following former rules; *cf.* RENAULT, Actes, Second Hague Conference on Bills of Exchange, 1912, I 150.

[77] ARMINJON-CARRY, §§ 436, 462.

[78] STAUB-STRANZ art. 97 n. 9 advocates the place of presentment. But this is too subtle; presentment may also be considered a modality of payment.

[79] BEA sec. 40 (1), 45 (2), 86 (1); 51 (4); 74.

contradictory principles which cannot be reconciled.[80] However, they may be corrected; only one decision has taken section 71 literally.[81] Commonly in case of a check, the reasonable time is simply understood to mean that each holder, to preserve the liability of his immediate indorsers, must present a check on the next following working day. Yet a bank issuing a check is deemed to put the instrument into circulation for a certain time.[82]

The interesting point here is, how foreign courts the laws of which do not know the criterion of "reasonable time," should apply this measure.

The main principle to be observed by a foreign court defining the duty of presentment is contained in § 193 NIL (sec. 40 (3), 45 (3), 86 (2) BEA):

"In determining what is 'reasonable time' or an 'unreasonable time,' regard is had to the nature of the instrument, the usage of trade or business (if any) with respect to such instrument and the facts of the particular case."

Foreign courts, applying American law as that of the place of payment, sometimes have failed to understand that this period must be estimated from case to case, and that drawer and indorser are on a different footing. The date of receiving a check, sending it to a bank for collection, dispatch to a correspondent bank and to the drawee must be ascertained; the holder must prove diligence in a severe examination.

No matter whether the Anglo-American "reasonable" time applies abroad as an incident of the indorser-indorsee

[80] Insofar (not respecting his own theory) I agree with BIGELOW-LILE, Bills, Notes and Checks (ed. 3, 1928) §§ 223, 351-355 against the authors who try vainly to harmonize the rules, with varying results. *Cf.* 6 Z. ausl. PR. 327 f.

[81] Columbian Banking Co. v. Bowen (1908) 134 Wis. 218, 114 N.W. 451.

[82] 2 DANIEL (ed. 6) 1789 f.

relation or as the unitary rule of the place of payment, this concept must be used in its original meaning.[83]

4. Exemptions from the Duties.

It is a difficult question whether excuses for delaying or omitting protests or other measures fall into the category of the independence principle or of the law of the place of payment.

The older authors either accorded to each signer discharge as provided by his own laws,[84] or likened temporary obstacles to the days of grace, subject to the law of the place of payment.[85] Lorenzen, declaring for the first principle, nevertheless on grounds of convenience, states an exception for the "definition of *vis major*" which should be that of the place of payment.[86] But this defeats the alleged principle. Arminjon distinguishes liberation by *vis major* and the obligations of the holders, which remain under their several laws.[87] Their duties, however, are essentially changed. The decisive question is: whether the law of the place of payment, quite contrary to the several laws principle, ought to be stretched,[88] so as to afford equitable relief to the holder, menaced in the preservation of his recourse. This should be affirmed with the exception of events affecting merely personal relationships.[89]

The American Negotiable Instruments Act uses a threefold language to define the exceptions to the duties of protest, presentment, and notice; these steps are "not re-

[83] RABEL, 5 Z. ausl. PR. (1932) 326, 330.

[84] E.g., 2 BAR § 310; SURVILLE § 498; 4 LYON-CAEN ET RENAULT § 660; 4 WEISS 463 f.

[85] 2 BROCHER 331; DIENA, 3 Tratt. 182, 192; 2 MEILI § 193; CAVAGLIERI, Dir. Int. Com. 390.

[86] LORENZEN 156.

[87] ARMINJON, DIP. Com. 371 § 203.

[88] Stretched over its normal scope which does not, despite the Restatement, § 332, include the causes of nonperformance, *supra* Vol. II, 466, *cf. supra* 205 f.

[89] RABEL, 6 Z. ausl. PR. 332 ff.; v. CAEMMERER, 4 Rechtsvergl. Handwörterbuch 265; KESSLER 151; HUPKA 256 f.

quired," [90] or "excused," [91] or "dispensed with." [92] Nevertheless, we do not see that these expressions have ever been neatly differentiated,—they are in fact merged in the Uniform Commercial Code, section 3-511—or would be able to furnish adequate categories for conflicts purposes. Yet, all these cases cannot be treated on the same footing. The following divisions may be proposed.

(a) *Personal defenses.* To stay within the American examples, an indorsee may sue the indorser or a maker or drawer without presentment, protest, or notice, where both parties knew that the instrument would not be honored and both were in fraud or the drawer was dishonest and the indorser knew it.[93] Likewise, where the indorser has participated in an application for bankruptcy of the maker, which made payment impossible at the time of maturity;[94] or the indorsee had to retain the check for a few days in the interest of the drawer and the indorser.[95]

The courts invoke waiver by conduct or construe sections 79, 80 "broadly." In truth, the exemption is based on circumstances outside the instrument, characterizing the underlying relationship between just the two parties. The individual contract and its law, under the principle of independence, govern the incident.

A different situation which, however, equally must produce the application of the several laws doctrine, arises where really waiver is written in the bill with restriction to a two-parties-relation.

[90] §§ 79, 114 no. 4, 159 (liability of the drawer); §§ 80, 115 no. 3, 159 (liability of indorser).

[91] §§ 81, 113, (delay by *vis major*).

[92] §§ 82 (3), 109-111, 159 (waiver); 82, (1), 112, 159 (impossibility).

[93] DANIEL 1236, 1792; going farther: First Nat. Bank v. Currie (1907) 147 Mich. 72, 110 N.W. 499; Start v. Tupper (1908) 81 Vt. 19, 69 Atl. 151 (semble); NORTON, Bills and Notes (ed. 4) 561.

[94] J. W. O'Bannon Co. v. Curran (1908) 129 App. Div. 90, 113 N.Y.S. 359.

[95] Churchill v. Yeatman, Gray Grocer Co. (1914) 111 Ark. 529, 164 S.W. 283.

(b) *Incidents of Payment.* In contrast to the group just described, the holder may encounter obstacles "beyond his control" or "not imputable to his fault." It stands to reason [96] that the law of the place of payment is competent, e.g., to free the holder unable to levy protest. Impossibility and frustration will work in this manner as grounds of exemption under the Anglo-American acts.[97]

Although the Geneva Convention introduces the exception of *vis major,*[98] it does not fully reach the scope of the Anglo-American exemptions on which recourse may be based when protest etc. is delayed. It excuses only absolute and objective, total impossibility, not frustration, excessive or extraordinary difficulty, partial or relative impossibility, while on the other hand destruction of the instrument belongs to another category.[99] Where, e.g., death or illness prevent the holder or his agent from presenting the bill, he may be excused under American law, but not according to the uniform law.

Illustration. A check could not be presented at a bank in Amsterdam during the German occupation. Dutch law had to control the question whether the recourse survived. This also agrees with BEA, section 72 (3). Strangely, an English judge instead applied the substantive rule of BEA, section 46 (2), to dispense with presentment.[100]

The much debated question concerning the moratory laws of the place of payment [101] has finally been answered

[96] To the same effect:
England: BEA sec. 72 (3).
Italy: Cass. (July 4, 1927) 4-5 Annuario Dir. Comp., Parte III, 10; Cass. *Sez. Unite* (July 1, 1927) Rivista 1928, 94.

[97] NIL sec. 81, 82 no. 1, 112, BEA 46, 50; Uniform Commercial Code 3-511 (1).

[98] Geneva Conv., art. 54.

[99] See in particular HUPKA 148 ff.; ANGELONI, Cambiale (ed. 3) 448 ff., §§ 222 f.

[100] Cornelius v. Banque Franco-Serbe (1941) 2 All E.R. 728; *cf.* DICEY (ed. 6) 699, illustration 2.

[101] LORENZEN 158, 161; ARMINJON, DIP. Com. 372 § 204.

by the Geneva Convention insofar as the wording of article 54 on *vis major* expressly names prevention by a "legal prohibition," "prescription légale," by any state.[102] Decrees and ordinances are included, but the co-ordination with acts of God introduces too short a waiting period of thirty days for termination of the unsurmountable obstacle to presentment or protest, and the ample reservations of the states, allowing deviations from article 54 and defense against foreign *moratoria* (annexe II, article 22), have marred the uniformity of the regulation.[103]

(c) *Estoppel.* The difference between the two situations described under (a) and (b) is illustrated by a German decision applying the American rule of estoppel. This rule prescribes, according to a frequent quotation, that:

"Where the indorser of a note by words or acts has in fact misled and put the holder off his guard and reasonably induced him to omit due presentation for payment and notice of non-payments, he is deemed in law to have waived the performance of these ceremonies. . ." [104]

In a case of the Appeal Court of Berlin, the holder, suing upon a German executed indorsement in a bill payable in New York, sought excuse for not having given timely notice and resorted to the American estoppel rule, under the theory that the unitary law of the place of payment should prevail. The bill was indorsed by the signature of the defendant's son as authorized agent, but the father, falsely denying that the son's signature was genuine, induced the holder to fetch back the instrument from New York where it had been sent for presentment, in order to have the defendant examine it. After exact investigation of the facts,

[102] Comptes rendus 1930 p. 253, 256-262.
[103] HUPKA 162-171.
[104] Foster, J. in Kent v. Warner (Mass. 1866) 12 Allen 561, 563; In re Swift (1901) 106 Fed. 65, 68.

the court held that the plaintiff's conduct satisfied the conditions under which NIL, section 159 dispenses with protest, for the time being, allowing it when the cause of delay ceases to operate.

The court wandered off from the principle of the several laws:

"The question is only whether the provisions excusing failure to protest belong to the provisions involving the time for protest (law of the place of payment) or to the provisions involving the necessity of a timely protest (law of the domicil of the defendant in recourse). The first view is preferable and highly suggested by convenience. Protest is an act to be made at one time by the last holder of the bill, commonly in a very short space of time. The last holder cannot be supposed to know and observe all laws of the debtors in recourse. Security of commerce therefore requires that a protest still permissible and in time under the law of the place of payment should also be available against a regressee whose domicil has other rules on the effect of delay in making protest." [105]

This eloquent reasoning unfortunately clashes with the existing rules. The recourse against the German indorser stood under German law which seemed to afford merely an action for tortious violation of good morals, but may have provided a more efficient remedy than that recognized for the case at bar. In any case, also under American law to which the court resorted, estoppel dispenses only with the recourse against the one indorser who induced the holder.

III. Time for Suing

1. Suing for Recourse

In the common-law jurisdictions, scarcely a doubt has been expressed that limitation of action, as usual,[106] is

[105] KG; (13th Div.), (April 25, 1932), 6 Z. ausl. PR. 334, IPRspr. 1932, 97, 100.

[106] Vol. III, p. 475 ff.

governed by the *lex fori*.[107] Some of the old leading decisions to this effect dealt with negotiable instruments. The exceptions, such as contained in the borrowing statutes, apply of course, and "extinction" of the action or discharge of the debtor takes the case out of the rule.

In the civil-law doctrine,[108] by which limitation of action is recognized as a substantive institution, governed by the law of the contract, it was taken for granted that the principle of independence was to prevail.[109] But the draftsmen of the Geneva Rules, apprehensive that the drawer might be freed earlier than his indorsee, chose just this situation to impose a single applicable law. As such they selected the law of the place of issue, because the basic law of the bill would afford the appropriate contractual ground for the single law.[110]

Article 5 of the Geneva Rules expresses this meaning so badly that it became controversial whether it refers only to periods of preclusion rather than also to limitation of action. The broader construction, however, prevails and is founded upon the fact that the time restrictions almost everywhere are but genuine limitations of action. No interpretation serves to extend the provision to the causes of interruption and suspension of the time period, which are left either to the *lex fori*[111] or to the several laws,[112] or reserved to national legislation.[113]

[107] LORENZEN 164; more recently, *e.g.*, Coral Gables v. Christopher (1937) 108 Vt. 414, 189 Atl. 147, 109 A.L.R. 474; Gaffe v. Williams (1942) 194 Ga. 673; Western Coal and Mining Co. v. Jones (1946) 27 Cal. (2d) 819.

[108] An attempt to collect decisions on the special matter ends in failure to discover a principle; see ARMINJON, DIP. Com. 374 § 206.

[109] 2 BAR § 308; DIENA, 3 Tratt. § 247.

[110] The writers also refer to an express utterance of a draftsman, Comptes rendus p. 363, *cf.* 2 MOSSA, La cambiale secondo la nuova legge (1937) 841 § 811; KESSLER 153 n. 1; ARMINJON ET CARRY 531 § 476.

[111] HUPKA 221 invoking a conflicts rule implied by Conv., art. 16 and Reservation, art. 17.

[112] ARMINJON-CARRY 531 § 476; ARMINJON, DIP. Com. 376 § 207 refers suspension for minor age to the national law.

[113] Geneva Conv., Annex II art. 17.

The entire idea of article 5, however, is wrong. This very problem could have remained in the domain of the principle of independence, since commonly the time periods run successively. As the rule now is, a bill issued in England carries a privilege to sue during three years in Continental recourses, which are normally of a few months or even weeks, and of one year under the Geneva Convention, article 70, for the holder and six months for an indorser, provided that the Geneva Rules have been made the only conflicts rules of the matter at the forum.

2. Suing for Payment

There is a problem for the civil law courts, respecting the obligation of a maker or acceptor, whether they should use a criterion different from what they would select for the respective contract as a whole. It would seem that there is a strong and sound tendency to apply the law of the place of payment, irrespective of its application to the obligation of the primary parties.[114]

[114] See for France the comment by BATTIFOL, Traité 550 § 549 on Cass. civ. (July 7, 1938) Gaz. Pal. Oct. 27, 1938, p. 530 (which establishes even a unitary rule for recourse against the Geneva Rules. In Germany *lex loci solutionis* has been applied in its quality as the general rule of contracts (2 RGZ. 13; 6 RGZ. 24, etc.).

CHAPTER 63

Checks

I. THE SPECIAL LAW ON CHECKS

Differentiation. In the Anglo-American enactments the check is defined as a bill of exchange drawn on a bank payable on demand.[1] What particular elements this variety of a bill of exchange does have, is relegated to the background, but they are not insignificant.[2] The Continental laws, developing the check more recently, and then rapidly, instituted an "autonomous" type of commercial paper. It is now regulated separately in the Geneva Convention of 1931,[3] though supplemented by national legal rules of the member states, and in many special statutes in other countries. The authors of the Convention, however, were anxious to preserve as much analogy as feasible to the Convention on Bills and Notes of 1930.

Whereas the long preparation of the prior treaty was largely inspired by the hope for accession of the common-law countries, no illusion in this respect remained in 1931.[4] The effort became a purely European compromise. Even so, three main systems were to be reconciled, the French, German, and Italian. Considering the fundamental divergencies then existing, the unification was hailed as a conspic-

[1] BEA s. 73; NIL s. 185.

[2] See the enumeration in 10 C.J.S. 412 and Supp. 1953.

[3] Convention portant loi uniforme sur les chèques, Geneva, March 1931. 5 HUDSON, Intern. Legisl. 889 No. 283 (hereafter called *Geneva Check Convention*); Convention destinée à règler certains conflits de lois en matière de chèques, Geneva, March 19, 1931, 5 HUDSON, *id.* 915 No. 284. (hereafter called *Geneva Rules.*)

[4] MOSSA, Check 86.

uous progress, although the 57 sections are incomplete and variegated by 31 reservation clauses, all of which have been used, some by all or almost all member states.[5] The law of checks was called at the Hague in 1912 "un enfant de Bohème" and in Geneva in 1931 "un enfant terrible."[6]

Among the differences between checks and bills of exchange, two are outstanding: checks enjoy total or partial exemption from the tax imposed on bills, and the time for presentment and for suing is much shorter. Conflicts law, moreover, is strongly influenced by the importance of the banking institution and bank collection tying the check to the individual bank visible on the face of the paper; no such drastic connection is afforded by similar negotiable instruments.

Also, the conflicts rules of the Bills of Exchange Act and those of the American courts on bills and notes pretend to include checks, although the peculiar nature of these instruments evidently demands some distinction. The Geneva Check Convention is accompanied by a convention on conflict rules, which shows even more improvisation than its counterpart concerning bills and notes, and has unhesitatingly adopted the latter's controversial rules on capacity, form (with one meritorious addition), and "effects," as well as the time for suing in recourse. A gratifying part will be found in article 7, which puts a series of incidents uniformly under the law of the place where the check is payable.

[5] See the table in HAMEL ET ANCEL, La convention de Genève sur l'unification du droit du chèque, (1937). HAMEL, 1 Banques 85 § 703 considers as a reservation art. 4 par. 3 of the Check Convention (allowing a member state to validate obligations between its nationals contracted abroad in the form of the national law); hence, this paragraph not mentioned in the reservations used by France has no effect. The contrary opinion of 2 PERCEROU ET BOUTERON 177 n. 3 seems less well-founded.

[6] GIANNINI, Sistema 354.

In the other countries, the European controversies are shared.

United States. If the conflicts rules concerning bills of exchange largely suffer from uncertainty, an additional grievous complication centers on the question whether there are modifications of these rules with respect to checks. In the most important jurisdiction, New York, the views have changed. In *Hibernia National Bank* v. *Lacombe,* the Court of Appeals declared in a case involving a check that the nature, validity, interpretation, and effect of the instrument were governed by the law of the place of payment.[7] *Amsinck* v. *Rogers,* establishing a scheme of division between the topics pertaining to the inception of negotiable instruments and the incidents of performance (payment), drew a line of distinction between bills and checks. The *Hibernia* decision was explained on the general principle of *lex loci contractus,* because the drawer of a bill of exchange undertakes to pay at the place of drawing, and the drawer of a check contracts to pay at the place of payment.[8] Finally, in *Swift & Co.* v. *Banker's Trust Co.,* the court in 1939 overruled the distinction, assuming that the Negotiable Instruments Act establishes a uniform law in which the obligations of a drawer of a check or a bill of exchange payable at demand are identical, and hence also the conflicts rules are common. Thus, the validity and effect of the drawer's contract should be governed by the law of the place of contracting. A check drawn in Chicago to a fictitious person upon a bank in New York through fraud of an employee of the drawing firm, was held to be a check payable to the bearer under an Illinois statute of 1931 and correctly paid by the New York bank; under the Negotiable Instruments Act, adopted in New York,

[7] 84 N.Y. 367.
[8] 189 N.Y. 252, 257.

the result would have been contrary.[9] This cannot be the last word.

Authority in the other American jurisdictions remains thoroughly divided.[10]

Function. The check is contrasted with bills of exchange as serving payment while bills are instruments of credit and financing. With the actual low stand of private international credit operations, hoped to be temporary, the check has made an enormous advance and, at present, may sometimes replace commercial drafts or promissory notes in their own field; certainly it is often used as security. Nevertheless, the statutes and the regulations by bank accords and most standard conditions are intended for instruments essentially contemplating payment. In the United States, the banks handle daily an estimated number of 35 millions of checks mainly in the service of collection for payment.[11]

By another functional restriction, checks in some parts of the world are more or less strictly regarded as local paper. At one time, it was specially noted in Latin America that Cuba and San Salvador permitted international circulation.[12]

Conflicts. The contrasts between the Geneva uniform check law and the Anglo-American statutes have been repeatedly described in detail, notably by Feller.[13]

Conflicts of laws relating to this subject are bound to

[9] Swift & Co. v. Banker's Trust Co. (1939) 280 N.Y. 135, 144, 19 N.E. (2d) 993. Whilst usually the local law of a bank is emphasized, here a bank is discharged for the reason that at the place of issue the check was payable to bearer, depending on the fraudulent act of an employee of the drawer, unknown to both parties.

[10] See 10 C.J.S., Supp. 1953, Bills and Notes § 48.

[11] MALCOLM, "Article 4, A Battle with Complexity," Wisc. L. Rev. (1952) 265, 270 and additional information by Mr. Malcolm.

[12] ARGAÑA § 32.

[13] FELLER, "The International Unification of Laws Concerning Checks," 45 Harv. L. Rev. (1932) 668. On the fundamental differences from English law, see GUTTERIDGE in 2 PERCEROU ET BOUTERON 222.

occur in increasing numbers, but for one reason or another, they very seldom reach the courts. The Conference of 1931 diligently tried to obtain progress over the preparatory drafts and succeeded in clarifying at least those questions most troublesome in international circulation. Such topics were revocation (stop payment), provision (cover), time for presentment, and prescription (time for suing). The Rules of Geneva transcend this subject matter, although they leave much open to doubt.

The habitual neglect of the conflicts rules by the lawmakers has produced doubts even with respect to the scope of application of the Geneva Rules. Although Germany has adopted them with the Convention in a new domestic law, and Italy now has clearly two different laws for the member states and other states, in France it is controversial whether the ratified Geneva Conflicts Rules are general or intended for the member states.[14]

A number of provisions are closely shaped after the model of the conflicts rules on bills and notes; they involve capacity (art. 2), form (art. 4), effects of obligations (art. 5), and form of protest (art. 8). Little will have to be added in these respects to the remarks made in the foregoing chapters.

The Rules have established a list of problems specially assigned to the law of the place of payment:

"Article 7. The law of the country in which the cheque is payable shall determine:

(1) Whether a cheque must necessarily be payable at sight or whether it can be drawn payable at a fixed period after sight, and also what the effects are of the post-dating of a cheque;

(2) The limit of time for presentment;

[14] For general application because France has not restricted the ratification of the Convention, HAMEL, Banques Suppl. 84 § 700; *contra* 2 PERCEROU ET BOUTERON 171 § 196.

(3) Whether a cheque can be accepted, certified, confirmed or visaed, and what the effects are respectively of such acceptance, certification, confirmation or visa;

(4) Whether the holder may demand, and whether he is bound to accept, partial payment;

(5) Whether a cheque can be crossed or marked either with the words 'payable in account' or with some equivalent expression, and what the effects are of such crossing or of the words 'payable in account' or any equivalent expression;

(6) Whether the holder has special rights to the cover and what the nature is of these rights;

(7) Whether the drawer may countermand payment of a cheque or take proceedings to stop its payment *(opposition);*

(8) The measures to be taken in case of loss or theft of a cheque;

(9) Whether a protest or any equivalent declaration is necessary in order to preserve the right of recourse against the endorsers, the drawer and the other parties liable."

The solutions given to the most troublesome questions will be reviewed presently.

II. Creation

1. *Form.* Article 4 of the Geneva Check Rules reproduces the obnoxious disunity left in the Rules on bills concerning form, but adds a salutary relief (paragraph 1, i.f.): "Where the form of the place of the signature is not observed, it shall be sufficient if the forms prescribed by the law of payment are observed."

2. *Capacity of Drawer.* Article 2 of the Rules, organized after the model of the analogous rule concerning bills, results in the principle that the national law of the drawer at the time of the signature determines his capacity of contracting in general and drawing checks in particular, while subsequent death or insanity is immaterial (Check Conv. art. 33). In the American practice, capacity is governed

by the law of the place of delivery; and if capacity existent at the time ceases subsequently as the Bill of Exchange Act states in case of the drawer's death, a respective notice to the bank ends its authority to pay.[15] In conflict the law of the place of payment should decide (*infra* III 2).

3. *Capacity of Drawee,* "Passive check capacity." The legal definition of a check in the Anglo-American Acts requires drawing on a banker. This is also the law of Austria, Germany, and the Scandinavian countries and the declared aim of article 3 of the Check Convention; but subjected to a strong restriction:

"A cheque must be drawn on a banker holding funds at the disposal of the drawer and in conformity with an agreement, express or implied, whereby the drawer is entitled to dispose of those funds by cheque. Nevertheless, if these provisions are not complied with, the instrument is still valid as a cheque."

The statement of the principle was thus deprived of any sanction, in order to satisfy the countries where either a check could be drawn on anybody, as was then the law in France, or on institutions assimilated to bankers, as the French law is now.[16] A reservation, No. 4, allows striking out the "nevertheless" sentence or extending the category of capable drawees. Both these privileges have been utilized, and in some statutes it now seems doubtful whether a check on a nonbanker is considered a bill of exchange, as in the United States, or radically void.

The article proceeds to uphold in any case the obligations arising out of the signatures affixed in countries whose laws permit drawing on persons such as the drawee.

[15] BEA sec. 75, and see FELLER, 45 Harv. L. Rev. 686.

[16] France: Decree Law, October 30, 1935, art. 3 amended by Law, Feb. 14, 1942.

In view of these differences, article 3 of the Check Rules states:

"The law of the country in which the cheque is payable determines the persons on whom a cheque may be drawn."

The Convention would certainly have done better either to adopt the entire common-law rule or to exclude any reservation for nullity as check or nullity altogether.[17] Fiscal interests have played an excessive role in the question.

The Italian statutes recognize as checks instruments issued and payable in a foreign country only where the drawee has passive check capacity in that country;[18] but these are valid anyway under the Geneva Rules, article 3.

The principal conflicts rule with its choice of the law of the place of payment is clearly adequate; the check being concentrated upon the right of the drawer to draw upon the specific drawee, his quality has to be determined by his own law. When, before the Convention, a check drawn in Austria on a nonbanker in Paris was a check in France, it was no check in Austria.[19]

Illustrations. (i) A check is drawn in New York on the Credit Municipal de Bordeaux recognized in France as assimilated to banks. Under Geneva Rule 3, the check is valid in France and under Geneva Convention, article 3, likewise in Germany. In an American court the law of the place of issue would result in invalidity as check, that of the place of payment in validity, and the latter should be preferred, despite the New York Court of Appeals.

(ii) Vice versa, where a check is drawn in Paris on an American stock exchange broker, American indorsers would be liable under the law of bills of exchange in most Con-

[17] For the latter method MOSSA, Check 140.

[18] Italy: RD., Dec. 21, 1933, art. 3, par. 1, criticized as immaterial by MOSSA *l.c.* 141. The German Check Law § 25 contained an exception for checks payable abroad which made sense in face of a *lex loci contractus.*

[19] STROBELE 91.

tinental and American courts. But what would be the French solution? It would seem that article 3 of the French Check Law means only French, not foreign *agents de change* and *courtiers en valeurs mobilières,* and the instrument would not be considered a check. Yet according to an official Instruction concerning the stamp duty,[20] the reasoning of which goes beyond the stamp question, it is fatal that the instrument does not bear the name "lettre de change," wherefore it would not be treated as a negotiable instrument at all.

III. Cover and Stop Payment

1. *Cover.* The most dreaded of all obstacles to unification of the law of negotiable instruments has a particular aspect in the law of checks; the existence of cover is the avowed requirement even in those countries that do not believe in the tacit transfer of cover by the creation of cambial rights. The requirement, it is true, is subject in the Check Convention of Geneva to degrees of seriousness depending upon the quality of the drawee as banker. The Check Rules, article 7 (b), call for the law of the country in which the check is payable, to determine:

"Whether the holder has special rights to the cover and what the nature is of these rights."

This rule, quite contrary to the Rules concerning bills and notes, which declare for the law of the issue, was generally recommended.[21] As justification, it was alleged that a check is drawn on the basis of a credit the amount of which is not identical with the sum of the check; that the banks must pay it immediately in the course of large business and there is no time to study various foreign laws;

[20] Instruction No. 4228 de la Direction générale de l'Enrégistrement, etc., Dec. 2, 1935, 2 Percerou et Bouteron 268.

[21] Hirsch, Provision 154; Strobele 95; the commissions of experts, the Institute of Int. Law, 33 III Annuaire 268, 277. The French writers are inclined to this solution against Cass. (Feb. 6, 1900) S. 1900.1.161.

and, above all, that subsequent insolvency of a drawer or his order of stop payment, subject to a foreign law, ought not to disturb a banker, at a place where the underlying claim of the drawer is deemed to have been transferred to the payee and the holder.[22]

Illustration. A check drawn in New York on a bank in Paris is presented by the holder at a time when the drawer had become a bankrupt. While an American bank knowing this would refuse payment, the Paris bank must pay the holder in his quality as assignee of the cover to the extent of the sum payable on the check. The Mixed Arbitral Tribunal between Belgium and Germany decided by the same test of *lex loci solutionis* that a Belgian plaintiff had no claim in the clearing against a German bank according to the German law, ignoring the doctrine of cover.[23]

Specific party agreements for the assignment of cover are to be distinguished in principle. They are frequent in Germany as well as in the United States when banks discount a negotiable instrument in security transactions. On the other hand, certification of a check by a bank is considered assignment of the funds to the amount of the check.[24] It would seem that despite the theoretical difference from the French type, the applicable law should always be that of the bank.

2. *Stop Payment.* Common law and civil law are in sharp disagreement not only concerning the effect of death and bankruptcy of the drawer of a check on the right of the holder, but also on revocability. At common law the order

[22] PERCEROU and MARKS VON WÜRTTEMBERG in the Conference, see BOUTERON, Statut 705 ff.

[23] TAM Germano-Belge (Jan. 1, 1929) 8 Receuil Trib. Arb. M. 791. The point was separate from the added fact that there cover was never provided.

[24] Comm. Credit Corp. v. Orange County (1950) 34 Cal. (2d) 766, 214 Pac. (2d) 319; *cf.* New York L. 1944 c. 537 § 325; 37 McKinney's Cons. L. Ann., § 325a, forbidding stop order; Natl. City Bank of Cleveland v. Erskine (N.Y. 1953) 110 N.E. (2d) 508.

to pay may be countermanded at pleasure,[25] though there may be liability in the internal relations. Evidently the revocation also ends the authority of the holder to receive, which traditionally, though no longer correctly, is regarded as an authority of agency. For the draftsmen of the Geneva Convention it was a matter of course that a check creates irrevocable relations.

The Convention left additional differences among its own members. The principle is that revocation of a check is not effective until the time of presentment has expired (article 32, paragraph 1). But by exercising Reservation No. 16, a majority of the states have prohibited revocation even after the time for presentment ends. Conflicts Rule, article 7, no. 7, conveniently makes this question depend on the law of the place of payment. Partly it has been perceived that the three problems of cover, subsequent incapacity of the drawer, and stop payment, are closely connected[26] and ought to be subject to the law of the place of payment.

If the authorization of the bank to pay is emphasized over that of the payee or holder to receive, the same test will be applied in England and, we hope, also in an American court.

Illustrations. (i) A check drawn in Chicago on a bank in Hamburg, Germany, is countermanded before payment; under German law the stopping is immaterial, even after the time of presentment expires; under American law it

[25] BEA sec. 75 and for the United States, BRADY, Bank Checks § 206. It is interesting that the New York surrogate decision, In re Mason's Estate (1948) 194 Misc. 308, 86 N.Y.S. (2d) 232, likewise does not hesitate to apply *lex loci solutionis* in the case of an Italian check upon a New York bank. The drawer died before the bank paid the check, but the bank did not know it. The court resorted to the customary New York rule as laid down in Glennan v. Rochester Trust and Safe Deposit Co. (1913) 209 N.Y. 12.

[26] MOSSA, Check 318.

would be effective. The German law should be applied. In the case of a German check on an American bank, revocation should be allowed.

(ii) A check drawn in Paris upon a bank in New York is revoked. This has consequences not only in the United States but also in France. In France, the drawer is exempt from the heavy penalties of French criminal law, as stop payment may be considered outright crooked.[27] In the United States, New York law has been applied without hesitation, where an Italian drawer died before the check upon a New York bank was cashed, although in the same breath the Surrogate referred to the applicability of the law of the place of contracting to checks.[28] In fact, the *lex loci solutionis* was competent.

3. *Restriction to Specific Holders.* The Geneva Convention made a compromise between the English "general" and "special" crossing of checks which was adopted in France, Italy, and other countries, and the German and Austrian clause "payable in account" *(nur zur Verrechnung, à porter en compte).* The Convention finished a considerable debate by permitting and regulating both types itself and opening a large choice to the state laws (articles 37-39). Where a country allows only crossing, a check carrying the other clause is construed as a crossed check, and vice versa (Reservation No. 18). The Conflict Rules (article 7, No. 5) add that the law of the place of payment decides which clause is admissible and what its effect is.

Illustration. The drawer in London crosses a check on a bank in Vienna with two lines not inserting any name between them (general crossing). The check figures in Austria, and by the Geneva Rules in all member states, as a check payable in account. It cannot be paid in cash to a third banker or a customer of the drawee (as under

[27] HAMEL, 1 Banques Supp. § 714, p. 88, d; 2 PERCEROU ET BOUTERON 185 n. 2.

[28] In re Mason's Estate (1948) 194 Misc. 308, 86 N.Y.S. (2d) 232.

article 38 of the Convention) or to a banker (as under the Bills of Exchange Act § 70 (2)).

In England the question falls under the law of the place where the check is first delivered; but can the transformation of the drawee's duty by his own law be ignored? There was a long debate in the Geneva Conference on whether during the circulation in the country of origin itself the law of issue should determine the nature of the payment clause. The majority rejected this exception, to give the place of payment more importance.[29]

In the United States neither type is used, since in contrast to the Geneva Convention, article 35, and the Bills of Exchange Act, 60, the drawee is responsible for examining the genuineness of indorsements.[30]

4. *Time for Action.* The time for suing has been fixed at a much shorter period in the Continental laws than for bills of exchange.[31] The Geneva uniform check law, article 52, allows six months after the end of the time for presentment against the drawee and six months from reimbursement by him or the day when he himself was sued for each endorsee.

However, under Reservation No. 25, after the expiration of these periods actions may be based on enrichment and against a drawer who has failed to provide cover; these provisions have been commonly instituted.[32]

The Check Rules, article 6, assign these problems to the law of the place where the check has been created. But interruption and suspension of the period of limitation is left to "each state," and other states may react as they wish.[33] In the common-law countries, the *lex fori* actually

[29] GIANNINI, Sistema 354.
[30] FELLER (*supra* n. 13) 690 n. 143.
[31] Geneva Conv. on Bills of Exchange, art. 70.
[32] France: art. 25 par. 3; Germany: art. 58; Italy: art. 59.
[33] Reservation No. 26.

controls these incidents, though with certain references to other laws, but whether under the Convention *lex fori* or *lex loci contractus,* or *lex loci solutionis* governs, no one knows.

That the law of the place of issue does not furnish an adequate unitary solution, is as true as in the case of bills of exchange. This test was simply adopted as a matter of school tradition.[34]

[34] E.g., Italy: Cass. (March 3, 1933) Foro Italiano, 1933 I 730: check issued by an Argentinean to the order of an Italian and payable at a branch of the same bank in Italy: prescription according to Argentine law; *Cf.* CAVAGLIERI 397.

Chapter 64

Conclusions to Part Twelve

Why the Geneva conflicts rules have failed to produce uniformity with the Anglo-American countries, providing such a poor example of unification, has often been explained but never justified. It was previously known that the differences in the national laws are numerous and of many kinds. These have proved too numerous and difficult, because the governments were not prepared to abandon particular rules and even mere banking habits.[1] Despite assertions to the contrary, the conflicts rules of the British Act have not been commended in authoritative opinions and those developed by the courts in the United States are considered confused.[2] The divergencies cherished throughout the world are largely superficial.

A considerable improvement in the present situation might be reached by following a suggestion of Hessel E. Yntema, which he allows me to mention. After investigations of many years, he proposes an international collaboration of the relatively few leading banks in each country which are most active in the field of foreign bills and notes. Each bank may issue forms complying with its own law and rely on the validity of the instruments approved by a partner to the agreement. This experiment should be tried.

In the long run, of course, uniform legal rules cannot be avoided. When the problems are scanned, certain observations impose themselves.

No reference should be made to the national law; its mingling with form and capacity in the Geneva rules is

[1] Argaña 215 blames unjustified negative tradition and exaggerated nationalism.

[2] Loronzen 5; Gutteridge 16 ser. 3. J. Comp. L. 54.

deplorable.[3] The law of the domicil is adequate only for emergency purposes.

Nor can any effort serve to discover a single local contact to provide a single law for all obligations arising on a bill of exchange. Whenever a bill is submitted for discount or acceptance, it is a primordial postulate that no foreign law should have to be consulted to determine the main effects of the intended transaction.[4] The same is true for checks, despite their closer connection with the place where payment is due. Since they are handled in millions through bank collections, the now frequent proposals to determine all check obligations by the law of the place of payment [5] are unrealistic. This is an irremovable block on the road to simplicity.

On the other hand, form, capacity, and other initial requirements of "cambial" obligations and their construction and effects must be subject to unitary legal treatment, for which the *lex loci actus* has an inveterate claim, although its definition needs elaboration and unification.

To delineate the scope of such acts, various in nature, the "extracambial" contracts and obligations must be excluded and assigned to their own connections;[6] if this is done, the "cambial" acts proper group themselves easily in three categories.

1. The law of *issue,* that is, of the place of negotiation through signature and delivery by the drawer or maker to the payee, creates the basic instrument, including its nature as negotiable [7] and the class of commodity papers to which

[3] *Supra* Ch. 59 III 2; 60 I 1 (b).
[4] *Supra* Ch. 61.
[5] E.g., HJALMAR EGNALL, Le chèque et la loi du lieu du payment (Paris, 1935) 103 ff.
[6] *Supra* 142 ff.
[7] *Supra* Ch. 61, III.

it belongs, construction,[8] and general rules.[9]

2. Under the principle of independence, opposed to the law of issue, each law of the successive places of contracting controls the respective obligations of drawer, maker, indorser, giver of aval, accommodating party, and acceptor for honor, with the exception of obligations determined by the law of the place of payment.[10] The law of the place of contracting especially governs validity and effects of warranty,[11] including liability after maturity [12] and damages in recourse.[13] Whether it ought to determine also the necessity and time for notification of default is doubtful.[14] Worldwide unification of these questions at least and of the time for suing should be earnestly sought at the Hague.

3. The law of the place of payment of the principal obligation governs conditions and effects of acceptance, time of maturity, modalities of payment, such as currency, time and locality, permissibility of part payment and conditional acceptance, amortization, discharge and excuses of any acceptor, and the necessity, time, and form of protest.[15]

In the case of checks, the scope of the law of payment is enlarged, as the Geneva rules have recognized.[16] It should also be observed that the American courts show unequivocal preference for the law of the place of payment in locating the liability of the maker of a promissory note.[17] Promissory notes in the United States, quite as *billets à ordre, eigene Wechsel* abroad, are prevailingly used in bank loans and therefore usually are payable at the lending bank. With

[8] *Supra* 148 ff.
[9] *Supra* 149 ff., 196.
[10] *Supra* Ch. 61.
[11] *Supra* 188 ff.
[12] *Supra* 198-199.
[13] *Supra* 200-201.
[14] *Supra* 215.
[15] *Supra* Ch. 62, I.
[16] *Supra* 225.
[17] *Supra* 206.

such facts in mind, a middle road might be found for conflicts rules between the civil law separating bills and checks and the common law merging them; promissory notes and checks may well be subjected to the larger domain of the law of the place of payment which, if it can be ascertained, is preferable to the domicil of the payee as such.[18]

A holder in due course for value or in good faith acquires the protection granted him by the law governing the indorsement made to him, when it affords larger rights than the law under which a precedent indorser obligated himself.[19]

As we have seen, the courts seek practical solutions, sometimes without any intention to do so but with the apparent effect of moderating fundamental contrasts, such as the opposition of signature and delivery [20] or the diverse treatment of bills carrying forged signatures.[21]

[18] *Supra.*
[19] *Supra.*
[20] *Supra.*
[21] *Supra.*

PART THIRTEEN

INHERITANCE

CHAPTER 65

Present Conflicts Rules

I. TERMINOLOGY AND SOURCES

1. Terminology

IN the United States, the common terms employed concerning succession on death are "descent and distribution" (for intestacy), "wills," and "administration." But it is gratifying that the Restatement uses "succession on death" to cover the first two topices. In the civil law, the "law of inheritance" or "law of succession" is a general term which will be used here to include all incidents depending on the law governing a decedent's estate, with the exception of administration in the common law countries.

Another linguistic difficulty is caused by the lack in English of a word for the main beneficiaries of an estate. "Heir" *stricto sensu* is merely a successor to land *ab intestato,* as the *héritier* once was in French; it is desirable in conflicts law to stretch this term as has occurred in France, to comprehend all intestate and testate successors to ownership of all assets in the civil laws, not only those named *heres (Erbe)* in the Roman or German systems, but also the French *légataire universel* and the beneficiary *à titre universel.*

Moreover, devise of real estate and bequest of personal property are analogous gifts that fall short of easy correspondence in other systems. Since the residuary legatee who would not be heir *ab intestato* in the same state does not incur personal liability in Anglo-American law, the term "legatee" may be used to denote all beneficiaries directly

taking by will and not regarded as "universal successors."

Finally, readers may be reminded that in the civil law the estate in principle forms an entity without regard to geographical frontiers, although the consequence that only one law of inheritance should govern is not drawn in all civil law jurisdictions. The principle, nevertheless, applies, at least in the best theories, when the claims of creditors of the estate are regulated.

On the other hand, foreign readers have to bear in mind the system of state control of estates prevailing in common law jurisdictions and a few others such as Austria and Denmark, producing many complicated problems in connection with the sovereignty of 48 states in the United States.

Although in England the law reform of 1925 has unified this system by transferring the title to real as well as personal estate at death to the administration of "executors" or "administrators," most American states retain the principle that real estate goes directly to the heirs, but the powers of administration are more and more extended to all assets.

2. Sources [1]

Assets left by a foreigner at death in foreign territory are a frequent topic of treaties, statutes, court decisions, and consular activity. On the interstate and international

[1] A second edition of the excellent collection of sources of private international law by PROF. MAKAROV, while under press, has most kindly been made available to me during my writing. A remarkable discussion of the treaties on inheritance is to be found in PLAISANT, Les règles de conflit de lois dans les Traités (1946) 231-261.

Comparative conflicts law: FRANCESCO P. CONTUZZI, Il Diritto ereditario internazionale (1908); LEWALD, Questions de droit international des successions, Recueil 1925 IV 5 ff.; *id.*, Internationales Erbrecht, 4 Rechtsvergl. Handwörterb. 448; P. ANLIKER, Die erbrechtl. Verhältnisse der Schweizer in Ausland und der Ausländer in der Schweiz (1933).

level, many efforts to foster harmony have been undertaken, but with small success.

Treaties. A century ago, a series of bilateral agreements were concluded containing provisions on inheritance. Commonly, they stabilized court jurisdiction over inheritance claims and competency of consulates to take care of property owned by their nationals. Some outstanding treaties of this group remain in force, such as, among others, those concluded by the United States with France of February 23, 1853,[2] and with Switzerland of November 25, 1850,[3] between France and Switzerland of June 15, 1869,[4] Baden and Switzerland of December 6, 1856.[5]

These and other treaties, drafted with more good will than legal ability, seldom spoke of the applicable law; but when they laid down jurisdictional rules, they usually contemplated that every tribunal would apply its own domestic law, although this has often been forgotten. The American-Swiss treaty of 1850, Article VI, says succinctly though quite ineptly:

"Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property is situated."

[2] Consular Convention, 10 Stat. 992, U.S. Treaty Ser. No. 92; materials in 6 MILLER, Treaties 169 ff.; also in DELAUME, American-French Priv. Int. L. (1953) 68-72 with comment.

[3] 11 Stat. 587 No. 353; MALLOY, 2 Treaties 1763; NUSSBAUM, American-Swiss Priv. Int. L. (1950), *cf.* 47 Col. L. Rev. (1947) 186; ANLIKER 115 ff.

[4] Convention on Jurisdiction, Swiss. Off. Coll. IX 1002; NIBOYET ET GOULÉ, 1 Recueil 735; ANLIKER 49 ff. with large literature; PILLET, Les Conventions 147 ff.; BATIFFOL, Traité 724 ff.

[5] Swiss Off. Coll. V 661; the continued validity of the treaty, not formally assumed by Germany, has been challenged by SCHNORR VON CAROLSFELD, 12 Z. ausl. PR. (1939) 285 and 2 SCHNITZER 503.

But American decisions overlooked the provision on "the laws," and the recent decision *In re Schneider* has, without any reason,[6] denied its effect.

The Franco-Swiss Treaty of June 15, 1869, Article 5, has no such express provision on the applicable law; it states merely that:

"Any action relating to the liquidation or partition of a succession, testamentary or intestate, and to accounting among heirs and legatees will be brought before the tribunal where the succession opens, that is, in the case of a Frenchman dying in Switzerland, the tribunal of his last domicil in France, and in the case of a Swiss dying in France, the tribunal of his place of origin in Switzerland. Nevertheless, the partition, auction, or sale of immovables must comply with the laws of the country of their situation."

This text, however, naturally for that time, was understood as meaning that the movable property of a Swiss national situated in France should be litigated by claimants to the inheritance before the French courts according to the French Code Civil, and vice versa. This construction has been preserved by the Swiss courts and recently has been reaffirmed.[7] The French Court of Cassation, however, held in 1939 that the treaty in the main restricts itself to the jurisdictional problem.[8]

A divergent interpretation by an Alsatian decision [9] has been called amazing.[10]

[6] *In re* Schneider (1950) 96 N.Y.S. (2d) 652; Clunet 1950, 976; 16 Z. ausl. PR. (1951) 620 with note ZWEIGERT; 3 Rev. Hell. (1950) 310. Notes in many American Law Reviews.

[7] BG. (June 29, 1928) 54 BGE. I 216. BG. (May 21, 1942) 68 BGE. II 155, 1 Schweiz. Jahrb. I.R. (1944) 222.

KG. Waadt (March 31, 1943) 41 SJZ. (1945) 106, 1 Schweiz. Jahrb. I.R. 221.

[8] Cass. Civ. (June 19, 1939) S. 1940.1.49; to the same effect Clunet 1902, 567.

[9] App. Colmar (June 15, 1949) Rev. crit. 1950, 62.

[10] BATIFFOL, note Rev. crit. 1950, 64.

Even apart from such failure, these treaties raise controversies of many kinds. Where does the property "lie" for the purpose of the American-Swiss treaty? The Swiss Federal Tribunal assumes that movables are situated in the country of the last domicil,[11] whereas American courts for the most part have applied American law to assets belonging to decedents domiciled in Switzerland.[12]

On the other hand, in Switzerland two different theories arose concerning the law applicable to immovables under the Swiss-French treaty; it is either said to be the *lex situs* or the *lex domicilii*.[13] The Federal Tribunal applies the latter opinion in favor of a single court and a single law;[14] the French courts, with one recent exception,[15] have not followed this.

A second comprehensive group of bilateral treaties was due to the hopeful international wave after the first world war. Their scope is more clearly defined; they rule on the functions of consuls, preliminary measures, and sometimes measures of liquidation; but they are commonly meager regarding conflicts rules. So far as they go, the European treaties, with the exception of the Austro-German and the German-Polish, differentiate between movables and immovables, and with the exception of the West-Scandinavian countries, are devoted to the nationality law.

The treaties relating to property and inheritance,[16] con-

[11] BG. (Nov. 24, 1883) *in re* Wohlwend, 9 BGE. 507, 513 ff.; *in re* Gem. Feldis (May 5, 1898) 24 BGE. I 312, 319; 43 I 87; *cf.* App. Bern (March 5, 1885) 21 ZBJV. (1885) 361.

[12] ANLIKER 115; NUSSBAUM, Amer.-Swiss law 27.

[13] See ANLIKER 50 ff.; WEISS, 4 Traité 175.

[14] BG. (June 29, 1928) 54 BGE. I 216, 219.

[15] Seine (Jan. 5, 1951) Rev. crit. 1951, 316, criticized by FLATTET in the note and in J.d. Trib. 1951, 604, refers to the Swiss courts for French immovables.

[16] U.S. Department of State, Div. of Research and Publication, Treaty Section: Treaty Provisions relating to the Rights of Inheritance, Acquisition and Ownership, etc. Compiled March 31, 1943, revised September 4, 1944.

cluded by the United States from 1850 with a great number of countries, contain the usual clauses of equality with the nationals of the other power, and free disposal, ordinarily with the right of selling real estate if the acquirer is disqualified to possess,[17] but with no conflicts provisions at all. Only the treaty with Thailand of 1937 declares that for the acquisition, possession, and disposition of immovable property the law of the situs exclusively shall be applicable.[18]

A different class consists of the conventions constituting uniform conflicts law, the Treaty of Montevideo, the *Código Bustamante,* the Northern Convention, and the drafts of the Hague Conference on the Law of Succession on Death.[19] These enter into many particular questions and will be used here on par with the statutes.

The statutes are short. The most recent codifications are disappointing in their reiteration of principles of yesterday or the past century. Some are even difficult to understand. While the Hague drafts stimulated a certain progress, contemporary legislation seems not too much disposed to observe international courtesy.

The Hague Drafts aroused the greatest hopes. In 1903 Franz Kahn in his comment on the draft of 1902 expected "with fair certainty" that the convention on succession would be accomplished.[20] The draftsmen and the other delegates were highly interested and laborious and were believed to be largely conscious of the necessary "sacrifices." They were unable, however, to agree on a number of fundamental principles. The majority simply adopted

[17] VIRGINIA M. MEEKISON, Treaty Provisions for the Inheritance of Personal Property, 44 Am. J. Int. L. (1950) 313 ff.

[18] Treaty with Siam of Nov. 13, 1937, Art. 1, par. 7, 53 Stat. Part 3, 1731 ff., U.S. Treaty Ser. 940, 192 L. of Nat. Tr. S. p. 247 ff.

[19] *Supra* Vol. I, pp. 29, 32, 33, 36.

[20] KAHN, 2 Abhandl. 35.

the principle of unity of succession and control by the last national law of the decedent, against the opposition of France and Switzerland, leaving the Anglo-American system entirely out of consideration. Comparative efforts have been made in the literature, but civilian and common lawyers regarded each other so much as complete strangers that, in the learned approach, mutual respect was expressed from a far distance and without a real resolution to unite.

II. Survey of the Conflicts Systems

The systems will be categorized by principles; there exist many exceptions to be mentioned subsequently.

A. Plurality of Successions

1. Immovables under *lex situs*

(a) *Movables under lex domicilii.* The law of the decedent's domicil as of the time of his death governs succession to movable property in the older system:

England and almost all common law jurisdictions of the British Commonwealth,[21] United States,[22] including Louisiana,[23] but only mistakenly extended to Puerto Rico,[24] and excluding Mississippi.

Argentina, court practice.[25]

[21] *Re* O'Keefe (1940) Ch. 124.

Canada: Stuart v. Prentiss (1861) 20 U.C.Q.B. 513 (C.A.); 10 Can. Abridgement 758 ff.

Australia: 17 Australian Digest 404 ff.

[22] Mr. Justice Holmes in Bullen v. Wisconsin (1916) 240 U.S. 625, 632.

[23] Louisiana: Immovables: Sevier v. Douglass (1892) 44 La. Ann. 605, 10 So. 804. Movables: Succession of Wells (1849) 4 La. Ann. 522; *In re* Lewis' Estate (1880) 32 La. Ann. 385.

[24] De los Angeles Melon v. Entidad Provincia Religiosa (1951) 189 F. (2d) 163. See the penetrating criticism by Eder, 1 Am. J. Comp. L. 123.

[25] Argentina: C.C. Art. 10, 3283; see Cám. civ. 2 Cap. (July 13, 1931) 95 Gac. For. 90 Nr. 5106; (March 30, 1932) 98 *id.* 100 Nr. 5292; Cám. civ. 1 Cap. (May 28, 1934) 121 *id.* 105 Nr. 6693. And others see 2 Romero, Manual, 203; Cám. civ. 1 Cap., Jur. Arg. 1942 I 715; Cám. civ. 2 Cap., Jur. Arg. 1943 III 723; (Dec. 22, 1948) Case Grimaldi; Jur. Arg. 1949 I 578; *Contra* the writers *infra* n. 57.

Belgium.[26]
Chile.[27]
Costa Rica.[28]
France.[29]
San Salvador.[30]
Siam.[31]
Treaty: Switzerland-Baden (1869), if the estate is in both countries.

The system of France, for a period, was in doubt with respect to the question whether the domicil was not superseded by the national law,[32] but is now resettled.

(b) *Movables under lex patriae.* Movables follow the law of the decedent's national law as of the time of his death:

Austria.[33]
Bolivia.[34]
Iran.[35]
Liechtenstein.[36]
Luxemburg.[37]

[26] Belgium: App. Bruxelles (June 16, 1926) Revue Pratique du Notariat Belge 1928 46, *cf.* GILON, Clunet, 1928, 1103; Trib. Verviers (Jan. 14, 1936) Pasicrisie 1936 III 133; Bruges (May 10, 1939) Rechtsk. WB. 1939-40, 105; Rb. Antwerp (June 16, 1950) *id.* 1950-51, 509.

[27] Chile: C.C. Art. 16, 997, 955.

[28] Costa Rica: C.C. Arts. 4, 5, 7 par. 2.

[29] France: Cass. civ. (June 19, 1939) affaire Labedan, Rev. crit. 1939, 480. Cass. Crim. (June 4, 1941) D. 1942.1.4, S. 1944.1.133; Trib. Seine (Feb. 6, 1952) Rev. crit. 1952, 494, have now also settled the exact point of contact, the place of "opening" the succession, which, of course, regularly in France is the last domicil.

[30] El Salvador: C.C. art. 994.

[31] Siam: Int. Priv. L. (1939) arts. 37, 38.

[32] *Infra,* 1 (b). On Peru C.C. (1936) art. V, see *infra* n. 56.

[33] Austria: Verlassenschaftspatent (Gesetz über Verfahren ausser Streitsachen) of August 9, 1854, as amended, § 22 (immovables), § 23 (movables).

[34] Bolivia: C.C. art. 463, 464.

[35] Iran: C.C. arts. 7 and 8.

[36] Liechtenstein: Law on the estate of foreigners of Dec. 4, 1911, arts. 1 and 2.

[37] Luxemburg: Immovables: App. Luxemburg (Nov. 13, 1931) 12 Pas. Lux. 467. Movables: Trib. Diekirch (Feb. 22, 1900) 7 Pas. Lux. 41, Pas. Belge 1908 IV 119; Trib. Luxemburg (June 11, 1913) 9 Pas. Lux. 478. *Contra:* Trib. Luxemburg (June 20, 1932) 13 Pas. Lux. 466.

Turkey.[38]

Treaties: Germany with Soviet Russia,[39] Estonia,[40] and Turkey.[41]

French courts temporarily.[42]

Before their Sovietization and allegedly still at present:

Bulgaria.[43]

Hungary.[44]

Rumania.[45]

2. Other Functions of *Lex Situs*

(a) *As principle for all assets.* That the *lex situs* should govern the totality of a succession including movables, was a widespread system before the movables were artificially deemed concentrated at the deceased's domicil.[46] More recently, it was adopted in a code of Latvia.[47] Recently abandoned in Illinois,[48] this system is represented by the law of Mississippi [49] and by the Treaty of Montevideo.[50]

The inheritance is thus entirely dismembered, and the local position of each asset or debt is of decisive importance. The Mississippi court thinks along rigorous territorial

[38] Turkey: Law on the rights and duties of foreigners in the Ottoman Empire, 1915, art. 4; CARABIBER, 6 Répert. 432; BERKI, La succession ab intestat dans le droit int. privé de la Turquie (thèse Fribourg, Suisse, 1941).

Yugoslavia: Law of July 24, 1934, §§ 25, 26.

[39] Oct. 12, 1925, Annex to art. 22 §§ 13 ff.

[40] March 13, 1925, Art. XVIII § 14 ff.

[41] May 28, 1929, Annex to Art. 20 § 14.

[42] Decisions from (May 5, 1875) 2 Clunet 358; (May 8, 1894) 21 Clunet 562.

[43] Bulgaria: former Constitution, art. 63; DANEFF in 25 Bulletin de l'Institut Intermédiaire International 1; GHÉNOV, 6 Répert. 194.

[44] Hungary: SCHWARTZ, 50 Z. int. R. 67 f.; SZÁSZY, 11 Z. ausl. PR. (1937) 189; see also 6 Répert. 469.

[45] Rumania: Cass. (Feb. 20, 1901) Clunet 1902, 916; PLASTARA, 7 Répert. 74.

[46] FREYRIA, *infra* Ch. 65, n. 1, *passim*.

[47] Latvia: C.C. of Jan. 28, 1937, § 16, literally only referring to domestic estates; *cf.* 11 Z. ausl. PR. 484.

[48] Illinois: the rule coming from an Ordinance of 1787 and reproduced in Stat. Annot. (Smith-Hurd) 1935, c. 39 § 1, was replaced by the Probate Act of July 24, 1939, Rev. St. 1951, c. 3 § 162 (§ 11).

[49] Mississippi: 1 C. Ann. 1942, § 467, derived from Code 1857.

[50] Texts of 1889 and 1940, arts. 44, 45.

lines.[51] Although notes and bonds of a foreign owner lying on deposit in Illinois were not held to be located in Illinois,[52] the solution would not be analogous in Mississippi.[53]

(b) *As exception for all domestic assets.* In Mexico, Panama, Peru, Uruguay, and Venezuela, all movable and immovable property situated in the country is submitted to the domestic law.[54] This attitude is sometimes taken as adopting the general principle of *lex situs*.[55] Other provisions in Venezuela and discussions in Peru, however, emphasize the law of the last domicil.[56] The latter seems to be accepted for foreign situated assets. But here as also in other Latin-American countries, the facts seem to point to a system where all domestic assets are subject to the *lex fori,* whereas foreign assets are ignored. Legal and factual exceptions seem to make this awkward scheme tolerable.

(c) *As exception for certain movables.* As noted above, the Argentine courts, defying a nearly unanimous learned

[51] Heard v. Drennen (1908) 93 Miss. 236, 46 So. 243: "All the rights to be derived through the will must be derived from its terms administered according to the law of this state, so far as it affects property situated here" but concerns real property. Yet the decision in Bolton v. Barnett (1923) 131 Miss. 802, 95 So. 721 in all respects overrules the often cited case Slaughter v. Garland (1866) 40 Miss. 172, which restricted the *lex situs* to intestate succession.

[52] Cooper v. Beers (1892) 143 Ill. 25, 33 N.E. 61, *cf.* 3 BEALE 1480; GOODRICH (ed. 1) 401 ff.

[53] Money deposited within the state is included, Ewing v. Warren (1926) 144 Miss. 233, 109 So. 601. The rule naturally includes a money lending business of an Italian domiciled in Italy, Jahier v. Rascoe (1885) 62 Miss. 699, and a negotiable warehouse receipt lying in Mississippi, Gidden v. Gidden (1936) 176 Miss. 98, 167 So. 785.

[54] Mexico: C.C. art. 14.

Panama: C.C. art. 631.

Peru: art. VI, 692; GARCÍA GASTAÑETA, Derecho Internacional Privado (ed. 2) 243.

Uruguay: C.C. art. 5.

Venezuela: C.C. art. 10.

[55] Thus, CAICEDO CASTILLA, 2 DIP. 34.

[56] Venezuela: C.C. arts. 894, 954.

Peru: JULIO DELGADO, Compendio de DIP. citing old theories, is doubtful, however; and see GARCÍA GASTAÑETA, *supra* n. 54.

opposition, follow the American principle in construing article 10 of the Code in the broad meaning of Story from whom it was borrowed. In consequence, it has been argued that article 11 ought likewise to apply; that is, movables in "permanent location" should also follow the law of the place where they are.[57] Against former cases, recent decisions have adopted this opinion [58] which transfers the contradictory statements of what is a permanent location [59] into the inheritance field. The same argument seems to apply to the Code of Uruguay, article 15.[60] Is this rule also meant to be applied by foreign courts? and also to foreign movables when Argentine inheritance law is referred to? I hope not.[61]

(d) *For domestic immovables only.* Although the Swiss statute recognizes foreign domiciliary inheritance law for movables of a Swiss national, if the foreign state prescribes it, Swiss immovables of a Swiss national are always governed by the law of the canton of origin.[62]

The same rule seems to be accepted in Bolivia,[63] where a foreign will, so far as it disposes of domestic immovables, is subject to domestic law.

In all these cases, it might be argued that the statutes are inspired by *lex fori* rather than by *lex situs.* Nevertheless, it does not seem doubtful that the rules are applicable in foreign courts, as if they truly came from *lex situs.*

(e) *Otherwise on the ground of public policy.* Where

[57] BAQUÉ 87 ff.; see *supra* Ch. 54.

[58] Cám. civ. 1 Cap. (Dec. 30, 1941) Jur. Arg. 1942.1.717; Cám. civ. 2 Cap. (July 27, 1943) Jur. Arg. 1943.3.723; *contra* Cám. civ. 1 Cap (March 16, 1926) 27 Jur. Arg. 33.

[59] *Supra* Ch. 58.

[60] Uruguay: C.C. art. 15.

[61] See the hypothetical assumptions by WALDEYER, Sucesiones Argentino-Alemán ab Intestato, Jur. Arg. 1951.I Doctrina 53, 55.

[62] N.A.G. art. 28 par. 1.

[63] Bolivia: C.C. art. 464.

the interests of domestic creditors, beneficiaries, or forced heirs are involved, numerous exceptions in favor of the domestic law are made by the states in whose territories assets are situated. As illustration, it may here suffice to mention the California statute, disallowing gifts by a testator of more than a third of his assets to charity. While the courts of California reduce legacies correspondingly, the forum of the domicil tries to correct the result.[64]

(f) *On the ground of comity.* In Germany since the early nineteenth century, the opinion has been maintained by some decisions and writers that the personal law adopted in principle should be barred in the case of foreign land subject to special rules of succession, such as feudal estates (family *fideicommissa*) or certain kinds of peasant land *(Anerbengüter*[65]*).* The Civil Code of Zurich provides such an exception for family foundations.[66] The German Code formulates the general provision repeatedly mentioned in this work[67] whereby the German rules yield to "special provisions" on objects situated in a foreign state whose laws claim to govern these objects. After some controversy, it is settled that these foreign provisions do not refer only to substantive rules on successions such as farms, or homesteads, but also to the conflicts rules of the situs. Hence, the *lex situs* rule for succession to immovables in the common law countries and France, Argentina, etc., breaks the unitary German conflicts rules based on the national law of the decedent.[68]

[64] E.g., Whalley v. Lawrence's Estate (1919) 108 A.C. 387; *infra* Ch. 66.

[65] Thus, of course, the American legislation on homesteads; Poland, IPR. art. 30; Liechtenstein: C.C. Pers. L. art. 828, 833, and others.

[66] 2 MEILI 139.

[67] EG.BGB. art. 28; Vol. 1, 342, 601; *supra* Ch. 55.

[68] RG. (Oct. 4, 1911) Warn. Rspr. 1911, 484, n. 437; (Oct. 2, 1930) 85 Seuff. Arch. (1931) No. 18; IPRspr. 1930, 175 No. 88; Planck's Kommentar, EG. art. 28, 2b; MELCHIOR 405; RAAPE 766; 4 FRANKENSTEIN 311 ff.; WOLFF, D. IPR. (ed. 3) 232.

The commentators, however, restrict this large reference to the *lex situs* by excepting problems of form and capacity, which have an independent conflicts rule in the continental doctrines. This leads to absurdities.[69] The German conciliatory gesture is excellent, provided it defers comprehensively to the foreign laws adopting the *lex situs*.

A similar provision is contained in the Swedish law and the treaty between Austria and Poland.[70]

B. Unity of Succession

This principle brings the entire succession under the personal law of the decedent at his death. The *Código Bustamante,* which itself does not determine the connecting factor of the person, accordingly subjects the succession to the "personal law." [71]

1. All assets are subject to the law of the last domicil:

Brazil.[72]
Chile.[73]
Colombia.[74]
Denmark.[75]
Ecuador.[76]

[69] These have been demonstrated by WILFRIED ZEUGE, Das Recht der belegenen Sache im Deutschen Internationalen Erbrecht (Würzburg 1939) 59 ff., although he did not know how to remedy them.

[70] *Cf. infra* 373.

Sweden: Intestate Estate Law, art. 2.

[71] Cód. Bustamante, art. 7.

[72] Brazil: Ley Introd. (1942) art. 10.

[73] Chile: C.C. art. 955 and Cód. Organico de Tribunales, art. 148, with exceptions, notably C.C. arts. 15, 20 and 998 of controversial scope, see recently ALBÓNICO, 2 Manual § 501 ff.; MARIO GONZALEZ ALVARADO, Le sucesión ante el DIP, (Diss., Santiago, Chile, 1944) 95, 99-101.

[74] Colombia: C.C. art. 1012, but restricted by art. 1054, see COCK, Tratado de derecho internacional privado (ed. 2) 204 ff., and by other controversial exceptions; see RESTREPO-HERNANDEZ, 1 D.I.P. §§ 512, 598, CAICEDO CASTILLA, 2 DIP. 75 §§ 241-243 with an attractive solution.

[75] Denmark: 2 Z. ausl. PR. 866; Revue 1910, 508.

[76] Ecuador: C.C. art. 1017.

Federated Malay States.[77]
Norway.[78]
Quebec.[79]
Peru (with exceptions).[80]
Former practice in German common law and in Prussia.[81]

2. All assets are subject to the national law of the deceased at the time of his death:
Belgian Congo.[82]
China.[83]
Cuba.[84]
Czechoslovakia.[85]
Egypt.[86]
Germany.[87]
Greece.[88]
Italy.[89]
Japan.[90]
Mexico.[91]
Morocco, French and Spanish.[92]
Netherlands.[93]

[77] Malay States: One Cheng Neo v. Yar Kwan Seng (1897), Digest of Rep. Cas. 1897-1925 (1929) 47.
[78] Norway: CHRISTIANSEN, 6 Répert. 580.
[79] Quebec: C.C. art. 7 as construed, see 3 JOHNSON 49, 52.
[80] Peru: C.C. art. 692, see *supra* n. 54.
[81] Common Law: SAVIGNY 272 ff.
Prussia: Obertribunal, 10 Entsch. 143, 146; (May 8, 1865) 60 Striathorst 20 No. 6, at 66, 67; 1 REHBEIN 97; FÖRSTER-ECCIUS, 1 Preuss. Landr. (1892) 65.
[82] Belgian Congo: C.C. art. 10 (wills).
[83] China: IPL. (of 1918) arts. 20, 21.
[84] Cuba: C.C. art. 10, par. 2; BUSTAMANTE, 1 DIP. (ed. 3, 1943) § 429.
[85] Czechoslovakia: IPL. (1948) § 40.
[86] Egypt: C.C. 1948, art. 17.
[87] Germany: E.G. art. 24, 25, extended to foreign nationals, 91 RGZ. 139 and unanimous doctrine.
[88] Greece: C.C. art. 28.
[89] Italy: C.C. Disp. Prel. art. 23; App. Napoli (Sept. 8, 1948), Monitore (1949) 117 emphasizes unity and indivisibility of the succession.
[90] Japan: IPL. art. 25.
[91] Mexico: argument from C.C. Arg. arts. 12, 14, except domestic assets.
[92] Morocco, French: IPL. art. 18; Spanish: Dahir 1913, art. 16.
[93] Netherlands: Hof Den Haag (Feb. 23, 1942), W. 1942, 327, aff'd H.R. (Jan. 8, 1943) W. 1943, no. 202; Hof Den Haag (Apr. 28, 1947) N.J. 1947, 743; *cf.* MEIJERS, W.P.N.R. 3494, 3555-8; VAN BRAKEL § 138; Official Com-

Philippines.[94]
Poland.[95]
Portugal.[96]
Puerto Rico.[97]
Spain.[98]
Sweden (in relation to the non-Scandinavian countries).[99]
Tunis.[100]
Treaties: Austria-Poland,[101] Austria-Germany.[102]
France-Switzerland.[103]
Italy-Switzerland (relating to jurisdiction).[104]
Colombia-Ecuador.[105]

With respect to double nationality, *apatrides*, national law divided according to local domicil, religion, race, or caste, the general principles apply. It is true that succession is not necessarily included, even in civil law countries, under the personal law. But in the divisions into classes

ment to the Benelux Draft p. 17 n. 32; DE WINTER, W. 1948, 405. The Hooge Raad maintains its own lack of jurisdiction to review non-enacted law, but certainly does no longer infer from art. 7 Alg. Bep. that immovables are subject to *lex situs* (H.R. (Apr. 5, 1907) W. 8524, Clunet 1910, 285, see the decision of Jan. 8, 1943) and is supposed to approve silently of the nationality principle.

[94] Philippines: C.C. art. 16, par. 2; SALONGA, Private International Law (Manila, 1952) 377.

[95] Poland: IPL. art. 28, par. 1.

[96] Portugal: Clunet 1913, 1355.

[97] Puerto Rico: C.C. art. 11, see EDER, *supra* n. 24.

[98] Spain: C.C. art. 10, par. 2; Trib. Sup. (June 6, 1873) Clunet 1874, 40, 82; TRIAS DE BES, DIP. (1932) 102 ff., (1939) no. 63ff.; 2 GOLDSCHMIDT 164 (against exceptions to the principle).

[99] Sweden: Law of March 5, 1937, (except within the Scandinavian Union).

[100] Tunis: Trib. Tunis (Mar. 31, 1899) Clunet 1900, 372; (Apr. 20, 1904) Revue 1905, 157; SLAMA, Conflits des Lois rel. aux successions ab intestat en Tunisie (th. Paris 1935) 61.

[101] March 19, 1924, art. 28.

[102] February 5, 1927, § 3 par. 1.

[103] June 15, 1869, art. 5, in contrast to the dual system of French conflicts law, PERROUD, Clunet 1934, 285.

[104] July 22, 1868; App. Ticino (June 21, 1950) 47 SJZ. 334 no. 118, 8 Schw. Jahrb. Int. R. (1951) 307.

[105] June 18, 1903, art. 23.

of persons such as in the now expired Egyptian system, succession pertained to the foreign or mixed jurisdictions.[106]

3. Mixed systems

As mentioned earlier in this work,[107] the Swiss law applies Swiss substantive law to foreigners domiciled in Switzerland and subjects foreign domiciled Swiss citizens to the "foreign legislation" with two exceptions: their land situated in Switzerland is governed by the law and jurisdiction of their canton of origin, and "where these Swiss citizens according to the foreign law are not subject to the foreign law, they are subject to the law and jurisdiction of their canton of origin."

I described the latter provision as an admirable effort to avoid collisions regarding Swiss nationals abroad, as the statute applies Swiss law to them only if the law of the domicil so admits.[108] This was in conformity with the Swiss commentators;[109] in the meantime, the Swiss Federal Tribunal in a dictum formulated the rule expressly to the effect that "Article 28 NAG in the case of a foreign domicil of Swiss citizens concedes precedence to the *conflicts rules* there in force."[110] This interpretation has been challenged recently on the ground that Swiss law should always govern when the law of the domicil *itself* does not claim to govern. The practical difference is significant when

[106] Similarly in the treaty United States-Persia of July 11, 1928, with respect to movables. See Vol. I, 104 ff.; Trib. Consulaire Français, Cairo (June 25, 1948) Clunet 1950, 608. On the present complicated law in Israel see MAKAROV no. 25; YADIN, 2 Am. J. Comp. L. (1952) 143.

[107] NAG. art. 28; Vol. I, 81, 115.

[108] I said "prescribes," which word was used in a somewhat related provision in Privatrechtl. Gesetzbuch Zürich, § 4 par. 2.

[109] ANLIKER 2; SCHNITZER (ed. 3) 460, 465; VOUMARD 89: "das Recht welches das Konfliktsrecht am Domizil anwendet."

[110] BG. (Nov. 18, 1949) 75 BGE. II 280, 283 ff.: "Wohl räumt art. 28 NAG. bei ausländischem Wohnsitz von Schweizerbürgern den dort geltenden *Kollisionsnormen* den Vorrang ein."

the conflicts rule of the domiciliary state refers to a third law.[111] The result would be disastrous:

A Swiss citizen dying domiciled in England leaves immovables in England and France. Does the Swiss statute mean that the English immovable is governed by English law but the French immovable is governed by Swiss law?

Such far-fetched arbitrariness would not square with the comity inspiring the Swiss provision and the analogous German solution.[112]

Scandinavian Treaty. The Northern Union of 1933 calls for the law of the last domicil, if this has been in one of the states of the Union during five years; the draftsmen presumed that during this period the deceased would have adjusted himself to his surroundings. Otherwise, the national law at the time of the death generally governs, with various exceptions for different incidents of the succession.[113]

C. *Lex Fori*

1. As principle

Soviet Russia applies its own law to all but certain situations.[114]

2. In Favor of Domestic Beneficiaries

There exist powerful remainders of the most ancient conception that foreign inheritance laws should be ignored, and foreigners should not inherit. The Code Napoleon reserved rights in successions, as a part of "civic rights," to

[111] H. LEWALD in Fragen des Verfahrens- und Kollisionsrechts, Festschrift für Hans Fritzsche (Zürich 1952) 171 ff., ignoring the dictum by the Federal Tribunal of 1949.

[112] *Supra* 255, 256; see also LOUIS LUCAS, cited *infra* n. 137.

[113] Scandinavia: Treaty of Nov. 19, 1934, art. 1, *cf.* UDDGREN, 92. Z. ausl. PR. 267 ff.

[114] LUNTZ, Meždunarodnoe častnoe pravo (Moskow 1949) 320.

French citizens; aliens could not inherit. Moreover, it maintained the *droit d'aubaine, jus albinagii,* reserving the sovereign a part in foreigners' assets before they were allowed to emigrate.[115]

(a) *Reciprocity.* One popular modernization of the old xenophobia was the requirement of reciprocity for the application of foreign inheritance law. This idea[116] is incorporated in the Austrian law of 1854,[117] requiring equal treatment of Austrian movable estates with domestic estates as a condition of applying the national law to the movables of a foreigner domiciled in Austria. This exception recurs with various limits in modern codes [118] and many treaties.

(b) *Prelèvement.* After the French Restoration, paradoxically, the spirit of the Revolution was more felt than during the Empire, but the Law of July 14, 1819, changed the old principle merely to the effect that domestic persons enjoy all rights derived from the domestic statute. The French courts are so intensely imbued with the force of the Law of 1819 that in the wide application of this *prelèvement,* heirs and legatees [119] of French nationality [120] may claim so much of the value of assets situated in France as to provide them with what they would receive under French inheritance law from all French assets and foreign movables. The courts regard this rule as a means to

[115] France: C.C. arts. 726, 912.

[116] Formerly Prussia: A.L.R.I. 12, 40; Baden, Law of June 4, 1864, art. 2.

[117] Austria: Verlassenschaftspatent (Gesetz über Verfahren ausser Streitsachen) 1854 § 23.

[118] Germany: EG. BGB. art. 25 i.f.s. *infra* n. 130.

Liechtenstein: Law of Dec. 4, 1911, art. 2 (Austrian rule).

Mexico: C.C. art. 1328.

[119] Not the "légataire universel," or a surviving spouse claiming under marital property law; BAUDRY LACANTINERIE ET WAHL, Droit civil, 1 Successions § 206; MAURY in PLANIOL ET RIPERT, Successions § 38.

[120] They must be citizens at the time of the testator's death, Cass. req. (May 10, 1937) Rev. crit. 1937, 677; Cour Paris (July 10, 1946) Rev. crit. 1947, 142.

protect a French national [121] who would be heir or legatee according to the French law of succession.[122] On the other hand, the right is accorded against all co-heirs, be they foreigners or Frenchmen.[123]

Modern French scholars regard this *"éviction de la loi étrangère"* by the French system of devolution and the consequent split in the law of succession [124] with deep regret [125] as a "legislative mistake," strangely aggravated by the courts.[126]

However, Belgium,[127] the Netherlands,[128] Argentina,[129] and other countries [130] have enacted provisions on this model. The German Code has adopted a more moderate but nevertheless cumbersome version, in case the deceased

[121] CHARRON in 4 Foreign Law Series 111; 10 Répert. 280 ff.

[122] Cour Paris (Jan. 6, 1862) S. 1862.2.338. A change of nationality does not extinguish this privilege, which brings the clash with foreign laws and even treaties to a climax; DELAUME, "De l'application et de l'interprétation des Traités . . . dans les relations franco-américaines," Clunet 1953, Nr. 3, § 16.

[123] Trib. Seine (Dec. 16, 1950) Clunet 1951, 906, Rev. Crit. 1951, 302; against the text of the Code, see LEREBOURS-PIGEONNIÈRE § 365.

[124] RENAULT, Clunet 1876, 21; NIBOYET, Manuel § 740 *bis;* ROBERT DENNERY, Le partage en droit international privé français (Paris 1935) 147.

[125] PLAISANT 246 f. discussing the French-Swiss Treaty.

[126] NIBOYET, 4 Traité 685 § 1254; LEREBOURS-PIGEONNIÈRE (ed. 6) 416; "institution exorbitante et archaïque."

[127] Belgium: Law of April 27, 1865, art. 4.

[128] Netherlands: Law of April 7, 1869, art. 1; but in KOSTERS' (636-642) interpretation the article serves only the case where a Dutch national suffers abroad because of his nationality.

[129] Argentina: C.C. art. 3470. ROMERO DEL PRADO, 2 Manual 182, observes that also a foreigner, son of a foreigner domiciled abroad, is privileged. Even the foreign *lex situs* of immovables is disregarded, Cám. civ. 2a (June 22, 1925) 57 Gac. Foro 98 Nr. 133.

[130] Chile: C.C. art. 998 for intestate succession.
Colombia: C.C. art. 1054.
Ecuador: C.C. art. 1056.
Honduras: C.C. art. 978.
Nicaragua: C.C. art. 1024.
El Salvador: C.C. art. 995.
Treaty of Lima (1878), arts. 20, 22. (MARTENS, Recueil (2d. ser.) vol. 16, 293).

was domiciled in Germany.[131] Notably, under all these systems, nationals may claim their statutory portions, contrary to the applicable foreign law.[132]

The Chilean Code, article 998, reserves "in the intestate succession of a foreigner" the rights of Chilean nationals to inheritance, marital portion, and aliments according to Chilean law. On the exact scope of this provision, at least three doctrines exist.[133] In any case, the Code is not content to maintain forced heirship as a territorial prerogative with respect to domestic assets.

In Brazil, as an exception to the domiciliary law, where a foreign domiciled person leaves assets in Brazil and a wife or children of Brazilian nationality, these share in the inheritance according to Brazilian law, if this law is more favorable to them than the foreign law.[134] The criticism directed against the corresponding provision in the older statute on account of its unprincipled invasion into the unity of the succession with no hope of foreign recognition, remains valid.[135]

These nationalistic relics of old times were sharply criticized[136] and expressly rejected in the Hague drafts on succession.[137] The Report of the Commission of the

[131] EG. BGB. art. 25, sentence 2.

[132] France: Trib. Seine (Apr. 26, 1907) Clunet 1907, 1132, 1135.

Germany: RG. (May 31, 1906) 63 RGZ. 356; (Oct. 23, 1911) JW. 1912, 22; 24 Z. int. Recht 317; see also OLG. Hamburg (June 15, 1906) 18 Z. int. R. 146, where, however, German law applied also as *lex situs*.

[133] Chile: ALBÓNICO, 2 Manual 117; GONZALES ALVARADO, *supra* n. 73.

[134] Brazil: Ley introd. 1942, art. 10 § 1.

[135] BALMACEDA CARDOSO, O Direito Internacional Privado (São Paulo 1943) 151. The law of 1916 had been criticized also because the exception could work to the disadvantage of the Brazilian party, see BEVILAQUA, 1 Codigo Civil Commentado, Art. 14.

[136] LAINÉ, Clunet 1906, 990; MAURY ET VIALLETON in 4 PLANIOL ET RIPERT 61; BATIFFOL, Traité § 662 ff. KAHN, 13 Z. int. R. 342, followed by most German writers.

[137] Actes de la 3me Conférence pour le droit international privé, (1900) 58 ff., 122, 130; Draft 1904, art. 7, see Actes de la 5me Conf., p. 354; Draft 1925 art. 5 *ibid.* p. 283; Draft 1928 art. 5, Actes de la 6me Conf., p. 406.

Sixth Conference, after exhaustive discussion, summarized three methods of preferring the *lex fori* to the foreign law, repudiating all of them with the result that:

(1) A claimant may not invoke a domestic rule more favorable to him.

(2) Where the forum considers the foreign national law of the deceased as violating public policy, the ensuing complications prevail over the equitable considerations favoring the foreign law.

(3) It is absolutely objectionable that the *lex situs* should discard the national law in order to enforce its own order of distributing assets situated outside the territory.

The recent French draft maintains a right to *prelèvement* only where a French heir (that is, an heir according to the applicable law) is discriminated against solely because of his status as an alien.[138]

Sometimes it is not clearly acknowledged where the obnoxious character of the criticized measure lies. No confusion should be made with similar results reached if the domestic law of the forum and a foreign law are in conflict, each considering itself competent to govern the same succession. Also in this situation, a system will try to defend itself by using the assets available in its territory.[139] This may be called a legitimate product of an unfortunate international conflict. But the *prelèvement* trespasses on a foreign law recognized as applicable.

(4) Special cases: Although the Hague and French drafts as well as the Restatement (§ 612) expressly re-

[138] Comité pour la Réforme du C.C., Travaux 1949-50, Projet, art. 55; 1 Am. J. Comp. L. 423; this restrictive interpretation, however, is doubted by LOUIS LUCAS, Rev. crit. 1952, 69. A similar restrictive meaning has been given in Luxemburg to the law of Feb. 29, 1872 by Trib. Diekirch (Feb. 22, 1900) 7 Pas. lux. 41.

[139] Benelux Draft convention, art. 16 (English translation in 1 Int. J. Comp. L. Q. (1952) 426).

serves public policy, it is gratifying that in the judicial approach remedial refusal of foreign inheritance law is exceptional.

It was only natural that old French decisions, when civil death had been abandoned in France, rejected similar foreign punishments [140] or that courts repudiate immoral dispositions.[141]

A doubtful problem, however, concerns the admission of binding agreements concerning inheritance.

Contractual disposal is recognized as an alternative to wills in a few systems, although, for the most part, it is prohibited. Even Sweden, conservative of old usages, forbids agreements to appoint an heir as well as pacts stipulating the succession of a third party.[142] No doubt, if subjects of a country allowing the appointment of an heir by pact use this faculty within their own country, extraterritorial effect will in principle be accorded in other jurisdictions, according to their conflicts rules, provided that the subsequent succession is governed by the same law.[143] A pact between German spouses concluded in Germany is recognized in France with respect to movables, though not an immovable on French territory.[144] Opposition, in

[140] See French law of May 31, 1854, (abolition de la mort civile) and Cass. (Feb. 26, 1873) D. 1873.1.208.

[141] Cass. (Jan. 24, 1899) Clunet 1901, 998.

[142] Sweden: Law of April 25, 1930 (on inheritance pacts) § 3; PAPPENHEIM, 5 Z. ausl. PR. 306.

[143] England and United States: no case is known, but binding contracts to make a will are valid; see also BRESLAUER 194.

France: BATIFFOL, Traité 657 § 654, against contrary opinions.

Germany: Old practice rejecting the objection of public policy, see LEWALD 319; NUSSBAUM 364 ff.

Italy: Cass. Firenze (Dec. 12, 1895) S.1897.4.17.

Netherlands: Hof den Haag (Nov. 26, 1925) W.11623.

Sweden: Law of March 5, 1937, Ch. 1, § 7: "The question of the binding force of an inheritance pact with the deceased or a gift mortis causa is to be examined according to the law of the country, whose national the deceased was, when the transaction was made."

[144] App. Colmar (Feb. 19, 1949) Nouv. Rev. 1949, 222; Rev. crit. 1950, 52.

this case, under the theory of public policy seems to disappear. On the other hand, a prohibiting state seeks to prevent its subjects from disposing in this way everywhere. A pact between French spouses made in Germany is void in France.

Other questions, however, are not settled. In particular, whether the former-mentioned parties may transact abroad, is controversial. Certain laws exclude pacts in their territory absolutely. The adequate rule, making recognition likewise dependent on the law governing the succession of the deceased person, is formulated in modern laws.[145] The Czechoslovakian statute,[146] however, requires for capacity and intrinsic validity compliance merely with the national law of the first decedent, in other respects with both national laws at the time of execution.

We shall limit our discussions to wills. Here we shall encounter related problems concerning joint wills, renunciation of future shares, and promises to leave or not to leave by will.

[145] See preceding notes and *cf.* 2 BAR 340; KAHN, 2 Abh. 218, n. 140; 2 ZITELMANN 965; RAAPE 647.

Germany: KG. (April 10, 1941) Deutsches Recht 1941, 1611, no. 9: Dutch spouses domiciled in Germany concluded a "marriage and inheritance contract"; declared void under Dutch C.C. art. 977 ff.

[146] Czechoslovakia: PIL. (1948) art. 42.

Chapter 66

Principles

I. Unity and Plurality of Succession

1. Historical Notes [1]

BARTOLUS made the territorial scope of inheritance statutes dependent on their wording.[2] Later, the jurists discussed the nature of these statutes, to ascertain whether they were personal or real or determined by the place of death. Alberic de Rosate is credited with the merit of having first treated the problem of a unitary law of succession in the proper perspective. But *lex situs* for immovables was the prevailing teaching of the statutists, although the German "Mirrors"—the Sachsenspiegel and Schwabenspiegel—as well as decisions of the Parliament of Paris, 1392 and 1429, together with a host of learned writers [3] were partisans of the law of the deceased's domicil as a single law.

A decisive new impulse to create a unitary law governing succession came from Mancini who, as president of the Institute of International Law in Geneva, on August 31, 1874, urged universal and total acceptance of the national law. In the following period, the weight of the literature in all civil-law countries with great energy favored the

[1] Most valuable: Freyria, La loi applicable aux successions mobilières (thèse, Lille 1944); see also Coulon, Principes généraux sur la dévolution héréditaire (thèse, Poitiers 1886, 1889) 35 ff.; for the latest periods see the book by Delaume, *supra*, bibliography.

[2] Bartolus, De Summa Trinitatis VI § 42.

[3] In former centuries among the statutists, Froland, Bouhier, and Boullenois, as cited by Weiss, 4 Traité 535 ff.

national law as the single law of the decedent.[4] Most statutes, following the model of the Italian Code of 1865 and the German of 1896, adhered to this system.

However, opponents have been frequent in France, supporting the traditional split between immovables and movables.[5] During the Hague Conference of 1928, Professor Basdevant [6] declared it inacceptable that French land should be governed by a foreign law, a view traditionally shared by the French courts,[7] and that the national instead of the domiciliary law should govern movables. The Swiss delegate, Sauser-Hall, also advanced objections against the single national law. It was finally adopted by the majority, subject to exceptions, but the convention was never ratified, largely because of this division of opinions.

In the common-law countries, learned writers did and do acknowledge the theoretical superiority of the single law. Practically, however, the contrary firm position of the courts is usually regarded as reasonable—it is true, without much penetrating analysis of the situations arising from the coexistence of several laws governing the same succession. This is due to the prevalent attention given to probate procedure and the administration of decedent's estates, which includes the verification and discharge of debts. The problems produced by this system are different from ordinary choice of law, and the difficulties involved require remedies on a different basis.

The most acute controversy concerning this problem has been developing for a long time in Argentina. The case for

[4] See 2 BAR 304, and WEISS, 4 Traité 543, who was himself a most eloquent advocate of the single national law.

[5] There is a long list of French authors of the 19th century.

[6] Comptes-rendus de la 6me Conférence 277.

[7] Cass. (Dec. 8, 1840) S.1841.1.56 and many decisions leading to (May 7, 1924) Revue 1924, 406; (May 23, 1948) J.C.P. 1950.2.5241: irrespective of the testator's intention.

the single law (of domicil) has been fully pleaded by both exegetic explanation of the puzzling code provisions and rational appraisal of the contrasting theories. It is the prevailing scholarly view that there is a cleft between *catedra* and *jurisprudencia,* through the exclusive "fault of the courts." [8] Velez Sarsfield, the principal author of the code, according to his numerous notes, wanted to follow Savigny strictly.[9] But the code contains so many apparent contradictions that the courts may well shift a part of the "fault" upon the draftsmen.[10]

2. Rationale

Any legal conception of a hereditary unit is due to an advance of legal thought over the primitive separateness of assets and rights. The comprehensive bringing together of all chattels under the law of domicil, strongly emphasized in English law,[11] was in itself a lawyerlike achievement.

That in so many jurisdictions the process of forming a unit out of an aggregate halted without encompassing immovables, was caused, of course, by the high importance of the land and the political and economic interests of feudal

[8] ROMERO DEL PRADO, 2 Manual 187; see his excellent exposition 151-239; before him: MOLINA, El Derecho Int. Priv. (Buenos Aires, 1882) §§ 92, 103; WEISS-ZEBALLOS, 1 Manual de Derecho Internacional Privado (ed. 5, Paris, 1911) 345; 2 *id.* 367; 2 VICO (ed. 1927) 273 ff.; and see the impressive brief, published by DR. SANTIAGO BAQUÉ, Régimen sucesorio internacional segun la ley Argentina (Buenos Aires, 1936). *Contra:* ALCORTA, 2 Curso de DIP. (ed. 2, Buenos Aires, 1927) 388; BIBLIONI, 4 Anteproyecto de Reformas al C.C. Argentino (1931) 26.

[9] Especially art. 3283 is taken as a clear declaration of the law of the last domicil. It was so understood by Trib. Seine (Apr. 17, 1912) Clunet 1913, 175, a foreign tribunal, but the only one to understand correctly as DÍEZ MIERES, *infra* n. 10, at p. 20 ironically states.

[10] ALBERTO DÍEZ MIERES, Las sucesiónes en el Der. Int. Priv., Conferencia, 21 March 1927 (Madrid, 1927) repudiating the "preposterous" Montevideo solution, advocated an accord with Spain with adoption of the unitary law as in Spain, but with the domiciliary test as in Argentina.

[11] Lord Chancellor Westbury, in Enohin v. Wylie [1862] 10 H.L. Cas. 1, 11 E.R. 924.

and modern rulers. This basis of the several laws doctrine is intensely emphasized and glorified in France, while Anglo-American practitioners take the twofold system of their conflicts law in stride as the most natural thing.

There can be no hesitation in conceding the absolute superiority of the Roman-Byzantine concept and the refined modern doctrine of "universal succession." [12] It is a succession of heirs in the place of the deceased, continuing his rights as well as his debts, giving coheirs equal provisions, and including legatees and creditors in a comprehensively considered coherent system. Unwise as it was for the purpose of a world law to declare at the Hague simply that there should be unity of succession, the majority vote for this principle is well understandable.

What we have now is a stalemate with respect not only to unity and plurality, but also to connecting factors and accessory incidents. Every system in the checkered table believes in its own merits. All together have created chaos.

To be realistic, we must discard once more the subtle arguments, pompous phrasing, and disturbing dialectic of conflicts philosophy. Must the conflicts rules on inheritance really be territorial because of the sovereignty of the states over their territory? [13] Must they on the contrary apply the personal law of the deceased, because inheritance allegedly is still in close relation to personal and family relations? [14] Is it true at all that the continental Roman-

[12] On the concept of succession in the Italian Code, G. STOLFI, Note sul concetto di successione, in Riv. trim. dir. e proc. civ. 1949, 535.

[13] Thus NIBOYET, 4 Traité § 1318; LEREBOURS-PIGEONNIÈRE (ed. 6) 409 § 361.

[14] Thus with special regard to the national law, ANZILOTTI, in Actes de la 5me Conférence 203; Comment Benelux Draft p. 17; *contra* BASDEVANT in Actes de la 5me Conférence 202; and see App. Napoli (Jan. 23, 1924) Giur. Ital. 1924 I 2, 175: Italian citizens may divide foreign assets without regard to the national law of the testator, as only property, not status, capacity, or family law, is involved.

istic laws start from the personal sphere, whereas the common law of inheritance is allegedly built upon exclusive economic consideration of the assets?[15] A glance at the foregoing survey of systems with its shocking variety of combinations of "real" and "personal" statutes destroys the easy affirmation of any such pretense. History knew these ideas and overruled them.

In fact, all these systems are in force irrespective of reasons. Even though the Romanistic principle is sound in itself, its application to the divided world is not at all natural. When in England the land reform of 1925 abolished the dualism of descent and distribution to realty and personalty, many were expecting an automatic repeal of the dualism in conflicts law. Nothing of this sort happened, which is the more notable since the Anglo-American expansion of the *lex situs* is as extravagant in this field as in that of marital property.[16] That eight pieces of land need eight different systems of liberty or restraint in testation is bad enough in all jurisdictions of the split law; but that even the capacity to make a will and the formalities and construction of will are independent in principle in every jurisdiction where an immovable is found transgresses the borders of tolerable tradition.

A slight beginning of consciousness is noticeable. An enlightened dissenting vote of a strong minority of the Iowa Supreme Court has reminded us that the ancient difference between the will of real estate made before a court of law and the testament of personal property, pertaining to the ecclesiastical jurisdiction, has vanished; hence, a revocation of a will, involving movables and immovables,

[15] Theory of Dicey, much noted on the Continent. Another fruitless debate was conducted on the relation of universal succession to the personal law between 2 BAR 306, 623, and KAHN, 1 Abh. 38.

[16] *Supra* Vol. I, p. 337.

effective by the law of the domicil, ought not to be ignored at the situs of land, merely because its own domestic law requires a different mode of cancellation.[17]

On the other hand, the Hague, Benelux, and French drafts have been influenced by a doctrine of recent French writers, strongly narrowing the scope of national law: by these it is limited to the designation of the beneficiaries and their shares, and excludes administration, liquidation, and liability for debts, if not also partition as submitted to the *lex situs*.

To a critical mind and to a new legislator, the practical effects of the two fundamental systems should be decisive.[18] To this end, the results so far discernible will be collected here.

II. Problems Concerning the Connecting Factors

1. Party Autonomy

Sometimes emphasis is laid upon the possibility that a person may select the law applicable to his succession by choosing his domicil—or for that matter, his nationality—or by buying land in an advantageous jurisdiction for purposes of succession. This we do not call autonomy of determining the law; it is individual freedom itself. The dubious French-Italian doctrine of *fraus legi facta,* fraud committed by using a foreign connection with the intention of evading the municipal law of the forum, was invoked where spouses abroad executed a joint will prohibited at

[17] Dissenting vote by Smith J. *in re* Barries' Estate (Iowa, 1949) 35 N.W. (2d) 658, 9 A.L.R. (2d) 1399 at 1407, citing *in re* Goldsticker's Will (1908) 192 N.Y. 35, and Ellis v. Davis (1883) 109 U.S. 485 (interesting but not really a support).

[18] In agreement, Savatier, Cours de DIP. (Paris, 1947) 304 § 436.

home; but only two French cases to this effect, both a century old, are known.[19]

A true option granted a testator, however, was once generally thought permissible. Some present enactments allow it under circumstances.

The outstanding provision of this sort is embodied in the Swiss law, directly intended to aid international relations. An alien domiciled in Switzerland is subject to Swiss inheritance law; nevertheless he may provide by will that his succession should be governed by his own national law (called *professio juris*).[20] It seems settled that by so doing the testator may exclude forced heirship granted by Swiss federal or cantonal law,[21] although other questions of construction are doubtful.[22] In the prevailing but controversial opinion, it is assumed that a Swiss national, domiciled abroad in a state recognizing the national (i.e. his Swiss) law of inheritance, may choose between the Swiss Civil Code and his cantonal law, particularly with respect to any differences in determining the forced heirs.[23]

In Peru, where domestic immovables are controlled by domestic law and movables by the law of the last domicil, the former code nevertheless allowed a foreigner to dispose at his choice of a "big business enterprise" in Peru under his national law [24] and of foreign-situated assets under either

[19] ANDRÉ TIRAN, Les successions testamentaires en DIP. (1932) 142 ff. at 154, in addition to the long-condemned decisions operating with fraudulent though serious change of nationality; *cf.*, *supra* Vol. I, pp. 507-510.

[20] NAG. art. 22.

[21] SCHNITZER (ed. 3) 468; PAUL FISCHER, 64 Z. Schweiz. R. (1945) 129, 132. That, as Schnitzer contends, there may be a renvoi from the national law to the domiciliary Swiss law, sounds inconsistent with the apparent meaning of the statute.

[22] VOUMARD, Transmission 51-81 enumerates three theories on the scope of the rule and numerous controversies.

[23] See FISCHER, *id.* 132 against SCHNITZER (ed. 2) 428, (ed. 3, 472).

[24] Peru: C.C. (1852) art. 694; CARLOS GARCÍA GASTAÑETA, Derecho Int. Priv. (1930) 244 contended that an analogous rule was to be inferred for intestate succession; this seems to mean that the foreigner may write a declaration (or only a will?) so disposing.

his national law or the *lex situs*.[25]

Conversely, the Decedent's Law of New York,[26] continuing a former provision of the Code of Civil Practice, is always satisfied when the New York law is chosen to govern an inheritance:

"Whenever a decedent being a citizen of the United States or a citizen or a subject of a foreign country, wherever resident, shall have declared in his will and testament that he elects that such testamentary dispositions shall be construed and regulated by the laws of this state, the validity and effect of such dispositions shall be determined by such laws." [27]

The Treaty between Colombia and Ecuador permits the testator to choose national or domiciliary law.[28]

Finally, among the peculiar rules with which American statutes abound, there is a provision in Maryland that where the testator "originally" was domiciled in this state, his succession is governed by Maryland law, unless he should "expressly declare a contrary intention in his will or testamentary instrument." [29]

Apart from these exceptional legal rules, certainly freedom to dispose by will depends on the leeway left by the law governing succession. Lists of imperative rules in the national laws limiting this freedom were collected at the fifth Hague Conference.[30] Nevertheless, some eminent courts occasionally still separate on the old lines, resorting to the presumptive intention of the testator not only in

[25] Peru: C.C. (1852) art. 693; 27 Anales Judiciales de la Corte Suprema de Justicia (Peru, 1931) 24.

[26] Decedent Estate Law, § 47; *cf.* Davids N.Y. Law of Wills § 531.

[27] An analogous provision respecting movables was contained in the former C.C. of Mexico, art. 3286.

[28] Art. 18; *cf.* Cock, Tratado de D.I.P. (ed. 2), 209.

[29] Md. Publ. Gen. L.: art. 93 sec. 344. Nevertheless, this statute applies only if the will is submitted in Maryland for original probate.

[30] Documents 1925 p. 89, 185, 358, 502 ff.; for France see Lerebours-Pigeonnière (ed. 5) 501 § 370.

construing his will, which is natural,[31] but also in determining the applicable law. There are recent examples.[32]

2. Concept of Immovables

The general principle that characterization of things connected with land as movable or immovable is referred to the law of the place where the land is, has been discussed above (Chapter 54).

Illustration: The granddaughter of the famous writer George Sand, married to an Italian, bequeathed the castle of Nohant in France with its inventory and an amount of money to the French Academy to maintain a memorial for her grandmother. The French court, following the French law of situs, considered the furniture and the money as immovable and therefore subject to French law.[33]

[31] Also the recent decision Amerige v. Attorney Gen. (1949) 324 Mass. 648, 659, 88 N.E. (2d) 126 (against the rule that a power of appointment is controlled by the law of the donor, the perpetuity rule of Massachusetts is applied because of the presumptive intention of the donor) is explained by the specific nature of the matter, *infra* p. 352.

[32] England: Re Allen's Est. [1945] 2 All E.R., a most objectionable decision, criticized by MORRIS, 24 Can. Bar Rev. (1946) 528.

France: Cour Paris (Apr. 24, 1913) Clunet 1913, 1276: Mme. Nazare-Aga, wife of a Persian diplomat, was born in France, educated there and did not leave that country. Until near her death she only knew French law and usages. Her act was evidently a holographic will according to the French C.C. The court refrained from attributing her a French domicil, but nevertheless presumed her intention to apply French law and granted reserved portions to her children under French law.

Germany: Bay. Ob. LG. (Jan. 3, 1934) IPRspr. 1934 Nr. 24 assumed that the testator may choose the law and in absence of his choice *lex situs* governs. *Contra:* ECKSTEIN, 6 Giur. Comp. DIP. 229 Nr. 189.

Netherlands: Hof Amsterdam (July 11, 1946) N.J. 1947 no. 66, affirmed H.R. (March 21, 1947) W. 1947, 382, applied the law of the Netherlands where the testator was formerly a national from birth and had his last domicil, because of the particular circumstances of the case.

Therefore, recognition to an adopted child was refused. The H.R., however, expressly stated (Jan. 8, 1943) W. 1943, 202, that autonomy of the testator is limited by the applicable law.

It is interesting that the Kammergericht in Berlin (April 10, 1941) Deutsches Recht 1941, 1611, HRR. 1941, 846, had understood the Dutch law just as the Amsterdam court did, in the case of a Dutchman long domiciled in Germany.

[33] Trib. civ. La Châtre (July 5, 1910) Clunet 1911, 588.

Exceptions are made by the provisions in Chile, Argentina, and Brazil, assimilating movables in a "permanent" situation to immovables [34] in foreign countries. The French draft, submitting a *fonds de commerce,* an established business, to the *lex situs,*[35] applies the same treatment also to inheritance law.[36] The reporter proposed special contacts also for patents, trademarks, designs and models, maritime and fluvial vessels, and aircraft, but the committee declined to institute so many separate successions.[37]

3. Renvoi

The Hague Convention on renvoi,[38] drafted at the Conference of 1951, is much limited in scope. Nevertheless, it affirms the renvoi principle in its oldest and most important application, viz., to the conflict between the principles of the national law and the law of the domicil. It shows also the direction in which further development must be sought.

Since the first volume of this work [39] called for a sound positive stand in construing references to foreign law, world opinion has made a highly gratifying progress, leaving behind all the sterile negation of renvoi in the universal literature. Even the adversaries concede more and more "exceptions" to their denial of renvoi.

True, while the new approach has been initiated in the Netherlands, where rejection of renvoi was practically unanimous,[40] some writers dwell on the old futile arguments, extolling the pretended wisdom of their conflicts

[34] *Supra* Ch. 54.
[35] French Projet, art. 48.
[36] *Id.* art. 54.
[37] Travaux de la Commission de Réforme du Code Civil (1949-1950), 635-637.
[38] Draft Convention to determine Conflicts between the national law and the law of the domicil, Engl. tr. in 1 Am. J. Comp. L. 275, 280-282.
[39] Vol. I, p. 79 ff.
[40] KOSTERS 135; MULDER (ed. 2) 94; MEIJERS W.P.N.R. 3555-3558; HIJMANS 157; VAN BRAKEL 66.

rules allegedly pointing directly to some internal law. More regrettably, a number of delegates, for one reason or another, refrained from voting, although it was carefully explained that, far from adopting the "theory of renvoi," the draft merely offered practical uniform rules indicating a specific law applicable, not the supremacy of foreign conflicts rules defeating those of the forum. This dreaded "theory of renvoi," especially in the form proclaiming total renvoi in all situations, may once have been favored by writers, but it now exists exclusively in the imagination of the anti-renvoyists. What writers of recent times who advocate acceptance of renvoi have had in mind has been exactly what the draft begins to teach, a sensible construction of the forum's own conflicts rules, certain complements to them, attaining uniformity, and references to foreign law just where they are sound.[41] The draft could very well call this by its name. The decisive point is whether a court insists on the literal or even narrow-minded interpretation of its conflicts rules at the cost of reasonableness, or looks to the international purpose of these same rules.

Perhaps it is allowed to hope, despite the remaining reluctance of some eminent scholars to abandon their old dogmas, that the field may be considered free for an unbiased discussion of the cases in which renvoi is sound and in which it is not.

We have to review the topic here, because the law of succession furnishes the most frequent field for renvoi. Of the numerous English cases in point, all but two involve succession.[42] Apart from the special rules on formal validity of wills, only two types of conflicts rules are in question,

[41] It may specifically be referred to the writings of MELCHIOR, RAAPE, GRISWOLD, and my own, as well as in this respect to PAGENSTECHER (*cf.*, 1 Am. J. Comp. L. 166).

[42] CHESHIRE (ed. 4) 90.

the personal law, as tested either by nationality or domicil, and the law of immovables as it is a part of a unitary governing set of rules or an independent factor. The Hague draft deals merely with the first problem.

The Personal Law

The draft provides as follows:

Article 1. When the State where the person interested is domiciled prescribes application of the national law, but the State of which such person is a national, prescribes application of the law of the domicile, each contracting State shall apply the provisions of the internal law of the law of the domicile.

Article 2. When the State where the person interested is domiciled and the State of which such person is a national, both prescribe application of the law of the domicile, each contracting State shall apply the provisions of the internal law of the law of the domicile.

Article 3. When the State where the person interested is domiciled and the State of which such person is a national both prescribe application of the national law, each contracting State shall apply the provisions of the internal law of the national law.

Article 4. No contracting State is obligated to apply the rules prescribed in the preceding articles, when its rules of private international law prescribe application in a given case neither of the law of the domicile nor of the national law.

Article 5. Domicile, for the purpose of the present Convention, is the place where a person habitually resides, unless it depends on that of another person or on the seat of an authority.[43]

The preference given to the law of the domicil confirms the practice of the German, French, and Swiss courts, contrary to all opinions still fascinated by the virtues of the

[43] Translation by 1 Am. J. Comp. L. 280.

nationality principle. E. M. Meijers has rediscovered a passage of Mancini's work in which the necessary concessions to foreign references to the law of domicil are masterfully stated.[44]

"Further references" are absolutely inevitable, if "each contracting state" has to follow the lead of the two nearest involved conflicts laws. The draft has not adopted the often repeated proposal that transmission of reference should depend on the consent of the two laws to which the reference would lead. In fact, such coincidence, desirable as it is in the interest of harmony, cannot be required for the purpose of renvoi, which in my opinion is simply the carrying out of the first and principal reference, that is, the reference contained in the conflicts rule of the deciding judge. What happens, otherwise, is illustrated by the French draft which states:

"If the foreign law applicable according to the French conflicts rules does not consider itself applicable, the foreign law, if any, to which this law refers shall be applicable if it considers itself applicable, otherwise French law shall apply." [45]

A French critic [46] refutes this doctrine with this illustration: If an Englishman died domiciled in Greece, and Greece refuses to accept the English reference, French courts may nevertheless have to apply Greek law, or (not very justifiably, in my opinion) English law; that French law should be substituted is perfectly arbitrary.

The favorite examples of the literature would be decided with more assurance.

Illustrations: (i) A Danish national lived and died in Brussels, but made his last will in the Netherlands before

[44] MEIJERS, Recueil de lois modernes concernant le DIP. (1947) 95.
[45] Art. 20, Engl. tr. by 1 Am. J. Comp. L. 420.
[46] LOUIS-LUCAS, Rev. crit. 1951 at 409.

a Dutch notary. The appeal court of The Hague, in a recent decision,[47] stated that a Danish court would apply Belgian inheritance law without accepting renvoi. Although the Belgian court of the domicil would accept the renvoi, the Dutch court felt forced by the Dutch legislation to apply Danish law. The Dutch legislator has defined his view on the applicable law, and foreign rules could not be obeyed.

The Convention would—and in the Dutch case, we hope it will—remedy this abstruse alleged legislative situation.

(ii) An English testator dies domiciled in Italy, leaving movable property in Italy. At present, the Italian courts reject the reference from the national state, England, to the domicil, Italy; hence, they apply the English law of inheritance. The English courts follow. In the same case, with France instead of Italy, at present, the French courts "accept" the English renvoi to the French domicil; the English again follow.

In the future, Italian courts would share the French attitude applying their own law of succession; the English courts would not have to ascertain the foreign view concerning renvoi and would always apply the law of the domicil. Moreover, where assets of an Italian-domiciled testator are situated in France, the French courts, thus far so adverse to transmissive reference,[48] would apply Italian rather than English law.

(iii) A Danish testator, domiciled in Italy, leaves movables in England and Germany. At present, Danish courts refer to Italian law, Italian courts to Danish law; both, allegedly, without admitting renvoi. Third states must divide according to their principle: England going the Italian way reaches the Danish inheritance law;[49] Germany

[47] Hof Den Haag (Feb. 23, 1942) W. 1942 no. 327.

[48] Vol. 1, p. 78 n. 33; CHARRON, in 4 Cahiers de Droit Etranger (ed. fr., 1934) 138 claims that App. Alger (Jan. 12, 1931) Gaz. Pal. 1931.1.581 contains no true application of transmissive reference; but see BATIFFOL, Traité 331 on Cass. (Nov. 7, 1933) S.1934.1.321, Rev. crit. 1934, 440; Clunet 1935, 88.

[49] *Cf.* Re Achillopoulos [1928] Ch. 433.

after the Danish model applies Italian law—we are in the paradise of no-renvoi.

In the future, in both jurisdictions, Italian law would govern the entire succession, wherever the movables may be and whatever court would decide.

(iv) An Englishman dies domiciled in Boston, Massachusetts. This case has been used as proof that the English foreign court theory would break down if both jurisdictions involved attempted to apply it.[50] The case is expressly decided by the draft to the same effect as in my propositions; Massachusetts law, of course, governs. The English court theory does not break down but is confirmed if all courts adhering to the domiciliary principle adopt it in relation to jurisdictions of the nationality principle. Among themselves no conflict exists, except when an American court would assume a domicil not recognized in England, a disharmony independent of renvoi and remedied by another section of The Hague draft.

If renvoi is entirely rejected, the results are indicated by a recent Swedish decision.

(v) An immigrant to the United States lost his Swedish nationality without acquiring another and died domiciled in the state of Washington. The Swedish Supreme Court, influenced by a review article of Undén, reversed its stand and rejected renvoi. Hence, it applied the inheritance law of Washington even to Swedish land, against the conflicts law of Washington and the inheritance law of Sweden.[51]

Reference to Lex Situs

In the Hague Conference of 1951, it was instinctively felt what is needed. The Italian delegate Perassi criticized

[50] Thus LEWALD, in Festschrift f. Fritzsche (Zürich, 1952) at 170 note, using a word used by M. Wolff against universal use of this theory. I take the opportunity to direct the author of that critical note to the list in Vol. III (1950) p. 593 correcting Illustration (c) in Vol. I, p. 79, where the typed manuscript was confused by three misplaced words.

[51] Sweden: S.Ct. Plenum (Feb. 28, 1939) Nytt Juridiskt Arkiv 1939 I p. 96, 13 Z. ausl. PR. (1942) 843.

the result of the draft in Italy: the courts would apply Italian inheritance law to the movables of a domiciled Englishman, according to the uniform rules, but would continue to apply English inheritance law to his Italian immovables, according to their anti-renvoi doctrine. Sauser-Hall replied that this is the consequence of the restriction of the draft to the conflict between domicil and nationality.[52] Time and again, it is the rejection of renvoi that troubles the solution.

On the other hand, it creates bad confusion if a reference to the situs is treated as if it were an agreement to the general conflicts law of the situs. This regrettably has been done by the English courts and is the main basis for the argument that renvoi leads to a vicious circle.

It may be recalled that the German Code by Article 28 of the EG., and its usual construction,[53] concedes that land situated in a foreign state is controlled by this state through *special* rules of descent and distribution. Between the United States and Germany, therefore, no conflict exists where a German testator leaves an immovable in American territory. Succession is governed by the law of the situs. Neither does a conflict exist in the inverse case, but this is due to renvoi; if an American testator leaves an immovable in Germany, American conflicts law refers to the German law, which renvoi back is accepted in Germany (EG., article 27). Hence, all third states, whether primarily referring to American or German law, are likewise directed to the German substantive rules.

Although adopted in the Swedish law on conflicts, this expressly stated difference is not shared anywhere else. An Italian court of appeals has rejected its very idea.[54]

[52] Actes de la 7me Conférence, 234 ff.; SAUSER-HALL, 8 Schweiz. Jb. Int. R. 121 ff.

[53] *Supra* Vol. I, 342; *supra* Ch. 65 n. 68.

[54] Italy: App. Napoli (Nov. 8, 1948) Mon. Trib. 1949, 117; see DE NOVA, Rev. crit. 1950, 351 (Offprint p. 31).

But the question, indeed, has never been examined. Where a unitary system and a special order of succession conflict, which should be granted preference? The German solution is based on the commonly accepted justification of *lex situs*—the state where the property lies commands respect —and warns against insoluble conflict. At the same time, this faculty of the situs, in fact, guarantees a uniform solution for all interested jurisdictions; a vicious circle is avoided.

It is submitted that the same result ought to be reached in both jurisdictions, on the one hand, by a reasonable construction at the forum of the reference and, on the other hand, by acceptance at the situs of the reference, that is, renvoi to the situs. We may remember that it is not an entirely new suggestion that *lex situs* may not refer to the whole law of the situs.[55]

Illustrations: (vi) An American citizen, domiciled in England, leaves a house in Norway. At present, Norway applies English inheritance law to all assets of the decedent. England and the United States primarily refer to Norway, but the English courts accept the Norwegian reference back.[56] A French court, if really excluding further reference, would probably have to look to "American" inheritance law (if they can find one).

But why should Norway, on the ground of the domiciliary principle in England, insist on the unitary doctrine in the teeth of the English system? On the other hand, Norway converted to renvoi should not be induced to carry this too far.

[55] GRISWOLD, 51 Harv. L. Rev. at 1196. My own suggestion, 4 Int. L. Q. at 406, "not understood" by LEWALD, *supra* n. 50 at 168, was moreover preceded by 4 FRANKENSTEIN 306.

[56] Re Trufort (1887) 36 Ch. D. 600; Re Duke of Wellington (1947) Ch. 506; CHESHIRE (ed. 4) 91 sub III accepts just this point among his now approved cases of renvoi.

United States: Restatement § 8, Re Schneider's Estate (1950) 96 N.Y.S. (2d) 652, much discussed with very questionable positive assumptions.

(vii) An American domiciled in England leaves a house in Rapallo (Italian Riviera). At present, England refers to Italy which refers to the United States which is said to refer back to Italy and so forth.

Here, Italy, as Norway in illustration (vi), is allowed to ruin a sensible order of succession by imposing its unitary system on the succession of an *American* citizen, domiciled in *England*. This result will be corrected, when Norway and Italy understand that their reference to the domicil or national law, respectively, means full abandonment of the treatment of succession, and England and the United States understand that they do *not* refer to the unitary systems of succession concerned.

(viii) A naturalized American citizen, having retained Swiss citizenship, dies at his last domicil in Illinois. He leaves a bank account in Switzerland and real property in Switzerland and New York. Two decisions of the Swiss Federal Tribunal [57] and the recent decision of the New York Surrogate *in re Schneider* [58] deal with these situations. They were to be decided on the ground of the American-Swiss treaty of 1850, as was recognized by the Bundesgericht, although disapproved by the Surrogate, with the result that the bank account and the American real estate were to be governed by the law of Illinois and the Swiss land by Swiss law.[59] If no treaty existed, the Swiss courts still would be entitled to treat the decedent as a Swiss subject [60] and apply the provision of their law of 1891 that succession to Swiss real property of Swiss citizens domiciled abroad is controlled by the law of the *Heimatkanton*.[61] In either case, the New York court erroneously assumed that renvoi to the domicil applied; but its decision together

[57] BG. (Nov. 24, 1883) *in re* Wohlwend, 9 BGE. 507, 509, 513, concerning the bank account; BG. (May 5, 1898) *in re* Gemeinde Feldis, 24 BGE. I 312, 319 concerning American and Swiss real estate; App. Bern (March 5, 1885) 21 Z. Bern J.V. 360: forum rei sitae for immovables.

[58] *In re* Schneider's Estate (1950) 96 N.Y.S. (2d) 652.

[59] See ANLIKER at 115; SCHNITZER, 501; NUSSBAUM, American-Swiss PIL. 1951, 21-23.

[60] *Supra* Vol. I, 81.

[61] NAG. art. 28 (1).

with another, likewise objectionable, holding of the Second Circuit Court, show nevertheless the changed climate.[62]

On the other hand, the reference to *lex situs* does include certain further references. In continental literature it is often forgotten what a healthy function in the American law is exercised by the references in the statutes of the situs to *lex loci contractus* and *lex domicilii* for validating the form of wills; an analogous recognition of foreign law is advisable for capacity to execute a will. These conflicts rules of the situs and whatever other foreign validating law may be invoked there, deserve application in any court applying *lex situs*. They are part of the "special law" in the right meaning of the German article 28 EG.

It is not suggested, therefore, that *lex situs* exclusively means substantive rules. They are the principal object, however.

Renvoi, as I understand it, is not a mechanical device. It serves to carry out the conflicts rule of the *forum,* and must not blindly run into any complications conditioned by the coincidence of foreign conflicts rules. Since our conflicts rules, commonly and fortunately, fail to explain their content, they permit interpretation in favor of a modicum of harmony. However, the harmony has to be sought in the spirit of the referring rule. This is in the first place the conflicts rule of the forum. If it refers to the national law in personal matters or in the matter of succession *in toto,* the entire conflicts law of the national state is invoked, and its further reference to the *lex situs* is susceptible of adequate application. Exactly the same is true where the forum is dedicated to the principle of the law of domicil, except that a reference back on the ground of the nationality principle must be eliminated, as the Hague Convention has well perceived.

[62] Mason v. Rose (C.C.A. 2d, 1949) 176 F. (2d) 486; criticized by Jerome Frank J. dissenting; see also BRAUNSCHWEIG, 31 Boston U.L. Rev. (1951) 74.

CHAPTER 67

The Form of Wills[1]

I. THE CONFLICTS SYSTEM

MULTIPLICITY of laws establishing forms for wills engenders conflicts particularly discomforting because invalidity of a will, discovered after the testator's death, is irreparable.

The present greatest differences of formal requirements consist in the varying position of the legislators on public testaments, as developed in the civil-law countries from Justinian's Corpus Juris; private wills before witnesses, peculiar to the common law; self-written (holographic) wills after a long history adopted and widely popularized by the French Civil Code; and oral (nuncupative) wills, derived from various sources. In the United States, many variants are represented; aside from the English private testaments, written and witnessed, almost half of the statutes admit holographs, although nuncupative wills are only allowed in extraordinary emergency situations.[2]

Yet the general public resents even more the innumerable small divergences in which the statutes seem to delight. How many witnesses for private, or for notarial wills: two? three? Two or three, two or five according to circumstances? Seven? Have the witnesses only to sign or also to give "attestation?" Have all solemnizing persons

[1] LORENZEN, "The Validity of Wills, Deeds and Contracts as Regards Form in the Conflict of Laws," 20 Yale L.J. (1911) 427; CONTUZZI, Diritto ereditario internazionale (Milano 1908); RABEL, "The Form of Wills," in Symposium, 6 Vanderbilt L. Rev. (1953) 533.

[2] See SCHOULER § 417 n. 3; 1 PAGE §§ 386, 395 ff. and Supp. 1950.

to be present all the time? or only at the signature? or may they come and sign successively? Must the testator sign in the presence of the witnesses or the official? At a certain place at the end? Must every step be acknowledged in the document? Must a holograph bear date and place, or only the date, or neither? Is it void if the date is printed? Must a signature carry the name as in the birth document, or does a given name, a nickname, pen name, or "your father" suffice?

The "pitfalls" and "hardship" involved in these ruthlessly whimsical legislations have drawn attention for a century. They have been experienced everywhere, particularly in the case of a change of domicil or nationality after the execution of a will. Some legal provisions have been especially devised for this case. But the need for a remedy, recently felt in the United States, arises also where a testator disposes of assets situated in several jurisdictions, or movables and immovables subject to different systems, or assets under general and special rules of inheritance.

Some, but not very much, satisfaction has been obtained by counselor's practice.

In the civil-law sphere, it is old advice that a will should be clothed in the most exacting public form available so as to satisfy any law requiring "authentic" testaments. It is well-known, however, that formal invalidity is strikingly often encountered just in notarial instruments.

In the United States and elsewhere, advantage has been seen in separate wills with respect to every state where immovables are left. These wills have to be altered according to changes of circumstances or of fancies. They may also be construed by different methods.

A relatively helpful private form may be suggested, combining a holographic will with the Anglo-American attestations of witnesses, both complying with the most

severe standards. I do not pretend, of course, that this eliminates all pitfalls.

1. Basic Tests

In the curiously involved history of doctrines from the twelfth to the eighteenth century, the ancient personality of law was replaced by the territorial *lex situs* of the feudal regimes until the personal law came back in the disguise of a *statutum reale* or openly. In this development, the form of testaments was from the thirteenth century on a subject of controversies in which domicil and *lex loci actus* were often in rivalry.[3] In the nineteenth century, the law of domicil as of the time of the death of the testator at common law and *lex loci actus* at civil law dominated the choice of law for the form of succession to movables.

At common law, the formal requirements of a will are, like all other requisites and the effects of wills, governed by the law governing succession. This is the law of the situation of immovables, and the law of the testator's domicil at the time of his death for movables. The purest, unadulterated expression of these rules is to be found in the Restatement of Conflicts Law.[4] A will affecting immovables must observe the domestic law of the place where they are situated or else be void.[5] A will complying with the law of the place of execution, or even with the requirements at the testator's domicil at the time of execution but not with what is law at the last domicil of the deceased

[3] LAINÉ, De la forme du testament privé en droit international (1908).

[4] Restatement, §§ 249, 306; 4 PAGE §§ 1634, 1638; GOODRICH (ed. 3, 1949) 514; Note, 169 A.L.R. (1947) 554.

[5] Coppin v. Coppin (1725) 2 P. Wms. 291; Pepin v. Bruyère [1900] 2 Ch. 504; [1902] 1 Ch. 24; Will valid under lex situs, though not at domicil; De Fogassieras v. Duport (1881) 11 L.R. Ir. 123; Murray v. Champernowne [1901] 2 Ir. R. 232.

Canada: *In re* Howard (1924) 1 D.L.R. 1062.

United States: *In re* Irwin's Appeal (1865) 33 Conn. 128; 2 BEALE § 249.3.

—such will is void.[6] Vice versa, a will invalid where it originated may convalesce at the domicil the testator had when he died.[7] In a famous criticism, Phillimore called this system of compulsion "unwisely, arbitrarily and unphilosophically" made.[8]

The civil-law tradition, here as in the matter of contracts, detaches the formal elements from the whole transaction and treats them in accordance with the maxim, *locus regit actum.* Not in the old Italian school, but since the French statutists, this principle was prevailingly observed in full rigor, with imperative force. The will had to conform to the formal provisions of the law governing at the place of execution at the time of execution or be considered void under the law governing succession. Thus, the Grand' Chambre du Parlement of Paris invalidated in 1721 a holographic will that the Governor of Douai, M. de Pommereuil, had made in that town in the holographic form of the Coutûme de Paris.[9] This remained the French approach during the nineteenth century. Hence, a foreigner could not employ the forms of his home state. In the numerous cases of wills made in France by Englishmen in the English manner with two witnesses, a manner unknown to French law, it happened that the will was invalid in England because France was the last domicil,[10]

[6] Bremer v. Freeman (1857) 10 Moo. P.C.C. 306; Moultrie v. Hunt (1861) 23 N.Y. 394; Nat v. Coons (1847) 10 Me. 543.

[7] *In re* Beaumont (1907) 216 Pa. 350, 65 Atl. 799; Blackwell v. Grant (1933) 46 Ga. App. 241, 167 S.E. 333.

[8] PHILLIMORE, Commentaries upon International Law (ed. 3) vol. 4, 705.

[9] 2 LAINÉ 416. Exactly to the same effect the Parliament of Paris had decided analogous cases since 1615. See DUBRUJÉAUD, Des conflits de lois relatifs à la forme du testament sous seing privé (thèse, Paris 1908).

[10] Bremer v. Freeman, *supra* n. 6.

and was equally void in France, because it was executed in France.[11]

A third connecting factor is the oldest of all: *lex situs* governing all assets including movable property. As mentioned above, this approach obtains in Mississippi,[12] and in the Treaty of Montevideo is subject only to the exception that authentic wills executed in a member state are recognized.[13]

These three basic tests, if standing unrelated, are a monument of isolationism. They are inexcusable where the ultimate penalty of invalidity befalls an instrument as the effect of one of the mentioned variants in the number of witnesses, attestation and signing, acknowledgment of presence, officials in public wills, dates and location of signature in holographic wills, etc.

2. Enlargements

(a) *English legislation.* Even before the belief of the lawyers in the necessity of rigorous formality began to decline, the international intolerance shown in our matter aroused astonishment. It is well-known how the decision in *Bremer* v. *Freeman*[14] alarmed the British colony in France and led to Lord Kingsdown's Act,[15] which created a very large faculty for British subjects to testate abroad. According to this law, which despite its record for bad drafting[16] is still in force, the formal validity of the will may derive from the law of the place of execution or that

[11] The line of these decisions, including Cass. req. (March 9, 1853) D.1853.1.217, S.1853.1.217, reached to the lower courts in the complicated law suit Gesling v. Viditz, Cour Paris (Dec. 2, 1898) D.1899.2.177 and Cour Orléans (Feb. 24, 1904) Revue 1909, 900 reversed, see *infra* n. 23.

[12] Miss. C. Ann. 1942, Title 1, ch. 1, § 467. See *supra* 253.

[13] Art. 44.

[14] *Supra* n. 5.

[15] Wills Act, 1861.

[16] See the criticism by MORRIS, 62 Law Q. Rev. (1946) 170, 173.

of the domicil or origin. (Section 1). It is well understood that in addition the law of the last domicil remains in an optional function (section 4).

This option is granted to British subjects making a will concerning "personalty" out of the United Kingdom. When executing a will within the United Kingdom, the list is strangely narrower (Section 2). Section 3, declaring a change of domicil immaterial, has a much disputed scope; in particular it is an unending controversy whether it adds anything new for British subjects and whether it applies also to aliens.[17]

(b) *Typical civil law.* In the civil-law countries of the later nineteenth century, another enlargement took place. The *lex loci actus* lost its mandatory character and permitted the personal law to govern formalities in disposition either of movables or, in accordance with the principle of unity of succession, of the entire inheritance. Personal law to the Continental European mind was in this period the national law at the time of executing the will. The old test of *lex loci actus,* thus, was replaced by the option, *lex loci actus* or *lex patriae*, as early laid down in the Italian Code of 1865.[18] The German Civil Code of 1896 inverted the order: *lex patriae* or *lex loci actus.*[19]

In France, two sections of the Civil Code created diffi-

[17] For the affirmative: WESTLAKE 121 § 85; DICEY (ed. 5) rule 197; BRESLAUER, "The Scope of Section 3 of the Will's Act 1861," 3 Int. L. Q. (1950) 343. For denial: FOOTE 301; CHESHIRE (ed. 4) 527; DICEY (ed. 6) 840. Loss of British nationality after execution of the will is innocuous according to *Re* Colville [1932] 1 D.L.R. 47 (British Columbia S. Ct.) and "probably" in the English courts, CHESHIRE (ed. 2) 518.

[18] Italy: Former C.C. (1865) Disp. Prel. art. 9, par. 1; FEDOZZI (ed. 2) 593.

[19] Germany: EG. BGB. art. 11, par. 1 and some treaties of Germany. Similar: Austria: doctrine, s. EHRENZWEIG, 1 System des österreichischen allg. Privatrechts (1951) 110; China: I.P.L. (1918) art. 21, par. 1; Czechoslovakia: Pr. I. L. (1948) 43. Japan: Pr. I. L. (1898) art. 26. Poland: Pr. I. L. (1926) art. 5 and 29, controversial. Siam: Pr. I. L. (1939) art. 40. Sweden: L. March 5, 1937, ch. 1, § 4.

culties. Article 999 permits Frenchmen abroad to testate by the French form of a holographic will or by local authentic testament. The courts rejected certain foreign executed wills of Frenchmen[20] but seemed agreed that authentic wills did not need intervention of one or two official solemnizing persons as the French Code demands. The definition should rather be taken from the foreign place of execution. Use by Frenchmen in a common-law jurisdiction of the private and secret Anglo-American forms was therefore admitted,[21] a nice legal trick to obviate hardships. On the other hand, foreigners in France were finally allowed, despite the categoric rule *locus regit actum* of C.C. article 3, to testate in France in their national forms; the Court of Cassation announced the facultative, optional function of this maxim in a decision of 1909, dealing with the will of a foreigner.[22] After this was secured, the authors went farther in construing article 999 as merely "enumerative"; Frenchmen should be able to use any forms of the local law, for instance a holographic will in an easier form than Article 970 C.C. allows.[23]

An analogous development may be noted especially in Quebec and Chile. When a domiciliary of Quebec executed a holographic will in New York, the old interpretation of the Quebec Civil Code, article 7, imperatively required compliance with New York law, which did not know holographic wills. But the Court of Appeals unanimously, and the Canadian Supreme Court by majority, validated the will applying Quebec law as the law of the last domicil,

[20] Trib. civ. Lyon, Clunet 1877, 149, without date concerned an Austrian oral will.

[21] Cass. civ. (Feb. 6, 1843) D.1843.1.208, S.1843.1.209; App. Rouen (July 21, 1840) S.1840.2.515; Trib. civ. Seine (Feb. 6, 1919) Revue 1920, 476.

[22] Cass. civ. (July 20, 1909) D.1911.1.185, S.1915.1.165, Clunet 1909, 1097, Revue 1909, 900, following the conclusions of the Procureur Général, Clunet 1909, 1098.

[23] BATIFFOL, Traité 582 ff. § 581.

stating renvoi from New York to Quebec, and the Supreme Court recognizing that the rule *locus regit actum* is permissive.[24] Article 18 of the Chilean Civil Code declares it necessary that every will be a public and solemn instrument, and article 1027 again recognizes a foreign will only if it is (written and) "solemn." But the views of the commentators and a decision of 1864 rejecting foreign holographic wills were superseded by a decision of the Supreme Court of 1927 recognizing them.[25] The Greek Code of 1830 recognized merely the *lex loci actus,* but the Wills Act of 1911 added the *lex patriae.*[26]

Among the many laws that followed the French lead,[27] an analogous trend toward *lex loci actus* or national law is noticeable, although Portugal insists on the law of the place of execution even with imperative force [28] and often the required authentic form is more rigorously insisted upon. Frequently, the domestic forms must be observed also by foreigners, and holographic wills may be excluded altogether. In the Netherlands, holographic wills of foreigners at the forum may be executed according to the

[24] Ross v. Ross (1894) 25 S.C.R. 307; 2 Q.B. (1893) 413, *cf.* FALCONBRIDGE, Conflict (ed. 2) 154 f., 280; 3 JOHNSON 5.

[25] App. Santiago (June 27, 1864) Gac. Trib. (1864) 436, no. 1195; Corte Supr. (Jan. 14, 1927) 25 Rev. Der. Jur. y Ciencias Soc., 2nd part, I 106; ALBONICO VALENZUELA, El DIP ante la Jurisprudencia Chilena (1943) 166.

[26] Greece: Law of Feb. 11, 1830, art. 61; Law on Wills of May 17/18, 1911, art. 53 par. 1; 2 STREIT-VALLINDAS 509; C.C. 1940, art. 11.

[27] Belgium: C.C. art. 999; POULLET (ed. 3) §§ 477 f.
Belgian Congo: C.C. art. 11.
Bulgaria: Law of Dec. 17, 1889, art. 88.
Cuba: C.C. art. 732.
Dominican Rep.: C.C. art. 999.
Egypt: C.C. 1948, art. 17 par. 2.
Haiti: C.C. arts, 805, 806.
Panama: C.C. arts. 765, 770.
Puerto Rico: C.C. art. 11.
Spain: C.C. art. 732.
Venezuela: C.C. art. 879.

[28] Portugal: C.C. art. 1910 ff., 1961, 1965; *infra* n. 81. Also the old bilateral treaties between Salvador, Ecuador, and Bolivia.

national requirements, but the Appeal Court of the Hague insists that a deposit with a Dutch notary is indispensable.[29]

Nevertheless, the most familiar formula of the civil-law countries can be stated as referring alternatively to *lex loci actus* or the national law,[30] less often the domiciliary law [31] of the testator. Sometimes, it is true, in the codes the alternatively to *lex loci actus* is only the code itself.[32] Nationality has been replaced by domicil as the test of personal law, for instance, in Brazil.[33] However, in France, where the law of the last domicil governs succession to movables, formal validity is yet subject to *lex loci actus* or *lex patriae* as of the time of execution.

(c) *Interstate and international unification. Uniform state statutes.* When the National Conference of Commissioners on Uniform State Laws was founded in 1892, practically their first work was the drafting of an Act relating to the execution of wills. The wording then [34] was

[29] Rb. Den Haag (June 3, 1926) W. 11545, N.J. 1928, 1020, affirmed Hof Den Haag (Jan. 9, 1928) W. 11813; *contra* MEIJERS, N.J. 1929, 468; WPNR 3493; BARMAT, De Regel Locus regit actum (Amsterdam, 1936) 314.

[30] In addition to the citations *supra* n. 19 and 26, e.g. Ethiopia: BENTWICH, 4 Int. L. Q. 113; Nicaragua: C.C. art. VI, par. 15.

[31] E.g. Denmark: (App. 30, 1940) U.F.R. 1940, 857, 13 Z. ausl. PR. 828: Dane, domiciled in Denmark, testating in France in French form.

[32] Colombia: C.C. art. 1084.

Ecuador: C.C. art. 1085.

Guatemala: C.C. (1877) art. 789.

Honduras: C.C. arts. 1011, 1012.

Mexico: C.C. art. 1593 (implicite); State of Morelos: C.C. arts. 15, 1601; State of Puebla: C.C. arts. 12, 3127.

Norway: Law of July 31, 1854, § 56.

[33] Brazil: The dominant opinion under the law of 1916 claimed the imperative effect of *lex loci actus* without any distinction; TENÓRIO (ed. 2) 336 § 443 against BEVILAQUA and RODRIGO OCTAVIO, 1 Manual do Código civil brasileiro (Lacerda ed.) 2 § 356. According to the Introd. L. of 1942 it seems that for *foreign* executed wills the law of the last domicil and *lex loci actus* are optional.

[34] Handbook of the National Conference of Commissioners on Uniform State Law, 1892, p. 9.

identical with the text agreed upon in 1896[35] and again with that promulgated in 1910,[36] as Uniform Wills Act, Foreign Executed. Among the many subsequent uniform bills, this is a *rara avis* belonging to the "conflictual" kind. Wills executed in a foreign state in a manner recognized at the forum or at the testator's domicil should be considered as if they were executed in the mode of the forum. This rule extends to interests in land.

The draftsmen stated from the beginning in 1892 that there was no real reason for the differences of formal requirements in disposing by testament of personalty and real estate, "the effect of which has been in many cases to defeat the purpose of a testator." Since divergence of the laws of real and personal property had been abolished in most states, "there would seem to be every reason why a similar simplification of the law would be accepted." However, the success was limited. The Act has been adopted only by thirteen jurisdictions.[37] In a new draft of Execution of Wills Act, 1940, intended to unify the municipal formal requirements of wills themselves, the old text was inserted with certain modifications as section 7.[38] This broadening of the scope was balanced by changing the "uniform" law into a "model law." Although its influence is certainly notable, in the past twelve years only Tennessee has joined the ranks of the adopting states. The draftsmen considered their work useful rather than necessary. Yet at least the conflicts rule of section 7 concerns one of the numerous points where the local differences

[35] *Id.* 1896, p. 19.

[36] *Id.* 1910, p. 144.

[37] Alaska, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Nebraska, Nevada, New York, South Dakota, Wisconsin. Washington repealed its adherence. Kansas and Tennessee acceded to the new draft, see on Kansas *infra* n. 49.

[38] 9 U.L.A. (1951) 421, 423, inserted in the Model Probate Code § 50, SIMES, Problems in Probate Law (1946) p. 82.

are devoid of any territorial, moral, social, or other justification and plainly apt to irritate the people involved. Legal formalities are indispensable, but to allow their local shades to disturb otherwise unimpeachable post-mortuary dispositions compromises the law. This motive was taken up and made the theme of a masterful exposition by Lorenzen in 1911.[39]

Canadian Uniform Law. The British Act of 1861 was amended by the Uniform Wills Act in Canada in 1929, particularly by including alien testators, and increasing the list of validating foreign laws.[40] But also this Act is in force only in two provinces, Saskatchewan and Manitoba. In Canada, Falconbridge is the eminent advocate of a generous recognition of foreign forms of testaments. A further improved text is due to him.[41]

Hague Conferences. It demonstrated a need recognized universally at the time, that the Hague Conferences on Private International Law beginning in 1893, almost simultaneously with the American Uniform Law Commission, exactly like the latter started their work with the conflict of inheritance laws and were concerned in particular with the form of wills.[42] The formula adopted has become a model for a few recent laws, although the Draft Convention as a whole has been a failure.

Scandinavian Convention. The Northern Convention of 1934 considers a will formally valid if it complies with the law of the place of execution or the law of the domicil

[39] LORENZEN, 20 Yale L.J. (1911) 427.

[40] 14 Minutes of the Proceedings, Canadian Bar Ass., 1929 (1930) 323, 332 ff.; also printed by MORRIS, 62 Law Q. Rev. (1946) at 185.

[41] FALCONBRIDGE, in 62 Law Q. Rev. (1946) 328; *id.*, Essays in Conflict of Laws, Ch. 23; 34 Proceedings Can. Bar. Ass. (1951) 42-45.

[42] Actes de la Cinquième Conférence de la Haye (1925) 283 art. 6; identical Actes de la Sixième Conférence de la Haye (1928) 405 ff. Projet art. 6.

or the national law at the time of execution.[43] The last personal law is omitted as in the Continental Codes.

The Swiss law of 1891 can be mentioned here since it was enacted at a time when legislative power over private law was with the Cantons. It allowed the forms of the place of execution, of the Canton of domicil at the time of execution or of the death, and of the home Canton. At present applied only to international relations, this means an option among the place of execution, the domicil at either time, and the nationality.[44]

(d) *Various rules.* The existing variety in all other jurisdictions is perplexing. Within the United States, five or more groups of conflicts rules are distinguishable.[45] It is highly significant that in most jurisdictions foreign executed wills on movables agreeing with the formalities of the place of execution, are recognized, either as a privilege restricted to formal requirements or as including intrinsic validity. The variants include, in addition, the law of the enacting state or the domicil at the time of execution or both. On the other hand, six states name only their own law and the *lex loci actus,* and eleven states retain exclusively the common-law criterion of *lex domicilii* as of the time of death.

In the Latin-American countries, even where the French Code is not followed literally, the "authentic" form enjoys a marked preference, either suppressing holographic wills altogether or at least for the use of nationals abroad. As on this point, the Codes also vary in combinations between

[43] ("Northern") Convention, concerning Inheritance and Succession (1934) art. 8, 6 HUDSON, Int. Legislation 947 no. 397, 164 League of Nations Treaties Ser. 279.

[44] N.A.G. arts. 24 and 28.

[45] The best survey has been given in the excellent article by HOPKINS, "The Extraterritorial Effect of Probate Decrees," 53 Yale L. J. (1944) 221, 254 ff.

lex loci actus, national or domiciliary law, respectively, and the domestic law.

Another minimum requirement, that a foreign will should be written, recurs also in American statutes.[46]

3. The Most Developed Reference Lists

(a) *Texts.* The Uniform Wills Act, Foreign Executed, 1910, stated that "A last will and testament, executed without this state in the mode prescribed by the law, either of the place where executed or of the testator's domicil, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state; provided said last will and testament is in writing and subscribed by the testator." [47]

This text did not specify the domicil of what time was deemed decisive. A new draft of 1938 therefore supplied a broader option, referring to the domicil either of the time of the execution or at the death.[48] This version was adopted by Kansas.[49] But, without discussion,[50] the Commissioners abbreviated the wording, leaving only the domicil at the time of the execution:

"A will executed outside this state in a manner prescribed by this act, or a written will executed outside this state in a manner prescribed by the law of the place of its execution or by the law of the testator's domicil at the time of its execution, shall have the same force and effect in this

[46] *In re* Tessini's Est. (1947) 73 N.Y.S. (2d) 904, an Italian testament in which the testator declares to be unable to write, was denied probate because an agent should have been asked to write for him.

[47] Handbook (1910) 144.

[48] *Id.* (1938) 314 with an appropriate note.

[49] Kansas L. (1939) ch. 180 § 45; Gen. Stat. Ann (1949) §§ 59-609.

[50] In Handbook (1939) 227, the note of 1938 is carried, but the text is changed, cancelling the mention of the last domicil. Mr. Barton H. Kuhn, Omaha, obliged me by stating that no discussion of the point is noted in the files.

state as if executed in this state in compliance with the provisions of this act." [51]

Probably the old text already meant to refer to the domicil at the time of execution, and was silent on the last domicil because this was the old accustomed device of which no lawyer needed to be reminded. Section 1 of Lord Kingsdown's Act may have been too closely followed. The final text expresses what the old wording omitted to specify. The formulation this time, it is true, sounds so exhaustive that it has been understood by competent interpreters as excluding the last domicil.[52] If so, the common-law rule would have entirely yielded to the civilian thought. This is unlikely in itself and seems not to have come to the mind of the draftsmen. The omission also of *lex situs* reinforces the argument that the draftsmen cannot have intended to exclude the old criteria. This interpretation is approved by a leading commissioner.[53]

Most recently, in an unofficial manner, an extremely ample (perhaps all too ample) list has been offered by the Commissioners which at the same time, opportunely leaving the narrow framework of a law for foreign executed wills, includes nonresident testators:

"A will is legally executed if the manner of its execution complies with the law in force either at the time of execution or at the time of the testator's death of 1) this state, 2) the place of execution, or 3) the domicile of the testator at the time of execution or at the time of his death." [54]

The Hague Draft, article 6, names the law of the place of execution, the testator's national law at the time of execu-

[51] 9 U.L.A. (1951) 423.

[52] Thus BORDWELL, "The Statute Law of Wills," 14 Iowa L. Rev. (1929) 445; HOPKINS, *supra* n. 45, at 268 regretting this result.

[53] On the ground of the facts, *supra* n. 50, Mr. Willard Luther, Boston, kindly authorized me to state his personal interpretation of s. 7 to this effect.

[54] 9 U.L.A. (1951) Supp. 1953 (for 1954) p. 48, in commenting on Uniform Probate of Foreign Wills Act, 1950.

tion or at the time of death.[55] The Swiss law, as mentioned before, declares sufficient conformity with the law of the place of execution, the domicil of either time, and the national law.[56]

Also the Argentine Civil Code admits foreign executed wills in the form of the testator's residence or nation or of the Argentine law.[57]

(b) *Comparison: time of validity.* It is highly interesting that while common law looked only to the personal law as of the time of the death and civil law only to the time of the execution, on both sides the distinct trend was to let formal validity of either time suffice. Lord Kingsdown's Act and the American Uniform Law added the time of execution; the Hague Draft and, before it, the Swiss Act added the time of death. The two great groups joined, but most laws are lagging, and expressions are sometimes defective. In South Africa, for instance (admitting *lex loci actus* and "domicil"), as recently reported, the two only decisions held opposite views on the formal validity of a will conforming only to the law of the last domicil.[58] In particular, it is surprising [59] that the German Code, followed by other codes,[60] fails even to make the

[55] Actes Sixième Conf., (1928) 405 ff., art. 6.

[56] N.A.G. art. 24.

[57] Argentina: C.C. art. 3638.

[58] *Re* McMillan's Estate (1913) T.P.D. 198 (invalidity); ex p. Estate Abbott (1950) (3) S.A.L.R. 325 (validity); see ELLISON KAHN, "Recent Cases in South African P.I.L.," 4 Int. L.Q. (1951) 397; the author advocates validity also according to the common-law test.

[59] The older German literature was divided. But in Austria, WALKER (ed. 3) p. 1805, against THÖL and STOBBE, stressed the awkwardness of excluding the law governing the succession, invoking Savigny's dictum, p. 312, that the testament is legally to be considered as executed at the moment of death.

[60] Germany: E.G. art. 24.
Czechoslovakia: Priv. Int. L. § 3.
Egypt: C.C. art. 17.
Japan: Pr. Int. L. art. 26.
Siam: Pr. Int. L. art. 39.

exception in favor of the last nationality that it states in the matter of capacity of willing; as has been pointed out, where an English lady writes a holographic will in London, and later acquires German nationality by marriage and dies, her will remains invalid.[61]

Law of Place of Execution. The common-law rule has since Lord Kingsdown's Act been very largely enriched by considering the *lex loci actus.* Familiar to the predecessors of the English scholars, this is justly recognized as the most appropriate source of formal validity. Most American statutes and the great majority of all other laws are now united under this old rule.

Law Governing Succession. On the other hand, again uniformity is in the making, when the American statutes, unfortunately often silently, retain validity under the law of the domicil at the time of death and civil-law statutes add this reference to their lists, as the Hague Draft, Switzerland, Italy, and Greece.

The Law of the Enacting State. The American Uniform Law, Lord Kingsdown's Act, and a considerable number of American and foreign statutes include "this law," i.e., the law of the enacting state, in their lists, which may be, but need not be, identical with the last domiciliary or national law. The reference covers the cases where assets are situated at the forum, while the other local contacts may be foreign; for instance, it obviates any hard proof of compliance with the law of the place of execution.[62] In systems tending to a strong territorialism, this is a natural device. Another unsuspected use may appear in the following situation. An American citizen, formerly domiciled in Tennessee, takes a new domicil in

[61] M. WOLFF, D.IPR. (ed. 3) 198, following LEWALD, IPR. 316 f. § 381.

[62] *In re* Hart's Estate (1936) 60 Misc. 108, 289 N.Y.S. 731; (1937) 250 App. Div. 753, 295 N.Y.S. 765.

Cuba (or The Netherlands, Japan, etc.), executes there a will conforming to the law of Tennessee, i.e., the Model Probate Code, with two witnesses, and dies there. An American domiciled abroad is no longer a citizen of a particular state;[63] the United States has no substantive law of succession for him. The domicil and the place of execution refuse recognition. But the court of Tennessee and others, if not demanding more exacting formalities, may admit the will to probate under "this," their own statute.

This, however, would be a probate judgment, not rendered at the last domicil, that would probably have no effect outside the state except as to the assets of Tennessee. The only real remedy would be a substantive all-American rule applicable by any foreign court that looks to the national law. Americans abroad are a new event in American law-making.

Domestic Wills. The American official text and many others are merely concerned with foreign executed wills. A considerable number of states, indeed, insist on their own formalities for domestic executed wills. This occurs not only with respect to the subjects of the forum and to domestic immovables but *"locus regit actum"* is likely to be applied to all assets in the imperative meaning when the will is executed at the forum. French practice and the German Code have advanced to a general option between the *lex loci actus* and the personal law. This development is followed in many other countries[64] but needs general acceptance.

The Personal Law of Other States. Comparing the advanced lists in the Model Law and the Hague Draft, a striking parallel is revealed with the likewise remarkable difference that here domicil, there nationality, is the only

[63] Vol. I, 134.
[64] Spain is doubtful; see 2 GOLDSCHMIDT 253.

criterion for the personal law. Most draftsmen do not even think of the connecting factor in the other half of the world. An exception is made by the Scandinavian Convention which had to consider the nationality principle in Sweden and Finland and the age-old domiciliary law of West-Scandinavia for their mutual relations, and more effectively, by the Swiss law in consideration of the split in the Cantons. It is the solitary merit of Argentina to have spontaneously remembered the division of the conflicts rules in the Western hemisphere. Of course, the *Código Bustamante* considers this contrast in its peculiar way.

There is an interest of harmony involved in this question, but also a certain practical effect.

Suppose a Frenchman, domiciled in England, executes in Portugal a holographic will according to the French Civil Code, Article 970. Valid under French law (C.C. Article 999), the will is invalid in Portugal.[65] In an American Court such as New York, neither *lex loci actus,* nor domicil of any time, nor "this" law justifies recognition. But all jurisdictions looking to the national law must hold the will valid by a kind of renvoi neglected in the discussions. Should not England and the United States join them?

On the other hand, suppose a Cuban, domiciled in Detroit, on a trip to Louisiana executes there a will with two witnesses conforming to Michigan law. Michigan and Louisiana (under the Uniform Law) consider the will valid, although Louisiana requires three to five witnesses. Should it not be valid also in Cuba or Germany or Japan?

Change of Personal Law. As it seems, section 1 of Lord Kingsdown's Act refers also to the case of a change of the testator's domicil between execution and death, although section 3 deals with the same case and only with change.

[65] Portugal: *infra* n. 81.

The American statutes recognizing the domiciliary law at either time are drafted with a particular view to the testator's change of domicil. But a German provision only by an irrational exception preserves the validity of the will of an alien who becomes a naturalized German, if the will is valid under the former national law and the law of the place of execution, yet conforms with German law (E.G. BGB. art. 24 al. 3).

Proposal: A will is legally executed if the form of its execution complies with the law in force either (1) in the enacting state at the time of his death, (2) at the place of execution at the time of the execution, or (3) at the domicil or in the national state of the testator at the time of execution, or at the time of his death.

II. Restrictions

1. In Favor of *Lex Causae*

The theory that the rule *locus regit actum* depends on the consent of the *"lex causae"* [66] obtains a particular place where the form of wills is tested under the law of the place of execution.

Around 1900, with special regard to wills, an author asserted that the theory giving superiority to the *lex causae,* which in this case is the law governing the succession, was not only the prevailing but the common view.[67] In the same vein, the first drafts of the Hague Conference from 1892 inserted a clause restricting the application of *lex loci actus* to the condition that where the national law governing

[66] Vol. II, p. 495, to which the reader may be referred.

[67] Contuzzi, Diritto ereditario internazionale (1908) 510 ff., citing Asser, Bar, Despagnet, Duguit, Durand, Foelix, Haggé, Laurent, Napolitani, and Fiore.

a stipulation of a will requires a certain form, the will cannot be made in another form.[68]

Although this view has since shrunk to a small minority of opinions,[69] the recent French draft declares its adherence to the dependence of *lex loci actus* on the *lex causae,*[70] and the reporter, Niboyet, wanted also the application to testaments;[71] the Benelux International Private Law in fact carries this application by stating that a legal act is valid respecting its form if it satisfies the respective conditions of the country where the act is accomplished, "except where the nature of the act or the national law of the person accomplishing it opposes (this effect)." [72] The Netherlands, moved by their famous prohibition of foreign executed private testaments to Dutch nationals (to be discussed presently), also initiated the first Hague Drafts.

This doctrine results in the extraterritorial effect of prohibitions by the national law or whatever else may be in other legal systems the *lex causae.*

The problem has occupied the attention of the courts in connection with the following legal provisions.

(a) *French Code Civil, Article 999:* A Frenchman in a foreign country may make his testamentary dispositions by act under private signature as prescribed by article 970 or by authentic act in the forms used at the place where this act is executed.

The significant history of interpreting this section has

[68] Actes 1893, p. 29, art. 6 par. 2; Projet transactionnel, basis for the Conference of 1904, Documents (1904) 166, art. 2 par. 2; see for the first drafts on this point 2 KAHN, Abh. 225 ff.

[69] See for the majority view LEREBOURS-PIGEONNIÈRE §§ 314, 367; BATIFFOL, Traité § 579; and the almost uniform German doctrine, *infra* n. 76; see also KG. (June 6, 1940) JR. 1940, 1372, HRR. 1940, 1108.

[70] Commission de Réforme du C.C., Travaux 1949-50, 673 ff. Projet art. 59. NIBOYET, *ibid.* at p. 672 claimed that the German law was to the same effect, strictly contrary to the facts.

[71] Art. 69 of the French draft of the subcommittee. Travaux *ibid.* 673 ff.

[72] Benelux draft (1951) art. 23.

been mentioned above. The result is that a French testator abroad may use even a holographic will in the local form not agreeable to article 970 of the French Code Civil, and oral wills according to Austrian, Swiss, or Scandinavian laws, or the American statutes permitting nuncupative wills. The French lawyers deservedly acknowledge the need of international security of transactions for an unchallenged operation of local form applied in executing wills.

(b) *Netherlands Code, Article 992.* The Dutch provision runs in categoric terms.

In contrast to the Frenchman, the Dutchman abroad testates invalidly in any local form, except in "authentic" form which, moreover, requires the intervention of a public official, irrespective of the foreign local conceptions. It suffices, however, as the Hoogeraad inferred from history and reason of the provision, that a foreign holographic will be deposited with a foreign public authority.[73]

The Dutch learned writers are scarcely inclined to characterize this provision as a rule of status, restricting capacity. They state in an entirely correct appraisal, a formal requirement sanctioned by nullity, and naturally enforced within the prohibiting state on the grounds of public policy.[74] They seem divided, however, with respect to the international effect. Is this effect merely prevented by contrary public policy of the foreign court or by the rule *locus regit actum* itself? In other countries, notably eminent French and Italian writers, on the contrary, for a long time acknowledged a binding international force of article 992 on two theories: either on the ground of the mysterious notion of "formes habilitantes," which constitute not a form

[73] H.R. (Jan. 6, 1927) W.11623; N.J. 1927, 266; OFFERHAUS 708 ff.; that the deposit may be made abroad, against what modern writers had to conclude from H.R. (Dec. 18, 1885) W.5252.

[74] See ultimately VAN BRAKEL § 150.

nor an incapacity, or by characterizing the prohibition directly as incapacitating the testator to execute a private will in a foreign country. Hence, the Dutch national personal law would be applicable in all courts under the nationality principle.[75] The great majority of authorities [76] have recognized the obvious truth that the formation of wills in oral, written, or authentic expression pertains to "form," and the domestic forms are open to foreigners; prohibitions such as the Dutch have to yield to the rule *locus regit actum* in the other countries. The Dutch rule is felt to imply repudiation of the reliance put on the local legal system,

[75] Belgium: App. Bruxelles (Jan. 9, 1937) Pas.1937.2.56, Clunet 1938, 367, Revue crit. 1938, 470; SATTER, 5 Giur. Comp. DIP. 19: holographic testament made in Belgium declared void; (June 20, 1931) Rev. trim. Inst. belge de droit comparé 1932, 56; 2 DE VOS 947 ff.

France: Cour Paris (May 7, 1897) Clunet 1897, 817; Trib. Seine (Aug. 13, 1903); Clunet 1904, 166; (Feb. 19, 1927) D.1928.2.33, Revue 1928, 102; LAINÉ, 2 Introduction 329 ff.; *id.*, Revue 1907, 833 ff.; WEISS, 4 Traité 635; VALÉRY, 1238 § 882; BARTIN, 31 Recueil 576; *cf.* DESPAGNET § 378 bis.

Germany: RG. (Dec. 17, 1912) J.W. 1913, 333, Leipz. Z. 1913, 774 (overruled with respect to marriage Apr. 6, 1916) 88 RGZ. 191; OLG. Karlsruhe (Dec. 13, 1919) 40 R-OLG. 159.

Italy: App. Genova (Aug. 4, 1891) Clunet 1893, 955; Cass. Torino (Apr. 12, 1892) Clunet, 1894, 1083; FIORE, 2 Delle Disposizioni Generali sulla Pubblicazione, applicazione ed interpretazione delle leggi (ed. 2) 385 ff.

[76] Belgium: Poullet (ed. 2) 557 ff. §§ 478 f.

France: Cass. civ. (June 29, 1922) D.1922.1.127, S.1923.1.249; for the case of a Dutchman: Orléans (Aug. 4, 1859) D.1859.2.158, S.1860.2.37; *cf.* Aix (July 11, 1881) S.1883.2.249, Clunet 1882, 426; Trib. Seine (March 23, 1944) S.1944.2.44. ARMINJON, 2 Precis (ed. 2) § 206 bis. NIBOYET, Manuel 665 § 542 and Revue 1928, 105; *cf. id.*, 3 Traité 352 § 953; 363 §956; LEREBOURS-PIGEONNIÈRE (ed. 6) 272 §256. BATIFFOL 311 ff., 584 § 582; 670 § 667.

Germany: OLG. Hamburg (May 2, 1917) 72 Seuff. A. 313; RG. (Apr. 6, 1916) 88 RGZ. 191 (dictum); (June 22, 1931) 133 RGZ. 161 at 163; KG. (Feb. 15, 1934) IPRspr. 1934, No. 71: "the local form suffices always." KAHN, 1 Abhandl. 43; 2 *id.* 226; KIPP in 1 WINDSCHEID, Pand. 541; PLANCK, Art. 11 n. 4; NUSSBAUM 89 ff.; NEUNER, Der Sinn 31; LEWALD 83, 86, 315.—*Contra* RAAPE, Komm. 171, 686 setting E.G. art. 24 over E.G. art. 11.

With comparative research: FRAGISTAS, 4 Z. ausl. P.R. (1930) 934.

Italy: Cass. (July 6, 1926) Foro delle Nuove Provincie (1927) I 296, cit. by FEDOZZI (ed. 1) 585 n. 4. (Oral will made in the Austrian time, recognized); BUZZATI 159, 423, 393; DIENA, Sui limiti alla applicazione del dir. straniero (also in Studi Senesi, vol. 15) 25-30.

Switzerland: SCHNITZER (ed. 3) 479.

warranted by *locus regit actum,* "one of the most beneficent rules of private international law." [77]

Evidently, this is the only reasonable and systematically fitting conception. Yet, can it be justified by the popular idea that just the law of the forum has its own privileged characterization of form? Such a prerogative is wholly unfounded in an international give and take. There as always, the nature of the rule is molded by the common theoretical conviction, in this case the more easily so, since even the Dutch dominating opinion coincides so far. A singular deviation of one statute is irrelevant. Not the law of the forum but the reasonable and internationally accepted concept of form grants the result that every state may permit and in fact, in the absence of any local prohibition, permits the Dutch national the use of its own forms.[78]

(c) The Dutch provision applies also in the former and present Netherlands colonies.[79] In Latin America, restrictions of the French type are numerous.[80] Portugal, where *lex loci actus* is the only validating law, does not recognize private testaments at all, wherever executed; the conse-

[77] LAINÉ in Actes de la Troisième Conférence de la Haye (1904) at 129; WALKER 809.

[78] FEDOZZI (ed. 1) 588 ff. starts with the acknowledgment that the Dutch rule "è indubbiamente relativa alla forma," but he considers the question not one of characterization but as a conflict of conflicts rules (on form). Hence, not the Italian characterization but the Italian conflicts rule would be the decisive element. This is not a valid contrast! It is just the content of the Italian conflicts rule that is in question; it is found by characterizing a concept, part of the rule, *viz.* the "form."

GEMMA, Propedeutica al Dir. Int. Priv. (Bologna 1899) 111 ff. agrees because he wants to favor holographic wills, the simplest and most suitable expression of the testator's intentions. But many legislators mistrust these wills. This kind of policy, in my opinion, is to be left to the individual municipal laws. Although some writers have approached Gemma's method to my own, only the results are kindred.

[79] Neth. Indies: C.C. art. 945.

Surinam: C.C. art. 972.

Curaçao: C.C. art. 971, dealt with in KG. Berlin (Feb. 15, 1934), IPRspr. (1934) nr. 71.

[80] See *supra* 306.

quences are absurd.[81] The attitude of other states to these prohibitions and those of oral wills [82] is naturally negative because of the effect of the independent rule, *locus regit actum.*

Wills of Minors. According to the Austrian, Spanish, and German Codes, a minor of a certain age may execute a will but may not use holographic forms,[83] or must testate orally in court.[84] In these cases the restriction of available forms clearly serves the protection of minor age. Therefore, a part of the doctrine resorts to the personal law and holds a holographic will void, wherever made,[85] whereas in another view form remains form without regard at whose protection it aims.[86]

It would seem, unfortunately, that in the country where such a provision is in force, it is meant to apply also to wills executed abroad.[87] However, the undoubted fact that the voidness attaches to the use of a certain form and not to incapacity to will, must work for validity in all other countries recognizing the *lex loci actus* in this respect. Only jurisdictions with a similar public policy may be exempted.

The situation, hence, is identical with the foregoing

[81] Portugal: C.C. art. 1910 ff., 1961, 1965. Sup. Ct. Lisbon (May 28, 1912) Revue 1913, 220: The holographic will of a German executed in Lisbon and recognized as valid by a German court is declared ineffective; App. Lisbon (Jan. 23, 1917) Clunet 1920, 278.

[82] BUZZATI 401; FEDOZZI (ed. 1) 584.

[83] Germany: BGB. § 2247; law of July 31, 1938 (Testamentgesetz) § 21. Spain: C.C. art. 688 par. 1, *cf.* 732 par. 3.

[84] Austria: A.BGB § 569; former Prussian ALR.I 12 § 17.

[85] Austria: EHRENZWEIG, 2 SYSTEM (ed. 2, 1937) 411; former Prussian Code: DERNBURG, 3 Pr. Priv. R. § 104 Nr. 7.

Germany: NEUNER, Der Sinn 35-38; RAAPE, Komm. 642 resorts to public policy.

[86] Austria: WALKER 916.

Germany: PLANCK, 5 Komm. § 2247, 2; 2 BAR 30 n. 24; CROME, 5 Bürg. R.54; KAHN, 2 Abh. 232; LEWALD, Questions 108.

[87] *Contra* KAHN *l.c.;* SCHNITZER 482 holds a holographic will made by a twenty-year-old German in Switzerland valid in both countries.

cases (a) and (b) and makes us wish in the same manner that the statutes should not try to rule beyond their territory.

2. In Favor of *Lex Situs*

A German national having executed a holographic will in Germany leaves land in England. Lord Kingsdown's Act does not validate wills on immovables, even if it should be taken as including alien testators. According to prevailing German opinion the will is valid in Germany under the *lex loci actus,* E.G. article 11, para. 1, sent. 2, also with respect to English land, though it is invalid in this regard in England under the Wills Acts. Raape, whose dissident theory is that *lex causae* overrides the local law in determining formal validity, suggests that, since E.G. article 28 concedes English land to be governed by English law, the succession to this immovable is to be treated as intestate also in German Courts.[88] This general favor given the *lex causae* is inacceptable, but another specific restriction of *lex loci actus* should be inferred from the yielding of German inheritance law to the English, E.G. article 28. Assuming that this concession is an exception to all German law involving this succession and comprehending formal validity as well as other requirements of a will, *locus regit actum* is put out of function.

III. Operation of the Rules

1. The Concept of Form

As shown above, in discussing delimitations between formal validity and capacity, it is practically settled that the concept of form is the same as in the matter of marriage and contracts,[89] but independent of any deviations in

[88] Raape, Komm. 173; IPR. 138, followed by Zeuge 58 ff.
[89] Vol. I, pp. 207, 214-216, 236; Vol. II pp. 496-498.

particular systems. Greek requirements of an orthodox marriage and Dutch prohibition of a foreign private will are analogous deviations. Form in all these matters is the natural concept of external expressions of a person's volition.

The requirements for the form of wills refer to a certain time: the time of the execution of the will or the time of the death or both. *Lex loci actus* aims exclusively at the time when the will is made; subsequent events or changes of law are irrelevant. In no case, formalities prescribed for a time after the death for the purpose of carrying out a will are pertinent to the applicable law, e.g., recording of the will requested in New York or in France, Poland, etc.[90]

Language requirements are important. It deserves mention that in many countries foreigners are allowed to use the local public forms in their own language with adequate safeguards.[91]

Form, of course, must be distinguished from the evidentiary value of a document which, in general, is that accorded at the place of execution.[92]

2. Renvoi

The faculties granted in greatly increasing number to find a law under which a will turns out to be formally valid,

[90] N.Y. *in re* Wizelhole's Estate (1941) 176 Misc. 100, 26 N.Y.S. (2d) 586.
France: Cass. (Apr. 13, 1897) D.1897.1.357; S.1897.1.401.

[91] Argentina: C.C. art. 663.
Cuba: C.C. art. 688 par. 4.
France: Cass. req. (Aug. 12, 1868) S.1868.1.405; (Aug. 3, 1891) S.1892.1.566; TRASBOT in 5 PLANIOL ET RIPERT § 566; the notary joins a French translation, the witnesses must know both languages.
Germany: Law of July 31, 1938 (Testamentgesetz) §§ 18, 19.
Spain: C.C. art. 688 par. 4; *cf.* 2 GOLDSCHMIDT 253.
Uruguay: C.C. art. 799.
Venezuela: C.C. art. 863.
Note, Clunet 1954, 612.

[92] SAVATIER 308 § 441 against confusion in Cour Paris (July 3, 1946) Gaz. Pal. 1946.2.147.

contain an equal justification of renvoi,[93] as Griswold has perceived. In most American states, as mentioned above, a will executed in the form of the place of execution is probated at the domicil as well as at the situs, and this reference entails further references elsewhere.

Illustrations. (i) Where an American, domiciled at death in the United States, while in Paris executes a will on his Cuban real property on a typed paper with two witnesses and the clauses of his home state, the will is good in Cuba, France, Germany, etc., as agreeable to the national law, though not by *lex loci actus;* it is also good in all American states and England, because it is valid at the last domicil.

(ii) Where a Portuguese devises his land situated in Massachusetts by a holographic will in France, a court in Maryland would refer to Massachusetts, which refers to France.

Obviously Portugal is wrong in applying domestic narrowness.

(iii) In the case *Ross* v. *Ross,*[94] where a testator domiciled in Quebec made a will in New York in the holographic form agreeable to Quebec but not New York law, under the optional principle of *locus regit actum* the will was held valid in Quebec, on the ground of Quebec conflicts law. But it was held at the same time that if Quebec should imperatively require validity under New York law, renvoi from New York to the Quebec domicil would be accepted. This is consonant with the British court practice.[95]

3. Defective Formality

As stated in the case of a defective marriage celebration,[96] if the validity of an act depends on its compliance

[93] GRISWOLD, 51 Harv. L. Rev. (1938) at 1191, 1201. For FALCONBRIDGE, Conflict of Laws (ed. 2) 154, this is only "a special indulgence shown in point of formalities."

[94] Ross v. Ross (1893) Que. Q.B. 413; (1894) 25 S.C.R. 307; 3 JOHNSON 89-94.

[95] See also GRISWOLD *l.c.; in re* Martin [1900] P. 211.

[96] Vol. I, p. 229.

with the formal requirements of a certain law, the effect of noncompliance is determined by the violated rule.

Illustration. An Italian was naturalized in the United States. Because he voluntarily acquired the new citizenship, he lost his Italian nationality. His will executed in New York (where he died domiciled) in holographic form without witnesses would have sufficed to Italian law which, however, was no longer competent. Since it was void under the *lex loci actus* and *patriae,* it was void also in Italy; a previous Italian will which should have been revoked remained in force.[97]

Where parties to a contract fail to comply exactly with the forms of both the *lex causae* and the *lex loci contractus,* a party may invoke the law that gives the act the more favorable treatment.[98] A corresponding principle must obtain here.

In Germany three theories were expressed in connection with a case where in 1928 a German executed a will in Davos, Switzerland, before a notary who called in the witnesses later than prescribed. The form sufficed for German law. A court held according to Swiss law that the will had been open to attack but in the absence of any attack was valid.[99] The authors believing in the superiority of the German *lex causae* reached the same result on different grounds.[100] The majority, however, declared for the "milder form." [101] The last view is justified by the free competition between *lex loci contractus* and national law in the German conflicts law.

[97] Trib. Bari (Feb. 4, 1949) 72 Foro Ital. (1949) 1.1114.

[98] Vol. II, p. 513 f.

[99] LG. Naumburg (Nov. 28, 1929) IPRspr. (1930) 183 Nr. 90.

[100] NIEMEYER 114; RAAPE, Komm 184; LIEBETRAU 41.

[101] HABICHT 91; NIEDNER 35; WOLFF, D. IPR. (ed. 2) 107; WALKER 231; 1 FRANKENSTEIN 561, 4 *id.* 466. *Cf. supra* Vol. I, p. 229, II p. 513.

IV. Joint Wills

In the past, widespread usage permitted the execution of one testament for two testators. This is still allowed in some countries for spouses or for a couple engaged to marry and spouses.[102] Within England validity may be assumed under equity principles.[103]

The probably prevailing American doctrine[104] recognizes that two wills may be joined in one document and considers that all wills can be revoked but a connected agreement can be enforced against the estate and possibly the beneficiaries. By way of construction it is often argued that, though both wills are revocable until the first death, they are presumed to be correspective, so that after one testator dies the other is bound.[105] Although the California Probate Act of 1931, § 23 states: "A conjoint or mutual will is valid but it may be revoked by any of the testators in like manner as any other will" and as late as 1948 the revocability was stressed to some degree, decisions of 1949 and 1950 joined the common opinion, basing irrevocability upon the agreement underlying the joint will that would be broken if the survivor revoked his own will, "at least where he accepts the benefits under the deceased's will in his favor."[106] There

[102] Austria: A.BGB. § 1248; Germany: Law of July 31, 1938 Testamentgesetz § 28; Spanish foral laws of Aragon, art. 17, 2° and 3° Apendice al C.C.; Navarra: Lacarra, 2 Institutiones de Derecho Civil Navarro (1932) Vol. 2 105. See Contuzzi, DIP. 566; 2 Goldschmidt 254.

[103] England: see Breslauer 189.

[104] 1 Page §§ 102 ff.; Note, 61 Harv. L. Rev. (1948) 681-684.

[105] Thus in Illinois: Curry v. Cotton (1934) 356 Ill. 538; Peck v. Drennan (1952) 411 Ill. 31, 37.

[106] Brown v. Sup. Ct. (1949) 34 Cal. (2d) 559, 212 Pac. (2d) 878; the decision overruled Lynch v. Lichtenthaler (1948) 85 Cal. App. (2d) 437, 193 Pac. (2d) 77, which required an express renunciation of revocation in the agreement, and also emphasizes against Shive v. Barrow (1948) 88 Cal. App. (2d) 838, 199 Pac. (2d) 693 that "the devisee or legatee cannot be prevented from enforcing the contractual obligation." See also Chase v. Leiter (1950) 96 Cal. App. (2d) 439, 215 Pac. (2d) 756 favoring the transformation of joint tenancy into community property by a joint will.

is no doubt that probate both times will be granted where both wills have not been revoked.[107]

Most countries prohibit the junction entirely. Within these jurisdictions, as a rule,[108] such wills cannot be validly executed, and for this reason are nowhere recognized so far as *locus regit actum* presides. Are such testaments, however, internationally to be recognized, when executed by nationals of a country allowing them and in a territory allowing them? Are joint wills which are prohibited where they are made, nevertheless recognizable elsewhere under the law of domicil or nationality? These questions are much debated in Europe.

1. In one opinion, the joining of the wills is a mere incident of form, subject to *locus regit actum*.[109] Thus, an authentic joint will of French spouses, invalid if made in France, was held valid in a French court when made in Batavia, and a joint will executed and probated in Tennessee

[107] *In re* Johnston's Est. (1945) 53 N.Y.S. (2d) 212.

[108] E.g. France: C.C. arts. 968, 1097; Italy: C.C. (old) 761, (new) 589; Netherlands: C.C. art. 977 ff.; Portugal: C.C. art. 1753; Spain: C.C. art. 669; Argentina: C.C. arts. 3612, 3618; Brazil: C.C. art. 1630; Guatemala: C.C. 841 (like Spain); Venezuela: C.C. art. 835.

[109] England: *In re* Cohn [1945] Ch. 5 without hesitation; respecting a German will.

France: Cass. Civ. (June 23, 1813) S.1813.1.380 and continued practice; (Feb. 25, 1925) D.1925.1.185, Trib. Mulhouse (Jan. 19, 1950) Rev. crit. 1950, 668; WEISS, 4 Traité 656, note; BATIFFOL, Traité 671 ff.; 10 AUBRY ET RAU 612; TRASBOT in 5 PLANIOL ET RIPERT 546, *contra* COLIN ET CAPITANT, 3 Cours § 1758 ff.

Germany: 2 BAR 329; 2 ZITELMANN 154.

Netherlands: VAN BRAKEL 195 § 150.

Argentina: Cam. Civ. 2a Cap. Heger, Christensen v. Johannsen, Christensen (Nov. 16, 1948) Jur. Arg. 1948, IV, 541; 9 MACHADO, Commentarió del C.C. 457 ff.; 9 LLERENA, C.C. Arg. 58 n. 1; MORENO, 1 Obras Juridicas (Buenos Aires 1883) 254; NIELSEN, Jur. Arg. 1948, III, doctrina p. 60.

Chile: ALBÓNICO, DIP. ante la Jur. Chil. 167.

Portugal: S.Ct. Lisbon (July 13, 1923) Revue 1924, 257: Portuguese spouses in Brazil before the Brazilian prohibition.

was recognized in Louisiana.[110] No offense is seen to the domestic public order despite the prohibition by the law of the forum.

2. Another view looks to the restriction of personal freedom that may affect the surviving spouse contrary to the public policy of the prohibiting state. The Italian courts have radically rejected all joint wills, mutual or reciprocal or not, and wherever and by whomever made.[111] The Civil Codes of Spain and Cuba declare expressly invalid a joint will of a national executed abroad.[112]

3. In a third theory, the court of a nonprohibiting state should distinguish whether a joint will is only a document of two independent wills—in which case recognition should be due either under the law of the place of execution or according to the national law of the parties—or is intended to bind the survivor—which ought only be permitted by the law governing the individual succession.[113]

4. Finally, it has been suggested that foreign joint wills of Frenchmen are valid, because the French doctrine emphasizes their formal character, and Italian joint wills are always void, since the Italian doctrine is apprehensive of possible irrevocability.[114]

The last opinion is inacceptable as it gives preponderance to the *lex causae* over the rule *locus regit actum*. The first,

[110] France: Caen (May 22, 1850) S.1852.2.566.
Louisiana: Moore v. Exec. Com. (1930) 171 La. 191, 129 So. 920.
Chile: ALBÓNICO, DIP. ante la Jur. Chil. 167 (despite the prohibition by C.C. art. 1003).

[111] France: 6 LAURENT 535; SURVILLE 307 § 193 and many others.
Germany: RG. (April 24, 1894) 5 Z. int. R. 58.
Italy: Cass. Flor. (Nov. 9, 1896) Clunet 1902, 175; Trib. Benevent (March 25, 1934) Rivista 1935, 420, deals only with Italian spouses having willed at a place where this was permitted.
Spain: T.S. (Feb. 13, 1920).

[112] Art. 733.

[113] Italian writers and decisions cited by CONTUZZI, 532 ff; KAHN, 2 Abh. 235; see also SCHNITZER (ed. 3) 484.

[114] Lewald, Questions, 100 ff.; M. WOLFF, D. IPR. (ed. 3) 230.

the French view, neglects the essential ground of their own prohibition; Italy, again, neglects the cases of noncorrespective wills, but also of wills that may have developed such effect but in fact did not because no spouse wanted revocation, the normal situation faced with joint wills in the United States.

Accepting the third theory, we may think with Kahn that formalities are prescribed for many reasons and all covered by the necessary international force of the law of the place of execution; but that the effects of irrevocability and reciprocity are a matter of the substance and depend on the law governing succession.

This, it would seem, would also suit the American conceptions.

CHAPTER 68

Substantive Requirements of Wills

I. TESTAMENTARY CAPACITY

CAPACITY of a person to make a will at all is distinguished from the right to dispose of assets free from restraint, which will be discussed separately.

The importance of this topic has been greatly diminished by the emancipation of married women. But the great differences in fixing the age at which juvenile persons may leave property by will, which varies from full age as in common law down to 12 years, according to sex, married status, and country, produce some conflicts.[1] Mental incompetence, prodigality, and undue influence raise well-known conflicts and questions of evidence.

The doctrine is split into three systems.

1. Law of Succession

At common law, capacity as an incident of the formation of a will is governed by the same law governing individual succession. This approach is congruous to the common-law treatment of formalities and, in fact, appears in old English decisions and in Beale's teaching: capacity is controlled by the *lex situs* respecting immovables[2] and by the

[1] E.g., Spain C.C. art. 663, 1°: 15 years; Germany Wills Act § 1 par. 2: 16 years; England: 21 years; United States for bequests 18 years, for devise 21 years, or no difference.

[2] England: Coppin v. Coppin (1725) 2 P. Wms. 291, 24 E.R. 725; Re Hernando, Hernando v. Sawtell (1884) 27 Ch. D. 284.

United States: Restatement § 249a; Carpenter et al. v. Bell et al. (1896) 96 Tenn. 294, 34 S.W. 209.

law of the domicil at the time of death[3] respecting movables.

In the United States, the principle that the law of the last domicil governs capacity to dispose of personal property, is confirmed in case ancillary probate is granted upon the theory that a previous grant of probate by the court of the last domicil is conclusive. Such recognition is at times extended by the court of situs of immovables, and even a probate by a nondomiciliary may be held conclusive.[4]

An analogous reference to the national law as of the time of death is not entirely alien to civil-law authorities.[5] Accordingly, the *lex situs* as of the time of death applies to every asset under the Montevideo Treaty.[6]

Once, Theobald wondered whether it was not a "ridiculous idea" that the testator's ability should depend on a domiciliary law unknown to him at the time of executing his will.[7] It is now generally felt that a change of domicil or nationality after the execution should not invalidate a will valid when it was made.[8] Hence, it has been sought to adopt the common-law rule to the effect that the law of the last domicil merely determines whether the testator had capacity at the time of execution.[9] An identical sug-

[3] In the goods of Maraver (1828) 1 Hagg. Eccl. 498; DICEY rule 179.
United States: STORY § 468; Shute v. Sargent (March 17, 1893) 67 N.H. 305, 36 Atl. 282; Woodward v. Woodward, 2 BEALE Cases 794; Restatement § 306 b.c.
Quebec: C.C. art. 6.

[4] See *infra* 419 ff.

[5] Austria: for immovables, EHRENZWEIG I 1 (1951) 121.
Germany: EG. BGB., arts. 7 and 24, have been construed to this effect by 4 FRANKENSTEIN 419; RAAPE, 2 D. IPR. (ed. 3) 266; ARNDT in ERMAN, BGB. Komm. (1952) art. 7, n. 3a.
Spain: LASALA LLANAS 252, comment to art. 128.

[6] Art. 44.

[7] THEOBALD, On Wills (ed. 10) (Morris) 3.

[8] BUSTAMANTE, 3 DIP. (ed. 3, 1943) 144 against RODRIGUES PEREIRA.

[9] 4 BURGE (ed. 1) 580; in his example, capacity at the time of execution was lacking if judged under the law of the last domicil.

gestion has most recently and surprisingly been made relative to German law.[10]

2. Personal law

Civil law has traditionally classified capacity as a matter of the personal law, which extends to the making of a will.[11] This, again, implies an exclusive view to one moment, the time of the execution.[12] In this order of ideas, the German Code provides an exception for a testator who was an alien when he made a will and had not reached the age prescribed by his national law, but later acquired German nationality and was of full age under German law at death.[13] That this exception should be enjoyed only by naturalized subjects of the forum, has been criticized as well as advocated.[14]

In England, Lord Kingsdown's Act would provide a correction, if it were considered applicable not only to form but also to capacity, which remains controversial.[15] But recent writers, despite this possibility, think that a will

[10] NEUHAUS, "Die Behandlung der Testierfähigkeit im deutschen IPR.," 18 Z. ausl. PR. (1953) 651, 656.

[11] Quebec (domicil): C.C. art. 835, *cf.* 3 JOHNSON 66, 69 f. (also for immovables).
Austria: A. BGB. § 575.
Czechoslovakia: IPL. § 41.
France: 10 Répert. 520.
Germany: EG. BGB. art. 7.
Italy: C.C. 1942, Disp. Prel. art. 17; MONACO, Manuale 565 against SCERNI 65.
Poland: IPR. § 29.
Siam: PIL. art. 39.
Spain: C.C. art. 9.
Sweden: PIL. § 2.
Switzerland: NAG. art. 7 par. 4 (for Swiss nationals).
Argentina: (domicil) C.C. art. 36, 45, 3611; 3613. Código Bustamante: (personal law) art. 144.

[12] WEISS, 4 Traité 671 n. 3; 10 Répert. 522 no. 140. Argentine C.C. art. 3613 expresses this contrast to "intrinsic" requirements art. 3612.

[13] EG. BGB. art. 24 par. 3, sent. 1, phrase 2; Testamentsgesetz July 31, 1938, §§ 2, 33 par. 2.

[14] Criticism by LEWALD 307; *Contra:* WOLFF, D. IPR. (ed. 3) 197.

[15] See WORTLEY, Recueil 1947 II at 68, and cited authors. For negation: CHESHIRE (ed. 5) 680; FALCONBRIDGE, Conflict 464.

cannot be validly executed by a person lacking capacity at the time of execution. The applicable law in this view is necessarily the law of the domicil at the time of execution.[16]

3. In the variety of solutions, usual in conflicts law, while some English writers state the common-law rule that the domiciliary law of the time of death governs [17] and preference goes to the time of execution, there are those who advocate cumulating both requirements,[18] but it was stated long ago that modern private laws are loath to invalidate a will only because of an incapacity subsequent to execution.[19]

4. It is submitted that a fourth solution is available: *vel* instead of *et*—why not recognize a will made by a testator considered capable under his personal law either of the time of execution or at his death, in the latter event on the ground that he chose to let his will stand?

Assuredly, provisions recognizing foreign inheritance laws should be construed as including capacity to testate.

Illustration. A mentally insane person executes a will in a lucid interval. If he is a German national, he has no capacity under BGB. § 7, although he can dispose of his English immovables according to English law. The German statute subjecting English land to English inheritance law (EG. BGB. article 28) ought to be interpreted as derogating from EG. BGB. article 7.[20]

II. Other Substantive Requirements

The above mentioned conclusive force of a foreign probate judgment, if recognized, includes not only mental incapacity

[16] Cheshire (ed. 4) 520; Morris in Dicey (ed. 6) 819 and new rule 179; Graveson (ed. 2) 240 would prefer this rule.

[17] Graveson (*l.c.*) who invokes In the Goods of Maraver (1828) 1 Hagg. Eccl. 498.

[18] Niboyet, 4 Traité (1947) § 1340.

[19] Kahn, 2 Abh. 204 n. 33.

[20] Quite as proposed *supra* 292, n. 19 respecting the rule on form, EG. art. 11.

but also undue influence,[21] fraud, and presumably all legal causes of lack of consent. It does not include the testator's power of disposal.[22] Apart from this exceptional element, the law of succession governs.

Civil-law statutes, reserving the personal law as the test of bodily and mental capacity, distinguish invalidity because of error, fraud, duress, immorality, or illegality.[23]

The area, thus differently described, is governed by the common principle that the law of the succession controls. In consequence, the technical effects of failure to comply with the intrinsic requirements of wills—nullity, relative nullity, voidability by action, collateral attack—are specified by the same law. This principle also furnishes the natural basis for all causes of restraints on alienation by will to be discussed hereafter.

Foreign laws are inclined to deny all effect to laws that govern succession if an essential requirement, not relating to form or capacity, of the governing law is missing.[24]

Illustrations. (i) A Swiss citizen, domiciled in France, left a son whose legitimacy was contested. An English court referring first to French and further to Swiss law, followed a Swiss decision acknowledging the share of the son; this was not on the ground of res judicata, but because the force of the last domicil (in France) was expressly recognized.[25]

(ii) A testator, domiciled in Ireland, set up a testamentary trust, disposing that a leasehold on English land should be converted into money. The English accumulation law, the *lex situs,* prohibiting extension of the limitation beyond

[21] E.g., Crippen v. Dexter (1859) 79 Mass. (13 Gray) 330, *cf.,* Hopkins 5, 53 Yale L. J. at 229-231; Mass. Ann. L. (1933) § 192, 10.

[22] The Hawaii decision cited by PAGE 711 n. 4 does not fit.

[23] Thus expressly, Argentina C.C. art. 3617 and Czechoslovakia, P.I.L. § 41 name both categories but treat them equally.

[24] KAHN, 2 Abh. 208.

[25] In re Trufort [1936] Ch. D. 600.

a certain period, made the trust invalid with respect to the leasehold.[26]

The treaty between Austria and Germany of 1927, however, calls only for the national law of the deceased at the time of execution.

III. Restraint on Power of Disposal

1. Law of Succession Governs

The rule that the law governing a succession decides whether the testator had the power of disposing in the manner he did, is well settled.[27] The same law determines the reasons and form of disinheriting a relative, including a deprivation *bona mente,* benevolently protecting his interests. The forum will not raise an objection of public policy against a system of legitimate portions or forced heirs different from its own. Usually, not even when the domestic law gives full liberty to the testator is a foreign restriction rejected.[28] Neither is a foreign unlimited disposal normally challenged as subject to domestic restraint,[29]

[26] Treke v. Carberry (1873) L.R. 16 Eq. 461.

[27] England: In re White [1941] Ch. 200, 1 All E.R. 216, 360.

United States: Story §§ 445, 475; Restatement § 201, 2 Beale § 249.1; 4 Page 713 n. 5 and Suppl. § 1643; Note 91 A.L.R. 491; Goodrich 512 § 168.

France: Constant practice and modern literature, see Batiffol, Traité 655 § 651.

Germany: Bay OLG. Dresden (June 16, 1914) 37 Sächs. Ann. 92; Bay. Ob. LG. (Oct. 12, 1917) 27 Z. int R. 377.

Switzerland: BG. (Oct. 21, 1943) 69 BGE. II 362; (June 27, 1946) 72 BGE. III 104. The legal sources are contradictory respecting the application of the cantonal statutes on forced heirship of brothers and sisters and of their issue. See discussion in Trib. Cant. Vaud (May 5, 1939) 36 SJZ. (1939/40) 193 No. 35 and *cf.,* citations *supra* Ch. 66, n. 20-22.

[28] England: In re Trufort (1887) 57 L.J. 36 Ch. D. 600 (Ch.) 1135; Enohin v. Wylie (1862) 10 H.L. Cas. 1, 138 R.R. 1, and others; 6 Halsbury (1907) 226; Dicey (ed. 6) 829.

United States: Ennis v. Smith (1853) 14 How. 400.

[29] Denmark: Copenhague (Aug. 6, 1903) Clunet 1905, 1099: Father domiciled in London disinherits his son respecting Danish assets.

Germany: RG. (Feb. 26, 1911) JW. 1912, 22, 24 Z. int. R. 317, Revue 1914, 262 rejects expressly application of public order (EG. art. 30); RG. (March 4,

although contrary views have sometimes been expressed in Europe under the theory of public policy.[30]

Illustrations. (i) A New York testator excludes his son from land he leaves in France. Since French law applies (according to both laws involved), the devise is reduced.[31] Italy, on the contrary, would apply New York law, and New York would accept the renvoi back.

(ii) Thornton, a British subject, domiciled in France, made a will in England in English form, disregarding the reserve portions of French law. The English court in 1824 directed the property to be distributed according to the French law of intestacy.[32]

(iii) A Frenchman domiciled in the United States may dispose of his personalty in France free from French restrictions.[33]

The numerous statutory exceptions by *prelèvement* in favor of the domestic law, in some codes with extreme disregard of foreign control of assets (mentioned in chapter 64), are particularly undesirable in this matter.

In the United States, a line must be drawn between distributive shares and family allowances, which should not be confused as they sometimes are. In an increasing number of statutes, both categories appear side by side. A surviving widow, or as the statutes may state instead, a sur-

1915) 8 Warn. 1915, p. 455 applies American law without mentioning art. 30; RAAPE, Komm. 736; *cf.*, PETER KLEIN, 13 Z. int. R. 87; NIEMEYER, IPR. 16.

Spain: 2 GOLDSCHMIDT 256 refers to the freedom of testation in Navarra, Cortes de Pamplona of 1688, for excluding a public policy objection.

[30] France: App. Poitiers (July 4, 1887) S. 1888.2.194; Trib. Grasse (May 3, 1926) Clunet 1928, 1022.

Germany: KEIDEL, Clunet 1910, 265; HABICHT 195; RAAPE Komm.

[31] Trib. Seine (July 13, 1910) Clunet 1911, 912; Cass. civ. (Apr. 4, 1881) S. 1883.1.65.

[32] Thornton v. Curling (1824) 6 Sim. 360. Not affected by Lord Kingsdown's Act, according to Cheshire (ed. 2) 530. Identical solution in France: Trib. Seine (July 13, 1910) Revue 1912, 414, Clunet 1911, 912 (American domiciled in France).

[33] App. Lyon (Feb. 3, 1932) Clunet 1932, 930.

viving spouse, may have a statutory intestate portion of a third, a half, or all the estate, which is frequently not barrable, but subject to election as against benefits under a will; at the same time, the spouse and minor children may have an emergency allowance for the time of the administration or a period following the death, with priority to the legatees or even creditors. Also, homestead exemptions combine with these two types of provisions.

As the Restatement seems to suggest, only the first kind of provision, if mandatory, falls strictly under the restraint depending on the law of succession;[34] this characterization, however, is certain and justified.[35]

Change of the personal law is treated accordingly. Where a Dutch woman at home appointed her husband as sole heir, except for the legitimate rights of her children which amounted to three fourths of her estate, and subsequently acquired domicil in England, the husband was awarded the whole inheritance.[36]

Conversely, an English mother acquires a statutory heirship by the fact that her daughter dies domiciled in France,[37] and an Englishman, acquiring a domicil in the English sense in Switzerland, becomes subject to the forced heirship of relatives who may or may not include, according to the canton of the last domicil, brothers and sisters or their issue.

United States. In the United States, the principle is

[34] Restatement § 301 compared with § 461.

[35] MARSH, Marital Property in Conflict of Laws (1952) 137-141 shows the quasi unanimity of the courts to this effect. His own reason for approaching the nonbarrable share to marital property because of related policies (p. 136) would lead to a theory similar to that of NEUNER, Der Sinn 66; and 5 La. L. Rev. (1943) 190; but in fact the reasoning is not convincing, the share is as much an inheritance right as any other.

[36] In re Groos [1915] 1 Ch. 572, Clunet 1915, 686, Revue 1919, 595. Accord: Germany: RAAPE, IPR. 269; Netherlands: H.R. (June 27, 1918) Clunet 1919, 426.

[37] Trib. Seine (June 14, 1901) Clunet 1901, 808.

said to be the same.[38] *Lex situs,* of course, governs at the time of the death without regard to any previous domicil.[39]

2. Family Provision Acts

In the type of British statutes, first adopted in New Zealand, tempering the sheer freedom of disposition of the common law, the next relatives of the testator are entitled to a share not fixed by law but left to the discretion of the court, comparable to the *portio debita* as developed in the practice of the Roman tribunal of the *centumviri.* In Great Britain[40] and some Canadian provinces,[41] as also in one recent Australian decision,[42] this right is connected with the succession and is granted only at the last domicil of the testator[43] without regard to the situation of the assets and the beneficiaries.[44] The conflicts rule, hence, is almost the same as above described, although it is regretted that the English court has no jurisdiction to grant maintenance, if the testator died domiciled abroad.

In other British jurisdictions, however, the emphasis lies on the territory rather than on the domicil; the court may vary the will only with regard to domestic land and

[38] 4 PAGE § 1640.

[39] Atkinson v. Staigg (1882) 13 R.I. 725; Staigg v. Atkinson (1887) 144 Mass. 564, 12 N.E. 354.

[40] Great Britain: Inheritance (Family Provision) Act, 1938, amended by Intestate's Estates Act, 1952, sec. 7.

[41] Ontario: Dependents' Relief Act, R.S.O. 1937, c. 214.

Alberta: Widow's Relief Act, R.S.A. 1922 c. 145; Re Corlet (Alta.) [1942] 3 D.L.R. 72, 2 W.W.R. 93.

Quebec: Pouliot v. Cloutier (1944) 3 D.L.R. 737, 740, [1944] S.C.R. 284.

Manitoba: The Wives and Children's Maintenance Act R.S.M. 1940 c. 235 (at the husband's lifetime) does not apply to persons resident in another province, Smith v. Smith (Man. 1953) 3 D.L.R. 682.

[42] Australia: Scholl J. in Re Paulin [1950] Vict. L. Rep. 462; FLEMING, 4 Int. L. Q. 239.

[43] FALCONBRIDGE, Conflict (ed. 2) 656 ff.

[44] DICEY (ed. 6) 556, 889.

all movables, and this can be done also by a court not at the last domicil.[45]

Also in the United States, the statutory allowances for support of the widow and children are not susceptible of a uniform characterization. In a number of instances, territorial limits are expressed or implied in the statutes, as when the domicil of the husband or even that of the widow must be in the state administering the statute or the benefit is due only out of property left in the state.[46] However, in some cases, the domiciliary statute or at least a judgment of allowance has been given extraterritorial effect in other states by enforcement on personal property.[47]

The Restatement has made a courageous attempt to regulate on these advanced lines the conflict of these statutes.[48] It would seem that this maintenance of the surviving spouse, as in France the *pension alimentaire* of the surviving spouse,[49] and many provisions of support imposed on decedent's estates in other countries, rests on a legal obligation not itself of the nature of inheritance.

3. Restraint on Liberalities to Certain Persons

(a) Mortmain statutes prohibiting or subjecting to special authorization benevolence to charitable and other corporations, are here set aside; they concern the capacity of beneficiaries only.[50] Those restrictions that contain a

[45] New Zealand: In re Roper [1927] N.Z.L. Rev. 731. See BROWN, 18 Can. B. Rev. 456.

Saskatchewan: Re Ostrander [1915] 8 W.W.R. 367; Re Elliot [1941] 2 D.L.R. 71; Re Herron Est. [1941] 4 D.L.R. 203.

[46] DAINOW, "Restricted Testation in New Zealand, Australia and Canada," 36 Mich. L. Rev. (1938) 1107. Some American material is collected by ATKINSON, 3 Am. L. Prop. 749 n. 8, the survey by BORDWELL, "Statute Law of Wills," 14 Iowa L. Rev. (1929) 194 ought to be renewed.

[47] Note, 13 A.L.R. (2d) 973-980.

[48] Restatement §§ 302, 461.

[49] MILHAUD, Clunet 1896, 495, 501; WEISS, 4 Traité 584, note, differs only in selecting the law of the creditor instead of that of the debtor.

[50] See BRESLAUER, 27 Iowa L. Rev. 432-435, and *supra* Vol. I, p. 164 f.

protection of the testator's family, however, apply only as a part of the law governing the succession. As it was said in the New York leading case: "The prohibition operates upon the testator's capacity to give rather than upon the power of the legatee to take." [51] Of course, the charter and general law of the corporation have to be consulted at the same time.

It deserves mention that also these prohibitions may be restricted to the assets found in the territory. Thus, a well-known California statute provides that no devise or bequest to any charitable or benevolent society shall exceed one third of the estate left by the testator to his legal heirs, and that foreign wills are subject to this restriction.[52] Thereby, a gift is limited so far as property is located in California, and not limited elsewhere; a court of another state dealing with assets situated in its territory on a different ground ignores [53] and a court of the domicil corrects the distribution reached in California.[54] Thus, another case of several masses to be separately distributed is formed.[55]

(b) *"Special Incapacity,"* it has been said, is constituted by the much debated prohibitions, contained in the French

[51] Chamberlain v. Chamberlain (1871) 43 N.Y. 421, 433. To the same effect Healy v. Reed (1891) 153 Mass. 197; Trustees of Amherst College v. Ritch (1896) 151 N.Y. 282, 45 N.E. 876. The statute was not applied in Crum v. Blits (1880) 47 Conn. 592, the testator having been domiciled in Connecticut. *Cf., supra* Vol. I, p. 165 and n. 195; BRESLAUER *id.* 434 f.; STUMBERG (ed. 2) 415.

Accord: Germany: OLG. Frankfurt and RG. (March 9, 1891) 46 Seuff. A. 418; LEWALD 308 § 374.

On France see Vol. I, 165 and n. 193.

[52] California: Probate Code 1931, § 40. Foreign situated property bequeathed to charity must be considered, In re Dwyer's Est. (1911) 159 Cal. 680; followed by Decker v. Vreeland (1917) 220 N.Y. 326, 115 N.E. 989.

[53] Johns Hopkins University v. Uhrig (1924) 145 Md. 114, 125 Atl. 606, upon the statute mentioned *supra* 256.

[54] Whalley v. Lawrence's Est. (1919) 108 Atl. 387.

[55] On the position of third states, Schultz v. Chicago City Bank & Trust Co. (1943) 384 Ill. 148, 51 N.E. (2d) 140, Comment, 21 Chi. Kent L. Rev. 268, states that a restriction by the domicil is recognized, one made by another state is not.

Code and others following it, on gifts to witnesses to the will, the guardian, the physician and minister taking care of the decedent in his last illness.[56] In the constitutional Declaration of Rights of Maryland, the list of persons to whom gifts cannot be made without sanction of the legislature, in addition to religious orders and denominations, includes a minister, public teacher, or preacher of the gospel.[57] Recent French doctrine acknowledges that such prohibitions are not really concerned with incapacity of the testator to give or of the donee to take, but are simply a part of the law of succession, protecting the family.[58]

4. Gifts Impairing Legitimate Shares

In many jurisdictions, a statutory portion gives rise to a claim against persons who received gifts *inter vivos* from the testator depleting the assets available at his death.[59] Such claims are considered based on obligations *ex lege* and therefore have been classified outside the conflicts rules on succession.[60] A contrary opinion, however, prevails.[61] The attacks against gifts preceding death are a necessary complement to the protection awarded under the statutory rule of succession.

[56] France: C.C. art. 907 ff. and similar provisions of other codes, see 2 KAHN Abhandl. 208 ff., recently, e.g., Venezuela, C.C. art. 814.

[57] Maryland: Const. § 38.

[58] Trib. Nice (Dec. 28, 1903) Clunet 1904, 713; LEREBOURS-PIGEONNIÈRE (ed. 6) 419 § 369; TRASBOT in 5 PLANIOL ET RIPERT 265; this replaces the older reference to the personal law of the beneficiary, 2 BARTIN, 2 Principes § 241, 10 Répert. 521, no. 136 ff.

[59] On the generally scant protection of the surviving spouse in the United States, see Note, 40 Georgetown L.J. (1952) 109.

[60] 2 ZITELMANN 998; see also DEMANGEAT, note in 1 FOELIX 218 note (a).

[61] Germany: 2 BAR 335; HEDEMANN, 23 Z. int. R. 229; RAAPE, Komm. 652. France: BATIFFOL 656 § 654.

5. Future Interests

A difficult question arises from the various provisions directed against the creation of future interests by will.

At common law and by the statutes against suspension of the power of testation and those against grants in perpetuity in the narrower sense, the testator is limited in the freedom of disposing of the future of his estate. The radical principle of the French Revolution, adopted in the *Code Napoléon* (article 896) and many Latin codes, did away with all feudal, rural, or fiduciary ties that would fetter the inheritance beyond the immediate successors. The German Code, on the contrary, brought the universal fideicommissary substitution to perfection; the pandectistic doctrine permitted charging of a beneficiary with delivery of his grant to future or conditional donees, whereas the Code made the first grantee and the subsequent takers all full heirs with temporary ownership. But at the same time, the period within which remaindermen may inherit is restricted in a manner comparable to the rules against perpetuity.

The starting point for forming conflicts rules on this matter is naturally the law governing succession. If this law rejects the limitation of a devise or bequest, the result ought to be accepted everywhere, for this is the purpose of establishing a governing law. The gift is either void *in toto* or the restriction is cancelled. Where, however, the law of the succession allows the testator's disposition, two obstacles to its extraterritorial effect may be encountered, although by no means generally occurring.[62]

The French and Italian courts usually operate with a

[62] 2 PONTES DE MIRANDA 338 states that, despite Brazilian C.C. art. 1734, which applies of course to Brazilian-governed successions, the provisions of a foreign inheritance law relating to substitutions are fully applicable; he enumerates twenty-four problems so involved.

wide concept of public policy. The principle of "equality" among the beneficiaries from which the prohibition of fideicommissary substitutions derived, has been opposed to any discrimination among successors.[63] Another approach, more emphasized in recent times, counteracts the law of succession by supporting the *lex situs*.[64] As a consequence, the ban on tying up assets is not applied to movables situated abroad.[65]

Illustrations. (i) A Belgian national, domiciled in Switzerland, executed a valid Swiss will, leaving his daughter as universal legatee for life and his brothers or their issue as remaindermen. The daughter died domiciled in France, leaving a will appointing the Salvation Army as heir. The heirs of a brother of the testator sued for his share according to the original will. Their claim was dismissed on the ground of public policy.[66] *Lex situs* would have worked more satisfactorily.

(ii) Where under German law an heir is charged with an executory estate, passing title at his death to a reversionary heir, assets situated in Italy would be considered in an Italian court not as bound by the substitution but as a part of his free estate.[67]

Should such exceptions based either on an extreme public policy or a preference for the domestic situs be followed in jurisdictions recognizing larger testamentary freedom? The German Reichsgericht once answered in the negative.[68] A fideicommissary substitution, valid under Roman law at the

[63] France: see citations in KAHN, 2 Abhandl. 271 f.
Italy: FEDOZZI (ed. 2) 600; PACCHIONI 321.
[64] France: Cass. civ. (June 24, 1839) D. 1839.1.257, S. 1839.1.57; req. (March 27, 1870) S. 1871.1.91.
Italy: FIORE, Sull'articolo 8 delle Disp. Prel., in Giur. Ital. 1901. IV. 193, 202, 208.
[65] Cour Paris (Aug. 7, 1883) Clunet 1884, 192.
[66] Trib. Seine (July 1, 1949) Nouv. Rev. 1949, 219.
[67] See authors *supra* n. 60.
[68] RG. (April 14, 1893) 4 BOLZE 4 No. 8.

testator's domicil, was extended to movables in Alsace notwithstanding the French law there in force. It is true that public policy had minor influence in this case, as Alsace was within the country. Nevertheless, neither the state controlling the entire succession nor another state following the same policy of freedom of testation has a compelling reason to bow before a diverse policy of *lex situs* if the treatment of the assets by the latter can be somehow corrected.

In the United States, the exclusive law of succession has been subjected to concessions to local interests, although on the other hand local prohibitions have been sacrificed in favor of charitable and other purposes. The most remarkable deviation, dispensing with the New York rules against remoteness of vesting interests in order to save a trust from invalidity, will be discussed below.[69]

[69] Chapter 75.

CHAPTER 69

Effect of Wills

I. CONSTRUCTION

1. Concept of Construction

IN common law the terms construction and interpretation of ambiguous texts are often interchangeable, the first term including the latter.[1] More specifically, it has been thoughtfully suggested that interpretation should mean the ascertainment of the real intention of a declarant and construction the use of canons, maxims, or rules, established by law or judicial decisions, in order to clarify the effect of a declaration or to protect an act from invalidity.[2]

This differentiation corresponds to a German distinction: The rules of interpretation concern factual ascertainment of intention, including presumptions where an intention is deemed to exist and only its expression is ambiguous. The rules stating what should be the legal effect in the *absence* of a presumptive intention are called suppletive (in a narrow sense), complementary to the declaration. Much theoretical thought has been devoted to this undeniable difference.[3]

Nevertheless, earlier in this work it has been submitted that only one reliable conclusion can be drawn in conflicts

[1] Matter of Costello (1933) 147 Misc. 629, 265 N.Y.S. 905.

[2] HEILMANN, "Interpretation and Construction of Wills of Immovables in Conflict of Laws, involving Election," 25 Ill. L. Rev. (1931) 778; RHEINSTEIN, Cases and Other Materials on Succession (1947) 482 f.

[3] See DANZ, Die Auslegung der Rechtsgeschäfte, (ed. 3, 1911) and the commentaries to BGB. §§ 133, 157; ENNECCARUS-NIPPERDEY, 1 Bürg. R. §§ 192, 193.

law from any such distinction, namely the contrast between, on the one hand, the true, veritable, expressly or tacitly declared intention of the declarer, and, on the other, intention implied either in fact or in law.[4] The same approach is suitable to the construction of wills. This favorite subject of lengthy discussions forms an oversized body of rules in English law and an extremely intricate network of subtle considerations in American courts, and produces plain confusion in conflicts law.

The core of the matter involves the frequent legal rules created by judicial practice or enactments, which state presumptions for the content of ambiguous words in a will, such as "my children," "my issue," "heirs"; the codes prescribe whether this expression includes illegitimate or adopted offspring, and stepchildren. There are innumerable rules of this category. If a coheir or a legatee dies before the testator, the statutes either attribute this portion to the same class of beneficiaries or cancel it. Or a devise by a husband to his wife is deemed to be in lieu of dower, et cetera. Many so-called rules of construction had the important function of correcting antiquated law. For instance, the English Statute of Wills 1837 (s.24), often copied in American statutes, extended the effect of wills to after-acquired property by providing that the will is "to be construed as if it had been executed immediately before the death of the testator unless a contrary intention appears in the will."

These rules are called interpretative, because they yield to any sign of a contrary intention of the testator; or at least to rebuttal; but when nothing indicates the true intention, the same rule is suppletive. Treatment in conflicts law must be always the same. We may state that all legal

[4] Vol. II, p. 530.

rules subsidiary to an intention ascertained by facts are to be deemed complementary rather than merely "interpretative." Among other consequences of this proposition, we ought not to differentiate between presumed (as opposed to tacitly declared) intention and legal effects,[5] or expect a court of the situs to look to a stereotyped meaning of certain words of the legal language of the situs as long as the inquiry still turns upon the actual intention of the testator,[6] —and this, I dare say, even though the lawyer writing the will has chosen terms that he presumed to reproduce the testator's wish. And if we look to a foreign legal definition of a term used by will, we should not believe that we apply the foreign law.[7]

The purpose and nature of construction of wills have changed in history. The bulky English canons are partly due of course to the old endeavor to facilitate the task of juries. In recent times, their effect was often unhealthy, introducing an element of judicial discomfort, until finally some courageous decisions opened the gate to free interpretation. An English writer says of this body of law:

> "Much of it has become unreasonably technical, but it is still applied, presumably in the interest of uniformity and certainty, though its effect is not infrequently to defeat what seems to the lay mind to have been the actual intention of the particular testator." [8]

How often was it held that "my money" in a testamentary gift always meant currency and never securities—this writer once experienced one of these decisions of the Court of Appeal which finally in 1948 Lord Atkin in the House

[5] STUMBERG, 419, 422, distinguishes intention, stated by operative facts and rules, from legal effects.

[6] Thus, apparently, ATKINSON in 3 Am. L. Prop. 749.

[7] Vol. II, p. 534.

[8] PARRY, Succession (ed. 3) 103 citing Lord Romer in Perrin v. Morgan [1943] A.C. 399, 420 ff.

of Lords called "absurd"; "the ghosts of dissatisfied testators" would from now on be considerably diminished. So, "money" has now "no fixed meaning"; [9] it is a "cardinal rule" that the court "has to sit in the testator's armchair." [10]

The same current, fortunately, breaks through the overlapping lines of American decisions. What is now tantamount to an almost universal view was expressed by the Illinois Supreme Court in 1952, urging that the intention of the testator is to be ascertained from the entire will and a strict technical construction of certain language is not warranted.[11] The New York courts are indefatigable in asking for such free interpretation.[12]

Conflicts law should finally take note of this development and further it. There are many fixed interpretations that are not even meant to transcend the domestic sphere.

2. Universal Principle

(a) In the first place it would seem, in spite of all traditional canons and presumptions, that respect is paid everywhere to the intentions of the testator, as they appear in the light of the entire document and of all "external" circumstances. It is very important not to resort to any petrified presumption at this stage of judicial investigation. Where the true intention is ascertained, there remains merely one question. In the Romanistic tradition leading

[9] Perrin v. Morgan [1943] A.C. 399—H.L., 408 per Viscount Simon, Lord Chancellor, 414 f. per Lord Atkin.

[10] *Ibid.* 420 per Lord Russell of Killowen.

[11] Kiesling v. White (1952) 411 Ill. 493, 499.

[12] See the New York Digest index. The same careful search of the testator's intention appeared in an older case, New York Life Ins. and Trust Co. v. Viele (1899) 161 N.Y. 11, affirming 22 App. Div. 80, 47 N.Y.S. 841. The courts discuss what 4 FRANKENSTEIN 470 missed on the ground of an incomplete private report in 11 Z. int. R. 105; they used free individual interpretation of the words "lawful issue" in the will of an American lady living in Germany.

to this free interpretation as well as in the English courts,[13] interpretation is limited by the condition that the result is not inconsistent with the expression used: the court may not substitute a stipulation not expressed by the testator.[14] Only most recently has it been sometimes suggested that the court should exercise a bolder discretion: the power to correct the will by an equitable decision.[15] American courts very firmly put presumptions and precedents behind the interpretation of the will in the instant case; thus, in the primary objective of investigation, all courts concur.[16] Conflicts arise only where the search for the intention in fact ends without result.

An obvious application is made when common-law courts look to a foreign law for explanation of technical terms peculiar to this law.[17] This is done everywhere, and no true application of the foreign law is implied.

(b) From this it is a close step to a consideration of foreign law without applying it in any sense. The testator may expressly or tacitly have contemplated such consideration, which the forum observes for the limited purpose of

[13] See Mr. Justice Holmes in Eaton v. Brown (1904) 193 U.S. 411; "The English courts are especially and wisely careful not to substitute a lively imagination of what a testatrix would have said if her attention had been directed to a particular point for what she has said in fact."

Germany: A.G. München (Dec. 29, 1927) IPRspr. 1928 Nr. 58.

Switzerland: 64 BGE. II 186.

[14] Matter of Watson (1933) 262 N.Y. 284, 186 N.E. 787: the court has no power to change a clause.

[15] To this effect the tentative draft of a law on inheritance for Israel.

[16] United States: Purl v. Purl (1921) 108 Kansas 673, 197 Pac. 185; 4 PAGE 701.

E.g., Germany: RG. (March 13, 1924) Leipz. Z. 1924, 74; RAAPE 643; 4 FRANKENSTEIN 471.

[17] England: *In re* Price [1900] Ch. 442, 452; Studd v. Cook (1883) 8 App. Cas. 577, 590; Re Miller [1914] 1 Ch. 516; Re Manners [1923] 1 Ch. 220; Dicey (ed. 6) 183 at 833; Chia Khwee Eng v. Chia Poh Choon [1923] A.C. 424; Re Allen's Est. [1945] 2 All E.R. 264.

construing his actual intention.[18] As if considering contracts, English courts speak outright of the "proper law" of a will,[19] and an intention expressly declared [20] or presumed.[21] The presumption refers to the law of the testator's domicil at the time of the execution.[22]

These are exaggerated formulas, usual when judicial presumptions are stiffening into legal rules. We have to replace the "presumptive" by a "tacitly expressed" intention and instead of inventing a "proper law" of the will give due regard to the law to which the testator seems to have looked, amid all circumstances of the case. In this manner, a sound and universally acceptable rule is in the making. When a Swedish woman died domiciled in Massachusetts, the Swedish Supreme Court assumed "without an express provision by the testatrix" that she left certain assets to her husband, which would have been his separate property by force of the Massachusetts law. As the Court said, not only the text but also all other circumstances, particularly the law of the country involved, are to be considered.[23]

From the form of a will, a reference to the content of a law may be drawn [24] or not drawn.[25]

Exception. In American practice, as the Restatement

[18] STORY § 479; DICEY (ed. 5) comment on rule 196; WESTLAKE (ed. 7) § 123 i.f.; SCHMITTHOFF (ed. 1) 234.

France: NIBOYET, 4 Traité § 1341; LERERBOURS-PIGEONNIÈRE (ed. 6) 371; BATTIFOL, Traité 672 § 668; but there is no judicial authority.

Germany: OLG. Karlsruhe (Nov. 17, 1898) 9 Z. int. R. 310.

[19] Bradfort v. Young (1885) 29 Ch. D. 617; Trotter v. Trotter (1828) 4 Bli. (N.S.) 502, 505.

[20] Solicitor General dictum in Anstruther v. Chalmers (1826) 2 Sinn. 1, 4.

[21] Eve J. *in re* Cunnington [1924] 1 Ch. 68, 72; Briton, domiciled in France, will made in England in English form: "the will ought prima facie to be construed according to French law."

[22] SCHMITTHOFF 234: particularly if it is identical with the last domicil.

[23] H.D. (Feb. 25, 1939) N.J.A. p. 101, 13 Z. ausl. PR. 844; on another point of the decision, MICHAELI 245.

[24] France: App. Paris (April 24, 1913) Clunet 1913, 1276.

[25] Germany: OLG. Karlsruhe (Nov. 17, 1898) 9 Z. int. R. 310.

§ 251 (1) clarifies the law, interpretation is not free where an interest in *land* is devised and certain words are used, having an "operative effect irrespective of the intent of the testator." This exception may be, apart from tradition, justified by the need for certainty in real property transactions. However, a doubt in the usefulness of such formalism is confirmed by its application. In the very example adduced by the Restatement, a devise of land in Y to "the children of A" is frustrated in the person of A's adopted son because "children" in Y means legitimate children by birth, although the adoption was made in X with full effect. The court thus would consider neither the intention of the testator nor the extraterritorial effect of the adoption nor the status of the child according to the law of its domicil. Certainty here conflicts with justice.

3. Conflict of Rules

Where the testator's factual intention is not discoverable and a set of legal rules must be applied in a subsidiary manner, no agreement has been reached on the choice of this law.

(a) An old and widespread opinion resorts to the law governing the succession.[26] The *lex situs* [27] for immovables, the law of the last domicil [28] or nationality [29] for movables,

[26] CHESHIRE (ed. 2) 533 (but see *infra* n. 32); DICEY (ed. 5) rule 196; STUMBERG (ed. 2) 423 n. 34; LEREBOURS-PIGEONNIÈRE (ed. 6) 421 § 377; but see STORY §§ 473, 479 a-f. 484.

[27] England: HALSBURY, Laws of England (ed. 2) 242.

United States: Jennings v. Jennings (1871) 21 Ohio St. 56; Staigg v. Atkinson (1887) 144 Mass. 564, 12 N.E. 354.

[28] England: Trotter v. Trotter (1828) 4 Bligh (N.S.) 502; but the exceptions for the law intended by the will are much emphasized, see Re Allen's Est., *supra* n. 17.

United States: see cases in 4 PAGE 707 § 1639.

France: Trib. civ. Seine (Apr. 2, 1925) Revue 1926, 405 (currency of legacy); Cour Paris (May 29, 1948) J. C. P. 1950 II 5241, Rev. crit. 1950, 197, affirmed by Cass. civ. (Nov. 13, 1951) S. 1952.1.189, Rev. crit. 1952, 323.

[29] Germany: R.G., Leipz. Z. (1924) 741.

respectively, furnish the rule of interpretation or invalidate the clause or the will.

This approach is favored by eminent authors, some of whom would have this the exclusive method.[30] The reason most advanced is that it is the law "with which the ordinary person is most familiar." [31]

(b) Another part of the authorities, continuing the direction toward the proper law of succession, presume that the testator in an ambiguous clause may have had in mind the law of his domicil at the time of the execution.[32] This, of course, is a rebuttable presumption.[33]

This view, primarily intended only for personalty, easily extends to immovables, provided that *lex situs* "has the last word" for allowing the creation of rights.[34] Indeed, the Restatement calls for the law of the domicil at the time when the will was made, with respect to movables (§ 308) as well as to immovables except in the case of legally fixed words (§ 251). This is a considerable progress in approaching several successions, especially when a single will disposes of both real and personal property. However, such

[30] HENNING, 41 N.S. Am. L. Reg. 623, 718, approved by GOODRICH (ed. 3) 376.

[31] CHESHIRE (ed. 4) 563.

[32] England: WESTLAKE 155 § 123; DICEY (ed. 6) rule 183; CHESHIRE (ed. 4) 562, 565.

Canada: Ontario H. Ct.: Re Bassette [1942] O.W.N. 278, [1942] 3 D.L.R. 207, FALCONBRIDGE 464.

Quebec: 3 JOHNSON 64.

United States: Staigg v. Atkinson (1882) 13 R.I. 725; *in re* Chappel's Estate (1923) 124 Wash. 128, 213 Pac. 684, with rationale, citing Story in Harrison v. Nixon, 9 Pet. (32 U.S.) 483; Palmer et al. v. Crews (1948) 203 Miss. 806, 35 So. (2d) 430, 4 A.L.R. (2d) 483; "royalties" of oilwells in Louisiana and Mississippi did not include other oil interests, according to the law of the domicil in Texas.

France: Trib. Seine (March 9, 1895) Clunet 1895, 628; *cf.*, the authors cited *supra* n. 18; DELAUME, Rev. crit. 1950, 199.

[33] *In re* Cunnington [1924] 1 Ch. 68.

[34] England: Nelson v. Bridport (1846) 8 Beav. 547, 570 per Langdale, M.R.; Lord Nelson was not allowed by Sicilian law to acquire land devised to him under English law.

a role of the domiciliary law purely as a device of mind-reading is quite arbitrary.

(c) More isolated opinions point to the law giving validity to the will,[35] the domicil of the beneficiary,[36] or look for combinations.[37]

Illustration. A mortgaged land is devised to a legatee. Where there is no clue to the intention of the testator, is the legatee entitled to demand that the secured debt be paid out of the general personal property? This question has been much discussed in England because the law was changed; the claim formerly granted is now denied; the cases are therefore antiquated.[38] It has been concluded that the legatee has only the rights given him by the *lex situs*.[39] However, in another view, this question of construction must be answered according to the law of the domicil as of the time of execution, following the presumed intention of the testator.[40]

This example shows that no certain solution of the choice of law problem is feasible, if we work with so elusive a criterion as "presumptive" intention. Where no actual intention can be verified, the applicable law must be the law governing the succession, not because the testator is supposed to have had it in mind, but simply because it is in charge of the situation!

The advantage of a common criterion for a plurality of successions could be maintained, if the situs were to recognize, by renvoi, the prerogative of the domicil, in the line

[35] *Cf.*, DICEY (ed. 6) 833.

[36] 4 PAGE 708 n. 5.

[37] E.g., WESTLAKE 155; CHESHIRE (ed. 4) 565; BRESLAUER, 27 Iowa L. Rev. at 429 ff.

[38] See in particular FALCONBRIDGE 451, 480; Locke King's Act 1854, amended 1867, 1877; Adm. of Est. Act 1925, sec. 35; Ontario: Wills Act R.S.O. 1937 c. 164, Rev. Stat. 1950, c. 426, sec. 37 (1).

[39] WESTLAKE § 118.

U.S.: Restatement § 490; STUMBERG (ed. 2) 425 ff.

[40] Maxwell v. Hyslop, L.R. 4 Eq. 407; Higinbotham v. Manchester (1931) 113 Conn. 62, 154 Atl. 242, 79 A.L.R. 85; 4 PAGE 732 § 1652.

of the improved doctrines of formal requirements and conclusive probate judgments.

However, the conclusive effect of judicial construction of a will is doubtful in this country.[41]

4. Transposition

A will may be executed in the technique of one system and finally governed by a law of another system. The testator may have preferred his former habits to the usage of his domicil, he may after execution change his domicil or nationality determining the applicable law, or he may dispose of his several successions by one will. Here, more than an ordinary construction is needed: something like the transposition of a piece of music to a different key.

Through renvoi to the law of domicil and that of the *situs,* continental courts have had not seldom to adapt American wills with their particular technique into the structure of a civilian legislation.[42] A sole residuary legatee in American terminology is understood as universal legatee in France, and both are sole heirs in the German parlance. An executor may not be allowed all the powers attributed by the will. Future interests, if vested, must be assimilated to a German *Nacherbschaft* or *Nachvermächtnis* and if contingent, conceived as conditional legacies. Creation of a trust fund or a foundation—possible in some countries, while not in others—has to be converted into a type of the forum or considered void.

A good operation of this kind will save a maximum of the testator's intention. But regard to the exigencies of

[41] See Note, 63 Harv. L. Rev. (1950) 504 and *infra* Ch. 71.

[42] In the Institute of Berlin during my directorship, this was a frequent subject of advice to courts and tax authorities. See the article by RUDOLF MÜLLER, 7 Z. ausl. PR. (1933) 808, 816. See also on the subject LEWALD, Questions 115-118; M. WOLFF, D. IPR. (ed. 3) 87; 4 FRANKENSTEIN 471-474.

the governing system cannot always obviate the results that must be reached when the forum applies the foreign law.

II. Revocation

A testator may, by his intentional act, rescind a will. The formal requisites vary: physical destruction of the document or of parts, repeal by a new will, tacit revocation by contrary dispositions, etc. Anglo-American law developed in addition an annulment ipso facto, by certain events,[43] also called revocation, although originally the will simply expired when the testator married and had a child, or a testatrix married, or had a child after the execution of the will. While the statutes formed variations of these causes and added divorce, in more recent times many provisions directly granting hereditary shares to posthumous and pretermitted issue have superseded the destruction of the will. Marriage of women has no effect any more, since they may have separate property and capacity to testate; and marriage of a bachelor usually breaks his will only under certain conditions; the legal presumption is rebuttable by such facts as express declaration to the contrary, settlement in favor of the widow, or other provisions for her benefit. Actually, the statutes making divorce a ground for "revocation by implication" are still the most practical of this decaying institution and in American courts the most rigorously applied in spite of counterevidence.[44]

Divorce and separation of spouses are causes of presump-

[43] England: Graveson (ed. 2) 250 ff.
United States: Elizabeth Durfee, "Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator," 40 Mich. L. Rev. (1940) 406; Simes, Model Probate Code 83-84.

[44] Elizabeth Durfee *l.c.* at 412, 415 ff.

tive revocation in a part of the civil-law countries by rules of subsidiary function,[45] in others not.

Formal validity of a voluntary declaration of revocation is assimilated to execution of wills by a few of the American statutes that give liberal options of foreign forms or liberal statutory interpretation.[46] Usually,[47] however, and even in the Execution of Wills Act of 1940, revocation is forgotten. Hence, the law of succession, especially the law of the *situs* of land, applies rigorously.[48] When a domiciliary of Illinois made a will and revoked it by writing "void" over the dispositions, the Illinois court recognized the revocation, but the court of Iowa as situs of land, by five against four votes, refused probate, although Iowa does probate the wills executed at the domicil.[49] This decision, as the dissenting judges said, perpetuates "an anomalous and confusing legal situation."

In civil law, the references to foreign law—of the place of execution or the domicil as of the same time, or also the domicil at death—are usually broad enough to embrace revocation by a new will or other declaration.[50]

[45] Revocation by force of law is distinguished, e.g., in the case of pretermitted children, from revocation by act, e.g., in Venezuela, C.C. art. 951, 990.

[46] *Supra*, Ch. 67 I; Okla. St. Ann. 1938 tit. 84 §§ 71-73; Utah C. Ann. 1943, § 101.1-14; Re Traversi (1945) 64 N.Y.S. (2d) 453.

[47] ATKINSON, 3 Am. L. Prop. 750.

[48] Restatement §§ 250, 307; *In re* Kimberly's Estate (1913) 32 S.D. 1, 141 N.W. 1081.

[49] *In re* Will of Barrie (1946) 393 Ill. 111, 65 N.E. (2d) 433; First Presbyterian Church of Sterling, Illinois v. Hodge (1949) 240 Iowa 431, 35 N.W. (2d) 658, 9 A.L.R. (2d) 1399, annot. 1412. In Matter of the Estate of Nora Gardner Lufkin (1933) 32 Haw. 826, where a Californian holographic will was revoked in Hawaii by another holographic will, invalid under the Hawaii statutes, the court recognizes the first and rejects the second, leaving uncertain whether the law of the place of execution or the new domicil decides.

Canada: Re Busslinger (Alta. 1952) 6 W.W.R. (N.S.) 408 and cited precedents.

[50] Expressly e.g., China: P.I.L. art. 26 par. 2; Czechoslovakia: PIL. § 43.

For cancellation by force of law, and for all substantive requirements, in any case, the views are divided.

(a) *Law of Succession:* Whatever happens to a will after its execution may be considered under the law ultimately controlling the succession. American courts incline to this view; they submit revocation in any sense to the *lex situs*[51] or *lex domicilii* as of the time of death,[52] respectively. Events that have not effect *mortis causa* are unimportant.

The same approach is taken in Continental courts, where the last national law of the decedent governs.[53]

(b) *Effect Inter Vivos.* The English courts are of a contrary opinion, connected with their wrong characterization of a revocation of a will (at least of a British subject) by subsequent marriage as an incident of marriage.[54] Any revocation of a testamentary disposition of movables is held to be governed by the law of the domicil at the time of the revocation.[55] If it is valid at such time, there is no will left.[56]

The Court of Appeals in New York makes use of a statute allowing revocation by holographic will made in a state where it is effective; if the revocation is made by can-

[51] Restatement § 250; *In re* Patterson's Est. (1923) 64 Cal. App. 643; and see cases in Note 9 A.L.R. (2d) 1414.

Sternberg v. St. Louis Union Trust Co. (Mo. 1946) 66 F. Supp. 16; Sternberg v. St. Louis Union Trust Comp. (1946) 394 Ill. 452, 68 N.E. (2d) 892, 169 A.L.R. (1947) 545.

[52] Restatement § 307, GOODRICH (ed. 3) 519; WOLFF, P.I.L. § 569; *In re* White's Will (1920) 112 Misc. 433, 183 N.Y.S. 129; *In re* Smith's Est. (1940) 55 Wyo. 181, 47 Pac. (2d) 677; cases in 9 A.L.R. (2d) 1412, 1430.

[53] France: App. Bordeaux (Aug. 5, 1872) S.1872.2.269; App. Alger (Apr. 14, 1908) Clunet 1909, 489, Revue 1909, 232, (marriage of a German wife with an Italian, revocation); VALÉRY 1246; BATIFFOL, Traité 673 § 669.

Germany: 2 BAR 239 tr. 832; 2 ZITELMANN 967; LEWALD 318 § 386.

Italy: FEDOZZI (ed. 2) 615.

[54] *In re* Martin, Loustalan v. Loustalan [1900] P. 211, Vol. 1 p. 375 and n. 181-183.

[55] CHESHIRE (ed. 4) 540, 542.

[56] DICEY (ed. 6) 835.

cellation valid under the law of the testator's domicil at the time, it is considered effective also in New York.[57]

Illustrations. (i) Revocation effective in state X where made, ineffective in state Y where the testator dies.

A testator domiciled in Washington, D. C., was divorced, which would cancel his will under the District law, but later moved to California and died there. The will was considered not revoked, following the view *supra* (a).[58] According to the English theory, the will would have remained revoked.[59]

(ii) Revocation ineffective in state X, effective in the last domicil Y.

A Dutch married woman married in the Netherlands where the will remained intact and died domiciled in England. The will was held effective in England; [60] in an analogous American case, the will was held revoked.[61]

(iii) A German woman, who became Italian by marriage, bequeathed her assets to her Italian husband. After annulment of the marriage, restoring her German nationality, the will was held void by a French court, under German inheritance law, BGB. § 2077.[62]

(iv) A case involving an implied revocation by executing a new will came recently for the first time to the French Court of Cassation. The court denied the intention of the testatrix, domiciled in France, to revoke her French will by executing a second Argentine testament, rejecting the application of the Roman and Argentine presumption that

[57] Re Traversi's Est. (1946) 189 Misc. 251, 64 N.Y.S. (2d) 453: dissenting opinion *in re* Barrie's Est. (1950) *supra* n. 49, 9 A.L.R. (2d) at 1414.

[58] *Re* Patterson's Est. (1924) 64 Cal. App. 643, 222 Pac. 374, 266 U.S. 594.

[59] DICEY, rule 185 Ill. 1.

[60] In the goods of Groos [1904] P. 269; see In the goods of Reid (1866) L.R. 1 P.&D. 74.

[61] Matter of Coburn's Will (1894) 9 Misc. 437, 30 N.Y.S. 383.

[62] App. Alger (Apr. 14, 1908) Clunet 1909, 489.

testament posterius rumpit prius.[63] The decision agrees with the principles.[64]

It might be asked at what time a will is deemed revoked if both laws annul it. Logically, in the American view the effect occurs at death and in the English at the time of the destructive event. The first approach makes it possible for the testator to confirm the will or at least re-execute it,[65] which is much more consonant with the modern transformation of revocation by law. Another connected problem arises when the law between the event and the death changes; the American decisions have taken a special attitude in such cases, more favorable to the time when the will was executed.[66] Still another phase of this question is illustrated by the following Canadian case.[67]

(v) A man domiciled in Quebec made a testament and afterward married a woman at whose desire they established their home from the start in Ottawa, Ontario, where he died. Under Quebec law his will in favor of his mother and sister was valid, although the widow received half of the community property. In Ontario the will was revoked by the marriage, and the widow and child inherited the entire assets. The Ontario Court, following the English approach, considered the will as definitively revoked at the time of the marriage. The Quebec court evidently would recognize the result, but only because the law of the last domicil governed.

There is no doubt that the law of the succession ought to determine these effects.

[63] Cass. civ. (Nov. 13, 1951) *supra* n. 28; *cf.,* Argentina C.C. art. 3827.

[64] *Contra* the annotation *ibid.,* with a criticism that may rather be addressed to the imperfection of present conflicts law. For a similar case, see *In re* Estate of Wayland (Prob. Div. 1951) [1951] 2 All E.R. 1041: testator executed an English and a Belgian will, the court searches for the intention, separates the wills, and concludes against revocation.

[65] WARREN, Cases on Wills, 315 n.

[66] Note, 34 Harv. L. Rev. (1921) 768.

[67] Seifert v. Seifert (Ont. 1914) 23 D.L.R. 440, 32 O.L.R. 433.

III. Election

A much developed doctrine of "election" in Anglo-American law deals with the cases where the beneficiary of a devise or bequest enjoys, as an effect of the same death, a benefit by the will or *ab intestato* or against the will or by marital property law. According to the facts and the legal situation, he may be entitled to both rights or have to choose between them.

The traditional cases of the doctrine are those where the testator gives property not belonging to himself but other property to the owner, and where his will fails but his intention is protected. If in the latter case the will is valid under one law and invalid by another, the purpose of the testator is carried out by putting the enriched beneficiary or intestate successor to election: he has to choose between his interests granted by the will and the benefit obtained against the will, releasing his right to the surplus to the disappointed person. The courts involved, according to the Restatement, have to co-operate.[68]

The present conflicts doctrine tends to state that election depends on the law governing the succession,[69] with respect to immovables [70] as well as to movables. However, American decisions are vastly divided.[71]

Occasionally, the erroneous idea of applying party autonomy has misled courts to invoke a law presumptively intended by the testator.[72] Doubts arose sometimes about the rights of a widow to dower, granted her in many jurisdictions (by

[68] Restatement § 252, apparently a uniform substantive rule.

[69] Westlake 125; Cheshire (ed. 4) 566-570; Dicey (ed. 6) 834; Beale § 253.1; Goodrich (ed. 3) 121 § 170; Stumberg (ed. 2) 424.

[70] England: De Nicols v. Curlier [1898] 1 Ch. 403, 413; [1900] A.C. 21-H. L.

United States: Restatement § 253, Notes, 22 A.L.R. 437; 79 A.L.R. 103, 105.

[71] Note, 105 A.L.R. 271, lists "seven views."

[72] Thus Re Allen's Est. (1945) *supra* n. 17; *contra* Morris, 34 Can. Bar Rev. 528; *id.* in Dicey (ed. 6) 834.

the old rule or by presumption) only when she did not take under the will of the husband; but in the general opinion, any question still of practical interest, about dower or the more recent legal shares substituted for dower, depends on the character of the right granted by the situs.[73]

The "singular tenderness" shown by English courts toward English heirs in adjudging benefits [74] has not been imitated in the United States.[75]

The interesting aspect of this situation is the relationship between the state laws confronting the beneficiary.

(a) In state X, a surviving spouse has an intestate portion if he does not take under the will. But there is land in Y and the testator was domiciled in Z, where no conditions attach to the taking of testamentary gifts, even though no respective intention of the testator is perceivable. The Canadian Supreme Court held that the surviving spouse may claim his testamentary rights in states Y and Z, under the legal requirements prevailing there, so as not to be bound by the provision in X.[76] The restriction on the will by a statute of election, thus, presupposes that the enacting state is that controlling the succession.

(b) If the testator owns land in several states, it would follow logically that election could be exercised in each state

[73] United States: In Staigg v. Atkinson (1887) 144 Mass. 564. Holmes, then judge of the Massachusetts court, did not specify whether he applied Minnesota law, not imposing election between dower and a legacy of personalty, *qua lex situs* or *lex domicilii* as of the time of the execution of the will. But see STUMBERG (ed. 2) 424 ff.; HEILMAN (*supra* n. 2) 797.

Canada: Re Elder [1936] 3 D.L.R. 422, 2 W.W.R. 70: the right to dower and election in lieu of will in Manitoba land was subject to election according to Manitoba Dower Act, C.A.M. 1924, c. 50, although the husband was domiciled in British Columbia.

[74] DICEY (ed. 5) 975; Brown v. Gregson [1920] A.C. 860- H.L. against *In re* Ogilvie [1918] 1 Ch. 482, 502, see MORRIS in DICEY (ed. 6) 558; *cf.*, CHESHIRE (ed. 4) 568; JARMAN, Wills 552.

[75] GOODRICH 521 § 170.

[76] Pouliot v. Cloutier [1944] 3 D.L.R. 737, S.C.R. 284.

without regard to the others.[77] This awkward result is usually corrected by the courts; they consider the choice first made in one state as binding under the theory of waiver or estoppel.[78] Where the estate contains movables and immovables, the same rule obtains.[79]

(c) A special case, however, exists if taking against the will at the domicil depends on election. It is controversial whether such taking has universal effect and operates even at the situs of immovables.[80] The affirmative answer means another slight progress towards unity of succession.

Courts of civil-law countries will recognize these rules of the common-law courts, if, according to their own choice of law, a common-law statute governs the succession. The construction of a will executed under American or English conceptions may be influenced thereby.

IV. Powers of Appointment

Another Anglo-American institution has some analogy to the Romanistic *substitutio pupillaris* and *quasi-pupillaris* with the difference that a Byzantine father wills in advance for his son, but the English son wills for his late father. In civil law this is a singular exception to the basic requirement for a will that it must be declared by the testator in person. At common law, the testator may empower a beneficiary to dispose of assets of the inheritance by deed or will.[81]

[77] Van Steenwyck v. Washburn (1883) 59 Wis. 483, 17 N.W. 289.

[78] England: Douglas-Menzies v. Umphalby [1908] A.C. 224.
United States: 4 Page 730.

[79] Van Steenwyck v. Washburn, *supra* n. 77; Lindsley v. Patterson (Md. Sup. Ct. 1915) 177 S.W. 826; see Goodrich 521 § 170.

[80] Pro: Coble v. Coble (1947) 227 N.C. 547, 42 S.E. (2d) 892; Note, 105 A.L.R. (1936) 271; *contra:* Bish v. Bish (1943) 181 Md. 621, 31 Atl. (2d) 348; Seaton v. Seaton (1945) 184 Va. 180, 34 S.E. (2d) 236.

[81] John Mulfort, "The Conflict of Laws and Powers of Appointment," 87 U. of Pa. L. Rev. (1939) 403; 4 Page § 1649; 2 Beale §§ 284.1, 236.1; 150 A.L.R. 521; Falconbridge 455 ff.

With respect to immovables, *lex situs,* of course, decides the entire issue.[82] The optional contacts affording formal validity are specially determined in English law.[83]

Where immovables are in the inheritance, the dominating idea of this institution asserts itself. The assets come from the donor and are further transferred by his will and left by him, though through the medium of the donee. Hence, the law of the donor's last domicil governs not only the validity and construction of the original provision, but also the exercise of the power. American courts, hence, generally require that the power be exercised—where the donor has not specified the form of exercise—by a will complying with the formalities of the donor's domicil: so many witnesses as required there,[84] but not so many as obligatory at the donee's domicil,[85] etc. Yet a contrary intention of the donor, inferred from circumstances, has been given effect.[86] The capacity of the donee must only satisfy the law of the donor's domicil; [87] undue influence is determined likewise,[88] as also revocation.[89]

Next to the tax problems [90] that are in the foreground, the question whether the donee's forced heirs may claim rights is outstanding. Again, merely the persons entitled to a share in the donor's estate have rights.[91]

[82] 2 BEALE §§ 234.1, 236.1.

[83] See DICEY (ed. 6) 845 ff.

[84] As in England: *In re* Scholefield [1905] 2 Ch. 408.

[85] Adger v. Kirk (1921) 116 S. Car. 298, 108 S.E. 97.

[86] Amerige v. Att. Gen. (1949) 324 Mass. 648, 659, 88 N.E. (2d) 126, *supra* Ch. 66; but see Survey 1950 at 53 on other decisions of the same court.

[87] Matter of the Will of Stewart (N.Y. 1845) 11 Paige 398.

[88] *In re* Harriman's Est. (N.Y. 1926) 217 App. Div. 733, 216 N.Y.S. 842.

[89] Velasco v. Coney [1934] P. 143; Note, 48 Harv. L. Rev. 1202, 1291; MULFORT, *supra* n. 81, at 421 n. 101 against the criticism 83 U. of Pa. L. Rev. (1934) 279.

[90] GRISWOLD, "Powers of Appointment and the Federal Estate Tax," 52 Harv. L. Rev. (1939) 929, 967.

[91] Restatement § 234.

In England, however, the distinction between general and special powers, familiar to this country in other respects, enters. If the original testator does not indicate the specific persons in favor of whom the power should be exercised ("special powers") but has left their designation to the donee, the donee is deemed to act on his own property so that his own domicil controls the exercise.[92] A will conforming to the Will's Act, 1837, is always in proper form to exercise a power given by an English testator if exercisable by will.[93]

These delicate rules, roughly sketched above, are decisive also in Continental courts, if they belong to the law governing the donee's succession.[94]

[92] As to capacity: Puey v. Hardern [1900] 2 Ch. 339; Re Walker [1908] 1 Ch. 560.

[93] DICEY (ed. 6) 851.

[94] 4 FRANKENSTEIN 493-496, SCHNITZER (ed. 3) 471.

Chapter 70

Scope of the Law of Succession

I. In General

THE variety of conflicts rules has influenced the domain controlled by the law of succession. An essential characteristic and outstanding advantage of the unitary system is provided by its wide radius extending not only to all assets but also to all debts of the decedent and of the estate.[1] But at common law, the sphere of the law governing succession is limited to the problems of "descent and distribution" in contrast to "administration" of the estate.[2] Another exclusion of problems from the law of succession under the theory of territorial law is contemplated by a most recent French doctrine.[3]

The common ground of these groups, the scope of "distribution," is comprehensive enough. It includes the source of succession: will, contract, or intestacy, with all incidents such as validity and revocation of wills and the acts leading from the death of the deceased to the acquisition, though not the delivery, of the benefits. To quote the Hague draft of 1928, the national law of the deceased governs:

(Sec. 1) The designation of the beneficiaries, the order in which they are called, the shares attributed to them, their obligation to bring in advancements, partition, legitimate parts, (sec. 2) the intrinsic validity and the effects of testamentary disposition.

[1] E.g., Nussbaum 351; Wolff, D.I.P.R. (ed. 3) 228.
[2] E.g., Dicey (ed. 6) 535; Goodrich (ed. 3) 507.
[3] E.g., Lerebours-Pigeonnière (ed. 6) § 362; devolution is subordinated to the law of property (ed. 5) 320, § 256.

In this enumeration partition is a controversial point. In any case, beyond this the law of succession may or may not govern marshalling of assets, liquidation, ascertainment and payment of debts, and actual satisfaction of the heirs, legatees, and other beneficiaries.

We shall analyze the first, narrower, group of problems in this and the following chapters, principally as a task of classification of subjects in conflicts law. In the meaning of the traditional Romanistic system, of course, this exposition has an equal bearing on most of the matters pertaining to what is called administration of decedents' estates at common law.

II. Delimitation of the Scope

1. Status of Beneficiaries

In the inchoate "general rules" that modern authors seek to establish in conflicts law, we find two separate topics which seem to this writer to form only one: the so-called incidental [4] or preliminary question and the requirement that a beneficiary must be able to share in the inheritance (capacity to enjoy rights) and not only that he be able to accept or renounce a part (capacity to act or dispose).

The opinions are divided on both subjects, which they should not be.

(a) *The incidental question.* If a "spouse," a "husband" or "wife" is called to succeed, by intestate or testate devolution, no court should be in doubt that the law applicable to determine whether a marriage exists, is defined in the conflicts rules of the forum on marriage and divorce. It would be too absurd to have two or more yardsticks in the same court for stating whether an identical marriage ceremony,

[4] This term, instead of "preliminary," was proposed by M. Wolff and accepted in England.

an annulment, or a divorce is recognized.[5] Even though a marriage celebrated at the forum is considered invalid at the domicil or by the national law of a party, the court is bound to consistency by the law of the forum.[6]

More doubt seems, at first blush, justified where testate or intestate succession is offered to the "children" or "issue," or also to the legitimate, recognized, or adopted children. Although the dominant opinion is that the normal conflicts rule of the forum defines the appropriate status of an individual claimant, an opposite doctrine stresses the circumstance that the law of succession predicates the status in question and therefore designates the persons benefited.

The first opinion has been almost a matter of course in Anglo-American conflicts law.[7] It is true that the English decisions on questions of legitimate birth and legitimation relevant to ascertaining benefits in English governed successions have caused much doubt; but the doubts refer to the structure of the English conflicts rules on legitimacy and illegitimacy and do not warrant a conclusion that English rules apply because the succession is governed by English law.[8] In the United States it is said that whether a child is legitimate "relates not to descent or distribution but to his status."[9] Likewise, the French courts use their regular tests to decide not only whether a person is a

[5] RAAPE, 50 Recueil 1934 IV at 493.

[6] *Supra* Vol. I, p. 235.

[7] CHESHIRE (ed. 4) 91; MORRIS, 54 L.Q.R. 611; 62 *id.* 89; in DICEY (ed. 6) 676; FALCONBRIDGE, Conflict 166. M. WOLFF, P.I.L. §§ 196-200, however, expounds arguments pro and contra.

[8] This subject has been thoroughly investigated by LIPSTEIN, Legitimacy and Legitimation in English Private International Law, in Festschrift für Ernst Rabel (1954) 611-630. On complications in Australia, see FLEMING, 1 Int. Comp. L. Q. (1952) 67.

[9] Note, 73 A.L.R. 941, 943.

"spouse," [10] but also a legitimate or natural child,[11] a child of a putative marriage,[12] or an adopted child.[13] In the same manner, courts decide likewise when full age is attained.[14] This is the prevailing view,[15] although the contrary argument has been presented in impressive reasoning [16] and has also been adopted by two Anglo-American authors.[17]

A different approach may be taken with respect to a declaration of death, as the following case [18] illustrates. A father died early in 1905; his son was three times declared dead: (1) in Vienna, the day of death being fixed on January 8, 1898; (2) in Leipzig as of December 31, 1905; and (3) in Dresden, dating the death on January 8, 1895. It appeared that the father was a millionaire, and the son's minor child had repudiated the son's succession with the assent of the orphan's court. The court in Dresden, apparently as probate court, could rely on its own statement of

[10] Trib. Seine (Jan. 17, 1924) Clunet 1925, 401; Revue 1925, 226: French *lex situs,* but common law marriage and marital property system of New York.

[11] Cour Paris (March 22, 1924) Revue 1924, 558; (Feb. 10, 1943) Nouv. Rev. 1944, 140, J.C.P. 1943 II 2438; (July 10, 1946) J.C.P. 1947 II 3392.

[12] Cass. (Jan. 6, 1910) Clunet 1911, 214; Cour Paris (Dec. 31, 1925) Gaz. Trib. 1926.2.306.

[13] Contra: for the law of succession, Cass. req. (Apr. 21, 1931) D. 1931.1.52, S.1931.1.377, Revue 1932, 526, much criticized, see BARTIN, Clunet 1932, 5; BATIFFOL, Revue 1934, 634, Traité 661 par. 658; disavowed by Cour Paris (July 10, 1946) G. Pal. 1946, II 141 on the report of FECHE, Av. gén., p. 142, J.C.P. 1947 II 3391.

Cf., RAAPE, 50 Recueil 1934 IV 493, 506.

[14] Woodward v. Woodward (1889) 87 Tenn. 644, BEALE, 2 Cases 794.

[15] France: MAURY, 57 Recueil 1936 III at 560; SAVATIER, J.C.P. 1947.2.3392, Cours 309 § 441. Contra DESPAGNET 1046.

Germany: KAHN, 1 Abh. 22 ff.; LEWALD 300 and in Questions 74 ff.; and especially RAAPE, Komm. 653, IPR. 68; see Recueil 1934 IV 485 ff.

Italy: DIENA, 158 Arch. giur. 374, 420 ff., commonly followed. MONACO, Efficacia 190.

[16] MELCHIOR 246 ff.; WENGLER, 8 Z. ausl. PR. 206 ff.; OLG. Karlsruhe, IPRspr. 1931 no. 96.

[17] LORENZEN, Cases (ed. 2) 794 n. 62; WELSH, Legitimacy in the Conflict of Laws, L.Q.R. 1947, 65.

[18] BARING, "Dreimal für tot erklärt," 10 Zentralblatt für Freiwillige Gerichtsbarkeit und Notariat (1909/10) 630. See on the doubts regarding the international treatment of absentees, Vol. I, p. 162, 164-167.

facts, irrespective of the son's personal law in former proceedings.

(b) *Capacity of beneficiaries.* With as little doubt as the independency of the conflicts rule on family status is observed in the common law courts, the contrary view is held in the same courts with respect to the capacity of persons to be designated or appointed as heir, devisee, or other beneficiary. The law governing the succession has a very firm position, just because it determines the devolution. Not only is devise of land in the exclusive province of *lex situs* also in this repect,[19] but the decedent's domicil rather than the domicil of the legatee defines the latter's capacity to receive movable property. In England, this view has been laid down in the case of two persons dying in a common disaster, an air raid on London.[20] Under the ancient rule, however, that minors not only lack capacity personally to accept but even capacity to acquire legal estate in land, the English courts use an optional test; full capacity of the minor according to the law of his own domicil at the time when he reaches full age, suffices.[21]

In civil law, the situations where a *beneficiary's existence* at the decisive time is in doubt have been constantly debated.

An heir must be "in being" at the death of the decedent, or, the law of succession allowing substitutions or future interests, during the period of the rule of perpetuities, or

[19] United States: Restatement § 249 comment a; Starkweather v. American Bibl. Soc. (1874) 72 Ill. 50; 2 BEALE § 249.4; 2 L.R.A. (N.S.) 415.

[20] England: Re Cohn [1945] Ch. 5; it is true that mother and daughter killed in London in an air raid were not only domiciled in but also nationals of Germany; hence their personal law was German under both systems. On the principle see WOLFF, P.I.L. (ed. 2) 577 § 550.

United States: Restatement § 306 comment b.

[21] Re Hellmann's Will (1866) L.R. 2 Eq. 363. An English will contained legacies to each of the two children of a German, who were of full age by German law, but minors under English law; In re Schnapper (1928) Ch. 420 announced the rule definitively. On the reformed functioning of the other disabilities of a minor see JARMAN, Wills (ed. 8) 114.

within an analogous period, as e.g. established in the German Civil Code. Is a child *en ventre sa mère* "in being"? Originally the answer was negative everywhere, and there are remainders of this view in actual rules. The Roman corrected it: *nasciturus pro jam nato habetur quomodo de commodo eius agitur.* This rule is textually maintained in most jurisdictions of the United States: the child *en ventre* "will be treated as living or born or surviving where such a construction will be to his benefit." [22] Modern codes even consider the embryo simply as a person under the *"condicio juris"* that it be born subsequently.[23]

The older doctrine applied the personal law of the future person.[24] But more recent writers emphasize that the existence of the beneficiary is a condition of the devolution, and, therefore, depends upon the law of succession.[25]

Most discussed and striking are the cases of *commorientes,* that is, of two persons dying in a common disaster or otherwise, so that it cannot be ascertained who died first. For these cases, different presumptions have been developed in the various laws, but in some jurisdictions there is no presumption and therefore no evidentiary substitute favoring one or the other group of claimants.[26] England formerly had no presumption, but from 1926 it

[22] Note, 48 Harv. L.R. (1935) at 1235, with just criticism of the "startling" House of Lords decision, Elliot v. Joicey [1935] W.N. 43 [1935] 79 Scot. J. 144.

[23] E.g., Swiss C.C. art. 16, par. 2, *cf.,* RABEL, 4 Rhein. Z. (1912) 167 ff.

[24] SAVIGNY 283 §§ 377, 385; LAURENT, 6 Dr. Civ. § 203 ff.; WEISS, 4 Traité 553, 574.

Spain: C.C. art. 9, 745 *cf.,* 30; 2 GOLDSCHMIDT 258.

[25] 2 BAR 314 (tr. 807); DIENA, 58 Arch. giur. 376, 401; FIORE, 4 D.I.P. (French tr.) §§ 1417, 1420 in case of a single law of succession; PILLET, 2 Traité 382; BATIFFOL 662 § 660; NIBOYET, Manuel 728; ARMINJON, 3 Précis § 128; LEWALD 297 § 362; Paris (Apr. 8, 1938) Clunet 1938, 1038.

[26] Vol. I, p. 167 f. and the German controversy, p. 167 n. 24. The start to establish a uniform law, Convention on declaration of death of Missing Persons, Lake Success, April 6, 1950. U.N. Publ. 1950, V 1, 3 Rev. Hell. (1950) 391, was not felicitous.

has been presumed that the younger person survived, and in 1952 the law of 1925 in application to husband and wife was repealed.[27]

Supposing that a father and his son are killed in an airplane crash, in one system the son, in another the father is deemed to have survived temporarily and to have transmitted his share in his own succession, while in modern statutes considering all presumptions arbitrary, neither inherits from the other. Bar suggested that the law of each succession should apply its own method.[28] Weiss concluded that no presumption should apply,[29] and Pillet pointed to the law of the place of the misfortune.[30] In this unresolved state, the question still remains in Quebec.[31]

Corresponding to the division of writers, some statutes respectively determine "capacity" to inherit by will or *ab intestato* according either to the personal law [32] or to the law of succession.[33] Also cumulation of both laws has been tried.[34]

(c) *Rationale.* It may be assumed that many writers who have taken sides for one or the other contact in all these questions are nevertheless not adverse to a distinction, which cuts through and corrects the usual antithesis.[35]

[27] Intestate's Est. Act 1952, Part I and First Sched., amending Adm. of Est. Act 1925, sec. 46(3).

[28] 2 BAR 113 (tr. 805); 113 LEWALD, Questions 63.

[29] WEISS, 4 Traité 578; followed by BERKI 74; Cód. Bustamante, art. 29.

[30] PILLET, 2 Traité 362, § 577 in order to have a law common to both.

[31] 3 JOHNSON 72. On various recent attempts see Note, Rev. crit. 1954, 235.

[32] Brazil: L. Introd. art. 10 § 2.
Sweden: Int. Est. L. § 9.
Código Bustamante: art. 152.

[33] Treaty of Montevideo art. 45 (b).

[34] Poland: P.I.L. art. 28 par. 2.
Austro-German Treaty § 1.
2 PONTES DE MIRANDA § 10.

[35] Most clearly, FALCONBRIDGE, Conflict of Laws 582, criticizing the Australian decision In re Williams [1936] V.L.R. 223 (*cf.*, DICEY (ed. 6) 509 n. 65) separates the question of succession and the question of status. 4 FRANKENSTEIN 359 ff., 381 ff., dissatisfied with the alternative dividing the

Where an inheritance law eliminates the appointment of an *"incerta persona"* it eclipses the personal law. Likewise, how could the personal law of a child decide alone whether it is an heir in a foreign succession? How can the law of the succession determine alone whether A is a legitimate child of B, both subjects of a different jurisdiction? If it is correctly stated that the existence of an heir is a requirement for his acquisition, established by the law governing succession, does it follow that his personal law is totally excluded?

No cumulation of the two laws, of course, is desirable. They have rather to divide their domains.

The law governing the individual succession—not the *lex fori* or the law applicable to family matters—defines the *category* of intended beneficiaries. This is usually not done by express exact description and only exceptionally by implicit exclusion of certain classes, as when English land law understands by "lawful issue" only children born in wedlock.[36] Thus, commonly what is meant by such terms must be explained from other sources. It is quite true that no state need have an adopted child forced upon it as heir.[37] But this is no answer to our question.

Sound construction of the rule of inheritance needs complementation by a relevant set of other rules, and certainly not by the domestic law of the forum. The question, thus, is whether the conflicts rule of the state whose law governs the succession or the conflicts rule of the forum ought to apply. As seen above, the answer supported by the great weight of authority is in favor of the view that the forum

literature, suggests a distinction between the calling by the law of succession and ability to receive the offered gift, which would be governed by the personal law.

[36] *Supra* Vol. I, p. 654.

[37] Hood v. McGehee (1915) 237 U.S. 611; Restatement §§ 142, 143; 2 BEALE 427 § 142; § 305.1.

apply its own conflicts rule. Unity of the personal law at the forum prevails over unity of the succession.

Illustration. Suppose two orthodox Greeks domiciled in Greece were married in Belgium before an orthodox priest, validly under Greek, invalidly under Belgian law. One, dying, left land in England, Belgium, France, and Germany. The status of marriage is determined [38] according to Greek law in all courts in which the rule *locus regit actum* is optional, except the Belgian, and in the latter according to Belgian law. This is done, although France and Belgium, by normal conflicts rule, and Germany, because of EG. art. 28, recognize that the *lex situs* governs succession in Belgium, France, and England. Likewise, irrespective of the *lex situs,* English and American courts consider the marriage invalid according to the imperative principle, *locus regit actum.*

As furthermore submitted in the first volume of this work with special regard to adoption,[39] there may be a considerable variance in defining the class of persons called to share in the inheritance. "Adoption" may mean anything between full status of legitimacy and mere educational rights. If "adopted" children are admitted without qualification by the inheritance law, the effect of adoption on succession for either party of the adoption is indicated by the whole law of the state that according to the conflicts rule of the forum governs the adoption.

The problem of capacity, as represented by the requirement of personal existence, is not different.

Notwithstanding the evident trend toward the law of succession, the simple contention that it governs capacity to take is theoretically untenable and practically inadequate. It has been said that the problem does not concern capacity in the true meaning at all, but a requirement of

[38] Vol. I, pp. 233-236.
[39] Vol. I, pp. 653-658.

the succession. But being a requirement, capacity is nevertheless what it is. Why should the personal law not serve as usual to determine status once and for all? And whether there is a person certainly concerns status. A person should not be deemed living for one succession and dead or having never existed for another, possibly at the same court and in a split succession to the same decedent. He should not be considered continuing his marriage and being a decedent simultaneously. The Restatement and a part of the modern writers are clearly wrong in extending the law governing succession to such points. Practically, how can the law of the last domicil of a testator decide whether a remainderman twenty-one years after the death or twenty-one years after another measuring period of life, is validly declared dead?

Whether a certain beneficiary or the member of a certain class of beneficiaries fulfills the required condition, should be decided by his own personal law.

Devolution to future persons, such as children not yet conceived, if permitted by the inheritance law, is best construed so that their right, vested or contingent or whatever its nature, is acquired at once but materializes only under the *condicio juris* of their future conception and birth.[40] This corresponds exactly to the laws to be applied. The origin of the right is in the death of the decedent, its realization in the birth of the beneficiary.

Of course, especially in this case, not much may be left to the personal law. Some codes, such as the German and the Argentine, declare in the course of their specific dealing with inheritance that a conceived child has capacity to

[40] Italy: Cass. (Dec. 14, 1945) Foro Ital. 1944-46 I 289; (Aug. 10, 1949) *id.* 1949 I 905; accord by the literature cited in the notes.

inherit but one not yet conceived has not,[41] while other codes regulate the matter as one of general capacity of persons.[42] This insertion of a provision into a subdivision of a code does not mean much. But the German Code makes it a principle that a *nasciturus,* after being born, is retroactively immediate successor of the decedent, and that nonconceived children can merely be substitute heirs from birth on (*Nacherben*). Where the structure of the system of succession thus necessitates an extension of its rules to foreign beneficiaries, a question of legal technique is involved. In the mentioned case, the Bürgerliche Gesetzbuch, § 2101, provides that an appointment of a person not yet conceived at the testator's death is to be understood presumptively as an appointment as substitute heir after the legal heirs; if this does not agree with the testator's intention, the appointment is void. These are clearly rules of succession.[43]

Insofar as the conflicts rules of the forum obtain, of course, one more difference in the treatment of the same succession appears in consequence of the variety of tests for the personal and family law. Additional differences of classification from forum to forum—e.g., whether legitimacy involves the status of the father or that of the child—however might be avoided.

(d) *Public policy* of the forum has been urged in countries excluding adulterine and incestuous children admitted by the law of succession.[44] Natural or not recognized children without such stigma have been allowed foreign-derived

[41] Germany: BGB. § 1923 par. 2.
Argentina: C.C. art. 3290.
[42] E.g., Switzerland: C.C. art. 31 par. 2.
[43] Both personal and inheritance laws support the New York decision assuming civil death of a man convicted for murder, Matter of Lindewall (1942) 287 N.Y. 347, 39 N.E. (2d) 907, annotated 17 St. John's L. Rev. 46; only the place of the conviction was discarded.
[44] France: Trib. Seine (Aug. 13, 1894) Clunet 1895, 95.

benefits superior to the French equivalent.[45] On the other hand, where the foreign law denies natural children any share, a domestic substitute has been allocated.[46]

(e) *Unworthiness.* Loss of benefits from an inheritance by tort is naturally in the domain of the law governing succession.[47] But public policy has been urged.[48] On the other hand, a Federal Circuit Court admitted an heir who killed the decedent and was convicted for manslaughter in Kansas, because the court found that the Oklahoma statute presupposed a killing in Oklahoma;[49] this, of course, is a singular method of applying the statute governing succession. Nor is there necessity to favor delinquents by cumulating both laws in principle.[50]

(f) *Corporations.* It should be even more certain than for individuals that the existence of corporations is determined by their personal law and the law of successions as such has nothing to do with it.[51] *Lex fori,* of course, may deny recognition to a foreign-created corporation.

For acquisition by will, however, the common trend to require the consent of both the personal law and the law of succession has been noted in Vol. I, pp. 164 f.[52]

2. Marital Property

The relationship between the marital property system applicable to the estate and the law of succession has been

[45] France: Trib. Seine (Dec. 23, 1924) D. 1927.2.21.

[46] France: Paris (March 22, 1924) Gaz. Pal. 1924.2.148 with the correction by BATIFFOL, Traité 660 par. 658.

Germany: *cf.,* Vol. I, p. 622 n. 63.

[47] 2 BAR 316; KAHN, 2 Abhandl. 211; 2 ZITELMANN 941; PILLET, 2 Traité 383; NUSSBAUM 351 n. 3; BATIFFOL, Traité § 665; SCHNITZER 495.

[48] *In re* Hall [1914] P. at 5.; WEISS, 4 Traité 579; DESPAGNET par. 365; and others.

[49] Harrison v. Moncravie (1920) 264 Fed. 776.

[50] Thus BATIFFOL 663 n. 1 and cited authors.

[51] "This is entirely undisputed today," 4 FRANKENSTEIN 386 and n. 136. See recently Swiss BG. (May 16, 1950) 76 BGE. III 60, 65.

[52] Add Guaranty Trust Co. of New York v. Catholic Charities (1948) 141 N.J. Eq. 170, 56 Atl. (2d) 483, 489.

explained earlier.[53] The discussion included the difficulties and hardships arising because the municipal statutes provide for the surviving spouse or the widow either by marital or by inheritance law and the conflicts rules combine the systems so that the survivor may happen to take both or none of the benefits. Recently a valuable study added a very comprehensive analysis of the American statutes.[54] But so long as the draftsmen of marriage settlements and wills and the legislators of statutes on matrimonial property or inheritance persist in ignoring the conflicts problems, little help is in sight.

3. *Donatio mortis causa.*

A gift by the decedent in his lifetime, made conditionally in case the donee survives him, has a hybrid nature. Accordingly, opinions are sharply divided on the characterization of this transaction: does it belong by its origin to contracts *inter vivos* or by its effect to acts *mortis causa?*

(a) *Act inter vivos.* The Anglo-American approach is in favor of construing the entire transaction as a contract *inter vivos.* In the English case of *Korvine's Trust,* the question was squarely asked whether a gift upon death by a donor domiciled in Russia of movables situated in England was a gift, subject to *lex situs,* or concerned succession, subject to the law of the last domicil. The court applied the English law of the situation,[55] in accord with the common opinion,[56] also in the United States, where the

[53] Vol. I, pp. 374-382.

[54] HAROLD MARSH, Marital Property in Conflict of Laws (1952) with discussion of the conflicts difficulties, at 130 ff., 225 ff.

[55] In re Korvine's Trust [1921] 1 Ch. 343.

[56] FALCONBRIDGE 565; see also GRAVESON (ed. 2) 214.

place of actual delivery is accentuated.[57]

However, a deeper analysis of the contract of donation and its performance by delivery, in view of the condition inherent in both acts, may show this classification oversimplified. A more recent decision applied the law governing administration:

In *re Craven's Estate* [58] a lady domiciled in England had shares and money in a bank in Monte Carlo, Monaco. On July 15, 1935, facing a dangerous operation, she told her son he should have the shares and bank balance transferred to his name, to keep them in case of misfortune happening to her. The son wrote on her behalf, and the bank acted accordingly. She died on the 20th. An expert witness stated in the law suit that under the French Code (article 931), in force in Monaco, a gift must be made in a public instrument, or by certain so-called "indirect" methods allowed by the practice, which were missing in the case. But the judge, approaching the question as an incident of collecting the assets in the course of the administration, resorted to English law. Hereunder the peculiar elements of a donation *mortis causa*—a special institution of common law—were assembled,[59] since the requirement that the donor must

[57] Emery v. Clough (1885) 63 N.H. 552; and the cases cited 4 PAGE 734 par. 1655. The case cited as contrary, Gidden v. Gidden (1936) 176 Miss. 98, 167 So. 785, in reality holds the gift ineffective because delivery of the negotiable warehouse receipt was omitted.

[58] Lloyds Bank v. Cockburn [1937] Ch. 423, [1937] 3 All E.R. 312, "better report" (FALCONBRIDGE 564) in 53 T.L.R. 694 (1937).

[59] See ATKINSON, Wills 156, and the older English cases in RANKING (ed. 18) 145 ff. It is a special institution distinguished from gifts *inter vivos* and still considered revocable, not only conditional on the precedent death of the donor. In France, art. 893 C.C. permitting only gifts *inter vivos* and testamentary disposition is referred by the courts just to the old law of revocable *donationes mortis causa* so that irrevocable gifts under the condition of survival of the donee are recognized. Cass. req. (May 14, 1900) D. 1900.1.358, S. 1905.1.438; COLIN ET CAPITANT, (ed. 3) (1929) 796. There is no hint in the report that the mother reserved revocation.

part with the dominion of the right was evidently fulfilled at the situs, Monte Carlo.

Falconbridge criticizes the application of the English characterization as gift *inter vivos;* Monaco law should have controlled the entire transaction.[60] In fact, the question was not one of administration but one preliminary to administration.[61] But what law governs a gift *inter vivos* is highly controversial. Mother and son were domiciled in England and British subjects; they met in Paris, because the mother had fallen ill there. English law applied properly to the contract. The transfer of the bank account and the securities in Monte Carlo was subject to the local law. Yet, although no valid cause for a transfer existed under that law, the cause did exist under the English law, sufficient for any court, also in Monaco.

In an analogous New York case, a resident of France gave a friend a check on a bank in New York, asking him to deliver the check to the drawer's sister in New York. The drawer died "before the check was presented for payment," though presumably after delivery to the payee. The surrogate considered that "the original transaction" was in France and the gift was void under French law.[62]

Indeed, the operative facts of the gift are determined by the local law. This is the law governing the obligatory contract of donating, if it can stand alone—as, e.g., a promise in notarial form,[63] made and accepted. The law of

[60] FALCONBRIDGE, *ibid.* HELLENDALL, 15 Tul. L. Rev., uses the case for confused ideas on characterization.

[61] HELLENDALL, 16 Can. Bar. Rev. (1938) 143 objects to FALCONBRIDGE that the question whether the assets were a part of the inheritance, regarded the English administration rather than the *lex situs.* This begs the question; see *infra* Ch. 70.

[62] *In re* Bloch's Est. (1945) 186 Misc. 105, 54 N.Y.S. (2d) 57. Facts and decision seem doubtful. See on the check phase *supra* Ch. 63 pp. 229, 233.

[63] Sloan Adm. v. Gertrude Jones (1951) 192 Tenn. 400, 241 S.W. (2d) 506. A third law, that governing marital property, has been held superior in King v. Bruce (Texas 1947) 201 S.W. (2d) 803; Texas spouses could not change community property into severalty by transferring to and disposing of it in New York.

the situs controls the type of the right granted and the transfer of possession and title and accordingly the performance that may be necessary to make the promise actionable. However, what is needed to exclude the asset from the inheritance is naturally an incident of the law of succession.

(b) *Act affecting succession.* The modern civil law doctrine [64] enumerates *donatio mortis causa,* or all transactions [65] conditioned on death, among the incidents of the law of succession. The Italian courts followed this development; although the Codes of 1938 and 1942 merely prescribed that the "national law" of the donor governed,[66] the Italian highest court in 1947 made it clear that the institution belongs to inheritance law [67] and therefore the national law as of the time of the donor's death is meant.[68]

In favor of this classification, it has been argued that the law of succession must control for the safeguard of the legitimate portion.[69] But in the modern systems special attack is provided against gifts damaging the funds available for forced shares, and these remedies belong to the law of succession irrespective of the characterization of gifts.

In fact, total enrolment of this type of benefaction into inheritance law goes too far. That not only the form,[70]

[64] France: PILLET, Traité § 945; AUDINET 5 Rép. 641 no. 25.
Germany: RAAPE 653; M. WOLFF D. IPR. (ed. 3) 229; Bundesfinanzhof (Sept. 20, 1951) IPRspr. 1950-51, 245 No. 111 (confused reasoning).
Colombia: 1 RESTREPO HERNANDEZ § 841.
Egypt: C.C. 1948, art. 17 par. 1 for the content and effect, art. 17 par. 2 for the optional form.
Hague Draft: art. 6, 7.
Código Bustamante: arts. 146 ff.
Scandinavian Convention: arts. 9-12.
German-Austrian Treaty, art. II §§ 5, 6.
[65] For the treaties see PLAISANT 263.
[66] Italy: C.C. Disp. Prel. art. 24; Cass. (June 9, 1941) Giur. Ital. 1941 I 1, 780; Trib. Torino (July 28, 1948) *id.,* 1949 I 2, 273.
[67] Cass. (Feb. 10, 1947) Foro. Ital. 1948.1.636.
[68] BARTOLOMEI, note *ibid.* Disp. Prel. art. 23.
[69] BATIFFOL 656 par. 654.
[70] France: Cass. (June 29, 1922) S. 1923.1.249.

but also the other requirements, are those of contracts, is certain; the gift may exist at least until the death. We conclude that it is in the province of the law of succession to decide whether the donated assets are parts of the estate. This law may prohibit a condition of survival in order to protect the form of wills more effectively, but if it recognizes perfected gifts, it is in the province of the law of property to state whether the gift is perfected.

Where land is the object and the law of succession establishes a separate system for immovables, the problem is simple.

Illustration. García de la Palmira, of Spanish nationality, a long-time resident of Paris, died, leaving French immovables and movables and immovables in Spain. His daughter claimed a quarter share, under a gift by the father in her marriage settlement made at a notary in Rome. The tribunal of first instance held the gift void under old Spanish law. The French Court of Cassation applied French C.C., article 1082, authorizing parents to dispose of their free portions in favor of children. "Succession as well as gift fall under the French *lex situs* (C.C. art. 3. par. 2)." [71]

4. Life Insurance

It depends on the contract with the insurer and, if this allows beneficiaries to be designated, on the use of such clause, whether the debt is a part of the estate or not. In case the debt is not created for the benefit of the heirs as such (not individually to them) or the personal representatives, the proceeds remain outside the succession.[72] From this rule, the New Zealand statute deviates, in barring the creditors of the estate from any life insurance.[73] On the

[71] Cass. Civ. (Apr. 2, 1884) Clement 1885, 77.
[72] E.g., OLG. Kolmar (Dec. 10, 1912) Els. LZ. 1931, 576.
[73] On the conflicts aspects, FALCONBRIDGE 573.

other hand, some fiscal laws extend estate taxes to all life insurance benefits, which is a deterrent but otherwise does not affect the normal rule.

A testator permitted to change the beneficiary may validly exercise this right at a time when he is a subject of a jurisdiction not offering this choice;[74] his right to change had "crystallized at the time of the issue of the policy." [75]

III. The Right of the State to Take Estates

In the municipal systems, usually the state—crown or fisc—or a body designated by the state may claim an estate that lacks any testate or intestate successor. But this right is based on two different theories. Either the state exercises the old *jus regale* of occupying ownerless property—*bona vacantia,* escheat; this is the doctrine of the common law, most American statutes, Austria, France, Belgium, and the majority of Latin-American countries. Or the last class in the order of intestate descent calls the state as heir, *jure hereditario,* as in Germany, Italy, Spain, Sweden, and Switzerland.[76]

The conflicts rules tend to follow the domestic characterization. Thus, in the first group it has often been taken for granted that every state should act according to its own principle. Notably in France, almost all courts[77] and

[74] *In re* Baeder and Canadian Order of Chosen Friends (Ontario 1916) 36 OLR 30 [1916] 28 D.L.R. 424.

[75] Falconbridge 573.

[76] In Brazil the former Introd. Law art. 14 left a doubt on the nature of the state's right, *cf.,* Bevilaqua (ed. 3) 398 f.; 2 Pontes de Miranda 307. The law of 1942 is silent but the common opinion is for the right to *bona vacantia.* This view has spread and finds some adherence even in respect to French and English law; see E. J. Cohn, 17 Mod. L. Rev. (1954) 381.

[77] C. Paris (Nov. 15, 1833) S. 1833.2.593, D. 1884.2.2; Cass. civ. (June 28, 1852) D. 1852.1.283, S. 1852.1.537; C. Paris (Jan. 20, 1923) Gaz. Pal. 1923.1.228; 10 Répert. 540 n. 72.

writers [78] have constantly permitted the French fisc to occupy heirless inheritances irrespective of the domicil or nationality of the deceased. This was suggested either by a formerly unconscious and later conscious characterization of the state's right according to the *lex fori,* or by an imperative application of the *lex situs.* Accordingly, assets situated abroad are not claimed at all.[79] But if "every court proceeds according to its own *lex fori,*" [80] another state may well occupy the assets of a foreigner, such as a Frenchman, and simultaneously appear as heir for foreign-situated assets of his own subjects when the situs agrees.

Even in view of this doctrine, it is certain that the estate must be without a successor according to the law governing succession and that the inheritance law of the forum as such is of no importance; [81] the domestic law determining the nature of the state right would be that of the situs of the assets.

With more effort to conciliate the two kinds of state rights, a widespread method makes the outcome dependent on the law applicable to the succession. If assets are in state X and the conflicts rule of X calls for the inheritance law of state Y, the law of Y appointing the state of Y (or any third state Z) as heir is obeyed in X. Only where the rule of Y is found to follow the doctrine of *bona vacantia,* would the forum in X prefer its domestic fisc.

[78] WEISS, 4 Traité 580; NIBOYET, Acquisition 256-281; MANUEL § 839; 4 Traité 291 § 1173; 777 § 1325; 3 PLANIOL ET RIPERT, by MAURY AND VAILLETON 193 par. 158 (still speaking of qualification by *lex fori* but also of the political and *regalia* nature of the territorial right); 10 Répert. 540, n. 73. Noteworthy the contrary opinion of C. Paris (Dec. 13, 1901) D. 1902.2.177 and COLIN, note *ibid.*

[79] App. Tananariva (Madagascar, June 30, 1909) Revue 1910, 881.

[80] PLANIOL ET RIPERT, 4 Traité (former ed.) § 158.

[81] See the exposition of LIPARTITI, L'acquisto delle eredità vacanti, 129 Arch. giur. (1943) 1 and § 9, against other Italian authors who contend that foreign public law is not included in the reference to foreign law of succession; on this point see also *supra* Vol. II, pp. 565 f.

In this manner, the English courts found that the Austrian code [82] and the Turkish law as of 1915 [83] shared the theory of the British law, and the Crown could take assets situated in Great Britain as ownerless. Again, by the same method, it was found that the Spanish state on the contrary is considered to be *ultimus heres*.[84]

This view has been followed in courts of both groups [85] and by Wharton.[86] True, the German theory implies that there is no *privilegium occupandi* as respects American assets left in Germany, which remain ownerless to anybody's occupation. But this would not be followed.[87] Nevertheless, extension of state power, however qualified, over the borders of another state encounters rejection in many cases. Such opposition may not only come from the state of the situs. A decision of the Reichsgericht dealt with the estate of a

[82] In re Barnett Trust [1902] 1 Ch. 847, Clunet 1904, 415.

[83] In re Musurus [1936] 2 All E.R. 1666, criticized 61 L.Q.R. (1945) 440.

Canada: In re Hole Est. (1948) 56 Man. L.R. 295; 27 Can. Bar Rev. (1949) 225.

[84] In re Maldonado [1953] 2 All E.R. 300; the method has been criticized by LIPSTEIN, Cambridge L.J. (1954) 22, because there is no difference other than in the name between the claims of the state.

[85] Austria: WALKER 923 n. 59.

Austria-Poland, Treaty of March 19, 1924; SATTER, Note to OGH. (June 8, 1932) 1 Giur. Comp. DIP. 301.

Austro-German Treaty of 1927, § 4.

Belgium, Cass. (March 28, 1952), Rechtsk. W. 1951-52, 1599, Rev. crit. 1953, 132, concerning Swedish law, states that the Belgian ordre public is not affected.

Germany: NIEMEYER, 13 Z. int. R. 38; NUSSBAUM 356; WOLFF, D. IPR. (ed. 3) 227 n. 4.

Italy: Min. Relazione to R.D. Oct. 26, 1939, n. 1586; Cass. Roma (Aug. 20, 1900) Annali giur. it. 1900, I 515; Cass. Torino (March 11, 1922) Giur. Ital. 1922 I 407.

Poland: IPL. art. 31.

Spain: 2 GOLDSCHMIDT 260.

Switzerland: N.A.G. art. 28; SCHNITZER 463.

Spanish-Greek Treaty of Sept. 22, 1903, art. 16: *lex situs* for immovables, national law of the decedent for movables.

Código Bustamante, art. 157.

[86] WHARTON § 603; see WOERNER §§ 134 ff.

[87] See M. WOLFF, D.IPR. (ed. 3) 57 § 13.4(a); *cf.*, RG. (May 16, 1940) 166 RGZ. 395.

Russian emigree who was stateless under the former German rule that stateless persons were subject to their former national law. The court discarded the Soviet inheritance law, terming it a noninheritance law, because this law restricted private succession so radically just to make place for succession by the state, closely resembling a right of escheat. A right of the situs was therefore denied, and the estate turned over to the normal order of distribution.[88]

Under these circumstances, a third thesis has appeared, to the effect that even in the jurisdictions construing their own privilege at home as a hereditary position, for the purpose of conflicts law the taking should be restricted to assets found in the territory. Following this lead, the Hague drafts recognize the national law of the deceased merely in favor of private beneficiaries, excluding the state and the corporations designated by it.[89] This approach saves examination of the nature of a foreign claim and eliminates claims practically defeated by an opposed *lex situs*. A recent American suggestion is in virtual agreement.[90]

In the relationship among common law jurisdictions, of course, only the question which state may exercise the right of escheat arises, and its decision depends on the situation of the assets.[91]

[88] RG. (May 16, 1940) 166 RGZ. 395.

[89] Hague draft convention on succession 1904, art. 2; 1928, art. 4. This model has been followed in some recent drafts, among them the Rumanian Civil Code art. 38 (the Code never entered into force). However, here the case is included where the relatives sharing under the national law of the deceased are not endowed with intestate rights by the Rumanian law. This seems a curious anticipation of Soviet mentality.

[90] JOSEPH MORSE, "Characterization, Shadow and Substance," 49 Col. L. Rev. 1027, 1038.

[91] Connecticut Mutual Life v. Moore (1948) 333 U.S. 541.

Chapter 71

Acquisition of Inheritance Rights

I. Devolution

1. Principle

MUNICIPAL Systems. The doctrine of common law contains two different systems of transmitting the decedent's assets. As the principle has remained in most jurisdictions of the United States, real estate is vested in the "heirs" from the decedent's death, whereas personal property first goes to the probate court, which in turn confirms or appoints the personal representative; only after administration is finished is the net surplus distributed to the beneficiaries.

In England since the Transfer Acts started in 1897, real property shares the treatment of the rest of the estate. Some American statutes have adopted the same regulation; most statutes provide the personal representative with important powers of sale, possession, income, or distribution of land, without disturbing the direct passing of the title to the heirs.

However, the variety of the statutes is so great and the desire for more uniformity so strong that the Model Probate Code could state the principle, a person's real and personal property passes to the persons to whom it is devised by his last will or it devolves by intestate succession, though subject to the possession of the personal representative.[1]

[1] Simes, Model Probate Code § 84.

In the ancient family organization, by the death of the father and the leader, the descendents who were thereby freed from his power—*sui heredes,* γνήσιοι, etc.—became actual instead of latent co-owners. When the property system hardened, this heirship was transformed into automatic—*"ipso iure"*—succession to the decedent's ownership. The pure spirit of feudal law would have insisted on the exclusive effect of new enfeoffment.

This principle, known in medieval and dynastic applications under the slogans: *le mort saisit le vif,* or *le roi est mort, vive le roi,* survives in the French group of legal systems principally with respect to the oldest group of "heirs," those *ab intestato,* and in the German Code and its group as the general rule, because it is the simplest method of transfer.

In Rome successors outside the "house," whether intestate or appointed by will, the *heredes extranei,* including collateral relations, did not acquire *ipso iure.* The beneficiaries were "called" (*delatio*), and had to acquire the legally offered position by acceptance, viz. formal (*cretio*) or informal express declaration (*aditio*) or conduct (*pro herede gestio*). This is in substance the general system in many countries.

Conflicts rule. What system governs the transfer of an estate, according to a view commonly taken for granted, depends on the law governing the succession. This is so universally settled that attention is required only by an incisive exception, that French decisions endeavor to consolidate. They dwell on the necessity of exempting a series of incidents from the law of succession and submit them to the law of the situs.[2] This discussion involves mainly the

[2] Most informative on the division of opinions in France in recent times, has been to me the subtle (though by no means convincing) monograph: ROBERT DENNERY, Le partage en DIP (Paris 1935). NIBOYET, who had much in common with the emphasis on territoriality, seems to have gained a critical and constructive view in his Treatise, vol. 4.

transfer of title and possession, undivided ownership of coheirs and partition, but affects fundamentals. This theory, indeed, exercised through the French delegates to the Hague Conference of 1928, influenced the fate of the Hague convention draft. Although the scope of the draft, article 1, does contain "partition," to the regret of some present French authors, everything concerning the practical handling of the inheritance or exceeding the ascertainment of the beneficiaries and their participation, especially all relations with the creditors or even all "third persons," was excluded and left to the extremely varied national systems. This would have been understandable in part, if Anglo-American doctrines had been taken into decisive consideration; as it was, an inter-European codification decapitated itself for the sake of a questionable theory.

Let us recall here merely the elementary phase of the problem.

It is no exception to the principle of the law governing succession at all that *lex situs* is itself the *lex successionis* in the United States, France, etc. Most decisions applying *lex situs* fall into this category.

In the case of movables, almost all systems agree in gathering them into one succession, whether determined by domicil or nationality of the decedent. What sense would this make, if the unity were to yield wholly to the *lex situs* for such important questions as title and possession? Is it not enough that the *lex situs* has final determination of the permissible kind of rights *in re* and the publicity required for their acquisition?

This important question will have to be faced in the following discussions.

2. Transmission

(a) *Title.* Apart from the case of coheirs, there is complete universal agreement that the title of heir as *successor* depends upon the law governing succession, be it *lex situs* or *lex domicilii* or *lex patriae.* It is likewise certain that his ownership in the individual tangible and intangible assets is conditioned by the law of situs in the two respects that the local law defines what rights the deceased owned and whether they are susceptible of being transferred to the heir. Of course, also publicity measures, such as registration, may be needed in relation to third parties.

But if under the law of succession the title vests in the court, should the situs ignore this and impose its own rule that the heir is owner; or vice versa? This question is fortunately quite generally answered in the negative. In many, not even published, cases it has been held, as a matter of course, on the Continent that during an English or American administration the beneficiaries were not owners, and, hence, not entitled to sue or apply for registration as proprietor of Italian land or a German automobile.[3] When at the end of the first World War an Italian national, heir to an Austrian inheritance, had not yet accepted and received judicial authorization according to the Austrian law, he was not admitted to sue the Austrian state at the Mixed Arbitral Tribunal.[4]

On the other hand, an heir in a French, German, or Italian succession has often, though perhaps not always,

[3] This does not mean that a European universal legatee in an American succession is considered in all respects as nonowner. The question of the time when he owes death duties in France has been discussed in Cass. req. (Nov. 19, 1941) S. 1942.1.129 and learned note by BATIFFOL (from which I dissent, however); German courts grant him a certificate of heirship, *infra* Ch. 71.

[4] TAM. Italo-Austriaco, Norlenghi v. Austria, 7 Recueil dec. Trib. Arb. Mixt. 266. On a dissident theory that common law refers to the *lex situs*, *infra* Ch. 71.

been recognized by American or English courts as "having title to and right of possession of the assets vested immediately" in him, as well as entitled to sue "on his own behalf and not in a representative capacity." [5] Or he has been appointed as ancillary administrator.[6] Even though a beneficiary does not obtain full property, he may acquire a "fixed and vested" [7] hereditary right; it is elementary that this depends on the law governing succession. For this and other reasons it has been justly urged that American banks and corporation registrars ought not always to insist on the appointment of an ancillary administration for allowing them to deliver deposits or transfer stock, respectively.[8]

(b) *Possession (seisin).*[9] According to the French and other civil codes, certain heirs,[10] and under the German and other codes all heirs,[11] by force of law succeed by the death of the decedent to the possession he had.

On this point, French and Italian opinions are clearly divided into two groups, one applying the law of the suc-

[5] England: Re Achillopoulos [1928] Ch. 483.

United States: *New York:* The Sultan of Turkey v. Tiryakian (1915) 213 N.Y. 420, 108 N.E. 72 (Turkish law); Ullmann v. Ullmann (1928) 223 App. Div. 636, 229 N.Y.S. 176 (German law); Roques v. Grosjean (1946) 66 N.Y.S. (2d) 348 (French law). *California:* Anglo-California Natl. Bank of San Francisco v. Lazard (CCA 9, 1939) 106 F. (2d) 693, 698, involving Californian land, with precedents.

[6] *Infra,* Ch. 71.

[7] Rowe v. Cullen (1939) 177 Md. 357, 9 Atl. (2d) 585.

[8] OPTON, "Recognition of Foreign Heirship and Succession Rights to Personal Property in America," 19 Geo. Wash. L. Rev. (1950) 156, 163. In Roques v. Grosjean, *supra* n. 5, the demand for ancillary letters is called untenable.

[9] GIAMBATTISTA MAZZOLINI, L'apprensione dell'eredita nel DIP., (Pavia 1930).

[10] *E.g.,* France and Belgium: C.C. art. 724; Italy C.C. art. 458; Netherlands: C.C. art. 880.

[11] *E.g.,* Germany: BGB § 857; Switzerland: C.C. art. 560; Venezuela: C.C. art. 995: very clearly in par. 2: If someone, not an heir takes possession of the hereditary assets, the heirs are considered ejected in fact, and may exercise all respective actions.

cession [12] and the other the *lex situs*.[13] The latter and more recent view is based on the power of the territorial law to regulate the legal situation of property. Although a French decision of 1939, speaking of the indivisibility of seisin, recognized the last domicil as governing,[14] the highest court invoked in 1941 the principle of territoriality.[15] If this is true, a foreign succession can never create seisin in France, nor a French succession possession in any foreign country. French immovables, of course, are out of the question.[16] For the other cases, reconciliation of views has been sought by the requisite that the consent of the *lex situs* is needed in addition to the law of the succession [17] or, more specifically, the foreign inheritance law should be recognized in the cases where the French Civil Code grants seisin.[18] Thus, a German testate heir could not claim seisin, while a German heir *ab intestato* could.

The entire discussion suffers from a confusion. In the German doctrine, it is understood that § 857 BGB. states a "succession" of the heir or heirs to the possession in a strictly limited sense.[19] It is the legal position of the de-

[12] France: WEISS, 4 Traité 594, 605; 4 PLANIOL ET RIPERT by VIALLETON ET MAURY 290 § 222; Trib. Seine (Dec. 8, 1924), Clunet 1925, 711, Revue 1925, 76; and NIBOYET, 4 Traité 864 f. against his former opinion.

Italy: Cass. Firenze (Nov. 17, 1874) Annali Jan. 8, 483, La Legge 1875 I 3; PACIFICI-MAZZONI, Instituzioni (ed. 5, 1925) 509; STOLFI, 1 Dir. Civ. (1919) 727 and n. 4.

[13] France: CHAMPCOMMUNAL, Successions 381, 384; PILLET, 2 Traité 386, 586, 449 § 618: everything concerning possession is territorial; LEREBOURS-PIGEONNIÈRE (ed. 6) 409 § 362, § 363, § 370.

Italy: FIORE, Elementi DIP. 526 and in Giur. Ital. 1901 IV 193 ff.; PACIFICI-MAZZONI *ib.* (*supra* n. 9); FEDOZZI, 4 Digesto Italiano 836; DIENA 218; GIAMBATTISTA, *supra* n. 5, 10 calls it the majority opinion; CAVAGLIERI, Lezioni (ed. 2) 258.

[14] Trib. Seine (Jan. 4, 1939) D.1939.2.17.

[15] Cass. req. (Nov. 19, 1941) S.1942.1.129, *cf.*, LEREBOURS-PIGEONNIÈRE (ed. 6) 411, 2°.

[16] Cour Paris (Oct. 25, 1952) Gaz. Pal. 1953.1.190.

[17] BATIFFOL, Traité 674 § 671.

[18] ARMINJON, 3 Précis (ed. 2) 149 § 135.

[19] STROHAL, Erbrecht 63 ff., 96 ff.; M. WOLFF, Sachenrecht 121; STAUDINGER, Komm. § 857 II.

ceased at his death, based on his physical or constructive possession of the assets, that passes, not the possession of the particular assets as such. The heir has the actions for recovery acquired by the deceased in his lifetime; he may take possession and sue any one who takes possession of the assets without his consent; the tangible assets so taken are in the category of things "taken away" which cannot be purchased by third persons in good faith; that is, the purchaser does not acquire a good title, although he does acquire good possession. The heir also enjoys the easier role as defendant in law suits affecting property. But between seisin and possession in the meaning of property law is a neat difference.

Some modern French civilists have admirably perceived a quite analogous distinction between *saisine* of a "natural *héritier*" and physical possession of the assets, "although the contrary is often said." [20] The heir may take possession and may sue others who do so; he may especially bring possessory actions. His position rules the estate rather than the components, the particular assets.[21]

From these facts it follows that the law of succession *alone* determines whether an heir has seisin. True, theoretically, consent by the *lex situs* is necessary to his protection; but why should it not be given?

That French courts should require a German widow, though not children, to request *envoi en possession* [22] would be scarcely worthwhile; with better reason it has been proposed to enlarge the scope of C.C. art. 724 to include all universal successors. Again, the law of the situs determines *alone* the cases of actual possession *("de fait")*.

It would seem that the above submitted distinction is

[20] MAURY ET VIALLETON in 4 PLANIOL ET RIPERT 262 § 196.
[21] BALLADORE PALLIERI, DIP. 176 f.
[22] Thus 4 FRANKENSTEIN 324, following the French doctrine.

suitable also to Anglo-American law, inasmuch as the personal representative (and in most American jurisdictions the heir to land) acquires *ipso jure*—in the words of the British Administration Act—"the same right of action as the deceased would have had alive . . . for any . . . right in respect of his personal estate," [23] (or of his land).

(c) *Specific Legacy*

Assuming that a Frenchman domiciled in New York is bequeathed by specific legacy a violin stored in a German safe, what law determines the nature of his interest? According to American law, a legatee has no right until the court order of distribution, and before this time his action at law needs the assent of the administrator; [24] under French law he is owner by the death (*legatum vindicationis*); [25] German law grants him merely an obligatory claim against the heir.[26] The prevailing opinion is that the effect of French law of succession is reduced in German territory to an obligation until some act of delivery intervenes.[27]

3. Acceptance and Repudiation

The law of succession determines whether acceptance is required to complete the acquisition, or renunciation is needed to annul it. An heir or a next of kin in the narrow meaning of the common law cannot even disclaim his inheritance, although he may lose or part with his share by other events. Devisees and legatees may renounce, except in certain jurisdictions when their creditors would be defeated.[28] Why the rule is different for descent by will

[23] Administration of Estates Act, 1925, sec. 26 (1).

[24] WOERNER § 561, 1910.

[25] France: C.C. art. 1014.

[26] BGB. § 1974; on the interpretation of legacies so as to satisfy the *lex situs*, see NUSSBAUM 301 n. 3. *Lex situs* determines the content of the devised right, RG. (Oct. 2, 1931) IPRspr. 1931, 175 No. 88.

[27] BGB. § 2174.

[28] ATKINSON, 3 Am. Property 629; § 14.15; 26 C.J.S. 1073 § 64 and Supp.

is explained by historical arguments, but is maintained only because it exists.[29] Also in China and Japan, as in ancient Rome, for religious reasons the "necessary" heirs cannot disclaim.

The inheritance law determines the time limits[30] and the address for express declarations[31] of acceptance or renunciation, as well as their form.[32]

However, this application not infrequently encounters rather unsatisfactory local laws with presumptions for acceptance, short time periods, heavy sanctions for silence, which may burden beneficiaries in foreign jurisdictions even without their knowledge. American statutes ordinarily have no time limits or allow a reasonable time; but an evident hardship occurs for instance when a five-year period of escheat runs against foreign heirs without their knowledge.[33] The case where a person became an heir by omitting renunciation and thereby incurred unlimited liability for debts has been noted in Germany.

Illustration. A laborer domiciled in Hamburg died without an estate; under the law of Hamburg the father in Holstein was *ipso jure* heir and could renounce only within six weeks, which elapsed. The father was sued by the guardian for alimony which his son promised to pay to an

[29] Bostian v. Milens (1946) 239 Mo. App. 555, 193 S.W. (2d) 797, 170 A.L.R. 424. As the annotation on p. 439 observes, the rule against renunciation is not adopted in Louisiana, Quebec, and Puerto Rico.

[30] In civil law, PILLET, 2 Traité applies the law of succession to these "modalities of the option," as condition of the devolution. In the codes, the time periods are spelled out; at common law renunciation, where permitted, may be made in reasonable time, 4 PAGE 1408.

[31] Usually the court at the last domicil of the deceased.

[32] *Cf.*, 4 PAGE 1406. If it is sometimes said that the formalities are determined by the law of the place where the acts are done, *e.g.*, SAVATIER 308, 441, the meaning must be the same.

[33] In re Apostolopoulos' Est. (1926) 68 Utah 344, 250 Pac. 469, 253 Pac. 1117, 48 A.L.R. 1322. Only where a treaty prescribes actual notice to consular authorities, is there prevention. The Supreme Court declares public notice to be adequate. Standard Oil Co. v. New Jersey (1950) 341 U.S. 428, 434.

illegitimate child. The court in Kiel held it "unthinkable that so long as the defendant, a subject of the forum, had not interfered with the inheritance or otherwise submitted to the foreign jurisdiction, he could be held liable for the debts." [34]

This decision followed precedents and a note by Bar.[35]

It has been suggested that the law of succession in such matters should be entirely excluded in favor of the personal law of the beneficiary,[36] but this would unduly disturb the system. Protection by public policy seems to be the only remedy so long as many inheritance laws are unmindful of the international complications.

The Hague Draft following a different suggestion omitted acceptance and renunciation from the incidents controlled by the law of succession (art. 1) for the reason that these acts "may exercise influence on third persons." [37] This confused idea, again, stems from the destructive belief in the *lex situs* as the great instrument of territorialism.

Another example of the present discord is caused by the reasonable rule that renunciation should be sent to the authority at the last domicil of the deceased. In the case of a Dutch testator, domiciled in Germany, the difficulty arose that Dutch law, governing the succession, prescribed that the declaration be directed to the court of the last domicil, whereas the German courts, under another well-meant principle, declined any jurisdiction in foreign-governed successions.[38]

Some discussion has turned around the French provision

[34] OLG. Kiel (Oct. 23, 1884) 40 Seuff. Arch. (1885) 257, accord OLG. Hamburg (Dec. 17, 1889) 1 Z. int. R. 55, Clunet 1893, 197.

[35] 2 BAR 343 n. 9: the decision of the Prussian Obertribunal erroneously cited by BAR and the courts probably is that of the Plenary, of Jan. 6, 1851, 20 Entsch. OT 10, insisting on the knowledge of the beneficiary of the devolution.

[36] 4 FRANKENSTEIN 535.

[37] Actes de la Sixième Conférence, 1928, p. 80.

[38] RABEL, Fachgebiete 178 ff.

that a minor heir may accept a share only under the benefit of inventory, i.e., limiting his liability for debts to the value of the estate inventory. It seems now agreed that the personal law fixes the time of full age, but that the French rule involves only French-governed successions.[39]

A future Conference would do well to search for implementation of the conflicts rules by international co-operation instead of cutting out an essential part of the subject.

II. Agreements on Inheritance Rights

1. Release to Ancestor

Distribution of the paternal estate among the sons (*divisio paterna*) [40] was a frequent event in ancient times when the father had reached the age of retirement. Entirely normal was the dismissal of a daughter from the house on marriage, a dowry replacing her share in the family property. A subsequent usage was the analogous emancipation of male descendants. There exists still a special institution in some Latin systems allowing pacts between an ancestor and a descendant releasing the latter's expectancy; [41] such agreements are similarly recognized in most states of the United States,[42] although in some jurisdictions the expec-

[39] For particulars see 10 Répertoire 514 no. 99; Charron 168; see also Fischer, 64 Z. Schweiz. R. at 139-141. It has been concluded that a French minor cannot accept any foreign succession where the law governing it does not permit just this means of limiting liability; Maury et Vialleton in 4 Planiol et Ripert 324 n. 3 § 240; *contra* ("absurd") 2 Pontes de Miranda 256.

[40] For antiquity see Rabel, Elterliche Teilung, in Festschrift 49. Versammlung deutscher Philologen (Basel 1907); for Italian history, Vittorio Polacco, Divisione operata da Ascendenti fra Discendenti (Padova 1884).

[41] *E.g.*, Venezuela: C.C. art. 1126 ff.

Spain: C.C. art. 833 in case of Mejora.

The provisions of French C.C. arts. 1078-1080, "Pacte d'ascendant," are distinguishable.

[42] Atkinson, 3 Am. Property 594 § 14.12 who notes that no cases are known relating to release by a collateral heir.

tancy cannot be released and the gift is treated as advancement on account of the hereditary share.[43]

These are exceptions either to the prohibition of agreements of future inheritance or to the requirement of consideration. In the German group, however, waiver of expectancy is allowed by transaction with any testator.[44]

In the case of marriage settlements in England, a release declared to the ancestor seems to be regarded simply as part of the contract *inter vivos* and valid as such.[45] Elsewhere, however, permission or prohibition belongs to the law finally controlling the estate,[46] which certainly is the correct characterization. An old Italian decision conformed to this conception in the face of the Italian prohibition, but emphasized that the daughter's release occurred in a marriage contract made in Zara, Austria, between Austrian parties, and the will declared Austrian law applicable;[47] perhaps for a daughter of Italian nationality the issue would have been different on grounds of public policy.

2. Release of Expectancy in General

In the late Roman law, *pacta de hereditate futura* were void in view of the exploitation of spendthrift heirs by speculators. This tradition was followed by Pothier. In the French revolution, renunciation of a future inheritance was prohibited as offending public honesty, and in the

[43] 26 C.J.S. 1085 § 62.

[44] See *infra* n. 52.

[45] BRESLAUER 80 cites old cases.

[46] *Cf., infra* sub 2.

[47] Italy: C.C. (1865) art. 954; Cass. Firenze (Dec. 5, 1896) Lanza v. Purkardhofer, Sirey 1897.4.17, Clunet 1897, 503 (Fedozzi). *Cf.,* (Senator) AUG. PIERANTONI, "La rinuncia alla successione nel DIP.," Rivista universale di Giurisprudenza e Dottrina, vol. 10, fasc. VII (Roma 1896); FEDOZZI, 22 Digesto Ital. IV 837; CONTUZZI, Dir. ereditario 486.

Code [48] as a means to prevent renunciations by daughters or younger sons under moral duress and to maintain equality among the relatives.[49] Any contracts of third persons between themselves without [50] the assent of the testator are commonly disapproved. In Louisiana, a most radical variant prohibits all releases and agreements on future inheritance even with the assent of the testator.[51] Other statutes recognize the validity of releases and other anticipated dispositions of future shares,[52] contrary to the French group, provided that there is no usury or lesion evident.

In the latter group, no obstacle exists to the application of the law of succession.[53] In the courts that consider an agreement of such sort not necessarily immoral, the decision should be the same. There seems not to be even a question on this point in the United States, as will appear presently.

3. Promise of Testamentary Disposal

In the larger part of the civil law, the Roman principle persists that *ambulatoria enim est voluntas testatoris;* the testator must be free, until the last moment of his capacity to make a will, to dispose of his property; the testament

[48] France: C.C. arts. 791, 1130 par. 2, 1600.
Italy: C.C. (1865) art. 954; (1942) art. 458.
Sweden: Law of April 25, 1930, with qualifications.
Spain: C.C. art. 816, 655.

[49] LAURENT, 9 Droit civil 418 ff.

[50] Thus Switzerland, C.C. art. 636.

[51] La. C.C. arts. 978, 1887, 1017; Alexander v. Gray (La. App. 1938) 181 So. 639.

[52] Austria: A BGB. 551 *cf.*, § 538; Germany: BGB. 2346, 2352; Switzerland: ZGB. art. 195.

[53] Czechoslovakia: IPL. 48 par. 2.
Denmark: S.C. Copenhague (June 25, 1902) Clunet 1904, 436, 15 Z. int. R. 605, Revue 1910, 508.
Germany: RG. (Jan. 29, 1883) 8 RGZ. 145; OLG. Stuttgart (May 19, 1893) 4 Z. int. R. 567; 2 ZITELMANN 966, 171; 4 FRANKENSTEIN 370; M. WOLFF, DIP. R. (ed. 3) 228 n. 1.
Switzerland: SCHNITZER 473.
Transvaal: Berman v. Winrow (1943) T.P.D. 213.

therefore is his "last will." In sharp contrast to this conception, common law has opened a vast domain to contracts whereby a person undertakes to make or not to make certain testamentary provisions.[54] The action for breach of such a contract arising at the death of the promissor directly affects the distributary shares. The modern state statutes, however, eliminate at least oral promises of this kind, which raise doubt and litigation, if opposition to the old custom does not go further. These laws are now really in conflict.

A recent case that went through all New York courts [55] dealt with an oral promise of the testator not to change his will involving certain stock. The agreement was valid at the place of the alleged contracting in Florida, but was held invalid under c. 31, § 7, of the Personal Property Act of New York. With a former decision, the fundamental public policy of this statute to prohibit oral bindings that "threatened the security of estates" was stressed. However, New York was the state presiding over the estate. What was explicitly, but only secondarily stated by the Court of Appeals that the domicil was and had been for a long time in New York, should have been the decisive ground. With the present division of statutory rules in this country, there is not much room for intransigent policy. In addition, the Court used as a different approach the proposition that New York was the place "of performance" for the agreement not to change the will. Those mechanical connecting factors generate curious ideas! The contract may well be considered centered in New York for the reason that the testator had merely temporarily sojourned for recovery in Florida and both parties lived in New York.

[54] 68 C.J. 565 ff. §§ 187 ff.; 17 C.J.S. 646 § 263.

[55] *In re* Rubin's Will, Rubin v. Irving Trust Co. (1953) 305 N.Y. 288, 113 N.E. (2d) 424, affirming App. Div. 113 N.Y.S. (2d) 70; the decision provokes once more the question of the scope of the law of administration, see *infra* Ch. 73.

In civil-law countries distinctions are made, as in a French case:

Frederic Meyer, of Hamburg, lived in Bordeaux from 1805 to his death in 1878, but supposedly remained a non-domiciled German, as also his son. When the latter married, the father promised in the marriage settlement before a notary that he would not give any advantage to his other children to the detriment of his son. The Court of Cassation held the promise valid, because it conformed to the French principle of equality, even though it might be considered immoral in Germany. Hence the agreement prevailed over the subsequent will that was governed by German law.[56]

This is exactly how an American court evaluates the breach of a joint reciprocal will in terms of damages.[57]

As a result, it would seem that a valid contract binding the testator under its "proper law" should be respected even in courts taking a strict view of freedom of testation insofar as a reasonable construction of their statutes permits.

III. Advancements (*collatio bonorum*)

Again, it is settled in principle that the law of the succession determines whether and by which method a gift made by the deceased in his lifetime to a beneficiary must be brought to account by him.[58]

In fact, the problem concerns the collection of the distributable estate and the access of the heirs to it.

[56] Cass. req. (Jan. 9, 1882) D. 1882.1.119.

[57] *Supra.*

[58] France: Cass. req. (June 28, 1882) Clunet 1882, 415; Weiss, 4 Traité 688; Pillet, 2 Traité 400 § 596; Arminjon, 3 Précis (ed. 2) 160 § 144 and the great majority.
Germany: OLG. Hamburg (Jan. 24, 1882) Hans. GZ. 1882 B Bl. 33 Nr. 27.
Italy: 4 Fiore 457; Contuzzi, Dir. ered. 543.
Hague Draft, art. 1.
Montevideo Treaty, art. 50 par. 1.

Of course, the law governing the gift—*e.g.*, the law of the parent-child relation or of an obligatory contract—imposes its own conditions for validity and effects; these may constitute a duty or a dispensation from a duty to account for the gift at the death of the donor. Therefore, the Hague drafts (1929, art. 2) insist that where the gift was originally exempted from collation under its own law, it should not be considered an advance on the hereditary share, even though the law of the last domicil were to the contrary; but this unratified rule is not beyond doubt.[59]

The very elaborate but much divided statutory doctrine of advancement in the United States,[60] apparently unknown outside this country, has taken no position in conflicts matters. It is evident only that, in the absence of statutes defining expressly what is to be considered an advancement, courts are inclined to look to the intention of the transferor at the time of making the transfer.[61]

Correspondingly, it certainly may be said with the civilian doctrine that where a rule of the law governing a gift or an acknowledgeable intention of the donor implies a duty of adjustment, this is binding so long as the donor by his will, or the law of the succession in his place, does not change the situation. The law governing the succession has the nearest claim to dominate [62] and the law of the transaction

[59] The case of French Cass. civ. (March 16, 1880) D. 1880.1.201, S. 1880.1.174, Clunet 1880, 195 contributing to this rule, involves the special case of the annexion of Savoy, an intertemporal problem independent of the donor's intention, and does not warrant broad generalizations.

[60] WOERNER (ed. 3) 1879; ATKINSON, 3 Am. Prop. 14.10; 26 C.J.S. 1164 93-115.

[61] 28 C.J.S. § 98 n. 94.

[62] France: Cass. (Aug. 8, 1921) Clunet 1923, 108: An Alsatian wife having made gifts to her husband under the French Code died under the German Code; the latter, not imposing a duty of accounting, governed.

Italy: Cass. Roma (Jan. 4, 1902) Foro Ital. 1902 I 558. A Turk made a gift to his son, but died as an Italian. The Italian law imposed accounting, despite the Turkish law.

inter vivos applies only in virtue of a renvoi to it.[63] The same law determines how far the intention of the donor and testator is decisive.[64]

Courts do have some difficulty in reconciling the two laws, but the clue should lie in a reasonable interpretation of the law of succession.

Illustration. In an old case, a Swiss widow, remarrying a Frenchman, obeyed a statute of the canton of Bern, and transferred a part of her property to her children. French law governed her estate, but because article 843 C.C. speaks only of "donations" to be brought to *"rapport,"* the Paris court denied the advancement,[65] a literal construction instead of possibly better reasons.

If, against the present usual method, the contribution to the estate must be made in nature, *e.g.,* because of a stipulation by the donor, the rights of third persons will be protected by the *lex situs.*

Trouble starts when there is more than one law of succession, as in the United States in the case of land, when the land is made subject to adjustment at all.[66]

IV. Partition

1. Coheirship

By the various systems, the several successors to a decedent are made either co-owners of the assets *pro diviso* (*pro rata parte*) as for instance in Roman and French law with respect to debts due to the decedent (*nomina sunt*

[63] Such renvoi is assumed by Pillet, 2 Traité 381 under the theory of vested rights.

[64] This, of course, does not exclude the dictum of Weiss, Traité 688: only the giver's personal law at the time of the gift can control the interpretation of his intention, irrespective of the situs.

[65] Cour Paris (Jan. 7, 1870) S. 1870.2.97.

[66] *Infra* Ch. 72.

ipso jure divisa),[67] or joint tenants as under German law [68] and in certain cases in the United States, entitled or not to dispose each of his part in the estate as a whole or only by majority or unanimity.

This structure of the shares is commonly considered a succession problem.

The new French territoriality theory, however, subordinates the question to the *lex situs* and a Report of the Sixth Hague Conference states that partition pertains to the law of succession covered by the draft only so far as it concerns the coheirs *inter se*. As an illustration, Basdevant invoked in the Hague Conference the much discussed agreement of coheirs respecting movables in France and Italy, that they should remain undivided through ten years; the then Italian Code (art. 984) permitted this period, the French (C.C. art. 815) only one of five years.[69] Why this case should prove the necessity of the *lex situs* for the relationship among coheirs or for partition has never been demonstrated.[70]

Clearly, the law governing succession is indispensable for determining not only the distributive parts but also the persons replacing the deceased in the ownership of the tangible and intangible assets and who can dispose of them between the decedent's departure and partition. Thus, with-

[67] C.C. art. 1220; formerly it was thought that this article applies before partition and art. 883 (*infra*) afterward; now art. 1220 is referred to third persons and art. 883 to the internal relationship. 3 COLIN ET CAPITANT (ed. 9) 300 § 535; MAURY ET VIALLETON in 4 PLANIOL ET RIPERT 754 § 655.

[68] BGB. §§ 2032 ff.

[69] Actes de la Sixième Conférence (1928) 88f. and Rapport de la Troisième Commission p. 297; also Actes de la Cinquième Conférence, Rapport p. 271, no. 1.

[70] *Cf.*, 2 BAR 348. Trib. Seine (May 25, 1935) Clunet 1936, 875 and the older authors (WEISS, 4 Traité 683 and others) invoke public policy; in 10 Répert. 101 No. 11 both *lex situs* and *lex successionis* are considered applied. BATIFFOL 683 contends that the French conception of undivided co-ownership (indivision) requires the limitation on its duration (just to five years?). BIBLIONI, Anteproyecto 252: "La divisione forzata es el disastro."

out hesitation, the Mixed Arbitral Tribunals followed this law in order to ascertain the nationality of the persons entitled by it.[71] It is difficult to see why the old condition for a real right, namely, that it needs recognition, though not creation, by the *lex situs,* should not suffice again.

Is this not also true of real subrogation? In France itself, the Court of Cassation in plenary session has held that where land or an estate is sold, the debt of the price replaces the land in the mass of the estate as an "effect of succession," for the purposes of jurisdiction and advancement.[72] Real subrogation in fact is a phenomenon of a law governing an estate,[73] whereas the *lex situs* claimed here [74] governs merely the individual objects.

2. Partition

(a) *Voluntary partition.* The civil law systems distinguish three kinds of dissolution of a coheirship: by agreement, by a nonlitigious judicial act, or by judgment in contentious proceedings. Division by contract is more usual in Central Europe than in the Latin countries.

In a widely noted decision of 1932, the French Court of Cassation recognized freedom of party disposal for a voluntary partition among the heirs of the Duke of Bourbon concluded before the Grand Marshal of the Vienna Imperial Court with discrimination against the female sex and

[71] TAM. Franco-Austrian (Dec. 9, 1927) 7 Recueil dec. Trib. Arb. Mixt. 659; Germano-Rumanian and Franco-German decisions, see *infra* n. 82, though with the former construction of French C.C. art. 1220. Thus far also the Italian writers, such as CAVAGLIERI, Lezioni (ed. 2) 249; FEDOZZI (ed. 2) 632 seem to agree with the text against FUSINATO, Della legge regulatrice della divisione de beni ereditari situati in territorio straniero (Torino 1898). But see *supra* n. 10.

[72] Cass., Chambres Réunies (Dec. 5, 1907) D. 1908.1.113, S. 1908.1.1.

[73] *Cf.,* 3 COLIN ET CAPITANT (1945) § 1127 (d). It is integrated in a particular legal institution, LAURIOL, Subrogation réelle (1954) § 698, §§ 720 ff.

[74] PICARD in 3 PLANIOL ET RIPERT 50; DENNERY, Partage 54; BATIFFOL 663.

including succession to the castle of Chambord in France.[75] Despite much criticism respecting the various aspects of the case, it certainly has authority wherever a voluntary partition agrees with the law governing succession. This point was questionable in the case; but if no asset subject to the separate *lex situs* is included, the local situation as such has no claim for an exception.

It has been noted that in this and another case the French courts characterized proceedings occurring in Vienna according to the French distinction of judicial and voluntary partition.[76]

Private partition: Waiver of partition. Where administration is not compulsory, private agreements are naturally allowed if all participants are adults or represent a minor with authorization.[77] Nothing in principle prevents them from disregarding the distribution provided by the will or the statute of distribution.[78] The same rules obtain even despite the difference of organization in the United States, provided the creditors are paid or not endangered. The beneficiaries may agree among themselves on a division without any probate. Most courts consider this method

[75] Cass. civ. (April 13, 1932) S. 1932.1.361; Clunet 1932, 997; AUDINET, Revue 1932, 549; DENNERY, Partage 135.

[76] Trib. Seine (July 13, 1909) S. 1910.2.263, Cass. (Oct. 22, 1913) S. 1918.1.61, D. 1921.1.219, Rev. 1914, 139; TRONCHON, Le partage successoral en DIP. (1938) 40: here a voluntary partition approved by a tribunal was assimilated to a judgment.

[77] France: 3 COLIN ET CAPITANT (1945) 606 § 1173.

Germany: 4 FRANKENSTEIN 562.

Italy: App. Napoli (Jan. 23, 1924) Giur. Ital. 1924 I 2: 175 C.C. (1942) art. 713.

Spain: S. T. (Feb. 10, 1826) 87 Coll. Leg. 466 at 509.

[78] Trib. Rabat (April 24, 1918) Revue Algérienne, 1922/23 II 142 held valid a division concluded in Algiers by parties subject to French law, whereby they adopted Jewish law. AUDINET, Note *ibid.* criticizes the decision only because the women did not understand to what impairment they consented.

which saves the costs and loss of time of an official intervention valid and the agreement enforceable.[79]

While the *lex fori* governs a court's proceeding, what law governs such voluntary act? The Hague Draft, article 1, enumerates *"partage"* among the incidents of the law of succession, and this presents certainly the prevailing civil law view. The French delegate, Basdevant, protested against adoption of a law different from that governing the relationship of the heirs until division, which in his opinion is the *lex situs*. But although the latter opinion is shared by other French scholars, we have just insisted on its fragility.

(b) *Effect.* Another much discussed difference concerns the effect of partition. In France and other states, the assets finally assigned to a coheir are deemed retroactively to have been his property from the decedent's death.[80] This "declaratory" effect, originally intended to avoid double enfeoffment, is favored as a protection against detrimental dispositions by other coheirs during indivision. In the German system, no such danger exists and partition is traditionally construed as mutual transfer of the shares *pro indiviso* so as to complete full ownership in the specific assets assigned; a coheir who inherited one third, receives the two thirds missing in his asset from his two coheirs.[81]

An instructive contribution to the required criticism of the "declaratory effect" in the international field was once

[79] ATKINSON, Wills (ed. 2) 565 § 103; 3 BEALE 144 § 465.4.
Contrarily, a few courts declare that the testator's wishes ought not to be frustrated. Taylor v. Hoyt (1932) 207 Wis. 120, 242 N.W. 141; Cochran v. Zachery (1908) 137 Iowa 584, 115 N.W. 486 (an heir and trustee may not give up his duties as trustee even though before probate they are merely moral).

[80] *E.g.,* France: C.C. art. 883; Italy: C.C. (1865) art. 1034, (1942) art. 757; Chile: C.A. (May 20, 1931) 29 Rev. Der. (1932) II 70: Where a coheir sold his share in the estate, and another coheir in the partition receives the asset in litigation, the seller never had any title to it.

[81] BGB, § 2048; partition must be followed by conveyance.

delivered in the Mixed Arbitral Tribunals of the 1920's.

The Tribunals repeatedly encountered cases where the coheirs were of different nationality and attempted to profit by the declaratory effect of partition under the French, or Belgian, or Rumanian law governing the succession; they assigned shares, bank deposits, etc., to the participant protected against the seizure of enemy property.

The tribunals,[82] as well as a Belgian decision,[83] used various shades of embarrassed arguments in their effort to eliminate such declaratory effect on the right of liquidation under the Treaties. In simpler form, it was stated that a private partition could not affect the official clearing procedure between states.[84]

However, if the "declaratory effect" is set aside where it is disagreeable to a state, what role should it have in international relations in general? In fact, it is recognized that it has no extraterritorial effect,[85] nor effect in relation to third persons. The difficulty of its application is noticeable in a long discussion of French writers. Opinions have been divided between the law of succession [86] and the law of the situation; [87] middle solutions have also been sought.[88] But the need in this case to distinguish the cause for acquiring title in tangible objects and its acquisition is evident; the first must be governed by the law of succession.

[82] TAM. Franco-German (April 26, 1927) De Lyrot v. Mendelssohn & Cie., 7 Recueil dec. TAM., 587; TAM. Franco-Austrian (Dec. 9, 1927) Goldwasser v. Merkurbank, *id.* 656; Goldwasser v. Banque des Pays de l'Europe Centrale, *id.* 659; Germano-Belgian (Oct. 22, 1929) De Molinari v. Deutsche Bank, 9 *id.* 661; Germano-Rumanian (April 8, 1930) 5 Z. ausl. PR. (1931) 202; *cf.,* RABEL *ibid.* DENNERY 84 thinks that some of these decisions have not "seen the problem of qualification;" this is beside my point.

[83] 67 Trib. Liège (March 12, 1921), Clunet 1922, 1033.

[84] TAM. Germano-Belge, 9 Rec. 661, *supra* n. 1.

[85] PLAISANT 266.

[86] PILLET, 2 Traité 404 § 597; NIBOYET, Manuel 733.

[87] BROCHER 439 § 136; 7 LAURENT 52; 2 ROLIN § 769; DESPAGNET § 370; CHAMPCOMMUNAL 412; MAURY ET VIALLETON, 4 PLANIOL ET RIPERT § 640; 10 Répert. 197 No. 73; FEDOZZI (ed. 2) 633 f.

[88] ARMINJON, 3 Précis (ed. 2) 155 § 141 bases the effect of the partition on the law of succession but restricts it to the assets situated in territories recognizing the same effect.

Chapter 72

Plurality of Succession

I. The Problem

(a) *Occurrence.* As appeared from the survey of conflicts systems relating to inheritance, immovables are separately treated and submitted to the law of the situation in the Anglo-American and at least thirteen more jurisdictions. In other states, *lex situs* extends to movables, or to domestic immovables, alongside another law controlling the rest of the estate. In addition to these primary rules, public policy, or renvoi, or deference to foreign conflict rules may produce a scission into segregated estates.

Another source of a split arises in the positive conflict of conflicts rules, such as at the death of an Italian domiciled in Massachusetts, a Frenchman domiciled in Brazil, or a German domiciled in Switzerland. The laws of both states involved claim his inheritance, and what happens usually is that each state distributes the assets it can get hold of according to its own law, with no small confusion, especially in the liability for debts. Suppose that a testator was formerly domiciled in Maryland and at his death in New Jersey, and that he leaves his widow domiciled in California, and movables in California, Mississippi, and Maryland, as well as land in Illinois. There are five laws of succession—not only of administration—within the one country of the United States.

The United States, of course, is the largest proving-ground for trying these problems. The only (meager)

legislative attempt to cope with them has been made in the Treaty of Montevideo, in which consequences had to be drawn from its complete dismemberment of estates by unlimited application of *lex situs* to all assets. Again, some scientific exploration solely occurs in France, and there mainly in the case of French immovables in an otherwise foreign-governed inheritance. The Parliament of Paris had urged the unitary application of the last domicil to liability for debts.[1] Under the influence of the Romanistic universal succession of the heirs to the deceased's position, this view was popular around the turn of the century, often in favor of the national law of the deceased.[2] More recently, a veering toward territorialism has reanimated the customary principle of *tot hereditates quot territoria,* enforcing the plurality in most respects.[3]

(b) *Scope.* The cleavage operated in an estate by the two-fold conflicts rule of a state or the opposite conflicts rules of two states goes to the very bottom of all incidents. It affects the limits and order of intestate succession, especially of the extremely varied benefits of a surviving spouse or collateral relatives; the form and intrinsic validity of wills; their construction; the forced shares; adjustment of shares by election and advancements; acquisition; partition; and liability for claims.

Accordingly, the Montevideo Treaty enumerates as pertaining to the laws of the situation of each asset: capacity to inherit, validity and effect of the will, rights in the inheritance, existence and shares of intestate heirs, existence and amount of the "assets available," and everything relating to forced portions and testamentary inheritance.

[1] LAINÉ, 2 Introduction 307.

[2] 2 ROLIN § 766; LAURENT, 7 Dr. civ. int. § 42 p. 71 ff.

[3] BOUHIER, Obs. Bourgogne Ch. 21 n. 212-215; 2 DE VAREILLES-SOMMIÈRES passim; LEREBOURS-PIGEONNIÈRE (ed. 6) § 363; *cf.,* ARMINJON, 3 Précis 122 § 114.

From the beginning, it is unfortunately evident that enormous incongruities and hardships are involved and the present legal situation in the world offers but scanty remedies. There is some help when federal principles step in; creditors of a divided estate enjoy equality in the United States, provided they are American citizens. But the generally avowed principle that all, domestic and foreign creditors, should enjoy equality, is riddled with exceptions.

Uniformity either of the substantive or of the conflicts rules or of their effect on a plurality of succession is a goal of the future. The following pages shall merely describe the *status controversiae*. In this sorry corner, clearly no theory helps when action is missing.

The position of the creditors of the decedent is deferred (chapter 72) until some account of the Anglo-American system of administration can be furnished (chapter 71).

II. Distribution

1. Intestate Rules

Each law governing a part of the estate designates the order of intestate succession with all its conditions and effects.[4] Thus Spanish law governing movables allowed heirs only up to the sixth degree, while French law for the immovables went to the twelfth degree.[5] A widow has dower rights [6] or usufruct [7] in one succession but not in the other.

[4] E.g., England: Brown v. Gregson [1920] A.C. 860.
Turkey: Berki 49: the return of *paterna paternis (ila fente)* applies to movables left by a Frenchman domiciled in Turkey, but not to his Turkish land.

[5] Trib. Bayonne (March 31, 1904) Revue 1905, 745: C.C. art. 705 (old).

[6] Falconbridge 458.

[7] Trib. civ. Seine (April 26, 1907) Clunet 1907, 1132; Trib. Nice (July 9, 1917) Clunet 1917, 1792.

2. Requirements of Wills

The formal [8] and substantive [9] requirements of wills, agreements on expectancies or containing last disposals, and their construction [10] are governed by each law separately. The options left for the formal validity of wills have a moderating influence, as also references to the law of the last domicil in matters of construction [11] and election [12] act against the rigor of total consequences.

Another remarkable correction has been attained where a gift was valid under the law of the domicil and invalid at the situs of land; the domiciliary court adjusts the portions, increasing the impaired shares at the cost of the enriched ones.[13] In conformity, the Restatement states a compensation in the inverse case where land and movables in X and land in Y are left to B, C, D, each a third, but the will is invalid in Y and the land in Y falls entirely to B: C and D should receive in X as much as their shares in Y were worth, before the rest is distributed in three equal parts.[14] This amounts to a noteworthy though unusual construction of a unitary will. No such helpful idea was discussed when in a French court a residuary legatee was charged with gifts of money to uncertainly described beneficiaries and the clause was considered valid as to movables in Italy but invalid as to immovables in France.[15]

Forced shares are due from each fragment of the succes-

[8] Germany: KG. (May 15, 1912) JKG. 42A: 141, 145; OLG. Karlsruhe (Dec. 12, 1919) 40 ROLG. 159 (German land of a New Yorker).

[9] France: Trib. civ. Seine (July 7, 1899) Clunet 1900, 148; LEWALD, Questions 117 speaks of a special kind of nullity.

[10] OLG. Karlsruhe (Jan. 31, 1930) Recht 1930 No. 587: appointment of heir for the German immovable part of a foreign succession is not an appointment to a *pars pro indiviso* of the total estate.

[11] *Supra* 334 ff.

[12] *Supra* 349 ff.

[13] In re Lawrence's will (1919) 93 Vt. 424, 108 Atl. 387.

[14] Restatement § 252, illustration; GOODRICH 513 n. 52.

[15] Trib. Seine (July 7, 1899) Clunet 1906, 148.

sion according to its own law.[16] Hence, under the law of the domicil governing only succession to movables, foreign immovables are not included in the estate.[17] The testator, hence, may avoid leaving assets in the state where his disposing power is restricted; on the other hand, he may have amply provided for the *legitime* portions in one country and legacies in another must be sharply reduced for their sake.

III. Acquisition

1. Option

Choice between acceptance and repudiation is separate in the several successions. In the United States, this leads to a considerable extension of the doctrine of election.[18] A release of expectancy may operate partially.[19]

In France, a problem concerns the provision that a minor heir may only accept under the benefice of the inventory, i.e., with restriction of his liability for debts. With two different calls his age may be differently considered, and there may be no restriction in the foreign succession.[20]

[16] Johns Hopkins University v. Uhrig (1924) 145 Md. 114, 125 Atl. 616: Maryland law applies to assets in the forum, California restrictions on charitable bequests are left "to determination by the California courts."

The principle was ignored by Trib. civ. Nice (May 3, 1905) Clunet 1911, 278.

[17] England: Wills Act, 1861, 24 & 25 Vict., c. 114.

France: Cass. (April 4, 1857) D. 1857.1.102; (Jan. 1, 1892) D. 1892.1.497, S. 1892.1.76; Trib. Seine (May 21, 1879) Clunet 1879, 549 (not to violate the statute real); SAVATIER, Cours 304 § 436.

Switzerland: BG. (June 29, 1928) 54 BGE.I.216. American domiciled in Switzerland. American real property is left out of accounting for forced shares. The nonbarrable share of children in Switzerland of ¾, in Germany of ½ of their intestate portion is counted separately.

[18] 4 PAGE 729 ff., § 1651.

[19] 4 FRANKENSTEIN 380 n. 110.

[20] *Supra* Ch. 71 n. 36. The inventory must include all foreign assets, Cass. (July 11, 1865) S. 1865.1.406.

2. Advancement

As seen before, it is primarily though not exclusively a matter of the inheritance law to decide whether premortuary gifts made by the testator to a beneficiary of his inheritance ought to be accounted in his share. In the concurrence of two laws of succession, notably the French courts have confirmed the total scission.

Lady Fairbairn, claiming the legal usufruct of half in French land, under French C.C., article 767, paragraph 2, was not held to deduct the value of the gift she had received in England.[21] The rule was definitely announced in one of the law suits involving the succession of the Spanish Queen Marie-Christine, which comprised land in France and a Spanish estate. The Tribunal Civil de la Seine stated that the inventory of the French inheritance consisted in the proceeds from the sale of French land—a subrogation preserving French jurisdiction[22] and inheritance law—but had to exclude immovables and movables received by the French beneficiary in Spain.[23]

The European authors almost unanimously endorse this solution as the inevitable product of the scission adopted by the courts.[24] Any gift considered an advancement is referred to the aggregate from which it was taken, independent of the assets of another succession. Sometimes such tracing is impossible.[25] Generally, fortuitous chance rules this "unjust and absurd" procedure.[26] Two persons

[21] Trib. Bayonne (Aug. 11, 1902), Fairbairn v. Wailes, Clunet 1903, 179.

[22] Cour Paris (Dec. 31, 1889), S. 1891.2.186, Clunet 1890, 121.

[23] Trib. civ. Seine (Dec. 27, 1906) Del Drago v. S. M. Alphonse XIII of Bourbon, Clunet 1907, 770, Rev. 1907, 398.

[24] France: CHAMPCOMMUNAL 418; MAURY ET VIALLETON in PLANIOL ET RIPERT §§ 623 f.; DENNERY 127; LEREBOURS-PIGEONNIÈRE (ed. 6) 411; ARMINJON (ed. 2) 3 Précis 160 § 145; NIBOYET, 4 Traité 873 § 1352.
Germany: RAAPE 687; LEWALD, Questions 83.

[25] 4 FRANKENSTEIN 566; against his proposals in this case ZEUGE 71.

[26] ARMINJON, *l.c.*; NIBOYET, *l.c.*

having received at the same time equal gifts, one may have to account for it, the other not. Yet the timid attempts to avoid these hardships [27] were necessarily rejected.

The Montevideo Treaty, article 50, affirms this source-theory but makes an exception for gifts of money; the amount should be distributed among the territories in the proportion of the benefits drawn from each of them. Any such solution is possible in a multilateral treaty. But how can it work?

A similar situation was apt to arise even within one state in the United States when the probate court restricted to personalty could not reach land given by advancement. Despite some remaining difficulties, this case is largely cleared away, as most though not all probate courts have the power to include the land in the adjustment, or an action in equity is available.[28] If, however, land is under foreign administration, the ordinary jurisdictional conflicts occur which are the subject of the next chapter.

3. Prerogatives of Domestic Beneficiaries

The various provisions upholding the domestic inheritance law against a recognized foreign inheritance law reach a climax where a domestic succession opens at the same time. But it may be conceded that not much can be added to the crude results of the French or Argentine court practice even though only one, foreign, succession is in the picture.

A French national is entitled to what French inheritance law would give him, if that law were to govern, not only in the meaning of what he would receive out of the assets situated in France, but to the effect that he be awarded

[27] NAST, Revue 1907, 406, expounding two theories, but consenting to the prevailing doctrine.

[28] ATKINSON, 3 Am. Prop. 499 f.

everything he would obtain if the foreign movables of the foreign succession were located in France. Of course, the French assets are the maximum fund of enforcement.[29]

An Argentine decision is in the same vein. The decedent, a Spanish national domiciled in Spain, in addition to leaving movables and immovables in Spain, was creditor of a deposit with an Argentine bank. A domiciliary of Argentina received indemnification out of this asset for loss of the share he would have had under Argentine inheritance law, although the law of succession was Spanish under both conflicts laws.[30]

4. Partition

It seems safe to state that courts are restricted by the territorial limits of their jurisdiction in a noncontentious judicial division of inheritance. This is a matter of course in the Anglo-American organization, distinguishing personal remedies in equity. It is also settled in France that a judicial partition cannot include foreign immovables,[31] and this may be presumed where the procedural statutes are silent on the question.[32]

On the other hand, freedom of agreement between the beneficiaries helps to eliminate the disturbances caused by plurality of governing laws.[33]

[29] DENNERY 146 explains that the equality emphasized by the law of 1819 did not refer to distribution but to devolution, in the old language called *partage de droit,* but concedes, p. 149, with MAURY ET VIALLETON, 4 PLANIOL-RIPERT § 36 f., that the so-called equality is nothing but the French law of descent.

[30] Cám. civ. 2a Cap. (June 22, 1925) 57 Gac. del Foro 98.

[31] Trib. Seine (Jan. 21, 1950) Nouv. Rev. 1949-1950, 214; Cass. (July 5, 1933) Nouv. Rev. 1934, 75; 4 FRANKENSTEIN 561, n. 82. Controversial in Italy, see CAVAGLIERI, Lezioni (ed. 2) 358; MONACO, Efficacia 89 n. 1.

[32] E.g., in Chile, see BALMACEDO CARDOSO 167.

[33] *Supra* Ch. 69; even the narrowest definition of party autonomy in France allows submission to one of the several laws of succession "provided that lex situs permits it," LEREBOURS-PIGEONNIÈRE (ed. 6) 415 § 363.

IV. Administration

Privity of administration, despite large exceptions, is a principle in the United States even in the case of a unitary succession of movables. In the civil-law countries, the same conception is connected with plurality of successions. Accordingly, where a testamentary executor was appointed by a French testator, his powers were construed by the German court under German law with respect to the immovables left in Germany, although the same person had different powers regarding the movables.[34]

[34] KG. (May 13, 1912) 42 JKG. 141 No. 29.

CHAPTER 73

Administrators and Courts

I. MUNICIPAL ORGANIZATION OF DECEDENT'S ESTATE

ALTHOUGH conflicts law is a rather minor part of the law of administration, it cannot be avoided in this survey; to understand its role, at least some account must be devoted to a legal situation that would frustrate even a research of several extensive volumes. Indeed, no true comparative study exists of the international relations in treating inheritances. Useful introductions to the several national laws and books advising practitioners about steps they may take, abound. But not one author has ever dared to probe the core of the international disorder. Nor can it be done here, for reasons that will become obvious to the reader. Within the United States, gratifyingly, some fruitful or at least promising attempts have been made to bring coherence into the interstate chaos.

1. Common Law

At common law, compulsory administration of decedents' estates was restricted to the personal estate, and the executor or administrator is therefore called a personal representative. In England and a few American states, administration now extends to real property. In most American jurisdictions, the independence of the heir's title to land has been preserved, but the personal representative exercises certain powers over the land, such as taking possession and sale, if necessary.

In modern Great Britain with its unitary court structure, and, excepting Scotch land, the full inclusion of immovables, there are still minor differences, but the system, though costly and potentially cumbersome, works out smoothly, at least within the present United Kingdom; the system of "resealing" probate judgments sets its courts in close reciprocity with dominions and colonies.[1] In the United States, the state statutes not only differ on many fundamental or formal points; they are often ambiguous and the local peculiarities are sometimes strongly stressed. Only a long and painful development, far from total achievement, offers a homogeneous scheme conquering the old self-confinement.

This survey is exclusively interested in the interstate and international effects of probate judgments and of the appointment of fiduciaries. These effects, however, depend basically on those which probate and letters of administration possess within the forum of the probate court itself.

(a) *Jurisdiction.* The main principle of the common law treatment of estates is *territorialism.* It is still much in view in the United States. Any court in whose territory assets of the inheritance are situated has exclusive jurisdiction to administer them; and the jurisdiction of each court is strictly limited to these assets. A few statutes have literally claimed authority over foreign executors or administrators as if they were appointed locally. The courts, not to assume that these statutes undertook to violate the Constitution, construed them as referring only to property located in the state.[2] Despite the law of the succession which includes all movables and chattels real irrespective of

[1] Administration of Estates Act, 1925, s. 168; Judiciary Act, 1925, s. 165; Colonial Probate Act, 1892, and Orders in Council.

[2] Thornton v. Curling (1824) 8 Sim. 310; Re Grassi [1905] 1 Ch. 584; DICEY (ed. 6) 828.

their situs, they are separated by their situs in matters of administration. Thus, the axiom retains its force that the law of the domicil governs distribution but the law of the state appointing the fiduciary governs administration. Accordingly, there is no privity between the fiduciaries of different states. Even if the same individual is appointed in these states, he acts in a separate capacity in each state.[3]

Usually most of a decedent's movables are situated at his domicil, and since its law governs distribution, the first—"original"—and "principal" probate is sought there. Even though no assets are found at the forum of the domicil, it is now settled by a British statute as well as in the United States that the domiciliary court has jurisdiction for probate and letters of administration.[4] Nevertheless, it is still one of the few certain rules in the majority of the American statutes that a will may be brought to original probate wherever there are assets.[5] A conforming statute has been adopted in New Jersey, where, to the contrary, no ancillary administration was granted if the domicil rejected probate.[6] In some other states, no ancillary probate at all is given, the parties being referred to the court of the last domicil.[7] It has also been said that the will of a person resident where he was domiciled should be probated originally only at that place.[8]

For succession to land, the original probate, accord-

[3] England: Cook v. Gregson (1854) 2 Drew 286.
United States: Restatement § 466, comment a.

[4] England: Administration of Justice Act, 1932, sec. 2.
United States: Restatement § 467; see comment c for the purposes of such grant.

[5] United States: Restatement § 469; this is the "better view," 3 BEALE 1464, § 469.2.

[6] "Rule of Chadwick's Case," 80 N.J. Eq. 471; see *In re* Dodge (1918) 89 N.J. Eq. 525, 104 Atl. 646; superseded by L. 1942, c. 335, p. 1186, § 1, N.J. Stat. Ann. Supp. 3:2-45.

[7] CAREY, in CARNAHAN, Cases 979 ff.

[8] WOERNER § 226.

ing to the old rule, must be at the situs. Statutes, however, derogate from this rule.

(b) *Effect of probate within the forum.* In Great Britain, a probate in "common form" is granted in uncontested cases by the court of the domicil if the court is convinced of the formal validity, the mental capacity of the testator, and absence of error and fraud. This judgment has force until attack. Then a litigated probate "in solemn form" has full effect, as it is "in rem," i.e., *erga omnes,* and only open to revocation on one of several grounds stated by successive decisions.[9] Thus, probate of a will is said to prove the nature of an instrument as a will, its formal validity, the mental capacity of the testator, the appointment of an executor, the contents ("what the will is"), so as to replace the original instrument until correction by the Probate Division and the vesting of title in land, though not a disposition of property.[10] But the effect is limited to the territory, except between the parties to the suit.

Where the deceased was domiciled abroad, an English probate indicates that the will of a British subject has been duly executed under Lord Kingsdown's Act but does not validate the will if incapacity, material invalidity, or illegality appear under the law of the domicil.[11]

In the United States, a probate decree, whether in common form or solemn form, with or without notice to all beneficiaries (depending on the various statutes), provided it is not "directly" attacked, is not challengeable by "collateral" attack with respect to those matters, as cautious language runs, which it purports to decide. What matters are these? This turns out to be a delicate question.

[9] See RANKING 52 ff.
[10] WILLIAMS, 1 Executors 118 § 180; PARRY, Wills 110.
[11] DICEY (ed. 6) 828; WILLIAMS *ib.*

Statutes,[12] courts, and writers use varying language. They all seem to agree that collateral attack is excluded on the ground that the will is formally insufficient, or that the instrument is not genuine. But the formulations extend this effect to one or more of the following matters: incapacity, undue influence, fraud and duress,[13] outright illegality,[14] invalidity,[15] construction,[16] and effect.[17] Atkinson states that probate is conclusive as to genuineness, due execution, testamentary capacity, and absence of revocation.[18] I think that this formulation is really supported by the cases in general, although the language of the statutes and courts is often broader.[19]

Within the state, of course, also a decree refusing probate on one of these grounds is conclusive.[20]

Letters of administration, except those with the will annexed, are conclusive in the same manner for the absence of a will and the legal shares of the beneficiaries.

2. Civil Law

Ordinarily the court at the place of the deceased's last domicil has jurisdiction over his estate, excepting foreign assets under the control of foreign law.[21] Compulsory ad-

[12] They were collected in Proceedings of the 24th Annual Conference of the Commissioners of Uniform State Laws, 1914, 172, but never again completely to my knowledge, and grouped by SIMES, Model Probate Code 306 f.

[13] BANCROFT § 163.

[14] 3 BEALE 1463 § 469.1 and n. 4.

[15] 3 BEALE 1466; BANCROFT 355; GOODRICH § 172.

[16] CAREY (*supra* n. 7) §§ 1001-1005, but see HENRY § 596; ATKINSON, Wills (ed. 2) 499 f.

[17] 169 A.L.R. 556 cites four state statutes.

[18] ATKINSON, Wills (ed. 2) 499 § 96, somewhat different from (ed. 1) 445 § 184. Similar, Model Probate Code § 80 (a), § 81.

[19] By far the majority of the cases cited by the authors involve nothing but formal validity and very few undue influence or mental capacity. But I am unable to check all the cases referred to in sometimes wild lists.

[20] Matter of Goldsticker (1908) 192 N.Y. 35.

[21] See, for instance, *supra* Ch. 70 n. 31.

ministration, comparable to that in common law countries, has been preserved in Austria where a regulation of 1854 has been only somewhat amended [22] and in the Scandinavian countries.[23] The purpose of these organizations is frankly patriarchal as well as fiscal, the latter aspect being now prominent also in the United States.

In the great majority of civil law countries a testator may appoint one or more testamentary executors, defining their powers up to a certain limit, or request the court to appoint one, but apart from this, the heir or heirs take custody of the assets, satisfy the creditors, carry out the last will, and distribute the residue. To some extent, officials such as public notaries, are frequently employed, and in some countries necessary. The jurisdiction of the court concerns protective measures, receipt of acceptance and renunciation from beneficiaries, care for the interests of minors, and noncontentious intervention on request. Some codes go farther than others in attributing functions to judicial assistance. Nothing, however, approaches the complete substitution at common law of officials for the heirs.

It is noteworthy that the German courts, against a strong current in the literature, constantly refuse to take jurisdiction for more than protective measures whenever the succession is governed by a foreign law. The measures they allow themselves involve affixing of seals, taking of inventory, delivery of a will from official deposit, and appointment of a trustee for a presumptive heir or a claim against the estate. They refrain, for instance, from discharging the testamentary executor of a foreign testator. Their reasoning is partly based on the ground that the scope of their activity is defined by international private

[22] Austria: Kais. Patent of August 9, 1854, amended by Fed. Law of Dec. 21, 1923, BG. 1923 No. 636, §§ 22-25, 137-140.

[23] SIEBECK, 6 Rechtsvergl. Hdw. 563.

law[24] and partly by the inconvenience of meddling with interests of foreign heirs and a foreign law and the probable absence of recognition in the foreign country.[25]

Equally, in Austria, the official administration there prescribed does not in principle take place where a foreign national leaves movables in the forum. When administration occurs, it follows Austrian inheritance law. This happens also, by exception, if by unanimous consent all appearing parties concerned submit the estate to the Austrian law.[26]

Similar provisions that the parties may choose the inheritance law of the forum occur in some Latin-American codes.

Bilateral treaties regulating consular intervention need only be mentioned.

3. Situs

In the Anglo-American system and all others that assign primary importance to the territory in which the assets of the estate are located, the question of the method of localization obtains particular relevance. But it is also pertinent everywhere in matters of procedure, taxation, escheat, and granting of certificates. Different approaches to this subject lead to the conflict of concurrent jurisdictions and sometimes to negative conflicts. Particulars transcend the framework of the present investigation. However, two observations may be added.

First, it is to be borne in mind that the situs for the purpose of administration is not necessarily identical with

[24] KG. (Feb. 4, 1937) Jur. Woch. 1937, 1728; IPRspr. 1937 Nr. 72, Clunet 1937, 832.

[25] KG. (July 11, 1911) 41 Jahrb. KG. 62; in accord RAAPE D.IPR 276; SCHLEGELBERGER, Komm. Freiw. Gerichtsbarkeit § 73, n. 2; § 74 n. 4; *contra* NIEMEYER, 13 Z. int. R. 21; 4 FRANKENSTEIN 627; LEWALD 329.

[26] Law of 1854 (*supra* n. 22) §§ 23, 24, 140.

that for such purposes as civil procedure, seizure, garnishment, or taxation.

Second, in the United States there has been a development with respect to negotiable instruments. The American cases present, in Beale's words, a "blurred picture." [27] In a decision of the Supreme Court of the United States,[28] administration was founded on the view that any debt is located at the domicil of the debtor, but the old doctrine of the ecclesiastical courts on mercantile specialty debts was adopted by the same Court in 1918.[29] Accordingly, the possession of an instrument by an administrator, though not its mere presence,[30] entitles him to administer the claim embodied in the instrument. Despite the insecure cases, the Restatement suggests that possession of a negotiable bill of lading or warehouse receipt determines jurisdiction.[31] Bills, notes, and bonds payable to order are practically subject to the same treatment; the Restatement says that they are exclusively administered by the administrator in possession.[32]

Shares of a corporation issued in states following the Uniform Stock Transfer Act,[33] are represented by certificates, although shares subject to the traditional method of transfer through the company books are localized at the place of the corporation.[34] Bills, notes, and bonds payable to bearer are treated like tangibles.[35]

[27] 3 BEALE 1480 § 471.8.
[28] *In re* Wyman (1884) 109 U.S. 654.
[29] Iowa v. Slimmer (1918) 248 U.S. 115.
[30] HOPKINS, "Conflict of Laws in Administration of Decedent's Intangibles," 28 Iowa L. Rev. (1943) 613, correcting 2 BEALE 1481.
[31] Restatement §§ 471, 476, 509.
[32] Restatement § 479.
[33] *Id.* § 477, *cf., supra* Vol. II, p. 75 and especially p. 76.
[34] *Id.* § 478; Vol. II, p. 75.
[35] STUMBERG (ed. 2) 448 n. 36, denying that the desirable proposition of the Restatement that the administrator at the situs is treated as the owner, is borne out by the cases.

4. Law Governing Administration

Whatever is substantive law in the operation of executors and courts at civil law is determined by the law of succession. Proceedings, of course, whether in litigious or in noncontentious matters, follow the *lex fori,* save for contrary positive rules.

Common law does not so distinguish. *Lex fori* controls everything, and since every court administers the assets situated in its territory, *lex fori* is identical with *lex situs.* But considering certain exceptions, the ordinary formula says that it is the law of the court appointing the administrator that controls administration.[36]

This rule was attacked recently, probably for the first time, with special regard to the case where administration of a decedent's estate is followed by trust operation.[37] Courts submitting the administration of a testamentary trust to the law intended by the testator feel the inconvenience of having all orders during the estate administration issued by the domiciliary court, and often by several other courts competent solely because of the physical presence of assets.[38] Similar awkwardness may be experienced when ancillary courts give directions without contact with the principal court. As we shall see, dealing with the outstanding problem of this topic, the claims of creditors, difficulties are increased by the protection of local interests and alleged public policy.

What role, however, has the law of the place where an asset is claimed as part of the estate, irrespective of such special rules of territorial administration? It has been

[36] Restatement § 468.

[37] JAMES A. MOORE, "Estate Administration and the Conflict of Laws," 35 Va. L. Rev. (1949) 316.

[38] Will of Risher (1938) 227 Wis. 104, 277 N.W. 160, 115 A.L.R. 790; *In re* Keeler's Estate (Surr. 1944) 49 N.Y.S. (2d) 592.

contended by the neo-territorialistic writers in France that the *lex situs* is of primary importance for the legal situation of all property, prevailing over the law of succession,[39] or at least that the movables are subject to the *lex situs* in the first place because of the "public credit," which is safeguarded by the *lex situs*.[40] In the rightly dominating opinion, it is only true that a beneficiary, executor, or creditor demanding an asset must comply with the respective local rules of procedure and property law on acquisition of title, but the content of his cause of action is primarily determined by the law governing succession.

Nevertheless, in the common law doctrine an analogous problem can be discovered, if only in a few sporadic applications. Thus, Dicey and Beale have been understood as including the transfer of title in "administration"; it was concluded that movables left in Germany by an Englishman domiciled in England pass to the English universal legatee directly because German law would govern the transmission of the title as heir.[41] However, the Restatement § 300 declares that the title to chattels passes at the death of the owner "to the executor or administrator appointed by the court of the state in which the chattels are habitually kept." This is of no consequence for civil law countries, and the general assumption is still good that the English legatee or the English administrator may be treated in Germany as entitled to recognition not on the basis of German law but by reasonable adjustment on the basis of English law.

The validity of a gift *inter vivos*, conditional on survival of the donee, was classified as an incident of administration

[39] BARTIN, 3 Principes § 450 f.; see *contra* NIBOYET, 4 Traité 911 § 1366.

[40] LEREBOURS-PIGEONNIÈRE (ed. 6) §§ 361-363 who corrects his result by introducing the French system of a liability proportional to the values received (413), *infra* 433.

[41] BRESLAUER 245, 247 n. 2.

in *In re Craven's Estate,*[42] and likewise a promise not to change a will was conceived as pertaining to administration in *In re Rubin's Estate.*[43] The Restatement, however, in accord with many writers, characterizes rules pertaining to administration as "primarily designed to facilitate the quick, effective and inexpensive settlement of the estate of the deceased" (§ 300, comment b), and it enumerates specifically such questions as the following: "accounting, post a bond, invest money, sell chattels, pay debts, ascertain priorities and similar questions" (§ 468, comment a).[44] Administration, thus, concerns short range matters, whereas transfer of title, validity of gifts, and the permissibility of agreements on testamentary dispositions involve devolution of rights by death. It would be very strange and unsound simply to leave the rules affecting persons and assets participating in the succession to the pleasure of foreign laws and a host of courts of administration.

II. Extraterritorial Effect of Probate

1. Common Law Countries

(a) *Assets in the forum.* A probate decree primarily involves only the assets situated in the forum, and whether it is recognized as conclusive outside the state even with respect to these assets, is a question not universally answered in the same sense.

However, since a British probate in common form does not and a probate in solemn form does have force *erga omnes,* it may be treated everywhere under the principles relating to foreign judgments.

[42] *Supra* Ch. 68 n. x.

[43] *Supra* Ch. 69 n. x.

[44] Compare the relatively innocuous cases described by Dicey (ed. 6) 813 as lying on the borderline of succession and administration.

Within the United States, a probate has the same effect as it has within the forum in the sister states with respect to the assets found in its own territory. To this extent, the probate is endowed with full faith and credit.[45]

(b) *Assets in other jurisdictions.*

England. In connection with the principle that succession to personalty is governed by the law of the last domicil of the deceased, an English court of probate, as a rule, will adopt the decision of the probate court of a foreign country where the last domicil was and grant probate in its turn. This is "established practice." [46] Yet in every case, the court "exercises its own discretion and judgment." [47]

United States. Once, in a generous attempt, the Massachusetts Supreme Court held that an American probate judgment, as directed *in rem,* was effective in any sister state. "The court here can only inquire as to the sufficiency of authentication, jurisdiction of the court, existence of estate upon which the will may act, and perhaps fraud." [48] This tradition is followed by the courts of that state.[49] A similar tradition in Montana stems from a decision where the Full Faith and Credit Clause of the Federal Constitution was again expressly invoked.[50]

However, the Supreme Court of the United States, long ago, refrained from such construction of the clause and, on the contrary, announced the full independence of the

[45] Tilt v. Kelsey (1907) 207 U.S. 43, 53.

[46] Per Sir J. Hannan in Miller v. James [1872] L.R. 3 P. & D. 4, 5; In the goods of Malaver (1828) 1 Hagg. Ecc. 498.

[47] In the goods of Kaufman [1952] P. 325.

[48] Mass: C. J. Shaw in Crippen v. Dexter (1859) 79 Mass. (13 Gray) 330.

[49] Slocomb v. Slocomb (1866) 95 Mass. 38 (immovables); Mass. Ann. L. (1933) § 192.10; HOPKINS, 53 Yale L.J. at 229-231.

[50] Montana: State ex rel. Ruef v. District Court (1906) 34 Mont. 96, 85 Pac. 866 ff.; HOPKINS, *ib.* 235 ff.

states respecting their local assets.[51] On the ground of this "power policy," mutual consideration depends upon the local conflicts rules, except where identity of parties and litigated object allows a resort to the doctrine of *res judicata*.[52]

"Letters testamentary and of administration have no legal force or effect beyond the territorial limits within which the authority of the state or country granting them, is recognized as law." [53]

Every American statute book contains provisions facilitating the extension of foreign probate to personalty, or even to all assets situated in the enacting state. They allow either the grant of an ancillary probate or a simple recording of the foreign decree.

Unfortunately, the language of these statutory digressions from the common law is extremely varied and prevailingly uncertain. Moreover, the courts often cling to the traditional lack of privity between the probate administrations.

With the threefold restriction, to the *personal estate,* to the *domiciliary probate,* and to the decree of a *sister state,* courts more or less generally recognize the probate decrees in the full measure in which they operate at home. But even in this narrow limitation, cautious investigation into the practice of the particular court would be opportune.

The broad language of many statutes suggests that also a probate by a nondomiciliary court suffices, but this does not seem to agree with widespread practice.[54] That foreign

[51] See in the last instance *in re* Barries' Estate (1949) 338 U.S. 815, 881; Note, DAVENPORT, U. of Ill. L. Forum (1950) 129, 131.

[52] Iowa v. Slimmer (1918) 248 U.S. 115, 121; Riley v. New York Trust Co. (1942) 315 U.S. 343, 349. HOPKINS, 53 Yale L. J. at 256; ATKINSON, 3 Am. Prop. 752 § 14.45.

[53] WOERNER § 157; Restatement § 436.

[54] CAREY 988: "Courts do not attach larger and wider constitutional validity to domiciliary probates."

countries are included in the recognition is expressly stated in some statutes,[55] but presumably is not the general construction of the provisions. And although it appears certain that recognition of a foreign probate includes most matters for which it is conclusive where it originates, the doubtful question whether it extends to the construction of the will makes itself more conspicuous in this application.[56]

Finally, the common law principle that foreign probate is totally inconclusive at the situs of *real property* has firm roots to this day. Yet so many exceptions to this principle by statutes or judicial ruling are existent that an absolutely negative attitude is to be observed in only a few states.[57]

The distinct trend of the development is marked by many decisions, the efforts of the leading writers, and the uniform drafts.[58] Though different in particulars, they converge in the proposition that a probate obtained at the last domicil of the deceased should be conclusive to the full extent, as at its origin, certainly with respect to movables, but since "there is no sacrosanctity about reality," [59] also regarding immovables.

(c) *Effect of ancillary probate.* When, after the end of appropriate proceedings—subject to the procedural law of the court—a foreign probate is "resealed," "confirmed," recorded, or adopted by a local probate, it seems to be a general rule that—apart from nullity of an irregular grant —only the original probate at its own place may be attacked

[55] E.g., Indiana, Burns' Stat. (1933) § 57 p. 119; § 7 p. 415, 416; HENRY § 598.

[56] CAREY §§ 1001-1005; *Contra* HENRY § 595.

[57] For particulars, see GOODRICH §§ 173, 174; ATKINSON, 3 Am. Prop. 751.

[58] The Restatement § 470(1); 2 BEALE § 469.1, 3 *id.* 1466 and some authors take too much for actual law. But their result is strongly supported by the postulates of GOODRICH (ed. 3) 525 § 172; HOPKINS, 53 Yale L.J. at 249, 258; Note 169 A.L.R. 81, 93, and especially CHEATHAM, 44 Col. L. Rev. at 559; Uniform Foreign Probate Act, withdrawn 1943, but adopted by Ill., La., Nev., Tenn., Wyo.; Uniform Probate of Wills Act, 1950, § 1.

[59] ATKINSON *l.c.* with HOPKINS *l.c.* 253.

by the means permitted at the same place.[60] An independent ancillary probate, however, may be treated differently, and some exceptional statutes establish their own rules on remedies even though a foreign probate was followed.[61] Indeed, the Commissioners of Uniform State Laws criticized, as early as 1914, the tendency to diminish the protection of local interests and proposed that remedies should be allowed against the ancillary grant.[62]

Clearly, however, a slow process is in the making to elevate the domicil to a determinative factor also in these matters and to subordinate the ancillary to the domiciliary fiduciary. In the same development, immovables are being increasingly brought within the powers of the administrator of personalty. And the fact that every fiduciary is answerable to his own appointing court, acquired a limited appreciation in other courts, leaving him more freedom from their supervision.

As an illustration of the transition of a jurisdiction, known for adherence to "power policy" respecting succession to land, to a liberal policy, a 1946 decision of the Illinois Supreme Court may be singled out which sketches the whole picture of contesting a domestic probate and then describes the effect of a foreign domiciliary probate on land in Illinois: everything involving the land depends on the Illinois law. The statute modifies the common law (i.e., absence of privity) only insofar as foreign wills are admitted, if they are (executed according to the law of the domicil or the law of the place of execution or) admitted to probate in a foreign state, Ill. Rev. St. 1945, Ch. 3, § 237. If so admitted, the will is "valid for all purposes, unless set aside in a suit brought to contest it. It cannot

[60] BANCROFT 394 § 163; Sternberg v. St. Louis, *infra* n. 63.
[61] See, e.g., BANCROFT § 163.
[62] Proceedings of the Commissioners of Uniform State Laws, 1914, 172.

be collaterally attacked in any other proceeding." But it can be attacked like a domiciliary will.[63]

2. Recognition in Civil Law Countries

From the European point of view, English and American probate judgments have not often been given attention, except with respect to the powers of administrators which will be discussed later. But a thorough Italian study has demonstrated that by its nature such probate of a will includes an official acknowledgment of the validity of the will—which is true within the limits mentioned above—and as a judicial instrument enjoys public credit also in foreign countries.[64] The Italian Supreme Court, already on the way to this thesis, was entirely convinced by the study. In consequence, an uncontested probate judgment is considered to be an act of voluntary jurisdiction, acceptable as a public attestation without the necessity of proceedings for enforcement of foreign judgment *(delibazione)*.[65] In addition, it was stated that the regular court in the United States was exclusively competent for a suit to contest a probate in common form rendered by an American court.

In other countries the official character of probate decrees is likewise recognized, but proceedings for examining uncontested foreign probates are usual and, e.g., in France necessary.

[63] Sternberg v. St. Louis (1946) 394 Ill. 459, 68 N.E. (2d) 892, 169 A.L.R. 545; on other kinds of statutes the not very satisfactory note *ibid.* at 567.

[64] GIUSEPPE PALLICCIA, "Testamento e probate nei paesi anglosassoni, con speciale reguardo al D.I.P. e ai beni italiani," Giur. Ital. 1935 IV 113.

[65] Italy: Cass. Civ. (May 12, 1937) Giur. Ital. 1937 I 667; *cf.*, also DE MARTINO, 7 Giur. Comp. Dir. Civ. 86 No. 106; Trib. Bari (Feb. 4, 1949) Foro Ital. 1949 I 1114.

3. The German Certificate of Heirship

Among the official certificates acknowledging the title of heir or other beneficiary, issued in the various jurisdictions and frequently required by courts, other state agencies, and banks, the German *"Erbschein"* is particularly elaborate and the nearest analogy to letters testamentary.

If the succession is controlled by a foreign law, the universal successor—in the case of an American estate, the heir, or statutory or testamentary residuary beneficiary—may obtain a certificate, limited to the assets situated in Germany and based on the foreign inheritance law (BGB. § 2369). At least a limited certificate is also given respecting real property under German law in the cases where a foreign inheritance law governs and refrains from including German immovables, as Anglo-American law does.[66]

The German *Erbschein* is an instrument endowed with public faith; its content is presumed to be correct and third persons dealing in good faith with its holder are protected. But this effect is, as a rule, limited to transactions effected in Germany.[67]

Analogous rules provide for a limited certificate to be granted to a testamentary executor (§ 2368). They are also applied to a foreign intestate administrator.

The presumption attached to these documents is extended to a few other countries by the respective treaties.

III. Extraterritorial Powers of Fiduciaries

1. Extraterritorial Scope of Appointment

(a) *Common law countries.* To enable an executor or administrator to act in a foreign territory, his powers

[66] Schwenn, "Die Anwendung der §§ 2369 und 2368 BGB. auf Erbanfall mit englischen oder amerikanischem Erbstatut," N. Jur. Woch. 1952, 1113.

[67] Nussbaum 369 n. 4.

must not be rigidly confined by his appointment itself to the forum in which he was appointed. The English doctrine satisfies this need. Although the court has only a territorially limited jurisdiction, the English grant extends to property no matter where situated.[68] He is charged with collecting all assets of which he can get hold; the assets in his hands are accountable to the English court and liable to all debts whether incurred in England or abroad.[69] This conception permits the personal representative to receive voluntary payments by debtors abroad and even to appear in foreign courts, provided this is agreeable to the latter. He may appropriate all chattels and claims as allowed by the *lex situs,*[70] and transfer them to England. Assets, however, possessed by a foreign administrator and brought to England, remain accountable to the foreign court.[71]

Occasionally, the one relevant difference [72] that continues between an executor and an administrator in the narrow sense, despite their large assimilation, may be noticeable:

"Since an executor derives his title from the will and the property of the testator vests in him on the latter's death, he is able to do any act of his office with the sole exception of pursuing an action in court. He may even commence proceedings until he has to prove his title which can only be done by probate." [73]

An executor, hence, may sell, assign, or pledge any portion of the personal estate. It has been held that the sale of land, if executed according to the *lex situs,* cannot be attacked by the purchaser on the ground that probate was

[68] CHESHIRE (ed. 4) 514.
[69] DICEY (ed. 6) 811.
[70] WESTLAKE 167 ff.; DICEY (ed. 5) rules 85, 87, 131.
[71] DICEY (ed. 6) 811 ff.
[72] For another, practically superseded difference, see *infra* 438.
[73] PARRY 47 ff.; RANKING 140.

not granted to him.[74] By the same consequence of his position, an executor may be sued by creditors or beneficiaries even before probate.[75]

The American position is basically similar,[76] but as the several states are to be viewed as both the forum and a foreign jurisdiction, emphasis lies on the powers of a foreign representative of whom we have to speak presently.

(b) *Civil law countries.* Testamentary executors are permitted in all systems, but they are never the owners at law of the estate. Their powers are limited by the statutes to a varying maximum, always less extensive than at common law. Within these limits, the testator may define the authority of the executor. The radius of the executors is never restricted territorially.

2. Recognition of Foreign Fiduciaries

(a) *Common law countries.* In England, to exercise full powers, a foreign representative must apply for appointment as ancillary administrator. In England, whether the inheritance law is British or foreign will not make a difference in normal situations.[77] The foreign fiduciary is accepted as ancillary administrator ordinarily, though not necessarily, according to the discretion of the court,[78] and he is subject to its directions.

In the United States, sometimes a foreign fiduciary is considered in the older manner as lacking title in the assets; but prevailingly he can at present, without auxiliary probate, take possession, remove and administer a chattel

[74] National Trust Co. Ltd. v. Mendelson (Ont. H.Ct., 1941) 1942 1 D.L.R. 438.

[75] Mohamidu Mohideen Hadjar v. Pitchey [1894] A.C. 437.

[76] Restatement § 474; GOODRICH § 182 (highly informative).

[77] *In re* Kehr, Martin v. Foges [1952] Ch. 26.

[78] Court of Probate Act 1857, s. 73; In the goods of Brieseman [1894] P. 260; in the goods of Earl [1867] L.R. 1 P.D. 450.

as well as receive payment of and assign claims, until a local administrator is appointed or, in another version, until he knows of such appointment.[79] At the same time he remains generally unable to sue on behalf of the estate, though some statutes do allow it, at least where no interested local party requests an ancillary administration.[80]

A variety of other concessions to foreign fiduciaries include the possibility to have an assignee sue [81] or to sue in his own name rather than on behalf of the estate,[82] which "artificial" distinction has been used for further liberalization of the principle.[83]

Nevertheless, the basic principle remains lack of privity between the territorial administrations; it shows itself strikingly when the same person appears in several states in the name of the estate in the same cause, and the judgments are devoid of effect except where they are rendered.[84]

Where the domicil of the testator was in a civil law country and his testamentary executor possesses sufficient powers under the law of that domicil, he (or his local attorney) will ordinarily be accepted as ancillary administrator according to the same rules. If, however, the heirs are authorized to act and present themselves, a common law court is correct in considering that such heirs—as I would put it—unite in their persons the functions of beneficiaries

[79] United States: Restatement §§ 474, 481; 2 BEALE 1533 ff.; HOPKINS, *l.c.* 635 cites three statutes. See the new survey of the topic by OPTON, "Recognition etc." 19 Geo. Wash. L. Rev. 156, 165-167.

[80] OPTON, *ibid.* concludes that in the prevailing view the title of the foreign fiduciary is recognized although he is barred from suing for the estate. *Cf.*, GOODRICH § 182 n. 69.

[81] Peterson v. Chemical Bank (1865) 32 N.Y. 21.

[82] Thus Turner v. Alten Banking & Trust Co. (C.C. 8, 1948) 166 F. (2d) 305.

[83] Mr. Justice Cardozo in Wilkins v. Ellett (1883) 108 U.S. 256; Kruskel v. United States (1949) 178 F. (2d) 738; CHEATHAM, *supra,* 44 Col. L. Rev. at 549.

[84] Restatement § 468. See the exceptions to the principles *infra* 437-438.

and managers of the estate. The court in England, in fact, will either appoint them as ancillary administrators or order an ancillary administrator to surrender the surplus to the heirs.[85]

American practice emphasizes rather the discretion of the court as exercised under statutory directions.[86]

The foreign representative appointed in an ancillary administration has to follow the local law and court orders and to account to the court that appointed him. Some courts even require a bond from a nonresident executor relieved from giving security in the will.[87]

(b) *Civil law countries.* Almost unanimous consent advances the conflicts rule that the law of succession determines the requirements and effects of a testamentary appointment of executor.[88] A divergent opinion of a few French writers in favor of the *lex situs* has remained isolated.[89]

The inheritance law controls in particular capacity and power of fiduciaries, also when that law entrusts them with larger activities than the forum. The literature is practically unanimous on this point,[90] decisive for the recognition of

[85] *In re* Achillopoulos [1928] Ch. 433; Laneuville v. Anderson (1860) 2 Sw. & Tr. 24; In the goods of Dost Aly Khan (1887) 6 P.D. 6.

[86] BEALE 1417.

[87] New York: GRANGE 117.

[88] France: Trib. Seine (Dec. 8, 1924) Clunet 1925, 711; Cour Paris (June 28, 1941) Rev. crit. 1946, 243; Cass. req. (Nov. 19, 1941) S. 1942.1.129; WEISS, 4 Traité 594; JOUSSELIN 76 ff.; 10 Répert. Successions no. 90; NIBOYET, 4 Traité 863; DELAUME ET FLATTEL, 90 J. Trib. (1951) 1, 6.

Germany: RG. (Jan. 25, 1888) 6 BOLZE 4 no. 11; (April 21, 1890) 26 RGZ. 380; (Nov. 5, 1928) Jur. Woch. 1928, 3139; KG. (July 16, 1925) Jur. Woch. 1925, 2142; 2 BAR 338; 4 FRANKENSTEIN 485.

[89] CHAMPCOMMUNAL 384.

[90] France: Despagnet (ed. 5) 1116 § 380; LAURENT, 7 Dr. civ. § 109; WEISS, 4 Traité 671; NAST, BATIFFOL AND MAURY in notes to Cass. Crim. (June 4, 1941), see *infra* n. 96; BATIFFOL, Traité 673 § 668.

Germany: 4 FRANKENSTEIN 488; LEWALD 338; WOLFF, D.IPR. (ed. 3) 229; NUSSBAUM, D.I.P.R., 352, n. 4; SCHWENN, N. Jur. Woch. 1952, 1113, 1116 II.

Italy: FEDOZZI in 22 Dig. Ital. at 833; FEDOZZI 593; PALLICCIA, Rivista 1932, 347.

Anglo-American executors and administrators exercising powers by far more extensive than any known at civil law.

Accordingly, the German courts, aware of the diversity of the authority with which administrators of decedents' estates are endowed in the various laws, recognize without hesitation the foreign-derived powers and especially the ample task of Anglo-American fiduciaries.[91] The Reichsgericht, like the Anglo-German Mixed Arbitral Tribunal, even exaggerated the principle; they concluded that the British nationality of a personal representative, as distinguished from the beneficiaries, sufficed for admitting a claim to the clearing-procedure between England and Germany.[92] The same basic approach is taken in Italy, Spain, and Cuba.[93]

In France, after older decisions,[94] a decision of the Seine Tribunal [95] was widely noted which recognized Spanish testamentary executors and liquidators with larger powers than French executors; they would continue the personalty of the testatrix, receive funds, and create a new foundation (the validity of which was thus rescued).

[91] Germany: OLG. Hamburg (Oct. 1, 1887) Hans. Ger. Z. 1887 HBe. 289 no. 124 (English executor); RG. (April 25, 1932) 86 Seuff. 271 No. 152, IPRspr. 1932; 6 No. 1; KG. (May 13, 1912) 42 Jahrb. KG. 141; *supra* Ch. 69 n. 30; (July 2, 1925) Jur. Woch., 1925, 2142.

[92] RG. (Feb. 18, 1926) Jur. Woch. 1926, 1788, invoking as support Anglo-German TAM. (Feb. 4, 1924) 4 Recueil Trib. Arb. Mixt., Klingenstein v. Maier, see the just criticism by ERNST WOLFF, Jur. Woch. *l.c.*

[93] Italy: Cass. Roma (Feb. 21, 1899) Foro Ital. 1899 I 333, Giur. Ital. 1899 I 1, 2161: powers of a trustee did not offend Italian public policy; Cass. (July 9, 1941) Foro Ital. Mass. 1941, 511 No. 2062: Swiss executor.

Spain: Trib. Sup. (Feb. 1, 1910) also in Revue 1911, 771: the testatrix was a subject of Catalonia; therefore Catalonian law governed the powers of the executors.

Cuba: Trib. Sup. (Jan. 16, 1908) also in Revue 1911, 131: the American personal representative had authority to sue and collect as provided by the Pennsylvania law of succession, the national law of the testator.

[94] Cass. req. (Apr. 19, 1859) D. 1859.1.277; Trib. Seine (April 20, 1898) J.C. 1899, 765; (July 13, 1910) Clunet 1911, 912.

[95] (Dec. 8, 1924) Gaz. Pal. 1926.1.293; Revue 1925, 76, Affirmed on other grounds Paris (July 1, 1926) Revue 1926, 540.

Finally, the criminal section of the Court of Cassation adopted the proposition that a fiduciary appointed in a common law court acts in France in his own name though on account of the estate.[96]

From this recognition must be distinguished the permission to undertake certain activities in the territory. Although not in Italy, in Belgium and France a formal judgment of *exequatur,* enforcing the original appointment [97] and in Germany a certificate of authority [98] are needed for certain purposes, although merely advisable for others.

Although the usual practice, analogous to the Anglo-American, requires a foreign executor to follow the local law, the German courts, in consistency with their conception that they only assist foreign law governing a succession, apply that law in case they intervene.[99]

[96] Cass. Crim. Section (June 4, 1941) D. 1942 C. 4, S. 1944.1.133, Juris Classeur 1942.II 2017: the testator may give the executor *saisine* under C.C. art. 1026.

[97] Belgium: Rb. Brugge (March 10, 1939) Rechtskund W. 1939 c. 105: a Michigan administrator in intestate succession is authorized to demand recovery of a debt, but needs an *exequatur.*

France: Trib. Seine (July 23, 1920) Clunet 1920, 684.

[98] Testamentsvollstrecker-Zeugnis, BGB. §§ 2368 f.

[99] OLG. Frankfurt (July 11, 1898) 33 Frankfurter Rundschau (1899) 88 (sworn inventory); RG. (Nov. 5, 1928) Jur. Woch. 1929, 434, IPRspr. 1929, No. 1 (accounting).

Chapter 74

Claims

I. Single Law of Succession

1. The Question of Liability

FIRST attention is due to the case where one law governs the entire inheritance but the assets are scattered through several territories. Suppose that an American citizen domiciled in Cuba leaves shares of an American corporation deposited in a New York bank. His succession is governed by Cuban law under the conflicts law of New York and, presumably, also by renvoi in Cuba. What approach have the American or Cuban creditors to take when seeking payment out of those shares?

The inherent difficulties of the international problem are enhanced by the contrast of the conflicts principles. Where unity of succession is established, irrespective of the situation of the assets, should the foreign part of the assets simply be included in the account, even though at the place of the situation local assets are submitted to a separate administration? Common law lawyers, on the other hand, often consider "liability" for claims as a matter of administration; does this mean that no regard is taken to the conflicts rule of the situs? Some French writers suggest that the *lex situs,* more or less replacing the law of succession, should be looked to in the relationship between the estate and the creditors.

To start answering these questions, it should be clear for all systems whatsoever that the transmission of the debts of the deceased to a successor in any sense is a neces-

sary part of the law of succession,[1] quite as the transfer of the deceased's property is. Only enforcement is a separate activity at common law, subject to traditional dependence on territorial principles, and everywhere, of course, procedural incidents follow the *lex fori.*

The term "liability" should indicate who is the passive subject of the debt and what can be demanded. Common law segregates the question what distinction may be made among the funds out of which the creditor seeks to be paid. Three main systems of liability for the claim against the estate, apart from the claims created after death, may be distinguished.

Universal succession in the Romanistic doctrine commits the heir to unlimited responsibility with the means of the estate and all his own means, except where certain measures are taken for limiting his burden. Such measures are especially acceptance under the *beneficium inventarii,* restricting the liability of the accepting heir to the value of the assets to be listed in the inventory *(pro viribus hereditatis*[2]*),* and *separatio bonorum,* segregation of the inheritance from the heir's assets, on the request of an interested person. This is unlimited or limited personal liability.

The Germanic, agreeing with the general archaic, conception regards the debts of the deceased as burdening

[1] United States: ATKINSON, Am. Property Law 641 § 14.20: "Liability is independent of Administration."

England: DICEY (ed. 6) 811.

France: CHAMPCOMMUNAL 414; 3 BAUDRY-LACANTINERIE ET WAHL (ed. 3) 463 § 3094 f.; WEISS, 4 Traité 599 f.; NIBOYET, 4 Traité 914 § 1368, 921 § 1371; BATIFFOL, Traité 676 § 573.

Germany: 2 BAR 350; 2 ZITELMANN 976; LEWALD 389; NUSSBAUM 359; WOLFF, D. IPR. (ed. 3) 228.

Netherlands: KOSTERS 627; MEIJERS, Weekblaad 3495, IX.

Switzerland: VOUMARD, Transmission 83 ff.

[2] See, e.g., for Argentina: C.C. art. 3363; MOLINA, 12 Rev. Ciencias Jur. Santa Fé (1950) 151.

the ancestral home and property. Whoever takes the assets responds for the debts so far as the assets go (liability *cum viribus hereditatis*). This is the foundation of the Anglo-American liability restriction to the assets of the inheritance, from which the feudal ties detracted the land.

A third group has looked for a modern method of limiting responsibility and found them close to common law methods. The German and Swiss Codes resort to official administration on request.

2. Civil Law

The law of succession determines whether liability is imposed on persons—the heirs, devisees, universal legatees, universal or residuary legatees, or under certain circumstances, a special legatee or donee—or whether it rests upon the assets. It determines whether liability is unlimited, or limited to the assets composing the estate, or to their value, and what steps are needed for any limitation.

An obvious consequence involves the recourse of a paying beneficiary against those persons charged by the inheritance law with primary liability.[3]

Under the nationality principle, this means that the rights of the creditors are subject to the law of the country whose national the deceased was. That in this application the national law is particularly improper, has been sometimes noted.[4] An involuntary avowal of this fact is contained in a provision of the German Civil Code which calls for the national law of the deceased but permits the

[3] Trib. Seine, Clunet 1895, 118; TRÉBAUT, 10 Répert. Succession § 46; on this point BATIFFOL 677 states an old tradition and unanimity in France.

[4] KAHN, 2 Abhandl. 286 perceived that "the interest of the creditors of an estate demands another contact than the national law," although his own suggestions were inacceptable.

heirs of a German who was domiciled abroad to invoke the limitation granted by the law of the domicil.[5] Indeed, the Scandinavian Convention on Inheritance and Succession, deviating from its usual combination of tests, resorts to the decedent's domiciliary law for determining liability for debts; only the effect of public summons to the creditors, issued at the domicil, on creditors in other countries is qualified by appropriate conditions.[6] The place where the debtor lived and carried on his business, is rightly supposed to have influenced the credit extended to him. Its law, of course, should not operate for the exclusive benefit of the heir.

Law of the debt. It stands to reason that the debt transferred to new debtors retains the character imprinted on it during the lifetime of the deceased. The claim may from its inception be indivisible or joint, and stays so.[7] At civil law the question who may sue or be sued also is a part of the substantive order; hence, if English law governs the succession, not the beneficiary but the administrator has been allowed in a French court to sue a debtor,[8] and the analogous solution may be expected in the case of claims against the estate. However, the complicated rules of the common law relating to extraterritorial situations, especially when a creditor of the estate sues the administrator outside the state of his appointment, disturb the problem—which, in the opinion of this writer, has not yet been mastered.[9]

[5] EG. BGB. art. 24 par. 2; OLG. Hamburg (March 8, 1911) 28 R. OLG. 59; KAHN, 1 Abhandl. 465; RAAPE, Komm. 655 ff.

[6] Scandinavian Convention of Nov. 19, 1934 (*supra* Vol. I, 33 n. 85), arts. 17, 18, 25; *cf.*, PLAISANT 253.

[7] MAURY ET VIALLETON in PLANIOL ET RIPERT, 4 Traité 499 § 400; NIBOYET, 4 Traité 913 § 1368.

[8] Cour Paris (April 2, 1896) Clunet 1897, 465; otherwise if French law governs, App. Grenoble (March 31, 1908) Revue 1908, 609.

[9] See for the analogous question of the person qualified for receiving an appointment as ancillary administrator or a certificate of heirship, *supra*.

Enforcement. In the traditional Continental doctrine, the law of succession extends to enforcement by action, with the sole exception of pure procedural questions. This law dictates, in particular, the measures giving the beneficiary time for considering his attitude in the face of claims, the calling up of the creditors for filing their claims, and the cases in which separation of the inheritance may be requested, although assistance by foreign authorities may be needed, and may often be unavailable, to implement such measures.

According to this prevailing theory, where a French testator, domiciled in France, leaves movables in Italy, a French court applies French inheritance law to all movables and makes all heirs liable in proportion to their shares (Code Civil, article 732) with all assets remaining obligated to all creditors as they were in the lifetime of the deceased (article 2092).[10]

Lex situs. Opposition by the neo-territorialistic theoreticians,[11] in France gives the law of the place where the assets are situated and seized for enforcement the primary role, either on the strength of a principle valid for all assets[12] or by submitting enforcement upon movables to the *lex situs* because of the "public credit" affected.[13] The prevailing opinion rejects these obscure reasonings. Discrimination according to territorially divided objects is inconsistent with the leading ideas of the Continental systems.

[10] WEISS, 4 Traité 601.

[11] See the citations in the critical surveys by TRÉBAUT, 10 Répert. 516 No. 112 ff.; VOUMARD, Transmission 126 ff.; NIBOYET, 4 Traité 904 § 1364 ff.; also BEVILAQUA (ed. 3), 401 n. 12, citing PILLET, Principes § 179 inclines to *lex situs* for claims of creditors, because of the "public credit."

[12] BARTIN, 3 Principes § 450 f.; *contra* NIBOYET, 4 Traité 911 § 1366.

[13] PILLET, 2 Traité 414 § 602; NIBOYET, Manuel § 536; LEREBOURS-PIGEONNIÈRE (ed. 6) 411 f., who, however, corrects the result by introducing the French rule of a liability proportional to the value inherited. See the convincing refutation of the "credit public" theory by MAURY ET VIALLETON in 4 PLANIOL ET RIPERT 491 f.; NIBOYET, 4 Traité 919 ff. § 1370 f.

Under the Treaty of Montevideo, the law is different, but it constitutes always a plurality of successions when the assets are in different states.

3. Common Law

England. If it is said that the assets in the hands of an English administrator are liable for all debts whether incurred in England or abroad,[14] it is to be understood that the law of succession determines what debt of the deceased passes and against whom. On the other hand, proof of the claim and order of priority are subject to English law as *lex fori* with the exception of assets under foreign administration and removed to England.[15]

Among the numerous particulars of this doctrine which cannot be explored here, the old case of *Aldrich* v. *Cooper* [16] is interesting. A mortgagee may proceed against freehold and copyhold, but if he exhausts the personal estate, a simple creditor may take his place; accordingly, where claimant A has a real security in two funds, X and Y, and B only in X, A may satisfy his claim at his option, but when he chooses the fund X, B is subrogated in A's right in Y.

United States. The law of the place of administration certainly does not control the existence of a debt or determine who should pay it after distribution of the assets. But it fixes the time within which a claim must be proved,[17] the manner in which it may be proved,[18] the modalities of payment, and the preferences of classes of creditors.[19] These

[14] DICEY (ed. 5) Appendix Note 25, p. 971 ff.; (ed. 6) 811.
[15] DICEY (ed. 6) 812.
[16] Lord Eldon in Aldrich v. Cooper (1808) 8 Ves. 382, 32 Eng. R. 402; WILLIAMS (ed. 12) § 812.
[17] Restatement § 498.
[18] Restatement § 499.
[19] Restatement §§ 500-503; STORY §524 f.; WOERNER § 166; 3 BEALE § 497.1; § 501.1.

questions are independent of the domiciliary law of the deceased or of the creditors.[20]

The principle of equality. A basic idea, similar to that of the civil law, was once announced by the Supreme Court of Massachusetts: the assets, wherever situated, should be available to all creditors of the same class without discrimination.[21] But since it was predicated that each state has independent power over the assets situated in its territory,[22] the general doctrine isolates the local property of each state from all other assets. The right to be satisfied out of this property belongs to those creditors who bring and prove their claims before the local court.

The Restatement expresses this rule in an explicit manner:

> § 495. . . . "all creditors regardless of where they are domiciled can prove their claims in any state in which administration proceedings have been instituted."
>
> § 497. "All creditors of a decedent who have proved their claims in a competent court in which there are administration proceedings of the estate of that decedent are entitled to share pro rata in any application of the assets of the local administrator to the payment of claims, irrespective of the source of such assets or of the residence, place of business, domicil or citizenship of the creditors, except
>
> (a) where there are valid claims against specific funds, or
>
> (b) where there are valid preferences given by local statute to creditors of a particular class."

Although the Restatement left the question open whether preferences could constitutionally be given to resident noncitizens, there is certainly a difference to the effect that the

[20] Baker v. Baker (1917) 242 U.S. 394; Wilson v. Hartford (1908) 164 Fed. 817; Duehay v. Acacia Mut. Life Ins. Co. (1939) 105 F. (2d) 768.

[21] Dawes v. Head (1825) 3 Pick. (Mass.) 127, per C. J. Parker.

[22] STORY § 420; Bostwick v. Carr (1914) 165 App. Div. 55, 151 N.Y.S. 74.

Privileges and Immunity Clause of the Federal Constitution assures equality to citizens only; therefore the formulation of the Restatement exceeds somewhat the actual law in generosity.

The standard by which preferences may be granted by statute to local creditors in a solvent estate has recently been defined. Citizens must have "reasonable and adequate access to the courts" for filing their claims. They need not necessarily enjoy all technical and precisely similar rights conferred upon the local claimants.[23]

Insolvent estates. If an estate is known to be insolvent, it is settled in theory that equality of all creditors ought to outweigh convenience of local distribution. The creditors having proved their claims receive only a pro rata percentage corresponding to the dividend that is likely to result from all assets and debts of the entire estate.[24] It has been held, however, that the local creditors may receive this quota before the others.[25] Nevertheless, it has become obvious that multiple administration must lead to "conflicts and confusion."[26] It demands a very difficult interstate cooperation. Receivership in the case of insolvent corporations has been reformed for analogous reasons by Con-

[23] 3 BEALE §§ 466, 510.1, 512.1; Canadian Northern Railway Comp. v. Eggen (1920) 252 U.S. 553, 562; Duehay v. Acacia (*supra.* n. 19) at 776, where a statute of the District of Columbia was construed so as to conform with the Constitution. See also In re Torrington (1934) 70 F. (2d) 949.

[24] Blake v. McClung (1898) 172 U.S. 239; In re Hanreddy's Estate (1922) 176 Wis. 570, 186 N.W. 744, LORENZEN, Cases 967; In re Hirsch's Estate (1946) 146 Ohio St. 393, 66 N.E. (2d) 636, ann. 164 A.L.R. 761, 765. Similar for receivership, Restatement §§ 559, 560.

[25] In re Estate of Brauns (1936) 276 Mich. 598, 268 N.W. 893; see in general Note, 164 A.L.R. 768; 21 Am. Jur. 863 § 878 n. 11.

In Owsley v. Bowden (Ga. 1926) 132 S.E. 70, the creditors filed in Georgia received sufficient payment "to discharge these debts," which seems to be full payment, because they had not filed in time in Alabama, the domiciliary state, and were barred there.

[26] Report on Uniform Ancillary Administration of Estate Act, Handbook of the Commissioners on Uniform State Laws, 1934, 365. See, as early as 1840, Goodall v. Marshall, 11 N.H. 88, 98, 101.

gressional action[27] and purposeful policy of the United States Supreme Court.[28] Concentration on the domiciliary administration as in the case of receivership has been justly advocated in the whole field of the administration of decedent's estates.[29] Where the estate is insolvent, however, the most efficient and adequate measure would be the extension of the national Bankruptcy Act to the estate administration, matching the legislation of all other significant countries.[30]

Effect of Judgments. The Supreme Court of the United States as early as 1841 stabilized the doctrine that in consequence of the territorial limits of his powers an administrator cannot bind the estate outside of the state in which he is appointed.[31] Even a judgment rendered in the state of his appointment has no binding effect upon another administration.[32] The judgment against him as representative is merely regarded as an order to pay out funds committed to his care just in the same jurisdiction. As the Supreme Court expressed it: "While a judgment against a party may be conclusive not merely against him but also those in privity with him, there is no privity between two administrators appointed in different states"; hence a judgment obtained against the ancillary administrator with the will annexed in Massachusetts has no effect against an executor at the testator's domicil in Michigan.[33] It has

[27] Bankruptcy Act, chapter X.

[28] CHEATHAM, "The Statutory Successor, The Receiver and the Executor in the Conflict of Laws," 44 Col. L. Rev. (1944) 549.

[29] HOPKINS, 53 Yale L.J. 221, 634; and especially CHEATHAM, *l.c.*

[30] See NADELMANN, "Insolvent Decedents' Estates," 49 Mich. L. Rev. (1951) 1129, 1161 f. and (cited by him) SIMES, "Some Lessons from a Comparative Study of American Probate Legislation," Proceedings, Section of Real Property and Trust Laws, Am. Bar Ass. (1949) 42, 48.

[31] Vaughan v. Northrup (1841) 15 Pet. 1.

[32] Stacy v. Thrasher (1845) 6 Howard 44, 60 f. See also Low v. Bartlett (1864) 8 All (Mass.) 259.

[33] Brown v. Fletcher's Estate (1907) 210 U.S. 82.

equally remained constant practice that a judgment against a domiciliary administrator has no effect on assets in an ancillary state,[34] or one against a foreign executor outside the state of his appointment on the entire estate.[35] It does not even make a difference that the same person is the administrator in both courts or the executor in one and administrator in the other.[36]

An exception was once made by the Supreme Court when the same person was executor in both states, because his support by the will of the testator unified his position; the judgment was given full faith and credit.[37] Yet, despite the alleged privity in such case, such a judgment was subsequently merely considered prima facie evidence of the debt [38] (which in itself is also an exceptional favor).

It follows that any creditor may present a claim in any jurisdiction [39] where assets are found [40] and at the domicil.[41] If the claim is rejected, he may prove it elsewhere. If it is allowed, this is not even an evidence of the existence of the claim in other jurisdictions.[42] Limitation of action in one state has no importance in the others; [43] in the kindred English view, a surplus reached in the ancillary English administration was surrendered to the local beneficiaries without regard to American creditors barred by the Eng-

[34] Johnson v. Powers (1890) 139 U.S. 156; Wilson v. Hartford (1908) 164 Fed. 817; Green v. Martin (1932) 239 N.W. 870.

[35] Learned Hand J., in Burrowes v. Goodman (1931) 50 F. (2d) 92; see also Feldman v. Gross (1952) 106 F. Supp. 308.

[36] Restatement § 506, comment a. STORY § 522a was doubtful.

[37] Carpenter v. Strange (1891) 141 U.S. 87, 104.

[38] Hill v. Tucker (1851) 13 Howard 458.

[39] Restatement § 506 (2).

[40] WOERNER § 172; GOODRICH 570 and citations. *Cf.*, 3 A.L.R. 64.

[41] Goodall v. Marshall (1840) 11 N.H. 88, 98.

[42] Green v. Martin (1932) 239 N.W. 870; Restatement § 495 comment b. In Johnson v. Powers (1890) 139 U.S. 156, the same result follows naturally in the absence of identity of *res* and *persona*.

[43] Wilson v. Hartford (1908) 164 Fed. 817.

lish statute of limitation though not by the statute of the American domicil.[44]

Disposition of Ancillary Funds. The American courts, like the English, claim discretionary power to dispose of the assets or the surplus. Where no special reasons demand attention, the most usual proceedings are the following: If no locally domiciled creditors exist from the beginning in an ancillary court, transfer of the funds to the domiciliary administrator is ordered.[45] Likewise, if all locally appearing creditors are paid, the remaining balance of the personal estate is transferred to the principal administrator; the Restatement favors this.[46] An exception has been made, for instance, where expedience, costs, and other reasons advised the contrary [47] or there was no assurance that an administrator "is or will be appointed" at the domicil in Argentina.[48]

Conflict of Systems. In a hundred-years-old English case, it was held that a foreign personal representative, having taken heirship according to foreign law without benefit of inventory, is personally liable in England, not as an administrator of English movables but as a debtor.[49] Hence, while the administration in England, governed by English law, is accountable for the assets only, in addition English proceedings make the successors accountable according to foreign inheritance law. This is one way to adjust the English system to the recognition that the succession is governed by a foreign law determining also the scope of liability for debts.

This example may inspire solutions in many other situa-

[44] *In re* Lorillard (1922) 2 Ch. 638.
[45] Dow v. Lillie (1914) 144 N.W. 1082; Restatement § 496.
[46] Restatement § 522.
[47] Burman v. Lenkin Construction Co. (1945) 149 F. (2d) 827.
[48] *In re* Bokkelen (N.Y. 1935) 155 Misc. 289.
[49] Beaven v. Lord Hastings (1856) K. & J. 724.

tions where the systems clash. In accordance, it has been stated in the Netherlands that the creditors of an Englishman who died domiciled in England cannot sue the beneficiaries personally in Holland as they would be entitled to under Dutch law.[50]

II. Several Laws of Succession

1. Lack of Privity

Realistic understanding on the Continent faces the scission of inheritance laws, if nothing corrects it, with the same awe and displeasure as common law lawyers realize the splitting up of the assets in multiple administration. The several independent systems, indeed, in the case of their international segregation, result in the incoherent existence also of several systems of liability and enforcement. An heir may, with deliberate planning, accept one succession and repudiate the other, so as to become liable to the claims against the first but not to those against the second, which are higher. The law of state X may hold land liable only to mortgagees or claims otherwise arising in connection with land, and the beneficiary leaves the small assets in Y to the pleasure of all other creditors. On the other hand, if there happens to be total responsibility of all estates to all creditors, they may exhaust the funds left to one successor under the law of X to the advantage of the successor called by the law of Y. Moreover, an absolute lack of correlation deprives the payor of any recourse for contribution.

When in England movables alone were attachable by creditors of the estate (and the case is the same where at present a Scotch heir to an immovable is liable only in a

[50] Meijers, Weekblaad No. 3495, IX; Gheel Gildemeester, Vererwing (1948) 134.

subsidiary order), the paying heir was granted recourse in England.[51] In international relations nothing similar is assured.

That mortgages and other security rights can, and in the case of land charges not supported by an underlying personal obligation must, be enforced in their totality against the assets affected, is settled.[52] But an old French doctrine construed a category of *"dettes immobilières,"* including mine royalties, that would be restricted to the territory of the land, whereas the movables had to support the great majority of the claims.[53]

In the prevailing opinion, the principle is certain: all assets are liable to all creditors, but each asset only according to the law of succession recognized in the country where it is situated. No privity exists among the several laws of succession so followed.[54]

2. Equalization

Correction of this sad outlook has been sought in various ways. An influential doctrine postulates proportional division of the assets among the creditors of the various systems, conforming to the value of the assets situated in the several territories.[55] However, not only is it very difficult to assemble the facts for such evaluation, but no pertinent rule can be founded in the absence of federation or treaty. The Montevideo Treaty in fact provides a liabil-

[51] WESTLAKE § 118; DICEY (ed. 5) 973; (ed. 6) 813.

[52] VOUMARD 86, 144.

[53] For extension of this category, JOUSSELIN, (Thèse, 1899) 105; *contra* PLANIOL ET RIPERT § 906 f.; NIBOYET, 4 Traité 905 § 1364.

[54] France: NIBOYET, Traité 916 § 1370; SAVATIER, Cours 304 § 436.
Germany: NUSSBAUM 359.

[55] France: MAURY ET VIALLETON in 4 PLANIOL ET RIPERT 489; LEREBOURS-PIGEONNIÈRE (ed. 6) 412.
Germany: 2 BAR 350.
Switzerland: VOUMARD 89.

ity merely proportional to the part obtained by the local assets in the entire inheritance, but gives the local claims preference for total satisfaction.[56] The very idea of preventing a creditor from requesting full payment of his claim is unsound and disastrous to personal credit. Credit is usually granted in reliance on the entire possessions of the debtor, which may be true even of a mortgagee. Therefore, in another view, all assets must be available to every creditor.[57] At present, this responds of course to the principles of most countries, though not all; but the result of applying the divergent modalities of limitation and enforcement has never been studied. One difficulty has been overcome in France; an heir claiming benefit of inventory must extend the inventory to the entire inheritance.[58]

In the internal relationship between the beneficiaries of the separate successions, an obligation of contribution is as desirable as it is far from recognition. It has been suggested that joint debtors with recourse proportional to the values received by them,[59] provided that the construction of a will does not involve a different regulation. This rule, not of conflict of laws but a uniform substantive rule, deserves to be carefully worked out. It is not a part of any present law.

[56] Treaty of Montevideo, arts. 46-48.

[57] M. WOLFF, D. IPR. (ed. 3) 227; NUSSBAUM, D. IPR. 359; BATIFFOL, Traité 676 f. § 673 (making no difference whether there is one or several laws of succession.

[58] Cass. req. (April 23, 1866) S. 1866.1.290; C. Paris (Dec. 12, 1886) S. 1886.2.42; TRÉBAUT, 10 Repert., Successions No. 118.

[59] WOLFF and NUSSBAUM, *supra* n. 55; RAAPE, Kommentar 688; 4 FRANKENSTEIN 580 develops a different proposal which is impractical.

PART FOURTEEN

TRUSTS

Chapter 75

Trusts

I. Trust in General

If there should be any part of the conflict of laws free from "confusion," it is not the treatment of trusts. According to Bates it is "highly uncertain." [1] Griswold states that in that great maze which we know as conflict of laws, there are few fields more uncertain in the cases and difficult in principle than trusts.[2] Cavers describes the numerous hazards for the creation of trusts which even may shift in the perhaps long period during which a trust should run.[3] Beale's attempt to mold the liquid case material into firm rules [4] had too little support in the decisions and not enough practical appeal. It would seem that the very territorial principles of the law of property from which Beale started, appear unsatisfactory to the courts.

Curiously enough, in view of the scarce and not too reliable authority in England,—"scanty and often misleading"—writers look for enlightenment to the American cases.[5]

However, no new examination of the decisions would

[1] Bates, "Common Law Express Trusts in French Law," 40 Yale L.J. (1926) 34.

[2] Griswold, Book Review, 55 Harv. L. Rev. (1947) 163.

[3] Cavers, Book Review, 20 North Car. L. Rev. (1947) 231.

[4] Beale, "Living Trusts of Movables in the Conflict of Laws," 45 Harv. L. Rev. (1932) 969; 2 Beale and Restatement §§ 241-244, 294-299; Beale, "Development in the Law of Conflict of Laws (1935-1936)," 50 Harv. L. Rev. (1937) 1156 f.

[5] Croucher, "Trust of Movables in Private International Law," Mod. L. Rev. (1940) 111.

help. In the words of Chief Justice Layton of Delaware speaking of the "vexed question" of trusts *inter vivos,* the diversities are "such that no useful purpose will be served by an attempted analysis of the decisions." [6] The profound uneasiness these tentative efforts of the judiciary evoke is caused by a struggle against mechanical rules without resolute acceptance of the hints given by the prominent writers on this subject.

1. Municipal Systems

Trust, the most typical and most advertised institution of the Anglo-American law, has engendered numerous specialized applications which have grown into autonomous types. In its general form, apt to serve almost any purpose of property transactions, the trust survives; but its particularly brilliant employment in recent periods lies in certain functions among which in the United States long term dispositions of wealth take the foreground.

In the civil law sphere, identical factors have been active since the very earliest times, to build up new types of transactions by the medium of fiduciary transfers of persons and property. As a final result, however, the compact civil codes laid down the specific fruits of this development but ignored the oldest and central institution. This was not done by oversight but was felt as a necessity.

The reasons have been thoroughly investigated by recent scholars. Those who protest against introduction of the Anglo-American trust believe that this institution violates

[6] Wilmington v. Wilmington (1942) 27 Del. 243, 24 Atl. (2d) 309. See also Note, 139 A.L.R. (1942) 1129 on the "near impossibility of deducing a uniform rule."

Every feasible analysis has been made at their times by CAVERS, "Trusts Inter Vivos and the Conflict of Laws," 44 Harv. L. Rev. (1930) 161-202, and in the special monograph by WALTER LAND, Trusts in the Conflict of Laws (1940).

the principle—itself contested in many jurisdictions—that the number of property rights is closed, and if not this, at any rate, that it is incompatible with sure and neat definition of *jura in re,* since the right of *cestui que trust* defies any clear classification of proprietary and obligatory interests. Furthermore, the assets constituting the *res* are inalienable through normal transfer, although a widespread axiom declares ineffectual in principle, or even without exception, restraint on alienation by contract or any private transaction. Finally, the group of codes, led by the Code Napoléon, prohibiting fideicommissary substitutions, is more or less hostile to fiduciary transfers of rights with obligation to ulterior transmissions under condition or terms of time.[7]

Thoughtful opposition to these arguments has been expounded with equally learned historical, logical, and economical reasons.[8]

Whatever the merits of these considerations have been in the past and present stage of the main European systems, there is a distinct tendency to lower the defenses against the trust. Louisiana and Quebec, partly by statute and greatly by practice, have emulated their common law surroundings.[9] An increasing and already long series of Latin-American statutes, since Alfaro's Panamanian statute,

[7] See in particular MOTULSKI, "De l'impossibilité juridique de constituer un 'Trust' anglo saxon sous l'empire de la loi française." Rev. crit. 1948, 451-468; GARRIGUES, "Law of Trusts," 2 Am. J. Comp. L. (1953) 25.

[8] Especially LEPAULLE, Traité théorique et pratique des trusts (1932) (extracts by CHAFFEE, 46 Harv. L. Rev. 535); *id.*, "La notion du trust et ses applications dans les divers systèmes juridiques," 2 Actes du Congrès Int. de Droit Privé (Rome 1951) 197; VERA BOLGÁR, "Why No Trusts in the Civil Law?" 2 Am. J. Comp. L. (1953) 204.

[9] Louisiana: Trust Estate Act, L. 81 of 1938; *cf.*, F. F. STONE, "Trusts in Louisiana," 1 Int. Comp. L. Q. (1952) 368.

Quebec: C.C. 1866, arts. 981-981n; *cf.*, MIGNAULT, "La Fiducie dans la Province de Quebec," Sem. Int. de Droit (Paris 1937).

have incorporated either in part [10] or in principle the trust,[11] as a legal institution, and a very vivid discussion continues in the Spanish-speaking countries.[12] Continental Europe offers little prospect for wholesale conquest, but it is more acutely than ever remembered that the Romanistic system retained, in addition to all the special devices for acting by an intermediary, (1) the fiduciary disposition of property rights, from which source German practice, immediately after the Civil Code came into force, took inspiration for a vast development of transfer of title for security purposes, and (2) fiduciary agency in the agent's own name, used in varied fields, often under the very term of trustee *(Treuhänder)*. Especially have German business and judicial practice and German science devoted a high degree of attention to these transactions and institutions, but a number of similar efforts are noticeable everywhere.

This is not the place to go into the municipal legislative problems. We may, however, for the benefit of understanding the conflicts problems, draw from the recent animated debates a two-fold inference.

On the one hand, the main argument against the plain adoption of the trust in civilian systems is neither the lack of kinship nor the lack of an adequate place in the statute book. It is rather the fulfillment of most of the

[10] ALFARO, Adaptacion del trust del derecho anglo-sajón al derecho civil, 1 Cursos Monograficos, Acad. Interamer. (1948) 67; *id.*, "The Trust in the Civil Law with Special Reference to Panama," 33, Ser. 3, J. Comp. Leg. part III/IV, 25-31.

[11] Panama: L. Jan. 6, 1925, amend. L. No. 17, Feb. 20, 1941.

Puerto Rico: L. April 23, 1928. SANCHEZ VILLELAS, "The Problem of Trust Legislation in Civil Law Jurisdictions; The Law of Trusts in Puerto Rico," 19 Tulane L. Rev. (1945) 374.

Mexico: Ley General de Inst. de Credito etc. 1926/1932/1941.

[12] See PATTON, "Trust Systems in the Western Hemisphere," 19 Tul. L. Rev. 398; *id.*, "The Nature of the Beneficiary Interest in a Trust," (1949) Interamer. Bar Ass. S. IV Sixth Conf. with rich documentation; POMPEYO CLARET Y MARTI, "De la Fiducia y del Trust," Estudio de Der. Comp. (Barcelona 1946).

salutary functions of trusts by special devices that make a revolutionary change of existing sets of rules less imperative.

On the other hand, experience has shown that by a really skillful new statute, though not without it, trust can be integrated in a civilian body of legislation. At the same time, in my opinion, a close analysis of the individual incidents of Anglo-American law would show a much greater approximation to the Continental thought than is commonly supposed by the opponents.

Hence, being well aware of the fundamental differences of approach, we ought to avoid, once more, the rash impression of an irreconcilable contrast.[13] This observation should facilitate at least the unreserved recognition of rights and duties arising from common law trusts in the countries of civil law.

2. Categories in Conflicts Law

(a) *Testamentary and inter vivos trust.* Evidently, a fundamental distinction between the sources creating a trust has always been believed natural, on the assumption that creation by a will is a part of inheritance law and belongs to the jurisdiction of the probate court, whereas creation by settlement is subject to the law of contract and jurisdiction is taken by some undefined court *in personam,* or on the ground of the situation of the assets. It is worthwhile to recall these assumptions, apparently long forgotten by some courts and writers. To bring them to recollection means to reveal their patent inconvenience under present circumstances, which explains the inconsistency of their

[13] A cautious advance of the French to the English idea of administration is stated by BATIFFOL, "The Trust Problems as Seen by a French Lawyer," 33, ser. 3, J. Comp. Leg. III/IV 18, 24.

application. With such basic principles, the courts labor in vacillating efforts.

(b) *Trust of land and trust of movables.* The Restatement superimposes on the just-mentioned distinction between testamentary and living trusts the division of trusts according to their object. The matter, therefore, is created as a part of property law. By further subdivisions, the scheme respecting "creation" of trusts results as follows:

Creation *inter vivos*: for chattels: *lex situs* (§ 294 par. 17)
for choses in action: *lex loci* (§294 par. 2)
for land: *lex situs* (§ 241)
by will: of land: *lex situs* (§ 241)
of movables: *lex domicilii* (§ 295)

The "Corpus Juris" supposes a different system to exist in fact. In general the law of the domicil of the settlor would control trusts of tangible movables, which in the case of wills would be the domicil at the time of death; intangibles would be governed by the law intended by the settlor and only in the absence of an intention his domiciliary law.[14]

The distinctive treatment of intangibles in both systems seems to be prompted by the awkward primary tests for tangibles. Narrow territorial and materialistic connections are utilized to support the *lex situs* in this application; only a merely mechanical extension of the adage, *mobilia sequuntur personam,* can justify a principle that trusts are dependent on the settlor's domicil.

That a fiduciary transaction comprehending an entire estate should be recognized and nevertheless torn asunder because of the local situation of its components, is the hard core of the principal difficulties experienced in the matter.

(c) *Creation and administration.* The prevailing opinion

[14] 15 C.J.S. 936, § 18 g.

divorces creation and administration of trusts. In the case of a testamentary trust, the main rule of jurisdiction is taken from the law of decedents' estates; the law of the state of the testator's domicil at his death governs administration also of the testamentary trusts. The Restatement, repeating this rule (§ 298), however, grants an exception if "the will shows an intention that the trust should be administered in another state" (§ 297). A trust of movables created *inter vivos* is administered at the place located by the trust deed. A trust of land is always administered under "the law of the state where the land is and can be supervised by the courts of that state only" (§ 243). This, again, is a system built up by a sense of geometry rather than wisdom.

In contrast to this formulation, "American Jurisprudence" states that the courts gradually are subjecting trusts of movables to the law of the place of administration and scrutinize every hint of intention in the fixing of this place.[15]

(d) *Voluntary and legally-implied trusts.* Conflicts discussions ordinarily do not include statutory and constructive trusts which in fact belong in the vicinity of extracontractual obligations. They seldom refer to resulting trusts,[16] which certainly are not typical of the chief problems.

With this negative exception, however, the great variety of trust purposes has not provoked any attempt to differentiate the conflicts rules. Yet we may take it that the field of these rules is and must be restricted to the current main use of trust, that is, dispositions of wealth for long periods for the benefit of the settlor's family and charitable corporations. They have no connection, for instance, with representation of shareholders or bondholders by a trustee

[15] 11 Am. J. 382 § 95; 139 A.L.R. 1129, 1134.

[16] *In re* Smith's Will (Surr. 1947) 67 N.Y.S. (2d) 330 contains a very short mention.

appointed in accordance with the bylaws of a corporation or by a bond deed, with bankruptcy trustees, Massachusetts business trusts, and so forth.

Nor are the incidents included in the law of trusts differentiated for conflicts treatment (with the exception of two marginal questions).[17]

3. Judicial Favor

Although no exception to the prohibitory statutes of the situs of land seems to have been allowed,[18] a common phenomenon of American judicial attitude to trusts of movables is the favor shown by the courts in upholding their validity. Charitable testamentary trusts have most often been so privileged, but courts have expressly extended their benevolence further.[19]

Thus, a regular conflicts rule is adopted, and prohibitions contained in the statutes so invoked are the cause for choosing a different statute. The New York courts, but not they alone, by recognizing a foreign governing law validate the creation of trusts that would have been invalid under the law of the forum. This practice eliminates the adverse effect of the domestic rules against remoteness of vesting interests [20] when no such obstacle is raised by the presumable situs of the funds, against accumulation of income when the law of the place of administration is more favorable,[21] and against indefiniteness of beneficiaries in gifts to charities.[22] As the courts state, the purpose is to uphold the

[17] *Infra* n. 56.

[18] LAND § 12.

[19] Lanius v. Fletcher (1907) 100 Tex. 550, 101 S.W. 1076; Hope v. Brewer (1892) 136 N.Y. 126, 32 N.E. 558; LAND 57 § 17.

[20] Chamberlain v. Chamberlain (1871) 43 N.Y. 424.

[21] Manice v. Manice (1871) 43 N.Y. 303, 388, erroneously also speaking of the place of the beneficiary, 4 PAGE 725 n. 5.

[22] Hope v. Brewer (1892) *supra* n. 19.

trust rather than to support the trust corporations of New York; the New York courts have attempted it was said,[23] "wherever possible to uphold the validity even of charitable testamentary trusts which were to be administered in another state."

This practice does not think highly either of the traditional restrictions on free disposal or of the traditional conflicts rules on trust creation. In the first regard, "in the age of endowment campaigns and trust advertising the spectre of the dead hand no longer troubles the judge or legislator." [24] In the second aspect, the usual excuse is the implied intention of the testator or settlor, which, however, in these cases is more fictitious than ever, since it is the court that after the event compares the two or more statutes possibly in question and does the choosing. Indeed, the courts are dissatisfied with their own substantive statutes as well as with their own conflicts rules.

How the courts help themselves, however, is one more instance in the list of situations where exceptional liberal conflicts rules are gradually invented to obviate antiquated difficulties for *interstate* transactions.[25] The conclusion must be the same as we submitted earlier, that the exceptions are unfit for *international* use.

4. Changes of Contact

The law governing creation is naturally invariable, but also the court supervising the administration under its own *lex fori* is ordinarily not deemed to lose jurisdiction because of supervening events. Even the transfer of the funds to a different location has been held no ground for a change

[23] Hutchison v. Ross. (1933) 262 N.Y. 381, 394, 187 N.E. 65.

[24] CAVERS, 44 Harv. L. Rev. at 167, 168 n. 24; LAND 74.

[25] Usury contracts, Vol. II, pp. 408-412, 427 ff.; Sunday contracts, Vol. I, p. 564 ff.; liquor sales, Vol. III, p. 177; Statute of frauds, Vol. III, p. 54 (c).

of law, unless the settlor has reserved the right to change the place of administration.[26]

II. Testamentary Trusts

Where a trust is set up by a will, it is obvious that the formal requisites of this will must be observed. The *lex fori* is of no importance, but the conflicts rule of the forum tells whether the inheritance law of the last domicil or nationality or that of the place of execution or of the situs, or any one of them, validates the testament. Natural as this solution is, the effects may not always satisfy, particularly in the international field, because even with respect to formal validity a will and a trust are different things.

This is more evident if we think of material validity.

The American doctrine has generally assumed that intrinsic validity is governed by the law of the situs of immovables and by the law of the last domicil of the decedent respecting movables.[27] In numerous cases, however,—Land estimates one-fourth [28]—the American decisions have deviated from this principle. Mostly it has been done in favor of the validity of the trust. But the New York leading case, *Hutchison* v. *Ross*,[29] marked in 1933 the formal repudiation of the rule of domicil in the field of living trusts and affected its application to testamentary trusts from whence the rule came. Technically the application of a non-domiciliary law was based on statutory construction restricting domestic prohibitions to domestic wills, or on the intention of the testator, which in the usual manner is described either as his real, presumed, or assumed intention. It is assumed where the will determines a place other than

[26] Land § 26.1.
[27] Restatement §§ 241, 295; Falconbridge 560; Land §§ 9, 17.
[28] Land § 17.
[29] *Supra* n. 23; Beale, 50 Harv. L. Rev. at 1156.

his domicil for the administration of the trust, and—for the sake of upholding a trust—especially where the trust would be invalid at the domicil but valid at the place of administration. The Massachusetts court reviewed the problem with this result in 1949 when a testator domiciled in New York left personal property in trust in the forum; in this individual case under Massachusetts law, invalidity followed for an appointment to a remainder and the funds reverted, by "capture," to the first appointee for life.[30] Some decisions use the familiar argument that the testator is supposed to have chosen a law validating his will.[31] The New York practice described above leads to the domicil against the place of administration, although the latter is in New York, [32] or to the place of administration against New York law.[33]

The process of veering away from the last domicil is so well-advanced that it has been observed that the domicil is no longer determinative of the applicable law, if it stands alone in the congeries of elements pointing to other contacts.[34] More radically, the very function of the law of the domicil has been explained by the "theory that such trust is to be administered at testator's domicil" so that the intention of the testator now would be the uniform test.[35] But on the other hand, no case seems to recognize even the express choice of law in a will unless some "substantial connection" with the selected place is noted.[36]

[30] Amerige v. Att. Gen. (1949) 324 Mass. 648, 88 N.E. (2d) 126. Note, 63 Harv. L. Rev. (1950) 699; 50 Col. L. Rev. (1950) 239.

[31] Lanius v. Fletcher (1871) 100 Tex. 550, 101 S.W. 1076; *cf.*, 4 PAGE 731 § 1647.

[32] Cross v. United States Trust Co. (1892) 131 N.Y. 330, 30 N.E. 125; Dammert v. Osborn (1893) 140 N.Y. 30, 35 N.E. 407.

[33] *Supra* n. 19-21.

[34] SWABENLAND, "The Conflict of Laws in Administration of Express Trusts of Personal Property," 45 Yale L.J. (1936) 438.

[35] 4 PAGE 722 and n. 8.

[36] SWABENLAND, 45 Yale L.J. at 450.

Rationale. It is remarkable what progress the American courts have made without any sure guidance by principles, merely weighing the traditional contacts such as the testator's domicil at the time of his death, his intention—both taken from inheritance law—and the doctrine of prevailing elements—taken from the law of contracts; thirteen such elements have been counted in the decisions.[37] However, only a few scholars have pointed to a role of the place of administration superior to the rest of the "elements." [38]

Validity and administration. Is it a conception suitable to a sound treatment of testamentary trusts, that the stipulations producing it are exactly like any other postmortuary disposition?

A will regulates the order of the beneficiaries; a trust ties down the assets for satisfying the beneficiaries. The rules of succession attach to the death of the testator; even fideicommissary substitutions as such are related in some manner to the time of death. Trust rules serve the ulterior fate of the estate and have nothing to do with the personal relations of the deceased; they are impersonal. Administration of a decedent's estate is a short-range management to liquidate and distribute assets after payment of the debts; administration of a trust fund is a matter mostly of decades under the economic requirements of care during a life time. The further time advances, the more the one-time domicil of the testator falls back into remote memory. That its law should be the cornerstone of validity and effect for this entire period, is no matter of course.

Confirmation of this difference has always been afforded by the language distinguishing executor and trustee, although the executor is a trustee himself, and substantially

[37] LAND 210.

[38] Especially GOODRICH and CAVERS, 44 Harv. L. Rev. 190.

by the scope of trust administration, as it has developed. Whereas the field of estate administration is occasionally exaggerated, as observed earlier,[39] it never reaches the width of the attributes of trust courts and trustees. The law of the place of administration is said to govern the questions: to whom the trustee may pay income or capital; whether the interest of the beneficiary is assignable; and the power of creditors to reach the trust *res* or its income.[40]

Finally, but not least, the difference in the nature of ordinary and trust dispositions is demonstrated by the fact that trusts of movables are supervised by one court alone; "no other court can discharge a trustee and no other courts will give him instructions." [41]

Hence, the mere circumstance that our law permits a person to establish a trust not only by deed among living persons but also by will, ought not to cause rational conflicts rules to assimilate just in the latter case the source of the trust with the will. The German doctrine has developed an instructive terminology. A man may change the beneficiary of a life insurance in his will without declaration to the insurer; he may appoint a testamentary executor or a guardian for his minor children in a pact on his succession.[42] However, these acts may be done *in* the instrument; they are not done as parts of testamentary disposition, or binding pact, respectively. *The testament provides the form, nothing else.* It seems to me that this is exactly the situation also of testamentary trusts. Apart from formal requirements, they should share the law applicable to living trusts.

[39] *Supra* Ch. 71.

[40] 3 BEALE 1024 § 297.2.

[41] Restatement § 299; 2 BEALE § 299.1.

[42] BGB. § 332; § 2278 par. 2: only devices and bequests can be made by a binding successoral pact, but other unilateral dispositions may be inserted in the document, 116 RGZ. 32.

What rule? If the foregoing exposition is correct, the answer to the questions of what importance the intention of the testator has and whether the place of administration is the most adequate localization, must be deferred until living trusts are discussed. It is of outstanding interest to ascertain whether the courts which empirically experiment are right in substituting a kind of party autonomy to the traditional law of domicil. This question depends on general conceptions. It should be recognized, indeed, that creating a trust, at least in the Anglo-American orbit, is permitted as an attribute of personal freedom of transacting. The territorial limits of this freedom, if some exist and whatever they contain, are certainly not a particular problem of testamentary trusts.

III. Trust Inter Vivos

1. England

Although the English decisions are limited to trusts created in marriage settlements, their criteria are so varied that the underlying principle could only be found in the search for the proper law.[43] Thus the intention of the settlor is sought through the evaluation of all factors. Also, as in contracts, usually English law is found to have been in the settlor's mind. No limitations upon free choice are known. Accordingly, it is held in Canada that a marriage contract made in Quebec may prescribe that the deed and stipulations as well as administration and disposal of the funds shall be construed and governed by the law of England.[44]

[43] Cavers, 44 Harv. L. Rev. at 185 f.; Croucher, "Trust of Movables in Private International Law," 4 Mod. L. Rev. (1940) 111.

[44] *In re* Jutra's Est. (Sask. App. 1932) 2 W.W.R. 533, 536; 3 Johnson 389.

2. United States

Former decisions, in varying choice of law, preferred to take either the domicil of the settlor or the place where the deed was delivered, as the decisive criterion. The domicil, however, has been demoted, especially since 1933,[45] to one of many elements for the search of the allegedly intended law. *Lex loci contractus,* favored by Beale for intangibles,[46] has been sometimes adopted, when the funds were delivered simultaneously with the execution of the contract.[47] More important, the "situs" of the trust, that is, the place where the funds are located at the time of the delivery of the trust deed, or where they are intended to be brought, enjoys attention. Factors are also the residence or establishment of the trustee, the domicil of the beneficiaries, and others.[48] The group of living trusts, thus, has been more clearly than trusts by will brought under the dominance of choice of law from case to case, according to express or assumed intention, the equivalent of the English proper law, but with better emphasis on the objective evaluation of the closest connection of the case with a statute. This doctrine is unambiguously adopted in such decisions as in New York by *Shannon* v. *Irving Trust Co.* (1937),[49] in Illinois by *Riggs* v. *Barrett* (1941),[50] and in Delaware by *Wilmington* v. *Wilmington* (1942).[51]

It is true, neither is this yet a rule recognized throughout

[45] Hutchison v. Ross (1933) 262 N.Y. 381, 394, 187 N.E. 65.

[46] Hutchinson v. Hutchinson (1941) 48 Cal. App. (2d) 12, 119 Pac. (2d) 214 invokes lex loci contractus (Illinois) for illegality, but all factors of the transaction were in Illinois.

[47] 139 A.L.R. (1942) 129 ff. no. 4.

[48] LAND § 37.1: eight "elements."

[49] Shannon v. Irving Trust Co. (1937) 275 N.Y. 95.

[50] Riggs v. Barrett (1941) 308 Ill. App. 549, 32 N.E. (2d) 382.

[51] Wilmington Trust Co. v. Wilmington Soc. of the Fine Arts (1942) *supra* n. 6; *cf.,* GOODRICH, 32 Va. L. Rev. 323; ann. 30 Geo. L.J. 788.

the country nor is the scope of this rule clarified. It does not seem to have been extended to trusts of land.

Creation and Administration. Writers and courts are still accustomed to distinguish also in living trusts the questions of the birth of the trust and of its management. Thus, it is commonly stated that the rules on perpetuity and accumulation pertain to administration because they restrict the holding in trust rather than the giving.[52] I respectfully disagree. The grant in trust is restricted quite as it is altogether prohibited in other countries; there is a difference only in degree. So far as a trust fails, there is nothing to administer by the appointed trustee. Other incidents, as seen before, attributed regularly to the law of administration, affect likewise the substance, the object of the creation.

This difficult tracing of the borderline is eliminated if both phases are placed under the same law. Such unique law, of course, can only be the law of the place of administration, already controlling most of the really significant causes of litigation.[53]

This place is determined, in the actual opinion of many courts and writers, by the intention of the settlor. This is the hub of the entire problem. If the intention of the settlor *inter vivos* as well as of the testator is decisive, it cannot go to two places; and, again, it cannot be supposed to dwell on a temporary place of domicil rather than on the locality where he wants the trust to live, at the place of its management.

IV. Conclusions

This writer continues to recommend the largest latitude for parties to a contract, to select the law applicable to

[52] Cavers, 44 Harv. L. Rev. at 1164 and n. 13.
[53] *Supra*, Vol. II p. 14.

their transaction. Creation of a trust ought to be an analogous subject. But the situation is not quite the same as with business contracts.

A trust of the kinds here in question rests on a gift, a liberality, which may be useful but never is necessary in the sense business is needed. Indeed, it is alien to a great number of legal systems, and even repugnant to numerous civilians. Above all other considerations, there is no other party to the transaction whose confidence in the contract or testament would deserve protection. Therefore, the great principle of freedom of transacting is more likely to suffer restrictions, if a subject of one state creates a trust in another state, than when he sells merchandise in that other state. Restrictions may be of two sorts. Although it is a rather empty requirement in the law of contracts that party choice of the applicable law should have a "substantial connection" with the chosen law, a similar requirement may perhaps make sense here in certain cases. And, reaching deeper, it is possible to argue that in view of the opposed principles of the systems the subject of one country has not always unlimited freedom to create a trust in another country.

If English courts tend to apply simply English law to trusts on English soil, if New York courts simply acknowledge the validity of a living trust created by a Cuban or Frenchman, domiciled in his native country, wishing to have the trust administered in New York and the *res* is there, a problem is raised that does acutely exist in the face of the various but essentially kindred American or common law rules against restraint of disposal and suspension of ownership. On the international plane, neither indifference to the foreign brand of prohibitions nor favor of validity can stand unchallenged without qualification.

This is a new problem and it can only tentatively be solved. To be true to the accepted standards of private international law, a division is probably inevitable. Property law depends on the *lex situs,* personal law on domicil or nationality. Under the rules of *lex situs,* a Frenchman may, in fact, dispose of assets situated in New York, according to the law of New York. This is energetically questioned in France, as we shall see; in some decisions the creation of trusts is considered a part of personal law. But from the internationally prevailing view, there is no doubt, and the New York courts are correct so far.

Nevertheless, if the French national is domiciled in France, under the American principles themselves his marital and family relations and, when he dies, his movable succession are governed by French law. It is true that a provision of the New York Decedents' Law allows him to declare for New York inheritance law, but this is a very anomalous rule, while we are looking for principles. In no case can he evade French marital property law nor the legitimate shares—*la réserve*—of his forced heirs.[54] The conflict appearing in *Hutchison* v. *Ross* with the marital property law of Quebec may be recalled.[55]

Within the United States, in the stupendous growth of trust business, the new development of unbarrable shares has been widely neglected. In the case of succession, this omission may be repaired to a degree, but trusts *inter*

[54] CAVERS, 44 Harv. L. Rev. 198 assumes the contrary. A different case was that of the decision in Prince de Bearn v. Winans (1909) 111 Md. 434, where a resident of Maryland executed a trust in Paris, in contemplation of the marriage of his daughter to a Frenchman, granting her a power of appointment. She appointed, by will, her husband in trust of her entire estate. After her death, against contrary advice received by the widower in Paris and Baltimore, the court held that the French *réserve* for their children was inapplicable; Maryland rather than French law applied to the execution of the power of appointment under a trust deed made by a resident of Maryland where also the funds were situated.

[55] *Supra* Vol. I, p. 369.

vivos make a *fait accompli* and do not even seem easily vulnerable to attacks on the ground of violated forced heirship. Filling this gap needs more than a conflicts rule. It should not be expected, however, that foreign courts will agree to the present treatment.

That American trust corporations are rather unwilling to administer trusts established by foreigners, is well justified under these circumstances.

Party autonomy, finally, has no place where all relevant facts are united in one jurisdiction. This case forms a natural exception quite as in the matter of contracts.[56] As there, only one decision deals with such a situation. All elements were in New York: the securities and the cash, their delivery, the bank; nevertheless the deed declared for Tennessee law in considering the violated perpetuity rules of New York.[57] No foreign element was in cause.

By standard forms and also judicial opinion, the application of a law other than that of the place of administration is qualified by an exception; the latter law applies normally to the commission of the trustee and to suits for termination of the trust.[58]

With a license claimed by all writers on this subject, the American conflicts law on trusts may optimistically be resumed in the following assumptions.

Testamentary trusts are formally valid, if the form of their documentation complies with one of the laws on the execution of wills recognized by the law of the forum.

Validity and effect of all trusts and the formal requirements of living trusts are governed by the law of the place of administration. The administration is conducted at one place for all movables, which is determined by express

[56] *Supra* Vol. II, p. 400 (b), case of 44 RGZ. 300.
[57] City Bank Farmers Trust Co. v. Cheek (1935) 93 N.Y.L.J. 2941.
[58] LAND § 36.4.

or tacit statement of the settlor. In the absence of his ascertainable intention, the trust is administered at the place that has the most characteristic connection with its management; a bank carrying on trust administration, of course, presents such connection.[59]

V. Recognition of Foreign Trusts

1. Common Law Countries

English courts have recognized Italian restrictions on the creation of future interests,[60] and a Scotch trust against the English restraint on anticipation.[61] The invalidity of an English trust in Argentina was taken into account.[62] Jurisdiction *in personam* is taken in order to fulfill an obligation to create a trust abroad.[63]

American courts show their benevolence also to foreign trusts under correct reservations for foreign jurisdiction. Where real and personal property was situated in Canada, the surrogate judge in New York left the determination of the validity of the trust to the court in Canada,[64] and when a trust was to be administered in New South Wales, as was said: if the trust is valid there, it will be upheld in New York.[65]

That objection of public policy contrary to validity has been singularly reduced in New York and other—though not all—courts, has been mentioned before. In Louisiana,

[59] Cavers, 44 Harv. L. Rev. at 164 n. 12.

[60] *In re* Piercy [1895] 1 Ch. 83, with respect to the part of the land in Sardinia not yet sold by the trustees, Italian law governs (without any consideration to the question of renvoi), evidently as *lex fori*.

[61] *In re* Fitzgerald [1904] 11 Ch. 573.

[62] Brown v. Gregson [1920] A.C. 860 H.L.

[63] Keeton, Law of Trusts (ed. 5, 1950) 13; Halsbury-Hailsham, Vol. 13, p. 79 § 75; Vol. 6, p. 224 § 273.

[64] *In re* Smith's Will (1947) 67 N.Y.S. (2d) 330.

[65] *In re* Grant's Will (1950) 200 Misc. 35, 101 N.Y.S. (2d) 423.

long before the trust was introduced into legislation, a trust valid in another state was approved.[66]

2. Civil Law Countries

(a) *In general.* A national of a country where trusts are unknown and which follows the nationality principle, would perhaps not find agreement in his national courts, if he established a trust abroad, and certainly not, if he attempts it within his country. But authority is scarce. There is no case in Germany deciding the question in general.[67]

In France, foreign-created trusts have sometimes been recognized. The Court of Cassation, Criminal Section, held in 1941 that the validity of a testamentary trust of the common law type is governed by the law of the sucession.[68] Prevailing opinion concludes that estates under French inheritance law are inaccessible to administration as trust funds.[69] On the other hand, where an English or American national dies domiciled in a common law jurisdiction, movables left him in France may be possessed by his trustees, though only on authorization.[70]

Two older decisions of French tribunals sanctioned trusts. In one case, the widow of the sewing machine manufacturer Singer, about to be remarried and wanting to act in the spirit of a trust deed of the deceased, gave her shares in the family concern in trust for the benefit of her children. The Tribunal de la Seine recognized this living trust on the ground that she was then an American citizen and domiciled in England, hence living under English law.[71]

[66] Heirs of Hullin v. Fauré (1860) 15 La. Ann. 622.

[67] Professor Makarov has kindly confirmed his corresponding negative result.

[68] Cass. Crim. (June 4, 1941) D.1942.1.4, S.1944.1.133, J.C.P. 1942 II.2017.

[69] MOTULSKI, *supra* n. 7 at 467 § 19 and citations.

[70] BATIFFOL, Traité 673 § 668.

[71] Trib. civ. Seine (May 16, 1906), Clunet 1910, 1229.

In the other case, included in a testamentary trust was a villa in Beaulieu on the French Riviera. The Tribunal of Nice construed the will to the effect that the beneficiary should be absolute owner, avoiding thus unconformity with French law.[72]

From these fragmentary and often criticized pieces, no comprehensive picture can be drawn. Especially, that a Frenchman could create a living trust in New York with French recognition as has been believed in this country, has been, until now, an unwarranted assertion. The courts have taken great pains, it is true, to demonstrate that trusts do not offend the French prohibitions on fideicommissary substitution: the assets do not go first to the trustee as owner; he is only a "mandatory," and the beneficiary is vested at the time of death; nor of agreements on future inheritance nor of donations *mortis causa*.[73] Yet, the emphasis on the nationality of the settlor or on his domicil has sometimes been climaxed by classifying the creation of trust under the personal law.[74]

Italian and Belgian views seem to coincide with the French attitude.[75] The climate is certainly more favorable than it was, but the development has only started.

(b) *Powers of trustee.* Although the substantive rules involving the powers of trustees of a bond issue are a special

[72] Trib. Nice (May 5, 1905) Clunet 1911, 278.

[73] Trib. Seine (May 16, 1906) Clunet 1910, 1229; (Dec. 19, 1916) Clunet 1917, 1069.

[74] Same decisions; see for older cases the digest in Clunet 1911, 134-139.

[75] Belgium: Trib. civ. Bruxelles (Nov. 27, 1947) Pas. Belge 1948, 3.51; Evans v. Evans, although the settlor, an Englishman, was domiciled in Belgium and the immovables situated there: critized by MOTULSKI (*supra* n. 4) 458.

Italy: see PALLICCIA, "Trusts testamentari inglesi riferentisi a beni situati in Italia," Rivista 1932, 347; FEDOZZI, D.I.P. 593 ff. citing old decisions; the judge *in re* Piercy (1895) *supra* n. 60, stated on the basis of the expert witness reports that the English trust, so far as the Italian land was sold by the English trustee, was not opposed by Italian law which recognized the power of the trustees to sell and the use of the proceeds.

matter not here in discussion, the procedural right to appear in court on behalf of the bondholders is usually assimilated to the right of trustees in general to represent the beneficial interests in court: as in the case of bond trustees,[76] now very widely known to the municipal statutes, it may be taken as commonly recognized that a trustee of the Anglo-American type can exercise his powers in civilian territory.[77] It is a useless speculation whether he should be considered as an owner under restriction or an agent or a composite of depositary and mandatory (which is the Scotch translation into the domestic system).[78] Scientific interest, aroused by such debates, has submitted the nature of the rights of trustee and beneficiary to penetrating analysis. There is no easy way beyond Maitland's resigned judgment: the beneficiary's right may appear as obligatory, but for many practical purposes of great importance it has been treated as if it were *in rem*.[79]

It is the practical aspect that dominates the question of exercise of the rights of both the trustee and the beneficiary in foreign jurisdictions. No real difficulties involving this exercise have turned up, with one exception to be discussed presently.

[76] Cuba: Trib. Sup. (Feb. 19, 1938): trustees of a New York bond issue are entitled to appear in court in Cuba.

France: Cass. civ. (Feb. 19, 1908) *infra* n. 75.

[77] France: Trib. Seine (Dec. 10, 1880) Clunet 1881, 439; (June 28, 1901) Clunet 1901, 812, affirmed Cour Paris (Jan. 27, 1904) D. 1905.2.356; Cass. civ. (July 29, 1901) Clunet 1901, 971 (semble); Cass. civ. (Feb. 19, 1908), KERR, Clunet 1912, 243; LEPAULLE, Traité des trusts 363, 409.

Italy: Cass. Roma (Feb. 21, 1899) Foro Ital. 1899.I 332, Giur. Ital. 1899 I 1.216.

Germany: constant practice in unpublished decisions of the probate courts *(Nachlassgerichte)*.

Netherlands: KOSTERS 631; VAN BRAKEL 186 § 142 and n. 4.

Scotland: Croskery v. Gilmoour Trustees (1897) 17 Session Cas. 697.

[78] See n. 77.

[79] MAITLAND, 3 Collected Papers at 26, 25 Grünhuts Zschr. 32, also cited for final analysis by SIEBERT, Das rechtsgeschäftliche Treuhandverhältnis 98.

(c) *Inalienability of the fund.* A considerable space in the arguments against recognition of trusts in civilian countries is taken up by the incapacity of trustees and beneficiaries to dispose of the property tied up in a trust. This feature of the trust institution has often been presented as incompatible with systems where the establishment by private transaction of restraints on free circulation is either exceptional or totally prohibited, as by the German Code, § 137. Some French authors, less negative, point to the situations where French law does prescribe inalienability, as for dower, substitutions in favor of children during the life of the first beneficiary, and contract clauses in certain judicially excepted cases.[80] Batiffol contends that the *lex situs* may allow or disallow the common law restraint on alienation.[81] Commonly it is felt that French law, i.e., *lex situs,* raises no objection against the inclusion of French assets in a foreign trust as such but objects to the lack of protection enjoyed by purchasers who in good faith acquire the property in French territory. This is a popular argument occasioned by a decision of 1901.

Illustration. The fourth Baronet Sir Robert Paul sold paintings out of the family trust fund to a dealer in Paris for 90,000 francs. The trustees sued for annulment of the sale. The Tribunal de la Seine and the Court of Paris dismissed the suit. Considering the trustees as mere mandataries, the seller was held to have been the true owner and the sale valid. Moreover, prohibition of alienation is against public order.[82]

When English trustees, sued by creditors of the beneficiary, opposed the inadmissability of disposing of capital

[80] PICARD in PLANIOL ET RIPERT (ed. 2, 1952) §§ 222 ff.
[81] Traité 644 § 645.
[82] Trib. Seine (June 28, 1901) Clunet 1901, 812, affirmed Paris (Jan. 27, 1904) D.1905.2.356.

or income by anticipation, as well as of seizing these interests, two sections of the Tribunal de la Seine split. One division accepted this plea and lifted the seizure.[83] The other rejected it, since such an absolute restriction offends public order and lacks the publicity provided by the local law of property.[84] The Appeal Court of Paris reversed the first decision. It recognized an English marriage settlement including a trust but held that capital and income when brought to France entered into free commerce.[85] The annotation repeats the necessity of protecting the public against invisible fetters.

Why all these authors and judges have believed it necessary to set up a barrier against the application of English law is difficult to understand. In the common law countries, respect for the law of the situation of property has always been very high. English trust law is inherently modified by the conflicts rules on *lex situs*. But moreover, in England and the United States themselves, a bona fide purchaser of trust property is treated no worse than ordinarily. In New York, for instance, the principles have been laid down since 1823.[86] Of course, a trustee cannot sell trust property or allow its seizure without a court order. Neither can a French husband dispose of the dower. Hence, the objects can be recovered from a purchaser knowing the nature of the property. Yet, "equity will not aid a cestui que trust against a bona fide purchaser (from a trustee) without notice of the trust." [87] The seller is estopped and the beneficiaries have only an equitable interest against which "the transferee is entitled to hold the property free of the

[83] Trib. Seine (Dec. 22, 1926) Revue 1927, 70.
[84] Trib. Seine (Feb. 23, 1927) Revue 1927, 263.
[85] Cour Paris (April 18, 1929), Bear v. Humphries, Rev. crit. 1935, 149.
[86] Galatian v. Erwin (Ch. N.Y. 1823) 1 Hopk. Ch. 48, aff. 8 Cow. 301.
[87] Petrie v. Myers (1877) 54 How. Prac. 513, 516.

trust and is under no liability to the beneficiaries." [88] The doctrine of bona fide purchase is also applicable to persons taking the property from the first purchaser.[89]

In Germany, it would seem questionable whether the prohibition of contractual restraints on alienation (BGB. § 137) is a part of unyielding public policy or only applicable to German-governed contracts and to property on German soil. Before introducing trusts into the German system, § 137, of course, would have to disappear.[90] But the courts deny protection also to foreign trust property, when a trustee alienates assets in breach of trust.[91] This practice, again, can be justified so far as the property is dealt with in the German territory.

The law of the new situation, according to the general rule, governs property transactions.[92]

[88] SCOTT, 2 Trusts 1573 § 284.
[89] *Id.* 1595 § 287.
[90] SIEBERT, Das rechtsgeschäftliche Treuhandverhältnis 420.
[91] RG. (Feb. 19, 1937) 153 RGZ. 370; WÜRDINGER, "The German Trust," 33 ser. 3 J. Comp. L. part III/IV, 31, 34.
[92] *Supra* Ch. 56.

PART FIFTEEN

APPLICATION OF FOREIGN LAW

CHAPTER 76

Ascertainment of Foreign Law [1]

AN international discussion involving almost every country has been directed to the following questions:

I. Is the foreign law a fact, or is it at least to be evidenced as a fact? Or is the court entitled to investigate it on its own motion? Or is this a duty of the court?

II. Is the application or nonapplication of foreign law reviewable on appeal?

III. What methods of evidence are admitted?

IV. What effect has the absence of proof of the foreign law?

The debates have been so comprehensive that little can be added. The third question concerns exclusively, the others greatly, the rules of procedure, which are not here considered. But a summary is advisable with the accent upon the evolution in court practice and legislation. Reporting on this topic in the United States and in certain countries is sometimes anachronistic.

I. JUDICIAL NOTICE OF FOREIGN LAW

1. Mere Party Evidence

(a) *Foreign Law is a fact.* At common law the treatment of foreign law has been connected with the idea that only domestic law is law, hence foreign law must be proved

[1] NUSSBAUM, "Proof of Foreign Law," 50 Yale L.J. (1941) 1018; *Id.*, Grundzüge des internationalen Privatrechts (1952) 235; RUDOLF B. SCHLESINGER, Comparative Law Cases and Materials (1950) 32-139.

as a fact.[2] A party basing a claim or defense on a foreign rule must plead and prove it as "any other fact," that is, in the same manner and time; as such, it goes to the jury, if there is any in the case. Thus taught, following older Continental authors, Story,[3] and his disciple Foelix in France,[4] as well as Calvo in international law.[5] On paper, this doctrine remains the accepted dogma in the British and most American jurisdictions and sometimes abroad.[6]

The British aloofness from "foreign law" has gone so far that English executors have been held justified in ignoring Scotch law when distributing inheritance assets to the wrong beneficiary.[7] And the Restatement asserts that if the court disbelieves the evidence offered by a party, it cannot resort to evidence refuting the allegation.[8]

However, this belief has been thoroughly shaken. Many writers practically everywhere have protested. Compromises have been sought in various forms, as when it is said that foreign law is to be regarded on one side as fact and on the other side as law. Some scholars and courts have resorted to the theory of "material" or "formal reception" or the "local law theory" whereby the foreign law is deemed

[2] DICEY (ed. 6) 866, rule 194; 3 BEALE 1664 § 621.1; STUMBERG (ed. 2) 176; on the old cases see NUSSBAUM, Grundzüge 246.

[3] LESSONA, Rev. Droit Int. (Bruxelles) 1905, 547.

[4] STORY § 637; FOELIX § 18.

[5] CALVO, 2 D. Int. § 886.

[6] United States: see 67 L.R.A. 33; GOODRICH § 83; NUSSBAUM, 50 Yale L.J. 1018.

France: e.g., BATIFFOL, Traité 352 § 332.

Spain: long series of decisions from 1880 to 1926, see YANGÚAS 308; T.S. (Dec. 4, 1935) Clunet 1936, 671.

Chile: C.C. art. 13 and note of VELEZ SARSFIELD; Trib. Sup. (Nov. 12, 1926), 24 Rev. Der. I 289; ALBÓNICO 152.

Colombia: RESTREPO HERNANDEZ 232 § 1923 seem to refer to the common view, criticizing it.

[7] Re Hellmann's Will (1866) L.R. 2 Eq. 363.

[8] Restatement § 621 comment b; *contra* NUSSBAUM, Grundzüge 244 n. 40.

incorporated into the law of the forum; [9] these immediately come to the directly opposed result that foreign law is within the rule *jura novit curia*.[10] But we know that foreign law applies not by reception but "as such and because such." [11]

Italian and Dutch courts have largely abandoned the old conception.[12] In the United States, the axiom has been condemned by such scholars as Thayer and Wigmore; [13] the difficult transition may be gathered from the thoughtful argument with which the Supreme Court of New Hampshire overruled its former adherence to the fact theory:

". . . But as grave and serious doubts of the propriety of the treatment of foreign law as an ordinary question of fact have presented themselves, the rule has been re-examined and consideration given its standing. Its logical support and its practical merits are so open to objection and inviting to criticism that the rule of stare decisis is not strong enough to close the door to the consideration. . . . Conceding that foreign law is a matter of fact, yet it also is law in every true sense . . . it is a fact as domestic law is." [14]

In the end, the court found that judicial notice must be taken.

The Commissioners of Uniform state laws have drafted

[9] *Supra* Vol. I, p. 62 f.; see most recently YNTEMA, Festschrift für Rabel (1954) 535 f. against W. W. COOK's local law theory.

[10] Trib. Milano (June 10, 1949) Foro Padovano 1949 I 676.

[11] CERETI, 14 Riv. Dir. Proc. (1936) II 100, 107 n. 1: "non come recetticio ma come tale e perchè tale."

[12] Italy formerly: Cass., (May 13, 1937) 7 Giur. Comp. D.I.P. 281; (July 9, 1941) 10 Riv. Dir. Proc. 135 with many precedents. MONACO, L'efficacia 87 in 1952 considers this still as the dominant practice; but see *infra* n. 33.

Netherlands: formerly H.R. (April 21, 1876) W. 3989; now: *infra* n. 31.

[13] THAYER, "Judicial Notice and the Law of Evidence," 3 Harv. L. Rev. (1890) 285; *id.* "Law and Fact in Jury Trials," 4 Harv. L. Rev. (1891) 172; WIGMORE, 10 System of Evidence (ed. 3, 1940) 529; GOODRICH 222: both the fact theory and the submission to the jury "does not evoke admiration."

[14] Allen, J. in Saloshin v. Houle (1931) 85 N.H. 126, 155 Atl. 47; of course, the court could have gone to the logical end, Note, 30 Mich. L. Rev. (1932) 753 f.

their law on judicial notice "to correct two outworn rules of the common law," namely, that the law of a sister state is a fact and the decision is for the jury, an "inheritance from the insular common law of England of two centuries ago" when all foreign countries spoke foreign languages and had alien systems.[15]

(b) *Like a fact.* Under the leadership of such writers as Fiore and Diena, continental doctrine has abandoned the "fact" cliché, but retained its main practical results with a changed justification. The maxim, *jura novit curia,* is considered inconvenient for application. It is inappropriate to a law not promulgated in the forum and therefore difficult to know. Foreign law exceeds the ordinary range of knowledge expected of the judiciary. As it was said, long ago, in England:

"With foreign laws an English judge cannot be familiar; there are many of which he must be totally ignorant; there is in every case of foreign law an absence of all the accumulated knowledge and ready association which assist him in the consideration of what is the English law . . . " [16]

Hence, the party must plead and prove the foreign rules on which he bases his contention. This opinion has been adopted throughout the world and now governs in most countries.[17]

[15] 9 U.L.A. (1951) 399.

[16] Nelson v. Bridport (1845) 8 Beav. 527, 534, 50 Eng. Rep. 207, 210.

[17] In addition to the citations above n. 6:

United States: Cuba Railroad Co. v. Crosby (1912) 222 U.S. 473; 15 C.J.S. 840 n. 67 (speaking of avoiding the danger that the "hospitality" of the courts be stressed).

Belgium: POULLET §§ 336 f.

France: Cass. req. (Oct. 31, 1923) Revue 1934, 140; Cass. civ. (May 25, 1948) S. 1949.1. 21, Rev. Crit. 1950, 663; LEREBOURS-PIGEONNIÈRE (ed. 6) 232 § 212.

Greece: see the reports by TENEKIDES, Clunet 1932, 589, 593; FRAGISTAS, 10 Z. ausl. PR. (1936) 535; MARIDAKIS, 1 PIL. § 22; GOFAS, 6 Rev. Hell. (1953) 78.

Numerous writers, it is true, have found this combination of assumptions trying. If foreign law is law, some conclude that it must be treated like domestic law. Others revert to the characterization as fact, because the party has the burden of proof—non sequitur—or because the court has to take the ready-made law from the foreign source instead of examining its logical and social background.[18] But again, the latter argument is open to doubt. Neither is a judge in any country entirely free to create municipal law, nor is he bound to receive the presentation of foreign rules like an automaton. There are certainly degrees of freedom in the two situations, but the origin of the doctrine has caused an exaggerated emphasis on dependence on the foreign sources.

However, there is no doubt that the present doctrine is based on real or fancied convenience. So much as possible, the judge should be spared research in systems alien to him and the hazards of decision. Even so, in dealing with foreign law, he cannot be dispensed from the typical judicial operations which are not applicable in examining facts.

Thus, it is plainly settled that the court has the right and duty to weigh the evidence offered by the parties in its

Italy: former prevailing opinion, supported in C. Proc. Civ. art. 294; Cass. (May 23, 1930) Rivista 1931, 90, Foro Ital. 1930.1.968; (Dec. 1, 1930) Clunet 1931, 760; (July 8, 1931) Giur. Ital. 1932 I 1, 741, Rivista 1931, 280; (March 9, 1935) Rivista 1935, 405; (Dec. 19, 1933) Revue crit. 1935, 360; (Jan. 29, 1936) *ib.* 1936, 290; see UDINA, Rev. crit. 1935, 359; PERASSI, Lezioni 8; MORELLI, Elementi DIP. (1946) 16.

Portugal: C. Proc. Civ. art. 521.

Spain: Trib. Sup. (May 28, 1880); *id.* (Nov. 7, 1896); *id.* (Nov. 15, 1898); ORUE 492.

Argentina: C.C. art. 13; 1 ALCORTA 119, 137 f. *cf.*, 3 Z. ausl. PR. (1929) 394; Cám. Cio. (July 7, 1952) J.A. 1953, 5212.

Brazil: C. Proc. Civ. art. 212 and the writers on procedural law; Sup. Ct. (Nov. 12, 1926) 24 Rev. Der. I 289, but see *infra* n. 30.

Costa Rica: C.C. art. 11.

Guatemala: Law on Jurisdiction (1936) art. XXVI.

Nicaragua: C.C. art. VII.

[18] BATIFFOL, Traité 352 § 332.

judicial capacity, not as a trier of fact.[19] Although the German supreme court goes farther than other courts in reserving a place for its own research, its practice should be followed, holding that the judge in construing a foreign contract—where no formal canons of interpretation interfere—is not bound to foreign interpretations.[20]

Most manifestly, the legal nature of the task is recognized in common law jurisdictions by transferring the decision from the jury to the court,[21] as concerns the law of a foreign country.[22]

Judicial notice is taken, of course, of treaties to which the state of the forum is a party, provided that these are applied as domestic law.[23]

2. Discretionary Right of the Court to Investigate

In Brazil, article 14 (Int. C.C.), permits the judge to require a party to prove the text and validity of an enactment which he pleads. This is a partial legislative acceptance of a faculty which is either conceded as an enlargement of the court's power beyond passive waiting for the party evidence[24] or borrowed from the principle of judicial

[19] England: CHESHIRE (ed. 4) 130.
United States: 1 BEALE § 54; 3 *id.* § 682.
France: Cass. req. (July 29, 1929) D.H. 1929, 457, Clunet 1930, 680.
Spain: Trib. Sup. (July 12, 1904).

[20] RG. (Nov. 14, 1929) Jur. Woch. 1930, 1855. 1.

[21] England: Judic. (Consol.) Act, 1925, sec. 102; Lazard Broth. & Co. v. Midland Bank [1933] A.C. 289, 298.
United States: Note, 30 Mich. L. Rev. (1932) 749; Uniform Jud. Not. of For. L. Act, § 3.
New York: C. Civ. Prac. § 344 a, B.

[22] United States: Uniform Act, cited, § 5; Leary v. Gledhill (1951) 8 N.J. 260, 84 Atl. (2d) 725.

[23] Argentina: C.C. art. 13.
Germany: RG. (Feb. 25, 1904) 57 RGZ. 142: The Bern Railway Convention is irrevisible when offered as Austrian law; *cf.*, MELCHIOR § 292.
Nicaragua: C.C. art. VII and other codes.
Spain: CASTILLO, 4 Rev. Espan. D. Int. (1951) 409, 447.

[24] Thus also in France: Cour Paris (March 14, 1952) Rev. Crit. 1952, 325; BATIFFOL, note *ibid.* understands that even judicial notice is taken.

notice.[25] This right may also directly follow from the modern conception that the court is responsible for the course of the proceedings and has to advise the parties of failures to complete their activity.[26]

The American Uniform Act expressly states:

§ 2. The court may inform itself of such law in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.

What is here in discussion, is a mere right of the court which is not reviewable on appeal. There is a difference according as theories unfavorable or favorable to judicial notice of foreign law are taken as a starting-point. The New York rule, as well as the provision of the Uniform Act and similar statutes, has been commonly construed to the effect that the court would only act when a party has pleaded the foreign law. The statute, it has been held, removes the necessity of proof but not that of pleading, or, at least, of drawing the attention of the court to the foreign rule.[27]

On the basis of the broadly drafted New York statute of 1943, which literally would allow any spontaneous research by the court, thus far the Court of Appeals has only once disapproved this position.[28] This decision still leaves

[25] Italy: Cass. (May 12, 1937) 7 Giur. Comp. DIP. 281; (March 28, 1938) *ib.* 327.

Netherlands: H.R. (June 28, 1937) W. 1938 No. 1.

[26] German C. Civ. Proc. § 137, as generally interpreted; *ib.* § 293 (*infra* n. 3) had originally just this meeting.

[27] E.g., Strout v. Burgess (Me. 1949) 68 Atl. (2d) 241, 12 A.L.R. (2d) 939; Scott v. Scott (1951) 153 Neb. 906, 46 N.W. (2d) 627, 23 A.L.R. (2d) 1431; Bergman v. Lax (1951) 107 N.Y.S. (2d) 266; Allen v. Saccomanno (Wash. 1952) 242 P. (2d) 747.

[28] Pfleuger v. Pfleuger (1952) 304 N.Y. 148, 106 N.E. (2d) 495; on the recent New York practice, see NUSSBAUM, "Proving the Law of Foreign Countries," 3 Am. J. Comp. L. (1954) 60.

intervention to the discretion of the judge,[29] but it ruled that any court of original jurisdiction can cure the failure of the party to specify the foreign rule relied upon by taking notice ex officio. Moreover, the court stated that the discretion of the court ought to be exercised with respect to the statute of a sister state.

If this stage is reached, it is more certain than before that judges may use their private knowledge in evaluating party evidence. It is not probable, however, in this connection that a court may, on its own motion, introduce a foreign law that was not pleaded into the suit otherwise than by questioning the parties.

3. Duty to Take Judicial Notice

Is there a duty of the court to insert into the procedural matter (a) the question of the applicable law, (b) the materials to solve this question, (c) the solution of this question? So far no provision seems to have stated an absolute duty of this kind. The duty in question is always tempered by some measure of discretion, obliging judges to make appropriate efforts rather than to achieve results. However, such a provision definitively changes judicial passivity into active responsibility.

Common law procedure has not encouraged such enterprise. Central European judges could be charged with more linguistic aptitude and familiarity with the basic Romanistic ideas of the surrounding countries. The greatest influence, however, has come from the writers who since Savigny infer from the position of the national laws within the international community the dignity of a true

[29] The Appellate Division states that it may, according to its discretion, take judicial notice of the law of a sister state or a foreign country, or in the absence of actual proof indulge in presumptions of similarity. In re McDougald's Est. (1947) 272 App. Div. 176, 70 N.Y.S. (2d) 200.

law of conflicts and the equality of the laws before the judge.[30]

The German Code of Civil Procedure provides:

> The law in force in a foreign country, the customary law and the local enactments need proof only insofar as they are unknown to the court. In ascertaining such law the court is not limited to the evidence adduced by the parties; it is entitled to use other sources of knowledge and to issue orders for providing what is necessary to such use.[31]

While the New York statute has been construed narrowly as an effect of judicial prerogative, the German provision, which verbally expresses just this conception, is recognized as establishing a formal duty.[32] The court finds ex officio what law is applicable to the case and, if it knows its content, has to apply it; otherwise it must ask the parties to supply information.

A number of other countries have joined this group; in particular, as mentioned before, Italy and the Nether-

[30] E.g., United States: HARTWIG, "Construction and Enactment of Uniform Judicial Notice," 40 Mich. L. Rev. (1940) 174 advocates a federal provision on taking judicial notice.

France: WEISS, 4 Traité . . . ; PILLET, Principes 84.

Germany: common opinion from 1 ZITELMANN 287 f.

Greece: STREIT-VALLINDAS § 14; MARIDAKIS D.I.P. § 22 and many others.

Italy: FEDOZZI 442 f.; MORELLI, Lezioni (ed. 2, 1943) 46 § 18 (more determined than in D. Proc. Civ. Int. (1938) 54 f.)

Spain: YANGUAS MESSIA, 1 D.I.P. 303.

Argentina: A. ALCORTA.

Brazil: 2 MACHADO VILLELA 256; BALMACEDA CARDOSO 179; Institute of International Law, 11 Annuaire (1892) 330.

Colombia: CAICEDO CASTILLA 135 ff.

[31] ZPO. § 293.

[32] RG. (March 23, 1897) 39 RGZ. 371, 376; (June 18, 1900) Jur. Woch. 1900, 585; (Nov. 11, 1911) Jur. Woch. 1912, 196; (Oct. 24, 1912) 80 RGZ. 262; (Nov. 5, 1928) Jur. Woch. 1929, 1434; and constantly. MELCHIOR 421 § 284; NUSSBAUM 96.

lands have veered to the principle of taking judicial notice.[33] The Latin-American treaties have adopted it.[34]

In the United States, the Uniform Act and the New York statute are formulated in agreement with this doctrine,[35] although the courts hesitate to give it full effect. The clearest expression is found in the Massachusetts statute:

> The courts shall take judicial notice of the law of the United States or of any state, territory or dependency thereof or of a foreign country whenever the same shall be material.[36]

This sounds imperative, and foreign countries are included. Under this approach, there is no burden of proof nor of pleading.[37] The party has an interest to aid in procuring the means of persuasion, and in practice the party takes the

[33] Austria: ZPO. § 273; OGH. GlU No. 394, 2473, 6511, etc.; WALKER 244; WAHLE, Schweiz. Jur. Zeit. 1932, 188.

Greece: isolated decisions: Trib. civ. Rhodos (1948 and 1949) 5 Rev. Hell. (1951) 221; Trib. civ. Athens No. 2260/1951, 6 Rev. Hell. (1952) 77, note GOFAS.

Hungary: C.C. Proc. of June 6, 1952, § 200, 19 Z. ausl. PR. (1954) 150.

Italy: Cass. (June 28, 1940) Rivista 1942, 242, 8 Giur. Comp. D.I.P. 232; (July 31, 1941) Foro Ital. 1942 I 9, 10 Giur. Comp. D.I.P. 73; (Aug. 12, 1946) Foro Padovano 1947 I 285 (including foreign conflicts law); DE NOVA, Rev. Crit. 1951, 174.

Netherlands: foreign law is law: H.R. (June 4, 1915) W. 9871; (March 20, 1931) W. 12287, N.J. 1931, 890; to state ex officio; Rb. Rotterdam (Jan. 9, 1918) W. 10355; Rb. Amsterdam (March 9, 1918) W. 11593, N.J. 1925, 861; VAN BRAKEL 48 § 27.

Switzerland: to the partial effect that the courts determine ex officio whether foreign or Swiss law applies. BG. (Nov. 3, 1900) 26 BGE. II 719; (Nov. 24, 1933) 60 BGE. II 433; (May 16, 1950) 76 BGE. III 60. SCHNITZER 172. But cantonal restrictions of judicial inquiry are maintained by the Federal Tribunal, as NIEDERER, Allg. Lehren 346 notes.

Hungary: DE MAGYARY, Clunet 1924, 590, 600.

Poland: IPL. art. 39 par. 1.

Chile: Sup. Trib., 15 Rev. Der. I 253; 16 *ib.* II 70; 25 *ib.* I 544; ALBONICO 15.

Soviet Ukraine; C. Proc. Civ. art. 8; MAKAROV, Précis 100.

[34] Treaty of Montevideo, art. 2 and Prot. Add.

Código Bustamante, art. 408-410.

[35] 9 U.L.A. 399 ff. sec. 1; N.Y. Civ. Prac. Act § 344a, A.

[36] Mass. Stat. 1926 c. 168; Ann. L. 1951, c.233 § 70; but see Note 32 Mass. L.Q. (1947) 20; SCHLESINGER *supra* n. 1.

[37] RG. (June 2, 1918) Warn Rspr. 1918 No. 147.

initiative. The system tends rather to cooperation than to revolutionary intervention of judges.

For the American federal courts, the rule has been that they should take judicial notice of federal law and all state laws.[38] Consequently, in diverse citizenship cases, they are not limited to the state laws of which the state takes judicial notice.[39]

In matters of "voluntary jurisdiction" (noncontentious judicial decisions), unlimited judicial responsibility for application of the competent law is prescribed in Germany.[40] Where administrative authorities decide, they require everywhere full evidence by the petitioner.

Also within this group, the statutes and their interpretation are at variance in defining the intensity of purpose. The German Reichsgericht insists that the court is charged with the duty of examination, even though counsel present concordant statements on the foreign law,[41] but this is rarely observed anywhere. Great influence must be accorded to the procedural law of the court. Where, for instance, the rules of procedure require the plaintiff to indicate not only his cause of action in terms of fact but also the legal rule on which he relies, judicial initiative is somewhat restricted.[42] The nature of the individual case and of the foreign law involved has varying significance. For understandable reasons, many courts are reluctant to use their power of examination, especially when the attorneys are

[38] Restatement § 324. *Cf.*, Australia: State and Territorial Laws and Records Recognition Act 1901-1950.

[39] Thus since the Erie RR. v. Tompkins case, GOODRICH 234 n. 27; Waggeman v. Gen. Fin. Co. of Philadelphia (1940) 116 F. (2d) 254.

[40] SCHLEGELBERGER, 1 Kommentar zum Gesetz über freiwillige Gerichtsbarkeit (ed. 4) § 27 n. 26; MELCHIOR 422 n. 4; KG. (June 24, 1937) Jur. Woch. 1937, 2827 over-ruling its former decisions; LG. Saarbrücken (Oct. 20, 1949) IPRspr. 1945-49, No. 1.

[41] See *infra*, IV.

[42] Colombia: RESTREPO HERNANDEZ 238 § 1950.

negligent. On the other hand, it is wrong to speak of a danger in the administration of justice when a judge invokes a foreign law ignored by the parties. Surprise, of course, must be avoided by a party in relation to the adverse party, as the New York statute realizes, and quite equally by the court in relation to both parties; they must be timely invited to take position. That even the broadest mandate to the court can result only in a restricted response when libraries, experience, and funds for consultation are deficient, is too trite a truth not to be borne in mind by all legislators.

4. Sources of Foreign Law

There are no more lawyers, we hope, who believe that any foreign code exhausts the legal system of the country. Decisions must be explored also for civil law countries.[43] Contrary to former errors,[44] again, a foreign rule is given the construction adopted by the foreign courts, even though the same text, derived from the same model or borrowed from the forum, may be construed differently by the court itself.[45] This is by no means a limitation on the creative intelligence of a judge; he acts simply as the foreign judge supposedly would do; American judges are very familiar with this operation.

[43] Permanent Court of Int. Justice (July 12, 1929) Publications, Ser. A No. 20/21.
England: Lazard Broth. v. Midland Bank [1933] *supra* n. 21.
France: Cass. req. (Nov. 18, 1924) Gaz. Pal. 1925.1.150.
Germany: RG. (March 12, 1906) Jur. Woch. 1906, 297.
Italy: Cass. (Dec. 19, 1933) Revue crit. 1935, 360.
Anglo-German T.A.M. The Thames & Mersey v. Allianz, 8 Recueil Trib. Arb. Mixtes 68.

[44] See NUSSBAUM 99 n. 2; *id.*, Grundzüge 234.

[45] United States: Los Angeles Inv. Sec. Corp. v. Joslyn (1939) 12 N.Y.S. (2d) 370, 379.
France: Ap. Douai (March & May 7, 1901) Clunet 1901, 180.
Germany: RG. (March 12, 1906) Jur. Woch. 1906, 297.

One should not, however, forget the literature, at least as represented by the leading handbooks. Case law as well as statutes may lead foreign observers to strange conclusions.

Some writers hold that an American statute may be subjected in a foreign court to judicial review of its constitutionality as might occur at home.[46] This is a queer contention. Not only would such a supervision be delicate,[47] but it is totally unfounded. It would be tantamount to anticipating the overruling of a decision of a foreign supreme court which, in a system of stare decisis, binds the lower courts.

II. Review on Appeal [48]

1. Review of Conflicts Law

(a) *No review.* If foreign law is earnestly considered to be a fact "like other facts," review is excluded where new facts are barred in appellate courts and where review is barred on questions of fact.[49] Not even an error in applying Spanish conflicts law has been held reviewable by the Spanish supreme court.[50]

An impediment of another kind exists in English and American procedure, where the all important evidence by expert witnesses on foreign law can only be offered to a trial court. However, the upper court has various opportunities of evaluation and reversal, and statutory innovations

[46] Niboyet, 3 Traité §§ 970 f.; Maury, 57 Recueil 1936 III 966.

[47] Pontes de Miranda, 1 Trat. (1935) 365 § 7; Batiffol, Traité 355 § 334.

[48] Lewald, "Le control des cours suprêmes sur l'application des lois étrangères," 57 Recueil (1936 III) 205; *id.*, "Kollisionsfrage und revisio in jure," in Basler Studien zur Rechtswissenschaft, Heft 15 (Basel 1942) 205; Riezler, Internat. Zivilprozessrecht 500 ff.

[49] Spain: Trib. Sup. (Nov. 19, 1904).
Colombia: Restrepo Hernandez § 1968.

[50] Spain: Trib. Sup. (June 7, 1875) despite art. 1602 Cod. de Enjuiciamento; likewise as to decisions of the Dirección dos Registros (Dec. 26, 1891).

have permitted appellate courts to take judicial notice.[51]

The principal question, in the general opinion, concerns supervision by the highest tribunal.

(b) *Review of written conflicts law.* The French Court of Cassation, following its charter of 1796, reviews judicial errors only in the application of "la loi," the written legal rules.[52] Hence, all the conflicts rules, ingeniously developed on the scanty ground of article 3 of the Code Civil, would fall outside the scope of *révision.* This limitation was observed for a long time and is still respected in Belgium and the Netherlands.[53] The French Court, however, usually circumvents the obstacle by citing article 3 or some substantive code provision as violated, and thereby virtually has passed into the following group.[54]

(c) *Violation of conflicts law.* The system reached by the French highest court is that most used in civil law countries. In Germany it was predicated by Waechter in 1841 and adopted by the Commercial Court of Appeals in 1875.[55] The list of the jurisdictions in the note [56] is not exhaustive.

[51] E.g., New York, Civ. Prac. Act, sec. 244 a, D.

[52] Decree of Nov. 27, 1790.

[53] Belgium: Cass. (Feb. 21, 1907) and (March 19, 1931) Clunet 1931, 735 and constant practice; POULLET § 339; Cass. (March 26, 1953) Clunet 1954, 421.

Netherlands: H.R. (June 2, 1937) W. 1938 No. 1; (Jan. 8, 1943) W. 1943, No. 202; KOSTERS 125, constant practice. GARDE CASTILLO, "Los problemas del recurso de casacion en D.I.P.," 4 Rev. esp. D. Int. (1951) 409, 453, 447, and RESTREPO HERNANDEZ § 1977 advocate the same principle for Spain and Colombia respectively.

[54] France: Cass. civ. (April 13, 1932) D. 1932.1.89, S. 1932.1.361; Cass. req. (March 15, 1933) S. 1934.1.393; Cass. Civ. (March 22, 1944) D.C. 1944 J. 166; LEREBOURS-PIGEONNIÈRE (ed. 6) § 212.

[55] WÄCHTER, 21 Arch. Civ. Prax. (1841) 310; ROHG. (March 2, 1875) 17 ROHGE. 167.

[56] Austria: ZPO. § 503; OGH. constant practice, WALKER 244.

Germany: ZPO. § 549 par. 1; RG. (Oct. 30, 1907) 19 Z. int. R. (1909) 838; (June 26, 1919) Jur. Woch. 1920, 40, 51; (May 13, 1929) IPRspr. 1929 No. 3; MELCHIOR 425 §§ 286 f.

Greece: STREIT, Recueil 1927 V 71.

Italy: Cass. (June 8, 1931) Rivista 1931, 280; (Aug. 12, 1946) Foro

The effect of this system is to control the application of the entire set of domestic rules of conflict. The supreme court watches how "the principle of the connection with foreign law" [57] operates, without touching the use made by the lower court of a foreign law. What does this mean?

The court does examine whether domestic substantive law ought to apply instead of foreign law, or the latter instead of the former. The Reichsgericht also usually criticizes a judgment not precisely stating which law applies, even though the end result seems to be the same whatever contact of the case is held decisive.[58]

Whether, however, the subordinate court erred in admitting the existence or nonexistence of a specific foreign rule, be it substantive or conflictual, is not reviewed. The question has arisen whether an exception should be made when the application of the domestic law depends on renvoi from a foreign conflicts rule. The German court answers in the affirmative.[59] In a 1932 case, an American couple had married in Chicago, established their first domicil in St. Louis, and later transferred their residence to Hamburg, where the husband sued for divorce. The proceedings

Padovano 1947 I 285; MORELLI, Lezioni § 18; DE NOVA, Rev. crit. 1951, 170. *Cf., infra* n. 70.

Netherlands: expressly excluding review of foreign law: H.R. (June 22, 1928) W. 11857, N.J. 1928, 1486; (May 29, 1933) W. 12661, N.J. 1934, 529; (June 26, 1937) W. 938 No. 1; (April 12, 1942) W. 1942 No. 48; VAN DER FLIER, Clunet 1936, 116.

Rumania: Cass. (March 21, 1932) Revue 1935, 56; PLASTARA, 7 Répert., Roumanie No. 139.

Spain: ORÚE, Manual § 363; but *contra* GARDE CASTILLO (*supra* n. 51).

Switzerland: BG. (Feb. 18, 1910) 36 BGE. II 35; (March 17, 1926) 52 BGE. II 97.

Chile: divided authority; to the effect described above Trib. Sup. (Sept. 7, 1923) Rev. Der. 1923.1.398; ALBONICO, esp. p. 22 and n. 47, against others.

Colombia: 2 RESTREPO HERNANDEZ § 1974.

[57] LEREBOURS-PIGEONNIÈRE (ed. 6) 231 § 211.

[58] RG. from (Oct. 30, 1907) 19 Z. int. R. 338 constant practice, MELCHIOR § 283; (July 7, 1933) IPRspr. 1933, No. 15, Revue crit. 1935, 447, Clunet 1935, 1190.

[59] 55 RGZ. 248; 59 *id.* 26; 78 *id.* 234; 91 *id.* 41; (June 2, 1932) 136 RGZ. 361; (July 7, 1934) *supra* n. 56; RAAPE, Komm. 47; *id.* D.I.P.R.

turned on the question of renvoi effect which should be ascribed to American conflicts law on the law governing divorce of American spouses domiciled in Germany. The Reichsgericht explained that here the content of the American law is only an incident to the problem whether German divorce law is applicable. From the formulation in the decided cases, it has been concluded that this exception is not allowed when the reference goes to a third law.[60] But since not only the substantive law of the forum but also its conflicts law is controlled, this limitation is unfounded.

Switzerland accepts the same exception;[61] other countries reject it,[62] doubtless contrary to the purpose of conflicts law.

Analogous exceptional appraisal of foreign laws has been justly urged in certain other situations.[63]

(d) *Indirect review of foreign law.* Strangely enough, in the same breath in which foreign law is branded as an intolerable burden on appellate courts, "indirect," irregular control is admitted in France[64] as well as in Germany,[65] while the highest court of the Netherlands allows review in cases of public policy,[66] probably everywhere an official concern. The particulars are of slight interest, except that the breach of allegedly necessary restrictions in the

[60] LEWALD, Recueil 1936 III 255.

[61] Switzerland: BG. (Nov. 27, 1918) 44 BGE. II 453.

[62] Belgium: Cass. (March 9, 1882) Pas. Belg. 1882.1.62.

France: Cass. civ. (March 7, 1938) Revue crit. 1938, 472; for many other cases see MAURY, Recueil 1936 III 405.

Netherlands: H.R. (Jan. 8, 1943) W. 1943 no. 202; VAN PRAAG, Rechterliche Organisatie 583, 907; VAN BRAKEL 50-52 § 30.

[63] DÖLLE, "Betrachtungen zum ausländischen, internationalen und interlokalen Privatrecht," Festschrift für Leo Raape (1948) 149, 153.

[64] BATIFFOL 363 § 343 discusses the control of qualifications, notably in the matter of registration and (§ 344) the "contrôle des motifs" and the theory of "dénaturation."

[65] MELCHIOR 432 § 295, *cf.*, 513 f. § 373.

[66] H.R. (March 13, 1936) W. 280, 281; (April 28, 1939) W. 895; VAN BRAKEL 50 n. 3.

leading countries demonstrates the shortcomings of the principle.

2. Review of Foreign Law

In the doctrine just described, the ultimate review refrains from any opinion on the correctness of lower court findings on what the foreign law is. The Swiss Federal Tribunal, which at the same time must abstain from cantonal law, has been forced to set up an entire jurisdictional system, full of hedges.[67]

Authors of many nations are dissatisfied with the prevailing usage,[68] which has been abandoned in a number of jurisdictions,[69] including most Italian decisions.[70]

No equivalent difficulty has ever been felt in common law courts. In the framework of access permitted to the highest state courts, no difference is made between domestic and foreign law. The federal Supreme Court, on appeal from the federal courts, takes judicial notice of the law of all American states, and on appeal from a state court "of

[67] See the complications in BG. (Sept. 20, 1950) 76 BGE. II 247, Praxis 1950 No. 146, Schw. Jahrb. Int. R. 1951, 310. The Court recalls that even though Swiss law was applied as foreign law against the construction of the Federal Tribunal by a Swiss court, review is excluded.

[68] See in particular 1 BAR 143; ZITELMANN 288; 1 FRANKENSTEIN 293 and NEUBECKER 369 (both for the present law); 1 PONTES DE MIRANDA 369; GARDE CASTILLO 460; DÖLLE, in Festschrift für Raape (*supra* n. 63) 153.

[69] Austria: ZPO. § 503; WALKER 244; POLLACK, 2 Ziv. Proz. Recht. (ed. 2) 608.

Belgium: Cass. (July 4, 1949) Pas. 1949 I 522; (March 26, 1953) Clunet 1954, 421.

Czechoslovakia, Poland, Yugoslavia: see LEWALD, Recueil 8936 III 288.

Finland: Int. Family L. § 56.

Greece: divided authority; see MARIDAKIS, P.I.L. 276.

Portugal: Trib. Sup. (Feb. 4, 1918) cited by MACHADO VILLELA, 2 Trat. D.I.P. (1922) 264.

Siam: P.I.L. art. 8.

Soviet Russia: MAKAROV, Précis 103; MAURACH, 47 Z. int. R. (1932) 19.

[70] Italy: Cass. Roma (Nov. 10, 1917) Giur. Ital. 1918 I 1, 24; Cass. (July 8, 1931) Rivista 1931, 280 (with history); (Dec. 29, 1937) Foro Ital. 1938 II 158, 12 Rivista 1938, 289; (June 12, 1938) 7 Giur. Comp. D.I.P. 331; (Aug. 12, 1946) Foro Padovano 1947 I 285, 22 Giur. Cass. Sez. Civ. 1946 II 619; DE NOVA, Rev. crit. 1951, 170.

all law of which the state court takes judicial notice." [71]

Theoretically, not a shred of an argument can be made for the exclusion of foreign law from review. The authors justly regard the assimilation of foreign and domestic law in the courts of appeal as a simple consequence of a true law of conflicts. The only real issue is procurement of the means for easy and practical perusal of foreign documentation. On this point, the idea to entrust only the lower tribunals with the final decision on the entire law of the world has been rightly ridiculed.

III. Methods of Proof

Since the Sussex Peerage Case of 1844,[72] it has become the English rule that foreign law is proved by expert witnesses.[73] The particulars constitute a complicated network, especially in the United States.[74] Statutes and decisions are normally offered but commented upon by experts. The usual American rule calls for such documents or experts or both.[75] Also the English Court of Appeal does not require the latter without exception; if statutes are presented and sufficient experts are not available, the court must "apply its own mind." [76] American practice is "more liberal" [77] also in other respects, and the New York legislation has perfected development by allowing the courts to "consider any testimony, document, information or argu-

[71] Restatement § 625, comment a.

[72] Sommerich and Busch, "The Expert Witness and the Proof of Foreign Law," 38 Corn. L.Q. (1951) 125; Melchior 431.

[73] 7 Wigmore, Evidence § 2090a.

[74] See 2 Wigmore, Evidence §§ 566, 664; 3 *id.* § 690 and §§ 1217, 1697, 1953.

[75] Where nevertheless the evidence of an English rule left doubt, the ascertainment was left to the jury; Electric Welding Co. v. Prince (1909) 200 Mass. 386, 86 N.E. 947.

[76] Rouger Guillet & Cie. v. Rouger Guillet & Co. Ltd. [1948] 1949 All E.R. 244; Clunet 1950, 642.

[77] 2 Wigmore § 664.

ment on the subject." [78] A recent English statute on a special matter is similarly broad.[79]

Although in Continental procedure all means of evidence allowed by the court are admitted,[80] proposals to alleviate the perplexity concerning foreign law that often exists, have been devised in literature, congresses, and some treaties; it is recommended that information be made available by diplomatic correspondence, authentic opinion of foreign courts, or domestic or foreign Justice Departments.[81] In fact, most courts and administrative agencies for good reasons refuse to give advice. What comes forth through consulates is frequently of no use. All available and reliable channels of information are certainly worth cultivating. Experience, however, shows the pitfalls in the testimony of witnesses unilaterally appointed by one party, and those not infrequently occurring in official communications concerning particular litigious points.[82] Judges, parties, and experts must fully cooperate. But it is not least in the interest of a trustworthy source of information for the courts that I have not ceased to demand the creation of fully adapted independent research institutes for foreign and international private law. Where they do exist, in very few cases will the search end in the vacuum presently to be discussed.

[78] Civ. Prac. Act § 344a-C.

[79] Foreign Compensation Act 1950, 14 Geo. VI c. 12, rule 4, see Int. L.Q. 1951, 361, 364.

[80] E.g., Argentina: Cam. Fed. la, Jur. Arg. 1944 IV 211, 8 Rev. Arg. Der. Int. (1945) 378.

[81] For an admirable report on the entire question see HARRY LEROY JONES, "International Judicial Assistance, Procedural Chaos and a Program for Reform," 62 Yale, L.J. (1953) 515-562.

[82] Example: the Kammergericht of Berlin (June 24, 1937) Jur. Woch. 1937, 2827. H.R.R. 1937, 1376, had to refute with the help of the Kaiser Wilhelm Institute for Foreign and Internat. Priv. Law official documents issued by a probate court in New Jersey, which asserted that the N.J. statute of March 17, 1926, concerning intestate succession by a surviving spouse referred also to foreign immovables. The statute, of course, laid down internal and not conflicts law.

It is the scientific approach that is generally missing, supplanted by a mechanical routine operation. If Lord Dennan in the Sussex Peerage Case and Coleridge in Baron de Bode's Case are still rigorously followed and the court is admonished not to construe the foreign code but "make the best of the witnesses," a sterility, long forgotten in other legal operations, is prescribed. Words neither of statutes nor of decisions are a gospel. Foreign law is not a fact. Its spirit and appraisal of values and interests must decide.

IV. Absence of Proof

1. Rejection of the Claim

Taking conflicts law seriously and having determined in a particular case that a foreign law governs a claim or a defense, a court may feel impelled by logical considerations to hold that the issue depends exclusively on the commands of that law. Nothing entitles a judge to exchange the governing law against any other. If then the contents of the foreign law cannot be ascertained, eminent authority believes it to be unavoidable that the claim or defense should fail.[83]

Thus, Mr. Justice Holmes speaking for the Supreme Court of the United States, held in *Cuba Railroad Co.* v. *Crosby*[84] that Cuban law concerning the liability of employers for accidental injury of the employees not having been evidenced, the suit was to be dismissed. Against the objection that this involved a hardship on the plaintiff he stated: "The only just ground for complaint would be

[83] 1 Zitelmann 289, 293; Niemeyer, Vorschläge 77; Hellwig, 1 Zivilproz. R. 577; Anzilotti, Rivista 1906, 271; Morelli, D. Proc. Civ. Int. (1938) 50 ff.; De Nova, Rev. crit. 1951, 125 n. 4; Balmaceda Cardoso 186; Restrepo Hernandez 237 § 1944 ("just and logical," citing Machado Villela).

[84] Cuba RR. Co. v. Crosby (1912) 222 U.S. 473.

if rights and liabilities, when enforced by our courts should be measured by a different rule from that under which the parties dealt." [85] Similar views have been taken in other American [86] and foreign cases.[87] Whether the individual issues justified these results, is a separate question.[88]

Nevertheless, as a logical conclusion of general validity, the proposition is convincing only so long as foreign law is thought to be an ordinary element of the cause of action. Uncertainty of an essential fact must be fatal in a law suit; normally it leads to dismissal not only without prejudice *(ab instantia)* but with full force of *res judicata.*

Foreign law, however, is not a fact. Neither is it entirely equal to domestic law whose incertitude is not allowed to prevent a positive holding, because otherwise the court would commit a denial of justice. Failure to know a foreign law creates a particular problem, not necessarily subject to the treatment either of facts or of the municipal law of the forum.

Indeed, the courts have in most cases found both conceptions unsatisfactory. But expediency has suggested experimental rather than methodical rulings.

2. Presumptions for Similarity

The great majority of American authorities have resorted to the law of the forum by presuming that the

[85] *Id.*, 480.

[86] Christie v. Cerro de Pasco Copper Corp. (1926) 214 App. Div. 220, 211 N.Y.S. 143 and cited cases; Riley v. Pierce Oil Corp. (1927) 245 N.Y. 152, 156 N.E. 617; Arams v. Arams (1943) 182 Misc. 328, 45 N.Y.S. (2d) 251.

[87] Germany: ROHG. (April 20) 25 ROHGE. 53; RG. 51 Seuff. A. No. 85 Reichsober. HG. (April 28, 1879) 25 ROHGE. 13, 53.

[88] NUSSBAUM, 50 Yale L. Jour. at 1042 criticizes the Cuba R.R. decision because the railroad would certainly have been able to produce evidence of the Cuban law if it had been favorable.

foreign law is the same as the law of the court.[89] This device was also once traditional in Europe [90] but has almost vanished there.

(a) Common law courts have presumed that the common law of another state is identical with their own.[91] Yet, whereas European analogous assumptions were less scrupulous, American courts since the *Cuba Railroad Case* have become conscious that rules of civil law cannot be submitted to such identification.[92]

(b) The presumption has been extended by special provisions to the statutory law of the forum.[93]

(c) German courts, failing to verify American law, have resorted to English decisions [94] or substituted French law for that of Belgium or Luxemburg.[95] Such replacements within a close family of laws are better than to introduce the municipal law of the court, but advisable only if the foreign court itself, as in less developed countries, may be supposed to look to another authoritative system.

[89] 3 BEALE 1680; 15 C.J.S. 847; Peterson v. Chicago Great Western Ry. Co. (1943) 138 F. (2d) 804; the domestic law determines also the burden of proof, Menard v. Goltra (1931) 328 Mo 368., 383, 40 S.W. (2d) 1053, 1058.

[90] Germany: ROHGE. II 39; II 44: VII 61; VIII 12; 1 BAR 133 n. 4, 136f. Italy: App. Venezia (July 31, 1906) Rivista 1906, 271; (March 8, 1932) Riv. Italiana (FEDOZZI) 1932, 170. *Contra* FEDOZZI, D.I.P. 482; MORELLI *l.c.*

[91] Restatement § 622; 34 L.R.A. (N.S.) (1911) 261; KALES, "Presumption of Foreign Law," 19 Harv. L. Rev. (1906) 40; STORY § 272; WESTLAKE § 353; e.g., Read v. Lehigh Valley R.T. (1940) 284 N.H. 435, 31 N.E. (2d) 891; Miller v. Vanderlip (1941) 285 N.Y. 116, 33 N.E. (2d) 51; Smith v. Kent Oil Co. (1953, Colo.) 261 P. (2d) 149 (no presumption for Colorado statutory law); Associates Discount Corp. v. Main St. Motors Inc. (1953) 157 Ohio St. 488, 105 N.E. (2d) 878; Michigan law not evidenced, presumed similar to Ohio law concerning the question whether a chattel mortgage creates a legal or an equitable title.

[92] *Supra* n. 80 ad 82 and older cases.

[93] Long list of cases in 31 C.J.S., Evidence § 133 and Supp. 1954 also covering this extension; GOODRICH § 83 n. 31 names four statutes. To the same effect, the procedural codes of Zurich § 100 and of some other Swiss Cantons.

[94] OLG. Hamburg (April 4, 1929) IPRspr. 1929 No. 63.

[95] KG. (March 3, 1922) Jur. Woch. 1922, 1122.

How defectively the use of presumptions works is a known topic of criticism. Workable where similarity is probable, they have been used far beyond this limit.[96]

3. Subsidiary Law

(a) Without employing presumptions of similarity or at least without taking them seriously, the law of the forum has been applied, sometimes by contending that the parties tacitly submit to the local law or that the local law is the only one at the judge's elbow.[97]

That *lex fori* should be an auxiliary source of decision has also been explained on the theory of a vast function of the municipal law of the court.[98] It is described as an all comprehensive, fully potent order, which automatically presents itself when the conflicts law is frustrated. Some present writers assert that foreign law is an exceptional source; the normal rule is exclusively the domestic law, to which the court for many reasons resorts. Or the reference to foreign law is conceived as conditional, one condition being that it can be proved.[99]

Such nostalgic reminiscences of comity ideas and territorialism can be avoided. The law of the forum enters, if at all, as an emergency substitute rather than as an

[96] BIGELOW in STORY (ed. 8) § 853a; VON MOSCHZISKER, "Presumptions as to Foreign Law," 11 Minn. L. Rev. 1 (1926).

[97] See KALES, "Presumption of Foreign Law," 19 Harv. L. Rev. (1906) 401; GOODRICH 234; MORELLI, 1 D. Proc. Civ. Int. 57 § 36 and cit.

Finland: Int. Fam. L. § 56.

Germany: ROHG. (June 28, 1872) 7 ROHGE. 16; 1 BAR 137; RAAPE, D.IPR. 82, III.

Greece: MARIDAKIS PIL. 275.

Hungary: Draft I.P.L. § 17.

Poland: I.P.L. art. 39 par. 2.

Portugal: Draft C.C. 1951, art. 5.

Switzerland: BG. (June 20, 1914) 40 BGE. 480; (Sept. 23, 1941) 67 BGE. 215; (June 15, 1943) 69 BGE. II 309, 311.

[98] Most efficiently presented by BATIFFOL, Traité 368 ff.

[99] FIORE §§ 270, 272; ROLIN § 520.

ubiquitous force happily released from its odious chains. This role is necessitated by the present defective international order. But it is not true that if the foreign law is not provable the domestic law has a natural vocation to govern.

(b) Another line has been taken by some European writers and followed by the German Reichsgericht since 1885 [100] and identically by a Massachusetts decision of 1911.[101] In 1912 Mr. Justice Holmes directed attention to it by an obiter remark that,

"in dealing with rudimentary contracts or torts made or committed abroad, such as promises to pay money for goods or services, or battery of the person or conversion of goods, courts would assume a liability to exist if nothing to the contrary appeared." [102]

A few remarkable decisions have heeded this suggestion.[103]

Some scholars have advocated this approach, because no one national law in reality is available under the premises.[104] *Contra,* it has been urged that a law exists and is merely of unknown content.[105] The leading idea still seems to be that the law of the forum is employed as representing fundamental principles of civilized nations.

The vagueness of this idea, however, is illustrated by the observation that Holmes used conversion as an obvious example of this kind of *jus gentium,* while the New York

[100] Germany: RG. (Sept. 28, 1885) 16 RGZ. 337; (March 24, 1909) 71 RGZ. 9; (July 11, 1919) 96 RGZ. 230.

[101] Parrot v. Mexican Central Railway Co. (1911) 207 Mass. 184, 192, 93 N.E. 590, citing older Mass. decisions (p. 194).

[102] Cuba R.R. v. Crosby (1912) 222 U.S. 473.

[103] Esp. Arams v. Arams, *infra* n. 104; trial court in Riley v. Pierce Oil Co., *supra* n. 85; Crane, J., dissenting vote; trial court in Leary v. Gledhill, *infra* n. 108; Industrial Export and Import Corp. v. Hongkong & Shanghai Banking Corp (1947) 191 Misc. 493, 77 N.Y.S. (2d) 541, aff'd. 302 N.Y. 342, 96 N.E. (2d) 466 (ban on repayment by the Chinese Central Bank under the laws of China).

[104] FIORE § 272; ALCORTA 145.

[105] RESTREPO HERNANDEZ § 1965.

Court of Appeals has ruled out its application in the case of a conversion allegedly committed in Mexico,[106] although more recently a lower court has applied it to conversion committed in Switzerland and other places.[107] In one case, the same court reversed itself on the question whether a seaman injured in the course of his duty on a Panamanian ship and claiming damages for failure of the ship's officers to furnish prompt and proper medical care, could be heard under the presumption of the law of civilized countries.[108]

Nevertheless there is a future in a device emphasizing international thought in international relations.

4. Distinction of Situations

Recent writers have hinted at the differences of the cases in which the search for a foreign rule lacks success.[109] The foreign law may be more or less alien or exotic; the procedural matter may be more or less closely tied to the foreign origin; and the just result of the conflicts problem may be more or less securely felt. Assuming such circumstances, a choice is open among several methods. Their number, however, does not include the usual presumptions of similarity. Whatever reasons once supported them have lost their usefulness. Not even the former community of common law has retained significance beyond elementary truth.

(a) *Acquiescence in the law of the forum.* Courts readily accept an agreement of counsel either on the contents of a foreign law or on application of the domestic

[106] Riley v. Pierce Oil Corp., *supra* n. 85.

[107] Arams v. Arams (1943) 45 N.Y.S. (2d) 251 attempts to distinguish the Riley case by distinctions not made in that case.

[108] Sonneson v. Panama Transport Co. (1947) 272 App. Div. 948, 72 N.Y.S. (2d) 153, ending after complicated proceedings, 278 N.Y. 262, 82 N.E. (2d) 569, cert. den. 337 U.S. 919, 961.

[109] NUSSBAUM, 50 Yale L.J. at 1041; GOODRICH (ed. 3) 236.

law.[110] The individual procedural law of the court must decide whether such agreement is acceptable; generally, it does not seem to be contrary. Yet the conditions for a true agreement on the applicable law often are not given and such agreements are totally excluded in suits on family and status matters. Nevertheless, they have been recently recommended [111] and in a recent case preferred by Chief Justice Vanderbilt to the presumption of civilized laws.[112] Their nature should be defined. A contract, although not a contract of international private law, is required in my opinion, viz. a procedural contract, valid on the basis of procedural authorization and only for the purpose of the law suit. Hence, the court should not be satisfied with silence on the foreign law, possibly due to ignorance of the conflicts problem, but inquire whether there is a binding understanding.

(b) *Dismissal.* Complaints have been rightly dismissed when a claim was brought by an alleged beneficiary in an estate or his creditor, annulment of a marriage was sought, or damages for wrongful death depended, on statutes not proved.[113] This group is very much larger. It needs examination to state exactly the individual causes of action which cannot be separated from their accrual under a foreign law.

(c) *"Civilized Laws."* The resort to the law of civilized nations is known as vague and uncertain and scarcely able to support more than elementary principles. But it has

[110] *Supra* Vol. II, p. 386. The Swiss Federal Tribunal (August 31, 1953) 79 BGE. II 295, applied in 80 BGE. II 51, has overruled its practice (referred to in my cited note and still professed in 77 BGE. II 87); the court now simply recognizes an agreement expressed by counsel of the parties on the law applicable to the litigious contract.

[111] NUSSBAUM, 50 Yale L.J. at 1040.

[112] Leary v. Gledhill (1951) 8 N.J. 260, 269, 84 Atl. (2d) 725; SOMMERICH AND BUSCH, *supra* n. 72 at 143.

[113] NUSSBAUM, 50 Yale L.J. at 1041.

some features of the "general principles," which in one sense or another are considered the subsidiary source of public international law. Also this approach may gain a firmer shape by closer analysis. Comparative research teaches us what is common in closer and wider families of legal systems. There is no need to guess that a loan must be repayable under French law, as being a civilized law.[114] If a glimpse into any French textbook is really too much to ask, even half-civilized peoples do not deny the rule; it is a notorious fact. With progressive knowledge much more than platitudes did and will result. For instance, the dissident vote in *Riley* v. *Pierce Oil Corporation* inferred from the facts that the defendent company must be liable for the contract of its dummy (the Mexican subsidiary company) "and pay for the oil taken." [115] But if the case was not to be decided under American law (because both parties were American corporations, a questionable ground), it could not be based without evidence, as the dissenting vote implied, on a nonexistent universal rule of piercing the corporate veil nor on a universal liability of an undisclosed principal. The claim, however, probably could well be justified on the ground of unjust enrichment, a doctrine of Romanistic heritage, at least now slowly being rediscovered also in Latin-American countries.[116]

(d) *Lex fori.* Application of the municipal law of the forum apart from similarity presumptions ought not to appear so satisfactory to the courts as they believe it to be. At best, the results are approximately correct. As an unavoidable last resort, it must be accepted.

[114] Trial court in Leary v. Gledhill, *supra* n. 111.

[115] Crane, J., dissenting in the Riley case, *supra* n. 85; "Against Holmes and Crane," RUSSELL, "Presumption of Similarity," 5 N.Y.U.L.Q. Rev. (1928) 29, 34.

[116] DAWSON, Unjust Enrichment 107.

Had the trial court in the *Cuba Railroad Case* investigated Mexican law, or had the Supreme Court remanded the case for such examination, the decision would have done justice to the claim, instead of dismissing it without knowing the merits and probably with prejudice.

PART SIXTEEN

INTERTEMPORAL RELATIONS

CHAPTER 77

Transitory Relations of Conflicts Law

I. CHANGE OF FOREIGN LAW [1]

Change of the applicable substantive law. When the foreign law invoked by a conflicts rule has been altered, the question arises whether the former or the more recent foreign rule applies. The primary solution is commonly taken from the transitory rule of the applicable legal system itself.[2] This is so evidently correct that the insistence of many writers on a broad exception in the name of public policy of the forum appears exaggerated. Frequently the new rule rather than the change is what may disturb the sensitivity of a court. If state X bans miscegenetic marriages and makes the prohibition retroactive, the court in

[1] Special literature in addition to the major works, mostly comparative: ZITELMANN, "Das Verhältnis der örtlichen und zeitlichen Anwendungsnormen zu einander," 42 Jh. Jahrb. (1900) 189; FRANZ KAHN, 43 Jh. Jb. (1901) 299, 1 Abhandl. 363-479; KARL NEUMEYER, "Die zeitliche Geltung der Kollisionsnormen," 12 Z. int. R. (1903) 39-50; ANZILOTTI, La questione della retroattività (1905) 115, 128; MARIN, Essai sur l'application dans le temps des règles de conflit dans l'espace (Paris 1928); PAUL ROUBIER, "Les conflits de lois dans le temps en D.I.P.," Revue 1931, 38; BALDONI, "La Successione nel tempo delle norme di D.I.P.," 24 Rivista (1932) Nr. 1-2; Full bibliography on transitory law is given by PACE, Il diritto transitorio (Studi di diritto privato italiano e straniero, ser. II, vol. II, 1944).

[2] France: Cass. req. (Nov. 18, 1912) S. 1914.1.258, Revue 1913, 492, follows art. 2 of the Italian Civil Code of 1865 and therefore applies the provisions of the former Codice Albertino on natural children.

Germany: ROHG. (June 28, 1878) 24 ROHGE. 170, 190; KG. (June 14, 1913); 27 ROHGE. 108; RG. (July 2, 1925) Jur. Woch. 1925, 2142; MELCHIOR 68 § 43.

Hungary: Draft PIL. (1947) § 127.

Italy: DIENA, Clunet 1900, 925; *id.*, 10 Z. int. R. (1900) 383; 2 Principii 90; BALLADORE-PALLIERI, D.I.P. 55.

Switzerland: 1 SCHNITZER IPR. 176.

Y, finding the prohibition repugnant, will probably reject it entirely, irrespective of the date of the marriage in question. Of course, a foreign marriage valid at the time and place of its celebration is considered valid in any case by the normal conflicts rule.[3]

If the applicable law is silent on the question of retroactivity, the general principle seems to favor the new rule. Thus, in a famous decision, the court of Bordeaux [4] held that a marriage celebrated in religious form in Mexico during a period when such form was prohibited, was validated by a subsequent decree of the Emperor Maximilian. That the victorious republicans, again retroactively, reinstated the prior rule nullifying ecclesiastic marriages, and that the French court refused application of the later enactment, in favor either of marriage or of a French national, involved in the cause, transcends the matter of retroactivity.

Although obligations once regularly acquired are assured against impairment by the new law if not by the constitution, it has been submitted earlier that current foreign-governed contracts are subject to the latest formulation of the applicable law, unless a preceding contrary party agreement, is ascertainable and permitted by the law of the forum.[5]

As is well-known, no change of private law is assumed as an automatic effect of annexation, cession, or merger of territories.

Change of foreign conflicts rules. The answer is the

[3] *Supra.* Vol. I, p. 273 f. and n. 132.

[4] App. Bordeaux (Feb. 5, 1883) S. 1883.2.137, Clunet 1883, 621; controversial comments by BARTIN, 1 Principes 299, ROUBIER, Revue 1931, 38 ff.; 1 PONTES DE MIRANDA 339.

[5] *Supra* Vol. II, pp. 546-548. The discussion on the 7th Hague Conference, 1951, Actes 78-81, produced different opinions and a prevailing tendency to leave the questions involved to the interpretation of the contract by the court. But judges need guidance.

same when a foreign conflicts law to which the forum resorts in the course of renvoi is modified during the relationship subject to it.[6]

II. Change of the Conflicts Rule of the Forum

Occurrence. Much more serious is the difficulty inherent in the rivalry of older and newer rules in the applicable law of the forum itself. Previously recognized,[7] this question was explored in numerous decisions and a massive literature when, on January 1, 1900, the German Introductory Law to the Civil Code replaced the international private laws of the particular German territories by a unified, fundamentally different regulation. The theories developed on this occasion in the German and international literature continue in the center of discussion. Analogous problems were raised by the Hague Conventions on private international law, and again by the termination of membership in them and by the statutes and codes appearing in considerable number in the recent decades. The Introductory Law of Brazil of 1942, changing from national law to the domiciliary principle, provides an interesting counterpart to the inverse German reform of 1896. However, neither of these events has been given much attention.

The problem ought to be the same for other than statutory amendments, for instance, when a court passes from *lex loci contractus* to *lex loci solutionis* or from *lex domicilii* to *lex situs*. But judicial decisions seem rarely to be regarded as involving the creation of new conflicts rules. No one has ever thought of excepting former legal situations after the Supreme Court of the United States took

[6] 1 Frankenstein 241; Melchior 45.

[7] J. C. Meyer, Principes sur les questions transitoires intertemporels, nouv. ed. par A. A. De Pinto (Leyde 1858) 36-42, stating differences and analogies between intertemporal and international private law.

the momentous step from federal conflicts law to state law in diversity of citizenship cases.

Because the questions raised by these changes are of only temporary importance, the remarkable fact that no convincing solution has been discovered in an abundance of learned proposals is partly explained by short-lived practical interest. Repeated attempts to deduce positive transitory rules, that is, a division of application among successive sets of rules, from the "nature" of private international law naturally have been futile.

1. Court Decisions

The judicial materials include very few reports other than German of the decade after the Civil Code came into force. The courts in Germany resorted without hesitation to the copious intertemporal rules included in the Introductory Law, following articles 7-31, which deal with private international law. These rules were first applied as if they were also intended for conflicts law. When the writers noted that the "laws thus far in force" *(die bisherigen Gesetze)*, which were to be continued in effect, meant only the substantive rules, the weight of authority, both judicial and theoretical, turned to analogous application. The result was much the same, since cases where such analogies could be refuted rarely materialized in litigation.

Out of a considerable series of cases,[8] the following may illustrate the method used.

Illustrations. (1) In a suit decided in 1906 in Hamburg,[9] the testator Schiegel, a naturalized American citizen, had married in Bremen under the local unlimited community

[8] MELCHIOR 64 ff.; ROUBIER, Revue 1931, 79.

[9] OLG. Hamburg (June 15, 1906) 18 Z. int. R. (1908) 146; accord: OLG. München (Feb. 17, 1909) 21 ROLG. 233 (former immutability of marital property upheld); KG. (Sept. 30, 1915) 34 ROLG. 32 (first marital domicil decisive).

property system. Before 1900 the conflicts rule of the courts in Hamburg referred to the first matrimonial domicil, which was Bremen. The new rule of the Introductory Law, E.G., article 15, invokes primarily the national, American, law of the husband. But since article 200 maintains the marital property system that existed on December 31, 1899, this provision takes precedence, including the consequence that the old conflicts rule of the court in Hamburg still points to the law of the first matrimonial domicil, Bremen.

In this case, Bremen was the first domicil of the spouses, a German territory whose substantive marital property law after 1899 was expressly continued by article 200 of the Introductory Law. The new conflicts rule of article 15 E.G. is held superseded by this article 200, from which it is concluded that the former conflicts rule referring to Bremen as the first matrimonial domicil is also maintained. To allow an immediate word of criticism: why is the old conflicts rule of the court of Hamburg held competent instead of that of Bremen, which would have the same result? And what would have happened if the court of Baden, which applied the national law also under the older system, had to decide? Could it not be that article 200, irrespective of any conflicts rule, was destined to salvage any marital property system based on the law of *any German territory?* However, the courts did not decide otherwise even though the parties at the time of the marriage were domiciled abroad.

(II) A married couple of Bavarian nationality were first domiciled in Corfu, where since 1856 the Roman-Greek dowry system, involving separation of property estates, had obtained. The court of Nuremberg, Bavaria, in 1909 excluded the application of the Bavarian transitory provisions because the parties had never lived in Bavaria. It applied its own former conflicts rule of the Pandectistic system leading to the Corfu law. This, however, contained an excep-

tional conflicts rule for foreigners to the effect that the national law of the husband should govern marital property; this renvoi would have led to the former community property system of the city of Nuremberg. But since the court followed the Pendectists rejecting renvoi, the reasoning ended with the dowry system.[10]

Thus, an artful combination of artificial principles succeeded in avoiding the identical result which the conflicts rules of the national German law, article 15, paragraph 1, E.G., and of the domiciliary law, the Greek Code of 1856, would have reached.

(III) An illegitimate child was granted a decree of legitimation in Czarist Russia after the father's death. The former conflicts rule of the lower court was that the father's domicil governs legitimacy. But there was an obscure renvoi and uncertainty where the domicil as of the decisive time should be located. The Reichsgericht went to great pains on both questions and after reviewing a series of possible connections wound up with the ruling that Russian law applied and the legitimation was void.[11]

The same result could have been reached by the simple statement that a foreign public act must be valid under its own law before being recognized elsewhere.

In France, Bartin noted with approval [12] that the French courts believe it is "natural" that the principle of nonretroactivity of laws covers conflicts law. But since the three main decisions commonly cited deal with changes of substantive law,[13] authority to support such a rule is very thin. While a French tribunal, as well as the Franco-German Mixed Arbitral Tribunal, have treated events affecting marriage or marital property occurring before France de-

[10] OLG. Nürnberg (Jan. 22, 1909) 20 Z. int. R. (1910) 548.
[11] RG. (Nov. 12, 1906) 18 Z. int. R. (1908) 165.
[12] BARTIN, 1 Principes 286 No. 117, criticized by 1 PONTES DE MIRANDA 336.
[13] *Supra* notes 2 and 4.

nounced the Hague Conventions on these matters, in accordance with the Conventions,[14] this follows better than from a general principle from the special conflicts rules used everywhere in marital matters.

2. Theories

(a) *Applying the substantive intertemporal rules of the forum.* The German practice of the early century is not only favored by most German writers [15] but also by leading authors elsewhere. Thus, Batiffol, rejecting all other doctrines, writes: "If the internal transitory law subjects a marriage or a contract to the law in force at that date (of the act), there is a priori no reason to exclude from this law the conflicts rules on marriage or contracts." [16]

However, it is recognized since Zitelmann's article that the sections of the German Introductory Law, stating in detail what provisions of the new code are inapplicable to previously created legal relations, do not include conflicts problems; allegedly they apply by analogy, but reasons for analogy may fail to exist,[17] and the analogy itself has often been attacked with good reasons.

On the other hand, though the "former laws" maintained do not encompass conflicts law, they do include in the dominant German opinion foreign substantive laws.[18] Hence, it is commonly taught that where laws conflict simultaneously in space and in time, the intertemporal problem must be solved before the international one. A case belonging to the former substantive law is subject also to the former conflicts rule of the court seized with the case.

[14] Trib. St. Etienne (Jan. 1921, 1914) 583; TAM. Franco-Allemand (Feb. 12, 1927) 6 Rec. Trib. Arb. Mixtes 922.

[15] ZITELMANN, Jh. Jb. 1900, 189; NEUMEYER, 12 Z. int. R. No. 14; MELCHIOR 64 ff.; LEWALD 4; WOLFF, D. IPR. (ed. 3) 2.

[16] BATIFFOL, Traité 339 § 316; ARMINJON, 1 Précis (ed. 3) 301; SCHNITZER 176.

[17] ZITELMANN, *supra* n. 1.

[18] NEUMEYER, 12 Z. int. R. at 48.

The Brazilian Introductory Law of 1942 has a short article 6 at the end of the general provisions preceding the conflicts rules in articles 7-18, which states that laws have immediate effect with the exception of legal situations definitively constituted and the execution of acts legally perfected. This provision, like the German transitory articles,[19] again leaves in doubt whether it extends to conflicts laws.

(b) *Distinguishing foreign cases.* In one of his most penetrating, though not entirely happy studies, Franz Kahn opposed two main theses to the view just described. He observed that private international law is essentially different from substantive law and ought to have its own transitory rules.[20] As a rigid positivist, he coupled this statement with the assertion that this transitory system must be established under the isolated viewpoint of a determinate national legislation.[21] Kahn himself began the elaboration of special intertemporal rules in this sense. Much more attention has been devoted to his second proposition envisaging cases that had no connection with the German law until the code came into force; these should not be treated under the old German conflicts rules.[22] A marriage of two foreigners domiciled abroad and lacking assets in Germany, having nothing to do with the former German law, would be subject to the new conflicts law.

These conceptions have often been criticized, especially because of the vacuum they leave and the uncertainty of the ties that the case should have with the forum. As Neumeyer objected, the sway of a conflicts rule cannot depend on the time when a relationship is brought before the court of

[19] KAHN, 1 Abh. 367 f.

[20] *Ib.* 385, followed by NEUMEYER 39 ff. and others.

[21] *Ib.* 394 ff., followed by ZITELMANN, NEUMEYER, ANZILOTTI, and others.

[22] *Contra* NEUMEYER, *ib.* 42 ff.; other polemics against KAHN, e.g., MELCHIOR § 40; ROUBIER 69-73.

the forum instead of the time of its origin or modification.

Raape attempts to combine the prevailing doctrine with Kahn's view, which he improves. According to him, the provisions of the *"Einführungsgesetz"* do extend to conflicts law, but only where the relationship was "imprinted" with the law of the forum during the former legislation. He seems to require a substantial connection of the parties with Germany before 1900. Thus, the marital property system is subject to the old, mostly domiciliary criterion when the parties before 1900 had German nationality or domicil. If neither, the application of the old rules is "outright senseless." [23]

(c) *Establishing general transitory rules.* Some scholars look for general principles valid for the change of conflictual as well as municipal law. In France and Brazil, this approach has been strengthened by invoking the constitutional maxim that new laws do not have retroactive effect on *facta praeterita* but only on *facta pendentia;* they may not impair existent contracts.[24]

These writers, however, join Kahn in recognizing that the new conflicts rule may state that it operates retroactively and such effect may be presumed in a number of situations. This is the case when public policy at the forum changes; thus the Spanish courts after 1936 have refused to recognize foreign divorces that they would have recognized in 1934; or the rules of the forum on evidence, qualified as substantive law, are altered, e.g., the means of proving illegitimate paternity.[25]

(d) *Applying the new conflicts rules.* All theories pre-

[23] RAAPE, Komm. 350.

[24] ROUBIER 79; PONTES DE MIRANDA 335; DE CASTRO Y BRAVO, Der. Civil de España, Vol. I (1949) 651 ff. contrasts legal transactions with suspended situations; similarly MACHADO VILLELA, DIP. 479; BALMACEDA 220.

[25] See the various proposals by KAHN 394 ff.; ROUBIER 678; DE CASTRO, *supra* n. 24, 646; YANGÚAS, D.I.P. 221.

serving in principle the former conflicts rules of the forum in order to connect old events with a certain legal system are opposed by the contrary principle that new conflicts rules immediately reach all cases. An early attempt by Niedner to deduct retroactivity from the nature of conflicts law as an alleged branch of public law [26] has been unanimously rejected. But Anzilotti has had an important following, particularly in Italy, when, instead of connecting the problem with the intertemporal rules of the forum, he attributed it to the intertemporal rules of the legal system to which the new conflicts rules refer.[27]

While, he argues, situations entirely liquidated belong to the old set of rules and future situations are reserved for the new rules, the remaining problems consist simply in the replacement of one substantive law (viz. that invoked by the old conflicts norm) by another substantive law (viz. the law referred to by the new conflicts norm), a problem to be solved by the transitory law of the newly invoked system.

This is an astonishing mistake of a great scholar, illustrating the enormous difficulty of the matter. Criticizing with mastery all the other solutions, Anzilotti directly violates the thesis defended by himself following Kahn that substantive and conflicts rules follow heterogeneous principles, the latter being merely formal. What the foreign system thinks of a sequence of its own substantive rules would not even afford a model for the change of its own conflict rules and must be completely immaterial to the application of the forum's conflicts law. The impracti-

[26] NIEDNER, "Kollision der örtlichen und zeitlichen Kollisionsfragen," in Das Recht 1900, 250. Inversely, 1 FRANKENSTEIN 241 ff. advocates retroactivity as principle.

[27] ANZILOTTI, *supra* n. 1, 2 Rivista 115, 126, followed by AGO, Teoria 178 ff.; ARMINJON, 1 Précis 188; MONACO, Efficacia; PACCHIONI, Elementi 245 ff. The partial opposition by BALDONI (*supra* n. 1) § 7 rests on his theory on the nature of conflicts law; against him AGO, Teoria 179 n. 1, 184; BATIFFOL, *l.c.*

cability of this theory is, of course, manifest when the foreign system has never been changed and has no transitory rules at all.

Eliminating this theory, opposition to the transitory rules of the forum results in the principle that the new conflicts rules apply, subject to some exceptions, particularly on the ground of public policy.[28]

Pace, the author of a voluminous new treatise on the general subject of transitory law, rightly places emphasis on what he calls the structure, and what we call the construction, of the *new* rule.[29] Conflicts rules are not included, and the author's insistence on the adaptability of his formula *tempus regit factum* has deviated too much attention from the details of the matter. Nevertheless, his extended polemics and his starting point in the new law seem closely to associate his effort to the spirit of Kahn's search for specialized rules, which despite all its defects is still the best method of approaching the desperate problem.

An original and enlightening idea has been expressed by E. M. Meijers and the Benelux draft. In principle, the present rules apply; by exception foreign legal relations are recognized as they were determined by the conflicts laws—*all* of them—of the countries essentially connected with these relations at the time of origin or extinction.[30]

III. Rationale

The divergent theses of the leading writers arrive at the application of four different sets of rules, existing or planned:

(1) The substantive transitory rules of the forum, either by direct application or by analogy;

[28] Thus, Yangúas 217 f.
[29] Pace, *supra* n. 1, and a summary in Rivista dir. com. 1947, 256-267.
[30] Benelux draft, art. 25 par. 2; *cf.*, Makarov, 18 Z. ausl. PR. (1953) 218 f.

(2) An inceptive system of transitory rules of the forum, either for the special purpose of conflicts law, or involving the change of both substantive and conflicts rules;

(3) The substantive transitory rules of the applicable system; or perhaps certain parts of this law;

(4) The present conflicts rules of the forum as retroactive with exceptional cases of nonretroactivity.

I am unable to subscribe in full measure to any of the doctrines suggesting these solutions. Each has some merits and some severe drawbacks. In my opinion, the following considerations are decisive.

1. With Kahn and Raape, we must deny by all means the influence of a former conflicts rule on a relationship which had no connection with this rule during its time. If two Spaniards domiciled in France had married there, the intrinsic requirements were subjected, respectively, by the old German and the new Brazilian conflicts law to the law of the domicil and by the new German and the old Brazilian conflicts law to the national law. Who would dare to say that the old or the new conflicts rule is "right," just, adequate, and better protects the interest of the parties than the other? Naively, it has been presumed that the law of the former time was preferable because the parties trusted it—a very strange idea that these Spaniards should confide in a conflicts law of whose existence they never knew. It is likewise rather absurd to discriminate foreign-governed family relations according to the deadlines of January 1, 1900, of Germany or 1942 of Brazil. Contrary to Kahn and Raape, however, this is not only true when the parties never had a domicil and never brought an action in the forum; it is always true in foreign-governed relationships. The German transitory rules themselves were adequate only for such legal situations as would have been governed

by the new Civil Code, if it were applied retroactively. In these cases, it could possibly—inconvincingly as we have seen—have been argued also that the former conflicts rules pointing to the relevant particular territorial laws had to be preserved. But if French spouses fixed their first matrimonial domicil in 1899 in a German town in which separation of property obtained, a French court would tend to presume that the parties agreed on the French community system. Could they be presumed instead in Germany or in a third country to have "trusted" the local system so that this system must be perpetuated after 1900?

Even considering the relationships with which they were connected in a drastic way, is there any "expectation of the parties" to protect when their transaction is *void* under the law applicable under the old conflicts rule? Moreover, expectation of laymen based on conflicts law is a fantastic invention; if the parties did not care to agree on an applicable legal system, there must be another solid ground for exempting the case from the conflicts law in force.

Illustration: In a case decided in 1907 by the Reichsgericht a married woman signed a release to her husband in 1896 in Wiesbaden, where under German common law the domicil, namely, Baden, determined the validity of contracts. Nevertheless, as the question whether the wife had made a valid gift between spouses belonged to marital property law according to the conflicts rule of Baden, the national law seemed to apply. This would have been the law of Mark Brandenburg and "subsidiarily the Prussian Landrecht." According to the "more recent practice" of the court, however, further reference would be made from Prussian to Baden law whose article 1096 allowed revocation.[31]

What law, we may ask again, did the parties trust?

[31] RG. (Oct. 11, 1907) 19 Z. int. R. (1909) 222, Schall v. Schall.

The right solution, therefore, cannot lie in simply going back to the old conflicts rules, for the only reason that important elements of the case happened to appear in the past, or even some substantial connections with the forum then existed.

2. On the other hand, "respect for the past" has always been paid to what was called *jura adquisita,* vested rights, *wohlerworbene Rechte.* Despite Pillet, Dicey, and Beale, this category has lost its charm. It is also settled that conflicts law itself never creates any indefeasible right, only to be constituted "by the just meaning of the competent legislation." [32] Unfortunately, the misused and demolished vested rights doctrines have left a vacuum to this day. In the intertemporal field, at this time, merely two assumptions seem assured:

(a) A foreign judgment recognized as *res judicata* by a decision of the forum at the time of its previous conflicts rules remains binding, although this recognition required that a conflicts rule of the forum, now repealed, was observed by the foreign court. We re-enter the problem, however, where no recognition was sought at the time of the old conflicts rule.

(b) An obligation fulfilled, a marriage dissolved, an inheritance right won or lost by the death of the decedent, in short, a legal relationship finished under the old set of rules remains liquidated.

(c) While these propositions are confined to the forum's own conflicts rules, there is clearly a need for a broader respect for the past, as in the "immemorial" prescription of the Pandectists. A few suggestions have been made

[32] ANZILOTTI, 2 Rivista at 131. The "vested right" of a natural child, born in the period when Austrians were considered German nationals, assumed in German decisions 1950 and later (16 Z. ausl. PR. 509) eliminates EG. art. 212, but is based on substantive law.

recently to fill some gaps left by the disappearance of the vested rights category. Thus, the Benelux draft preserves the relations recognized by the conflicts laws of "the laws" with which they are connected,[33] and Niederer proposes to allow the court's discretion for maintaining exceptionally the products of a legal system that would not be competent under the court's normal conflicts rules.[34] On these questions, transcending by far the field of private international law, further discussions are highly desirable.

3. In a series of existing conflicts rules, reference is made to the law of a specific time, and in particular that of a past event. When the form of marriage, a contract, a conveyance, a will is governed by the law of the place of celebration or execution, also the law of the time is meant The first matrimonial domicil or the nationality of the husband or the spouses refers primarily to the initial stage of the marriage. The status of a child is determined according to the moment of its birth or legitimation. Tort is subject to the law of the place where, at the time when, the harm is done. Possession and property comes into existence at a certain time under the law of this time. Construction of agreements and wills must take into consideration the law of the time of execution.

These and other references to the past, developed within the framework of the conflicts rules of one system, should be greatly and consistently enlarged, especially in the interest of the validity of transactions. They serve better than transitory rules when they concede optional application in favor of validity or when the transaction depends on a future event, as a testamentary will does.

[33] *Supra* n. 30.

[34] NIEDERER, Einführung in die Allgemeinen Lehren des int. Privatrechts (1954) 320.

Illustrations: (I) Suppose a German when domiciled in Brazil executed in 1941 in Cuba a will in German holographic form and died domiciled in Cuba in 1953. The will was valid in the eyes of a Brazilian judge when his old conflicts rule referred to the national, German, law of formal requisites. Under the new domiciliary approach, a Brazilian court would regard the will as invalid if no help were forthcoming. The transitory rule of the 1942 Law does not help.[35] But the rule, *locus regit actum,* would, provided that we suppose that the Brazilian law has merely forgotten to mention it [36] and, moreover, that the unsound rejection of renvoi in article 16 were relaxed to permit further reference from Cuban to German law.

(II) Suppose a seventeen-year-old Italian boy, domiciled in Florida, made there a will in 1941, then moved to England where he died in 1944. Capacity to execute a will is given in Italy at 16, in Florida at 18, and in England at 21 years, and must exist in Italy at the time of execution and in Florida and England at the time of death. A Brazilian court formerly looked to Italian law and held the will valid. Now it must find capacity at the time of execution missing and at the time of death still missing. Any transitory law depends on the time of the death. But if Brazil were to recognize validity of a foreign will also in a case where the testator had capacity by his national law at the time of execution, conflicts law would take care of the situation.

4. That the contacts preferred by a new determination of choice of law should generally yield to the abandoned standards without appropriate direction by the lawmaker is not a very attractive idea. It has been a strange idea when the new rules substituted a congeries of dubious provincial case laws, as in the German, Polish and other legislations. Even elsewhere there is not much substance

[35] *Supra* 510.
[36] *Supra* 517.

to suggest a presumption for the old setup, nor, it is true, for any other a priori considerations. Discovering individual solutions needs much more detailed studies than have been afforded thus far. To resume the principal experience of this work in a caveat as used in the Restatements, our last word may call once again for prudent research.

TABLES

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