

HUBER'S DE CONFLICTU LEGUM¹

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Of the vast number of treatises on the Conflict of Laws Huber's "De Conflictu Legum Diversarum in Diversis Imperiis"³ is the shortest. It covers only five quarto pages; and yet it has had a greater influence upon the development of the Conflict of Laws in England and the United States than any other work. No other foreign work has been so frequently cited. Story himself relied upon Huber more than upon any of the other foreign jurists. Indeed, Lainé⁴ goes so far as to say that Story's celebrated work on the "Conflict of Laws" is in reality nothing but a "paraphrase" of Huber.

In the estimation of continental jurists, Huber does not occupy such a prominent position. He is considered one of the lesser writers on the subject. Whence comes this difference in the appreciation of Huber? Before this question is answered it will be

1. "Ulrich Huber was descended from a Swiss family. His grandfather entered the military service of The Netherlands. Ulrich was born at Dokkum in 1636. He studied at the universities of Franeker and Utrecht. In 1657 he became professor of law at the University of Franeker. He was twice offered the chair of law at Leyden, but refused each time. He was afterwards appointed as a member of the Provincial Court at Leeuwaarden, but shortly before his death he returned to Franeker. He died in 1694, or four years before Voet published his Commentary.

"Ulrich Huber was regarded as one of the first rank in the Dutch school of law. His principal works are "De Jure Civitatis"; "Praelectiones Juris Civilis"; "Digressiones Justinianae"; "Eunomia Romana"; and the "Hedendaegse Rechtsgeleertheyt zoo elders als in Frieslandt gebrukelyk." In addition to these works he wrote a considerable number of works on theological and philosophical subjects": *Wessels*, "History of the Roman-Dutch Law," 316-17.

2. [Born April 21, 1876; Ph.B., Cornell, 1898, LL.B. 1899; studied at École de Droit, École libre des Sciences Politiques, Paris, and at Heidelberg and Göttingen; J. U. D. "maxima cum laude," Göttingen, 1901; practiced law at New York, 1901-3; professor of law, University of Maine, 1903-4; professor of law, 1904-11, dean 1910-11, George Washington University; professor of law, University of Wisconsin, 1911-14; professor of law, University of Minnesota, 1914-17; now professor of law at Yale University. He is a member of many American and foreign learned societies and committees; and is author of numerous writings, especially in the fields of conflict of laws and comparative law. His articles have appeared in many of the important American and European law reviews.—Ed.]

3. It constitutes a part of title 3, part 2, book 1, of *Huber's* "Praelectionum juris civilis, tomi tres."

4. *Clunet*, Journal du droit international privé, XXIII, 486.

profitable to set forth very briefly Huber's views on the subject of the Conflict of Laws and to compare them with the views of the other leading statisticians.

I

Huber has formulated his views concerning the legal basis upon which, in his opinion, the rules of the Conflict of Laws rest in the following three maxims:

1. The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.

2. All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.

3. Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects.

Maxims one and two announce the doctrine that all laws are territorial, that they have no force and effect *ex proprio vigore* beyond the limits of the enacting state, but bind all found within the territory. In thus proclaiming in such unqualified terms the territoriality of all laws Huber went beyond any of his predecessors. The writers belonging to the Italian school⁵ wrote at a time when feudalism was losing its foothold in the respective countries in which they wrote, and the modern doctrine of territorial sovereignty had not yet developed. The questions did not relate to the conflicting laws of independent states. In Italy they arose between the various local city laws and the Roman law which governed throughout the peninsula as a general common law. In France they arose between the different provincial "customs" of one and the same state. To limit the operation of laws to the confines of the state or province in which they had originated appeared, under such conditions, to be both unnatural and unnecessary. Following the tradition of the old Germanic law, some laws were deemed to fol-

5. "The Italian doctrine consisted at first in the sketches, gradually gaining in clearness and certainty, of Durant, Belleperche, Cinus, and Fabre. It was thereupon enlarged, developed and complicated through the writings of Bartolus, and later enriched through additions from Baldus and Salicet. During the entire fifteenth century and a part of the sixteenth, in the hands of Paul de Castre, Alexander, Rochus Curtius in Italy, and Masuer, Chasse-neuz, and Tiraqueau in France, it remained stationary. Dumoulin, at last, gave to it new life and a new impetus when d'Argentré arrested the movement and replaced it with a new theory": *Lainé*, "Introduction au Droit international privé," I, 250-51.

low the person wherever he went; whereas others were regarded as having merely a local effect. Neither the Italian writers, nor the French writers belonging to the Italian school, attempted, however, to define with precision which of the statutes would have extra-territorial effect and which would not.⁶

In Brittany, feudalism had maintained itself more strongly than in any other of the French provinces. Inspired by these feudal ideas, d'Argentré contended that "all customs are real," that is, territorial. In one respect, however, this courageous Britton yielded to the traditional view. The rule that the status and capacity of a person has extra-territorial effect had become so thoroughly established in France through the influence of the Italian school, that d'Argentré accepted the same as an exception to his general theory; but he attempted to confine it within narrow limits.⁷

The new doctrine formulated by d'Argentré did not fall upon a receptive ground in France, and for a century and more it was not accepted there. Feudalism was disappearing and there was no inclination to emphasize the differences in the laws of the various provinces.

In Holland conditions were different. The Dutch provinces had just gained their independence and formed a federation. But this federation affected but little the independence of the individual provinces in which there existed an intense jealousy of their local rights. This condition coupled with the fact that a growing commerce with foreign nations caused them to look upon the Conflict of Laws as arising between separate political sovereignties, led them to accept most readily d'Argentré's doctrine of the territoriality of all customs. A new school of jurists arose, represented by Paul Voet, Huber, and John Voet, which carried d'Argentré's doctrine to its logical conclusion. It declined to recognize any exception to the rule that laws have ipso jure no extra-territorial operation. According to these writers all extra-territorial effect of laws rested solely upon comity. Paul Voet was the first to lay down his new doctrine, without developing it. He did not even present it as something new, and supported his statement that all laws are territorial by reference to the older writers.⁸ His son, John Voet, on the contrary, was fully aware of the fact that the views set forth involved

6. *Lainé*, "Introduction au droit international privé," I, 248 et seq.

7. *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 2, 3, 9, 11. See discussion of status and capacity, *infra*.

8. *P. Voet*, "De Statutis," s. 4, c. 2, n. 7.

a radical departure from those expressed by d'Argentré, whose views he vigorously assailed.⁹ Twenty years before the publication of John Voet's great work on the Pandects, in which the latter's treatment of the Conflict of Laws is found, Huber had announced the doctrine of the Dutch school in the clearest and most unmistakable language, and had made it the foundation of his treatise on the subject under discussion.

Comity. Huber's third maxim indicates that the "sovereign" of a state may "by way of comity" recognize rights acquired under the laws of another state. Huber was the first writer who made it clear beyond a doubt, that the recognition in each state of so-called foreign created rights was a mere concession which such state made on grounds of convenience and utility, and not as the result of a binding obligation or duty. From the wording of the maxim it would appear that Huber conceived of comity as a *political* concession which might be granted or withheld arbitrarily by the sovereign. He adds, however, that the solution of the problem is to be derived "not exclusively from the civil law but from convenience and the tacit consent of nations."¹⁰ What convenience and the tacit consent of nations might prescribe was evidently a question for the courts, and so the term "comity" came soon to be understood as *judicial* comity.¹¹

Public Policy. In his third maxim the limits beyond which the recognition of foreign laws cannot go are also stated. In Huber's words they can be recognized only "so far as they do not cause prejudice to the power or rights of such government or of their subjects."¹² In other places he adds that such recognition will be denied if it would be revolting to accord it,¹³ or if there has been an evasion of the local law.¹⁴

APPLICATION OF HUBER'S MAXIMS

Status and Capacity in General. With reference to status and capacity the greatest difference of opinion has existed among the different writers. Those belonging to the Italian school applied the law of the domicile. They gave to such law extra-territorial opera-

9. *J. Voet*, "Ad Pandectas," bk. 1, tit. 4, pt. 2, n. 5, 7.

10. *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 2.

11. *Catellani*, "Il diritto internazionale privato e i suoi recenti progressi," II, 455-56.

12. See also *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 3, 11, 12.

13. *Ibid.*, n. 8 (in case of incestuous marriages).

14. *Ibid.*, n. 8, 13.

tion, but they did not do so uniformly nor in accordance with fixed principles.¹⁵ D'Argentré regarded these matters as belonging to the personal statute which he admitted, by way of exception to his general doctrine, to have extra-territorial effect *ex proprio vigore*. In order to restrict the scope of this exception he held, however, that a statute was personal only if (1) it affected the person in a general and not merely in some special manner, and (2) it did not affect immovable property directly or indirectly.¹⁶ According to Paul Voet laws relating to status or capacity were not operative *ipso jure* in another state.¹⁷ He recognizes that on grounds of comity extra-territorial effect might be given to the personal statute, but he mentions only the case of a prodigal placed under guardianship, and holds that the incapacity thereby imposed would be recognized even with respect to immovable property in another state.¹⁸ John Voet set forth the theory of the Dutch school more fully than any other writer, and forcefully argued in favor of the proposition that the laws governing status and capacity, like any other laws, could have by reason of their own inherent force no extra-territorial operation.¹⁹ To what extent exceptions might be recognized on grounds of comity is discussed by him in connection with the different topics. He felt unable to lay down any general rules in this regard.²⁰

Huber is generally very lucid in his statements, but in the matter of status and capacity it is difficult to get his exact meaning. He says that from the general maxims stated the following maxim may also be derived:²¹

"Personal qualities impressed upon a person by the law of a particular place surround and accompany him everywhere with this effect, that everywhere persons enjoy and are subject to the law which persons of the same class enjoy and are subject to in that other place."

The illustrations given in the same section would seem to indicate that a person who has become of age according to the *lex domicilii* will have capacity everywhere to bind himself and even to transfer immovable property situated elsewhere, and that a person placed under guardianship by the law of his domicile will not be bound by contracts entered into in another state. From the two

15. *Lainé*, "Introduction au droit international privé," I, 259-62; *Catellani*, "Il diritto internazionale privato," I, 332-340.

16. *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 7, 8.

17. *P. Voet*, "De statutis," s. 4, c. 2, n. 6, 7.

18. *P. Voet*, "De statutis," s. 4, c. 3, n. 17.

19. *J. Voet*, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 5 et seq.

20. *J. Voet*, *Ibid.*, n. 16.

21. *Huber*, "Praellect.," pt. 2, bk. 1, tit. 3, n. 12.

sections that follow it is clear, however, that such is not Huber's meaning. He there distinguishes between status and capacity and subjects the latter to the *lex loci actus*.²²

Capacity to Dispose of Immovable Property. The writers belonging to the Italian school applied the *lex domicilii*.²³ Those following d'Argentré disagreed with respect to the question whether a statute affecting capacity to dispose of immovable property should be regarded as a real statute. D'Argentré himself was of this opinion;²⁴ but some of the later writers, giving a more restricted meaning to the term "real statute," held that the laws governing capacity to convey immovable property *inter vivos*, or by will, belonged to the class of personal statutes and were subject, therefore, to the *lex domicilii*.²⁵ Others made various distinctions.²⁶ All would admit that if the law of the situs prohibited a transfer of the property such prohibition was binding everywhere.

Of the writers belonging to the Dutch school Paul²⁷ and John²⁸ Voet held that the law of the situs would determine the capacity of a person to dispose of immovable property. Huber does not express himself clearly on the point. He states that the *lex loci actus* "does not apply to immovables when they are considered, not as to their dependency upon the free disposition of the respective owners, but as to the extent in which certain qualities are found impressed upon them by the law of the particular country in which they are situated; such qualities remain unaffected in such state irrespective of what the laws of other states or the agreements of individuals

22. Lainé assumes that Huber in giving the illustrations mentioned in paragraph 12 must have had in mind some conditions which he does not express. Such conditions may have been, according to Lainé, that the judges called upon to apply the foreign law had authority to confirm the "*venia aetatis*" or the interdiction, or to declare the party of age in accordance with local law: Lainé, "Introduction au droit international privé," II, 185.

23. *Catellani*, "Il diritto internazionale privato," I, 485-86.

24. *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 7, 8.

25. *Hert*, "Opera," I, "de collisione legum," s. 4, n. 8.

26. Rodenburg and Boullenois accepted the doctrine that the *lex domicilii* governed with respect to transfers *inter vivos*. (*Rodenburg*, "Tractatus de jure conjugum," tit. 2, c. 1; *Boullenois*, "Traité de la personnalité et de la réalité des loix," ed. 1766, I, 77 et seq.; 127 et seq.; 705 et seq.; "Dissertations sur des questions qui naissent de la contrariété des loix et des coutumes," ed. 1732, 2-4.) As regards wills Rodenburg applied the *lex rei sitae* ("Tractatus, de jure conjugum," tit. 2, c. 5, n. 7). Boullenois distinguished whether the capacity to make a will affected the person or immovables. In the former case the *lex domicilii* would govern; in the latter case, the law of the situs (*Boullenois*, "Traité de la personnalité," I, 718, ed. 1766).

27. *P. Voet*, "De statutis," s. 9, c. 1, n. 4; s. 4, c. 2, n. 6; s. 4, c. 3, n. 12.

28. *J. Voet*, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 8.

may provide to the contrary."²⁹ From his subsequent observations it is doubtful whether in Huber's opinion the majority of a party to convey immovable property, or his general capacity to dispose of such property, should be governed by the *lex rei sitae*, or whether on grounds of comity the *lex loci actus* or the *lex domicilii* should control. The statement quoted may refer only to special mandatory provisions of the law of the situs.³⁰

Capacity to Make a Will Disposing of Movable Property. The capacity of a testator to dispose of movable property by will has been determined invariably by the *lex domicilii* of the testator at the time of his death.³¹ Huber does not express himself on the subject.

Form. Under the influence of Bartolus, the jurists of the Italian school came, on grounds of practical convenience, to recognize the rule that a legal act executed in the form prescribed by the law of the place of execution should be regarded as valid everywhere. At first this rule was an optional one, it being permissible to comply as regards formal execution with the law governing the validity of the transaction in general. Whether in the opinion of these writers the rule *locus regit actum*, as it was subsequently called, assumed in the course of time a mandatory character is uncertain.³² D'Argentré's doctrine of the territorial character of all law should have caused him logically to apply the *lex rei sitae* to the transfer of immovable property. But he passed the question over in silence, and his successors retained the traditional rule and applied it especially with respect to wills.³³ The rule *locus regit actum* was at first optional in France, but it became obligatory in the end.³⁴ An express prohibition of the law of the situs would, of course, prevail.³⁵ The Belgian jurists were the first to accept the

29. Huber, "Praellect.," pt. 2, bk. 1, tit. 3, n. 15.

30. The view that the *lex rei sitae* should determine the capacity to transfer immovable property *inter vivos* and by will became also the prevailing view in Germany in the sixteenth and seventeenth centuries: *Wächter*, "Archiv für die civilistische Praxis," XXIV, 275.

31. J. Voet, "Ad pandectas," bk. 28, tit. 3, n. 12.

32. Lainé, "Introduction au droit international privé," II, 399-400.

33. Lainé, "Introduction au droit international privé," II, 359; Bouhier, "Observations sur la coutume du duché de Bourgogne": "Oeuvres," I, 766, c. 28, n. 10, ed. 1787; Froland, "Mémoire concernant la nature et la qualité des statuts," I, 136, ed. 1729.

According to Boullenois, if the formalities prescribed relate to proof and authenticity the *lex loci actus* applies, but if they are attached to things the law of the situs governs: *Boullenois*, I, obs. 21, p. 426; obs. 23, p. 456; *Boullenois*, II, obs. 46, rule 4, p. 467, ed. 1766.

34. Lainé, "Introduction au droit international privé," II, 400-405.

35. Bouhier, "Observations sur la coutume du duché de Bourgogne," c. 28, n. 10; "Oeuvres," I, 766, ed. 1787.

logical conclusion to which d'Argentré's doctrine led, and under their influence the Edict of Albert and Isabella, of 1611, was enacted, Art. 13 of which prescribed that the formalities of wills relating to land should be governed by the law of the situs.³⁶ The inconvenience of this rule began, however, to be felt very soon. Juristic opinion reverted in favor of the *lex loci actus* and found expression in an official interpretation, as it was called, of the Edict by the Privy Council of the Belgian Provinces, rendered in 1634, which amounted in fact to a repeal of the above provision. It held that a will relating to foreign immovables might be validly executed in Belgium in the form prescribed by Belgian law.³⁷

The writers of the Dutch school entertained different views on the subject. Paul Voet recognized the rule *locus regit actum*, even as regards transactions affecting immovable property. A will disposing of such property was void, according to him, if it did not satisfy, as regards form, the *lex loci actus*.³⁸ He allowed, however, certain exceptions to the mandatory character of the rule, the principal one of which was that a contract or a will which was not executed in the form prescribed by the law of the place of execution should be sustained at the domicile of such party if it complied with the formal requirements of the *lex domicilii*.³⁹ Huber applied his second maxim, that all parties are to be deemed subjects of the place where they happen to be, to matters of form and concluded therefrom that the *lex loci actus* was binding absolutely. He recognized no exception and held the rule applicable to movable and immovable property alike.⁴⁰ According to him a will by a Dutch

36. Art. 13 of the Edict reads as follows: "Si es lieux de résidence des Testateurs, et de la situation de leurs Biens, y a diversité de Coutumes pour le regard de ces dispositions de dernière volonté; Nous ordonnons qu'en tant que touche la qualité desdits Biens, si on en peut disposer, en quel âge, et avec quelle forme et solennité, on suivra les Coutumes et usances de la dite situation." *Nouveau commentaire sur l'Édit Perpetuel, du 12 juillet, 1611* (Lille, 1770), p. 79.

Burgundus and Christinaeus approved this view: *Burgundus*, "Tractatus controversiarum ad consuetudines Flandriae," tract. 6, n. 2, 3; *Christinaeus*, "Practicarum quaestionum decisiones," IV, dec. 5, n. 5.

37. *Lainé*, "Introduction au droit international privé," II, 362.

38. *P. Voet*, "De statutis," s. 9, c. 2, n. 1, 3.

39. *Ibid.*, n. 9, exc. 4. A will executed in the forms prescribed by the *lex loci actus* would not be sustained at the domicile, however, if the testator had gone to such place for the purpose of evading the *lex domicilii*. *Ibid.*, n. 4.

40. *Huber*, "Praellect.," pt. 2, bk. 1, tit. 3, n. 3, 4, 8.

"Si *lex actui formam dat, inspicendus est locus actus, non domicilii, non rei sitae*. . . . licet enim hic subjectus revera maneat patriae suae, tamen illud, ut supra diximus, de actu primo est intelligendum, quoad actum vero secundum subditus illius loci sit temporarius, ubi agit vel contrahit, simulque ut forum ibi sortitur, ita statutis ligatur": *Hert*, "Opera," I, "de collisione legum," s. 4, n. 10, p. 179, ed. 1716.

subject disposing of property in Holland, executed in Frisia in the form prescribed by the Dutch law, was therefore invalid.⁴¹ John Voet, on the other hand, would sustain a will disposing of movable property if it conformed, as regards formal execution, either to the *lex loci actus* or to the *lex domicilii* and a will disposing of immovable property if it satisfied the *lex loci actus* or the *lex rei sitae*.⁴²

Immovable Property. The question to what extent the capacity of a person to convey immovable property and the formal requirements of instruments disposing of such property are controlled by the law of the situs has been discussed already. As regards substantive validity it should be noted that, ever since d'Argentré, laws affecting immovables as such formed the principal class of real statutes and were governed by the *lex rei sitae*.⁴³ Great differences of opinion existed, however, in the application of the rule.⁴⁴ All agreed that an express prohibition imposed by the law of the situs should be respected everywhere.⁴⁵ Huber applies to immovables the law of the situs "when they are considered, not as to their dependency upon the free disposition of the respective owners, but as to the extent in which certain qualities are found impressed upon them by the law of the particular country in which they are situated."⁴⁶

Movable Property. From the earliest time in the Conflict of Laws movables were deemed subject to the law of the domicile of their owner, a rule which was expressed by the Latin maxims "mobilia ossibus inhaerent" and "mobilia personam sequuntur." These maxims were employed as a rule with reference to questions of succession and to the property of married persons, that is, with reference to questions affecting a person's property as a whole. Scarcely an instance can be found where the rule was actually

41. Huber, *Ibid.*, n. 4.

42. J. Voet, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 15.

The rule that a legal act was valid, as regards formal requirements, if it satisfied the law of the place of execution, was established also in Germany in the course of the sixteenth century: *Wächter*, *Archiv für die civilistische Praxis*, XXIV, 276.

43. There is little on the subject in the works of the writers belonging to the Italian school (*Lainé*, "Introduction au droit international privé," I, 258-59; *Catellani*, "Il diritto internazionale privato," I, 346-49). Bartolus inquires by what law the question whether a person has the right to raise a house higher is to be governed and he answers it by referring the question to the law of the situs; *Bartolus*, "In primam codicis partem commentaria," English translation by Professor Beale under the title of "Bartolus on the Conflict of Laws," n. 27.

44. *Lainé*, "Introduction au droit international privé," I, 328 et seq., 342 et seq., 395 et seq., 408 et seq., 413 et seq.

45. *Rodenburg*, "Tractatus de jure conjugum," tit. 2, c. 5, n. 1-6.

46. *Huber*, "Praellect.," pt. 2, bk. 1, tit. 3, n. 15.

applied to the transfer of a particular article. The older writers stated the rule governing movables in general terms without distinguishing between the cases where a person's property as a whole was affected or the transfer related to a particular article.⁴⁷ Some followed d'Argentré's⁴⁸ view and held that movable property was attached to the person of the owner, being adherent to his person, as it were, and was governed, therefore, by the law governing his person. Others agreed with Dumoulin,⁴⁹ and regarded the question as falling within the real statute and subject, therefore, to the law of the situs, but by a legal fiction regarded such property to be at the domicile of the owner. Of the writers of the Dutch school Paul⁵⁰ and John⁵¹ Voet accepted Dumoulin's view. Huber recognized the general rule in the distribution of movable property upon death but dismisses the subject by a mere reference to John à Sande.⁵² The latter accepted d'Argentré's explanation.⁵³

Contracts. The writers of the Italian school applied the law of the place where the contract was made to the determination of the natural consequences of a contract, that is, to the consequences which inhere in the contract from its inception, and the law of the place of performance, to the consequences which arise subsequently to the formation of the contract as the result of negligence or default. If no place of performance was specified the negligence or default was deemed to occur at the forum.⁵⁴ Dumoulin did not distinguish between the direct and indirect consequences of a contract but advanced the view that the intention of the parties should govern. If such intention was not expressed it was to be derived from the attendant circumstances.⁵⁵

47. *Bar*, "Private International Law" (Guthrie's translation), 488-90.

48. *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 30.

49. *Dumoulin*, "Coutumes générales du haut et bas pays d'Auvergne," II, art. 41; "Opera," II, 747, col. 1, ed. 1681.

50. *P. Voet*, "De statutis," s. 4, c. 2, n. 2, 8; s. 9, c. 1, n. 8.

51. *J. Voet*, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 11.

52. *Huber*, "Praelect," pt. 2, bk. 1, tit. 3, n. 15.

53. *John à Sande*, "Opera juridica omnia," "Dec. Fris.," bk. 4, tit. 8, def. 7, p. 194, ed. 1697.

54. *Lainé*, "Introduction au droit international privé," I, 135-36; *Bartolus* (Beale's translation), n. 15, 16, 18. Bartolus applies the same rules to a contract to sell immovable property: *ibid.*, n. 16.

55. *Lainé*, "Introduction au droit international privé," I, 255-56.

"Aut statutum loquitur de his, quae meritum scilicet causae vel decisionem concernunt, et tunc aut in his, quae pendent a voluntate partium, vel per eas immutari possunt et tunc inspicuntur circumstantiae, voluntatis, quarum una est Statutum loci, in quo contrahitur; et domicilii contrahentium antiqui vel recentis, et similes circumstantiae": *Dumoulin*, "In codicem Justiniani," I, 1, "conclusiones de statutis aut consuetudinibus localibus;" "Opera," III, 554, ed. 1681.

The principle that the will of the parties, expressed or implied, was the controlling consideration was accepted also by the Dutch writers. In conformity with this view a contract might have extra-territorial operation and affect immovable property in another state.⁵⁶ Mandatory provisions of the situs would, of course, prevail.⁵⁷ Nor could effect be given to the expressed or implied intention of the parties if it ran counter to prohibitory statutes of the forum or its laws establishing a public policy.⁵⁸ Huber appears to accept these views. He holds, however, relying on the Roman maxim "contraxisse unusquisque in eo loco intellegitur, in quo ut solveret, se obligavit" that where the place of performance differs from the law of the place where the contract was entered into, the parties will be deemed to have contracted with reference to the law of the place of performance.⁵⁹

Marriage. According to the early writers capacity to marry was governed by the general rule applicable to capacity. On grounds of policy and because of the influence of the church, whose co-operation was necessary in the celebration of a marriage, it seems, however, that the *lex loci celebrationis* had a greater influence than in connection with ordinary contracts.⁶⁰

As regards the ceremony required to constitute a valid marriage the rule *locus regit actum* was recognized.⁶¹ Whether a marriage could validly be entered into by observing the formalities prescribed by the law of the domicile of the parties is not certain. The question cannot have arisen frequently in practice as even in Protestant countries it was the universal custom to celebrate a religious marriage, which in the nature of things conformed to the *lex loci celebrationis*.⁶² The jurists who explained the rule *locus regit actum* on the theory of a voluntary submission to the local law

56. *P. Voet*, "De statutis," s. 4, c. 2, n. 15. Cf. s. 9, c. 1, n. 2; *J. Voet*, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 19.

57. *J. Voet*, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 20.

58. *Ibid.*, n. 18. For illustrations see also *Huber*, "Praellect," pt. 2, bk. 1, tit. 3, n. 11.

59. *Huber*, "Praellect," pt. 2, bk. 1, tit. 3, n. 10.

60. *Catellani*, "Il diritto internazionale privato," I, 478-79.

Boullenois expresses himself concerning the old French law as follows: ". . . le mariage étant du droit civil de chaque nation, par rapport aux formalités et aux conditions que la loi de chaque Pays exige, il est bon et valable dans tout autre, dès qu'il a été une fois valablement contracté dans un Pays": *Boullenois*, "Traité de la personnalité et de la réalité des loix," I, c. 3, obs. 23, p. 495, ed. 1766.

61. *P. Voet*, "De statutis," s. 9, c. 2, n. 9; *J. Voet*, "Ad pandectas," bk. 2, tit. 2, n. 4.

62. *Friedberg*, "Das Recht der Eheschliessung in seiner geschichtlichen Entwicklung," 295-96. See also *Varnier*, "Droit français du mariage au point de vue du droit international privé," Paris, 1891, pp. 84 et seq.

naturally assumed that the rule had a mandatory character.⁶³ This was also no doubt Huber's view.⁶⁴

Various exceptions were laid down with reference to the application of the *lex loci celebrationis*. A marriage celebrated in accordance with the law of the place of celebration might not be recognized at the domicile of the parties if it was entered into in the face of a prohibitory statute there existing,⁶⁵ or in evasion of the law of the domicile,⁶⁶ or if it was deemed to conflict in other respects with the law of the forum. According to Huber such marriage will not be recognized if it prejudices others, if it is incestuous or if it was entered into in evasion of the law of the domicile.⁶⁷

Effect of Marriage Upon Property. In the absence of a marriage settlement the writers of the Italian school applied the personal law of the husband.⁶⁸ D'Argentré regarded the statutes relating to the effect of marriage upon the property of the spouses as real statutes, and held in consequence that the law of the domicile could not affect property situated in another province or country.⁶⁹ Dumoulin, on the contrary, maintained that the parties must be deemed to have submitted, by way of tacit agreement, to the *lex domicilii*.⁷⁰ Most of the later writers on the Conflict of Laws have accepted Dumoulin's theory of a tacit contract and the law of matrimonial domicile as the governing law.⁷¹ Some writers, notably Boullenois, rejected the notion of a tacit contract, but desired that a single law should govern the property rights of spouses. They contended that the laws relating to the effect of marriage upon the property rights of husband and wife belonged to the status of

63. *Hert*, "Opera," I: "de collisione legum," s. 4, n. 10.

64. *Huber*, "Praellect.," pt. 2, bk. 1, tit. 3, n. 8.

65. *J. Voet*, "Ad pandectas," bk. 23, tit. 2, n. 4.

66. *Ibid.*, bk. 1, tit. 4, pt. 2, n. 14; *Boullenois*, "Traité de la personnalité et de la réalité des loix," I, obs. 31, p. 427, ed. 1766; *Bouhier*, "Observations sur la coutume du duché de Bourgogne," I, c. 28, n. 60-62, "Oeuvres," I, 773-74, ed. 1787.

67. *Huber*, "Praellect.," pt. 2, bk. 1, tit. 3, n. 8.

68. *Bartolus* on the "Conflict of Laws" (Beale's translation), n. 19.

69. *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 28-33.

70. *Dumoulin*, "Consilium," 53, n. 3, "Opera," II, 964, ed. 1681.

71. *Bouhier*, "Observations sur la coutume du duché de Bourgogne," I, c. 26, n. 3, "Oeuvres," I, 714, ed. 1787; 1 *Hert*, "Opera": "de collisione legum," s. 4, n. 44, 46, 47, 49. *Pothier*, "Traité de la communauté, principes préliminaires," n. 15. The latter states expressly that if the husband at the time of the marriage had the intention to acquire a new domicile he will be deemed to have submitted to the law of the new domicile.

The above became also the prevailing view in Germany towards the end of the seventeenth century. *Wüchler*, *Archiv für die civilistische Praxis*, XXV, 48. Concerning the writers following d'Argentré's view, see *Hert*, "Opera," I, "de collisione legum," s. 4, n. 46.

marriage and were governed, therefore, by the personal law of the parties, that is, the law of their domicile.⁷² Writers rejecting the contract theory and basing the application of the *lex domicilii* upon the direct operation of the law governing the status of the parties were logically forced to hold upon a change of domicile, that the law of the new domicile must determine the rights of the parties in future acquisitions of property, but it seems that this conclusion was not uniformly reached.⁷³ All agreed that express prohibitions or other mandatory provisions of the law of the situs were binding everywhere.⁷⁴

The Dutch writers entertained conflicting views. Paul Voet states that the matter is governed by the law of matrimonial domicile, by which is meant the law of the actual domicile of the husband at the time of marriage, or, if he intended at that time to establish a new domicile, the law of the intended domicile.⁷⁵ He says also that a subsequent change in the domicile will not affect the applicatory law.⁷⁶ At the same time he holds that the laws concerning the effect of marriage upon the property of the spouses are real and have no operation with respect to foreign property.⁷⁷ Story's ex-

72. "Je ne sais si, pour échapper à tous les cris de M. d'Argentré contre Me. Charles du Molin, il n'eût pas été plus court et plus convenable, sans recourir à la présomption d'une convention et d'une soumission, dont il ne paroît aucune trace, de regarder les statuts de la communauté et de la non-communauté, comme des Loix qui affectent les conjoints d'un état et d'une condition pure personnelle": *Boullenois*, "Traité de la personnalité et de la réalité des loix," II, obs. 28, pp. 299-300, ed. 1766.

73. See *Boullenois*, "Traité de la personnalité et de la réalité des loix," II, obs. 38.

74. *Bouhier*, "Observations sur la coutume du duché de Bourgogne," I, c. 26, n. 3, 21, "Oeuvres," I, 714, 716, ed. 1787.

75. *P. Voet*, "De statutis," s. 9, c. 2, n. 5.

76. *Ibid.*, s. 9, c. 2, n. 7, where he says: "Quid si maritus alio domicilium postmodum transtulerit, eritne conveniendus, secundum loci statutum, in quem postremum sese recepit? Non equidem. Quia non eo ipso, quod domicilium transferat, censetur voluntatem circa pacta nuptialia mutasse. . . . Nisi eadem solemnitas in actu contrario intercesserit. . . . Accedit, quod illa pacta solus mutare nequeat maritus; id quod tamen posset, si per emigrationem in alium locum, ea mutarentur."

77. He says: "Verum quid statuendum de variarum Provinciarum in Belgio consuetudine, vel potius statuto, quo inter conjuges post celebratas nuptias, ut in Hollandia; post copulam, ut apud Ultrajectinos, bonorum inducitur communio, nisi pactis sit exclusa dotalibus, reali ne statuto adnumerabitur, an potius personali? Resp. Et si forte de jure civili tale statutum, ad exemplum societatis ad bona alibi jacentia sese extenderet, in qua societate, si ea sit omnium bonorum, etiam omnia continuo, perfectam aliquam traditionem, exceptis nominibus, communicabantur. . . .

"Etiam si pactum interveniat, ex eo nasceretur actio personalis, ad bonorum extra territorium jacentium, ubi contraria consuetudo locum habet communicationem, vel aestimationem. . . . Quia tamen illa communio statutaria potissimum rerum spectat alienationem, adeoque res ipsas afficit primario et principaliter, negari non poterit, quin reali statuto, hoc nostrum sit

planation of the various passages is that according to Voet all such contracts, whether express or tacit, are real and not personal laws, and therefore do not directly affect property out of the territory, "but only indirectly, by a remedy to enforce the contract against extra-territorial property."⁷⁸

John Voet, strong advocate as he was of the doctrine that all laws are territorial, and holding in that respect widely different views from Dumoulin, on grounds of expediency accepted the latter's theory of a tacit contract. Indeed, he contributed much in establishing the doctrine by showing in a most ingenious and forceful manner that the effect of marriage upon the property rights of the spouses results from the will of the parties.⁷⁹

Huber rejected the theory of tacit contract, for he states expressly that upon a change of domicile the former law will not control the rights of the parties in property that is subsequently acquired.⁸⁰ In other respects he accepts the view that the rights of the parties with reference to all property, immovable as well as movable, should be controlled by one law, the law of matrimonial domicile.⁸¹

Marriage Settlements. The validity of marriage settlements, so far as it depends upon capacity or form, is governed by the rules stated above. With respect to substantive validity the law of matrimonial domicile has been held generally to govern, subject to mandatory provisions of the law of the situs of immovables.⁸²

Intestate Succession. The writers of the Italian school did not work out any consistent theory on this subject. Influenced by the doctrine of universal succession of the Roman law some applied the law of the domicile of the decedent to all property. Many held,

connumerandum; ut ad bona alibi sita, ubi contrarium obtinet statutum, reales effectus non exerat . . .": P. Voet, "Ad statutis," s. 4, c. 3, n. 9.

78. Story, "Conflict of Laws," 8th ed., 254, note 4.

79. J. Voet, "Ad pandectas," bk. 23, tit. 2, n. 85.

80. Huber, "Praelect.," pt. 2, bk. 1, tit. 3, n. 9.

81. Ibid., n. 10.

82. Huber, "Praelect.," pt. 2, bk. 1, tit. 3, n. 10; Catellani, "Il diritto internazionale privato," I, 356, 481.

Bartolus had already contended that marriage settlements should be governed by the law of the husband's domicile. After stating that the *lex loci contractus* governs matters which arise out of the contract itself at the time it is made, he adds: (n. 17) "This doctrine does not apply in the case of dowry, for a reason stated in the text" (*Bartolus* on the "Conflict of Laws," Beale's translation, p. 19). The passage referred to is Digest, V, 1, 65, which reads as follows: "Exigere dotem mulier debet illic, ubi maritus domicilium habuit, non ubi instrumentum dotale conscriptum est; nec enim id genus contractus est, ut et eum locum spectari oporteat, in quo instrumentum dotis factum est, quam eum, in cujus domicilium et ipsa mulier per condicionem matrimonii erat reditura."

however, that the laws governing intestate succession were real. According to Bartolus a distinction must be made. If the statute of the situs of immovable property is real it would govern absolutely. If it was personal, it would not apply to the estate of a foreigner.⁸³ All were agreed that the law of the domicile of the decedent would determine the distribution of movables. In France and Germany laws of succession were regarded from the beginning as real.⁸⁴ D'Argentré proclaimed vigorously the same doctrine. As regards immovables the law of the situs therefore applied.⁸⁵ Movables, however, were considered as adhering to the person or as being situated at his domicile and were controlled, consequently, by the law of the decedent's domicile.⁸⁶ The above became the general doctrine in the seventeenth century in France, Belgium, Holland, and Germany.⁸⁷ The Dutch jurists Paul⁸⁸ and John⁸⁹ Voet and Huber⁹⁰ accepted this view. The doctrine that the succession to the whole estate of the decedent should be governed by one law arose only at a later date.⁹¹

Wills. The rules governing capacity and form have been stated above. The substantive validity of wills relating to movables was governed by the domicile of the testator at the time of death.⁹² Wills relating to immovables were subject to the law of the situs.⁹³ These views were shared also by the Dutch writers, including Huber.⁹⁴ The latter does not mention the rule governing

83. *Bartolus* on the "Conflict of Laws" (Beale's translation), n. 42; *Lainé*, "Introduction au droit international privé," II, 289-290.

84. *Lainé*, "Introduction au droit international privé," II, 284.

85. *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 9, 10, 23, 24.

86. "Sed alia ratio est de personarum jure in quo et mobilia continentur, quia talia non alio jure habentur quam persona ipsa, et ideo legem ab domicili loco capiunt": *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 3.

87. *Lainé*, "Introduction au droit international privé," II, 294 et seq.

88. *P. Voet*, "De statutis," s. 4, c. 3, n. 10; s. 9, c. 1, n. 3, 8.

89. *J. Voet*, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 3, 11, 21; bk. 38, tit. 18, n. 34 (movables).

90. *Huber*, "Praellect," pt. 2, bk. 1, tit. 3, n. 15.

91. In Germany theory and practice broke away from the old law in the eighteenth century. The new doctrine supported the application of the law of the domicile of the decedent at the time of his death to immovable and movable property alike. The principal grounds upon which this doctrine was justified were: 1, that the estate represents the person of the deceased and should be governed therefore by his personal law; 2, that the law of inheritance is a succession in universum jus, which must be subject to one law: See *Wächter*, *Archiv für die civilistische Praxis*, XXV, 195-98.

92. *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 30; *J. Voet*, "Ad pandectas," bk. 28, tit. 3, n. 12.

93. *Dumoulin*, "In codicem Justiniani," I, 1, "conclusiones de statutis aut consuetudinibus localibus," "Opera," III, 556, ed. 1681.

94. *P. Voet*, "De statutis," s. 9, c. 1, n. 4, 8; *J. Voet*, "Ad pandectas," bk. 28, tit. 1, n. 44; *Huber*, "Praellect," pt. 2, bk. 1, tit. 3, n. 15.

the interpretation of wills. In this regard the writers, generally referred to the domicile of the testator at the time of the execution of the will, even with respect to wills disposing of immovables.⁹⁵

Procedure. Since Bartolus, it has been recognized that matters relating to procedure were subject to the law of the forum.⁹⁶ Great differences of opinion have existed, however, with respect to the matters falling within the term "procedure." This has been true especially concerning the statute of limitations or prescription of actions. Bartolus regarded the question as going to the substance. In the matter of contracts he applied the law of the place of performance.⁹⁷ The later writers followed Bartolus in regarding the question of the prescription of actions as affecting the substantive rights of the parties instead of the remedy merely. In its application to contracts some applied the law of the place of contracting; others, the law of the place of performance.⁹⁸ Paul Voet broke with the traditional view on the subject by holding that the prescription of actions is a matter of remedy and subject to the law of the forum.⁹⁹ Huber took the same view.¹⁰⁰ Neither of these authors advanced any reasons for rejecting the old view. John Voet, who accepted the same doctrine, appears to justify it on the ground that the forum will be generally the domicile of the debtor.¹⁰¹ The prescription of actions affecting immovables was held by all to be subject to the *lex rei sitae*.¹⁰²

International Jurisdiction in Civil Matters. Following in the footsteps of the Roman law, the continental countries have never taken the view adopted by the Anglo-American courts that a personal action may be brought in any country in which the defendant may be served with process. They have required always that the defendant shall either be domiciled in the place where the action is brought, or own property there, or that the transaction shall have some connection with the law of that place.¹⁰³ Where the jurisdic-

95. *J. Voet*, "Ad pandectas," bk. 28, tit. 5, n. 16; *Hert*, "Opera," I: "de collisione legum," s. 6, n. 3, p. 222, ed. 1716.

96. *Bartolus* on the "Conflict of Laws" (Beale's translation), n. 15.

97. *Ibid.*, n. 19.

98. *Michel*, "La prescription libératoire en droit international privé," 29 et seq.

99. *P. Voet*, "De statutis," s. 10, n. 1.

100. *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 7.

101. *J. Voet*, "Ad pandectas," bk. 44, tit. 3, n. 12.

102. *Dumoulin*, "Opera," III, 557, ed. 1681; *J. Voet*, "Ad pandectas," bk. 44, tit. 3, n. 12; *Boullenois*, "Traité de la personnalité et de la réalité des loix," I, obs. 20, p. 350, ed. 1766.

103. *Wetzell*, "System des ordentlichen Civilprozesses," 3d ed., §§ 40-41; *Bar*, "Private International Law" (Guthrie's translation), 908 et seq.

The French doctrine that the courts have, on principle, no jurisdiction in

tion was based upon the forum contractus the Roman law required in addition that the defendant be served with process within the jurisdiction or that he possess property in such jurisdiction.¹⁰⁴ In modern times it has been contended, however, that inasmuch as the requirement of personal service in the above case resulted in Roman law from the fact that it knew nothing of citation by writing, this **condition** should be recognized no longer today when a citation by writing may be served upon the defendant in another state.¹⁰⁵ Even the writers belonging to the Dutch school, who extended the doctrine of the territoriality of all laws beyond the earlier writers, did not go so far as the Anglo-American courts, so as to base jurisdiction in personal actions upon service alone. In consonance with the principles of the Roman law,¹⁰⁶ which he followed, Huber held that all actions might be brought at the domicile of the defendant.¹⁰⁷ Actions in rem might be brought, according to Huber, also at the situs of the property,¹⁰⁸ and actions arising out of contracts, at the place where such contracts were to be fulfilled,¹⁰⁹ or, in exceptional cases, where they had been entered into.¹¹⁰

Foreign Judgments. The subject of res judicata and the enforcement of foreign judgments has become greatly complicated

personal actions with respect to suits between foreigners is of modern origin. It did not exist in the old law: 8 Denisart, "Collection de décisions nouvelles, Étranger, § V, n. 1; 5 Weiss, "Traité de droit international privé," 2d ed., 55.

Concerning the old French law see in general, Boullenois, "Traité de la personnalité et de la réalité des loix," obs. 25.

104. Wetzell, "System des ordentlichen Civilprozesses," 3d ed., § 41, p. 509, citing Digest, V, 1, 19, § 1, pr.; XIII, 4, 1; Bar, "Private International Law" (Guthrie's translation), 921.

105. Wetzell, "System des ordentlichen Civilprozesses," 3d ed., § 41, p. 509.

106. "Juris ordinem converti postulas ut non actor rei forum, sed reus actoris sequatur; nam ubi domicilium res habet vel tempore contractus habuit, licet hoc postea transtulerit, ibi tantum eum conveniri oportet": Code, III, 13, 2.

"Actor rei forum, sive in rem sive in personam sit actio, sequitur. Sed et in locis, in quibus res, propter quas contenditur, constitutae sunt, iubemus in rem actionem adversus possidentem moveri": Code, III, 19, 3.

"Venire bona ibi oportet, ubi quisque defendi debet, id est, ubi domicilium habet, aut ubi quisque contraxerit. Contractum autem non utique eo loco intellegitur, quo negotium gestum sit, sed quo solvenda est pecunia": Digest, XXXII, 5, 1-3. Cf. Digest, V, 1, 19, and discussion of subject by Bar, "Private International Law" (Guthrie's translation), 917-19, note 64.

107. Huber, "Praellect.," pt. 2, bk. 5, tit. 1, n. 49.

108. Ibid., n. 48. Huber applied this doctrine both to movables and immovables. John Voet, on the other hand, held that as regards actions in rem affecting immovables the jurisdiction of the situs was exclusive: *J. Voet*, "Ad pandectas," bk. 5, tit. 1, n. 77.

109. Huber, "Praellect.," pt. 2, bk. 5, tit. 1, n. 53, 54.

110. Ibid., n. 55. In accordance with the provisions of the Roman law Huber required with respect to contracts the additional condition that the defendant be served within the jurisdiction or own property therein: n. 54.

in modern times in consequence of the development of territorial sovereignty. During the Middle Ages, when the Roman law was regarded on the continent as the *jus commune* of all civilized countries, the recognition and enforcement of foreign judgments rendered by courts of competent jurisdiction appeared a natural duty imposed by considerations of justice. The jurists applied to this subject the same rules which were deemed controlling in the determination of the question whether a law had only territorial or also extra-territorial operation. Foreign judgments in personam were generally given effect everywhere in accordance with the Roman maxim "*res judicata pro veritate accipitur.*"¹¹¹ Baldus,¹¹² D'Argentré,¹¹³ John Voet,¹¹⁴ and Hertius¹¹⁵ held this view, which Huber¹¹⁶ likewise followed. According to the Dutch writers such recognition and enforcement rested, however, upon comity and would be declined when the interests of the forum or of its subjects would be impaired thereby.¹¹⁷ The courts of the situs were regarded as having exclusive jurisdiction with respect to actions in rem affecting immovables.¹¹⁸ Such judgments were not recognized or enforced, therefore, unless rendered by a court of the situs.¹¹⁹

Some of the French writers took views differing from the above.¹²⁰

Criminal Law. The doctrine that criminal laws are exclusively territorial is a modern doctrine and was not established as yet when Huber wrote. Bartolus and Baldus had developed a considerable number of rules concerning the law of crimes in its international aspects. One of these was that if a citizen was prosecuted for a crime which he had committed abroad his guilt and punishment should be determined in accordance with the *lex loci delicti*.¹²¹ The leading French writers on the subject of the Conflict of Laws during the sixteenth century, D'Argentré and Dumoulin, paid little

111. Digest, I, 5, 25.

112. Baldus, "In primum, secundum et tertium codicis librum commentaria," bk. 1, tit. "de sum. Trinitate," n. 93.

113. D'Argentré, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 47.

114. J. Voet, "Ad pandectas," bk. 42, tit. 1, n. 41.

115. Hert, "Opera," I: "de collisione legum," s. 4, n. 73.

116. Huber, "Praellect.," pt. 2, bk. 1, tit. 3, n. 3, 6.

117. P. Voet, "De statutis," s. 4, n. 14; Huber, "Praellect.," pt. 2, bk. 1, tit. 3, n. 3, 6.

118. Hert, "Opera," I, "de collisione legum," s. 4, n. 73.

119. J. Voet, "Ad pandectas," bk. 42, tit. 1, n. 41.

120. See Boullenois, "Traité de la personnalité et de la réalité des loix," I, obs. 25.

121. See Bartolus on the "Conflict of Laws" (Beale's translation), n. 44-49; Meili, "Lehrbuch des internationalen Strafrechts und Strafprozessrechts," 37-45.

attention to the subject. In the seventeenth century and at the beginning of the eighteenth the French practice went very far in the application of the law of the forum to crimes committed abroad.¹²² The Dutch jurists entertained various views. Burgundus held that, in the absence of an express statutory provision to that effect, the criminal laws of the forum would not apply to crimes committed by subjects abroad.¹²³ He was also of the opinion that if the state into which a criminal had fled was asked to prosecute him, as might happen under exceptional circumstances in view of the fact that extradition was not granted, it could do so only in accordance with the *lex loci delicti*.¹²⁴ Confiscations of property pronounced in criminal courts were deemed to have no application to property in other states.¹²⁵ Paul Voet maintained that a criminal might be prosecuted according to the law of the forum with respect to crimes committed in another state.¹²⁶ Foreign sentences confiscating property were held by him to be effective everywhere as regards movables but not as regards immovables.¹²⁷ Huber likewise holds that the state in which a criminal is apprehended may prosecute him for a crime committed abroad, for whoever is found within a territory is, according to him, subject to its criminal jurisdiction.¹²⁸ He appears, however, to have reference solely to the question of jurisdiction and would recognize no doubt the application of the *lex loci delicti* to all substantive matters. With respect to the recognition and enforcement of foreign judgments Huber would make no distinction between judgments in civil and criminal matters. Both should be enforced, on grounds of comity, for reasons of utility and convenience, unless it would cause prejudice to the state or to its citizens.¹²⁹

II

From the foregoing presentation it may be readily inferred why the English courts, when toward the end of the eighteenth century the first cases involving a conflict of laws presented themselves for decision, should have accepted the doctrine of the Dutch school in

122. *Meili*, "Lehrbuch des internationalen Strafrechts und Strafprozessrechts," 49.

123. *Burgundus*, "Tractatus controversiarum ad consuetudines Flandriae," tract. 5, n. 5, 6.

124. *Ibid.*, n. 9, 10. "In delictis rationem loci habemus in quo sunt commissa": *Ibid.*, n. 2.

125. *Ibid.*, tract. 3, n. 13.

126. *P. Voet*, "De statutis," s. 11, c. 1, n. 5.

127. *Ibid.*, s. 11, c. 2, n. 3, 4.

128. *Huber*, "De jure civitatis," bk. 3, s. 4, c. 1, n. 41-42.

129. *Ibid.*, n. 42.

preference to the views entertained by the writers of the Italian and French schools. According to Meili,¹³⁰ the reception of the doctrine of the Dutch school in England was materially assisted by the fact that William III was at the same time king of England and stadtholder of Holland and that the English and especially the Scotch students of the law were in the habit of completing their legal education in Holland. The real reason for such reception lay, however, much deeper. Had the English lawyers and judges been equally familiar with the writings of the Italian, French, and German writers they would unquestionably have accepted the theory advanced by the Voets and Huber, for these writers were the first to announce in the most unqualified manner the doctrine that all laws are territorial in their nature and can operate within the domain of another state only so far as the latter, on grounds of comity, consents to such operation. This viewpoint alone was acceptable to the Common Law of England which, owing to the strong influence of feudalism, possessed a most pronounced territorial character. This explains also why, of the Dutch writers, Huber's treatise should have been cited and relied upon most. Paul Voet, it is true, had expressed before the fundamental views advanced by Huber, and from a theoretical viewpoint the doctrines of the Dutch school were developed most by John Voet, whom Lainé¹³¹ calls on that account the real founder of the Dutch school. John Voet was no doubt the greatest of the three. Indeed, so great was his influence upon the Dutch law that he is said to occupy a position similar to that which Pothier occupies with respect to French law. Although Huber did not originate the doctrines of the Dutch school, nor develop them, he stated the fundamental position of this school more lucidly and concisely than did either of the other two writers. The three axioms mentioned by Huber at the very outset of his treatise and which are the corner-stones of his entire discussion, express the viewpoint of the Dutch school in the boldest and most categorical manner. Story gives to these maxims his unqualified assent.¹³²

The practical tone of Huber's treatise, which is illustrated by cases which the writer recollected from his experience as judge of the Frisian court, its brevity and simplicity, appealed to the English and American judges. The author contents himself with a brief statement of the principal rules and their application, without

130. *Meili*, "International civil and commercial law" (Kuhn's translation), 83-84.

131. *Lainé*, "Introduction au droit international privé," II, 388.

132. *Story*, "Conflict of Laws," 8th ed., 31.

dwelling upon the many controversial points which obscure the writings of other writers.

Huber rejects the classification of statutes into personal, real and mixed—a classification adopted by Paul and John Voet—and proposes to solve all problems upon the basis of the axioms mentioned. The above division seems nevertheless to underlie his discussion of the subject. Although he states so nowhere expressly, and in some respects leaves the matter in doubt, he admits that all questions affecting immovable property directly, excepting matters of form, are subject to the *lex rei sitae*. He recognizes also, at least as regards status, that the personal statute will be given extra-territorial effect on grounds of comity.

Even if the correctness of the general maxims laid down by Huber is admitted as the fundamental basis upon which the Conflict of Laws must rest, much doubt may be experienced in their application to individual problems. Huber's own deductions are at times quite uncertain and in other instances quite arbitrary. For example, if the principle of temporary subjection, which Huber adopts as his second maxim, is sound, it should logically apply to all questions of capacity, and yet Huber's statements with respect to this important matter are obscure and it is very questionable to what extent they harmonize with the above axiom. If a person is subject to the law of the place in which he acts, whence does Huber derive the rule that the intention of the parties controls the obligation of contracts? If matters affecting immovables directly are to be excepted from the operation of the *lex loci actus* and to be submitted to the *lex rei sitae*—a proposition which is nowhere clearly stated by Huber—why should not the formal execution of instruments disposing of such property be subject logically to the law of the situs? And yet Huber applies the rule *locus regit actum*. How can the rule that the transfer of movables is governed by the *lex domicilii* be reconciled with the general maxims? Surely the conclusions stated by Huber cannot be derived all by mere logic from the maxims announced. It must not be forgotten, however, that Huber's object was to write a practical treatise which should state the existing law. Had he amplified his statements he would have admitted, without question, that some of the rules laid down by him could not be derived from his general principles but had found general recognition on grounds of convenience.

The Belgian jurist, Albéric Rolin, speaking of Huber, says:¹³³

133. *Rolin*, "Principes du droit international privé," I, 79.

"His doctrine, however, is badly reasoned and little scientific. It is summed up in several axioms, stated quite arbitrarily, from which the author draws his deductions. We place above him immeasurably the jurist we have just mentioned, John Voet, whose influence upon the law of his country seems to us to have been more considerable."

We may contrast with this the following estimate from the pen of Professor Harrison. He says:¹³⁴

"But there is a special point in regard to which Ulrich Huber differs from the other civil jurists. All these writers, though they possess much good sense, learning, and practical wisdom, strove to distinguish between personal and real statutes. That was, as has been stated, an absolutely futile inquiry, which was devoid of all reality. If Ulrich Huber's treatise rests on the same basis, it furnishes nevertheless something in addition. Huber's treatise "de conflictu legum" is only a short essay, forming part of his introduction to the civil law, and is contained within five quarto pages. . . . They are characterized by clearness, practical judgment and an entire absence of pedantry. The rules laid down within those five pages are satisfactory and exact. The matter is not exhausted, it is true, and the maxims are very general. But, at the same time, they establish the bases of Private International Law and deal with the subject in conformity with our modern ideas.

"In the seventeenth century Private International Law was in the hands of the Dutch; in the following it belonged to the French. But the latter have added nothing to the general principles of the science. It must suffice to cite the names of D'Aguesseau, Bouhier, Froland, and Boullenois, who lived in the first half of the eighteenth century, in the great period which preceded the era of the French revolution. Their works contain ingenious remarks with respect to special cases; but none of these authors succeeded in adding a single scientific principle to Huber's three famous rules, and all accepted the old useless method which attempted to classify the statutes instead of analyzing the legal relations."

Concerning the influence of the Dutch school upon the development of the Conflict of Laws, Meili's words probably express the general verdict among the modern continental jurists.¹³⁵ He says:¹³⁶

"It has been said for a time that the Dutch writers opened the way for the development of Private International Law—les jurisconsultes des Pays-Bas ont frayés la route—as Foelix has asserted.¹³⁷ The Dutch school has in fact put the Conflict of Laws out of joint and has placed the whole subject on a basis where it nearly perished. At all events it

134. Clunet, *Journal du droit international privé*, VII, 428.

135. Some take a less radical view. See *Catellani*, "Il diritto internazionale privato," I, 454 et seq. One of the late French writers on the Conflict of Laws defends the theory of the Dutch writers: *Vareilles-Sommères*, "La synthèse du droit international privé," I, 8, 78-97.

136. *Meili*, in Niemeyer's *Zeitschrift für internationale Privat- und Strafrecht*, VIII, 190.

137. *Foelix*, "Traité du droit international privé," I, 4th ed., 15.

blocked the way to its future development. Retrogression and not progress resulted from this school. Every day we still feel the reflex effect of this erroneous doctrine. The Dutch writers prepared a juridical blind alley for our subject in the form of *comitas*. This is the truth and all else is fiction."

"Comity," says another writer,¹³⁸

"is a pretext for the evasion of the consequences of a strict territorial law. After the notion of such law is denied, it would be idle to combat it, for it becomes unnecessary. But it may not be amiss to observe that in its obscure and little defined concept, interest, courtesy, and reciprocity, ideas so important for the history of law, play a part. . . . The name of science cannot be given to them, nor can a practical and useful system be based upon them. They authorize simply concessions ungoverned by rule, the supposed independence of a state consisting in an adjustment of its conduct to that followed by other states, resulting ultimately in a real isolation between the people of the different countries, and in making of courtesy and reciprocity a system of reprisal, instead of a furtherance of juridical relations."

The Anglo-American view is stated nowhere better than in the following words of Story:¹³⁹

"It has been thought by some jurists that the term *comity* is not sufficiently expressive of the obligation of nations to give effect to foreign laws when they are not prejudicial to their own rights and interests. And it has been suggested that the doctrine rests on a deeper foundation; that it is not so much a matter of comity or courtesy as a matter of paramount moral duty. Now assuming that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity, and charity. Every nation must be the final judge for itself, not only of the nature and the extent of the duty, but of the occasions on which its exercise may be justly demanded. And certainly there can be no pretense to say that any foreign nation has a right to require the full recognition and execution of its own laws in other territories, when those laws are deemed oppressive or injurious to the rights or interests of the inhabitants of the latter, or when their moral character is questionable, or their provisions are impolitic or unjust. . . .

"The true foundation on which the administration of international law must rest is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return. . . .

"There is then not only no impropriety in the use of the phrase 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one

138. *Bustamante*, "Tratado de derecho internacional privado," I, 456.

139. *Story*, "Conflict of Laws," 8th ed., 32, 33, 35.

nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and is inadmissible when it is contrary to its known policy or prejudicial to its interests. In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their government, unless they are repugnant to its policy or prejudicial to its interests. It is not comity of the courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning by which all other principles of the municipal law are ascertained and guided."

Such a difference in the appreciation of the Dutch school, and of Huber in particular, as appears from the quotations above given, must be due to a difference in the fundamental conception concerning the nature and legal basis of the subject of Private International Law. This is indeed the true explanation. The word "comity" on the continent stands opposed to "justice." It was in this sense that the Dutch writers probably used it. Huber does not say so in so many words but John Voet does. He says that foreign laws are admitted "ex comitate . . . liberaliter et officiose . . . nullo alioquin ad id jure obstricto."¹⁴⁰ Although Huber was not the originator of the theory of comity he was nevertheless the first to give prominence to the idea through his maxims, and became thus in large measure responsible for its popularization. The notion of justice and comity are, however, not necessarily dissociated.

"Once the tacit existence of comity is admitted," says Catellani,¹⁴¹

"it can be derived only from custom and the decisions of courts, and in the one case as well as in the other it becomes an effect and manifestation of the popular conscience whose constant direction indicates to the judges what they ought to regard as the tacit will of the state. Comity in this sense, and so modified in its original meaning, becomes an element which may be rendered a more and more perfect vehicle for the development of Private International Law. In each age it will reflect the consciousness, rooted more and more firmly in the popular conscience, of what corresponds to the common advantage of all the states and all mankind. And when this conscience becomes later conscious also of the existing solidarity between the states and the international rights of individuals, both will find in the notion of comity the same sanction through the tacit will of the state."

It was in this juridical sense that the term comity came to be actually understood. Says Westlake:¹⁴²

140. *J. Voet*, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 1.

141. *Catellani*, "Il diritto internazionale privato," I, 454-55.

142. *Westlake*, "Private International Law," 5th ed., 22-23.

"While English writers and judges freely borrowed the term 'comity' from John Voet and Huber, it may be doubted whether they meant it strictly in a sense independent of justice. Although on the continent comity and justice are usually regarded as forming an antithesis, it is probable that in this country the prevailing view has been that while a concession is made in not determining every question by the *lex fori*, that concession is dictated not only by a convenience amounting to necessity, but also by deference to a science of law embodying justice, which the law of the land was deemed to have adopted as governing its own interpretation and application, and from which it was conceived that the rules of comity were drawn."

Huber was a positivist who stated fearlessly what he believed to be the actual law. He saw that the recognition and enforcement of foreign law depended upon the assent of the state called upon to recognize or enforce the alleged right. A foreign law could have no effect *ipso jure* outside the territory of the enacting state. It must be recognized or accepted, that is incorporated, by the law of the forum. This is Huber's doctrine in essence. This is also the standpoint of the Anglo-American law and of the continental courts. The foreign doctrinal writers are not satisfied, however, with this conception of the Conflict of Laws.¹⁴³ Their aim is to plant the science of Private International Law upon a foundation more stable than that of comity. No uniformity can ever be attained, according to them, if each state is free to adopt those rules of the Conflict of Laws which appear to it most convenient and useful. They seek to derive the rules of the Conflict of Laws, therefore, from a source that shall be superior to the internal law of each state, and this source they conceive to be International Law. Instead of being a part of the internal law of each state, the rules of the Conflict of Laws constitute, in their opinion, a universal system which imposes its rules upon the individual states from without. According to this conception, the rules of the Conflict of Laws are in reality rules defining the jurisdiction of the different states, the limits of each being determined by International Law. As the positive International Law of today has developed very few principles relating to our subject,¹⁴⁴ each jurist

143. See *Pillet*, "Principes de droit international privé," Paris and Grenoble, 1903; *Zitelmann*, "Internationales Privatrecht," Leipzig, Vol. 1 (2d ed.), 1912, Vol. 2 (1st ed.), 1903.

144. "Pillet believes in a compulsive force of universal law, exercised alike on Sovereigns and private individuals, or perhaps through Sovereigns on private individuals. Neither the comity theorists nor Dicey believe in it. I believe in it, but I think it is very easy to exaggerate its content. Phillimore's views are very much mine, and I respectfully refer to them ("International Law," IV, §§ 4, 5). In more recent days, those of Professor Kahn ("Natur und Methode des internationalen Privatrechts"), cited by Pillet, approach very nearly to the same thesis": *Baty*, "Polarized Law," 168.

must needs be guided in the formulation of the fundamental principles by his own sense of justice, and assume, as it were, the rôle of an international legislator.

The continental jurists recognize that in certain matters affecting its social and economic interests each state must be free to exclude the operation of foreign law within its territory. The rules governing in this regard are called rules of "public order." Concerning the meaning and application of these rules there is hopeless disagreement. If the conclusions reached in individual instances are similar to, or identical with, those obtained upon the basis of the doctrines of the Dutch school, the fundamental difference in the scientific viewpoint of the internationalists and the positivists must not be overlooked. The continental jurists are theorists who believe that the harmonious development of the science of Private International Law can be promoted best through the elaboration of an ideal legal system, without reference to the existing law. The Anglo-American lawyers and judges, on the other hand, are positivists, who understand by the term "law" rules which are recognized and enforced by courts of justice. They find it difficult to see how good can result from a discussion of principles which exist only in the mind of the particular writer.

That these discussions have not resulted in a *communis opinio doctorum*, which might have a beneficial effect upon the development of the Conflict of Laws, is known to all acquainted with the continental literature on the subject. It is difficult to find a subject with reference to which there is so much disagreement. Solid progress can be made only if the juristic discussions keep in touch with actual life and positive law. A uniform system of the Conflict of Laws that shall have force in the different countries will never exist as long as there are independent states. All that is humanly attainable is a greater uniformity than that now existing. Before much can be accomplished in this direction there must exist a better understanding of foreign legal systems, and a greater degree of trust and confidence in such systems. As long as each country feels at heart that its own law is the best in the world, and that justice can be secured only in accordance with its rules, there is little hope of any real progress. As the solidarity of nations comes more into evidence and the justice of enforcing foreign laws under given circumstances becomes more apparent, the different systems will gradually tend towards greater uniformity. During this process the fundamental conceptions concerning the Conflict of Laws entertained by Huber, though imperfectly developed by him, will

constitute a secure foundation. Instead of having almost destroyed the science of Private International Law, as Meili has asserted, the Dutch jurists were the first to have any real conception of such a science. Huber's axioms must, in the nature of things, govern our subject until the complete sovereignty of the individual states is lost and a common superior has been established.

As long as there remains between the Anglo-American and continental writers such a wide difference in their conception of "law" and the science of law, there will naturally remain also the same wide difference of opinion in their estimation of Ulrich Huber and of the Dutch school in general.

APPENDIX

DE CONFLICTU LEGUM DIVERSARUM IN DIVERSIS IMPERIIS ¹	OF THE CONFLICT OF DIVERSE LAWS IN DIVERSE GOVERNMENTS
1. <i>Origo et usus hujus Quaesiti, forensis quidem, at juris Gentium magis quam civilis.</i>	1. Origin and use of this question, forensic indeed, but belonging to international rather than to civil law.
2. <i>Regulae fundamentales hujus doctrinae.</i>	2. The fundamental rules of the subject.
3. <i>Acta inter vivos et mortis causa valent ubique secundum jus loci, quo celebrantur.</i>	3. Acts inter vivos and mortis causa are valid everywhere according to the law of the place where they are done.
4. <i>Quod exemplo declaratur, testamenti.</i>	4. Its application to wills.
5. <i>Contractus.</i>	5. Its application to contracts.
6. <i>Rei Judicatae.</i>	6. Its application to res judicata.
7. <i>Actionis instituendae.</i>	7. Its application to the bringing of actions.
8. <i>Matrimonii.</i>	8. Its application to marriage.
9. <i>Extendi hoc etiam ad effectus earum rerum, etiam quod ad immobilia.</i>	9. The extension of the rule to the effect of the above transactions and even with respect to immovables.
10. <i>Limitatio regulae de loco.</i>	10. Limitation of the rule of the place.
11. <i>Alia limitatio ejusque amplificatio.</i>	11. Another limitation and its amplification.
12. <i>Regula de qualitatibus personalibus certo loco impressis,</i>	12. The rule that personal qualities impressed by a certain

1. The text follows the second edition of *Huber's* "Praellectionum Juris civilis tomi tres," Leipzig, 1707, a copy of which may be found in the library of the Harvard Law School. The splendid collection of works on the Conflict of Laws contained in this library has been placed generously at the disposal of the writer.

ubique vim habentibus.

13. *Scilicet, qualem ejusmodi personae jure cujusque loci habent: ut exemplis declaratur.*

14. *In jure immobilium spectari jus loci, quo sita sunt.*

15. *Declaratur exemplis Testamenti, Contractuum et Successionis ab intestato.*

1. Saepe fit, ut negotia in uno loco contracta usum effectumque in diversi(s) locis imperii habent, aut alibi dijudicanda sint. Notum est porro, leges et statuta singulorum populorum multis partibus discrepare, posteaquam dissipatis imperii Romani provinciis, divisus est orbis Christianus in populos ferme innumeros, sibi mutuo non subjectos, nec ejusdem ordinis imperandi parendique consortes. In jure Romano non est mirum nihil hac de re exstare, cum populi Rom. per omnes orbis partes diffusum et aequabili jure gubernatum Imperium, conflictui diversarum Legum non aequae potuerit esse subjectum. Regulae tamen fundamentales, secundum quas hujus rei judicium regi debet, ex ipso jure Rom. videntur esse petendae; quanquam ipsa quaestio magis ad jus Gentium quam ad jus Civile pertineat, quatenus quid diversi populi inter se servare debeant, ad juris Gentium rationes pertinere manifestum est. Nos ad detegendam hujus intricatissimae quaestionis subtilitatem, tria, collocabimus axiomata,

place have force everywhere.

13. It is manifest to what sort of limitation such persons are subject according to the law of each place, as will be shown by examples.

14. As regards immovables the law of the situs must be consulted.

15. This is shown by examples from the law of wills, contracts, and intestate succession.

1. It often happens that transactions entered into in one place have force and effect in a different country or are judicially decided upon in another place. It is well known, furthermore, that after the breaking up of the provinces of the Roman Empire and the division of the Christian world into almost innumerable nations, being not subject one to the other, nor sharing the same mode of government, the laws of the different nations disagree in many respects. It is not surprising that there is nothing in the Roman law on the subject inasmuch as the Roman dominion, covering as it did all parts of the globe and ruling the same with a uniform law, could not give rise to a conflict of different laws. The fundamental rules according to which this question should be decided must be found, however, in the Roman law itself. Although the matter belongs rather to the law of nations than to the civil law, it is manifest that what the different nations observe among themselves belongs to the law of nations. For the purpose of solving the subtlety of this most intricate question, we shall lay down three maxims which being conceded as they should be

quae concessa, sicut omnino concedenda videntur, viam nobis ad reliqua planam redditura videntur.

2. Sunt autem hae: I. *Leges cujusque imperii vim habent intra terminos ejusdem reip. omnesque ei subjectos obligant, nec ultra, per l. ult. ff. de Jurisdic.* II. *Pro subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur, per l. 7, s. 10. in fn. de interd. et releg.* III. *Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium praejudicetur. Ex quo liquet, hanc rem non ex simplici jure Civili, sed ex commodis et tacito populorum consensu esse petendam: quia sicut leges alterius populi apud alium directe valere non possunt, ita commerciis et usu gentium promiscuo nihil foret magis incommodum, quam si res jure certi loci validae, mox alibi diversitate Juris infirmarentur, quae est ratio tertii axiomatis: quod, uti nec prius, nullum videtur habere dubium. De secundo videntur aliqui secus arbitrari, quando peregrinos legibus loci, in quibus agunt, teneri negant. Quod in quibusdam casibus esse verum fatemur et videbimus infra: sed hanc positionem, pro subjectis imperio habendos omnes, qui infra fines ejusdem agunt, cer-*

everywhere will smooth our way for the solution of the remaining questions.

2. They are these:

(1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond (Digest, 2, 1, 20).

(2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof (Digest, 48, 22, 7, §10, i.f.).

(3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.

It follows, therefore, that the solution of the problem must be derived not exclusively from the civil law, but from convenience and the tacit consent of nations. Although the laws of one nation can have no force directly with another, yet nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law. And that is the reason for the third maxim concerning which hitherto no doubt appears to have been entertained. As for the second maxim, some persons seem to be of a different opinion and to deny that foreigners are subject to the law of the place in which they act. I consider this to be true in certain cases, as we shall see below. But the proposition that all within the boundaries of a government are to be deemed subjects

tissimam esse, cum natura Reipubl. et mos subigendi imperio cunctos in civitate repertos, tum id, quod de arresto personali apud omnes fere gentes receptum est, arguit. Grotius 2. c. 11. n. 5. Qui in loco aliquo contrahit tanquam subditus temporarius legibus loci subjicitur. Nec enim ulla ratione freti sunt, qui peregrinos, sine alia causa, quam quod ibi reperiuntur, Arresto medio, illic juri sistere se cogunt, quam quod imperium in omnes, qui intra fines suos reperiuntur, sibi competere intelligunt.

3. Inde fluit haec Positio: *Cuncta negotia et acta tam in judicio quam extra judicium, seu mortis causa sive inter vivos, secundum jus certi loci rite celebrata valent, etiam ubi diversa juris observatio viget, ac ubi sic inita, quemadmodum facta sunt, non valerent.* E contra, negotia et acta certo loco contra leges ejus loci celebrata, cum sint ab initio invalida, nusquam valere possunt; idque non modo respectu hominum, qui in loco contractus habent domicilium, sed et illorum, qui ad tempus ibidem commorantur. Sub hac tamen exceptione; si rectores alterius populi exinde notabili incommodo afficerentur, ut hi talibus actis atque negotiis usum effectumque dare non teneantur, secundum tertii axiomatis limitationem. Digna res est, quae exemplis declaretur.

thereof is nevertheless perfectly correct, for it is in conformity not only with the nature of a state and the custom of subjecting all found therein to its sovereignty, but also with the doctrine accepted by almost all nations concerning personal arrest. Grotius, 2, c. 11, n. 5, says that he who contracts in any particular place subjects himself as a temporary subject to the laws of such place. For the doctrine that foreigners are compelled to submit to mesne arrest, for no other reason than that they are found in a place, can be justified only on the ground that the sovereignty is deemed to extend over all found within the territory.

3. From the above the following principle is derived; all transactions and acts, in court as well as out, whether mortis causa or inter vivos, rightly done according to the law of any particular place, are valid even where a different law prevails, and where, had they been so done, they would not have been valid. On the other hand, transactions and acts done in violation of the law of that place, since they are invalid from the beginning, cannot be valid anywhere; and this is true not only as regards persons having their domicile in the place of the contract, but also as regards those who are there for the time being. With this exception, nevertheless, if the sovereigns of another nation should be affected thereby with a serious inconvenience they would not be bound to give force and effect to such acts and transactions, according to the restriction laid down in the third maxim. The matter is important enough to be illustrated by examples.

4. In *Hollandia* testamentum fieri potest coram notario et duobus testibus, in *Frisia* non valet, nisi septem testibus confirmatum. Batavus fecit testamentum more loci in *Hollandia*, ex quo bona, quae sita sunt in *Frisia*, illic petuntur. Quaeritur, an iudices *Frisii* secundum illud testamentum vindicias dare debeant. Leges *Hollandiae* non possunt obligare *Frisios*, ideoque per axioma *primum* testamentum illud in *Frisia* non valeret, sed per axioma *tertium* valor ejus sustinetur et secundum illud jus dicitur. Sed *Frisius* proficiscitur in *Hollandiam*, ibique facit testamentum more loci contra jus *Frisicum*, redit in *Frisiam* ibique diem obit, valetne testamentum? valebit, per axioma *secundum*, quia dum fuit in *Hollandia*, licet ad tempus, jure loci tenebatur, actusque ab initio validus ubique valere debet, per axioma *tertium*, idque sine discrimine mobilium et immobilium bonorum, ut juris est ac observatur. *Frisius* e contra facit in patria testamentum coram Notario cum duobus testibus, profertur in *Hollandia*, ibique bona sita petuntur, non fiet adjudicatio, quia testamentum inde ab initio fuit nullum, utpote factum contra jus loci. Quin idem juris erit, si Batavus heic in *Frisia* tale testamentum condat, etsi in *Hollandia* factum valeret; verum enim est, quod heic ita factum ab initio

4. In *Holland* a will can be made before a notary and two witnesses. In *Frisia* it is not valid unless attested by seven witnesses. A Dutch subject made a will in *Holland*, in accordance with the custom of the place, by virtue of which property situated in *Frisia* is demanded in that place. The question is whether the judges of *Frisia* should allow him to vindicate the property in accordance with such will. The laws of *Holland* cannot bind the *Frisians*; therefore, according to the first maxim, such will would not be valid in *Frisia*, but by the third maxim its validity would be supported, and by that the will is sustained. But suppose that a *Frisian* goes to *Holland*, where he makes a will in conformity with the law of the place but contrary to *Frisian* law, and returns to *Frisia*, where he dies. Is the will valid? It is valid according to the second maxim, because while he was in *Holland*, although only temporarily, he was bound by the law of the place; and an act, valid from the beginning, should be valid everywhere, in accordance with the third maxim, without distinction between movable and immovable property, and such is the actual law. A *Frisian*, on the other hand, makes in his own country a will before a notary and two witnesses. It is carried into *Holland*, and a demand is made of the things found there. Recovery is denied because the will was invalid from the beginning, having been made contrary to the law of the place. And the same thing would be true if a Dutch subject should make such a will in *Frisia*, although it would have been valid if made in *Holland*; for a will made here in this manner would

fuerit nullum, per ea, quae *modo* dicta fuerunt.

5. Quod de testamentis habuimus, locum etiam habet in *actibus inter vivos*; proinde contractus celebrati secundum jus loci, in quo contrahuntur, ubique tam in iure quam extra iudicium, etiam ubi hoc modo celebrati non valerent, sustinentur; idque non tantum de forma, sed etiam de materia contractus affirmandum est. *Ex. gr.* In certo loco merces quaedam prohibitae sunt; si vendantur ibi, contractus est nullus: verum si merx eadem alibi sit vendita, ubi non erat interdicta, et ex eo contractu agatur in locis, ubi interdictum viget, emptor condemnabitur; quia contractus inde ab initio validus fuit. Verum si merces venditae, in altero loco, ubi prohibitae sunt, essent tradendae, jam non fieret condemnatio; quia repugnaret hoc iuri et commo Reip. quae merces prohibuit, secundum limitationem axiomatis tertii. Ex aduerso, si clam fuerint venditae merces, in loco, ubi prohibitae sunt, emptio venditio non valet ab initio nec parit actionem, quocumque loco instituat, utique ad traditionem urgendam: nam si traditione facta, pretium solvere nollet emptor, non tam e contractu quam re obligaretur, quatenus cum alterius damno locupletior fieri vellet.

be void from the beginning for the reasons just stated.

5. What we have said about wills applies also to acts inter vivos. Contracts made in accordance with the law of the place where they are entered into will therefore be supported everywhere, in court as well as out, even in those places where contracts entered into in such manner would not be valid. And this may be affirmed not only with respect to the form of the contract but also as regards its substance. For example: In a certain place particular kinds of merchandise are forbidden to be sold. If they are sold in such a place the contract is void. But if the same merchandise were sold in some other place, where it is not prohibited, and suit is brought on the contract where the prohibition exists, the purchaser will be held because the contract was valid from the beginning. If the goods are to be delivered, however, in a place where they are prohibited, no recovery can be had because it would be repugnant to the law and interests of the state prohibiting the sale of such goods, according to the restriction contained in the third maxim. On the other hand, if the merchandise should be sold secretly, in the place where such sale is prohibited, the sale would not be valid from the beginning and no action will lie no matter where it may be brought, not even to compel the delivery; for if the purchaser should refuse to pay the price after delivery he would be bound not so much by virtue of the agreement as by the delivery of the thing, in so far as he would enrich himself at the expense of another.

6. Similem usum habet haec observatio in *rebus judicatis*. Sententia in aliquo loco pronuntiata, vel delicti venia ab eo, qui jurisdictionem illam habet, data, ubique habet effectum, nec fas est alterius Reipub. magistratibus, Reum alibi absolutum veniave donatum, licet absque justa causa, persequi aut iterum permittere accusandum; Rursus sub hac exceptione; nisi ad aliam Rempubl. evidens inde periculum aut incommodum resultare queat; ut hoc exemplo constare potest nostrae memoriae. Titius in Frisiae finibus homine percusso in capite, qui sequenti nocte, sanguine multo e naribus emisso, at bene potus atque cenatus, erat exstinctus; Titius, inquam, evasit in Transisulaniam. Ibi captus, ut videtur volens, mox judicatus et absolutus est, tanquam homine non ex vulnere exstincto. Haec sententia mittitur in Frisiam et petitur impunitas rei absoluti. Quanquam ratio absolutionis non erat a fide veri aliena, tamen Curia Frisiae vim sententiae veniamque reo polliceri, Transisulani licet postulantibus, gravata est. Quia tali in viciniam effugio et processu adfectato, jurisdictioni Frisiorum eludendae via nimis parata futura videbatur, quae est tertii axiomatis exceptionis ratio. Idem obtinet in sententiis rerum Civilium, quo pertinet sequens exemplum memoriae quoque nostrae. Civis *Harlinganus* contractum iniverat cum *Groningano*, seque submiserat

6. The above rule applies equally to the subject of *res judicata*. A sentence pronounced in any place, or the pardon of a crime granted by one having jurisdiction, will have effect everywhere. Nor is it lawful for the magistrates of another state to prosecute, or suffer to be prosecuted a second time, one who has been acquitted or pardoned in another place, although without a sufficient reason; with this exception again, that no evident danger or prejudice will result therefrom to such other state, as may be seen from the following case within our memory. Titius struck a man on the head upon Frisian territory. The man having lost much blood through his nose, and having eaten and drunk heartily, died during the following night. Titius escaped into Transylvania. Being apprehended there, voluntarily as it seems, he is tried at once and acquitted as if the man had not died from the wound. This sentence is sent to Frisia and freedom from punishment is asked on behalf of the person acquitted. Although the reason for the acquittal may not have been untrue, it was nevertheless a serious question with the court of Frisia whether it should give effect to the foreign sentence and excuse the delinquent, although requested by the Transylvanians; for such an escape into the neighboring country and pretended prosecution appear to prepare the way too much for an evasion of the Frisian law, which is the basis of the exception under the third maxim. The same is true of judgments respecting civil matters, as is seen from the following example which is also within our memory. A citizen of

judicibus Groninganis. Vi submissionis hujus Groningam citatus, et cum non sisteret se, condemnatus fuerat, quasi per contumaciam. Petita executione dubitatum est, an concedenda foret, in curia Frisica. Dubitandi ratio, quod vi submissionis, si reus in territorio judicis, cui se submitit, non reperiatur, nemo contumaciae peragi possit, ut *alibi* videbimus: neque *sine detrimento jurisdictionis nostrae et praejudicio civium nostratum talibus sententiis effectus dari queat*. Concessa tamen est eo tempore; quibusdam Dominis ita censentibus; quod Frisiis non liceret arbitrari, quo jure sententia Groningae lata esset, modo secundum jus loci valeret. Alii hac ratione; quod Magistratus Harlinganus in urbe sua requisitus citationem permisit, quod facere potius non debuisset. Alioqui Amstelodamenses negavisse executionem sententiae latae in absentem, per Edictum vi submissionis citatum ad Curiam Frisicam, et nemine contradicente damnatum, memini factum et recte meo judicio; propter limitationem axiomatis *tertii* commemoratam.

7. Praeterea dubitatum est, si ex contractu alibi celebrato, apud nos actio instituatur, atque in ista actione danda vel neganda aliud juris apud nos, aliud esset, ubi

Harlem made a contract with a citizen of Groningen, in which he submitted himself to the judges of Groningen. Being cited to appear before the courts of Groningen, by virtue of this submission, and not appearing he is condemned as contumacious. Execution of the judgment being sought from a Frisian court, it was doubted whether it ought to be granted. The reason of doubting was that if the defendant was not found in the territory to whose judges he had submitted, he could not be proceeded against as contumacious, as we shall see elsewhere. Nor can effect be given to such judgments without detriment to our jurisdiction or prejudice to our citizens. It was granted, however, at that time, certain magistrates being of the opinion that the Frisians could not be allowed to inquire by what principle the judgment of Groningen had been pronounced, but only whether it was valid according to the law of the place. Others advance the reason that the magistrate at Harlem on request had granted a citation in his city, which he ought rather not to have done. Moreover, I recollect the fact that the magistrates in Amsterdam deny the execution of judgments by default, the defendant having been cited before a Frisian court by an order based upon submission and having been condemned without being heard, and in my opinion correctly, on account of the restriction contained in the third maxim.

7. Again, the question has been raised whether if suit is brought here upon a contract made elsewhere, and our law with respect to the allowing or denying the action differs from that of the place

contractus erat initus, utrius loci jus servandum foret. Exemplum: Frisius in Hollandia debitor factus ex causa mercium particulatim venditarum, convenitur in Frisia post biennium. Opponit Praescriptionem apud nos in ejusmodi debitis receptam. Creditor replicat, in Hollandia, ubi contractus initus erat, ejusmodi praescriptionem non esse receptam; Proinde sibi non obstare in hac causa. Sed aliter judicatum est, semel in causa *Justi Blenkenfeldt* contra G. Y., iterum inter *Johannem Jonoliin*, Sartorem Principis Aurasionensis contra N. B., *utraque ante magnas ferias 1680*. Eadem ratione, si quis debitorem in Frisia conveniat ex instrumento coram Scabinis in Hollandia celebrato, quod ibi, non jure communi, habet paratam executionem, id heic eam vim non habebit, sed opus erit causae cognitione et sententia. Ratio haec est, quod praescriptio et executio non pertinent ad valorem contractus, sed ad tempus et modum actionis instituendae, quae per se quasi contractum separatumque negotium constituit, adeoque receptum est optima ratione, ut in ordinandis judiciis, loci consuetudo, ubi agitur, etsi de negotio alibi celebrato, spectetur, ut docet. Sandius *lib. 1, tit. 12, def. 5*, ubi tradit, etiam in executione sententiae alibi latae, servari jus, in

where the contract was made, which law ought to govern? For example, a Frisian who becomes indebted in Holland, on account of merchandise sold there at retail, is sued in Frisia after the expiration of two years. He pleads our statute of limitations which is applicable to this class of debts. The creditor replies that such limitation does not exist in Holland, where the contract was made, and that it cannot be pleaded therefore in this action. But it was otherwise decided—once in the case of *Justus Blenkenfeldt v. G. Y.* and again in an action between *John Jonoliin*, tailor of the Prince of Orange, *v. N. B.*—both before the great fair in 1680. For the same reason, if someone should sue a debtor in Frisia on an instrument executed before a magistrate in Holland, which is entitled there to immediate execution, but not by common right, it will not have the same effect here, but will require an examination of the facts and judgment. The reason is that the statute of limitations and execution do not pertain to the substance of the contract but to the time and mode of bringing suit, which constitutes in itself a quasi-contract and a separate transaction. It is recognized, therefore, upon very good grounds, that in matters of procedure the practice of the place where the suit is brought is observed, even with respect to a transaction which has been entered into elsewhere. This is taught by *John à Sande*, *lib. 1, tit. 12, def. 5*, where he states that even as regards the execution of foreign judgments the law of the place where the execution is asked is to be observed and not

quo fit executio, non ubi res iudicata est.

8. *Matrimonium* pertinet etiam ad has regulas. Si licitum est eo loco, ubi contractum et celebratum est, ubique validum erit effectumque habebit, sub eadem exceptione, praeiudicii aliis non creandi; cui licet addere, si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu venire possit. In Frisia matrimonium est, quando mas et foemina in nuptias consenserunt et se mutuo pro conjugibus habent, etsi in Ecclesia numquam sint conjuncti: Id in Hollandia pro matrimonio non habetur. Frisii tamen Conjuges sine dubio apud Hollandos jure Conjugum, in lucris dotium, donationibus propter nuptias, successionibus liberorum aliisque fruuntur. Similiter, Brabantus uxore ducta dispensatione Pontificis, in gradu prohibito, si huc migret, tolerabitur; at tamen si Frisius cum fratris filia se conferat in Brabantiam ibique nuptias celebret, huc reversus non videtur tolerandus; quia sic jus nostrum pessimis exemplis eluderetur, eoque pertinet haec observatio; Saepe fit, ut adolescentes sub Curatoribus agentes furtivos amores nuptiis conglutinare cupientes, abeant in Frisiam Orientalem, aliave loca, in quibus Curatorum consensus ad matrimonium non requiritur, juxta leges Romanas, quae apud nos hac parte

that of the place where the judgment was rendered.

8. Marriage also is governed by the same rules. If it is lawful in the place where it is contracted and celebrated it is valid and effectual everywhere, with the reservation that it does not prejudice others; to which reservation may be added that its example is not too revolting—for example, if an incestuous marriage in the second degree, according to the law of nations, should happen to be allowed anywhere, which is scarcely supposable. In Frisia it is a valid marriage if a male and female agree to marry and recognize each other as husband and wife, although no religious ceremony was performed. In Holland it would not constitute a marriage. The Frisian spouses will enjoy nevertheless in Holland, without doubt, the rights of husband and wife as regards marriage settlements and the rights of children to inherit the property of their parents, etc. In like manner, if an inhabitant of Brabant, who has married with papal dispensation within the prohibited degrees, should remove to this place the marriage will be recognized. If a Frisian, however, should go with the daughter of his brother to Brabant and be married there the marriage would not be recognized on his return to this place; because in this manner our law would be evaded by the worst examples, concerning which I should like to make the following observation: It often happens that young people under guardianship, desiring to unite their secret desires through the bonds of matrimony, go to eastern Frisia or to some other place where the consent of their guardian is not nec-

cessant. Celebrant ibi matrimonium et mox redeunt in Patriam. Ego ita existimo, hanc rem manifesto pertinere ad eversionem juris nostri; ac ideo non esse Magistratus heic obligatos, e jure Gentium, ejusmodi nuptias agnoscere et ratas habere: Multoque magis statuendum est, eos contra Jus Gentium facere videri, qui civibus alieni imperii sua facilitate, jus Patrii Legibus contrarium, scientes volentes, imperiuntur.

9. Porro, non tantum ipsi contractus ipsaeque nuptiae certis locis rite celebratae ubique pro justis et validis habentur, sed etiam jura et effecta contractuum nuptiarumque in iis locis recepta, ubique vim suam obtinebunt. In Hollandia conjuges habent omnium bonorum communionem, quatenus aliter pactis dotalibus non convenit; hoc etiam locum habebit in bonis sitis in Frisia, licet ibi tantum sit communio quaestus et damni, non ipsorum bonorum. Ergo et Frisii conjuges manent singuli rerum suarum, etiam in Hollandia sitarum, Domini: cum primum vero conjuges migrant ex una provincia in aliam, bona, quae deinceps alteri adveniunt, cessant esse communia manentque distinctis proprietatibus; sicut res antea communes factae manent in eo statu juris, quem induerunt, ut docet Sandius *lib. 2, decis. tit. 5, def. 10*, ubi in fine testatur, inter consuetudinarios Doctores esse con-

essary to marriage, according to the provisions of the Roman law, which has been abrogated with us on this point. They celebrate their marriage there and presently return home. I consider this a manifest evasion of our law. Our magistrates are not bound therefore by the law of nations to recognize and give effect to marriages of this kind. And those especially would seem to act against the law of nations who marry citizens of another state by its facility, knowing such law to be contrary to their home legislation.

9. Furthermore, not only are the marriage contracts themselves, duly entered into in a certain place, to be regarded as binding and valid everywhere, but the rights and interests also attached thereto by the law of the place where they were celebrated. In Holland the spouses have a community of all their property unless they have stipulated otherwise in a marriage contract; this will be the effect with respect to the property situated in Frisia, although the community of property existing there is only of profit and loss and not of the property itself. Therefore Frisian spouses will remain the separate owners of their property even if it is situated in Holland. When the spouses migrate, however, from one province into another the property which may thereafter come to either will not be community property, but remain their separate property; and the property which had become community property before will retain the legal status which it had acquired, as is laid down by John à Sande, *lib. 2, decis. tit. 5, def. 10*, where it is stated at the end that

troversum, an immobilia bona etiam alibi sita in tali specie communicentur, quod nos affirmandum putamus. Ratio dubitandi, quod Leges alterius Reip. non possint alieni territorii partes integrantes afficere; sed responsio est duplex: prima, non fieri hoc vi legis alienae immediata, sed accedente consensu Potestatis summae in altera Civitate, quae legibus alienis in loco suo exercitis praebet effectum; sine suo suorumque praejudicio, mutuae populorum utilitatis respectu, quod est fundamentum omnis hujus doctrinae. Altera responsio est, non tantum hanc esse vim Legis, sed etiam consensum partium bona sua invicem communicantium, cujus vi mutatio domini non minus per matrimonium quam per alios contractus fieri potest.

10. Verum tamen non ita praecise respiciendus est locus, in quo Contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. *Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit, l. 21. de O, et A.* Proinde et locus matrimonii contracti non tam is est, ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt; ut

there was a controversy among the doctors of the common law whether immovables situated in another country were to be affected in like manner, in regard to which question we believe an affirmative answer must be given. The reason for the doubt was that the laws of one state cannot affect the integral parts of another territory. But the answer is a two-fold one. In the first place, it is not by reason of the immediate force and operation of a foreign law, but in consequence of the sanction of the supreme power of the other state, that effect is given to foreign laws exercised upon property within its territory, out of respect for the mutual convenience of the nations, provided, however, that no prejudice is occasioned to a sovereignty or to the rights of its citizens, which is the foundation of the whole subject. The second answer is that it is not so much by force of law as by the consent of the parties reciprocally communicating their property rights to each other, by which means a change of property may be effected, no less from matrimony than from other contracts.

10. The place, however, where a contract is entered into is not to be considered absolutely; for if the parties had in mind the law of another place at the time of contracting the latter will control. "Everyone is deemed to have contracted in that place, in which he is bound to perform." (Digest, 44, 7, 21.) Hence the place of matrimony is not so much the place where the ceremony is performed as the place where the contracting parties intended to live. It happens every day that men in Frisia, natives as well as

omni die fit, homines in Frisia indigenas aut incolas ducere uxores in Hollandia, quas inde statim in Frisiam deducunt; idque si in ipso contractu ineundo propositum habeant, non oritur communio bonorum, etsi pacta dotalia sileant, secundum jus Hollandiæ, sed jus Frisiae in hoc casu est loci Contractus.

11. Datur et alia limitationis saepe dictae applicatio, in hoc articulo; Effecta contractuum certo loco initorum, pro jure loci illius alibi quoque observantur, si nullum inde civibus alienis creatur praejudicium, in jure sibi quaesito, ad quod Potestas alterius loci non tenetur neque potest extendere jus diversis territorii. Exemplum: Hypotheca conventionalis antiquior in re mobili, dat πρωτοπραξίαν jus Praelationis, etiam contra tertium possessorem, Jure Caesaris et in Frisia, non apud Batavos. Proinde si quis ex ejusmodi hypotheca in Hollandia agat adversus tertium, non audietur; quia jus illi tertio in ista re mobili quaesitum per jus alieni territorii non potest auferri. Ampliamus hanc regulam tali extensione; Si jus loci in alio Imperio pugnet cum jure nostrae civitatis, in qua contractus etiam initus est, confligens cum eo contractu, qui alibi celebratus fuit: magis est, ut jus nostrum quam jus alienum servemus. Exemplum: In Hollandia contractum est matrimonium cum pacto, ne uxor teneatur ex aere alieno a Viro solo contracto; Hoc

residents, marry wives in Holland whom they immediately bring into Frisia. And if they had such an intention at the time of the marriage there will be, in the absence of a marriage contract, no community of property according to the law of Holland; the Frisian law will be the place of the contract in this case.

11. There is in this connection a further application of the restriction often mentioned: the effects of contracts made in a particular place will be recognized elsewhere in accordance with the law of the former place, if no prejudice result therefrom to the citizens of such other country with respect to rights acquired by them, and the sovereignty of the latter place is not bound to extend, nor can it extend, the law of another territory so far. For example: a prior hypothecation by agreement of movable property confers πρωτοπραξίαν "a right of priority," even against a third possessor according to the law of Caesar and in Frisia, but not according to the Batavians. Hence if someone should proceed against a third party in Holland by virtue of such a hypothecation he would not succeed because the rights of the third party in the movable property cannot be destroyed by the law of another territory. We may enlarge the rule to the following extent: if the law of the place of contracting is contrary to the law of our state, in which a contract is also made, inconsistent with the contract which is entered into elsewhere, it is reasonable that we should observe our own law rather than the foreign law. For example: in Holland matrimony is contracted with the agreement that the wife shall

etsi privatim contractum valere dicitur in Hollandia, cum Praejudicio creditorum, quibus Vir postea obligatus est: in Frisia id genus pacta non valent, nisi publicata, nec obstant ignorantiam allegantibus justam, idque recte secundum jus Caesarum et aequitatem. Vir in Frisia contrahit aes alienum, uxor hic pro parte dimidia convenitur. Opponit pactum dotale suum; Creditores replicant, Jure Frisiae, non esse locum huic pacto, quia non est publicatum, et hoc praevallet apud nos in contractibus heic celebratis, ut nuperrime consultus respondi. Sed qui in Bavaria contraxerunt, etsi agentes in Frisia, tamen repellentur; quia tum simplex unumque; jus loci contractus, non duplex, venit in considerationem.

12. Ex Regulis initio collocatis etiam hoc axioma colligitur. *Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure, quo tales personae alibi gaudent vel subjecti sunt, fruuntur et subjiciantur.* Hinc qui apud nos in Tutela, Curave sunt, ut adolescentes, filii fam., prodigi, mulieres nuptae, ubique pro personis Curae subjectis habentur, et jure, quod Cura singulis in locis tribuit, utuntur fruuntur. Hinc qui in Frisia veniam aetatis impetravit, in Hollandia contrahens ibi non

not be liable for the debts contracted by the husband alone. Although it is a private contract it is said to be valid in Holland, to the prejudice of creditors to whom the husband may become later indebted. In Frisia such contracts would not be valid unless published, nor would ignorance of this fact constitute an excuse according to the law of Caesar and equity. The husband contracts a debt in Frisia and his wife is sued here for one-half the amount. She pleads the marriage contract. The creditors reply that by Frisian law the agreement is not valid because not published, and this contention prevails with us with respect to contracts entered into here, as I gave recently as my opinion when I was consulted. But those who contracted in Holland, notwithstanding such suit was brought in Frisia, were nonsuited because the law of the place of contracting came into consideration as the law of a single country and not as that of two countries.

12. From the rules laid down at the beginning the following maxim may also be derived: personal qualities impressed upon a person by the law of a particular place surround and accompany him everywhere with this effect that everywhere persons enjoy and are subject to the law which persons of the same class enjoy and are subject to in that other place. Hence persons who with us are under tutors or curators, as young men, prodigals, or married women, are regarded everywhere as persons subject to curators, and will possess and enjoy such rights as the local law and guardianship bestow. Hence he who has bestowed upon him the rights of a

restituitur in integrum. Qui prodigus heic est declaratus, alibi contrahens valide non obligatur neque convenitur. Rursus in quibusdam Provinciis qui viginti annos excessere pro *majoribus* habentur, et possunt alienare bona immobilia, aliaque jura minorum exercere in illis etiam locis, ubi ante viginti quinque annos nemo censetur esse major; Quia Legibus rebusque judicatis aliarum Civitatum in suos subjectos quaelibet aliae potestas comiter effectum tribuunt; quatenus suo suorumque juri quaesito non praejudicatur.

13. Sunt, qui hunc effectum qualitatis personalis ita interpretantur, ut qui certo loco, major aut minor, pubes aut impubes, filius aut paterfam. sub curatore vel extra Curam est, ubique tali jure fruatur eique subjiciatur, quo fruatur et cui subjicitur in eo loco, ubi primum talis factus est aut talis habetur: proinde, quod in patria potest aut non potest facere, id eum nusquam non posse vel prohiberi facere. Quae res mihi non videtur habere rationem, quia nimia inde *σύγχυσις* jurium et onus pro vicinis ex aliorum legibus oriretur. Exemplis momentum rei patebit. Filiusfam. in *Frisia* non potest facere testamentum. Proficiscitur in *Hollandiam* ibique facit testamentum; quaeritur, an valeat. Puto valere utique in *Hollandia*, per *Regulam primam et secundam*, quod leges afficiant omnes eos, qui sunt in aliquo ter-

person of age in Frisia will not be granted restitution in Holland with respect to contracts entered into there. In the same way he who is declared a prodigal will not be bound by contracts entered into elsewhere. Again, in some provinces persons above the age of 21 are regarded as of age and may alienate their immovable property and exercise other rights going with majority even in those places where a person becomes of age only at 25, because whatever qualities are assigned to their subjects by the laws and judgments of any state will be given effect elsewhere, as long as no prejudice results therefrom to the rights of such government or to its citizens.

13. There are those who interpret the effect of a personal quality in another way. According to them he who according to the law of a certain country is of age or is under age, a puber or impuber, a house-son or *pater familias*, under guardianship or free from guardianship, will be governed everywhere as regards the consequence of this status by the very law which conferred such status upon him; so that what he can do or cannot do in his own country he ought to be allowed to do or to be prohibited from doing everywhere. This opinion does not seem to me well founded; there would result therefrom too great a confusion of rights, and from the laws of some states too great a burden for their neighbors. Some examples will make this clear. A house-son in Frisia cannot make a will. He goes into Holland where he makes a will. The question is whether it is valid. I think it is. At all events in Holland, by virtue of the first and second maxims, because the laws

itorio: nec civile sit, ut Batavi de negotio apud se gesto, suis legibus neglectis, secundum alienas judicent. Attamen verum est, id heic in *Frisia* non habiturum esse effectum, per *regulam tertiam*, quod eo modo nihil facilius foret quam Leges nostras a Civibus eludi, sicut eluderentur omni die. Sed alibi tale testamentum valebit, etiam ubi filiisfam. non licet facere testamentum, quia cessat ibi illa ratio eludendi juris patrii per suos cives; quod in tali specie non foret commissum.

14. Hoc exemplum spectabat actum ob personalem qualitatem domi prohibitum. Dabimus aliud de actu domi licito, sed illic, ubi celebratus est, prohibito, in suprema Curia quandoque judicatum. *Rudolphus Monsema* natus annos XVII *Groningae* diebus quatuordecim, postquam illuc migraverat, ut pharmaceuticam disceret, Testamentum condiderat, quod ei in *Frisia* liberum erat facere, sed *Groningae*, ait *D. Nauta* Relator hujus judicati, non licet idem puberibus *infra XX annos*, nec tempore morbi fatalis, neque de bonis hereditariis ultra partem dimidiam. Decesserat ex eo morbo adolescens, herede Patruo, materteris legato dimissis, quae testamentum dicebant nullum, utpote factum contra jus loci. Heres urgere, personalem qualitatem ubique circumferri et jus ei in

of a state apply to all within its territory. Nor is it just that as regards acts done within their territory the Dutch shall put aside their own law and decide the case according to foreign law. But it will have no validity in *Frisia*, in accordance with the third maxim, because by that means nothing would be more easy for our citizens than to evade our laws, and they might be evaded every day. But elsewhere such a will would be valid even where by their laws a house-son could not make a will because in such a case there would be no evasion of the domestic law by subjects thereof and the above reason would therefore not apply.

14. The example I have given refers to an act which was prohibited at home on account of a personal quality. We shall give another act allowed at home, but prohibited where it was done, decided sometime ago by our Supreme Court: *Rudolph Monsema*, who was born and lived at *Groningen*, when he was seventeen years and fourteen days old went abroad to learn the business of a druggist. He made a will which he could have made in *Frisia*, but at *Groningen*, according to *Dr. Nauta*, the reporter of this decision, infants under twenty years of age are not allowed to do so, not even at the time of their last illness, for more than one-half their patrimony. The young man died of the sickness, leaving his uncle on his father's side as his heir and leaving nothing to his aunts on his mother's side, who contended that the will was void because it was made in violation of the law of the place. The heir urged that a personal quality accompanies the person everywhere, and that, as he could have made

Patria competens. alibi quoque valere: sed iudicatum est contra testamentum, convenienter ei, quod diximus, praesertim cum heic eludendi juris patrii affectatio nulla fuisset, etsi minime consentientibus suffragiis, *Nauta* quoque dissentiente. *Decis. M. S. 134. Anno. 1643. d. 27, Octobris.*

15. Fundamentum universae hujus doctrinae diximus esse et tenemus subjectionem hominum infra Leges cujusque territorii, quamdiu illic agunt, quae facit, ut actus ab initio validus aut nullus alibi quoque valere aut non valere nequeat. Sed haec ratio non convenit rebus immobilibus, quando illae spectantur, non ut dependentes a libera dispositione cujusque patrisfamilias, verum quatenus certae notae Lege cujusque Reipubli. ubi sita sunt, illis impressae reperiuntur; hae notae manent indelebiles in ista Republ. quicquid aliarum Civitatum Leges aut privatorum dispositiones secus aut contra statuant; nec enim sine magna confusione praejudicoque Reip. ubi sitae sunt res soli, Leges de illis latae, dispositionibus istis mutari possent. Hinc Frisius habens agros et domos in provincia Groningensi non potest de illis testari, quia Lege prohibitum est ibi de bonis immobilibus testari, non valente Jure Frisico adficere bona, quae partes alieni territorii integrantes constituunt. Sed an hoc non obstat ei, quod antea diximus, si factum sit Testamentum jure loci validum, id effectum

the will at home, he could make it abroad. But the decision was given against the will, consistently with what we have said, especially since there was no intention to evade the home law. The decision was, however, by no means universally approved, *Nauta* himself dissenting. (*Decis. M. S. 134. October 27, 1643.*)

15. The foundation of all this doctrine we have said and maintained to be the subjection of all men to the laws of a country so long as they remain therein; whence it follows that an act valid or invalid from the beginning is also valid or invalid elsewhere. But this observation does not apply to immovables when they are considered, not as to their dependency upon the free disposition of the respective owners, but as to the extent in which certain qualities are found impressed upon them by the law of the particular country in which they are situated; such qualities remain unaffected in such state irrespective of what the laws of other states or the agreements of individuals may provide to the contrary. For it is evident that the laws applicable to such property, enacted by the state in which the immovable property is situated, cannot be changed by such disposition without great confusion and prejudice to the state. Hence a Frisian who owns fields and houses in the province of Groningen cannot dispose of them by will, because it is prohibited there to dispose of immovables by will, for the Frisian law cannot affect property which constitutes an integral part of another territory. But is this not opposed to what we stated above, that if a will is validly executed according to the law of the place

habere etiam in bonis alibi sitis, ubi de illis testari licet? Non obstat; quia Legum diversitas in illa specie non afficit res soli neque de illis loquitur, sed ordinat actum testandi; quo recte celebrato, Lex Reipubl. non vetat illum actum valere in immobilibus, quatenus nullus character illis ipsis a Lege loci impressus laeditur aut imminuitur. Haec observatio locum etiam in Contractibus habet: quibus in *Hollandia* venditae res soli Frisici, modo in *Frisia* prohibito, licet, ubi gestus est, valido, recte venditae intelliguntur; idemque in rebus non quidem immobilibus, at solo cohaerentibus; uti si frumentum soli Frisici in *Hollandia* secundum *lastas*, ita dictas, sit venditum, non valet venditio, nec quidem in *Hollandia* secundum eam jus dicitur, etsi tale frumentum ibi non sit vendi prohibitum, quia in *Frisia* interdictum est et solo cohaeret ejusque pars est. Nec aliud juris erit in successione ab intestato; Si defunctus sit Paterfamilias, cujus bona in diversi(s) locis imperii sita sunt, quantum attinet ad immobilia servatur jus loci, in quo situs eorum est; quoad mobilia, servatur jus, quod illic loci est, ubi testator habuit domicilium, qua de re vide Sandium *lib. 4, decis. tit. (VIII) def. 7*. Sunt hae definitiones ejusmodi, ut a latiori explicatione non abhorreant, quando Statutarii Scriptorum non desunt, qui de nonnullis aliter existimaverint, quos vide laudatos apud Sandium in Decisionibus praedictis, quibus adde, quae novissime tradit Rodenburgius *tract. de jur. quod orit. e Stat. divers.* inserto libro *de jure Conjugum*.

it should have effect even as to property situated elsewhere, where it is lawful to dispose of it by will? No, because the diversity of laws in this respect does not concern immovable property but regulates wills. The will having been properly made, the law of the state does not invalidate it as regards immovable property so far as no quality impressed upon it by the law of the place is affected or impaired. This rule applies also to contracts. Frisian immovable property, sold in Holland in a manner prohibited by Frisian law but allowed in Holland, is deemed lawfully sold, and this is true, not only as regards the immovables themselves, but also with respect to things attached to the soil, so that if corn growing in Frisia is sold in Holland according to the lasts, as it is called, the sale is not valid—not even in Holland—although the sale of such corn is not forbidden there, because it is prohibited in Frisia and because it is attached to the soil and is a part of it. The same rule applies to intestate succession. If the decedent is the father of a family whose property is situated in different parts of the country, the law of the situs governs as regards immovables. But with respect to movables the law of the place where the testator had his domicile is applied, for which see John à Sande (*lib. 4, decis. tit. VIII def. 7*). These rules are such that a fuller explanation might be given, inasmuch as writers are not wanting who think otherwise in some particulars, and who are mentioned by John à Sande in the decisions referred to above, to which add Rodenburg's recent "Tract. de jure quod orit. e stat. divers.," which is appended to his work on the law of husband and wife.