CHAPTER 10

Effects of Marriage on Property

I. Basic Conceptions

Corresponding to far-reaching differences in the main conceptions of marital property systems, the conflicts rules on this subject are split into three groups, two of which are illustrated by the American conflicts rules on marital property rights in (1) immovables and (2) movables, and the third by the European rules on marital property rights.

1. American Rules on Immovables

The old rule on immovables, which is preserved in this country, applies the lex situs. The underlying idea is that an immovable is considered an isolated object of rights. This idea can be traced back to ancient Germanic laws and was characteristic of the feudal system of landholding. If a woman owned land at the time of marriage, the interest acquired by her husband through the marriage was determined by the law of

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2 Immobilia reguntur lege loci. Story §§ 158, 186, 188; 4 Phillimore no. 476; Wharton 405 § 191. D'Argenté originated this doctrine in polemics (Commentarii in Patrias Britonum Leges, art. 218, gl. 6, § 34) opposing Dumoulin's theory of domicil (consilium 53) in case no matrimonial convention was made. The doctrine was advocated in the Netherlands and in France by Paul Voet and Froland, from whom Story took inspiration. The problem was called the "most famous question" in a decision of the Court of Dutch Brabant of November 3, 1693, "Decisio brabantina super famossissima questione." See Froland, 1 Mémoires concernans la nature et la qualité des status (1729) 272, 309, 316; 1 Lainé 234, 334.
the place where the land was situated. Therefore, under the common law, if the spouses own real estate in ten different countries, ten different matrimonial laws must be consulted, each applying to its respective immovables only. The point of contact is the immovable itself; the place where the spouses are or where the assets are managed is irrelevant. This conception implies that no problem arises other than that of determining the interests of one spouse in the lands of the other. In fact, section 237 of the Restatement contents itself with declaring: "The effect of marriage upon interests in land owned by a spouse at the time of marriage is determined by the law of the state where the land is."

2. American Rules on Movables

Movables, according to the old rule, follow the person, *mobilia ossibus inhaerent*; rights in movables, created under the law of the domicil, have extraterritorial effect. With respect to marital property, this rule is well settled in the United States despite occasional inroads made by the law of the situs. Accordingly, the mutual interests of husband and wife in each other's movables are localized at the place of the interested parties.

So far the rule is unassailable. Doubt is cast on the rule, however, so soon as we ask whether all the movables belonging to a married person are together thought to form a unit, an entity, or whether each asset is a separate unit. The conception of all the movables constituting one unit seems to obtain when the prevailing rule is justified by the "desirability of applying a single uniform regime to the entire estate of the parties,"

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3 It is remarkable, however, as a token of the strength of the territorial theory that the cases that actually or apparently preferred the *lex situs* are continually emphasized by the writers; and this theory was adopted in the proposed Final Draft of the Restatement § 311.

4 Note, 43 Harv. L. Rev. (1930) 1287; Stumberg, 11 Tex. L. Rev. (1932) 63, supra n. 1; Leflar, 21 Cal. L. Rev. (1933) 233, supra n. 1.
or when it is stated more precisely in the words of Beale 5 to be motivated by the consideration that

"These (movables) are brought together into an aggregate unit, and from the time of acquisition become part of that unit, and . . . the entire unit is treated by third parties as well as the spouses as a unit."

We should like to think that this idea means that the law of the marital domicil thus governs more problems than the single problem mentioned above concerning the existence and nature of the interests of husband and wife in each other’s property. But we are warned against any such supposition by the language of the Restatement, which again speaks exclusively of “rights or other interests in movables” (§§ 289 ff.) and when we find similar expressions used by the writers. We shall see, indeed, that many, although certainly not all, other problems regarding the relationships between the spouses, as well as between them and third persons, are treated in American common law as belonging to the fields of contract, tort, or quasi-contract rather than to that of marital law. Apparently, the formulation of conflicts rules in this country has been unduly influenced by the narrow scope of the matrimonial law believed to remain after the passage of the Married Women’s Acts. Furthermore, insufficient attention has been paid to the problems arising under the community property systems and to the regulations of the rest of the world.

3. Continental Rules on Marital Property Relations

Quite a different picture is presented by the traditional European marital laws, for which Central Europe has most fully elaborated the general theories. The tangible and intangible assets of the parties (activa) are conceived as forming one part of a major whole, viz., the estate, while the debts of the spouses form the other part. Therefore, inquiry is not

5 2 Beale § 290.1.
limited to the determination of those interests which one spouse may have in the assets of the other, but it is also directed to the obligations that may arise between the spouses, the liability of either to creditors, the enforcement and execution of claims during coverture and after its termination, management of the wife's goods other than those pertaining to her separate estate, presumptions as to ownership, and like questions. All these problems are regarded as forming one complex unit, similar to an inheritance treated as an aggregate, to which one conflicts rule applies.

Generally, such a system extends to every asset, but in England and Argentina immovables are excepted and assigned to the *lex situs*, just as they are in this country. But even in these countries the system is not confined to the mutual interests of the spouses in each other's property.

The Continental systems, of course, are recognized in any common law court in accordance with its conflicts rule; nobody would think of refusing recognition because such a property regime is "unknown in the *lex fori.*"  

4. Scope of the Marital Property Law

It is important to emphasize the comparatively broad scope of marital property law in civil law countries.

In the American system also, the "effect of marriage upon the interests of one spouse," to use the expression of section 237 of the Restatement, refers to all rules of the applicable municipal law under which, by virtue of the marriage, property rights or interests are created, modified, or terminated. In particular, both in the United States and in civil law countries, these rules determine what powers of management one spouse may exercise and what control the other may have; to what extent freedom of alienation is affected; who is the

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proper party to sue and be sued with respect to the property of either spouse; and similar questions.

In civil law countries, marital property law also includes the effects of such events as voluntary or judicial separation, divorce, postnuptial agreements, bankruptcy, and abuse by the husband of his rights of management. In principle, this is true in the United States too, but there are many variations and exceptions.

Although article 191 of the Código Bustamante subjects the wife's right to recover her dowry to her personal law, a rational solution requires that either the matrimonial law of the spouses or the general contracts law governs. The former is the right solution where the applicable matrimonial law includes special rules on dowry, e.g., in Austria and Italy; in France the matrimonial law has been applied to a dowry constituted under the law of Maryland.

In community property states everywhere, marital property law determines what constitutes the community fund and what the separate property of either spouse, and in addition the questions of management, possession, and control by the wife and the husband, respectively, the actions permissible during the community, the termination and partition of the common fund, et cetera.

An integral part of these systems is also the regulation of liability of the different estates of the parties for debts either of the community or of the husband or wife. Liability of the community property for community debts only, as in Washington, or also for the debts of the husband as in Louisiana, or for all debts of the husband and the prenuptial debts of the

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7 See Williams v. Pope Manufacturing Co. (1900) 52 La. Ann. 1417, 27 So. 851 (married woman, domiciled in Mississippi, allowed according to the (matrimonial) law of Mississippi to sue in tort in Louisiana, as the tort had been suffered there). See also Texas & Pacific Railway Co. v. Humble (1901) 181 U. S. 57; Traglio v. Harris (C.C.A. 9th, 1939) 104 F. (2d) 439.
8 Cf. RAAPE 342.
wife, as in California, is naturally considered by the lawyers of those states as growing out of the marriage. The same approach is used in Europe, not only with respect to a system of community but to any marital system, in classifying the problem of the husband's liability for prenuptial or postnuptial debts of his wife and vice versa. This does not seem to be the usual way of thinking in this country but should be recognized as the actually governing principle.

As a matter of fact, if marriage property law is defined in the conflict of laws as dealing with problems of title to property only, its scope is much narrower than in European countries. To visualize the difference and the attendant difficulties, let us assume that German spouses are domiciled in Germany and that the wife has been charged with a criminal offense but acquitted. Under the German Civil Code (§ 1387, No. 2), the husband is obliged to pay or to reimburse his wife for the expense of her defense, and as a co-debtor he is personally liable to his wife's creditors, e.g., to her attorney. If her husband can be sued in an American common law court, what attitude should that court take? Should it classify the problem according to the lex fori? It might find that no such claim is granted to the wife or her attorney by the matrimonial law of the forum although some claim under another theory may be prosecuted. Obviously, the desirable solution is that German matrimonial law as the law of the domicil should be applied in its full bearing.

If we change the facts of the case slightly, there would probably be no doubt at all about an American court's reaching an analogous solution where the husband, under the German Civil Code (§ 1385), has to pay the taxes, interest on mortgages, and insurance premiums for those assets of his wife of which he is possessed ex iure mariti during coverture. These debts may be compared with the liabilities which are often indicated as incidents of community property.
Conversely, a German court, applying the essentially narrower matrimonial law of a common law state, faces the question of what to do about matters considered part of the matrimonial law in Germany but not so considered by the governing foreign law. If, for instance, American parties are domiciled in a common law jurisdiction and the wife borrows money with the consent of her husband, the latter would be liable to the creditor only upon his assumption of a guaranty. Under the German Code (§ 1386 par. 1), however, the husband is liable for the interest on the loan, both wife and creditor being able to enforce the liability (§ 1388), which extends to the reserved property of the wife as well as to the husband's own property. If the German court follows the characterization appropriate to the civil law doctrine, it has to consider the problem as one of matrimonial law and therefore governed by the law of the American domicil. The most sensible consequence seems to be to adopt the conflicts rule applied in this country to surety contracts. Or, instead of the law of the place of contracting thereby indicated, should the German judges, as in other contracts cases, apply the law of the place of performance, as required by the German conflicts rule? The result would be that reached neither in Germany nor in the United States.

An analogous question concerning torts was raised before a French court. Article 1477 of the French Civil Code provides as part of the matrimonial law that a spouse diverting or concealing any effects of the community property shall be deprived of his share of such effects. The judge considered this provision inapplicable to an Italian couple and granted the ordinary remedies common to both French and Italian private laws.\(^\text{10}\)

In conclusion, it would seem that the broad concept of marital property law, as developed in Europe, can conven-

\(^\text{10}\) Trib. civ. Seine (Feb. 6, 1897) Clunet 1899, 771, criticized by Clunet in Clunet 1899, 740; see also Bartin, 2 Principes 284.
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iently be employed in the United States whenever reference to the civil law in this field is to be made, and that, moreover, the scope usually allocated to marital property law needs enlargement.

5. Relation Between the Marital Property Law and the Lex Situs

As is well known, the law of the domicil or the national law governing either movables or all property may clash with a divergent law established at the situs. On the one hand, German writers have attempted to develop a theory of the relation between general conflicts rules (such as the rules on marital property or inheritance) and special rules (such as those of property referring to the lex situs or of obligations referring to the lex loci solutionis). On the other hand, fear of friction has fostered the broad scope of the lex situs in the United States.

* Necessary role of the lex situs. What problems must be governed in all systems by the law of the situs? The lex situs determines quite naturally the kinds of property interests and the modes of their creation, transfer, modification, and termination, and it decides to what extent, if at all, bona fide purchasers and attaching creditors are protected in their expectations. In its application to problems of marital property rights, the law of the situs may come into conflict with the personal law. The personal law may grant one spouse some property interest in an immovable of the other, for instance, a lien, which is unknown at the situs of the immovable, or the personal law may provide that, immediately upon the marriage and without any conveyance, certain assets of the spouses are transformed into a community fund, while no such transformation by immediate operation of law is known under the law of the situs. In all such cases, the law of the situs prevails.

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11 Cf. Melchior 398; M. Wolff, IPR. 51, 52.
over the personal law insofar and only insofar as such immediate property questions are concerned.

Thus, the Montevideo Treaty\(^\text{13}\) limits the matrimonial law of the domicil insofar as its application is prohibited by the law of the place where the property is situated, with the significant restriction in the 1940 draft to matters *de estricto carácter real,* i.e., which pertain strictly to real rights.

*Illustration:* Before the unification of the German civil law, a couple domiciled in Westphalia lived under the system of community property, whereby the land owned by one spouse, immediately upon marriage, fell into joint tenancy by both parties. The wife owned land in Saxony, where, however, no transfer of land ownership could take place without a conveyance. The Court of Appeals of Saxony held that the wife continued to be the sole owner but that she was bound by reasonable application of the personal law to execute an appropriate conveyance.\(^\text{14}\)

In the same sense, it has been held in France that restraints upon the husband’s alienation of his wife’s dowry or liens to secure claims of the wife against her husband, provided by the personal law, are recognized as an interest in French immovables only to the extent and subject to the conditions under which the analogous rights of French law are established.\(^\text{15}\) An express provision of the former Italian Code was understood in the same way.\(^\text{16}\) The maxim underlying all these cases has been formulated by Zitelmann in the following

\(^{13}\) Treaty on international civil law, text of 1889, arts. 40, 41; text of 1940, art. 16.

\(^{14}\) OLG. Dresden (Dec. 1, 1896) 18 Ann. Sächs. OLG. 513; cf. Lewald 178, 179 no. 239; analogous decision of RG. (April 20, 1903) JW. 1903, 250. An interest created under Maltese matrimonial law was dependent on publication in Tunis for absolute effect against third persons. Trib. Tunis (March 15, 1905) Clunet 1906, 444.

\(^{15}\) Trib. civ. Seine (Aug. 20, 1884) Clunet 1885, 76; Trib. civ. Seine (Jan. 12, 1889) Clunet 1899, 346; cf. Niboyet 635 no. 507, but also 3 Arminjon 109 n. 2. On a different recent practice see above, p. 327.

\(^{16}\) Lewald, 29 Recueil 1929 IV 532, n. 1, approved by Fedozzi 642, disagreeing with other writers.
sentence: "Das Vermögensstatut lebt nur durch die Anerkennung der Einzelstatuten." It has been decided in Canada that marriage settlements concerning property situated in another country are enforceable "so far as the lex situs does not prevent their being carried into execution."  

American conception of the lex situs. In comparison with the American law of situs, the European property law has a very modest function. It does not determine the regime under which the spouses shall live, with its innumerable ramifications, and of course not the requisites and construction of a marriage settlement. It merely decides the technical execution of the commands of the personal law.

Under the American system as in feudal times, however, the law of the place where the immovable is located determines every question relating to the extent and content of the effects of marriage on property. Normally, foreign law is applied at the situs, neither to determine the property interests which one spouse may have in the assets of the other nor, if our assumption concerning the actual scope of American marital law is right, to determine what liabilities, if any, exist with respect to real property and whether the real property of one spouse is liable to the creditors of the other spouse. In contrast to movables, the law of the situs, and not the domiciliary law, is considered competent to fix the economic purposes of the marriage institution and to formulate public policy concerning administration by the husband, control by the wife, and protection of the creditors. This means, furthermore, that there are as many matrimonial laws as there are states where either of the spouses has immovable property.

Even the capacity of married women with respect to all transactions connected with an immovable is governed by the

17 ZITELMANN in Festschrift für Otto Gierke (1911) 255 at 261; LEWALD 178 no. 239.
18 In re Jutras Estate (Saskatchewan) [1932] 2 W.W.R. 533, at 537.
law of the state where the immovable is located and, in accordance with the ordinary rule of this country, not by the law of the place of contracting.

An explanation sometimes offered for the broad rule on immovables in the United States is that it is an essential function of a state to determine the title to interests in land. But does it not suffice that the property interest as such be governed by local law? Why should the local law also try to determine the effects of marriage? Moreover, if this proposition were correct, the law of the situs would also have to be applied to movables. Some American writers have indeed claimed for the situs "a sort of primary control over property within . . . its border," a claim quite unknown outside the United States. The law of the situs is said to have the power to decide what effect, if any, should be given to the law of the domicil, and the latter is said to be applicable not on the basis of an independent rule of conflict of laws but only indirectly by way of reference by the law of the situs. Attempts have been made to explain a few decisions in this way, but these appear to be inspired rather by considerations of public policy. It would be absurd to assume that the courts of the domicil itself or the courts of a third state could not apply the law of the domicil without the permission of the law of the situs. True territorialism, furthermore, would require that the municipal law of the situs be applied, not merely its conflicts rule.

There exists, however, an important restriction upon the application of the lex situs. In almost all American jurisdictions, immovables acquired by assets pertaining to the separ-

19 LEFLAR, 21 Cal. L. Rev. (1933) 221, 225, 230, supra n. 1. The Restatement § 8 (1) seems to share this view.
22 WIGNY and BROCKELBANK, Exposé 331 n. 1 to art. 289.
rate property of one spouse, are his separate property, and when acquired with community property are community property—the so-called replacement or source doctrine.\textsuperscript{24} As a result, the impact of the *lex situs* to a considerable extent is qualified by the operation of the *lex domicilii* influencing the ownership of assets used for acquiring immovables in another state.\textsuperscript{25} This may be the law of the actual or of the former domicile of the spouses. The *lex situs*, of course, retains its power over acquisitions of immovables through earnings, gifts, and succession or distribution on death.\textsuperscript{26} The courts ordinarily also apply the *lex situs* without hesitation in determining the validity and construction of such contracts by the husband or the wife as dispose of land, in adjudging the ownership of profits and fruits, and in ascertaining the internal relations between the spouses with respect to their interests in immovables.\textsuperscript{27}

*Illustration.* The husband bought land in Idaho with money earned in Michigan, and acquires separate property despite the community property system of the former state. But, if he deeds the land to his married daughter domiciled in New York, there is a presumption, under Idaho law, that the property is held in community by her and her husband.

The converse case has been singularly treated. If land is sold in the state where it is situated and thus be converted into money or a chose in action, the movables so acquired should also, under the doctrine of replacement, to be consistent, be substituted for the land and remain subject to the law of the situs. But in a series of early cases, it was thought in the court of the matrimonial domicil that, thanks to the conversion effected at the situs, the time had come to apply the *lex fori*

\textsuperscript{24} So named by Jacob (precedent note). See also *In re Gulstine's Estate* (1932) 166 Wash. 325, 6 P. (2d) 628.

\textsuperscript{25} See Neuner, 5 La. L. Rev. (1943) 167, 169, supra n. 1.

\textsuperscript{26} See for example the distinctions made in Newcomer v. Orem (1852) 2 Md. 297, 56 Am. Dec. 717.

\textsuperscript{27} See cases collected by Neuner, 5 La. L. Rev. (1943) 172, 173, supra n. 1.
of the domicil to the movables acquired.\textsuperscript{28} In two other old cases, temporary differences of policy with respect to the emancipation of married women caused one court at the domicil \textsuperscript{29} and the other at the situs \textsuperscript{30} each to apply its own domestic law to the proceeds, in order to enforce in the interest of the wife the progressive view of the forum against the old common law principle. Inferences as to the present rules can scarcely be drawn from these decisions.

The \textit{lex situs} in other countries. The system founded by the postglossators, which places the effects of marriage on immovables under the law of the situs, has been adopted by Great Britain, the United States, and Argentina, and the Austrian courts.\textsuperscript{31} A similar situation exists with respect to Swiss immovables belonging to Swiss nationals.\textsuperscript{32}

In France, Italy, and other Latin countries, this system has been applied in a few decisions,\textsuperscript{33} though by prevailing opinion it has long been abandoned.\textsuperscript{34} French public policy

\textsuperscript{28} Courts applying their own common law on marital property rather than the community property rule of the \textit{lex situs}: Kneeland v. Ensley (1838) 19 Tenn. 620; Newcomer v. Orem (1852) 2 Md. 297, 56 Am. Dec. 717; Castleman v. Jeffries (1877) 60 Ala. 380. Court of community property system not applying the \textit{lex situs} of Georgia: Henderson v. Trousdale (Sup. Ct. 1855) 10 La. Ann. 548.

\textsuperscript{29} Glenn v. Glenn (1872) 47 Ala. 204, refusing application of the old common law principle of South Carolina.

\textsuperscript{30} Smith v. McAtee (1861) 27 Md. 420, 92 Am. Dec. 641, rejecting pathetically the old common law principle of Illinois.

\textsuperscript{31} Argentine Civil Marriage Law (1888) art. 6. Austria: OGH. (Oct. 22, 1924) 6 SZ. 778 no. 337.

\textsuperscript{32} NAG. art. 28 no. 1. This reservation of the local law is understood to cover capacity to contract and acquire by will, STAUFFER, NAG. art. 28 no. 14. SCHNITZER 265, 133, 243 observes that before the Swiss Civil Code the law of the canton of origin and not that of the \textit{situs} was meant; thus the system was not exactly that of the \textit{lex situs}.

\textsuperscript{33} Cass. (civ.) (April 4, 1881) Clunet 1881, 426; see also OLG. Colmar (Dec. 21, 1911), as a German court, DJZ. 1913, 174; CLUNET in Clunet 1907, 676. Outside of France, it is often not understood that this opinion is obselete.

\textsuperscript{34} France: Principle of indivisibility, NIBOYET 601 no. 478; WEISS, 3 Traité 171, 4 \textit{ibid.} 195; 2 ARMINJON 465; AUDINET, 40 Recueil 1932 II 289ff. Belgium: POULLET 443ff. Italy: DIENA, 2 Princ. 148.

Portugal: CUNHA GONÇALVES, 1 Direito Civil 689 (excluding only special laws on immovables).

even goes so far as to make equal treatment of movables and immovables imperative, the nature of the conjugal association being said to require that all its effects be regulated by one single, immutable law. Hence, it has been repeatedly decided in France that the American regime of separation of assets applies to French immovables owned by Americans, the American rule to the contrary notwithstanding.\(^{35}\)

In Austria, there was a split of authority on this point.\(^{36}\)

In the Scandinavian Convention on Family Law (art. 3, par. 2), only the right to dispose of immovables is reserved to the local law.

**Louisiana rule.** In Louisiana, statutes have expressly provided since 1852 that the community property system there in force applies to all property, including movables, acquired in Louisiana "by non-resident married persons."\(^{37}\) The courts have given effect to this provision in order to grant the outstanding benefits of the Louisiana community system to the wife with respect to real property acquired in the state,\(^{38}\) but have declined to apply this provision to choses in action,\(^{39}\) while their position as regards tangible personal property does not seem entirely settled.\(^{40}\) How this strange rule can be fitted into a well coordinated law of conflicts seems not to have been discussed so far.

The Civil Code of Latvia also subjects to the *lex fori* all property of spouses not domiciled in the country.\(^{41}\)


\(^{36}\) The courts were traditionally for the *lex situs*; cf. 1 EHRENZWEIG-KRAINZ 106.


It is doubtful whether art. 164 of the Cal. Civ. C. of 1872, as amended in 1917 and 1923, is to be understood in a similar sense. Cal. Civ. C. (Deering, 1941) 68 ff., § 164; cf. 10 Cal. L. Rev. (1921) 154; STUMBERG, 11 Tex. L. Rev. (1932) 56, 58, *supra* n. 1.

In Texas no such case has been found, STUMBERG, *ibid.* 65.

\(^{38}\) Succession of Dill (1923) 155 La. 47, 98 So. 752.


\(^{40}\) DAGGETT, The Community Property System of Louisiana (1931) 109-111.

\(^{41}\) C. C. (1937) art. 13 sentence 2.
Deference of Continental countries to the Anglo-American rule of lex situs. The application of the law of the situs to marital property interests in immovables in some countries, particularly those following the Anglo-American system, has been taken into consideration by several other countries, which in such cases allow their own personal law to yield to the lex situs to a greater extent than usual (see page 335). The outstanding provision of this kind, article 28 of the Introductory Law to the German Civil Code, leaves the determination of interests in or respecting foreign immovables or movables to such particular local provisions as claim to govern at the situs. Thus, all rules applied in Maine or California with respect to immovables of a married person—at least insofar as these rules are classified in America as rules of matrimonial character—42—are respected and applied in Germany as well. Article 28 of the German law has been followed with respect to immovables by the Hague Convention of 1905 on Effects of Marriage (art. 7) and other codifications.43 The reservation is applied, for instance, to homestead provisions.44 French courts, however, profess a radically contrary policy; in their eyes unity of the matrimonial regime has the dignity of an inevitable dogma.45

Rationale. The American system of isolating interests in immovables, although it has hardly ever been justified on rational grounds,46 is based on firm traditions and is undisputed in its reign. Its principal advantage lies in the simplicity with which it enables a court to determine the interests of the

42 One of the many questions not hitherto discussed, because the fundamental difference in scope between the matrimonial laws of this country and Europe has been neglected.
44 Cunha Gonçalves, 1 Direito Civil 689 with reference to the Portuguese Decree no. 7033 of October 16, 1920.
45 See supra p. 341 and infra p. 359.
46 On the specious justifications by the ancient scholars, see 1 Bar § 181.
parties. This simplicity exists, however, only so long as the
court has to deal with isolated legal relationships regarding a
specific piece of land. Complications similar to those arising in
cases of succession or bankruptcy arise when assets are located
in different states and are to be treated as belonging to a single
estate, either in the relation of the spouses to each other or in
their relations with third parties.

The European system of treating all problems of property
relations as one single complex, subject to one single law,
avoids the difficulties that arise when different assets belonging
to the same persons are subjected to different laws. It creates
so many complications of its own, however, that it is problem­
atical which of the two systems should be preferred. The
greatest practical difficulties are caused by the coexistence of
two such fundamentally different approaches. International
cooperation of the type suggested by the Hague convention
and generous concessions such as those made to the Anglo­
American system by the Introductory Law of the German
Civil Code, might smooth over some of the friction between
the two systems.

II. Theory of Implied Contract

Another basic difference in views concerns the relationship
between the matrimonial law and the marriage settlement.

1. French Practice

The French courts still follow the theory of Dumoulin,
who advocated in 1525 that the effects of marriage upon prop­
erty should be determined primarily by the intention of the
parties. This theory is well known in this country too; in the
famous opinion in Saul v. His Creditors,47 Porter, J., although
rejecting certain elaborations of Dumoulin’s theory as de­

47 (1827) 5 Mart. N. S. (La.) 569. A mistake by Judge Porter in interpreting
the Spanish law has been noted by de FuniaK, Principles of Community
Property (1943) 249.
veloped in later French and Spanish practice, adopted the principal ideas of the theory. In the opposite doctrine, marriage effects belonged to the domain of the various territorial ("real") statutes, which were in fact multiple and inconsistent customs. To free the relations between husband and wife from this entanglement, the parties were declared free to regulate their rights and duties by marriage settlement once and for all, the extraterritorial effect pertaining to the personal "statute." Even in cases where the parties had made no settlement, they were said simply to have tacitly agreed to subject themselves to a certain local custom, preferably to the custom in force at the marital domicile, identical for practical purposes with the domicile of the husband at the time of the marriage. 48

(a) Method and result of French cases. The full liberty of the parties to make any settlement they choose is still recognized by the French courts, which continue to imply a tacit contract in the absence of a settlement. 49

While once this method resulted in the general application of the matrimonial law of the first domicile, it is now employed more consistently with the original idea; in order to determine the presumed intention of the parties, all facts of the individual case are taken into consideration, including the conduct and statements of the parties after the marriage. 50 Criticism of this method of practical interpretation 51 has been answered by the Tribunal de la Seine with the argument that manifestations of the parties during marriage, though they cannot modify the regime adopted at the time of the marriage, nevertheless give

48 Cf. CALEB, Essai sur le principe de l'autonomie de la volonté en droit international privé (1927) 135; NIBOYET 792 no. 684; 3 ARMINJON 87ff. nos. 88ff.

49 Cass. (civ.) (July 11, 1885) S.1855.1.6993; Cass. (req.) (July 15, 1885) Clunet 1886, 93; Cass. (req.) (May 18, 1886) Clunet 1886, 456. See other decisions cited by WEISS, 3 Traité 639ff.


51 NIBOYET 833 no. 716; PILLET, 2 Traité 225.
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significant support to the assumptions of the court. By these methods, it has been presumed that the parties have tacitly agreed to adopt the law of the domicil of the husband or that of their common nationality or that of an intended future domicil. But as an after-effect of the old domiciliary tradition, the presumption of a tacit agreement to the law of the real or intended marital domicil seems to be preferred, the latter especially when it happens to result in the application of French law. Some decisions have aroused amazement. Thus, a Swiss married a French woman in New York, went with her to Switzerland and many years after to France, but French law was presumed intended. The same result was reached in cases where sixty years after the marriage the bodies of the spouses were brought to France and where Swiss spouses had stayed in France no longer than three weeks.

(b) Influence of the French doctrine on other countries. The French system has been followed by some courts in other countries and hinted at in the statutes of Spain, Portugal,

63 See the report of Brachet in Trib. civ. Versailles (May 15, 1924) Revue 1925, 241, 245. See also JOELSON, op. cit. supra n. 1, at 91.
64 CALEB, 4 Répert. 180 no. 69ff.; cf. Cour Paris (Nov. 18, 1937) Clunet 1938, 310; Cour Paris (March 2, 1938) Clunet 1938, 544. In Switzerland this was erroneously believed to be the French law; cf. SCHNITZER 197.
65 Trib. civ. Belfort (June 13, 1911) and Cour Besançon (March 18, 1912) Clunet 1913, 171.
67 Cour Paris (June 28, 1937) Schardon c. Chavon, Clunet 1938, 537; the commentator, ibid. 540 is surprised, but the Cour of Cassation affirmed (May 5, 1938) Gaz.Pal.1938.2.232, cf. 7 Giur. Comp. DIP. no. 128.

Brazil: with respect to marriages anterior to the Civil Code see VALLADÃO 153 and more recently Sup. Trib. Fed. (June 12, 1940) In re Wolner, 140 Revista dir. civ. (1942) 281 (submission to the Brazilian general community property system, assumed to have been effectuated by declaration in the marriage record,
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and in the original text of the Treaty of Montevideo. The Civil Code of Louisiana varies the French doctrine by declaring that "every marriage contracted in this State, superinduces of right partnership or community of acquest or gains, if there be no stipulation to the contrary"; of course, this is not an interpretation of the parties' intention but a statement of the legal regime.

In England, the contractual theory has exercised some influence. An express marriage settlement is construed according to the law presumed to be intended by the parties; ordinarily, the effect is that, by a rebuttable presumption, it is governed by the law of the marital domicil. Moreover, although no longer popular, the doctrine of intended marital domicil has not been forgotten. Finally, the inference from a tacit marriage covenant to an immutable law of the first domicil, which was rejected in Saul v. His Creditors, was proclaimed in De Nicols v. Curlier as late as 1898. The case, however, referred to a marriage celebrated in France by parties domiciled in France; a tacit marriage agreement was assumed, because the French courts administering the law of the domicil would have proceeded by this method. Neither in England, according to the better view, nor in Canada, according to the distinctly

without marriage settlement; per abundantiam the Austrian law, possibly national law of the parties is understood, with Krasnopol'ski, Oesterreichisches Familienrecht (Wien, 1911) § 17, as permitting autonomy of the parties (at 287)).

The Netherlands: A few older decisions overruled by H. R. (May 17, 1929) W. 12006; on a later decision of Hof den Haag (Feb. 6, 1931) W. 12373 see Van der Flier, Clunet 1933, 1110.

59 Spain: C. C. art. 1325; Portugal: C. C. art. 1107; Belgian Congo: C. C. art. 12; but all these are rather harmless reminiscences, M. Wolff, 4 Rechtsvergl. Handwörterb. 410; Treaty of Montevideo on international civil law, text of 1889, art. 41 (the marital domicil expressly agreed upon by the parties before the marriage).

61 In re Fitzgerald, Surman v. Fitzgerald [1904] 1 Ch. 573; In re Bankes, Reynolds v. Ellis [1902] 2 Ch. 333, etc. Cheshire 495ff.
62 In re Martin, Loustalan v. Loustalan [1900] P. 211, 239; See Westlake 72 § 36; Dicey 765.
64 Cheshire 492, in contrast with 495.
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adopted opinion, is such construction imitated. In the absence of an express settlement and a will, marital property is governed by the law of the husband’s domicile. Hence, the community system of Quebec was applied in Ontario to spouses who had their first domicile in Quebec, because the law of Quebec like the French referred to the presumable intention of the parties to choose the local regime rather than because the Ontario court shared the theory of implied contract. 65

(c) Influence on America. In the United States, the old French doctrine had some influence on Story. 66

The “intended domicil” appeared in a few decisions 67 but has been rejected by prevailing opinion as well as by the Restatement. 68 A contemplated domicil which, because of a change of mind, does not become a home in fact, may figure as an important element in ascertaining the law tacitly chosen by the parties in setting up a marriage contract, but it is no veritable domicil at all and is therefore neglected in this country; domicil is the test for the determination of marital property rights in movables, independent of any intention of the parties.

In Latin America, while the Montevideo Treaty of 1889 testifies to the widespread adoption of the theory of intended marital domicil, the new text of 1940 evidences a disposition to abandon the theory. 69

(d) Opposition to French practice. The literature, including the modern French writers, 70 unanimously rejects the old

66 STORY §§ 198, 199.
67 Ford’s Curator v. Ford (1824) 2 Mart. N. S. (La.) 574, 578, 14 Am. Dec. 201; 1 WHARTON 402 § 190.
68 Restatement § 289; 2 BEALE § 289.1 n. 3; GOODRICH, “Matrimonial Domicile,” 27 Yale L. J. (1917) 49 at 50 (against STORY); STUMBERG, 11 Tex. L. Rev. (1932) 53, 55, supra n. 1 and in his Principles of Conflict of Laws 285; cf. CHESHIRE 492.
69 Art. 16. Supra n. 59; see also 1 RESTREPO HERNÁNDEZ no. 224.
70 BARTIN, D.1898.24577, BARTIN, 2 PRINCIPES 247 no. 3025; PILLET, 2 MÉLANGES 95; VALÉRY 1128 no. 794; 3 ARMIGNON 101 no. 95 bis; NIBOYET 833 no. 716; AUDINET, 40 Recueil 1932 II 257–259, 265. As is known, Du-
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French practice. The presumed intention is called an excessively fictitious assumption, and the unpredictability of a future court decision on this intention is considered intolerable. Of this system, it was recently said that the matrimonial law, whose main reason to exist must be found in the security of the spouses and of third persons, fails completely to serve its purpose.

It is interesting that French writers advocating reform have expressed a preference in certain cases for the domiciliary test rather than the nationality principle. The French private draft of 1930 favors the first marital domicil.

III. Contacts

1. Domicil

Domicil is the test of the effects of marriage on property in the Anglo-American countries, Denmark, Norway, Argentina, Paraguay, and Peru, recently joined by Brazil in accordance with the general principles of these countries in matters of status. Furthermore, domicil, rather than nationality, has been recognized by the courts in Austria, whose marital Moulins's contemporary, D'Argentré, fought against extraterritorial effect of a tacit agreement, see Weiss, 3 Traité 29. In Italy, Anzilotti particularly attacked the doctrine of presumed intention.

Lerebours-Pigeonnaire 407 no. 343, justifies the regard for manifestations of the parties subsequent to the marriage as a means of avoiding surprises which the courts would otherwise inflict on the parties.

Savatier, D.1936.i.7.

3 Arminjon 104 no. 97; Coste-Floret, Note, 7 Giur. Comp. DIP. 224 no. 126.


Munch-Petersen, 4 Leske-Loewenfeld I 746; Borum, Personalstatutet 455.

Latvia: C. C. (1937) § 13, extending however lex fori to all property situated in the country.

Norway: Christiansen, 6 Répert. 575 no. 116.

Argentina: Civil Marriage Law of 1888, art. 5 par. 1.

Paraguay: Civil Marriage Law of Dec. 2, 1898, art. 5 par. 1.


Austria: OGH. (Jan. 5, 1864) 5 GlU. no. 2701; OGH. (Feb. 27, 1890) 28 GlU. no. 13176; dictum in OGH. (Oct. 22, 1924) 6 SZ. no. 337; contra: most writers, see Walker 748.
property law has apparently continued in force after 1938. The particular system of the Swiss conflicts law extends to the property effects of marriage.\textsuperscript{78}

The domicil in question has been generally and still is the domicil of the husband at the time of the celebration of the marriage. This principle, derived from the old ideas of coverture and merger, as in England, is preferred in the United States as a simple and unequivocal test to indicate the matrimonial center, more reliable than the concept of first conjugal domicil. Yet another view has been taken in Switzerland and increasingly in Latin America, where the law of the first domicil actually established by the husband and wife in common is declared applicable.\textsuperscript{79} But as this doctrine needs to be supplemented when the parties, because of premature death or separation or continued migration, never establish a common domicil, the husband’s domicil at the marriage has to be utilized as an inevitable emergency test.\textsuperscript{80} The \textit{Código Bustamante} (art. 187) adopts this method also in case the parties have no common nationality.\textsuperscript{81}

These divergent concepts are obviously part of the marital property laws, so as to make characterization of the domicil dependent on the applicable law.

2. Nationality

In other countries,\textsuperscript{82} the nationality of the husband is the test adopted and is preferred to the possibly different nation-

\textsuperscript{78} Switzerland: NAG. arts. 19, 20, 32; cf. HUBER–MUTZNER 472.
\textsuperscript{79} Switzerland: BG. (Sept. 19, 1929) 55 BGE. II 231. Treaty of Montevideo on international civil law, text of 1940, art. 16.
\textsuperscript{80} Brazil: Introductory Law of 1942, art. 7.
\textsuperscript{81} Opinion adopted in Switzerland following TEICHMANN; see STAUFFER, NAG. 87f no. 13; BG. (Sept. 19, 1929) 55 BGE. II 230.
\textsuperscript{82} Germany: EG. art. 15, followed by Hague Convention on Marriage Effects, art. 2.


Bulgaria: GHÉNOV, 6 Répert. 192 no. 68; GANEFF, 4 Leske–Loewenfeld I 818.
ality of the wife. In this field, unity and clarity of the regime to govern the effects of marriage on property are considered more important than attempts to satisfy both national laws. This contrasts markedly with the controversial literature respecting the effect of divided nationality on personal marital relations. 83

Following the general trend from nationality to territoriality, 84 however, the courts of some countries are inclined to apply their own municipal law, if the wife was a national of the forum before the marriage or at the time of suit or if the first marital domicil was established at the forum. 85 In France,

China: Law of 1918, art. 10 par. 2.
Finland: Law of 1929, art. 14 par. 2.
Guatemala: Law on Foreigners (1936) art. 40; C. C. (1933) art. 116 (in cases of common nationality of the parties).
Greece: C. C. (1940) art. 15.
Hungary: Répert. 463 nos. 83, 83 bis, 88.
Iran: C. C. art. 963.
Japan: Law of 1898, art. 15.
The Netherlands: Hof Amsterdam (June 6, 1919) W. 10444; VAN HASSELT 6 Répért. 630 no. 170.
Poland: Law of 1926 on private international law, art. 14 par. 3.
Portugal: C. C. art. 1107, cf. art. 16; CUNHA GONÇALVES, 1 Direito Civil 689.
Rumania: Cass. (Feb. 23, 1937) affaire Grigoriou, 7 Giur. Comp. DIP. no. 189.
Spain: C. C. arts. 9 and 1325 as currently interpreted; see MANRESA, 9 Comentarios al Código Civil Español (1908) 199.
Sweden: Law of June 1, 1912, § 1 no. 2.
83 In this field only isolated voices have protested the dominant doctrines such as 2 ZITELMANN 749 who advocated a compulsory system of separate property in nationally mixed marriages.
84 See supra pp. 151 ff., 348.
85 In Spain, Spanish law has been applied where the marriage is celebrated in Spain and the wife is a national; see TRÍAS DE BES, 31 Recueil 1930 I 658, 680.

this trend has inspired a draft proposal of the Société d'études législatives, basing the property regime on the law of the place where the parties “fix” their domicil immediately after marriage, of which the last version significantly limits itself to provide for the application of French law in the case of a first French matrimonial domicil.\(^{86}\)

On the other hand, the far-reaching arm of the national law is exhibited by the declaration of the Italian Supreme Court that a regime of general community of property, under which the spouses in Argentina believed they were living, was inapplicable, because this regime was forbidden to them as Italian nationals by article 1433 of the Civil Code (of 1865).\(^{87}\) The disharmony between the Italian nationality principle and the Argentine domiciliary principle has attracted attention, in view of the millions of Italian immigrants living in Argentina, and has resulted, if not in concessions to the domiciliary law, at least in the suggestion that the parties should be induced to declare a choice of law on their marriage.\(^{88}\)

Illustration.\(^{89}\) A German married woman domiciled in Zürich, Switzerland, contracted a loan with a Swiss bank. The contract was, without doubt, governed by Swiss law. The question, however, whether she could, without her husband’s consent, make her nonreserved property liable, was answered in Germany under the German law of nationality, while a Swiss court would have applied the Swiss law of domicil. Court actually applied the law of New York and not the Brazilian general community system. But the New York regime could not govern immovables in Brazil. Moreover, under the principle of renvoi, Brazilian law was competent in every respect. In the cases of São Paulo (VALLADÃO 133) the law of the forum was undisputed.


\(^{87}\) Cass. Roma (April 16, 1932) Foro Ital., II Massimario 1932, 282 no. 1376; \textit{cf. Udina, Elementi} 184 no. 135; \textit{Fedozi} 446.


\(^{89}\) \textit{Bay. ObLG.} (May 11, 1929) IPRspr. 1929, no. 75.
Law of the Place of Celebration

The law of the place of celebration has been invoked but rarely. Except within the strict confines of title questions, the situs of movables is attributed no importance in any law.

4. Renvoi

Divergences between the law of the situs and the personal law (for instance, in the case of immovables in the United States), or between the proper law (French practice) and other principles, make place for renvoi. If two French nationals domiciled in the United States are married, under American law their movables are governed by the law of the state of their domicile; French courts would probably arrive at the same result by construction of the parties' intention. German courts would follow the presumed French decision under the statutory command of renvoi (EG. art. 27).

It is likewise by renvoi that, in Germany, the lex situs governs the effects of marriage on immovables owned by Americans. German courts have interpreted this renvoi so broadly that all questions determined in the United States according to the lex situs of immovables are by them decided in conformance with the German law applicable to immovables located in Germany.

Illustration: An American wife in New York owned German immovables. The law of the matrimonial domicile, New

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90 Argentine Civil Marriage Law (1888) art. 5 par. 1, probably presuming that the marital domicile is at the place of celebration. Texas Ann. Rev. Civ. Stat. (Vernon, 1940) art. 4627 declares expressly that removal to Texas subjects the marital rights of persons "married in other countries" to Texas law.

91 See the decisions above, n. 54, and LEWALD, 29 Recueil 1929 IV 567. When renvoi was followed by OLG. Colmar (Feb. 12, 1901) Clunet 1903, 666, 11 Z.int.R (1902) 282, it was done under French law, but the court was German at the time.

Spain: see MANRESA, op. cit. supra n. 82, at 205.

92 OLG. Colmar (Aug. 24, 1911) 4 Rhein Z.f.Zivil-und Prozessrecht 295; cf. OLG. München (March 15, 1913) 30 ROLG. 45 (renvoi by Hungarian law); OLG. Breslau (Oct. 31, 1929) JW. 1930, 1011.
York, did not require the husband's joinder for conveying the land. Under German matrimonial law, however, the land was a part of those assets of the wife of which she could not dispose without her husband's consent. The German court held that the American renvoi to the lex situs resulted in the application of all the rules of German law on matrimonial property and that, therefore, the husband's consent was necessary. Thus, the ordinary German conflicts rule on capacity to contract was not applied. Similar arguments have been made in Switzerland.

The French courts are in a different position, as their doctrine of renvoi yields to their doctrine that the matrimonial property law must be supreme and unqualified.

The problem arising from the different scope of European and American marital property laws in the application of renvoi has not yet been properly explored. It seems obvious, however, that renvoi must be applied when the two foreign laws involved agree with each other in a certain result. Suppose that Italian spouses are domiciled first in Italy and then in Switzerland; a Swiss court would apply the Italian system of separate property so far as the mutual relations of the spouses are concerned, and Swiss law of "property union" with respect to their relations to third persons. In like case, an English court would strictly follow the Swiss court, provided the parties retain their Swiss domicil. Would an American court, disregarding the Swiss partial recognition of Italian law, also apply the Swiss principles of "property union" between the parties? Another question is still more delicate: Would an American court introduce its own distinction between movables acquired before and after marriage?

94 HUBER-MUTZNER 476 n. 417.
95 See supra n. 35 and infra n. 122.
IV. The Problem of Mutability: Change of Personal Law During Coverture

1. Change in Legislation

If altered during the marriage, the governing municipal law, according to principles generally recognized in Europe, rules in its changed form. The same law also determines what retroactive effect changes have on the matrimonial relationship.

In the United States, the Fourteenth Amendment in some measure limits retroactive state legislation.

2. Change in Status

It is an old question whether alteration of the initial domicil alters marital relations. The question now comprehends any change in the personal law and is of extraordinary importance in view of the enormous differences of matrimonial property systems and the multiplied migrations of our time.

The former conception in Germanic countries seems to have been that the legal incidents of property are only an outgrowth of the personal relations between the spouses. The personal regime being mutable, the property system was held mutable too. This concept was followed in Switzerland, England, and, before the German Civil Code, in the northwestern parts of Germany and in Baden.

Nevertheless, as early as 1265 A.D., the Spanish Partidas, which have been so influential in the Americas, declared the matrimonial regime immutable in the face of a change in personal status.

In France from the times of the postglossators, the prob-

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96 E.g., Cour d'Aix (April 28, 1910) Clunet 1911, 199 (change from Italian to French law by the annexation of Nizza in 1860).
97 HABICH 128 and the general opinion in Germany.
98 See the interesting Note, 16 Cal. L. Rev. (1927) 399.
99 TEICHMANN, Über die Wandelbarkeit oder Unwandelbarkeit des gesetzlichen ehelichen Güterrechts, bei Wohnsitzwechsel (Basel, 1879); 2 ZITELMANN 725.
100 Partida IV, ley 24, tit. XI, a very clear and neat statement.
lem was controversial; the victory of the theory construing marital property law as a tacit contractual system naturally brought with it the assumption of permanence. Moreover, in French municipal law itself, the immutability of marital regulation of property was proclaimed so as to prohibit postnuptial settlements of any kind, and finally also in the Civil Code (arts. 1394, 1395), even in the case of divorce and remarriage of the spouses (art. 295 par. 2), in the belief that, to secure conjugal peace and to protect husband and wife against their respective maneuvers as well as those of their creditors, the system of marital property must be stable. Therefore, the principle of immutability was considered imperative. 101

On the contrary, it is characteristic of modern codifications to permit marriage settlements during marriage. 102

3. The Principles

(a) Full mutability. In England, the House of Lords decided in the Hog case (1804) 103 that parties, acquiring a domicil in Scotland after fifteen years of marriage, thereby became subject to the Scotch rule of community, and Lord Eldon held that the rule applied to all movables which Hog possessed. However, the communio bonorum of Scotch law was not a true marital regime but only a mode of distribution, and hence adequately governed by the law of the Scotch domicil of the deceased at the time of his death rather than at the time when he acquired such domicil. 104

101 The entire Latin group followed this model.
102 The United States: see 3 VERNIER § 156.
Denmark: Law on Effects of Marriage of 1925, c. 4 § 28.
Germany: BGB. § 1432.
Greece: C. C. (1940) art. 1405 (for modification of settlements only).
Guatemala: C. C. (1933) art. 103.
Sweden: Marriage Law of 1920, c. 8 § 1.
Switzerland: C. C. art. 179 par. 1.
103 Lashley v. Hog (1804) 4 Paton (Scotch Appeals Case) 581. DICEY 767 Rule 186; CHESHER 493.
104 WESTLAKE 73ff.; FOOTE 354 (both concluding for the system of full immutability).
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In Switzerland, the principle of mutability, limited to the relations of the spouses to third persons, applies to a married couple transferring their domicile to Switzerland.\(^{105}\)

(b) Mutability of new acquisitions. In the United States\(^{106}\) and Argentina,\(^{107}\) the principle of mutability is established in the sense that only movables acquired after the change of domicile are governed by the law of the new domicile. The same principle was adopted by the Scandinavian Convention on Family Law (art. 3) and is sometimes assumed to be English law.\(^{108}\) In the United States, the continuing effect of law on property once acquired\(^{109}\) is the more important principle, since the interests in movables acquired under the former domiciliary law continue in any objects that may replace these movables,\(^{110}\) so long as the proceeds of the original goods can be traced.\(^{111}\) (In the language of the civil law, a subrogation; *pretium succedit in locum rei, and res succedit in locum pretii.*) Moreover, the authorities emphasize that transfer of movables from the state where they have been acquired or from one domicile to another does not alter their condition, either as separate or community property.\(^{112}\) This doctrine

\(^{105}\) NAG. arts. 19, 20.


\(^{107}\) Argentine Civil Marriage Law (1888) art. 5 par. 2, followed by Paraguay: Civil Marriage Law (1898) art. 5 par. 2.


\(^{109}\) Brookman v. Durkee (1907) 46 Wash. 578, 90 Pac. 914; Restatement §§ 291, 292.

\(^{110}\) Schouler, 1 Domestic Relations § 592; 1 Wharton 415ff. § 193a.

\(^{111}\) McAnally v. O'Neal (1876) 56 Ala. 299, 302.

\(^{112}\) Restatement §§ 291–293. Brookman v. Durkee (1907) 46 Wash. 578, 90
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is generally thought to be protected by the constitutional guarantees against deprivation of property without due process of law. Only the technical nature of community property may have to be construed, after a transfer, so as to agree with the new lex situs. The debts contracted by the husband or wife likewise retain their nature as enforceable on separate or community property respectively.

Under section 291 of the Restatement, however, control by the former domiciliary law ends when "the interests are affected by some new dealings with the movables in the second state." The exact meaning of this proposition is in doubt. Beale, in another place in his treatise, referring to Drake v. Glover, where it was said that "The lex loci contractus governs, 'as to the nature, the obligation, and the interpretation of a contract,'" remarks only that dealings with movables must be carried out in accordance with the law of the new domicil.

How these rules work in practice has been illustrated during a century in a few cases only, covering only a part of the situations imaginable and leaving incertitude in many respects.

(c) Immutability. In the field of the law of conflicts, immutability is proclaimed ordinarily by all systems following

Pac. 914 and many other decisions; see 12 L.R.A. (N. S.) 921; 57 L.R.A. 353. In Europe it goes without saying that these rules apply.

113 In re Drishaus' Estate (1926) 199 Cal. 369, 249 Pac. 515; In re Thornton's Estate (1934) 1 Cal. (2d) 1, 33 P. (2d) 1.

114 As to moving domicil from a separate property state to a community property state: Hyman Lichtenstein & Co. v. Schlenker (1892) 44 La. Ann. 108, 10 So. 623; Clark v. Eltinge (1902) 29 Wash. 215, 69 Pac. 736; Huyvaerts v. Roedtz (1919) 105 Wash. 657, 178 Pac. 801. For the inverse situation no case is illustrative; see also De Funia, 1 Principles of Community Property (1943) 532, 533.

115 Note, 43 Harv. L. Rev. (1930) 1286, 1289.

116 2 Beale § 292.1; cf. Restatement § 291.

117 (1857) 30 Ala. 382 at 389 quoting Story § 219 § 263. This distinction is universally recognized.

118 Neuner, 5 La. L. Rev. (1943) 176, 178-182, supra n. 1, makes an interesting attempt to coordinate the cases.
the nationality principle and in addition by some others. Under this principle, the spouses continue under their former matrimonial law.

Switzerland has adopted this conception, so far as the rights of the parties between themselves are concerned. The Federal Tribunal has observed that rights created under the first law survive in such form as is consonant with a new statute.


China: Law of 1918, art. 10 par. 2.

Japan: Law of 1898, art. 15 par. 1.

Poland: Law of 1926 on international private law, art. 14 par. 3.

See moreover:

Greece: C. C. (1940) art. 15; formerly by interpretation of C. C. (1856) art. 4 § 3; 2 Streit-Vallindas 346 n. 22.

Guatemala: Law on Foreigners (1936) art. 40 last sentence.


Spanish Morocco: Dahir de la condition civil de los españoles y extranjeros, art. 13.

Decisions in the following countries:

Austria: 1 Ehrenzweig-Krainz (ed. 1) 105.


The Netherlands: applied in the case of a Dutch husband by KG. (Feb. 26, 1925) Z. des Deutschen Notarvereins 1927, 58.

Spain: Trías de Bes, 6 Répert. 253 nos. 103, 109.

Sweden: Sup. C. (July 31, 1931) Nytt Juridiskt Arkiv, 1931, 403, 7 Z.ausl.PR. (1933) 934 (Swedish spouses domiciled in the United States).

120 Quebec: Astill v. Hallée (1877) 4 Q.L.R. 120.

Denmark: Borum and Meyer, 6 Répert. 219 no. 44; cf. 10 Z.ausl.PR. (1936) 620, but see for another view Munch-Petersen, 4 Leske-Loewenfeld z. Ausl. PR. (1937) 96 no. 4.

Norway: Christiansen, 6 Répert. 575 no. 116; Synnestvedt, DIP. Scandinavie 262. This rule was overlooked in Muus v. Muus (1882) 29 Minn. 115, 12 N. W. 343, but probably would not have changed the decision.

Treaty of Montevideo on international civil law, text of 1889, art. 43.


121 See NAG. art. 19 par. 1, as contrasted to par. 2 and art. 31 pars. 2 and 3; BG. (Dec. 19, 1910) 36 BGE. II 619; BG. (Dec. 5, 1940) 66 BGE. II 234 no. 48. (Swiss spouses having transferred their domicil to a foreign country
Under the rigid French notions, this approach leads to strange results. In the case of a married couple, first domiciled in New York and then in France, the separate property system of New York was applied in every respect, even to French immovables of the husband acquired after the change of domicile. This was done, although the New York matrimonial law does not extend to foreign immovables and, besides, would not be applied by a New York court to objects acquired at a new domicile. This result was based on the principles of unity (assets regarded as an aggregate unit) and of immutability, both of which go together: “L'immutabilité et l'unité vont de pair; l'une ne peut se concevoir sans l'autre.”

4. Exception: New Marriage Settlements

Assuming immutability as a principle of conflicts law, the matrimonial law of the first domicil or first nationality decides whether there is mutability in the field of private law, i.e., the first personal law decides whether or not the parties may make a settlement under a changed personal law.

General Continental customary law has admitted an important exception, however, which is formulated by the German Civil Code (Introductory Law art. 15, par. 2), namely that if a foreign husband acquires German nationality after the marriage or if foreign spouses establish their domicile in Germany, they are allowed to contract a marriage settlement retained their regime established in Switzerland, except when the foreign law opposes it.)

122 Trib. civ. Versailles (May 15, 1924) with the conclusions of Counsellor Brachet, affirmed by Cour Paris (Oct. 17, 1924) Revue 1925, 240, 254. Easier to decide to the same effect was the case of Trib. civ. Seine (Jan. 17, 1924) Revue 1925, 226 (incommutability and indivisibility of the property separation of a naturalized American, former Frenchman, domiciled with his wife first in New York and then in France).

123 RG. (March 9, 1900) 10 Z.int.R. (1900) 281; RG. (Sept. 25, 1903) 13 Z.int.R (1903) 587. ANZIOTTI, Sui mutamenti dei rapporti patrimoniali fra coniugi nel diritto internazionale privato (Firenze, 1899) 121.
ment, even if no such agreement would be permitted by their former personal law.\(^{124}\)

The Hague Convention on Marriage Effects accepts this result in the case where both spouses acquire a new common nationality,\(^{125}\) but not where there is only a change of domicil\(^{126}\) nor where the husband alone changes his nationality. The more sweeping German statute has aroused much criticism,\(^ {127}\) which is justified in the case where the husband alone becomes a German national after marriage.

In the case where both parties change their status, it has been argued that a former personal law that allows them to modify their regime during coverture, invests them with a right effective after the parties leave its orbit, whereas, if it prohibits such modification, the prior law ceases to have a legitimate role.\(^ {128}\) This last argument suffices to prove that the solution of the question should be reserved to the new personal law. Various writers have suggested that, in the event of a change of personal law, the parties should be allowed to adapt their property relations to their new legal surroundings, irrespective of the municipal law of the first state and the

\(^{124}\) Followed by Poland: Law of 1926 on international private law, art. 14 par. 2.

\(^{125}\) Italy: C. C. (1942) Disp. Prel. art. 19 par. 2.

\(^{126}\) Nicaragua: C. C. art. 105.

\(^{127}\) Switzerland: C. C. art. 179 par. 2.

\(^{128}\) Sweden: Law of June 1, 1912, §1 no. 9.

\(^{129}\) KG. (Feb. 26, 1925) Z. des Deutschen Notarvereins 1927, 58 (settlement concluded by Dutchmen after having established themselves in Germany void). This restriction by the Convention of the rule of EG. art. 15 par. 2 is approved by Lewald, 103 no. 144, and others. Contra: under EG. art. 15 par. 2, the KG. (June 23, 1932) HRR. 1933, no. 205, recognized a settlement by Swiss nationals who had established their second domicil in Germany, whereby they agreed to a system of separate property in accordance with the German Code but not in accordance with Swiss C. C. art. 179 par. 2.

\(^{127}\) 2 Zitelmann 741 n. 401; Neumeyer, IPR. (ed. 1) 203; Kosters 468; Lewald 103 no. 144; 3 Frankenstei 310ff. who overrates the nationality principle.

\(^{128}\) Kosters 454.
general conflicts rule of the second state. Louisi­ana has in­
stituted such an exception to its otherwise rigid rule of im­
mutability.

The draft proposed by the French Société d'études légis­
latives provides that if the marital property was not governed
by French law and if both parties are of French nationality,
either by naturalization or reintegration—viz., of both, or
of the party not a French national—they may adopt a settle­
ment accepting a regime within a year. Under the recent
Brazilian law, a party who is naturalized may require, with
the consent of the other, that the judicial decree of his
naturalization should state the acceptance of the Brazilian
regime of general community property saving (acquired?)
rights of third persons.

5. Classification

The classification of the problem of mutability is theoreti­
cally easy; there can be no doubt that it belongs to the field
of effects of marriage on property. Most French writers,
however, think that immutability in French law implies a
certain incapacity, characteristic of the French regime, which
therefore, concerns status and as such is dependent on the na­
tional law. Nevertheless, the French courts place the

129 Switzerland: NAG. arts. 20, 32, 36b.
Italy: ANZIOTTI, op. cit. supra n. 123, at 65; DIENA, 2 Princ. 153ff.;
FEDOZZI 453.
130 La. Rev. Civ. C. Ann. (1932) art. 2329, as amended by Act No. 236 of
1910.
131 Bull. Soc. d’Études Lég. 1930, 175ff., art. 21; cf. ibid. 1928, 319ff. at
339ff. According to art. 26 as proposed by the French regime replacing a foreign
system, has an effect retroactive to the day of marriage, this is, however, without
prejudice to the rights acquired by third persons and the validity of regularly
performed acts of the spouses.
132 Brazil: Introductory Law (1942) art. 7 § 5.
133 To this effect in France, BATIFFOL, Revue Crit. 1934, 641.
134 2 ARMENJON 465 no. 218; BARTIN, 2 Principes 143 § 271; NIBOYET no.
710; VALÉRY 1096 no. 768; AUDINET 474 no. 589; CABLE in 4 Répert. 199
340 advocates the lex loci actus.
135 Cour Montpellier (April 25, 1844) D.1845.2.36; Cass. (req.) (June 4,
problem in the category of the régime matrimonial in a peculiar way. The Court of Cassation, in adopting the classification, emphasized as decisive the unity of the marital property law (régime légal), meaning thereby that parties who have once come to live under the French system of communauté légale are bound by it irrevocably, regardless of whether they are of French nationality. Parties, however, who have chosen or who are subjected to a foreign regime, may change to the French community system whenever such change is permitted by their first personal law.

Fortunately, no such queer controversy exists in any other country.

6. Renvoi

The renvoi problem is resolved by including in the governing law the conflicts rule respecting variability. For instance, two Americans, who have not made a marriage settlement, establish their domicil first in the United States and then in Germany. According to the American rule (Restatement § 290), on the one hand, newly acquired movables would be considered subject to the German system of community of administration. Under the German conflicts rule, on the other hand, the common law system of the first domicil would continue to apply to all property. The German matrimonial law will be applied, however, because its application is induced by the American rule of conflict of laws.

7. Rationale

Apart from the antiquated historical reasons that have influenced French developments, the invariability of the governing law has been explained as being required by the theory of


137 This is hailed by Lerebours-Pigeonnière 402 no. 340.
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vested rights, by the alleged function of the law first applying to give a definitive solution, by the need of the wife to be protected against arbitrary changes, and by other arguments equally weak. From a rational standpoint, there is only one reason for avoiding a radical change in the regime, the danger of confusion and unworkability in maintaining two heterogeneous systems at the same time, a danger illustrated under the American rules pursuant to which a former regime partially survives with respect to movables acquired before the change of domicile or replaced at any time, and makes itself felt in other ways.

These difficulties, it is true, seem not to have attracted much attention in this country. For some unknown reason, cases dealing with the topic are relatively few.

On the other hand, the permanence of property relations, more completely adopted in Europe than in this country, raises problems in connection with other conflicts rules. While the law governing marital property is fixed on the day of the marriage or of acquisition, the law controlling succession to the estate of a predeceasing spouse depends on his nationality or domicile as of the day of his death, and the law governing the personal relations between the spouses admittedly changes with every change of domicile or nationality. In every municipal legislation, these three matters are to a certain degree coordinated. Their harmony may be greatly disturbed by combining in the applicable laws two or more divergent principles, one for marital property, a second for personal relations, and a third for succession upon death. Difficult problems of charac-

138 In connection with an assumed implied contract, a vested right (jus adquisitum) was at the base of the Prussian Allgemeine Landrecht; see Prussian Obertribunal (March 11, 1873) 69 Entsch. kgl. Ob. Trib. 101. Among the modern writers see PILLET, Principes 521 no. 289; DIENA "La conception du droit international privé d’après la doctrine et la pratique en Italie," 17 Recueil 1927 II 343, at 416: RAAPE 304; WIERUSZOWSKI, 4 Leske-Loewenfeld I 64 n. 373.
139 1 BAR § 184; KOSTERS 453.
140 1 BAR, loc. cit.; WEISS, 3 Traité 647.
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Characterization, much discussed in recent literature, result. Those regarding the relation between marital property and inheritance law will be illustrated hereafter.

The position of third states is particularly delicate. In this country, an acquisition by an Italian married couple, after emigration to the United States, will be treated according to the law of the state where the parties establish themselves. Italian courts, however, hold that Italian matrimonial law continues to govern in every respect. What should be done by a court in Cuba or France? Under the nationality principle there in force, these two countries generally agree with the Italian conception, although such a decision seems ill-advised.

The circumstance, finally, that the German doctrine has adopted the principle of mutability in the related field of paternal rights in the property of a minor child, further suggests that all existing rules are unsatisfactory and that entirely new methods should be devised.

V. MARRIAGE SETTLEMENTS

1. Characterization

What agreements are covered by the rules dealing with marriage settlements, is in practice only to be ascertained by comparative law.

2. Permissibility

In the United States, the ordinary rule respecting contracts is applied to antenuptial agreements. Hence, the Restatement declares applicable the law of the place of contracting. The

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141 Doubt of the advisability of the principle on this ground has been considered by Neuner, Der Sinn 67, 68.
142 Cf. 3 Frankenstein 307.
143 See infra, pp. 558, 606-607.
144 Rabel, 5 Z. ausl. PR. (1931) 261 and 283; Joelson, op. cit. supra n. 1.
145 Restatement § 238 comment b, § 289 comment c, should be read with a view to the criticism by Stumberg 288, 289 referring to Hutchison v. Ross (1933) 262 N. Y. 381, 187 N. E. 65.
ARGENTINE CIVIL CODE states the same rule.\footnote{This place, however, may easily coincide with that of the first marital domicile.\footnote{Generally, the conditions under which a marriage settlement is permitted are determined, in the absence of an antenuptial agreement, by the law governing the marital property. This law decides questions such as are incident to the English doctrine of freedom of contract, to the Italian provisions that the parties may choose only between narrowly defined regimes (viz., the dowry system or the community of gains), or to the German provision that the parties, unless the husband is domiciled abroad, may not, merely by referring to the foreign law and without expressly stating its rules, incorporate a foreign regime in their contract. The same law also controls the question whether the parties may insert clauses in Argentina.}}

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\footnote{Argentina C. C. arts. 1220 (new 1254), 1205 (new 1239); cf. 2 VICO 48 no. 69, ibid. 50 no. 72; Cám. civ. I Cap. (June 27, 1941) J. A. 1942. I 926, 937 (explains in a learned comment that the restrictions on community property settlements do not apply to foreign-concluded contracts).}

The Brazilian C. C. of 1916, Introduction art. 8 provided that the spouses may choose the Brazilian law. On this unfortunate addition proposed by the Senate and approved by the House of Representatives, which has been called mysterious, see BEVILAQUA, 6 Répert. 168ff. no. 50.

\footnote{See, for instance, Le Breton v. Miles (N. Y. 1849) 8 Paige 261 (intended domicile in France); Spears v. Shropshire (1856) 11 La. Ann. 559, 66 Am. Dec. 206; Davenport v. Kernes (1873) 70 Ill. 465; Mueller v. Mueller (1899) 127 Ala. 356, 28 So. 465.}

\footnote{Italy: C. C. (1865) art. 1381; C. C. (1942) art. 161.}

\footnote{Spain: C. C. art. 1317.}

\footnote{The Netherlands: BW. art. 198, contrary to French law, see PLANIOL, RIPERT, et NAST, 1 Rég. Matr. 47 no. 36.}

\footnote{BGB. § 1433, followed by Italian C. C. (1942) art. 161. Germans in Belgium may by virtue of § 1433 choose the Belgian community of gains, RG. (March 16, 1938) 52 Seuff. Arch. no. 96, JW. 1938, 1718. The Reichsgericht even extended this benefit to Germans simultaneously citizens of another state, beyond the limits of § 1433 par. 2, RG. (March 13, 1924) Leipz. Z. 1924, 741. Contra: the Hooge Raad (June 24, 1898) W. 7141; H. R. (Jan. 14, 1926) W. 11459, and KOSTERS 447, have seen in a similar Dutch provision, BW. art. 198, a rule on formalities not binding Dutch subjects abroad; but see the criticism by HIJMANS 108; OFFERHAUS, Gedenkboek 1838-1938, 707.}

An old decision of Louisiana, Bourcier v. Lanusse (1815) 3 Mart. O. S. 581 held that the submission of the parties to the coutume of Paris was invalid, the C. C. of Louisiana not permitting parties to choose a law other than of a state of the union.
favor of third persons or provisions looking to the death of one of them.

The law meant here is, of course, the law of the husband's or of the matrimonial domicil in certain countries and the national law of the parties in the great majority of civil law countries.

In both systems, the validity of the settlement is suspended until the celebration of the marriage. In England, the applicable law is considered to be that intended by the parties, which, only by rebuttable presumption, is identified as that of the matrimonial domicil.

The French courts again have developed a contrary view. Where two Italians marrying in France stipulate universal community of assets, the contract is prohibited and void in Italy but has been held valid in France, either by application of the law of the situs or nowadays generally under the doctrine of implied contract.150

On principle, an antenuptial agreement made by foreign immigrants before coming to this country will be recognized in the United States.151 But they cannot be sure that a settlement validly made here will be recognized in their homeland.

3. Formalities

The rule locus regit actum governs the formalities of marriage settlements. For this particular subject matter, it is recognized also in England that this rule as generally understood is optional, that is, it applies in case of noncompliance with the formalities of the proper law.152


151 See, however, infra n. 156.

The Hague Convention on the Effects of Marriage, article 6, has adopted some peculiar provisions; either the *lex loci actus* or both national laws of the parties must be observed.

4. Capacity

It is generally held outside the United States that capacity to contract an antenuptial agreement is entirely distinguishable from capacity as envisaged under the personal or the property law relations of husband and wife. In the common assumption, it is not affected by the marriage but flows from the general status rights of the party. Therefore, capacity to enter into a marriage settlement before marriage is governed by the law of the domicil or nationality of the party at the time when the agreement is made, the same as the capacity of an unmarried person to make any other kind of contract.

However, in disagreement with this view, the Hague Convention on the Effects of Marriage (art. 3) has referred to the national law at the time of the marriage rather than that of the contract. By a remarkable coincidence, the English writer Cheshire suggests that on principle the law of the matrimonial domicil should prevail. Although his main impulse derives from his peculiar proposal to extend the marital law to capacity to marry, it may be argued on another ground that the marital law governing the objective permissibility of settlements should likewise cover their subjective requirements.

Nevertheless, in recent times, the dominant opinion has been well supported by the emphasis laid on the independence of married women. If the wife retains her own personal law during the marriage, her status deserves to be respected in the case of postnuptial settlements—in accordance with their basic significance—and the more so in the case of contracts preceding the marriage.

The right to alter the property regime during coverture is determined in the same way as in the absence of a settlement. The very origins of the doctrine of immutability in France were connected with antenuptial agreements. Because the property of spouses was supposed to be governed by such an agreement for the whole duration of their union in all jurisdictions, tacit agreements were implied. The doctrine was applied in England in the case of a French marriage and is used in Canada in the analogous case of a contract made or a marriage celebrated without express settlement in Quebec.

Also, the American courts basically consider express marriage settlements to be valid and unaffected by any change of status. But they have construed some agreements as intended solely to cover property owned at the time of the marriage or acquired while the parties resided at their first conjugal domicile. This was done particularly in the case of immigrants who had settled their matrimonial property in the old country without contemplating emigration. A certain tendency in favor of such a presumption may still be observed, sometimes subject to question. According to the English and Continental point of view, a settlement applies to all assets of the parties wherever and whenever acquired. This interpretation is certainly convincing, where change by postnuptial agreement

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154 De Nicols v. Curlier [1900] A. C. 21 regarding movables; In re De Nicols, De Nicols v. Curlier [1900] 2 Ch. 410 with regard to immoveables (implied French contract was held enforceable against property in England).

155 See supra n. 65.

156 Long v. Hess (1895) 154 Ill. 482, 40 N. E. 335 (the parties having immigrated many years ago; their settlement made in the grand duchy of Hesse was declared not binding); Castro v. Illies (1858) 22 Tex. 479, 73 Am. Dec. 277; Fuss v. Fuss (1869) 24 Wis. 256. More recently: Hoefer v. Probasco (1921) 80 Okla. 261, 196 Pac. 138 (avoiding by mere construction of the intention of the parties for clear equitable reasons the interference of the agreement to a homestead acquired in a new domicile).

after change of status is permitted and there is actually no new settlement.

This contrast and the conflict of policy behind it are sharply illustrated by the well-known case of *Hutchison v. Ross*,\(^{158}\) where the higher New York courts applied the *lex situs* to give effect to transactions between spouses who were continuously domiciled in Quebec and lived under a marriage covenant of property separation, immutable under the law of Quebec. This leading case in conflict of laws on trusts has been considered a violation of the marital law of the domicil, and the lawyers of Quebec resented the Appellate Division's\(^{159}\) interpreting the covenant as not intended to bind the spouses during their whole marriage or to subject them definitely to the law of Quebec, a construction which has been called fantastic.\(^{160}\)

6. Settlements Concerning Immovables

The Restatement declares that settlements concerning immovables are to be construed in accordance with the law of the situs, excepting the validity of the contract.\(^{161}\) This statement has been criticized as too broad,\(^{162}\) but it is misleading as a whole unless it is remembered that the Restatement recognizes renvoi from the *lex situs* (§ 8, (1)). The "*lex situs*" in this case simply consists of a conflicts rule common to all jurisdictions of this country. First, the validity of the contract is ascertained according to the law of the place of contracting or whatever law is deemed to be applicable thereto. Second, under another conflicts rule which is not more "*lex situs*" than the first, the

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\(^{159}\) *Ross v. Ross* (1931) 233 App. Div. 626, 253 N. Y. Supp. 871. The argument was not adopted by the Court of Appeals (see note 158, *supra*).

\(^{160}\) 1 *JOHNSON* 449, Appendix (devoted to the case).

\(^{161}\) Restatement §§ 237, 238 comment b; 2 *BEALE* § 238.2.

\(^{162}\) *NEUNER*, 5 La. L. Rev. (1943) 184, *supra* n. 1, explains that the first part of the rule is too broad.
agreement is recognized as having full effect in the state of the immovable, unless a particular public policy is offended, and likewise is to be recognized in all third states. An antenuptial contract concluded between residents of Nebraska in that state is applicable, beyond any doubt, "to real property situated in Kansas owned by the husband at the time of his death," in accordance with "the general rule that antenuptial agreements, equably and fairly made are valid and enforceable." 163

In the great majority of countries, this result is unchallenged, on the premise that immovables and movables are parts of a unit.

7. Obligatory Settlements

An interesting experiment has been made in Guatemala, where a marriage settlement in the form of a public instrument must be executed when an alien or naturalized bridegroom intends to marry a Guatemalan woman. 164 European authors have suggested similar measures for aliens marrying in the country or foreign married couples acquiring citizenship. 165 Many uncertainties would be avoided by some cautious pressure in this direction.

VI. PROTECTION OF THIRD PARTIES

Opinion is strongly divided concerning the advisability and means of protecting third parties. While, according to the older conception, the personal law could be invoked against everyone, in recent times protection of third parties within the jurisdiction results from the system of territoriality or from exceptions to the rule of the personal law.

164 Guatemala: Law of Foreigners (1936) art. 41; C. C. (1933) art. 100 no. 41; cf. MATOS 356 no. 241.
165 See authors cited supra n. 88. See, in particular, the detailed requests that marriage officers should address to the parties, as proposed by ROGUIN at the Hague Conference of 1900, Actes de la Troisième Conférence de la Haye (1900) 231.
1. No Exception to the Personal Law

No exception to the application of the personal law is granted to third parties in France, Poland, and a few other countries. French courts, when they actually recognize that foreign law governs the property regime, consider it the duty of anyone dealing with the husband or wife to inform himself about the legal background.¹⁶⁶

2. Exception with Respect to Third Persons

Conversely, in a system historically rooted,¹⁶⁷ Swiss law distinguishes sharply between the relations of husband and wife to each other and their relations with third persons. Irrespective of the law applying to the former, the latter are governed by the matrimonial law of the conjugal domicil, which determines especially the legal position of the wife in relation to the husband's creditors in the case of his bankruptcy or of an execution levied upon his property.¹⁶⁸ This proposition sounds attractive, but its application is complicated¹⁶⁹ and, as the Swiss Federal Tribunal itself was compelled to admit, results in certain curious consequences.¹⁷⁰ It was criticized by Meili as early as 1902.¹⁷¹

The Código Bustamante declares in article 189 that the forum's provisions on the effects of marriage as respects third


¹⁶⁷ See in particular Prussian Allg. Landrecht, II Tit. 1 §§ 351, 352 declaring the law of the first domicil immutable except in relation to third persons. The code referred only to the case where married persons, without a marriage settlement, move from a country of separate property to another of community property, but the courts extended the rule to the converse case; see Obertribunal (March 28, 1846) 13 Entsch. kgl. Ob. Trib. 297 no. 24 where it is stated that the continuance of the original regime should not harm third parties acting in good faith.

¹⁶⁸ NAG. art. 19 par. 2.

¹⁶⁹ SCHNITZER 194ff.; HUBER-MUTZNER 469ff.; BG. (July 10, 1907) 33 BGE. I 617, 622; BG. (July 14, 1909) 35 BGE. II 463, 470; BG. (Dec. 10, 1910) 36 BGE. II 616, 618; BG. (Oct. 17, 1918) 44 BGE. II 333.

¹⁷⁰ BG. (July 11, 1929) 55 BGE. III 732; cf. also BG. (Dec. 17, 1908) 34 BGE. I 734, 737.

¹⁷¹ ΜEILI § 75; see JOELSON, οp. cit. supra n. 1, at 108–116.
persons belong to the sphere of public policy of the forum, i.e., that they apply even where a foreign personal matrimonial law otherwise governs.

3. Exception in Favor of Third Persons in Good Faith

Under the German provisions, a person may rely on the results of German matrimonial law when he contracts with a married foreigner domiciled in Germany, if he is ignorant of the fact that the spouses are governed by some foreign regime and this fact is not recorded in Germany in the proper public register; likewise a married woman who carries on an independent business enterprise in Germany with the consent of her husband is purported to have capacity as under German law, although she may otherwise be governed by a foreign regime.

Illustration: Suppose an American married couple domiciled in Germany. Nothing has been entered in the public record respecting matrimonial property rights. The husband sold a crop of grain owned by his wife to a buyer who was ignorant of the fact that the husband and wife were living under the American system of separation of assets, under which, contrary to the German law, the husband had no power to sell and transfer his wife's crop. The German rule granting the husband such power is to be applied.

Other countries also prescribe that a foreign regime must be publicly recorded and establish consequences for the parties' failure to do so.

In effect, the German system is not much different from the Swiss, because parties living under a foreign system of matrimonial law otherwise would apply.
matrimonial property law very rarely take the trouble to have this fact recorded.

The international relation between these two systems has been described by the Swiss Department of Justice,\textsuperscript{174} to the effect that a Swiss married couple living in Germany have to observe the German prescriptions of registration to make their marriage settlement effective, even in cases where otherwise Swiss law would be applicable under the conflicts rule of the court. Thus, a Swiss national domiciled in Switzerland, who contracts with a Swiss husband or wife domiciled in Germany, must inform himself concerning the property system valid in Germany. In addition, Swiss legislation has given such spouses opportunity to publish their property regime with the registrar of their home canton, effective for transactions in Switzerland.

In the United States, no particular provisions exist for such protection. Sometimes it has been assumed that the application of the \textit{lex situ} to the marital property in immovables has the purpose of giving third parties the legal position they are likely to suppose,\textsuperscript{175} or that, for the benefit of a bona fide purchaser or a creditor, movables are occasionally treated as if they were not brought from a former domicile.\textsuperscript{176} But the cases do not seem to give such assumptions any considerable support.

\textbf{VII. Questions of Classification}

1. Composition of Community Property

Two cases of the German Reichsgericht undertake to determine whether the community fund includes certain rights which taken by themselves are governed by a law other than that of the community property. In the first case, German parties were married under a German contract of community of

\textsuperscript{174} See 29 SJZ. (1932-33) 25 no. 18.
\textsuperscript{175} See NEUNER, 5 La. L. Rev. (1943) 172, \textit{supra} n. 1.
acquests. The wife having acquired a tort claim under Belgian law, the court properly applied German matrimonial law to the problem whether the claim belonged to the community. But the preliminary problem whether the claim was alienable, so that it could fall into the community fund, should have been decided under Belgian law.\textsuperscript{177}

In the second case, German spouses, living abroad, had validly settled their community regime under Belgian law. In the proceedings for partition of the community fund, the question arose whether the rights of the husband in a German partnership were a part of the community fund. The court correctly inquired into the alienability of the right, applying the German law governing the partnership and deciding that the right was not alienable in the precise sense in which alienability is required in the Belgian and French law of community property.\textsuperscript{178}

A comparable case in this country is where the husband buys a chattel outside the domiciliary state. Thus, in \textit{Snyder v. Stringer},\textsuperscript{179} the husband, domiciled in Washington, acquired an automobile in Iowa with earnings made in Montana and Iowa. Under the laws of these two states, the earnings and the automobile purchased therewith would have been acquired as the husband's separate property, but they were deemed to be community property by the law of the domiciliary state, Washington.

2. Marital Property and Inheritance

(a) \textit{Importance of defining limits of each field}. To draw the proper line of demarcation between marital property law and the law of succession upon death is important in defining

\textsuperscript{177}RG. (May 30, 1919) 96 RGZ. 96. Comments in various sense by \textsc{Mellendorf} 187; \textsc{Raape} 309; \textsc{Frankenstein} 400 n. 52.

\textsuperscript{178}RG. (March 16, 1938) JW. 1938, 1718. For another interpretation \textsc{Robertson}, Characterization 152 n. 60.

\textsuperscript{179} (1921) 116 Wash. 131, 198 Pac. 733; cf. \textsc{Leflar}, 21 Cal. L. Rev. (1933) 232, \textit{supra} n. 1.
the scope of conflicts rules. In the United States, Great Britain, and Argentina, the law governing movable marital property is determined differently from that governing inheritance of movables; in most countries, the difference also includes the rules on immovables.

It has been asked, for instance, in England whether the English rule that a will is revoked by marriage is to be classified as a rule of matrimonial or testamentary law. As the rule has been held to be essentially connected with the marriage relationship, its effect is measured by the law of the matrimonial domicil, "i.e. in most cases by the lex domicilii of the husband at the time of marriage," rather than by the lex domicilii of the testator at the time of his death. This reasoning is unsound, and the decision ought to be overruled.

Many international treaties contain special clauses providing rules for the distribution of estates upon death. For instance, one of the oldest bilateral treaties on jurisdiction, that between France and Switzerland of 1869, provides that the assets of a Frenchman or a Swiss dying within the territory of the other country should be distributed by the court and under the law of his last domicil in his home country. The Swiss Federal Tribunal held in a recent case that the question whether certain assets belonged to the wife's separate property or to the acquisitions of marriage is a matter of marital law and does not come within the treaty.


\[182\] CHESHIRE 523.


\[184\] Treaty on the jurisdiction and execution of judgments in matters of private law of June 15, 1869, art. 5 par. 1.

\[185\] BG. (Dec. 4, 1936) 62 BGE. I 235, Praxis 1937, 61.
The two fields of marital property and inheritance are not separated in the systems of municipal law by a uniform or invariably clear line. This fact has given rise to various useless theories that have greatly overburdened the so-called problem of characterization. The only acceptable method of treatment has proved to be that based on general principles. Repeated comparative research has revealed a basic criterion that more or less obviously underlies all legislations, namely, that matrimonial law determines the interests of husband and wife during the marriage, including the specification of the assets of either spouse on the dissolution of their conjugal life. In the event of one spouse’s predeceasing the other, the law of inheritance regulates the distribution of those assets which belonged to the deceased in accordance with the matrimonial law. This distribution is particularly significant where the matrimonial regime is a community property system. On the death of one spouse, two partitions take place, either actually or at least for the purposes of an accounting or a fictitious liquidation. First, all property of husband and wife is examined to ascertain what constitutes the community fund and which part of it continues to be owned by the surviving spouse, while the other part, together with the predeceased spouse’s separate estate, forms the inheritance. Second, administration and distribution of the assets designated by the matrimonial law as the separate property and the part of the community fund belonging to the deceased, are governed by the law of inheritance according to the will or the rules of intestacy, as the case may be.\(^\text{186}\)

This distinction is adequate to satisfy the theoretical needs of all legislations and therefore to serve the needs of international application as required by the law of conflicts. Of course, the distinction is so general that it leaves occasional

doubts as to classification. In fact, in determining which rule of conflicts is applicable, uncertainty may arise from two sources. On the one hand, some municipal systems have institutions of mixed or obscure character. On the other hand, marital and inheritance regulations, forming integral parts of municipal legal systems, should logically be applied concurrently, and not separately as necessitated by the dictates of two different conflicts rules. We must explain these two difficulties.

(b) Rights and expectancies distinguished. Ordinarily, interests in assets of one spouse, which by marital law or marriage settlement have been conferred upon the other, come into being or, in the usual language, acquire the quality of vested rights before the dissolution of the marriage. At common law, for instance, a wife by virtue of the marriage has a dower interest in every parcel of real estate of which her husband has been seised at any time during coverture. This interest can be defeated neither by a conveyance of the husband nor by his will. On the other hand, where testamentary or intestate succession entitles a surviving spouse to participate in the distribution of the predeceased spouse’s estate, the surviving spouse receives no more than a mere expectation, strengthened at the most by provisions for forced shares; *viventis hereditas non datur.*

It follows that where a legal system grants to a spouse a genuine right to be acquired upon and during the marriage, this right is always to be classified as matrimonial. Such a right will therefore be acquired under the applicable matrimonial law, irrespective of the inheritance law of the last domicil or the last nationality. By a marriage settlement, in England, “the law of the testator’s domicil may be ousted from its regulation of a will.” 187 In this country, much discussion has centered around the question whether, in all ten of the community

property states, the wife has a present interest in the community fund during the marriage, sufficient for a separate income tax return.\textsuperscript{188} There seems to be a growing tendency to affirm the existence of an actual right for all purposes.\textsuperscript{189} In France, Germany, Switzerland, as well as in the Latin American countries, all regimes, except that of complete property separation, undoubtedly give actual rights during marriage. Antenuptial or valid postnuptial settlements have a clear precedence over intestate distribution also in this country.\textsuperscript{190}

Where, conversely, a right of a spouse is recognized as existent only at the time of the dissolution of marriage, the right by no means necessarily originates in the law of inheritance. Death of one spouse is ordinarily only one of several possible causes of dissolution and the regimes that are usually called systems of community upon death are in reality meant to confer some interest also in cases other than death.\textsuperscript{191} For this reason alone, such systems cannot be characterized as constituting successions on death. Moreover, although the nature of the benefits granted to a surviving wife is uncertain in such systems, analyses undertaken in recent years for the purpose of applying conflicts rules have shown that in almost all such institutions the widow is entitled to an interest upon marriage rather than upon inheritance.\textsuperscript{192}

Still, some legislations contain veritable mixtures of elements which resist satisfactory classification. Thus, certain

\textsuperscript{188} See \textsc{Daggett}, “Wife’s Interest in Community Property,” Legal Essays (1935) 101 ff. For the construction of the law of Idaho see \textsc{Jacob}, “The Law of Community Property in Idaho,” 1 Idaho L. J. (1931) 1, 25.

\textsuperscript{189} See \textsc{Stumberg}, 11 Tex. L. Rev. (1932) 53, 65 n. 50, supra n. 13; \textsc{Daggett}, “Division of Property upon Dissolution of Marriage,” 6 Law and Cont. Probl. (1939) 225, 233.

\textsuperscript{190} \textsc{Ford’s Curator v. Ford} (1824) 2 Mart. N. S. (La.) 574; Estate of J. B. Aubichon (1874) 49 Cal. 18.

\textsuperscript{191} \textsc{Kaden}, 4 Rechtsvergl. Handwörterb. 1.

\textsuperscript{192} The Austrian community on death is to be classified with matrimonial law; see \textsc{Rabel}, 5 Z. ausl. PR. (1931) 261; likewise the Danish community of goods, see \textsc{Pappenheim}, 6 Z. ausl. PR. (1932) 120; and the Hungarian community of gains, see \textsc{Almásti}, 1 Ungarisches Privatrecht (Berlin, 1922) 197 ff., \textsc{Raape} 344.

An interesting example of a matrimonial institution clearly preserved from ancient ideas is the continued community property of the German Code (§§ 1483
American institutions of mixed character, such as the widow’s right of election between dower rights and testamentary bequests under the law of Pennsylvania, or between dower and intestate share in Florida, or between statutory portion and legacy under New York law, have been objects of discussion in the European conflict of laws.

The name that an institution bears in its legislative home country cannot be decisive. Nor should the law of the forum influence the analysis of foreign institutions.

(c) Coordination of the two fields in municipal legislation. In some municipal laws, the connection between the matrimonial property law and the law of inheritance is particularly strong. Recent authors have drawn attention to the purposeful balancing of provisions in the two fields, disregard of which has caused unfortunate results.

...
Thus, for instance, under the Massachusetts statute, a widow has a dower interest in the property of her late husband, while no community property is recognized. A husband, who shortly before his death had transferred his domicile to California, would not leave any community property, nor would the widow have any dower right. "That result would defeat the spirit of both of the dower laws of Massachusetts and of the community property laws of the distributary estate; yet it would be reached none the less." If the husband had gone to Louisiana, the widow would receive nothing if there are "heirs." Conversely, where the husband removes his domicile from California to Massachusetts, the widow enjoys simultaneously her community share acquired under California law and the dower interest under Massachusetts law.

Similarly, in Sweden the wife is granted a share in the community fund and for this reason is excluded from participation in the inheritance, if there are descendants of the husband. Where a German married couple, not having concluded a marriage settlement, acquire Swedish nationality and the husband dies, the widow has no claim under German matrimonial law, which provides no benefits for the wife, nor under Swedish inheritance law.

Where, conversely, a wife is not given any matrimonial right (except, of course, through an express marriage settlement), she may be granted under modern legislation a generous and indefeasible portion in her deceased husband's estate. If, for instance, the spouses were of Swedish nationality at the time of their marriage and later became German nationals, in the courts of both countries the widow would receive, under the Swedish matrimonial law, half the husband's property as community part and, in addition, under the German law of succession on death, half or a quarter of the rest as heir.

187 LEFLAR, 21 Cal. L. Rev. (1933) 221 at 226, 227, supra n. 1.
198 La. C. C. (Dart, 1932) art. 924; NEUNER, 5 La. L. Rev. (1943) at 176, supra n. 1.
EFFECTS OF MARRIAGE ON PROPERTY

Thus, coordinations carefully worked out within a domestic statute are badly disturbed when different systems of law are called into play by the choice of law rules on matrimonial property and inheritance. Ingenious remedies have been suggested, but so far with little success. The problem is aggravated by the double fact that in most systems of private law the relation between the two groups of provisions is hidden, and that the factual situations are far from suggesting that radical change of the conflicts rules, or enlargement of the scope of the law at the last domicil, is in equity required. We may take for illustration the American cases in which the husband transfers his domicil from a separate property state to a state where community property obtains. Apart from the hardship imposed by the former common law doctrine upon the wife, which it was not the task of conflicts rules to remedy, it seems not inequitable to apply the law of the first domicil. Bruggemeyer, a lawyer, earned almost all his money in Illinois as his separate property and then stayed for years with his wife in California where she died. There was no reason why this change of domicil should have shifted half of his earnings to the heirs of his wife. The spouses Latterner lived three years in Boston, Massachusetts, and fifteen in Los Angeles, until they separated. No equitable argument challenged the character as separate property of the husband’s earnings as a physician in Boston. O’Connor married in 1925 in Indiana, but the spouses separated within “a few days”; there was no ground why the husband’s later moving to California should give the widow half of the husband’s premarital land in Indiana.

The easiest practical way to assure that matrimonial and inheritance statutes in the same legal system preserve their

199 See RABEL, 5 Z.ausl.PR. (1931) 283; NEUNER, Der Sinn 66 and 5 La. L. Rev. (1943) 190, supra n. 1; 4 FRANKENSTEIN 326; RAPE, 2 D. IPR. 197.
200 In re Bruggemeyer’s Estate (1931) 115 Cal. App. 525, 2 P. (2d) 534.
202 In re O’Connor’s Estate (1933) 218 Cal. 518, 23 P. (2d) 1031.
natural balance, is simply more circumspect drafting of these statutes. In this country, a federal Union where a part of the population is inclined to change domicile, statutes of descent and distribution should not blindly envisage only cases where both the first and the last domicile happen to be in the state and, moreover, no marriage settlement was established. In a community property state, the possibility that the surviving spouse may fail, for any cause without his fault, to enjoy the regular matrimonial share, should be considered. Vice versa, in a separate property state, there should be an appropriate provision to adjust the ordinary distribution in the case where the surviving spouse is amply provided with a matrimonial property interest. True, theoretically the matter belongs to conflicts law, but conflicts rules suitable to all situations are scarcely available at this time.