CHAPTER 5

Specific Applications of the Personal Law

I. PERSONAL CHARACTERISTICS

In the conflict of laws, especially in civil law countries, the sphere of application of the personal law is extensive. The branches in which the personal law is of the greatest importance are the law of family relations and that part of the law of contracts and other transactions which regards capacity. The application of the personal law to these branches of the law is to be discussed separately. The present chapter is concerned only with its application to the remaining personal relations.

1. General Capacity to Have Rights and Duties

While in the days of slavery personality was not enjoyed by all human beings,\(^1\) it is now taken for granted that every human being is a person and as such capable of having rights and duties. However, some exceptions still persist. Under the canon law of the Roman Catholic Church, an individual is deemed to lose his personality upon joining certain monastic orders. In a few countries, this rule of the canon law is still recognized as exerting an analogous effect in the temporal order of affairs.\(^2\) The German Reichsgericht once decided, applying the rules of the then prevailing principle of domicil, that the personality of a woman who had become a nun in a

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\(^1\) Restatement § 120 comment d.

\(^2\) For instance: in Ecuador C. C. arts. 92–94. In the Chilean C. C., arts. 95–97 have been canceled by Law no. 7, 612 of Oct. 11, 1943, art. 2.

In Argentina the canon law rule is expressly denied recognition C. C. art. 103.

In Austria a monk was held incapable of acquiring any new rights; the assets owned by him at the time of his entry into the order were placed under curatorship, 1 Ehrenzweig-Krainz (1925) 161 § 70.
Russian convent was extinguished to exactly the same extent that it was under her personal law, i.e., the law of the place of the convent.³

A few countries and states, among them several of the United States, have retained the old punishment of civil death. The meaning of this term is quite doubtful under the modern statutes. Constituting a penal measure, such a diminution of a person's legal status is generally disregarded by other states or countries.⁴

Capacity of having rights and duties includes capacity to sue and be sued in the sense of what the Continental doctrine terms capacity of being a party⁵ or of "standing in court."⁶ As individuals generally have full personality, they enjoy such capacity, while it may be wanting in the case of unincorporated associations. It seems that procedural rules everywhere acknowledge that capacity to sue and to be sued in this sense is determined by the personal law, in this country the law of domicil.⁷ The question is entirely distinguishable from that of the procedural capacity of a person, i.e., to effectuate procedural acts on his own behalf or on behalf of another person, a capacity that is affected by incompetence.⁸

For a long time, Continental authors have discussed so-called "special capacities."⁹ This term covers a variety of different problems which preferably should be discussed individually.

³ RG. (July 13, 1893) 32 RGZ. 173, 175 (capacity of a Russian Catholic nun to be a party to a German lawsuit, decided according to the law of the place of her nunnery).
⁴ For details see Note, 6 U. of Chi. L. Rev. (1939) 288.
⁵ See, for instance, German Code of Civil Procedure, § 50: Capable of being a party to a lawsuit is he who is capable of having rights.
⁶ "Stare in judicio" (Roman law), "ester en justice" (French law), "capacity to stand in judgment" (Louisiana lawyers).
⁷ Federal Rules of Civil Procedure, rule 17 (b).
⁹ Cf. Savigny § 364; for French theories of Boullenois and Froland see 2 Lainé 207, 211; for a theory of Brocher cf. Gebhardsche Materialien 70.
The term "special capacity" has been used, first, to indicate those characteristics which an individual must possess in order to qualify, for instance, for the office of guardian or administrator or for membership in a cooperative association or for eligibility as a member of a board of a corporation. Such requirements, not affecting the individual's general personal standard, are regulated by that law which determines the other incidents of the legal relation in question. Hence, a person's capacity to serve as administrator of a decedent's estate is determined by the law of the state in whose court the estate is being administered, and a person's capacity to be a member of a corporation is determined by the law of the state of incorporation.

The term "special capacities" is used, secondly, as referring to the numerous rights and privileges enjoyed by a country's citizens as opposed to resident or sojourning aliens. As said before, this vast topic, traditionally covered in the French books on private international law, exceeds the boundaries of the law of conflicts and pertains to internal administrative law.

The term "special capacities" is employed, finally, to designate requirements for certain transactions, such as that of a certain age for marrying or that the parties be not married to each other as a condition for the validity of a gift. Where such requisites are not regarded as mere applications of the personal law, they must be considered separately.

2. Beginning and End of Personality

The determination of the exact moment at which an individual's personality begins is generally referred to the

10 German courts, see LEWALD 39, no. 43, NEUMEYER, IPR. (ed. 1) §20; GUTZWILLER 1626.
11 The various municipal laws are not all alike in this respect. § 1 of the German Civil Code provides, for instance, that an individual's personality (Rechtsfähigkeit) begins with the completion of his birth. According to the Civil Code of Spain (C. C. art. 30), however, an individual is not recognized as a person until he has lived at least twenty-four hours.
personal law, which also determines the legal status of a child *en ventre sa mère.*

Difficult problems of conflict of laws are caused by the differences of municipal laws with respect to absentees. The two world wars have given this subject ominous importance. Most laws follow one or another of three different systems:

First: the rebuttable presumption of the common law, according to which an individual is presumed to be dead when he has been absent without being heard of for a stated number of years, for instance, seven years;

Second: the French system, according to which a person's unexplained absence for a stated period of time is judicially investigated and established and certain effects similar to those of death are incurred;

Third: the German system, of much influence upon recent legislations, according to which the legal effects of death take place when and only when a judicial decree has been issued providing that the absentee shall be regarded as dead (declaration of death) and as having died at a certain moment.

12 Art. 28 of the Código Bustamante reads:

"Personal law shall be applied for the purpose of deciding whether birth determines personality and whether the unborn child shall be deemed as born for all purposes favorable to him, as well as for the purpose of viability and the effects of priority of birth in the case of double or multiple childbirth." (Translation in 22 Am. J. Int. Law Supp. (1928) 276). See also Huber-Mutzner 410.

On the other hand, art. 53 P.G.R. of Liechtenstein applies the law of that principality to persons born within its territory, in matters governed by Liechtenstein law. Application of the territorial law is also advocated by Gemma, Revue 1930, 48, and by Fedozzi 370.

13 This system prevails in most countries whose private laws follow the general pattern of the French Code, including Italy. For Switzerland, where it has been modified in several respects, see below n. 16.

14 German BGB. §§ 13–19. War emergency laws of 1916, 1917 and 1925. Although French writers had disapproved of this institution, it was imitated in the first World War for persons missing in war; see Rheinstein, 13 Rheinische Z.f. Zivil- und Prozessrecht (1924) 50. Shortly before World War II in 1939, Germany and Italy modified their laws on absentees according to the model of the rules concerning persons missing in war; see R. Schmidt, "Das neue, italienische Verschollenheitsrecht," 13 Zaul.PR. (1940) 103. While Italy, however, retained the declaration of absenteeism, Spain, by Law of Sept. 8, 1939, adopted the German system, see 42 Bull. Inst. Int. (1940) 120.
A workable solution of some of the most important problems of conflict of laws respecting absentees has been provided by article 9 of the Introductory Law to the German Civil Code, as modified by the Law of July 4, 1939, § 12, which may be summarized as follows:

(1) An absentee is declared dead by a German court in accordance with German law, if he was a German citizen at the time of his disappearance (§ 12 par. 1); a foreign declaration of death will not be recognized in such case by a German court.

(2) Upon the application of his wife, a male absentee of foreign nationality is declared dead by a German court in accordance with German law, if the wife is domiciled in Germany and is a German national or was a German national before her marriage (§ 12 par. 3); this provision is designed to enable the wife to remarry.

(3) Irrespective of whether or not he has been a resident of Germany, a foreign absentee is declared dead pursuant to German law with respect to such of his assets as are situated in Germany and to legal relations governed by German law (§ 12 par. 2).

These rules have been used as a model in several countries, either for statutory enactments or in judicial practice. Austria, which is among these countries, considers a foreign

15 Poland: Law of 1926, art. 4.
China: Law of 1918, art. 8.
Japan: Law of 1898, art. 6.
Liechtenstein: P.G.R. art. 57 par. 2.
16 Belgium: Trib. Antwerp (July 13, 1939) cited by Van Hille, 66 Rev. Dr. Int. (Bruxelles) (1939) 758, 760.
Switzerland: particularly, the third rule stated above is followed, see App. Basel-Stadt (Feb. 19, 1932) 30 SJZ. (1933-1934) 269 no. 53 (a man born in Basel, naturalized a citizen of Minnesota, not heard of since 1906; assets inherited by him in 1910 were taken in public deposit; in absence of a written rule, the judge decides as in the case of a Swiss citizen); cf. Just. Dep.1, BBl. 1933, II 75 no. 9, 30 SJZ. 120 no. 94; Fritzsch and Pestalozzi, 9 Z. ausl. PR. (1935) 702; Schnitzer 139. On other controversial points see Beck, NAG. 424.
absentee’s last domicil in the country as a ground for juris­
diction.17

The principles that problems of the law of absentees should
be determined in accordance with the personal law of the ab­
sentee, and that jurisdiction for judicial action belongs pri­
marily to the state of which he is a national or domiciliary, as
the case may be, have been recognized in France 18 and Italy 19
and in many other countries.20 Hence, for instance, the
Austrian law was applied in both Germany and Switzerland
to determine whether the former Austrian Archduke Johann,
who had become a ship’s captain, had assumed the name of
Johann Orth and had disappeared without being heard of, was
to be regarded dead.21 Local rules are in force, however,
practically everywhere, providing for temporary care and cus­
tody of the property of a foreign absentee.22

Under the principle of personal law, a court recognizing
a declaration of death pronounced by the competent national

17 Austrian Law of February 16, 1883, §1, amended by Law of March 31,
1918. With respect to an absentee whose last domicil was in Austria, the courts
of the country of which he was a national have been declared to lack jurisdiction
by the Austrian Supreme Court (Nov. 3, 1909) 12 GiU. NF. no. 4776; contra:
WALKER 221. On Czechoslovakia see HOCHBERGER, 4 Z. osteurop. R. (1938)
623.

For Switzerland, see Civil Code arts. 35–38; Just. Dep., BBl. 1916, II 522;
HUBER-MUTZNER 411. The question whether Swiss courts may pronounce a
foreigner absent was declared unsettled by the Swiss Department of Justice on
July 12, 1933, 30 SJZ. (1933–1934) 120 no. 94.
law was applied not only with respect to the family relations of a Swiss absentee
but also with respect to his property. The decision has been criticized by J.
DONNEDIEU DE VABRES 436, 437.
20 The Belgian Trib. Antwerp (July 13, 1939) 9 Rechtsk. Wkbl. 1939, 44
no. 8 excepts the first period of absence from being exclusively governed by the
Polish law, but contra the opinion of the State Attorney Van Hille and the note,
ibid.
21 German RG. (June 28, 1893) 4 Z. int. R. (1894) 72; Swiss BG. (Jan. 22,
1897) 23 BGE. I 166, 171. The remarriage of the wife of a missing Russian
husband was held invalid by a German court because the Russian absentee was
not declared dead and was deemed to be living under Russian law, OLG. Kiel
(Nov. 30, 1926) Schlesw.-Holst. Anz. 1927, 145. See also LEWALD 41 no. 47
and NUSSBAUM, D. IPR. 117.
22 See 1 VICO 433 no. 499 with respect to the countries of Latin America.
court, will also recognize restrictions imposed upon the effects of such a declaration. Thus, the wife of a Czechoslovakian national declared dead in Czechoslovakia was not permitted to remarry in Germany, since an additional decree was necessary to dissolve the marriage under Czechoslovakian, though not under German, law.\textsuperscript{23}

The approach which regards a man as either alive or dead for all purposes is more satisfactory than to regard the same person as alive for some purposes and as dead for others. For instance, whether a missing heir or legatee is to be regarded as dead can more consistently be answered in accordance with his personal law than in accordance with the laws governing the descent or the distribution of assets, possibly lying in different jurisdictions.\textsuperscript{24}

There also are different rules in the case where two or more persons perish in a common disaster: some laws presume that the deaths have taken place in a certain order, others reverse that order, and in a third group no presumption exists. Is this problem a question of the personal law? Writers are in disagreement.\textsuperscript{25} The Brazilian Law suggests application of the national law; the \textit{Código Bustamante} also applies the

\textsuperscript{23} Czechoslovakian Law of June 30, 1921, art. V; KG. (Sept. 25, 1931) IPRspr. 1932, no. 12; cf. Wengler, 8 Z.ausl.PR. (1934) 238 n. 1.

\textsuperscript{24} The law governing the distribution of the estate has been applied in the following cases: German RG. (Jan. 7, 1890) 25 RGZ. 142, Clunet 1892, 1191; KG. (May 31, 1897) 9 Z.int.R. (1899) 468, Clunet 1900, 163; OLG. Hamburg (Nov. 27, 1896) Hans.GZ.Beibl. 1897, 243; OLG. Colmar (June 12, 1912) Els. Lothr. J. Z. 1913, 38. The personal law of the absentee has been applied by Ob. Trib. Stuttgart (July 8-10, 1862) 15 Seuff. Arch. 321; Bay. ObLG. (May 17, 1890) 13 Bay. ObLGZ. 50 no. 17 (a man who had emigrated to the United States in 1869 and was declared dead in 1886, was considered to have inherited a share in the meantime, as he was presumed living at the time of the succession under the law of his last German domicil). A third solution was adopted by OLG. Dresden (Dec. 20, 1909) 66 Seuff. Arch. 68, 70. The application of the \textit{lex successionis} has been approved by Lewald 41 no. 46, and M. Wolff, IPR. 59, and disapproved by Nussbaum, D. IPR. 117.

\textsuperscript{25} Cf. Weiss, 4 Traité 572 and Despagnet 1046 no. 365 (advocating personal law); 2 Bar § 365, p. 311, tr. by Gillespie 805 (law of succession on death); Valéry 1194 no. 842 and Nussbaum D. IPR. 117, n. 2 (\textit{lex fori}).
national law, but only to the field of distribution of estates, a limitation of the principle which has been criticised.\(^{26}\)

3. Name

(a) Individual name. Beale has stated that the determination of an individual's personal name is not regarded in common law countries as a problem of status, since a person is traditionally free to assume a name and to change it at his discretion.\(^{27}\) However, today most American states allow special court proceedings to aid and confirm a change of name, and a name thus acquired cannot again be changed without the intervention of the court.\(^{28}\) Moreover, the right to use a name is governed by important legal rules.\(^{29}\) In civil countries it is well recognized that a person's name is determined by law and that, therefore, problems of conflict of laws can arise with respect to the determination of an individual's name and to the manner and extent of his protection against abuse of his name. Traditionally, these questions are decided in accordance with the individual's personal law,\(^{30}\) except such as are controlled by imperative local regulations.\(^{31}\)

\(^{26}\) Código Bustamante art. 29; cf. the criticism by Pontes de Miranda, 39 Recueil 1932 I 555, 622, 671.

\(^{27}\) Linton v. First National Bank (1882) 10 Fed. 894; Application of Lipschutz (1941) 32 N. Y. S. (2d) 264. Cf. 2 Beale § 120.3.


\(^{29}\) See 45 C. J., Names 382 § 18.

\(^{30}\) Germany: RG. (April 11, 1892) 29 RGZ. 123, 127; RG. (Dec. 12, 1918) 95 RGZ. 268, 272. KG. (April 22, 1927) IPRspr. 1927, no. 19. KG. (April 15, 1932) JW. 1932, 2818, IPRspr. 1932, no. 11.

Switzerland: NAG. art. 28; BG. (Oct. 24, 1907) 33 BGE. I 770, 776; BG. (July 14, 1910) 36 BGE. I 391, 395; BG. (Nov. 22, 1934) 60 BGE. II 387, 388. Giesker-Zeller, Der Name in Internationalen Privatrecht (in Festschrift für Georg Cohn (Zürich, 1915) 167ff); Huber-Mutzner 419.


\(^{31}\) The reported judgment of the court of Paris (n. 30) supposes French laws respecting names possibly to have public interest but discounts expressly any influence of French public policy.
Thus, it has been held by German courts that an individual’s right to use a title of nobility is to be determined by his national law.32 Such titles having been entirely abolished in Czechoslovakia, a citizen of that country is denied the right to call himself a count in Germany. On the other hand, the Reichsgericht has held a Swiss citizen entitled in accordance with Swiss custom to append to his own name the titled name (“von B”) of his wife.33 Whether a foreigner’s change of name is recognized depends on the recognition or non-recognition of such change of name by the country of which he is a national.34

In suits for damages for abuse of a person’s name, or in suits for an injunction against such abuse, a tendency exists, however, to resort to the local law, or to the law applicable to delictual actions, even where the personal law provides actions on other theories. In Germany it has been held, for reasons of public policy, that the measure of damages in a foreigner’s action for wrongful appropriation of his name, is not higher than in an analogous action by a German national.35 It has also been suggested that it should never be lower.36

Within the realm of application of the personal law, doubts have arisen with respect to families whose members are not all of the same nationality. Where, for instance, a wife’s nationality is different from that of her husband, the Swiss Federal Tribunal has held her name to be determined by her own

33 RG. (Dec. 12, 1918) 95 RGZ. 268, 272.
34 Switzerland: The Justice Department refuses, in the case of a child of Swiss nationality (BBl. 1907, I 539), and recognizes in the case of a German child (BBl. 1921, III 836), the name given to the child by a German stepfather according to a German institution unknown to Swiss law (viz., the cantonal law in 1907 or federal law in 1921). Dutch decisions; see VAN HASSELT § 1.
35 KG. (April 29, 1920) JW. 1921, 39; KG. (April 8, 1914) Leipz. Z. 1915, 1327; RG. (Nov. 29, 1920) 100 RGZ. 182, 185 (both referring to the “Gervais” case). Cf. EG. art. 12 restricting tort actions against German nationals to what may be claimed under German law.
36 RAAPÉ, 2 D. IPR. 380; see also J. DONNEDIEU DE VABRES 437.
national law,\textsuperscript{87} while in Germany the general rule governing marital status presumably applies, and the wife's name is determined in accordance with the national law of the husband.\textsuperscript{88}

(b) Commercial name (firm). In Germany\textsuperscript{39} and Switzerland,\textsuperscript{40} it is held that the firm or official name of a commercial enterprise is determined by the law of the principal establishment. On the other hand, in Belgium national and foreign firms are equally protected under the local law.\textsuperscript{41} In France, a foreigner is held not to be entitled to any protection of his commercial name, unless such protection is provided by treaty or reciprocity is otherwise assured.\textsuperscript{42} The most important treaty, to which France, together with the majority of the commercial countries of the world, is a party, is that of the Paris Union for the Protection of Industrial Property.\textsuperscript{43} Under article 8 of this convention, the commercial name of a citizen or corporation of any signatory country is protected in every other signatory country without any preliminary registration, deposit, or other formality being required.

4. Status as Merchant

In most of the countries of the European Continent and of Latin America, merchants are subject to duties which are

\textsuperscript{37}BG. (July 14, 1910) 36 BGE. I 391, 395; see Stauffer, NAG. art. 8 no. 15.
\textsuperscript{38}GEBHARDSCHE MATERIALIEN 183; RAAPE 290; NUSSBAUM, D. IPR. 125. The Reichsgericht (Nov. 23, 1927) 119 RGZ. 44 has applied in an analogous way to the name of an illegitimate child the law governing illegitimate relationship rather than the child's personal law. An obscure rule is in force in Liechtenstein, P.G.R. art. 45.
\textsuperscript{39}RG. (Oct. 2, 1886) 18 RGZ. 28; RG. (Nov. 13, 1897) 40 RGZ. 61, 64; RG. (May 31, 1900) 46 RGZ. 125, 132.
\textsuperscript{40}2 MEILL 262 § 167; tr. by KUHN 450.
\textsuperscript{41}Cass. belge (Dec. 26, 1876) Pasicrisie 1877.1.54; POULLET 155 no. 150.
\textsuperscript{42}Decisions in Clunet 1902, 304; Trib. Bordeaux (Aug. 4, 1902) Clunet 1903, 866. In the Netherlands, however, protection to a foreign commercial name depends on a Dutch Law of July 5, 1921 (S.842) cf. the liberal decision of H. R. (May 31, 1927) W. 11675, VAN HASSELT 653; to the contrary effect Kg. Amsterdam (Sept. 30, 1924) NJ. 1925, 142.
\textsuperscript{43}English text in U. S. Treaty Series, No. 834.
not incumbent upon other individuals and, correspondingly, entitled to special privileges not enjoyed by non-merchants. Special rules also apply to numerous types of contracts where the parties, or in certain cases one of the parties, belong to the class of merchants. Wherever such special rules are in force, the determination of a person's status as merchant or non-merchant is generally regarded as a problem of personal law. However, in consonance with the traditions of the law merchant, in the determination of the personal law nationality is disregarded in favor of the law of the "commercial domicile," i.e., of the place where the business is established. 44 The French Committee for Private International Law, after full discussion, recently voted a legislative motion to amend the French law accordingly. 45

Distinguishable from the quality of being a merchant is the capacity of carrying on a business as a prerequisite to becoming a merchant; this question is commonly regarded as governed by the law determining the legal acts of minors, married women, insane persons, etc. 46

44 Germany and Italy: dominant opinion cf. FICKER in 4 Rechtsvergl. Handwörterb. 462.
Poland: Law of 1926, art. 2.
Switzerland: cf. HUBER-MUTZNER 420.
Argentina: cf. 3 VICO, nos. 221, 243, etc.
Treaty of Montevideo on international commercial law of 1889, art. 2;
Treaty of Montevideo on international terrestrial commercial law, text of 1940, art. 2. More detailed provisions in Código Bustamante arts. 232ff.
Other opinions: 2 BAR § 290 (2) at 130 and in 1 Ehrenberg's Handbuch des gesamten Handelsrechts (1913) 330; MELCHIOR 151 § 105; NUSSBAUM, D. IPR. 211; SCHNITZER 134, 151.

45 Travaux du Comité français de droit international privé, Seconde année (1935) 132, on the capacity to be a merchant in international relations (text of proposition at 169). See also the resolution of the Institute of International Law in Cambridge (1931), 36 Annuaire II 1931, 181, on NIBOYET's proposal. Against the unfortunate application of the lex fori in the Hague Draft of 1925 on Bankruptcy, see NIBOYET 519, no. 426.

46 BAR, 1 Ehrenberg's Handbuch 343; 3 VICO, nos. 234, 237.
Insofar as the character of a transaction as commercial or non-commercial ("civil") is determined by elements other than the status of the parties, the law that governs the contract in general is held to be decisive.  

5. Infancy

Another situation regarded by civil law lawyers as pertaining to status is that of infancy. An infant's capacity to engage in transactions is limited; he is subject to parental power or guardianship; his domicil is fixed by operation of law; his position as a party to a lawsuit is peculiar; and a variety of other special rules apply to him. Hence, the personal law determines the age at which infancy generally terminates, as well as the events which may affect the individual’s position during infancy.

A basically similar view obtains in England and has sometimes guided American courts, for instance, in affirming the power and duty of the domiciliary state to decree custodianship or to terminate guardianship over infants. It has occasionally been recognized that attainment of majority at the domicil is sufficient to terminate ancillary administration of a minor’s property in another jurisdiction. Story, however, speaking of the disabilities of minors as well as of other incapacities, associated himself with those among the statutists who, in this then much debated question, instead of conceiving infancy or majority as aspects of personal status, regarded incapacity to take part in legal transactions as incidental to specific contracts or other acts. As indicated below, this has become the general doctrine of this country. (See Chapter 6.)

47 DIENA, 1 Dir. Commer. Int. 62.
48 Griffin v. Griffin (1920) 95 Ore. 78, 187 Pac. 598, 604.
49 In re Honeyman (1922) 117 N. Y. Misc. 653, 192 N. Y. S. 910.
50 For cases see 2 BEALE 663 n. 2.
51 See STORY, throughout c. IV; 1 FOELIX (ed. 3) c. II 181.
52 STORY § 103.
In the Continental discussion, the two following points have attracted interest:

(1) In certain jurisdictions, marriage ends the period of infancy, whether of females or of both males and females, either unconditionally or with certain provisos. This is illustrated by the statutes of twelve American jurisdictions 53 as well as by a number of European laws. 54 Under the European conflicts rule, such attainment of majority by marriage depends upon the personal law of the infant. Since, for instance, under Hungarian law women reach majority by marriage, a nineteen-year-old Hungarian girl who marries an American and, by this fact, neither acquires American citizenship nor loses Hungarian citizenship, will be regarded as being of full age by every court applying the nationality test. 55 On the other hand, a young Englishman marrying in Italy is not emancipated, as the Italian rule on emancipation does not apply to his status. 56 The case of a bride who acquires her husband’s nationality on marriage under the nationality law of the husband’s country is more doubtful. If a Swiss girl of seventeen marries a German and thereby changes her nationality, is the Swiss rule, “Marriage imports majority,” able to terminate her infancy, although she abandons her Swiss personal law at the very moment of her marriage? Affirmation of this question is favored in recent German literature. 57

(2) Under the German and related systems the status of a person of full age may be granted to an infant by decree of a court or an administrative agency—“declaration of major-

53 5 VERNIER § 271.
54 The Netherlands: BW, art. 385.
Hungary: ALMÁSI, 1 Ungarisches Privatrecht (Berlin, 1922) 54.
Switzerland: C. C. art. 14 par. 2.
Turkey: C. C. art. 11 par. 2.
55 RAAPF 69.
56 DIENA, 2 Princ. 115.
57 WALKER 128 n. 39, 788; WAHLE, 2 Z. ausl. PR. (1928) 142, mentioning Austrian decisions to this effect; RAAPF 77; M. WOLFF, IPR. 61. Contra: 1
ity” 58—whereas in France, Italy, Spain, etc., less effective forms of “emancipation” are provided. 59 Similarly, at common law and under certain American statutes, a judicial decree may eliminate a part of a minor’s disabilities. 60 At civil law, jurisdiction to render such a determination is generally held to rest with the country which furnishes the personal law of the infant. 61 This law also determines whether emancipation is possible at all, for what causes it may be conferred, and what effect it produces; it decides in particular whether the minor thus emancipated enjoys unlimited legal capacity or whether he needs special authorization or consent in particular situations. 62 As will be discussed in detail below, the general rule of capacity in this country forms part of the law of the contract, while in the Continental system it refers to the personal law.

II. Public Policy

Foreign law in the field of “status” is more often denied application on account of local policy considerations than in

Frankenstein 423, 3 Frankenstein 235 n. 31; Lewald 57; Beck, NAG. 175 no. 72.

As to the effect of a newly acquired nationality of the bride, see RG. (Jan. 10, 1918) 91 RGZ. 403, 407 dealing with the question of whether guardianship over a German girl ended by her marrying a Russian in Czarist times. It seems that the court classified the question as one of the effects of marriage; this is why it quoted EG. arts. 14 and 15 and the Hague Convention of July 17, 1905 on Marriage Effects, arts. 1 and 2.

58 Germany: BGB. §§ 3-5.
Austria: Allg. BGB. §§ 174, 252.
The Netherlands: BW. arts. 473 ff.
Brazil: C. C. art. 91; cf. Pontes de Miranda, 39 Recueil 1932 I 622.
France: C. C. art. 477.
Italy: C. C. (1865) art. 311; C. C. (1942) arts. 390ff.
Spain: C. C. art. 322.
60 Vernier § 282.

61 On general principles, it would not appear unthinkable for a decree of emancipation to be rendered by a court of a country not that of the nationality, in accordance with the substantive law of the infant’s national law. On this question 1 Frankenstein 427; Stauffer, NAG. art. 7 no. 7; Raape 91 (who thinks that it could be done where the procedure required by the personal law limits the cooperation of an authority to mere recordation (blosse Beurkundung).

62 Diena, 2 Princ. 114; O. von Gierke, 1 Deutsches Privatrecht (Leipzig, 1895) 221 ff.; Weiss, 3 Traité 342, and following these writers Swiss BG. (May
any other field of law. Regrettable as the disharmony caused thereby may be, it is a common trait of existing laws, a trait nowhere more distinct than in France where, to quote Julliot de la Morandière, each day the application of the personal law is progressively restricted in favor of French law.68

However, a peculiar doctrine has been expressed by Dicey and repeated in America by Beale and the Restatement (§ 120), that a foreign status of a kind unknown at the forum (English or American law respectively) will not be recognized.64 No other authority exists for this proposition than a few English cases which have been critically destroyed by Cheshire.65

Thus, prodigality is "not a status at common law."66 If a Frenchman domiciled in France is judicially declared a spendthrift by a French court, American courts will certainly recognize those effects of the decree which relate to transactions carried on in France.67 But the question is whether an American court will ascribe effects to the French decree with respect to American transactions. In France, for instance, the spendthrift can bring a lawsuit only through a committee (family council). Can he sue without any guardian in the United States or in England? No doubt, appointment of a conservator in one American jurisdiction under a local statute, has been said to be inoperative on transactions in another jurisdiction, a statute being bare of extraterritorial meaning under an ancient statutist doctrine.68 Whatever the actual merits of this antique rule, a French interdiction of a prodigal does in-

23, 1912) 38 BGE. II 1, 3 (the declaration of majority is governed by the national law).
63 Colombia, Comisión de Reforma del Código Civil (1939-1940) 218.
64 Dicey 531 Rule 136 (1); 2 Beale § 120.1.
65 Cheshire 144. He thinks that In re Selot's Trust [1902] 1 Ch. 488, is to be explained upon other grounds and that Worms v. De Valdor (1880) 49 L.J. N.S. (Ch.) 261, has been decided wrongly.
66 2 Beale § 120.8.
67 Restatement § 120 comment c; 2 Beale § 120.1: "The existence of the foreign status is a fact and should be recognized as a fact by a court in any state."
68 Gates v. Bingham (1881) 49 Conn. 275.
tend to restrict the capacity of the individual everywhere. Dicey and Beale derive their thesis that such decree can not be recognized in a common law jurisdiction from an English decision, *Worms v. De Valdor*, in which Frey, J., erroneously reasoned that the French adjudication of prodigality did not change the status of the person, although he asserted in addition "that if a change of status were effected by an order of a French court, this (English) court would not take notice of a personal disqualification caused by such change of status."

No such problem is known in civil law. A French decree declaring an individual of French nationality and domicil a spendthrift is recognized in any other country, including Guatemala and Chile, as affecting the individual's personal status. The principle has been well formulated by the Swiss Department of Justice with respect to foreign declarations of death, which are unknown to Swiss law; if not contrary to public policy, the foreign decree must be granted the same effect as conferred upon it by the foreign law.

With respect to legitimation and adoption, the implications of the Dicey-Beale theory are even more serious. Is such an act, performed abroad, not to be recognized by a court whose domestic law has not yet introduced the institution of legitimation or adoption? If such institutions are known to the forum, but the particular variety adopted by the foreign law is not, should the effect of the foreign act be limited to that given locally to the most nearly related type, rather than simply recognized to the same extent as in the foreign jurisdiction? American cases show a strong tendency to limit recognition of the foreign institution. An analogous opinion is widely held.

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69 (1880) 49 L.J. N.S. (Ch.) 261; followed in *In re Selot's Trust* [1902] 1 Ch. 488.

70 See MATOS nos. 218, 219.

71 Chile: App. Santiago (Nov. 7, 1934) 34 Revista Der. J. y Cien. Soc. (1937) II sec. 2-14 (interdiction by judgment of the Italian Court of Genoa; exequatur granted by the Supreme Court).

72 BBL. 1916, II 522 no. 5.

73 See GOODRICH § 142; STUMBERG 309; see also LORENZEN, 6 Répert. 349 no. 340. But see FALCONBRIDGE, Case Note, 19 Can. Bar Rev. (1941) 37, 39.
in the case of a foreign business organization whose exact type is not included in the domestic commercial order.\textsuperscript{74} Or, in accordance with a recent suggestion, should the "status" created in a foreign country be recognized but its specific "effects" or "incidents" be reserved for close inspection under the light of the internal law of the forum?\textsuperscript{75} This line of thought seems to result directly or indirectly in an extensive application of public policy, much as French courts and writers invest the provisions of the \textit{Code Napoléon} with the dignity of international public order.\textsuperscript{76} A foreign adoption of an infant was not recognized in France before such act was permitted in France in 1923 by an internal law.\textsuperscript{77} The \textit{Código Bustamante} declares that none of its provisions relating to adoption will apply to states whose legislations do not provide for adoptions.\textsuperscript{78} All such rules are indefensible, inasmuch as they deny effect to foreign institutions without an urgent national interest in the particular case, a point clear to most French writers but often ignored by courts. Why should a country's own civil code rule the world?

On the other hand, English courts, before the Legitimacy Act of 1926, did not hesitate to recognize legitimation by subsequent marriage executed under foreign domiciliary law,\textsuperscript{79} and at present they recognize California legitimations by recognition, though unknown to English statutes.\textsuperscript{80} Argentine courts seem to treat foreign adoptions in the same way, their internal law notwithstanding.\textsuperscript{81} The Portuguese Supreme Court, recognizing a Brazilian adoption under analogous circumstances, held it a constant international rule that the non-existence of an institution in the \textit{lex fori} does not prevent the

\textsuperscript{74} This will be discussed in the second volume.
\textsuperscript{75} This theory has been proposed by Taintor, "Legitimation, Legitimacy and Recognition in the Conflict of Laws," 18 Can. Bar Rev. (1940) 691 at 708.
\textsuperscript{78} Código Bustamante art. 77.
\textsuperscript{79} \textit{In re} Wright's Trusts (1856) 25 L. J. (Ch.) 621, 2 K. &. J. 595.
\textsuperscript{80} \textit{In re} Luck [1940] A. C. Ch. 864.
\textsuperscript{81} 2 Vico no. 172; Roger, 6 Répert. 683 no. 44.
rights flowing from it from being given effect. The legal situation of a French illegitimate child recognized by a parent is enforced in Germany where this type of status is unknown. The prevailing opinion certainly favors simple recognition of foreign legal situations without provincial restraint.

A third problem is illustrated in the Restatement by an English case, Atkinson v. Anderson:

"By the law of state X, the inheritance tax imposed upon 'strangers in blood' who inherit is at a higher rate than that imposed upon inheriting relatives and the term 'strangers in blood' is construed as including natural illegitimate children. The status of 'recognized natural child' exists in state Y but not in X. A dies domiciled in Y, bequeathing chattels in state X to C, who, according to the law of Y, is A's recognized natural child. C, on taking the chattels in state X, pays a succession tax as a stranger in blood."

However, this is an interpretation of a tax law and not a problem of international private law. It may well appear that an inheritance tax statute is intended to apply a higher tax rate to all illegitimate children. In such case, it would make no difference whether such children are or are not "recognized." Hence, the English decision in the case of Atkinson v. Anderson may be an entirely correct interpretation of the English tax statute, but it is not at all necessary to resort for its justification to a general theory of non-recognition of a foreign status unknown to the lex fori. For example, the Argentine tax on gratuitous transfer of property has been held applicable to a foreign adopted person "by simple interpretation of the tax statute" without regard to a conflicts rule.

84 Restatement § 120 comment b; 2 BEALE § 120.1 relies on Atkinson v. Anderson (1882) 21 Ch. D. 100.
85 (1882) 21 Ch. D. 100.