CHAPTER 6

Capacity

I. Object of the Discussion

The laws of the various countries differ widely with respect both to the grounds on which certain individuals are denied normal competence and to the scope of the disabilities imposed. Also, the term, "capacity," is not used with quite the same meaning everywhere. For the purpose of the conflict of laws, distinction should be made between a general rule of capacity and numerous exceptions thereto defined by special rules.

The purpose of the general rule is to determine the law that is to govern a person's ability to bind himself by contract with other parties or by unilateral acts. In most countries, the general rule applies also to dispositions of property, though in some the law governing title to property, especially tangible assets, movable and immovable, extends to capacity. ¹ The most important qualifications of the general rule are as follows:

(a) The personal characteristics necessary to hold a person liable in tort are generally subject to the law governing tort. ²

(b) The effects upon property interests of such events as

¹ For the United States see 2 Beale 1180 § 333.3; Goodrich § 145. Also art. 10 of the Argentine C. C. seems to have been drafted in accordance with Story §§ 102 and 424, and, following this model, to determine capacity with respect to immovables by the law of the situs; this has been demonstrated by Chávarri 76 nos. 67 ff., contrary to various opinions hitherto held. For Hungary, von Szladits in 23 Grotius Soc. 1937, 28 explains that every woman, whether of Hungarian or foreign nationality or domicile, has free disposition of immovables on Hungarian soil. This subject is very difficult and cannot be treated here.

² To be treated in succeeding volume.
marriage, bankruptcy, or appointment of a committee are the object of special conflict of laws rules.  

(c) Questions pertaining to the borderline zone between the law of capacity as a general topic and the law of distribution of estates, must be discussed in connection with the latter subject. But it may be noted that the provisions in the French law designed to protect minor heirs in the distribution of a decedent’s estate have been declared to be a part of the personal law of the heirs and therefore to be inapplicable to foreign heirs. In the United States, provisions that protect infants against the effects of statutes of non-claim apparently are considered part of the procedural law of the state where the assets are administered; the parallel with the French law is, of course, not perfect.

(d) Capacity to marry and to engage in other transactions of family law constitutes a particular topic to be discussed below.

In numerous countries, married women are still subject to restrictions of various kinds upon the legal effectiveness of their promises. The Restatement classifies the problem to what extent a married woman is subject to such restrictions as a problem of the law of contracts, which, both in accord with the general approach of the Restatement and in agreement with the majority of decisions, is declared to be determined by the law of the place of contracting. There is respectable authority, however, for the view that the state where a married woman is domiciled is justified in holding her incapable of

3 Restatement §§ 237, 238, 289, 290; Germany: M. Wolff, IPR. 61, II.
4 Cass. (civ.) (April 13, 1932) S. 1932 I. 361 and Note by Audinet; D. 1932 I. 89 with Note by Basdevant; Revue 1932, 549. Cf. J. Donnedieu de Vabres 507. The estate of the late Robert of Bourbon, Duke of Parma, was distributed in accordance with the family statute of the house of Hapsburg-Lorraine, which was recognized as his personal law by Austria, the country of which he was a national. Hence, the French Supreme Court held that his family statute determined what protection was to be extended to minor heirs.
5 Cf. Restatement § 498.
6 Restatement § 333 comment.
contracting under its own rules, even where the contract was
made in another state under whose law such contract would be
binding upon her. 7

Recognizing that limitations on the contractual capacity of
married women are closely connected with the structure of
the family and are motivated to a large extent by a desire
either to protect families against financial ruin or to safeguard
the dominating position of the husband as family head, the
European laws tend toward classifying the problem of con-
tractual capacity of married women as a problem of the law
of family relations. Consequently, the law by which these
problems are determined is that applying generally to the
personal relations between husband and wife. This law need
not necessarily be the personal law of the wife. 8

(e) The legal consequences of insanity are determined by
the personal law. Under the system of domicil, however, the
voluntary acquisition of domicil by an insane non-resident
presents difficulties, 9 and the claim of the law of the domicil to
govern transactions in such situations has been doubted. 10

(f) The capacity of an individual to determine the conduct
of a lawsuit to which he is a party, as distinguished from
capacity to be a party, which has been
treated above, 11 seems to
be considered in this country as a matter of procedural law
and governed, in consequence, by the internal law of the
forum. 12 In the eyes of a Continental lawyer, this is a question
of capacity to exercise rights, and therefore the answer de-
peends on the personal law. Thus, it has been decided in the
Netherlands that Swiss law governs the question whether a

7 Union Trust Co. v. Grosman (1918) 245 U. S. 412, per Holmes, J.;
8 See infra p. 302.
9 Cheshire 403.
10 Cheshire 406 proposes the law with which the transaction of an insane
person is most closely connected.
11 See supra p. 162.
12 See Restatement § 588 and cf. Federal Rules of Civil Procedure, rule 17
(b) and (c).
Swiss married woman can bring a lawsuit in a Dutch court without the consent of her husband.\textsuperscript{13} In an analogous way, the Swiss Federal Tribunal has declared that the power to do so affects capacity and therefore in the case of Swiss nationals is to be governed by the Swiss federal statutes rather than by the cantonal laws of procedure.\textsuperscript{14} However, as an exception to this rule the German Code of Civil Procedure declares that a foreigner lacking procedural capacity under his national law is deemed to have it when he would possess it under the law of the court.\textsuperscript{15}

\section{II. The Law Governing Capacity}

\subsection{1. Capacity Governed by the Law of the Place of Contracting}

The notion that the permanent characteristics of an individual are all to be regarded as incidents of his “status” and, therefore, all governed by the individual’s personal law, is not current in the United States.

In this country, excepting Louisiana, the almost universal rule, clearly supported by commercial expediency, is, as stated by Goodrich, that the capacity of married women—which is typically involved in capacity cases—is governed by the \textit{lex loci contractus}.\textsuperscript{16} “Some authorities seem to hold that capacity is to be determined by the ‘law of the contract,’”\textsuperscript{17} which may be different from the law of the place of contracting; but “many courts hold that capacity is governed by the \textit{lex loci contractus}, even while they assert that some other law may

\begin{itemize}
\item\textsuperscript{13} Hof Amsterdam (July 13, 1923) W.11163, N.J. 1924, 118. Belgium: Trib. comm. Bruxelles (Oct. 30, 1890) Pasicrisie 1891.3.5.
\item\textsuperscript{14} BG. (Dec. 27, 1916) 42 BGE. II 553, 555; BG. (April 7, 1922) 48 BGE. I 24, 29.
\item\textsuperscript{15} German C. Civ. Proc. § 55; KG. (March 3, 1936) JW. 1936, 3570 (English minor), see infra p. 186, n. 38.
\item\textsuperscript{16} GOODRICH 266 § 1051 Restatement § 333a; Milliken v. Pratt (1878) 125 Mass. 374, 28 Am. Rep. 241.
\item\textsuperscript{17} GOODRICH 267, excluding the possible influence of the intention of the parties, because a \textit{circulus vitiosus} would result.
\end{itemize}
govern the obligation and validity (in other respects) of the contract." 18 At present, it is true that some courts of agricultural states are inclined to protect married women domiciled in the forum against their out-of-state creditors. This is scarcely a domiciliary rule; it represents rather a public policy of the forum in preference to a recognized conflicts rule. But the law of the domicil also has it advocates, especially when it agrees with the lex fori. 19

In the less frequent cases relative to the capacity of infants, the law of the place where the infant acts is generally applied. 20 Minor 21 explains the rule by the particular character of the infant’s disability, evidenced by the fact that his contract is not void but only voidable; the infant is not incapable "in his person" but has a privilege to disaffirm the contract. Beale 22 denies the existence of a status of minority at common law because "the effects of minority are not so uniform or clearly fixed as to be described as the incidents of a status." These are obscure arguments. The true reason of the rule, commercial expediency, has been well indicated by Story himself 23 and has been accepted by the courts as necessary in a country where a large part of the population is constantly moving from one state to another.

In consequence of the rule, an individual reaching full age at his domicil, for instance at the completion of his eighteenth year or by marriage, is nevertheless treated as an infant, even at his domicil, with respect to transactions executed in a state where full age is attained only at twenty-one years of age. 24 Capacity for the purpose of contracts relative to immovables,

18 2 Beale § 333.3 at 1177.
19 Cf. Union Trust Co. v. Grosman (1918) 245 U. S. 412; Stumberg 216; and supra p. 103, n. 7.
20 Goodrich 267.
21 Minor § 72; cf. §§ 5, 11.
22 2 Beale § 120.11.
23 Story § 102 a, b, quoting Burge; cf. § 76 at p. 97, n. 2.
24 O’Dell v. Rogers (1878) 44 Wis. 136 at 181 (majority of a woman conferred by marriage).
correspondingly, is governed by the *lex situs.* And a decree based on a local statute, which in part removes an infant's disabilities for certain purposes, does not enlarge his capacity for acts in another state.

The American view has been keenly observed in recent years in Europe and has served as a major argument for the opponents of the traditional European approach.

The notion that capacity should not be separated from other problems of validity of contracts was once advocated by a few statutists, such as John Voet and Bijenkershoek, and applied during the first half of the nineteenth century in Denmark.

The rule that capacity to contract is simply determined by the law of the place of contracting is also said to prevail in the Soviet Union.

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26 State v. Bunce (1866) 65 Mo. 349 (authorization by Arkansas court); Philpott v. Missouri Pacific Railroad Co. (1884) 85 Mo. 164 (emancipation in Texas); Beauchamp v. Bertig (1909) 90 Ark. 351, 119 S. W. 75 (authorization in Oklahoma to sell).
27 Beauchamp v. Bertig (1909) 90 Ark. 351, 119 S. W. 75; Deason v. Jones (1935) 7 Cal. App. (2d) 482, 45 Pac. (2d) 1025. This approach is consistently followed by the Restatement; capacity to contract is declared to be determined by the law of the place of contracting (§ 333); capacity to transfer land and chattels by the law of the situs (§§ 216 and 255, respectively), capacity to marry by the law of the place where the marriage is celebrated (§§ 121ff.); see also the statement about capacity to be held responsible for a tort implied in § 379. With respect to the theoretical basis of Beale's opinion, see his Summary, § 55, 522, and the criticism by Wigny, Essai 19, 103.
28 The American cases down to 1933 have been collected and analyzed by Rudolf Mueller, "Die Geschäftsfähigkeit natürlicher Personen in der international-privatrechtlichen Rechtsprechung der Vereinigten Staaten," 8 Z. ausl. Pr. (1934) 885.
29 See Story § 54 a.
30 Bijenkershoek (1673–1743), Observationes Tumultuariae (edited by Meijers, De Blecourt and Bodenstein, 1926) no. 71 expressly invokes Johannes Voet. He applied the *lex loci actus* as to capacity to marry; see Lee, "Bijnkershoek's Observationes Tumultuariae," 17 Journ. Comp. Leg. (1935) at 43.
31 See Borum and Meyer, 6 Répert. 216 no. 21.
32 See Makarov, Précis 190.
2. Capacity Governed by Personal Law

Outside of the United States and the Soviet Union, problems of capacity are generally treated as belonging to the domain of personal law. Even in the United States, this approach is followed in Louisiana, although it appears weakened recently. A peculiar position is occupied by Switzerland, where problems of capacity are determined by the national law of the individual, while problems of personal status in general are referred to the law of the domicil.

Since Mancini’s time, the European rule has been justified upon the ground that the country of nationality is the one best qualified to determine whether and to what extent restrictions should be imposed upon the individual citizen in his own and his family’s interest. Rules determining capacity are regarded as the very core of the rules that permanently determine an individual’s legal status. It is obvious, of course, that incapacities accompanying an individual wherever he goes may endanger others who bona fide enter into transactions with him, but the principle is based upon the consideration that anyone who engages in a transaction with another must ascertain at his own risk whether such other party has sufficient legal capacity, or, as stated in the Roman maxim, Qui cum alio contrahit, vel est vel debet esse non ignarus conditionis eius (Dig. 50.17.19). (He who contracts with another either knows or ought to know the other’s condition.) In interstate or international transactions, the results of this maxim are even harsher than in transactions involving parties both subject to the same law. While it may often be difficult to ascertain

34 See as to capacity to sue Matney v. Blue Ribbon, Inc. (1942) 202 La. 505, 12 So. (2d) 253, Note, 18 Tul. L. Rev. (1943) 319, 321.
35 BG. (Nov. 21, 1908) 34 BGE. II 738, 741; BG. (May 23, 1912) 38 BGE. II 1, 4; BG. (Feb. 7, 1934) 61 BGE. II 12, 17 (2).
whether an individual is under age, married, or of unsound mind, it may be more difficult to find out that he is a foreigner and that his capacity is restricted by his personal law.

As a matter of fact, in order to alleviate embarrassments to national business life, exceptions to the rule have been found necessary for transactions contracted wholly within the territory of the forum.

(a) In the famous Louisiana decision, *Saul v. His Creditors*, it was recognized that a foreigner twenty-two years of age, a minor under the law of his domicil, could not plead this foreign law against a contract entered into by him in the state.36 The same rule was adopted occasionally in other jurisdictions at a time when the law of domicil was held to govern capacity.37

(b) In the Prussian and other German codes since the eighteenth century, the validity of transactions in which consideration is given and the capacity of standing in court, were in one way or another declared independent of foreign-created disabilities.38 By the German law (EG. art. 7 par. 3), it is provided that a foreigner who engages in a transaction in Germany is considered to have the same capacity as he would

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36 *Saul v. His Creditors* (1827) 5 Mart. N.S.569, 16 Am. Dec. 212, discussed by LIVERMORE, Dissertations on the Questions Which Arise from the Contrariety of the Positive Laws of Different States and Nations 32 § 17; STORY § 76; 1 WHARTON § 114ff.
37 See in particular *Woodward v. Woodward* (1889) 87 Tenn. 644, 11 S. W. 892, 897.
38 Prussian Allg. Landrecht of 1794, Einleitung §§ 35, 38, 39 provides that the rules of the Code shall be applied to foreign-domiciled persons engaging in contracts within the territory if these rules are more favorable to the validity of the contract than the laws of the domicil; cf. DERNBURG, 1 Lehrbuch des Preussischen Privatrechts (ed. 1, 1875) 46; Prussian Allg. Gerichtsordnung of 1793, 1 § 5: the capacity of a foreigner to stand in court is determined by the law of his domicil, § 6: but if he has completed his 25th year, it is immaterial whether the law of his domicil, or of the situs of the res, or particular acts that have not been presented to the court determine a later coming of age.

- Baden: C. C. of 1808, art. 3 (a).
- Saxony: C. C. of 1863, § 8.
- Germany: Code of Civil Procedure (1877) § 53.
- Greece: C. G. of 1856, art. 4 par. 2.
have if he were a German, even if his capacity be more limited under his own national law. This provision, designed to protect German business, is not applicable to transactions concerned with land outside of Germany, family relations, or inheritance, but applies to donations between living persons. Moreover, this provision is strictly limited to transactions made within Germany, and does not protect anyone when he contracts in a foreign country. Varying provisions of this type have been adopted in numerous codes.

Another kind of rule of more general scope was contained in article 84 of the German Bills of Exchange Law of 1848, and now appears in the Geneva Conflicts Rules on Bills of Exchange and Promissory Notes of 1930. Article 2 reads as follows:

“The capacity of a person to bind himself by a bill of exchange or promissory note shall be determined by his national law. If this national law provides that the law of another country is competent in the matter, this latter law shall be applied.

“A person who lacks capacity, according to the law specified in the preceding paragraph, is nevertheless bound, if his signature has been given in any territory in which according to the law in force there, he would have the requisite capacity.”

Under these provisions the signature is valid not only in the country where it has been made but also in every other country

40 Switzerland: art. 7b, par. 1 of NAG. provides that a foreigner who has engaged in a transaction in Switzerland cannot plead his lack of capacity if he would have capacity under Swiss law.
Greece: C. C. (1940) art. 9.
Japan: Law of 1898, art. 3 par. 2.
Iran: C. C. art. 962.
Montenegro: C. C. art. 788.
For Hungary see Szladits, 23 Grotius Soc. 1937, 25, 27.
41 See supra p. 34.
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signatory to the Convention. The country of which the signer is a national is allowed, however, to treat the signature as invalid.42

Under neither of these provisions does it matter by what law the contract is generally governed, of what country the parties are nationals, or where they are domiciled. Nor is it relevant whether the incapacity of the foreigner was known or unknown to the other party. A purely objective test is believed best to serve the interests of commerce; this policy of disregarding individual circumstances in laws intended to protect trade was consistently carried out in German law before 1933.

(c) A subjective test is applied in France, however, as established by the Court of Cassation in the celebrated Lizardí case.43 A twenty-two-year-old Mexican, being still a minor under Mexican law, bought jewels in Paris; he would have been of full age had he been a Frenchman. The court, considering that the seller had acted “in good faith and without negligence or imprudence,” declared the buyer bound by his contract. This decision has been followed consistently by the French courts.44 Under this so-called “doctrine of national interest,” protection is given against excusable ignorance of foreign incapacities, dependent upon the circumstances of each individual case.45 Accordingly, the courts are disinclined to accord the benefit of the doctrine to bankers or other business-

42 Germany has availed herself of this permission: German Bills of Exchange Act of June 21, 1933, art. 91 par. 2, 2d sentence.
43 Cass. (req.) (Jan. 16, 1861) S.1861.1.305.
44 Cour Paris (Feb. 8, 1883) Clunet 1883, 291; Trib. civ. Seine (July 1, 1886) Clunet 1887, 178; Cass. (civ.) (Feb. 23, 1891) D.1892.1.29; Cour Paris (July 22, 1933) Gaz.Pal.1933.2.724, Clunet 1934, 910. In the last-mentioned case, a contract was made in France by a Rumanian married woman, who exhibited to the other party an instrument purporting to be a judicially legalized general power of attorney of her husband. The instrument was ineffective under Rumanian law. The court characterized the conduct of both spouses as “truly tortious” (“un véritable quasi-délit”). J. DONNEDIEU DE VABRES 509 in discussing this case, notes an increasing tendency of the courts to limit exceptions from the application of the personal law to such grave situations.
45 This “serious defect” of the French solution has been admitted by 2 ARMINJON no. 21.
men who can reasonably be expected to investigate the personal status of their customers. Relief is generally granted, on the other hand, against a foreigner who fraudulently represents that he has his capacity. 46

This French approach is well-known throughout the Latin countries, but opinions are divided. 47

More emphatically than the French courts, the Swedish Law of 1904, as amended June 27, 1924 (c. 4 § 5), provides that transactions shall be valid in cases where the other party has not known of and has been unable to ascertain the incapacity. 48

(d) A combination of the German and the French rules has been undertaken in article 3 of the Polish Law of 1926 on private international law, prescribing that the capacity of a foreigner who lacks capacity under his personal law and who in Poland has entered into a transaction intended to have effect in Poland, is to be determined in accordance with Polish law when such determination is necessary for the security of honest commerce. This provision is as complicated and impracticable as that recently proposed by the Institute of International Law. 49

(e) These various exceptions to the principle of the personal law have resulted in widespread doubts on the propriety of the principle itself. Nevertheless, the only exception basically affecting the principle is the provision of the Uniform

46 France: Survill, Clunet 1909, 625.
Spain: Trib. Supr. (April 21, 1892) 71 Sent. 504.
Austria: Allg. BGB. §§ 866, 1041.
47 Especially in Italy, the doctrine was not adopted by the courts and has been advocated by only a few writers, such as Anzilotti 153 no. 2; 1 Fiore no. 449. Now the German model has been followed, supra n. 39. In Belgium, Perroud's hostile attitude (Clunet 1905, 305) has been followed by the authors of Novelles Belges, 1 D. Civ. 221 no. 157.
48 The provision does not apply, however, against a foreigner who is a national of a state which is a signatory to the Hague Convention of June 12, 1902 (Ord. of Oct. 10, 1924).
In Norway, the domiciliary law is applied without exception. See Christiansen, 6 Répert. 573 no. 99.
Geneva Conflicts Rules noted above. Other existing exceptions are intended strictly to protect businessmen (and not even all of them) operating in the state of the forum, while the rule shields the forum's own nationals who engage in transactions abroad. Indeed, a German court would allow the plea of incapacity of a twenty-year-old Frenchman who contracts an obligation in Switzerland (because of the principle of nationality), although he would be barred from such a plea in a Swiss court (because of the Swiss provision, analogous to the German exception). On widely different theories, writers have criticized the exceptions as well as their limits.

3. Mixed Systems

(a) English law. No English decision has decisively settled the question whether an individual's capacity to contract is to be determined in accordance with his personal law, i.e., the law of his domicil, or in accordance with the "proper law of the contract." Dicta can be quoted for either approach. The text writers increasingly tend toward advocating the application of the proper law of the contract insofar as mercantile transactions are concerned. This opinion has been followed.

50 See for instance Trib. civ. Seine (June 30, 1919) Clunet 1920, 184 (a Frenchman who was placed under guardianship in France entered upon a contract abroad; when he was sued in France his defense of incapacity was sustained). Cf. also for Bulgaria, GHENOV, 6 Repert. 189 no. 48.

51 RAAPPE 84, 85; PLANCK, 6 Kommentar zum BGB. (ed. 1) art. 7, no. 6 (d).

52 Cf. NIEMEYER, Das IPR. des BGB. 125; WALKER 111 ff.; LEWALD 59, no. 74; M. WOLF, IPR. 63. Only NEUBECKER 62 believed that the exception stated by EG. art. 7 par. 3 could be extended by interpretation.

53 For application of the domiciliary law: Udny v. Udny (1869) L. R. 1 Sc. App. 441, 457; Sottomayor v. De Barros (no. 1) (1877) 3 P. D. C. A. 1, 5; Cooper v. Cooper (1888) 13 App. Cas. 88.


by a Canadian court.\textsuperscript{55} Both Cheshire, who is the most vigorous advocate of this view among the text writers, and the Saskatchewan court seem to be influenced by American ideas. There remains, however, a twofold difference from the American rule: on the one hand, not all contracts are exempted from the law of the domicil; on the other hand, the law of the place of contracting is not followed unless it governs the whole of the contract. We shall have to examine this latter point when discussing the law governing contracts.

(b) \textit{Former Italian system}. The rule that an individual's capacity is determined by his personal law is clearly established by the Italian Civil Code.\textsuperscript{56} Hence, a contract made by a married woman of Italian nationality is held valid by the Italian courts, even if made in a country where a married woman cannot contract without her husband's authorization,\textsuperscript{57} and her husband happens to be a national of that country. So far as mercantile transactions are concerned, however, article 58 of the Commercial Code of 1882 provided that capacity of the parties is determined by the law of the place of contracting.\textsuperscript{58} The coexistence of these two different rules raised some minor problems that might have been overcome. But the fact that the two rules are theoretically antagonistic was much stressed. Recent critics have expressed their preference for the rule of the Commercial Code which is based upon the consideration that commercial transactions are concluded speedily and without the felt necessity of inquiring into the other party's nationality and capacity.\textsuperscript{59} Nevertheless, the commercial rule has

\textsuperscript{55} Bondholders Securities Corp. v. Manville \textsuperscript{[1933]} 4 D. L. R. 699 (Sask.). \textit{Cf.} Falconbridge, 3 Giur. Comp. Dip. 155, 156. There seems no doubt, on the other hand, that the law of the domicil governs capacity for engaging in other transactions, see Johnson 183.

\textsuperscript{56} Italy: C. C. \textsuperscript{(1865)} Disp. Prel. art. 6; C. C. \textsuperscript{(1942)} Disp. Prel. art. 17 par. 1.

\textsuperscript{57} Diena, Clunet 1920, 77. Under Italian law a married woman as such is no longer subject to any incapacity (Law no. 1176 of July 17, 1919).

\textsuperscript{58} See Diena, Clunet 1920, 79.

\textsuperscript{59} See Formiggini, 29 Rivista \textsuperscript{(1937)} 39, 40 n. 1; he criticizes art. 2 of the Geneva Convention, where the national law is adopted as the general rule (see supra p. 187), as a step backwards.
been sacrificed to the nationality principle in the recently re-cast legislation.\(^6^0\)

III. PROBLEMS RAISED BY INCAPACITATING PROVISIONS OF THE LAW OF THE PLACE OF CONTRACTING

A peculiar problem arises when a person who is fully capable under his personal law makes a contract in a foreign country where persons of his class are not capable of contracting. This case presents no difficulty to a court which follows the personal law principle, as his personal law gives this individual capacity.

What, however, is the position in a court applying the law of the place of contracting? Does it consider the contract invalid?

This question has been discussed in connection with the former Italian commercial rule (C. Comm. art. 58), which established the principle of the \textit{lex loci contractus}, as well as with reference to the exceptional rule contained in the Uniform Bills of Exchange Conflicts Convention. By prevailing opinion, it has been answered in favor of the validity of the transaction, in view of the basic function of the national law.\(^6^1\)

The considerations involved may be illustrated by the following hypothetical case:

A Swiss national, twenty years old, having his domicil in Geneva, Switzerland, goes on a trip and buys a car on the instalment plan:

(a) in Paris;
(b) in London;
(c) in New York.

Being of full age under Swiss law, he is considered of age in France under the nationality principle and in England under

\(^6^0\) Art. 58 of the Comm. C. has been repealed by art. 112 of the R. D. of April 24, 1939, containing provisions for the introduction of the First Book of the Civil Code.

\(^6^1\) FORMIGGINI, \textit{Rivista} (1937) at 46 n. 2, \textit{supra} n. 59.
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the domiciliary principle (if applied), in respect to all three contracts. Therefore, he would probably be held capable also by an American court in cases (a) and (b), although this decision would amount to a sort of renvoi. In the third case, the propositus is incapable under the law of the place of contracting. It would hardly be correct within the meaning of the theory of vested rights to consider the full age required by the young man in his country as a "right." Such an approach has been refuted in analogous situations.62 In the case of a married woman who is incapable under the law of the place of acting, but capable under her domiciliary law, the American authorities tend to hold her incapable,63 and contracts of a person of full age in his own state, who acts in a state where he is regarded as a minor, seem generally to be held voidable,64 except under the domiciliary system of Louisiana.65

A similar question arises where an American who is domiciled in the United States and is more than twenty-one years old, contracted an obligation in Chile, while the old law was in force under which minority lasted until the completion of the twenty-fifth year.66

Must an American court prefer in these cases the place of contracting to the domicil? Lorenzen's67 suggestion that capacity should be determined by domicil in international

62 See change of domicil, supra p. 148, n. 190.
64 See 1 Wharton § 114 and cases supra n. 27, probably not allowing the doubt expressed by 1 Wharton § 115a after n. 5.
65 Saul v. His Creditors (1827) 5 Mart. N. S. 569, 16 Am. Dec. 212, states the case expressly, as similarly did Woodward v. Woodward (1889) 87 Tenn. 644, 11 S. W. 892, 897.
transactions, as contrasted with interstate business, would do justice in these situations.

IV. Conclusions

The proper approach to capacity problems in conflict of laws has been repeatedly discussed in recent years in Europe, and an approximation toward the American system of *lex loci contractus* has been advocated in various quarters. In particular, Batiffol who studied American conflict of laws in the United States, recommended in 1934 in the newly founded French Committee of Conflict of Laws, a cautious application of other criteria than nationality. Some critics of the present European system have expressed themselves in favor of the proper law of the contract or, for special cases, that of the place of contracting, while others have wished to substitute the law of domicil for the national law.

The main argument against subjecting capacity to the law of the place of contracting or to the proper law of the contract is that either alternative greatly facilitates evasion of the statutory disabilities imposed by the domiciliary or national law. In addition, the domiciliary or national courts employing either conflicts rule are confronted by the dilemma whether to observe this rule and sanction evasions or to enforce their statutory provisions on grounds of public policy. Such a casuistic approach causes a great deal of uncertainty.

In this country, the uncertainty is somewhat mitigated by the circumstance that a sizable majority of the courts unqualifiedly prefer the law of the place of contracting to any domiciliary policy. Dissenting cases exist, however, and there is increasing emphasis on the interests of the domiciliary state.

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68 Travaux du Comité français de droit international privé, Première année, 1934, 21-66. Cf. Barbey, Le Conflit 35; Batiffol 325 no. 363ff. *Contra:* J. Donnedieu de Vabres 510, who defends the French case law, described above, p. 188, as infinitely more flexible and more richly detailed than the American system.
Moreover, if the advice of Cook were to be heeded, the picture would change. He recommends that statutes restricting the capacity of married women be examined to determine whether they involve only married women domiciled and acting within the state, or also foreign domiciled women acting in the state, or acts of locally domiciled women out of the state, or all these categories. This suggestion seems to favor as narrow as possible a construction of the statutory prohibitions. Its effect would probably reduce the scope of the restrictions upon capacity, whether under the law of the place of contracting or under the law of domicil, whichever is applied. Nevertheless, statutes do not easily lend themselves to such construction; although the results may be beneficent, this method of inquiry would considerably complicate the task of the courts and, at least for the time being, render it more difficult to ascertain the validity of contracts.

A retrospective view of these various attempts to solve this old and not yet liquidated problem, indicates a compromise useful in all countries and adequate to all interests concerned, which also promises more definite results than those reached thus far in the two opposite camps. The transactions in which an incompetent individual participates should, by reference to an objective criterion, be divided into two groups: one in which local interests prevail sufficiently to justify the application of the law of the contract; another in which the domiciliary or national protective policies are entitled to be effectuated everywhere by means of the personal law. For the purpose of conflicts rules, business contracts already are distinguished from transactions regulating family relations and decedents' estates in the statutes of Germany, Switzerland, Poland, Italy, etc., as well as in the English doctrine, though particulars vary. Following this lead, capacity to engage in transactions should be determined, consistently and without exceptions, by the

69 Cook, Legal Bases 438ff.
law governing personal status, when family relations and other personal matters are concerned, and by the law governing the contract in general, when exchange of property or services is involved. This approach, which would need to be elaborated more specifically, could be further refined by a carefully developed distinction between those incapacities which businessmen may justly be expected to investigate, and disabilities which may justifiably be ignored. Where the interests of third parties empirically appear worthy of protection, there should be no room whatever for interference by the personal law. Vice versa, the American rule extends the law of the place of contracting beyond any possible justification. It is even applied to the capacity to marry.

The law thus in part replacing the personal law should conveniently be the law governing the contract as a whole rather than the law of the place of contracting. This is evident in the case where a contract is clearly localized in a place other than that of execution.

Lorenzen's suggestion (supra n. 67) of a compromise between North and South American laws also tends toward the law governing the validity of contracts in general, rather than that of the place of contracting. He assumes, moreover, that the domicil of persons engaged in international trade is sufficiently stable to furnish a standard. The proposition above may not be far away from his idea.