CHAPTER 67

The Form of Wills

I. THE CONFLICTS SYSTEM

MULTIPLICITY of laws establishing forms for wills engenders conflicts particularly discomforting because invalidity of a will, discovered after the testator’s death, is irreparable.

The present greatest differences of formal requirements consist in the varying position of the legislators on public testaments, as developed in the civil-law countries from Justinian’s Corpus Juris; private wills before witnesses, peculiar to the common law; self-written (holographic) wills after a long history adopted and widely popularized by the French Civil Code; and oral (nuncupative) wills, derived from various sources. In the United States, many variants are represented; aside from the English private testaments, written and witnessed, almost half of the statutes admit holographs, although nuncupative wills are only allowed in extraordinary emergency situations.

Yet the general public resents even more the innumerable small divergences in which the statutes seem to delight. How many witnesses for private, or for notarial wills: two? three? Two or three, two or five according to circumstances? Seven? Have the witnesses only to sign or also to give “attestation?” Have all solemnizing persons

1 LORENZEN, “The Validity of Wills, Deeds and Contracts as Regards Form in the Conflict of Laws,” 20 Yale L.J. (1911) 427; CONTUZZI, Diritto ereditario internazionale (Milano 1908); RABEL, “The Form of Wills,” in Symposium, 6 Vanderbilt L. Rev. (1953) 533.
2 See SCHOULER § 417 n. 3; PAGE §§ 386, 395 ff. and Supp. 1950.
to be present all the time? or only at the signature? or may they come and sign successively? Must the testator sign in the presence of the witnesses or the official? At a certain place at the end? Must every step be acknowledged in the document? Must a holograph bear date and place, or only the date, or neither? Is it void if the date is printed? Must a signature carry the name as in the birth document, or does a given name, a nickname, pen name, or "your father" suffice?

The "pitfalls" and "hardship" involved in these ruthlessly whimsical legislations have drawn attention for a century. They have been experienced everywhere, particularly in the case of a change of domicile or nationality after the execution of a will. Some legal provisions have been especially devised for this case. But the need for a remedy, recently felt in the United States, arises also where a testator disposes of assets situated in several jurisdictions, or moveables and immovables subject to different systems, or assets under general and special rules of inheritance.

Some, but not very much, satisfaction has been obtained by counselor's practice.

In the civil-law sphere, it is old advice that a will should be clothed in the most exacting public form available so as to satisfy any law requiring "authentic" testaments. It is well-known, however, that formal invalidity is strikingly often encountered just in notarial instruments.

In the United States and elsewhere, advantage has been seen in separate wills with respect to every state where immovables are left. These wills have to be altered according to changes of circumstances or of fancies. They may also be construed by different methods.

A relatively helpful private form may be suggested, combining a holographic will with the Anglo-American attestations of witnesses, both complying with the most
severe standards. I do not pretend, of course, that this eliminates all pitfalls.

1. Basic Tests

In the curiously involved history of doctrines from the twelfth to the eighteenth century, the ancient personality of law was replaced by the territorial *lex situs* of the feudal regimes until the personal law came back in the disguise of a *statutum reale* or openly. In this development, the form of testaments was from the thirteenth century on a subject of controversies in which domicil and *lex loci actus* were often in rivalry. In the nineteenth century, the law of domicil as of the time of the death of the testator at common law and *lex loci actus* at civil law dominated the choice of law for the form of succession to movables.

At common law, the formal requirements of a will are, like all other requisites and the effects of wills, governed by the law governing succession. This is the law of the situation of immovables, and the law of the testator's domicil at the time of his death for movables. The purest, unadulterated expression of these rules is to be found in the Restatement of Conflicts Law. A will affecting immovables must observe the domestic law of the place where they are situated or else be void. A will complying with the law of the place of execution, or even with the requirements at the testator's domicil at the time of execution but not with what is law at the last domicil of the deceased

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3 Laine, De la forme du testament privé en droit international (1908).
5 Coppin v. Coppin (1725) 2 P. Wms. 291; Pepin v. Bruyère [1900] 2 Ch. 504; [1902] 1 Ch. 24; Will valid under *lex situs*, though not at domicil; De Fogassieras v. Duport (1881) 11 L.R. Ir. 123; Murray v. Champernowne [1901] 2 Ir. R. 232.
Canada: *In re* Howard (1924) 1 D.L.R. 1062.
United States: *In re* Irwin's Appeal (1865) 33 Conn. 128; 2 Beale § 249.3.
—such will is void. 6 Vice versa, a will invalid where it originated may convalesce at the domicil the testator had when he died. 7 In a famous criticism, Phillimore called this system of compulsion “unwisely, arbitrarily and unphilosophically” made. 8

The civil-law tradition, here as in the matter of contracts, detaches the formal elements from the whole transaction and treats them in accordance with the maxim, locus regit actum. Not in the old Italian school, but since the French statutists, this principle was prevailingly observed in full rigor, with imperative force. The will had to conform to the formal provisions of the law governing at the place of execution at the time of execution or be considered void under the law governing succession. Thus, the Grand’ Chambre du Parlement of Paris invalidated in 1721 a holographic will that the Governor of Douai, M. de Pommereuil, had made in that town in the holographic form of the Coutûme de Paris. 9 This remained the French approach during the nineteenth century. Hence, a foreigner could not employ the forms of his home state. In the numerous cases of wills made in France by Englishmen in the English manner with two witnesses, a manner unknown to French law, it happened that the will was invalid in England because France was the last domicil. 10

8 PHILLIMORE, Commentaries upon International Law (ed. 3) vol. 4, 705.
9 2 LAINÉ 416. Exactly to the same effect the Parliament of Paris had decided analogous cases since 1615. See DUBRUJÉAUD, Des conflits de lois relatifs à la forme du testament sous seing privé (thèse, Paris 1908).
10 Bremer v. Freeman, supra n. 6.
and was equally void in France, because it was executed in France.\textsuperscript{11}

A third connecting factor is the oldest of all: \textit{lex situs} governing all assets including movable property. As mentioned above, this approach obtains in Mississippi,\textsuperscript{12} and in the Treaty of Montevideo is subject only to the exception that authentic wills executed in a member state are recognized.\textsuperscript{13}

These three basic tests, if standing unrelated, are a monument of isolationism. They are inexcusable where the ultimate penalty of invalidity befalls an instrument as the effect of one of the mentioned variants in the number of witnesses, attestation and signing, acknowledgment of presence, officials in public wills, dates and location of signature in holographic wills, etc.

2. Enlargements

   (a) \textit{English legislation}. Even before the belief of the lawyers in the necessity of rigorous formality began to decline, the international intolerance shown in our matter aroused astonishment. It is well-known how the decision in \textit{Bremer v. Freeman} \textsuperscript{14} alarmed the British colony in France and led to Lord Kingsdown's Act,\textsuperscript{15} which created a very large faculty for British subjects to testate abroad. According to this law, which despite its record for bad drafting\textsuperscript{16} is still in force, the formal validity of the will may derive from the law of the place of execution or that

\textsuperscript{11} The line of these decisions, including Cass. req. (March 9, 1853) D.1853.1.217, S.1853.1.217, reached to the lower courts in the complicated law suit Gesling v. Viditz, Cour Paris (Dec. 2, 1898) D.1899.2.177 and Cour Orléans (Feb. 24, 1904) Revue 1909, 900 reversed, see infra n. 23.
\textsuperscript{12} Miss. C. Ann. 1942, Title 1, ch. 1, § 467. See supra 253.
\textsuperscript{13} Art. 44.
\textsuperscript{14} Supra n. 5.
\textsuperscript{15} Wills Act, 1861.
\textsuperscript{16} See the criticism by MORRIS, 62 Law Q. Rev. (1946) 170, 173.
of the domicil or origin. (Section 1). It is well understood that in addition the law of the last domicil remains in an optional function (section 4).

This option is granted to British subjects making a will concerning “personalty” out of the United Kingdom. When executing a will within the United Kingdom, the list is strangely narrower (Section 2). Section 3, declaring a change of domicil immaterial, has a much disputed scope; in particular it is an unending controversy whether it adds anything new for British subjects and whether it applies also to aliens.\(^{17}\)

(b) Typical civil law. In the civil-law countries of the later nineteenth century, another enlargement took place. The *lex loci actus* lost its mandatory character and permitted the personal law to govern formalities in disposition either of movables or, in accordance with the principle of unity of succession, of the entire inheritance. Personal law to the Continental European mind was in this period the national law at the time of executing the will. The old test of *lex loci actus*, thus, was replaced by the option, *lex loci actus* or *lex patriae*, as early laid down in the Italian Code of 1865.\(^{18}\) The German Civil Code of 1896 inverted the order: *lex patriae* or *lex loci actus*.\(^{19}\)

In France, two sections of the Civil Code created diffi-

\(^{17}\) For the affirmative: Westlake 121 § 85; Dicey (ed. 5) rule 197; Breslauer, “The Scope of Section 3 of the Will’s Act 1861,” 3 Int. L. Q. (1950) 343. For denial: Foote 301; Cheshire (ed. 4) 527; Dicey (ed. 6) 840. Loss of British nationality after execution of the will is innocuous according to Re Colville [1932] 1 D.L.R. 47 (British Columbia S. Ct.) and “probably” in the English courts, Cheshire (ed. 2) 518.

\(^{18}\) Italy: Former C.C. (1865) Disp. Prel. art. 9, par. 1; FedoZZI (ed. 2) 593.

culties. Article 999 permits Frenchmen abroad to testate by the French form of a holographic will or by local authentic testament. The courts rejected certain foreign executed wills of Frenchmen but seemed agreed that authentic wills did not need intervention of one or two official solemnizing persons as the French Code demands. The definition should rather be taken from the foreign place of execution. Use by Frenchmen in a common-law jurisdiction of the private and secret Anglo-American forms was therefore admitted, a nice legal trick to obviate hardships. On the other hand, foreigners in France were finally allowed, despite the categoric rule *locus regit actum* of C.C. article 3, to testate in France in their national forms; the Court of Cassation announced the facultative, optional function of this maxim in a decision of 1909, dealing with the will of a foreigner. After this was secured, the authors went farther in construing article 999 as merely "enumerative"; Frenchmen should be able to use any forms of the local law, for instance a holographic will in an easier form than Article 970 C.C. allows.

An analogous development may be noted especially in Quebec and Chile. When a domiciliary of Quebec executed a holographic will in New York, the old interpretation of the Quebec Civil Code, article 7, imperatively required compliance with New York law, which did not know holographic wills. But the Court of Appeals unanimously, and the Canadian Supreme Court by majority, validated the will applying Quebec law as the law of the last domicil,

20 Trib. civ. Lyon, Clunet 1877, 149, without date concerned an Austrian oral will.
23 BATIFFOL, Traité 582 ff. § 581.
stating renvoi from New York to Quebec, and the Supreme Court recognizing that the rule *locus regit actum* is permissive. 24 Article 18 of the Chilean Civil Code declares it necessary that every will be a public and solemn instrument, and article 1027 again recognizes a foreign will only if it is (written and) "solemn." But the views of the commentators and a decision of 1864 rejecting foreign holographic wills were superseded by a decision of the Supreme Court of 1927 recognizing them. 25 The Greek Code of 1830 recognized merely the *lex loci actus*, but the Wills Act of 1911 added the *lex patriae*. 26

Among the many laws that followed the French lead, 27 an analogous trend toward *lex loci actus* or national law is noticeable, although Portugal insists on the law of the place of execution even with imperative force 28 and often the required authentic form is more rigorously insisted upon. Frequently, the domestic forms must be observed also by foreigners, and holographic wills may be excluded altogether. In the Netherlands, holographic wills of foreigners at the forum may be executed according to the

26 Greece: Law of Feb. 11, 1830, art. 61; Law on Wills of May 17/18, 1911, art. 53 par. 1; 2 Streit-Vallinda 509; C.C. 1940, art. 11.
27 Belgium: C.C. art. 999; Poulet (ed. 3) §§ 477 f.
Belgian Congo: C.C. art. 11.
Cuba: C.C. art. 732.
Dominican Rep. C.C. art. 999.
Egypt: C.C. 1948, art. 17 par. 2.
Haiti: C.C. arts. 805, 806.
Panama: C.C. arts. 765, 770.
Puerto Rico: C.C. art. 11.
Spain: C.C. art. 732.
Venezuela: C.C. art. 879.
28 Portugal: C.C. art. 1910 ff., 1961, 1965; infra n. 81. Also the old bilateral treaties between Salvador, Ecuador, and Bolivia.
national requirements, but the Appeal Court of the Hague insists that a deposit with a Dutch notary is indispensable.  

Nevertheless, the most familiar formula of the civil-law countries can be stated as referring alternatively to *lex loci actus* or the national law, less often the domiciliary law of the testator. Sometimes, it is true, in the codes the alternatively to *lex loci actus* is only the code itself. Nationality has been replaced by domicil as the test of personal law, for instance, in Brazil. However, in France, where the law of the last domicil governs succession to movables, formal validity is yet subject to *lex loci actus* or *lex patriae* as of the time of execution.

(c) Interstate and international unification. Uniform state statutes. When the National Conference of Commissioners on Uniform State Laws was founded in 1892, practically their first work was the drafting of an Act relating to the execution of wills. The wording then was

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30 In addition to the citations *supra* n. 19 and 26, e.g. Ethiopia: BENTWICH, 4 Int. L. Q. 113; Nicaragua: C.C. art. VI, par. 15.

31 E.g. Denmark: (App. 30, 1940) U.F.R. 1940, 857, 13 Z. ausl. PR. 828: Dane, domiciled in Denmark, testating in France in French form.

32 Colombia: C.C. art. 1084.
Ecuador: C.C. art. 1085.
Guatemala: C.C. (1877) art. 789.
Honduras: C.C. arts. 1011, 1012.
Mexico: C.C. art. 1593 (implicite); State of Morelos: C.C. arts. 15, 1601; State of Puebla: C.C. arts. 12, 3127.
Norway: Law of July 31, 1854, § 56.

33 Brazil: The dominant opinion under the law of 1916 claimed the imperative effect of *lex loci actus* without any distinction; TENÓRIO (ed. 2) 336 § 443 against BEVILAQUA and RODRIGO OCTAVIO, 1 Manual do Código civil brasileiro (Lacerda ed.) 2 § 356. According to the Introd. L. of 1942 it seems that for *foreign* executed wills the law of the last domicil and *lex loci actus* are optional.

34 Handbook of the National Conference of Commissioners on Uniform State Law, 1892, p. 9.
identical with the text agreed upon in 1896 \(^{35}\) and again with that promulgated in 1910,\(^{36}\) as Uniform Wills Act, Foreign Executed. Among the many subsequent uniform bills, this is a *rara avis* belonging to the "conflictual" kind. Wills executed in a foreign state in a manner recognized at the forum or at the testator's domicil should be considered as if they were executed in the mode of the forum. This rule extends to interests in land.

The draftsmen stated from the beginning in 1892 that there was no real reason for the differences of formal requirements in disposing by testament of personalty and real estate, "the effect of which has been in many cases to defeat the purpose of a testator." Since divergence of the laws of real and personal property had been abolished in most states, "there would seem to be every reason why a similar simplification of the law would be accepted." However, the success was limited. The Act has been adopted only by thirteen jurisdictions.\(^{37}\) In a new draft of Execution of Wills Act, 1940, intended to unify the municipal formal requirements of wills themselves, the old text was inserted with certain modifications as section 7.\(^{38}\) This broadening of the scope was balanced by changing the "uniform" law into a "model law." Although its influence is certainly notable, in the past twelve years only Tennessee has joined the ranks of the adopting states. The draftsmen considered their work useful rather than necessary. Yet at least the conflicts rule of section 7 concerns one of the numerous points where the local differences

\(^{35}\) *Id.* 1896, p. 19.

\(^{36}\) *Id.* 1910, p. 144.

\(^{37}\) Alaska, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Nebraska, Nevada, New York, South Dakota, Wisconsin. Washington repealed its adherence. Kansas and Tennessee acceded to the new draft, see on Kansas *infra* n. 49.

are devoid of any territorial, moral, social, or other justification and plainly apt to irritate the people involved. Legal formalities are indispensable, but to allow their local shades to disturb otherwise unimpeachable post-mortuary dispositions compromises the law. This motive was taken up and made the theme of a masterful exposition by Loren­zen in 1911.\textsuperscript{39}

**Canadian Uniform Law.** The British Act of 1861 was amended by the Uniform Wills Act in Canada in 1929, particularly by including alien testators, and increasing the list of validating foreign laws.\textsuperscript{40} But also this Act is in force only in two provinces, Saskatchewan and Manitoba. In Canada, Falconbridge is the eminent advocate of a generous recognition of foreign forms of testaments. A further improved text is due to him.\textsuperscript{41}

**Hague Conferences.** It demonstrated a need recognized universally at the time, that the Hague Conferences on Private International Law beginning in 1893, almost simultaneously with the American Uniform Law Commission, exactly like the latter started their work with the conflict of inheritance laws and were concerned in particular with the form of wills.\textsuperscript{42} The formula adopted has become a model for a few recent laws, although the Draft Convention as a whole has been a failure.

**Scandinavian Convention.** The Northern Convention of 1934 considers a will formally valid if it complies with the law of the place of execution or the law of the domicil

\textsuperscript{39} Lorenzen, 20 Yale L.J. (1911) 427.
\textsuperscript{40} 14 Minutes of the Proceedings, Canadian Bar Ass., 1929 (1930) 323, 332 ff.; also printed by Morris, 62 Law Q. Rev. (1946) at 185.
\textsuperscript{42} Actes de la Cinquième Conférence de la Haye (1925) 283 art. 6; identical Actes de la Sixième Conférence de la Haye (1928) 405 ff. Projet art. 6.
or the national law at the time of execution. The last personal law is omitted as in the Continental Codes.

The Swiss law of 1891 can be mentioned here since it was enacted at a time when legislative power over private law was with the Cantons. It allowed the forms of the place of execution, of the Canton of domicil at the time of execution or of the death, and of the home Canton. At present applied only to international relations, this means an option among the place of execution, the domicil at either time, and the nationality.

(d) Various rules. The existing variety in all other jurisdictions is perplexing. Within the United States, five or more groups of conflicts rules are distinguishable. It is highly significant that in most jurisdictions foreign executed wills on movables agreeing with the formalities of the place of execution, are recognized, either as a privilege restricted to formal requirements or as including intrinsic validity. The variants include, in addition, the law of the enacting state or the domicil at the time of execution or both. On the other hand, six states name only their own law and the lex loci actus, and eleven states retain exclusively the common-law criterion of lex domicilii as of the time of death.

In the Latin-American countries, even where the French Code is not followed literally, the "authentic" form enjoys a marked preference, either suppressing holographic wills altogether or at least for the use of nationals abroad. As on this point, the Codes also vary in combinations between

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43 ("Northern") Convention, concerning Inheritance and Succession (1934) art. 8, 6 HUDSON, Int. Legislation 947 no. 397, 164 League of Nations Treaties Ser. 279.
44 N.A.G. arts. 24 and 28.
45 The best survey has been given in the excellent article by HOPKINS, "The Extraterritorial Effect of Probate Decrees," 53 Yale L. J. (1944) 221, 254 ff.
lex loci actus, national or domiciliary law, respectively, and the domestic law.

Another minimum requirement, that a foreign will should be written, recurs also in American statutes.46

3. The Most Developed Reference Lists

(a) Texts. The Uniform Wills Act, Foreign Executed, 1910, stated that “A last will and testament, executed without this state in the mode prescribed by the law, either of the place where executed or of the testator’s domicil, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state; provided said last will and testament is in writing and subscribed by the testator.”47

This text did not specify the domicil of what time was deemed decisive. A new draft of 1938 therefore supplied a broader option, referring to the domicil either of the time of the execution or at the death.48 This version was adopted by Kansas.49 But, without discussion,50 the Commissioners abbreviated the wording, leaving only the domicil at the time of the execution:

“A will executed outside this state in a manner prescribed by this act, or a written will executed outside this state in a manner prescribed by the law of the place of its execution or by the law of the testator’s domicil at the time of its execution, shall have the same force and effect in this

46 In re Tessini’s Est. (1947) 73 N.Y.S. (2d) 904, an Italian testament in which the testator declares to be unable to write, was denied probate because an agent should have been asked to write for him.
47 Handbook (1910) 144.
48 Id. (1938) 314 with an appropriate note.
50 In Handbook (1939) 227, the note of 1938 is carried, but the text is changed, cancelling the mention of the last domicil. Mr. Barton H. Kuhn, Omaha, obliged me by stating that no discussion of the point is noted in the files.
state as if executed in this state in compliance with the provisions of this act."  

Probably the old text already meant to refer to the domicil at the time of execution, and was silent on the last domicil because this was the old accustomed device of which no lawyer needed to be reminded. Section 1 of Lord Kingsdown's Act may have been too closely followed. The final text expresses what the old wording omitted to specify. The formulation this time, it is true, sounds so exhaustive that it has been understood by competent interpreters as excluding the last domicil. If so, the common-law rule would have entirely yielded to the civilian thought. This is unlikely in itself and seems not to have come to the mind of the draftsmen. The omission also of lex situs reinforces the argument that the draftsmen cannot have intended to exclude the old criteria. This interpretation is approved by a leading commissioner.

Most recently, in an unofficial manner, an extremely ample (perhaps all too ample) list has been offered by the Commissioners which at the same time, opportunely leaving the narrow framework of a law for foreign executed wills, includes nonresident testators:

"A will is legally executed if the manner of its execution complies with the law in force either at the time of execution or at the time of the testator's death of 1) this state, 2) the place of execution, or 3) the domicile of the testator at the time of execution or at the time of his death."

The Hague Draft, article 6, names the law of the place of execution, the testator's national law at the time of execu-

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52 Thus BORDWELL, "The Statute Law of Wills," 14 Iowa L. Rev. (1929) 445; HOPKINS, supra n. 45, at 268 regretting this result.
53 On the ground of the facts, supra n. 50, Mr. Willard Luther, Boston, kindly authorized me to state his personal interpretation of s. 7 to this effect.
tion or at the time of death.\textsuperscript{55} The Swiss law, as mentioned before, declares sufficient conformity with the law of the place of execution, the domicile of either time, and the national law.\textsuperscript{56}

Also the Argentine Civil Code admits foreign executed wills in the form of the testator's residence or nation or of the Argentine law.\textsuperscript{57}

(b) \textit{Comparison: time of validity}. It is highly interesting that while common law looked only to the personal law as of the time of the death and civil law only to the time of the execution, on both sides the distinct trend was to let formal validity of either time suffice. Lord Kingsdown's Act and the American Uniform Law added the time of execution; the Hague Draft and, before it, the Swiss Act added the time of death. The two great groups joined, but most laws are lagging, and expressions are sometimes defective. In South Africa, for instance (admitting \textit{lex loci actus} and "domicil"), as recently reported, the two only decisions held opposite views on the formal validity of a will conforming only to the law of the last domicil.\textsuperscript{58} In particular, it is surprising\textsuperscript{59} that the German Code, followed by other codes,\textsuperscript{60} fails even to make the

\textsuperscript{55} Actes Sixième Conf., (1928) 405 ff., art. 6.
\textsuperscript{56} N.A.G. art. 24.
\textsuperscript{57} Argentina: C.C. art. 3638.
\textsuperscript{58} \textit{Re McMillan's Estate} (1913) T.P.D. 198 (invalidity); ex p. Estate Abbott (1950) (3) S.A.L.R. 325 (validity); see ELLISON KAHN, "Recent Cases in South African P.I.L.," 4 Int. L.Q. (1951) 397; the author advocates validity also according to the common-law test.
\textsuperscript{59} The older German literature was divided. But in Austria, WALKER (ed. 3) p. 1805, against Thöl and STOBBE, stressed the awkwardness of excluding the law governing the succession, invoking Savigny's dictum, p. 312, that the testament is legally to be considered as executed at the moment of death.
\textsuperscript{60} Germany: E.G. art. 24.
Czechoslovakia: Priv. Int. L. § 3.
Egypt: C.C. art. 17.
Siam: Pr. Int. L. art. 39.
exception in favor of the last nationality that it states in
the matter of capacity of willing; as has been pointed
out, where an English lady writes a holographic will in
London, and later acquires German nationality by marriage
and dies, her will remains invalid.  

Law of Place of Execution. The common-law rule has
since Lord Kingsdown's Act been very largely enriched by
considering the lex loci actus. Familiar to the predecessors
of the English scholars, this is justly recognized as the
most appropriate source of formal validity. Most Ameri­
can statutes and the great majority of all other laws are
now united under this old rule.

Law Governing Succession. On the other hand, again
uniformity is in the making, when the American statutes,
unfortunately often silently, retain validity under the law
of the domicil at the time of death and civil-law statutes
add this reference to their lists, as the Hague Draft,
Switzerland, Italy, and Greece.

The Law of the Enacting State. The American Uni­
form Law, Lord Kingsdown's Act, and a considerable
number of American and foreign statutes include "this
law," i.e., the law of the enacting state, in their lists,
which may be, but need not be, identical with the last
domiciliary or national law. The reference covers the
cases where assets are situated at the forum, while the
other local contacts may be foreign; for instance, it obvi­
ates any hard proof of compliance with the law of the
place of execution. In systems tending to a strong terri­
torialism, this is a natural device. Another unsuspected use
may appear in the following situation. An American citizen,
formerly domiciled in Tennessee, takes a new domicil in

61 M. WOLFF, D.IPR. (ed. 3) 198, following LEWALD, IPR. 316 f. § 381.
62 In re Hart's Estate (1936) 60 Misc. 108, 289 N.Y.S. 731; (1937) 250
Cuba (or The Netherlands, Japan, etc.), executes there a will conforming to the law of Tennessee, i.e., the Model Probate Code, with two witnesses, and dies there. An American domiciled abroad is no longer a citizen of a particular state; the United States has no substantive law of succession for him. The domicil and the place of execution refuse recognition. But the court of Tennessee and others, if not demanding more exacting formalities, may admit the will to probate under “this,” their own statute.

This, however, would be a probate judgment, not rendered at the last domicil, that would probably have no effect outside the state except as to the assets of Tennessee. The only real remedy would be a substantive all-American rule applicable by any foreign court that looks to the national law. Americans abroad are a new event in American law-making.

Domestic Wills. The American official text and many others are merely concerned with foreign executed wills. A considerable number of states, indeed, insist on their own formalities for domestic executed wills. This occurs not only with respect to the subjects of the forum and to domestic immovables but “locus regit actum” is likely to be applied to all assets in the imperative meaning when the will is executed at the forum. French practice and the German Code have advanced to a general option between the lex loci actus and the personal law. This development is followed in many other countries but needs general acceptance.

The Personal Law of Other States. Comparing the advanced lists in the Model Law and the Hague Draft, a striking parallel is revealed with the likewise remarkable difference that here domicil, there nationality, is the only

64 Spain is doubtful; see 2 Goldschmidt 253.
criterion for the personal law. Most draftsmen do not even think of the connecting factor in the other half of the world. An exception is made by the Scandinavian Convention which had to consider the nationality principle in Sweden and Finland and the age-old domiciliary law of West-Scandinavia for their mutual relations, and more effectively, by the Swiss law in consideration of the split in the Cantons. It is the solitary merit of Argentina to have spontaneously remembered the division of the conflicts rules in the Western hemisphere. Of course, the Código Bustamante considers this contrast in its peculiar way.

There is an interest of harmony involved in this question, but also a certain practical effect.

Suppose a Frenchman, domiciled in England, executes in Portugal a holographic will according to the French Civil Code, Article 970. Valid under French law (C.C. Article 999), the will is invalid in Portugal.\(^6\) In an American Court such as New York, neither lex loci actus, nor domicile of any time, nor “this” law justifies recognition. But all jurisdictions looking to the national law must hold the will valid by a kind of renvoi neglected in the discussions. Should not England and the United States join them?

On the other hand, suppose a Cuban, domiciled in Detroit, on a trip to Louisiana executes there a will with two witnesses conforming to Michigan law. Michigan and Louisiana (under the Uniform Law) consider the will valid, although Louisiana requires three to five witnesses. Should it not be valid also in Cuba or Germany or Japan?

**Change of Personal Law.** As it seems, section 1 of Lord Kingsdown’s Act refers also to the case of a change of the testator’s domicile between execution and death, although section 3 deals with the same case and only with change.

\(^6\) Portugal: *infra* n. 81.
The American statutes recognizing the domiciliary law at either time are drafted with a particular view to the testator's change of domicil. But a German provision only by an irrational exception preserves the validity of the will of an alien who becomes a naturalized German, if the will is valid under the former national law and the law of the place of execution, yet conforms with German law (E.G. BGB. art. 24 al. 3).

Proposal: A will is legally executed if the form of its execution complies with the law in force either (1) in the enacting state at the time of his death, (2) at the place of execution at the time of the execution, or (3) at the domicil or in the national state of the testator at the time of execution, or at the time of his death.

II. Restrictions

1. In Favor of Lex Causae

The theory that the rule locus regit actum depends on the consent of the "lex causae" obtains a particular place where the form of wills is tested under the law of the place of execution.

Around 1900, with special regard to wills, an author asserted that the theory giving superiority to the lex causae, which in this case is the law governing the succession, was not only the prevailing but the common view. In the same vein, the first drafts of the Hague Conference from 1892 inserted a clause restricting the application of lex loci actus to the condition that where the national law governing

66 Vol. II, p. 495, to which the reader may be referred.
a stipulation of a will requires a certain form, the will cannot be made in another form.\textsuperscript{68}

Although this view has since shrunk to a small minority of opinions,\textsuperscript{69} the recent French draft declares its adherence to the dependence of \textit{lex loci actus} on the \textit{lex causae},\textsuperscript{70} and the reporter, Niboyet, wanted also the application to testaments;\textsuperscript{71} the Benelux International Private Law in fact carries this application by stating that a legal act is valid respecting its form if it satisfies the respective conditions of the country where the act is accomplished, "except where the nature of the act or the national law of the person accomplishing it opposes (this effect)."\textsuperscript{72} The Netherlands, moved by their famous prohibition of foreign executed private testaments to Dutch nationals (to be discussed presently), also initiated the first Hague Drafts.

This doctrine results in the extraterritorial effect of prohibitions by the national law or whatever else may be in other legal systems the \textit{lex causae}.

The problem has occupied the attention of the courts in connection with the following legal provisions.

(a) \textit{French Code Civil, Article 999}: A Frenchman in a foreign country may make his testamentary dispositions by act under private signature as prescribed by article 970 or by authentic act in the forms used at the place where this act is executed.

The significant history of interpreting this section has

\textsuperscript{68} Actes 1893, p. 29, art. 6 par. 2; Projet transactionnel, basis for the Conference of 1904, Documents (1904) 166, art. 2 par. 2; see for the first drafts on this point 2 KAHN, Abb. 225 ff.

\textsuperscript{69} See for the majority view LEREBOURS-PIGEONNIÈRE §§ 314, 367; BATIFFOL, Traité § 579; and the almost uniform German doctrine, \textit{infra} n. 76; see also KG. (June 6, 1940) JR. 1940, 1372, HRR. 1940, 1108.

\textsuperscript{70} Commission de Réforme du C.C., Travaux 1949-50, 673 ff. Projet art. 59. NIBOYET, \textit{ibid.} at p. 672 claimed that the German law was to the same effect, strictly contrary to the facts.

\textsuperscript{71} Art. 69 of the French draft of the subcommittee. Travaux \textit{ibid.} 673 ff.

\textsuperscript{72} Benelux draft (1951) art. 23.
been mentioned above. The result is that a French testator abroad may use even a holographic will in the local form not agreeable to article 970 of the French Code Civil, and oral wills according to Austrian, Swiss, or Scandinavian laws, or the American statutes permitting nuncupative wills. The French lawyers deservedly acknowledge the need of international security of transactions for an unchallenged operation of local form applied in executing wills.

(b) *Netherlands Code, Article 992.* The Dutch provision runs in categoric terms.

In contrast to the Frenchman, the Dutchman abroad testates invalidly in any local form, except in “authentic” form which, moreover, requires the intervention of a public official, irrespective of the foreign local conceptions. It suffices, however, as the Hoogeraad inferred from history and reason of the provision, that a foreign holographic will be deposited with a foreign public authority. 73

The Dutch learned writers are scarcely inclined to characterize this provision as a rule of status, restricting capacity. They state in an entirely correct appraisal, a formal requirement sanctioned by nullity, and naturally enforced within the prohibiting state on the grounds of public policy. 74 They seem divided, however, with respect to the international effect. Is this effect merely prevented by contrary public policy of the foreign court or by the rule *locus regit actum* itself? In other countries, notably eminent French and Italian writers, on the contrary, for a long time acknowledged a binding international force of article 992 on two theories: either on the ground of the mysterious notion of “formes habilitantes,” which constitute not a form

73 H.R. (Jan. 6, 1927) W.11623; N.J. 1927, 266; Offerhaus 708 ff.; that the deposit may be made abroad, against what modern writers had to conclude from H.R. (Dec. 18, 1885) W.5252.
74 See ultimately van Brakel § 150.
nor an incapacity, or by characterizing the prohibition directly as incapacitating the testator to execute a private will in a foreign country. Hence, the Dutch national personal law would be applicable in all courts under the nationality principle. The great majority of authorities have recognized the obvious truth that the formation of wills in oral, written, or authentic expression pertains to "form," and the domestic forms are open to foreigners; prohibitions such as the Dutch have to yield to the rule locus regit actum in the other countries. The Dutch rule is felt to imply repudiation of the reliance put on the local legal system,


France: Cour Paris (May 7, 1897) Clunet 1897, 817; Trib. Seine (Aug. 13, 1903); Clunet 1904, 166; (Feb. 19, 1927) D.1928.2.33, Revue 1928, 102; LAINÉ, 2 Introduction 329 ff.; id., Revue 1907, 833 ff.; WEISS, 4 Traité 635; VALÉRY, 1238 § 882; BARTIN, 31 Recueil 576; cf. DESPAGNET § 378 bis.


76 Belgium: Poulet (ed. 2) 557 ff. §§ 478 f.

France: Cass. civ. (June 29, 1922) D.1922.1.127, S.1923.1.249; for the case of a Dutchman: Orleáns (Aug. 4, 1859) D.1859.2.158, S.1860.2.37; cf. Aix (July 11, 1881) S.1883.2.249, Clunet 1882, 426; Trib. Seine (March 23, 1944) S.1944.2.44. ARMINJON, 2 Precis (ed. 2) § 206 bis. NIBOYET, Manuel 665 § 542 and Revue 1928, 105; cf. id., 3 Traité 352 § 953; 363 § 956; LERBOURS-PIGEONNIÈRE (ed. 6) 272 § 256. BATIFFOL 311 ff., 584 § 582; 670 § 667.

Germany: OLG. Hamburg (May 2, 1917) 72 Seuff. A. 313; RG. (Apr. 6, 1916) 88 RGZ. 191 (dictum); (June 22, 1931) 133 RGZ. 161 at 163; KG. (Feb. 15, 1934) IPRspr. 1934, No. 71: "the local form suffices always."

KAHN, 1 Abhandl. 43; 2 id. 226; KIPP in I WINDSHEID, Pand. 541; PLANCK, Art. 11 n. 4; NUSSBAUM 89 ff.; NEUNER, Der Sinn 31; LEWALD 83, 361; CONTRA RAAPE, Komm. 171, 686 setting E.G. art. 24 over E.G. art. 11.

With comparative research: FRAGISTAS, 4 Z. ausl. P.R. (1930) 934.

Italy: Cass. (July 6, 1926) Foro delle Nuove Province (1927) I 296, cit. by FEDOZZI (ed. 1) 385 n. 4. (Oral will made in the Austrian time, recognized); BUZZATI 159, 423, 393; DIENA, Sui limiti alla applicazione del dir. straniero (also in Studi Senesi, vol. 15) 25-30.

Switzerland: SCHNITZER (ed. 3) 479.
warranted by _locus regit actum_, "one of the most beneficent rules of private international law."  

Evidently, this is the only reasonable and systematically fitting conception. Yet, can it be justified by the popular idea that just the law of the forum has its own privileged characterization of form? Such a prerogative is wholly unfounded in an international give and take. There as always, the nature of the rule is molded by the common theoretical conviction, in this case the more easily so, since even the Dutch dominating opinion coincides so far. A singular deviation of one statute is irrelevant. Not the law of the forum but the reasonable and internationally accepted concept of form grants the result that every state may permit and in fact, in the absence of any local prohibition, permits the Dutch national the use of its own forms.  

(c) The Dutch provision applies also in the former and present Netherlands colonies. In Latin America, restrictions of the French type are numerous. Portugal, where _lex loci actus_ is the only validating law, does not recognize private testaments at all, wherever executed; the conse-

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77 Lainé in Actes de la Troisième Conférence de la Haye (1904) at 129; Walker 809.
78 Fedozzi (ed. 1) 588 ff. starts with the acknowledgment that the Dutch rule "è indubbiamente relativa alla forma," but he considers the question not one of characterization but as a conflict of conflicts rules (on form). Hence, not the Italian characterization but the Italian conflicts rule would be the decisive element. This is not a valid contrast! It is just the content of the Italian conflicts rule that is in question; it is found by characterizing a concept, part of the rule, _viz._ the "form."

Gemma, Propedeutica al Dir. Int. Priv. (Bologna 1899) 111 ff. agrees because he wants to favor holographic wills, the simplest and most suitable expression of the testator's intentions. But many legislators mistrust these wills. This kind of policy, in my opinion, is to be left to the individual municipal laws. Although some writers have approached Gemma's method to my own, only the results are kindred.
79 Neth. Indies: C.C. art. 945.
Surinam: C.C. art. 972.
Curaçao: C.C. art. 971, dealt with in KG. Berlin (Feb. 15, 1934), IPRspr. (1934) nr. 71.
80 See supra 306.
Inheritance

The attitude of other states to these prohibitions and those of oral wills is naturally negative because of the effect of the independent rule, *locus regit actum*.

**Wills of Minors.** According to the Austrian, Spanish, and German Codes, a minor of a certain age may execute a will but may not use holographic forms, or must testate orally in court. In these cases the restriction of available forms clearly serves the protection of minor age. Therefore, a part of the doctrine resorts to the personal law and holds a holographic will void, wherever made, whereas in another view form remains form without regard at whose protection it aims.

It would seem, unfortunately, that in the country where such a provision is in force, it is meant to apply also to wills executed abroad. However, the undoubted fact that the voidness attaches to the use of a certain form and not to incapacity to will, must work for validity in all other countries recognizing the *lex loci actus* in this respect. Only jurisdictions with a similar public policy may be exempted.

The situation, hence, is identical with the foregoing

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82 BUZZATI 401; FEDOZZI (ed. 1) 584.


84 Austria: A.BGB § 569; former Prussian ALRI 12 § 17.


86 Austria: WALKER 916.

Germany: PLANCK, 5 Komm. § 2247, 2; 2 BAR 30 n. 24; CROME, 5 Bürger. R. 54; KAHN, 2 Abh. 232; LEWALD, Questions 108.

87 Contra KAHN l.c.; SCHNITZER 482 holds a holographic will made by a twenty-year-old German in Switzerland valid in both countries.
cases (a) and (b) and makes us wish in the same manner that the statutes should not try to rule beyond their territory.

2. In Favor of Lex Situs

A German national having executed a holographic will in Germany leaves land in England. Lord Kingsdown's Act does not validate wills on immovables, even if it should be taken as including alien testators. According to prevailing German opinion the will is valid in Germany under the lex loci actus, E.G. article 11, para. 1, sent. 2, also with respect to English land, though it is invalid in this regard in England under the Wills Acts. Raape, whose dissident theory is that lex causae overrides the local law in determining formal validity, suggests that, since E.G. article 28 concedes English land to be governed by English law, the succession to this immovable is to be treated as intestate also in German Courts.\(^8\) This general favor given the lex causae is unacceptable, but another specific restriction of lex loci actus should be inferred from the yielding of German inheritance law to the English, E.G. article 28. Assuming that this concession is an exception to all German law involving this succession and comprehending formal validity as well as other requirements of a will, locus regit actum is put out of function.

III. Operation of the Rules

1. The Concept of Form

As shown above, in discussing delimitations between formal validity and capacity, it is practically settled that the concept of form is the same as in the matter of marriage and contracts,\(^8\) but independent of any deviations in

\(^8\) Raape, Komm. 173; IPR. 138, followed by Zeuge 58 ff.
particular systems. Greek requirements of an orthodox marriage and Dutch prohibition of a foreign private will are analogous deviations. Form in all these matters is the natural concept of external expressions of a person’s volition.

The requirements for the form of wills refer to a certain time: the time of the execution of the will or the time of the death or both. *Lex loci actus* aims exclusively at the time when the will is made; subsequent events or changes of law are irrelevant. In no case, formalities prescribed for a time after the death for the purpose of carrying out a will are pertinent to the applicable law, e.g., recording of the will requested in New York or in France, Poland, etc.

Language requirements are important. It deserves mention that in many countries foreigners are allowed to use the local public forms in their own language with adequate safeguards.

Form, of course, must be distinguished from the evidentiary value of a document which, in general, is that accorded at the place of execution.

2. Renvoi

The faculties granted in greatly increasing number to find a law under which a will turns out to be formally valid,

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91 Argentina: C.C. art. 663.

Cuba: C.C. art. 688 par. 4.

France: Cass. req. (Aug. 12, 1868) S.1868.1.405; (Aug. 3, 1891) S.1892.1.566; TRASBOT in 5 PLANIOL ET RIPERT § 566; the notary joins a French translation, the witnesses must know both languages.

Germany: Law of July 31, 1938 (Testamentgesetz) §§ 18, 19.

Spain: C.C. art. 688 par. 4; cf. 2 GOLDSCHMIDT 253.

Uruguay: C.C. art. 799.

Venezuela: C.C. art. 863.

Note, Clunet 1954, 612.

92 SAVATIER 308 § 441 against confusion in Cour Paris (July 3, 1946) Gaz. Pal. 1946.2.147.
contain an equal justification of renvoi, as Griswold has perceived. In most American states, as mentioned above, a will executed in the form of the place of execution is probated at the domicil as well as at the situs, and this reference entails further references elsewhere.

Illustrations. (i) Where an American, domiciled at death in the United States, while in Paris executes a will on his Cuban real property on a typed paper with two witnesses and the clauses of his home state, the will is good in Cuba, France, Germany, etc., as agreeable to the national law, though not by lex loci actus; it is also good in all American states and England, because it is valid at the last domicil.

(ii) Where a Portuguese devises his land situated in Massachusetts by a holographic will in France, a court in Maryland would refer to Massachusetts, which refers to France.

Obviously Portugal is wrong in applying domestic narrowness.

(iii) In the case Ross v. Ross, where a testator domiciled in Quebec made a will in New York in the holographic form agreeable to Quebec but not New York law, under the optional principle of locus regit actum the will was held valid in Quebec, on the ground of Quebec conflicts law. But it was held at the same time that if Quebec should imperatively require validity under New York law, renvoi from New York to the Quebec domicil would be accepted. This is consonant with the British court practice.

3. Defective Formality

As stated in the case of a defective marriage celebration, if the validity of an act depends on its compliance

93 GRISWOLD, 51 Harv. L. Rev. (1938) at 1191, 1201. For FALCONBRIDGE, Conflict of Laws (ed. 2) 154, this is only "a special indulgence shown in point of formalities."

94 Ross v. Ross (1893) Que. Q.B. 413; (1894) 25 S.C.R. 307; 3 JOHNSTON 89-94.

95 See also GRISWOLD l.c.; in re Martin [1900] P. 211.

with the formal requirements of a certain law, the effect of noncompliance is determined by the violated rule.

Illustration. An Italian was naturalized in the United States. Because he voluntarily acquired the new citizenship, he lost his Italian nationality. His will executed in New York (where he died domiciled) in holographic form without witnesses would have sufficed to Italian law which, however, was no longer competent. Since it was void under the *lex loci actus* and *patriae*, it was void also in Italy; a previous Italian will which should have been revoked remained in force.\(^97\)

Where parties to a contract fail to comply exactly with the forms of both the *lex causae* and the *lex loci contractus*, a party may invoke the law that gives the act the more favorable treatment.\(^98\) A corresponding principle must obtain here.

In Germany three theories were expressed in connection with a case where in 1928 a German executed a will in Davos, Switzerland, before a notary who called in the witnesses later than prescribed. The form sufficed for German law. A court held according to Swiss law that the will had been open to attack but in the absence of any attack was valid.\(^99\) The authors believing in the superiority of the German *lex causae* reached the same result on different grounds.\(^100\) The majority, however, declared for the "milder form."\(^101\) The last view is justified by the free competition between *lex loci contractus* and national law in the German conflicts law.

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\(^{97}\) Trib. Bari (Feb. 4, 1949) 72 Foro Ital. (1949) 1114.


\(^{99}\) LG. Naumburg (Nov. 28, 1929) IPRspr. (1930) 183 Nr. 90.

\(^{100}\) NIEMEYER 114; RAPE, Komm 184; LIEBETRAU 41.

\(^{101}\) HABICHT 91; NIEDNER 35; WOLFF, D. IPR. (ed. 2) 107; WALKER 231; FRANKENSTEIN 561, 4 id. 466. *Cf. supra* Vol. I, p. 229, II p. 513.
In the past, widespread usage permitted the execution of one testament for two testators. This is still allowed in some countries for spouses or for a couple engaged to marry and spouses.\textsuperscript{102} Within England validity may be assumed under equity principles. \textsuperscript{103} The probably prevailing American doctrine \textsuperscript{104} recognizes that two wills may be joined in one document and considers that all wills can be revoked but a connected agreement can be enforced against the estate and possibly the beneficiaries. By way of construction it is often argued that, though both wills are revocable until the first death, they are presumed to be correspective, so that after one testator dies the other is bound.\textsuperscript{105} Although the California Probate Act of 1931, \S 23 states: "A conjoint or mutual will is valid but it may be revoked by any of the testators in like manner as any other will" and as late as 1948 the revocability was stressed to some degree, decisions of 1949 and 1950 joined the common opinion, basing irrevocability upon the agreement underlying the joint will that would be broken if the survivor revoked his own will, "at least where he accepts the benefits under the deceased's will in his favor." \textsuperscript{106} There

\textsuperscript{102} Austria: A.BGB. \S 1248; Germany: Law of July 31, 1938 Testamentgesetz \S 28; Spanish foral laws of Aragon, art. 17, 2\textdegree{} and 3\textdegree{} Apendice al C.C.; Navarra: LACARRA, 2 Instituciones de Derecho Civil Navarro (1932) Vol. 2 105. See CONTUZZI, DIP. 566; 2 GOldSchMIDT 254.
\textsuperscript{103} England: see BREsLAUER 189.
\textsuperscript{104} PAGE \S\S 102 ff.; Note, 61 Harv. L. Rev. (1948) 681-684.
\textsuperscript{105} Thus in Illinois: Curry v. Cotton (1934) 356 Ill. 538; Peck v. Drennan (1952) 411 Ill. 31, 37.
\textsuperscript{106} Brown v. Sup. Ct. (1949) 34 Cal. (2d) 559, 212 Pac. (2d) 878; the decision overruled Lynch v. Lichtenthaler (1948) 85 Cal. App. (2d) 437, 193 Pac. (2d) 77, which required an express renunciation of revocation in the agreement, and also emphasizes against Shive v. Barrow (1948) 88 Cal. App. (2d) 838, 199 Pac. (2d) 693 that "the devisee or legatee cannot be prevented from enforcing the contractual obligation." See also Chase v. Leiter (1950) 96 Cal. App. (2d) 439, 215 Pac. (2d) 756 favoring the transformation of joint tenancy into community property by a joint will.
is no doubt that probate both times will be granted where both wills have not been revoked.\footnote{107}

Most countries prohibit the junction entirely. Within these jurisdictions, as a rule,\footnote{108} such wills cannot be validly executed, and for this reason are nowhere recognized so far as \textit{locus regit actum} presides. Are such testaments, however, internationally to be recognized, when executed by nationals of a country allowing them and in a territory allowing them? Are joint wills which are prohibited where they are made, nevertheless recognizable elsewhere under the law of domicil or nationality? These questions are much debated in Europe.

1. In one opinion, the joining of the wills is a mere incident of form, subject to \textit{locus regit actum}.\footnote{109} Thus, an authentic joint will of French spouses, invalid if made in France, was held valid in a French court when made in Batavia, and a joint will executed and probated in Tennessee

\footnote{107} In re Johnston's Est. (1945) 53 N.Y.S. (2d) 212.

\footnote{108} E.g. France: C.C. arts. 968, 1097; Italy: C.C. (old) 761, (new) 589; Netherlands: C.C. art. 977 ff.; Portugal: C.C. art. 1753; Spain: C.C. art. 669; Argentina: C.C. arts. 3612, 3618; Brazil: C.C. art. 1630; Guatemala: C.C. 841 (like Spain); Venezuela: C.C. art. 835.

\footnote{109} England: In re Cohn [1945] Ch. 5 without hesitation; respecting a German will.


Germany: 2 BAR 329; 2 ZITELMANN 154.

Netherlands: VAN BRAKEL 195 § 150.


Chile: ALBÓNICO, DIP. ante la Jur. Chil. 167.

Portugal: S.Ct. Lisbon (July 13, 1923) Revue 1924, 257: Portuguese spouses in Brazil before the Brazilian prohibition.
was recognized in Louisiana.\footnote{France: Caen (May 22, 1850) S.1852.a.566. \Louisiana: Moore v. Exec. Com. (1930) 171 La. 191, 129 So. 920. \Chile: ALBÓNICO, DIP. ante la Jur. Chi!. 167 (despite the prohibition by C.C. art. 1003).} No offense is seen to the domestic public order despite the prohibition by the law of the forum.

2. Another view looks to the restriction of personal freedom that may affect the surviving spouse contrary to the public policy of the prohibiting state. The Italian courts have radically rejected all joint wills, mutual or reciprocal or not, and wherever and by whomever made.\footnote{France: 6 LAURENT 535; SURVILLE 307 § 193 and many others. \Germany: RG. (April 24, 1894) 5 Z. int. R. 58. \Italy: Cass. Flor. (Nov. 9, 1896) Clunet 1902, 175; Trib. Benevent (March 25, 1934) Rivista 1935, 420, deals only with Italian spouses having willed at a place where this was permitted. \Spain: T.S. (Feb. 13, 1920).} The Civil Codes of Spain and Cuba declare expressly invalid a joint will of a national executed abroad.\footnote{Art. 733.}

3. In a third theory, the court of a nonprohibiting state should distinguish whether a joint will is only a document of two independent wills—in which case recognition should be due either under the law of the place of execution or according to the national law of the parties—or is intended to bind the survivor—which ought only be permitted by the law governing the individual succession.\footnote{Italian writers and decisions cited by CONTUZZI, 532 ff; KAHN, 2 Abh. 235; see also SCHNITZER (ed. 3) 484.}

4. Finally, it has been suggested that foreign joint wills of Frenchmen are valid, because the French doctrine emphasizes their formal character, and Italian joint wills are always void, since the Italian doctrine is apprehensive of possible irrevocability.\footnote{Lewald, Questions, 100 ff.; M. WOLFF, D. IPR. (ed. 3) 230.}

The last opinion is unacceptable as it gives preponderance to the \textit{lex causae} over the rule \textit{locus regit actum}. The first,
the French view, neglects the essential ground of their own prohibition; Italy, again, neglects the cases of noncorrespective wills, but also of wills that may have developed such effect but in fact did not because no spouse wanted revocation, the normal situation faced with joint wills in the United States.

Accepting the third theory, we may think with Kahn that formalities are prescribed for many reasons and all covered by the necessary international force of the law of the place of execution; but that the effects of irrevocability and reciprocity are a matter of the substance and depend on the law governing succession.

This, it would seem, would also suit the American conceptions.