PART SIX

CORPORATIONS AND KINDRED ORGANIZATIONS
In this part, with respect to Latin America, short citations will be used for the following articles, all published in the Tulane Law Review:


A series of articles on "The Judicial Status of Non-Registered Foreign Corporations," regarding the laws of Chile, Argentina and Uruguay by Rives in 6 Tul. L. Rev. (1932) 558; Brazil by Knight in 7 id. (1933) 210; Mexico by Schuster in 7 id. (1933) 341; Colombia by Rives in 8 id. (1934) 542; Ecuador by Greaves in 9 id. (1935) 409; Nicaragua by Eder in 10 id. (1935) 58; Guatemala by Schuster in 12 id. (1937) 74; Panama by Eder in 15 id. (1941) 521; Venezuela by Crawford in 12 id. (1938) 218 and by Goldstone in 17 id. (1943) 575.
The essential incidents of the activities of any legal entity are controlled by one municipal law, a single ubiquitous personal law, parallel to the statute personal of individuals. This is recognized in the legislation of all countries in the world, despite a contrary theory propounded by Pillet which has created much doctrinal confusion, and despite a useless theoretical dispute whether a corporate entity is susceptible of “status” or of “capacity.” Even the American conflicts law, which has tended to reduce the sphere of the law of domicil as governing the status of individuals, gives broad effect to the law of the state in which a corporation has been created.

This law governs existence, capacity, internal structure, external legal relations, modifications of the charter and dissolution of the legal entity. The importance of this principle cannot be overemphasized.

In the United States this conception is essentially, though not to its full extent, implemented by the Full Faith and Credit Clause of the Federal Constitution. Thus, state courts have been required to follow the constitution, laws, and judicial decisions of the corporation’s home state in order to determine such questions as that of stockholders’ liability.}

1 Pillet, Personnes Morales 46 §§ 34ff.
2 Converse v. Hamilton (1912) 224 U. S. 243; Selig v. Hamilton (1914) 234 U. S. 652. Corwin, “The Full Faith and Credit Clause,” 81 U. of Pa. L. Rev. (1933) 371, 386 ad n. 65, classifies this case into the formula of Mr. Justice Holmes, that relationships ought to be governed by the law under which they were formed. But this idea does not explain why the law of the corporation and not that of the stockholder governs.
But the criterion determining this personal law may take either of two forms. While, in common law countries and a few others, the law of the state of incorporation controls, in most civil law countries a corporate entity is subject to the law of the state in which it has its permanent central office of management (headquarters, domicil, "seat").

The details of this contrast will be discussed later. At this place we consider, with the help of elementary comparative observations respecting the municipal laws, what organizations are potentially susceptible of having a personal law.

I. Categories of Organizations

1. Survey

The Restatement, in an elaborate chapter on "corporations," declares "incorporation" to be the process by which official representation is substituted for individual action in causing liability of members, whether limited or unlimited and whether in contract or tort. This description has its origin in the theory that a corporation is nothing else than the members acting in their capacity as a corporate body. Whatever the merits of this theory may be (and it may have some virtue as an antidote for the noxious fiction theory likewise adopted in the Restatement), representation will not serve as an exclusive mark of incorporation because, on the one hand, partners also may be represented by administrators, possibly widely empowered, and, on the other hand, a membership corporation may reserve all important decisions to the general meeting of the members.

3 In English, the expression "seat" has been repeatedly used to translate the French siege social, German Geschäftssitz, and officially in the English text of Pan-American documents, particularly so in the Presidential Proclamation of August 21, 1941, 55 Stat. 1201, 1204, on the juridical personality of foreign companies.

3a A valuable comparative analysis on the qualification of foreign business organizations as "corporations" in BADR, Alien Corporations in Conflict of Laws (1953) 5-33.

4 As in the first volume, "Restatement" means the Restatement of the Law of Conflict of Laws (1934).

6 Restatement § 152 comment e.

6 Restatement § 152 comment a.
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Thus, the concept of “corporation” itself, which the Restatement fails to define, remains somewhat obscure. The Restatement does, however, make clear that the chapter on corporations is limited exclusively to incorporated “associations of individuals.” Hence, the rules therein adduced do not apply to foreign states, to what are called in this country municipal corporations, nor to civil law foundations. In modern theory, the state recognized as a legal person is an institution, not a mere association of individuals. In fact, although “corporation” in American terminology may denote (1) any distinct legal entity, equivalent to “juristic person” in the conception of civil law, ordinarily, however, it seems either to indicate (2) private incorporated associations formed by persons, or to refer (3), still more narrowly, to associations incorporated for business purposes, this being the most common usage. The Restatement conceives of a corporation as “any association of individuals,” adopting thereby the second meaning with the only difference that in speaking of individuals the possibility of corporations being members of a corporation is overlooked. In the further course of its development, however, without saying it, the Restatement gives attention almost exclusively to business corporations, which in itself is justified. The emphasis on these corporations corresponds with their prevalence in legal practice, and the gaps thus left uncovered by the Restatement are not difficult to fill.

More serious than the neglect of nonprofit corporations and the disregard of public corporations is the silence regarding all associations that are not corporations. The Restatement has simply provided a chapter on corporations and a chapter on “contracts.” In the latter, it has set out a few rules merely purporting to fix the place of contracting in contracts concluded among partners (§ 342), or between partners and
third parties (§§ 315, 318, 328-331), and a few rules in which the powers of partners to act for the partnership are identified with the authorization of any other agent (§§ 343-345). Apparently, the neat old contrast of company and partnership is responsible for this arrangement. The innumerable mixed forms of association that have developed in the last century are ignored. Moreover, the common assumption is perpetuated that a partnership can be adequately analyzed in terms of contractual relationship. But partnership, as it exists in England and the United States and in commercial use all over the world, is not a societas, as in ancient Rome (or in the German Civil Code), based on a contract as distinguished from an association and existent only in the person of the partners; it has entity aspects, a fact that requires recognition in conflicts law.

To find our way through these doubts, we may be permitted to adjust the usual American terminology to a broad classification of the organizations involved under the following scheme:

(a) Legal (or juristic, or moral) persons are entities having separate existence as subjects of rights and obligations in private law. They include:

(i) Public legal persons, such as the state itself, and the municipal and other public organizations created by the state as distinct persons, as well as certain other bodies.

(ii) Private incorporated associations (corporations in the second meaning supra), these being—

1. Business corporations,
2. Incorporated nonprofit associations,
3. Co-operative associations.

(iii) Private foundations, constituting independent units after the model pia corpora of the law of Justinian. Charitable corporations and charitable trusts may be put in this class.
(b) Unincorporated associations,\(^7\) including—
(i) Nonincorporated nonprofit associations,
(ii) Limited partnerships, limited partnership associations, joint stock companies, and business trusts,
(iii) General partnerships.
(c) Contracts of joint undertaking, that is, contractual arrangements such as joint adventures (*societas unius rei*), contracts of joint tenancy, et cetera.

Whatever comparisons may be made in this field, the basic concept, valid for the legislation of every country and every purpose, must be and is that of legal personality. This is a very simple concept developed by the Roman jurists and adopted everywhere. The essential feature of a legal person is that it is a person other than an individual and *entirely* distinct from any individual. An incorporated *association* is "a legal person apart from its members," a notion thoroughly familiar to American lawyers.\(^8\) The complete independence of the corporate person as a subject of rights and duties in respect to third parties, and not any form of representation of the members, is the decisive factor. Incorporation is the process by which this legal person is brought into being; an organization is endowed with personality.

It seems opportune here to mention the most important types of business organizations in common use and, as we shall have to concentrate mostly on commercial organizations, to add a brief survey of the other legal persons.

2. Private Business Organizations

The prototype of all corporate bodies in the modern world of private business is the regular stock corporation with transferable shares, the liability of the members being limited to

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\(^7\) Terminology following § 1 par. XIV of the Model Business Corporation Act.

\(^8\) *STEVENS*, Corporations, Ch. 1 § 1.
their contribution to the capital and the members participating in the profits and surplus according to some fixed proportion. There are varied additional characteristics inherent in the different types of stock corporations, represented by the usual American shareholder corporation, the English public company, the French société anonyme, and the German Aktiengesellschaft, but the indicated elements are the features common to all.\(^9\)

Akin to this fundamental type are French and German stock corporations with shares en commandite, that is, having at least one member with unlimited personal liability for the company’s debts.

Furthermore, “private limited companies”\(^10\) have sprung up in recent decades as younger brothers of the ordinary stock company. Based on capital stock quotas rather than on the personal liability of the members, these are definitely not partnerships in the ordinary sense. But restrictions on the transfer of shares and other measures to lessen the dangers to the public, make it possible for legislatures to reduce the onerous formalities and security requirements that regular stock corporations have to bear in Europe and Latin America. The model for all these minor forms of stock corporations has been the German Gesellschaft mit beschränkter Haftung (GmbH.), introduced in 1892 and since then adopted in almost all civil law countries with more or less modifications (société a responsabilité limitée, sociedad a responsabilidad limitada, et cetera). In England, a modified form of stock company, developed in the legal practice, has been authorized by the Companies Acts of 1913, 1929 and 1948.\(^11\)

\(^9\) G. HAMMURGER, 2 Rechtsvergl. Handwörterbuch 59 at 60, 126. Cf. also STREICHENBERGER, Sociétés anonymes de France et d'Angleterre (Lyon 1933) 31.


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Where an organization did not satisfy all the conditions of incorporation, the traditional theory saw in it nothing but some kind of contractual arrangement. The Restatement, as indicated, conforms to this tradition. It was also adopted in the highly elaborate provisions of the German Civil Code, framed toward the end of the last century. These prescribed that associations not having obtained juristic personality should be treated under the rules on "society," the members of which, among other particulars, may not be changed and are liable for the debts (BGB. § 54, sent. 2). The German courts, however, were not long embarrassed by this awkward construction; through ingenious interpretations, they arrived at conclusions ascribing to various "unincorporated associations" almost every attribute of incorporated associations. This perhaps most outstanding example of law, judge-made against the express direction of the legislature, appeared indispensable for the many thousands of groups that otherwise would have operated in a dubious legal status. Parallel developments can be found in the adjudications of all the other countries, such as, for instance, the various types of the so-called de facto corporations.

There is a rich variety of instances in which corporate and partnership elements appear mixed in one combination or another. Many doubts and learned discussions have arisen concerning the two questions: (1) whether a mercantile partnership is an aggregate or a legal unit and (2), if this is denied as by the dominant theory of the common law or the German law, then nevertheless whether a partnership should not be assimilated to fully incorporated bodies in certain important respects or for certain purposes. There have been analogous disputes about the nature of business trusts, de facto corporations, and other organizations "hybrid in nature, savoring of both corporations and partnership."12

12 Oklahoma Fullers Earth Co. v. Evans (1937) 179 Okla. 124, 125, 64 Pac. (2d) 899, 901.
Among the particular reasons for emphasizing the corporate elements of these mixed types, is the fact that on the existence of such entity aspects may depend a decision whether a personal law is to be ascribed to a business organization. Then too, significant conflicts problems are produced by the diversity of legal conceptions according to which parallel organizations are differently classified. For instance, mercantile partnerships are regarded as legal persons in the French doctrine, followed in Belgium, Italy, Spain, Portugal, Brazil, Mexico, and most other Latin countries, whereas Anglo-American, German, Swiss, Dutch, Argentine, and other courts prevailingly regard partnerships under their respective laws as mere aggregates of individuals.

Modern theory has paved the way to do justice to every one of the many types of combined structure. If doctrinal prejudices are avoided, it will become possible to formulate the conflicts rule applicable to partially corporated bodies.18

It is significant that in the legal language of all civil law countries one finds a single comprehensive term to embrace corporations, partnerships, and all intervening types, such as French sociétés, Spanish sociedades, Italian società, German Handelsgesellschaften. In the documents of the Pan-American Union, sociedad is translated by company, a term recently much employed in England and in bilateral treaties in the same broad meaning. In this country, the term business association reflects the feeling, which appears universal at present, that all these types are functionally and analytically related.

3. Public Legal Persons

States. From Savigny’s time, the generally accepted view has been that recognition given to a state according to the rules of public international law, implies recognition of its

18 See infra pp. 101, 116, 117.
capacity in private law matters. States thus enjoy full capacity without any special grant. In particular, they may bring suits to the extent allowed to all foreigners in general and, in principle, may receive donations and legacies as well as immovables on the same basis. Their activities, however, like those of other foreign persons, may be restricted by the local law. International law does not guarantee states more than a right to the usual buildings for diplomatic and consular representation. All these propositions were decided in the careful consideration of two cases: that of Zappa, a former Greek national, who appointed the Greek state heir to his immovables in Rumania and South Germany; and that of the Countess de Plessis-Bellière, who left her estate in France to the Holy See.

Public corporations. By further universal acceptance, recognition of a state extends *ipso jure* to all instruments of government exercising political powers of the state and endowed by it with separate legal personality, such as provinces or municipal corporations. The same is true with respect to charitable, educational, and religious corporations, performing public but nongovernmental functions and established

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16 Código Bustamante, art. 32; Montevideo Treaty on Civil Law (1889) art. 3; Argentina: C. C. art. 34; 3 Vico § 71.

18 2 Bar 671; 2 Wharton § 746 3/4; Westlake § 192; Trib. Montdidier (Feb. 4, 1892) legacy to the Pope, see Renault, Clunet 1893, 1118; App. Colmar (Dec. 12, 1933) Revue 1935, 178.


by the state as legal entities in private law. These latter "juristic persons of public law," which do not correspond with geographical segments of the country, are called in France "établissements publics," and in Germany "öffentlichrechtliche Stiftungen" or "Anstalten."

It follows that the question whether legal personality is bestowed upon a governmental unit, is determined by the state to which it belongs, and by no means according to the lex fori. Accordingly and by way of example, a state university not exclusively maintained by the state is not deemed to be a public corporation, if its own state denies it this nature.

Exceptions to the ipso jure recognition of foreign public establishments seem, however, to be made in some Latin-American countries, especially in the case of church institutions. Quite generally speaking, the Código Bustamante does not assure recognition for foreign administrative organisms (corporaciones) according to the law "that has created or recognized them," but leaves it to the pleasure of the "territorial law."

21 Pillet, Personnes Morales § 49. This does refer to chambers of commerce but not to the so-called foreign chambers of commerce, the first of which was in Yokohama in 1866, and the second the Belgo-American chamber in New York. The French Supreme Court, Cass. (req.) (Nov. 7, 1933) Revue Crit. 1935, 109 held a "foreign chamber" in Paris to be a private association.

22 See 7 Répert. 650 No. 2.

23 Neumeyer, 1 Int. Verwaltungs R. 140.

24 7 Répert. 650ff. No. 2.

25 This is the doctrine of internal law developed in this country according to Ballantine, Corporations 46, 810.

26 Infra p. 167 n. 198. Rules are missing in e.g., Venezuela, Goldstone, 17 Tul. L. Rev. (1943) at 587. The Código Bustamante, arts. 31-33 grants unconditional recognition only to the states; Treaty of Montevideo on Civil Law (1889) art. 3; Savigny's antiquated theory of "persons of necessary existence" has complicated rather than facilitated the Latin-American doctrines.

27 This obscure language may induce one to think that State X has to recognize a legal person invalidly created in State Y because its personality has been recognized in State Z which is participant in the convention. This, in my opinion, is not the meaning, nor do these words express adherence to the principle of incorporation. The same words were used by the Spanish Civil Code, art. 37, cf. art. 28,
4. Foundations and Trusts

In the civil law countries, a foundation is a juristic person of private law, consisting of assets perpetually bound to serve a certain purpose and existing independently of any individuals. The administrators of the assets are not owners at law as is an Anglo-American trustee or as in the case of a gift subject to a charge (donatio sub modo).

The problem of conflicts law has been thoroughly reviewed in the litigation respecting the foundation of Niederfüllbach. King Leopold II of Belgium created a private foundation with large funds in the city of Coburg, Germany, with the governmental authorization of the Duchy of Coburg, but for purposes which were to be performed in Belgium. The experts were of the unanimous opinion that the validity of the foundation depended upon the law of the place where the “seat” or central office of administration was to be. The country where its activities had to be exercised (Belgium) was considered quite as immaterial as were the national law of the founder and the place where the deed was executed. There was controversy only upon the question whether the stipulation of the deed fixing the seat of the foundation in Coburg, corresponded with reality or was fictitious.

Accordingly, the rule has been generally sustained that the creation, organization, capacity, and supervision of foun-

and did not prevent the Spanish doctrine from following the ordinary theory of central control. Probably the expression refers to the two methods in municipal law of giving birth to legal persons, namely, by special charter, the state creating the person, or by autonomy of the parties, on the grounds of statutes authorizing the creation. The expression recurs, for instance, in Guatemala, C.C. (1933) art. 17, and Honduras, C.C. art. 58.

28 Código Bustamante, art. 33, cf. 32, on which see infra p. 33 n. 11.

29 For comparative municipal law, see Les fondations, Part III of Travaux de la Semaine internationale de droit (Paris 1937).

30 The seat was assumed to be in Coburg by App. Bruxelles (April 2, 1913) S.1913.4.9; Neumeyer, 22 Z.int.R. 484 and Revue 1913, 15; von Liszt, 27 Z.int.R. 125, 128; contrarily, Charles de Visscher, Revue 1913, 183, 188.
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dations are to be governed by the law of the real central office of administration.\textsuperscript{31} This is a conflicts rule substantially similar in all respects to that concerning corporations in most civil law countries.

The nearest analogue in common law to the civil law foundation is a trust created for charitable uses. If the assets of a trust are liable, apart from any liability either of the trustees or of the beneficiaries, as, e.g., under an Oklahoma statute, the analogy is very close. Since the American conflicts rules on trusts differ in regard to immovable and movable objects and according as they are created by settlement or other transaction \textit{inter vivos} or by will, this topic is correctly treated in connection with property rather than the law of persons.\textsuperscript{32} However, it may be remarked in passing that the tendency, indicated in the leading case of \textit{Hutchison v. Ross}\textsuperscript{33} and in the New York legislation,\textsuperscript{34} of referring trusts settled with New York trust companies to the law of New York coincides with the continental conception. In fact, this result would be more correctly reached by localizing a trust at the place of its management rather than at the accidental situs of the assets or, still worse, by ascribing a wholly fictitious localization to choses in action held in trust.

5. Associations for Nonprofit Purposes

Associations incorporated for purposes other than gain have, I believe, been included in the Restatement's treatment of corporations. They are governed by a personal law, determined practically in the same manner as that of business corporations. Differences exist, however, in the manner of recognition. (\textit{Infra} Chapter 22.)

\textsuperscript{31} German BGB. § 80; Neumeyer, 1 Int. Verwaltungs R. 143, 146; Michoud, 2 Personnalite Morale §§ 320, 321; Arminjon, Revue 1902, 434; C\textsuperscript{r}mieu, 8 Reper. 430 No. 19. On the scope see Pillet, Personnes Morales § 300; 2 Arminjon (ed. 2) § 178.

\textsuperscript{32} Cf. Restatement § 294 and \textit{infra} Vol. IV, ch. 75, p 445.

\textsuperscript{33} (1933) 262 N. Y. 381, 187, N. E. 65, see also \textit{supra} Vol. 1, 2nd ed., 392, 397

\textsuperscript{34} Personal Property Law, art. 2 § 12a.
Conclusion. In summary, we see that the recognition of public establishments raises certain problems, while foundations and nonprofit associations clearly live under a personal law analogous to that of business corporations.

6. Legal Persons with International Purposes

Supranational legal bodies. The Holy See, before regaining temporal power by the Lateran Treaties, the International and the European Danube Commissions, and later the League of Nations were examples of autonomous organizations with undoubted capacity in private law, although not derived from one particular state. The United Nations and the Pan-American Union are now outstanding examples. Capacity is based either on multilateral conventions or on general recognition.

Plurinational centralized legal bodies. Such public organizations as the International Postal Union, the World Red Cross, the Union for the Protection of Literary and Artistic Works in Bern, the International Health Office in Paris, and the International Institute for Agriculture in Rome seem to be explained as legal persons simultaneously constituted in several states. Their private law capacity, however, as a rule, flows from the one state charged with the enforcement of the underlying multilateral agreement.

Plurinational decentralized legal bodies. There are many hundreds of business organizations and nonprofit associations for humanitarian or scientific purposes—among the oldest are the World Evangelical Alliance (1846) and the Young Men's Christian Association (1855)—which carry on

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37 According to the lists annexed to the circulars of the International Chamber of Commerce.
activities throughout the world or over large territories, but under the present rules have to do without an adequate legal unity. They have either to seek separate incorporation in the several states or to be content with acquiring personality in one state only. Both methods have grave drawbacks. Plurinationality except under special treaties lacks sound rules thus far. An organization intended to work internationally is split into national branches, tied to a central office by free will and convenience rather than by law. Three great associations of this kind, the Institute for International Law, the International Law Association, and the International Chamber of Commerce, encouraged by a Belgian statute of October 25, 1919, allowing activity in the country to "scientific" international associations, have inspired treaty proposals, but their efforts failed.

**Cartels.** International cartels and business trusts, too, have felt compelled to adjust their structure to the law of one state. Where antitrust legislation, as in the United States, is not affected, the parties have been able to organize under a certain chosen law.

But also within the United States, multiple incorporation has had a difficult development. According to the theory that a legal person is an artificial creature of the state, as

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27a E.g. the statutes of the Suez Canal Company of 1856, Art. 73 par. 2 (seats in Alexandria and Paris) and concession of 1866, Art. 16 (Egyptian law governs constitution; French law relations between shareholders), cf. The Suez Canal (London 1956) 26, 38, and French law on the status of the Company of June 1, 1957, Revue Crit. 1957, 435-446. The "Union charbonnière rhénane" was transformed, by Art. 84 of and Annex 29 to the French-German Treaty of Oct. 27, 1956 (BGBl. 1956 II 1589) into a French-German corporation with seats in France and Germany, cf. Barmann, 156 Arch. Civ. Prax. (1957) 156f.

38 Foreign corporations of this type are, thereby, legally recognized (art. 8); they must fulfill, however, certain conditions (arts. 2 and 3) in order to exercise their activities in Belgium. See Poulet 234 No. 214.

39 See Institute of Int. Law, Drafts of 1910, see Revue 1910, 559; of 1923, see 30 Annuaire (1923) 97, 348, 385; Int. Chamber of Commerce, Discussions in 1923 and 1928, cf. Gutzwiller, supra n. 35, 153 n. 85; Report Politis, Clunet 1923, 465. All these propositions were inadvisable in fact and were disapproved in opinions by the Institute of Foreign and International Private Law in Berlin and the Institute for the Unification of Private Law in Rome.

40 See Reinhold Wolff in 4 Rechtsvergl. Handwörterbuch 621; Geiler, 12 Mitteilungen dt. Ges Völker R. (1933) 196; and in particular Günther Hofheinz, Die Kartellbindung bei internationalen Kartellen (Heidelberg 1939) 63ff.

41 See Foley, "Incorporation, Multiple Incorporation, and the Conflict of Laws," 42 Harv. L. Rev. (1929) 516.
many corporations were believed to exist as there were incorporating states. This obstacle is being gradually overcome by the courts, but also in this case an entirely satisfactory solution frankly recognizing the corporate unity has not yet been reached.

*International public corporations for economic purposes.* The most recent and important problem in this connection concerns governmental institutions functioning like private economic enterprises. The idea of clothing an undertaking with the power of government but adjusting its daily life to the pattern of business corporations was resorted to in this country when the Tennessee Valley Authority was formed and, in the international sphere, by conferring large autonomy upon the Bank for International Settlements and, to a certain extent, the United Nations Relief and Rehabilitation Administration. Recently the creation of the International Air Transport Board, the International Monetary Fund and the International Bank for Reconstruction and Development, with many other organizations proposed, predicts the rise of an international corporate life never before imagined.

II. The Nationality of Corporations

1. Difference of Purpose from Conflicts Law

As a matter of strict classification, only conflicts problems relative to corporations should be included in the subject of

42 This theory has been urged by Beale as late as in his treatise, 2 *Beale* 902; cf. Fusinato and Anzilotti, *Rivista* 1914, 151, 158.


43a See *supra* n. 35a.

44 The best qualified guides to the literature are the following works:

Young, "The Nationality of a Juristic Person," 22 *Harv. L. Rev.* (1908) 1, particularly describing the antiquated theories; Schuster, "The Nationality and Domicil of Trading Corporations," 2 Grotius Soc. (1917) 57; Arminjon, "La nationalité des personnes morales," 34 *Revue Dr. Int.* (Bruxelles) (1902) 381; Neumeyer, 1 *Int. Verwaltungs R.* (1910) 106, and 12 *Z. f. Völkerrecht* 261; and,
conflict of laws. However, the Restatement and many treatises on conflicts law include a considerable part of the rules of municipal law relating to foreign corporations. The inclusion of this subject matter has some advantages; the two aspects of corporate activities, national and international, are interconnected, and the effort to separate them completely results in giving a misleading picture. However, there is a serious danger of confusion in the usual intermingling of conflicts rules with local rules. Once Pillet attempted to integrate both sets of rules in a broadly conceived law of aliens (*condition des étrangers*). This effort could not be more successful than the opposite tendency to extend conflicts law. While all aspects of corporate activity do need to be seen in relation to one another, the conflicts rules applicable to corporate action ought to be distinguished from legal and administrative restrictions on the action of foreign corporations.

Failure to discern precisely the various purposes of the rules regarding foreign corporations has largely contributed to another unfortunate controversy, with a literature of fantastic proportions, on the question whether legal persons are able to have a nationality, as though there were to be found an answer necessarily covering international private law and all branches of public law. Although the simple truth of the matter has been known for decades to a number of writers, the literature is too voluminous not to weigh
to be particularly recommended, Neumeyer and Gutzwiller, Reports, in 2 Mitteilungen dt. Ges. Völker R. (1918) 149; 12 id. (1933) 129; Pillet, Personnes Morales; Mazeaud, "De la nationalité des sociétés," Clunet 1928, 30-66; Cauvy, 10 Répert. (1931) 465.

46 In the long Chapter 6 of the Restatement, choice of law is treated in topic 1 (with exceptions); §§ 165, 166, topics 4 and 6.

47 See, for instance, Ballantine, Corporations § 8; almost all German authors; Pontes de Miranda 458 § 8; Código Bustamante separating "nationality" from "capacity"; and the study originally by Gil Borges, submitted by the Delegation of Peru to the Eighth Pan-American Conference (Diario de Sesiones, Lima 1938, 618-8).
heavily on many minds. Numerous authors and courts persist in using a language which suggests that they still believe that a legal person, like an individual, has a nationality for all purposes. Others deny that legal persons can have any nationality at all. Both sides are right and wrong. A better view is the following.

2. Where Unity of Criterion Desirable

The conflicts problems of what law governs the existence and activities of a corporation, are soluble without any regard to the concept of nationality and must be solved separately from all municipal rules. Under this aspect, a corporation is called foreign when it is considered governed by the law of a foreign state. In the United States, corporations created in another state and, in Canada, those created in another province, are foreign in contrast to corporations created by Congress or by the Dominion of Canada through its Secretary of State, respectively.

But when recognition of foreign corporations and, in the more frequent cases, when carrying on of business is made dependent on reciprocity or on some kind of authorization, it may be relevant to state to which particular country a corporation is considered to belong.

In all these three respects—personal law, recognition, and permission to do business—the first two of which pertain to conflicts law and the third to administrative law, the criteria for ascribing a corporation to a determinate state should evidently be identical. This important postulate of convenience seems to have been widely neglected.

A fourth application of the same test, once a test is chosen, ought to be made in the fortunately rare cases in which conflicts rules themselves contain a discrimination between nationals and foreigners. For instance, the German rule on torts (EG. BGB. art. 12) declares that a German national
cannot be held liable for tort under foreign law to a larger extent than under German municipal law. This rule applies also to German corporations, and what is a German corporation is to be inferred from the German conflicts rule providing that a corporation centered in Germany lives under German law. Under the conflicts rules of many countries, nationals are entitled to avail themselves of the inheritance law of the forum for claiming assets found in the territory, despite divergent distributary statutes of the law governing the succession upon death.48 Here the term "national" again may include legal persons.

3. Separate Fields

Outside of this circle of problems, there exist innumerable rules granting or denying the legal powers of domestic corporations to all foreign-created corporations or other legal persons, or to those of certain favored countries. Merely as examples, consider the multitudinous and heterogeneous provisions of taxation; the rules of jurisdiction regarding litigation of foreigners and attachment against them; the rules relating to the choice between federal and state courts; procedural burdens such as the obligation to furnish security for costs;49 the prohibitions on owning or managing objects such as immovables, ships, banks, radio stations; on receipt of gifts and legacies; the principles of diplomatic protection and international arbitration.

These rules of international, administrative, fiscal, juris-

48 France: Law of July 14, 1819, art. 2, droit de prélèvement.
Belgium: Law of April 27, 1865.
The Netherlands: Law No. 56 of April 7, 1869.
Germany: EG. BGB. art. 25 sent. 2.
Brazil: C.C., Introductory Law of 1942, art. 10 § 1, and numerous other Latin-American codes.

49 The clause of libre accès in the treaties is not considered as exempting from the caution iudicatum solvi, see Swiss BG. (July 12, 1934) 6o BGE. I 220 (construing the Treaty of Commerce of United States-Switzerland, of Nov. 25, 1850, Nov. 8, 1855).
dictional, procedural, and private law, to which those of penal law and criminal procedure may be added, are so different in purpose that they cannot be construed on the same footing, whether they refer expressly to domestic or to foreign juristic persons, or to foreigners, citizens, or nationals in general. In the correct method, each rule should be interpreted separately.

At present, the word "nationality" is intentionally avoided in connection with corporations by some British and United States official documents, consistently so by the Institute of International Law and several Latin-American statutes. On the other hand, corporations have had nationality distinctly ascribed to them by many statutes, treaties, and recent drafts, such as that of the Experts of the League of Nations and the Código Bustamante.

The American umpire in the Mixed Claims Commission between the United States and Germany had no doubt in describing the Standard Oil Company of New York and two other corporations as "American nationals," notwithstanding the definition of an American national, which he underlined, as "a person wheresoever domiciled owing permanent allegiance to the United States of America."

That allegiance can properly be owed only by individuals, is the main argument used against the nationality of juristic

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50 Annuaire 1929 II 301, cf. 141, 143ff.
51 For a survey on the language of the Latin-American statutes, see Borges, Informe 130-133.
52 E.g., Peace Treaty of Versailles, art. 54 par. 3 (status of Alsace-Lorraine people); Convention on Air Navigation of Paris, Oct. 13, 1919, art. 7 par. 2. Also British Peace Order. On the varying language of the treaties, see Travers, 33 Recueil (1930) III 28; Cavagliari, Dir. Int. Com. 186.
53 Am. J. Int. Law 1928, Supp. 171, 204 arts. 1, 2, 4.
54 Art. 16.
55 Mixed Claims Commission, U. S. and Germany, Administrative Decisions and Opinions 661, compared with the definition in Administrative Decision No. 1, id. 1 and 189, 193. United States on behalf of Lehigh Valley R. Co. v. Germany (Oct. 31, 1939) Mixed Claims Commission, United States and Germany, Opinions and Decisions in the Sabotage Claims 321, 324.
persons. But, as usual, inexact terminology is innocuous when its defects are known. If "nationality" is limited to the purposes of public law and if it is defined as the connection of a corporation with another country, there can be no harm in the use of the term. Only, it should be clear which purposes are involved and which are not. Dangerous generalizations, arising in fact from a careless use of the term nationality, conspicuously appeared when the so-called theory of control, grown up in matters of war seizure and liquidation, invaded for a time the field of conflicts law.55

However, the traditional doctrine confusing all these purposes has caused Anglo-American lawyers to look usually to the state of incorporation56 and civil law lawyers to the state of central office,57 as being the home state of a legal person in all respects. This view is incorrect without doubt. Nevertheless, it is a fact in itself, and the reasons or predilections that engendered the two opposite tests of personal law may well have presided also over their extension to other fields.

We may take it that incorporation here, and central office there, are widely applied criteria with a claim to subsidiary, though not normal, application.

A few illustrations must suffice. Swiss authorities constantly declare companies to be citizens and nationals of the country where they are incorporated and have their center.58 Similarly elsewhere, the test usual in conflicts law has been

55 **Infra** p. 57.
56 **BORCHARD, Diplomatic Protection** § 277; **SCHUSTER in 2 Grotius Soc. (1917) 64.**
57 **Cf. 2 STREIT-VALLINDAS 82; KOSTERS 659 n. 6; Italian Council of State (May 27, 1918) Giur. Ital. 1918 III 150, Rivista 1919-20, 391-406 and Note, SALVIOLI.**

58 See Federal Council, **BBl. 1876 III 246; 1892 II 811** (diplomatic protection); **RUEGG** in Schweizerische Vereinigung für Internationales Recht No. 10 (1918) (neutrality); **BG. (July 22, 1889) 15 BGE. 570, 579**; (Feb. 28, 1895) **20 BGE. 61** and other decisions on the application of treaties on jurisdiction and establishment. For decisions of other federal agencies see **SCHNITZER 313 n. 85, and cf. SAUSER-HALL, 50 Bull. Législ. Comp. (1921) 236, 248.**
applied to foreign corporations in defining their constitutional rights or their liability to provide security for costs, or used as a criterion for jurisdiction or as sufficient to establish federal jurisdiction because of diversity of "citizenship."

Yet, in contrast with the choice of law rule of the forum, the center of a corporation may be deemed to be the nominal place designated in the charter, or the main place of business, or despite adoption of the seat principle, the place of incorporation as such. Residence—or some degree of residence—is a test in England for income tax, liability to be sued, and to give security for costs, and in the United States for the purpose of venue or for qualifying a corporation as not liable to foreign attachment.

59 United States: Muller v. Dows (1876) 94 U. S. 444 (on diversity of citizenship); St. Louis & San Francisco R. Co. v. James (1895) 161 U. S. 545.

France: Cass. (req.) (May 12, 1931) and Report Bricout, S. 1932.1,57.


Austria: OGH., Opinion on § 57 ZPO., see Pollack, System des österr. Zivilprozessrechts (ed. 2) 177; Walker 149 n. 29.


Germany (formerly): RG. (Nov. 25, 1895) 36 RGZ. 393.

The Netherlands: Arnhem (June 28, 1927) W. 11723, N.J. (1928) 438 (Scottish principal establishment determinative).

Austria: Law of Aug. 1, 1895 (Jurisdictionsnorm) § 75.


Germany: ZPO. § 17.


Argentina: See 3 Vico 79 § 82.

E.g., Germany: ZPO. § 17 (jurisdiction of courts); BGB. §§ 22, 23 (jurisdiction of administrative authorities).

Switzerland: BG. (Jan. 21, 1927) 53 BGE. I 124, 131, 134 (jurisdiction over a corporation at its domicil).

See Vaughan Williams and ChruSSachi, 49 Law. Q. Rev. (1933) 337.

Cf. 2 Beale § 153.5.

Farnsworth v. Terre Haute R. Co. (1859) 29 Mo. 75; Henderson 189.
Taxation may refer to any one of these places or to that of doing business. That taxation is reasonably distributed according to the various local contacts of an enterprise is, to put it mildly, not characteristic of many systems.

The writers who have advocated one theory for everything are right in deploring the present chaotic experimentation. Obviously, however, no single theory is adequate for the task.

III. The Latin-American View

In South and Central America, a peculiar current of opinion obtains, which we ought to notice and try to analyze. This trend evidently started in 1876. When the British Government protested against measures taken in the Argentine province of Santa Fé against the Banco de Londres y Rio de la Plata en el Rosario, the Argentine Foreign Minister Irigoyen rejected diplomatic intervention on June 23, 1876, by answering that the bank was an anonymous company (stock corporation by shares), which could not have any nationality. In a further note of August 21, he added that the entity, distinct from the members, had nothing to do with their nationality, while the entity itself was merely a capital stock. Obviously, the fiction theory was used, perhaps in the form advocated by Brinz that makes the purpose of a corporation the subject of right (theory of Zweckvermögen). This denial of nationality to corporations, supported in several quarters in South America, was adopted in Rio de Janeiro in 1927 by the Committee of American Jurists representing seventeen republics, and was repeatedly expressed on

67 Taxation at the domicile has been regarded as the "general principle" in Europe, see Allix, Recueil 1937 III 572. The real domicile, not that indicated in the Articles of Association is decisive in France (see infra p. 43 f.) and the Netherlands, Rb. Amsterdam (Dec. 11, 1924) W. 11334.

68 See Zeballos, Clunet 1906, 695; Alcorta, 2 Der. Int. Priv. 38-40.

69 The doctrine is a part of the general complaints advanced, for instance, by Seijas (Venezuela), II Annuaire (1889-92) 442. See also Travers, Recueil 1930 III 37.
the occasion of the signatures to the Código Bustamante in Habana, 1928. The Argentine Delegation signed the treaty (which later was not ratified by Argentina) with the reservation that:

“It does not approve provisions affecting directly or indirectly the principle upheld by the civil and commercial legislation of the Argentine Republic to the effect that ‘juristic persons owe their existence exclusively to the law of the State which authorizes them and are therefore neither national nor foreign; their functions are determined by said law, in accordance with the precepts derived from the “domicile” which that law acknowledges to such persons.’”

And the Delegations of Colombia and Costa Rica observed:

“Juristic persons cannot have any nationality either under scientific principles or in the view of the highest and most permanent interests of America. It would have been preferable that in this Code, which we are going to enact, there should have been omitted everything which might serve to assert that juristic persons, particularly those with capital stock, have nationality.”

To satisfy this so-called Argentine doctrine, the Constitution of Colombia of 1936, for instance, which repealed the article of the Constitution of 1886 requiring reciprocity for the recognition of foreign corporations, limited itself to the statement in Article 12:

The capacity, the recognition, and generally the regime of companies and other juristic persons are determined by Colombian law.

This does not mean that Colombian internal law should always be applied; conflicts rules may be established, but

70 Reservation 4; practically similar, the reservations of the Paraguayan (3) and the Dominican Delegations (2, cf. 3).
71 Cf. TULLIO ENRIQUE TASCÓN, Derecho Constitucional Colombiano (ed. 2, 1939) comment on art. 12; similarly the Law on Stock Corporations of July 27, 1950, art. 228.
the intention is clear not to recognize as corporations belonging to a foreign country those operating within Colombia.

Thus, an erroneous legal theory was developed as a justification for political action. The aim was to defend against diplomatic intervention, on the background of unpleasant remembrances of foreign complaints, naval demonstrations, and claims to arbitrate expropriations and riot damages, before the era of the good neighbor policy.

As a positive support for the rule, it has often been adduced that foreigners, whether individuals or legal persons, have equal civil rights with nationals, a general Latin-American progressive rule, emphasized in nearly all constitutions. The argument, of course, tends to imply that a company enjoying all privileges of domestic fellow-companies, has no claim to anything more. But, even if equality were not riddled with exceptions and the conclusion were true, logic would lead to the conversion of all corporations into domestic legal persons rather than into persons not belonging to any state.

As a matter of fact, the stand taken by the Mexican Government in 1938 in the case of the Eagle Oil Company, was that British intervention was excluded because the legal person was Mexican, whereas the British Government complained of the forced local incorporation of the company.

Also, the very frequent legislative acts of Central and South American governments barring foreign corporations

72 See the impressive discussion of the legal reality of the Latin-American countries "as to the civil inequality of foreigners" by Zorraquín Becú, El Problema del Extranjero en la reciente legislación latino-americana (Buenos Aires 1943) 93, 95 and ff.

73 Note of April 12, 1938. The British government replied (note of April 21, 1938) that "if a government first can make the operation of foreign interests in its territories dependent upon their incorporation under local law and then plead such incorporation as the justification for rejecting foreign diplomatic intervention," . . . (39 Bull. Inst. Int. (1938) 67). See also Josef L. Kunz, The Mexican Expropriations (New York 1940) at 49; and documents cited by 2 Hyde 908.
from business without special authorization, have a tendency toward requiring domestication.\textsuperscript{74}

These remarks have had the exclusive purpose of conceptual clarification. While a book like the present does not deal with political aspects, the universal need of international collaboration will have to be stated at the end of this part. But the conclusion should be drawn at once that an equitable compromise between the interests of invested capital or skilled techniques and those of the territorial population, cannot be obtained either by artificial theories or by denying the existing international connections. Indeed, international law, apart from all possibly doubtful problems, permits a government to extend diplomatic protection to a corporation constituted in its territory, and at least under some circumstances, to espouse the cause of nationals who are holders of a considerable part of the capital stock or bonds.\textsuperscript{75}

Both the Treaties of Montevideo and of Habana have distinctly perceived the necessity of connecting public and private legal persons with determinate states, and the latter has simply called this connection nationality.\textsuperscript{76} The same is true of many Latin-American statutes and constitutions.

IV. DOMICIL OF CORPORATIONS

Another futile controversy based on traditional concepts for a long time has existed concerning whether and where corporations have a domicil.\textsuperscript{77} These questions originated in

\textsuperscript{74} See infra p. 185.

\textsuperscript{75} Borchard, Diplomatic Protection (1915) 622; Charles De Visscher, "La technique de la personnalité juridique en droit international public et privé," 63 Revue Dr. Int. (Bruxelles) (1936) 475, 484; Charles De Visscher, "Le déni de justice en droit international," 52 Recueil (1933) II 387; 2 Hyde § 279.

\textsuperscript{76} Código Bustamante, art. 16.

\textsuperscript{77} For American law, see the brilliant article by J. F. Francis, "The Domicil of a Corporation," 38 Yale L. J. (1928-29) 335. For a recent comprehensive, though objectionable, treatise, see A. Farnsworth, The Residence and Domicil of Corporations (1939) reviewed by Kahn-Freund, Annual Survey of English Law (1939) 374; F. A. Mann, 3 Modern L. Rev. (1940) 174.
the same practical grounds as the question regarding nationality. In large part, tax laws, commerce regulations, and jurisdictional rules were drafted originally with only individuals in view. Lawyers had to construe the legislative references to domicil with respect to corporations and partnerships. Unfortunately, many solutions are unsatisfactory, as when corporations are said to have no domicil but only "residence" or, at common law, are said to have several domicils in contrast to physical persons.

As an outgrowth of the fiction theory, in the United States every corporation is declared to be "domiciled" at its principal office in the state of incorporation\(^78\) and, in the absence of an actual office, at a substituted fictitious business place in such state. In the words of the Supreme Court:

"This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicil, the habitat, the residence, the citizenship of the corporation, can only be in the state by which it was created, although it may do business in other states whose laws permit it.\(^79\)

Hence, a corporation has a necessary domicil by force of law in the state where it was incorporated and cannot acquire a domicil outside that state.\(^80\) This rule is also settled in Canada apart from Quebec.\(^81\) In other words, a corporation is localized by its creation in a certain state and by this fact is domiciled there.

Obviously, this doctrine would be quite as well expressed by omitting any reference to the concept of domicil and by

\(^78\) Restatement § 41 comment a.
\(^80\) Restatement § 41 and comment b. Mr. Justice Holmes in Bergner & Engel Brewing Co. v. Dreyfus (1898) 172 Mass. 154, 51 N.E. 531; 1 BEALE § 41.1.
simply referring to the state of charter. Moreover, the purposes for which this fiction of a domicil has been invented are mainly taxation and jurisdiction, and, although in these matters the state of first incorporation has retained some significance, it has not such a prominent role at present as to justify an exclusive qualification as center. Most recently, first the entire intangible personality, wherever located, and then the entire revenue from securities have been deemed susceptible of taxation in the state in which a corporation has its principal place of business. The state of charter, however, does not seem to be correspondingly eliminated.

In most civil law countries a corporation is localized for conflicts purposes as well as for many others, at its "seat," i.e., in the place where central control and management is exercised. The same definition is unanimously given by English writers for such matters as taxation and trading with the enemy.

The English and American opposition to the general attitude of the civil law reverses in curious fashion the contrast existing in determining the status of individuals. On the Continent, the status of a corporation is subject to the domiciliary test, applied to individuals at common law, which, in reference to corporations, repudiates its own familiar criter-

82 See Henderson 190; Foster, Recueil 1938 III 455.
83 See Francis, supra n. 77, 352, 353.
85 See below p. 33.
86 Dicey, Rule 77, 478, speaking of residence; Foote 119; Westlake 368; Schuster, "The Nationality and Domicil of Trading Corporations," 2 Grotius Soc. (1917) 59, 69; Cheshire 156 ff., (commercial domicil, residence).
87 By an inadequate argumentation, Farnsworth, supra n. 77, first contends a priori that domicil must determine the "status" of a corporation (pp. 210, 231) and then impeaches the dominant opinion of the English writers because the usual definition of the domicil (as a central place of control) would give the corporation a status impossible in English law (p. 274). The author denaturalizes the conception of domicil to no useful purpose at all.
ion and adopts that of the legal connection; this inversion seems to have struck some English lawyers so much that they have thought that a "domicil of origin" should be construed as in the country of incorporation. The Código Bustamante (art. 16) mentions a "nationality of origin." These conceptions seem to correspond to the doctrine of this country assuming a necessary domicil in the state of incorporation.

88 See recently, Farnsworth, supra n. 77, 209; Gasque v. Inland Revenue Commissioners [1940] 2 K.B. 80, 84 per Macnaghten, J.; Cheshire 200.