CHAPTER 50

Other Transfers of Simple Debts

I. TRANSFER OF CLAIMS BY LAW

1. Subrogation by Law

SUBROGATION, the substitution by law of one who pays a debt in place of the creditor, is related to the voluntary assignment which a third party satisfying the creditor may be entitled to request instead of discharge. For instance, a surety paying the creditor may demand such assignment under Roman law (beneficium cedendarum actionum). In fact, the analogy between such compulsory “voluntary” assignment and immediate transfer by force of law (or judicial proceedings) is rather close. Subrogation is merely a technical improvement in the interest of the payor securing his position, particularly in the case of the creditor’s insolvency. Because of this functional similarity, the modern codes declare the rules of assignment applicable by analogy to the legal transfer of claims. Whether the effect of a subrogation is a clear succession to the title or the practical equivalent, e.g., acquisition of the right of collection, is of no concern for our purpose.

It follows for the conflict of laws that subrogation is to be governed by the same law under which the payor might demand assignment of the debt. This is the law governing the contractual or legal relationship between the payor and

Conflicts law: GULDENER 125 ff.
2 Germany: BGB. § 412.
Switzerland: C. Obl. art. 166.
the creditor, not the law governing the principal debt. Courts have sensed this better than some writers.

Illustration. Bales of Swedish cellulose, consigned to the Snia Viscosa Company in Milano, Italy, sank in Holland in fluvial transportation by a Swiss carrier. The buyer had insured the loss in Italy with Italian insurers and recovered from them. The insurers were allowed to take recourse against the Swiss carrier. Although the claim of the insured against the carrier was governed by Swiss law, this claim was transferred by subrogation to the insurer according to the Italian Commercial Code, then in force, article 438 paragraph 1. This provision did not restrict subrogation to tort actions as the Swiss law on insurance contracts, article 72, does. Swiss BG. (May 7, 1948) 74 BGE. II 81, 88.

Where, for instance, a surety pays to the creditor, it is the task of the law governing suretyship, and not of the law governing the principal debt, to determine whether the surety has to demand assignment before paying, or acquires the claim by virtue of the payment. This law includes conditions and effects, although the transfer of accessory rights thereby involved, according to the situation, may require additional consultation of other laws. Similarly, it has been held in Germany that a Belgian by paying customs duties to the Belgian state according to Belgian law, acquired the right of that state, effective in the German bankruptcy of the debtor.

The law of the principal debt, of course, determines the transferability of the debt. The tendency of the German and Swiss doctrine to enlarge the role of this law, incon-

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3 See particularly German RG. (April 23, 1903) 54 RGZ. 311, 316; Letzgus, Z. ausl.PR. (1929) 849; Batiffol 425 n. 6 § 541 and Traité (ed. 3) 677 § 626; Domke, Clunet 1938, 417; Arminjon, Droit Int. Pr. Com. 485 § 293.

4 Thus 2 Zittelmann 394; Neumeyer, IPR. 29.

5 See Pillet, 1 Traité 176 for the problems; Rilling, supra Ch. 47 n. 1, 76-79.


7 1 Fiore § 196; 2 Rollin § 979.
sistent with what is plainly suitable here, has nevertheless influenced a decision of the Swiss Federal Tribunal and its commentators.

A German engineer employed by the Swiss federal railroads was injured in the Swiss service and awarded compensation by the German board of accident insurance. According to the German law of social insurance, the tort claim against the Swiss railroads passed automatically to the German board. The Federal Tribunal acknowledged this effect of the law governing the relation between injured and payor, considering under Swiss law that the tort debt also was assignable and that although the debt was not ipso jure transferred to the social insurance office, the institution of subrogation was familiar. From this decision, writers have inferred the proviso that the law governing the transfer can operate only if the law of the debt recognizes the transfer.

Even this restricted reference to the debtor's law is un-

8 BG. (Feb. 28, 1913) 39 BGE. II 77, 2 Praxis 171.


In contrast with these decisions, a French court has refused to apply a Swiss statute providing for subrogation in favor of a social security fund which had compensated the Swiss victim of a traffic accident in France; see App. Besançon (May 14, 1959) Clunet 1960, 778 with Note by Breedin and Revue Crit. 1960, 67 with Note by Loussouarn; see also Ehrenzweig, Conflict 442.

9 Lewald 277 § 326, followed by RaaPe, IPR. (ed. 5) 509 f. (the German law can only order the transfer and it was up to the Swiss law to carry it out); M. Wolff, IPR. (ed. 3) 152 and Priv. Int. Law (ed. 2) 545 § 518. Guldener 139 even criticizes the decision because it should have applied only Swiss law.

Recently a German author has urged the acknowledgment of subrogation only if both the law of the principal debt and the law of the relationship between payor and creditor grant subrogation in the specific case; see Hoffmeyer, "Zur Aktivlegitimation ausländischer Ladungsversicherer bei Regressklagen," 125 Z. Handelsr. (1962) 125. This article, incidentally, affords a useful comparative survey of legal provisions concerning subrogation in matters of marine insurance.
necessary and confusing. It suffices that under the law govern­ning the debt, it can be transferred to any other person. If it is transferable, the debtor has no justifiable interest in the form and the modalities of the transfer, and still less has the law of the debt any bearing.

The wrong approach was followed by a Dutch decision in an analogous case. Two German postal officials serving on through trains were injured in accidents on Dutch territory and pensioned under the German social security scheme. The Appeals Court of Amsterdam rejected the recourse of the German board against the Dutch railroads, because Dutch law did not acknowledge subrogation in analogous cases and therefore the tort obligation was satisfied by the award of pensions granted by the board to discharge its own liability.\(^\text{10}\)

This naïve reasoning overlooks the entire modern development of concurrence of debts where the ultimate loss falls on one codebtor. In the conflicts field, it demonstrates the mistake of allowing the law of the debt to interfere.

A different answer is contained in a French decision.\(^\text{11}\) A Dutch car owner, insured against fire with an English company, lost the car in a fire at a French garage. The company paid the damage to the owner and recovered from the garage company. The insurance contract was deemed to be governed by Dutch law and produced legal subrogation (Dutch C. Com. article 284) at the time of the payment.

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\(^\text{10}\) Hof Amsterdam (April 12, 1921) N. J. 1922, 801.

\(^\text{Contra: Rb. Utrecht (May 7, 1952) N. J. 1953, 276, Clunet 1957, 476, Revue Crit. 1954, 784 with Note by BatiFFOL; in this case the court applied Belgian law granting subrogation of a proprietary right to a movable situated in Holland and covered by a Belgian insurance contract. On the other hand, see Hof Arnhem (Nov. 29, 1955) N. J. 1956, 231 and Rb. Leeuwarden (Dec. 13, 1960) N. J. 1961, 330; in these analogous cases subrogation was denied according to Dutch law. For a discussion, see Sauveplanne, "De subrogatie in het internationaal privaatrecht," De conflictu legum (Nederl. Tijds. Int. R., Special Issue October 1962) 413 and BatiFFOL, Traité (ed. 3) 677 § 626.

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The French-governed obligation of the garage company was ascertained as soon as plaintiff showed himself to be regularly subrogated under Dutch law. This result conforms to our own conclusions, but the court based it on obscure reasoning and the alleged rule for "quasi contracts" that the law of the place of the generating fact, that is, of the payment, governs.12

Likewise, in another case involving insurance against risks of carriage, a New York insurance company was recognized as subrogated to the insured because it had paid the client in France and subrogation at that time had become known to French law.13 If the lawyers concerned had cared to consult the law of New York, they would probably have reasoned otherwise.

Considering the great and ever-increasing importance of subrogation in modern relationships, its fate cannot be reasonably made dependent on the accidental place of payment. Subrogation flows from the law governing the underlying obligation,14 which we have found also to influence the law granting recovery of unjust enrichment. Where, for instance, an injured driver of an automobile has released the tortfeasor but cashed the insurance money, he is bound to refund this money, according to American views.15 How could this rest on the law of the place of the payment? The relationship insurer-insured dominates the entire problem.

In the case of accident insurance, we have found earlier

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12 See PERROULD, ibid., and contra supra p. 378.
14 This should be true even in a system where subrogation, e.g., of the insurer, is merely based on the law plus the payment, in minimizing the (insurance) contract, as in the doctrine of the Italian courts on the ground of former C. Com. art. 438, see Cass. Ital. (Feb. 19, 1937) 39 Dir. Marit. (1937) 80 and note by BERLINGIERI.
15 See on this and related questions, BILLINGS, "The Significance of Subrogation in Automobile Insurance Practice," Ins. L. J. 1948, 707.
that a direct action by the injured party against the insurer, when granted by the law of the place of the accident, ought to be allowed elsewhere. It is added here that if the insured has been satisfied by the insurer, their relationship determines the transfer of the tort action.

This would also seem to furnish the right solution to the recent controversy whether an insurer against liability is subrogated in a claim based on the Federal Tort Claims Act of 1946, which assimilates the United States as wrongdoer to private persons. The Act presupposes that an individual in an identical case would be liable under the law of the place where the loss or damage occurred. It is entirely unjustified to require another federal law to extend the right to sue especially to a subrogee. At least one circuit court has recognized the subrogation. Where a transferable claim arises from the tort according to the law of the place of wrong, its transfer to the insurer by operation of law depends simply on the law governing the insurance contract.

One difficult problem should be briefly noted. Subrogation as respects the same debt is often granted by statute to persons differing in their relationships to the debtor. For instance, it has been discussed in Germany that the Code entitles a surety paying the creditor to avail himself of a mortgage securing the debt, but the Code also subrogates the owner of the mortgaged property if he is not the principal debtor to the creditor, apparently including the right

16 See Vol. II (ed. 2) pp. 263 f.
20 GGB. §§ 774, 412, 401.
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against the surety.\textsuperscript{21} Can such owner recover from the surety? Is this a question of who first manages to pay? Or is it a case of equal distribution? Prevailing German opinion has recognized that the surety's position is superior; he may recover from the owner but the latter cannot recover from him.\textsuperscript{22}

Analogous delicate questions have been raised in the United States;\textsuperscript{23} some judicial decisions have been justifiably criticized. Thus, a tortfeasor without doubt is responsible to the subrogated insurer. Hence, in the better opinion, the insurer of one of two tortfeasors may recover from the other tortfeasor half of what he pays to the injured party.\textsuperscript{24} An employer paying compensation to an employee ought to have recourse against the insurer of a workman's accident.\textsuperscript{25} Other cases are more doubtful.

In conflicts law, the difficulty is increased at least in the cases, probably infrequent, where the persons potentially entitled to subrogation enter into the connection independently of each other.

However, modern legal science ought to solve the municipal problem in a uniform manner, establishing a gradation of liabilities, preliminary to the rank of rights subject to subrogation.

2. Other Transfers by Law

"Provision."\textsuperscript{26} The only topic ordinarily attracting attention in the Continental literature on this subject has been

\begin{itemize}
\item \textsuperscript{21} BGB. §§ 1143, 1249, 412, 401.
\item \textsuperscript{22} Strohal, 61 Jherings Jahrb. (1912) 59 ff.; RG., 76 Seuff. Arch. 135.
\item In Austria followed by 2 Ehrenzweg i § 293 and n. 36; 2 id. 2 § 311 n. 20.
\item \textsuperscript{23} Langmaid, "Some Recent Subrogation Problems in the Law of Suretyship and Insurance," 47 Harv. L. Rev. (1934) 976, also in Legal Essays in Tribute to Orrin Kip McMurray (1935) 245.
\item \textsuperscript{24} Langmaid, id. 998 (264) against decisions.
\item \textsuperscript{25} Langmaid, id. 1007 (272) against decisions.
\item \textsuperscript{26} Basic: Ernst E. Hirsch, Der Rechtsbegriff Provision im französischen und internationalen Wechselrecht (1930) 146 ff.
\end{itemize}
the transfer of the so-called "provision" to the successive endorsees of a bill of exchange under French law and those following the French doctrine. The rights to funds covering the draft and belonging to the drawer, including obligatory rights such as claims or credits due him by the drawee, are transferred to the payee by the negotiation of the bill and successively to the endorsees with every further endorsement.\(^27\) But this means only that the holder of the bill is entitled to such claims as the drawer may happen to have against the drawee at the time of maturity to the extent of the amount indicated in the bill. Text and construction make it clear that this is not an ordinary implied assignment; it does not necessarily have a present object and does not prevent the drawer from disposing of the funds before maturity. Hence, it is a transfer created and peculiarly conditioned by law. And this law is correctly and prevailingly identified with that governing the creation of the bill of exchange, which is, in the predominant opinion, rightly or wrongly, the law of the place of issue.\(^28\) That this law also should intervene in transferring the right of cover from one endorsee to the other, although the endorsement is governed by the law of its own place, has seemed impossible

\(^{27}\) France: C. Com. art. 116, as amended by Law of Feb. 8, 1922.  
Italy: Law No. 48 of Jan. 15, 1934, art. 1.  
Scotland: British Bills of Exchange Act, 1882, s. 53 (2).  
The problem was discussed formerly in American courts but has been liquidated by the Uniform Negotiable Instruments Act, § 127, cf. 5 U. L. A. § 127, and for the distinction of transactions to be observed, Guggenheim & Co. v. Lamantia (1929) 207 Cal. 96, 99, 276 Pac. 995.  

\(^{28}\) HIRSCH, supra n. 26, at 162.  
France: Cass. civ. (Feb. 6, 1900) S. 1900.I.161, Clunet 1900, 605; 4 Lyon-Caen et Renault § 644.  
Italy: CAVALIERI, Dir. Int. Com. 373 ff.  
Germany: OLG. Kolmar, decisions cited by HIRSCH, supra n. 26, 168, 170.  
Contrarily, in Illinois cases, before the uniform law, the law of the place of payment has been applied. National Bank of America v. Indiana Banking Co. (1885) 114 Ill. 483, 2 N. E. 40r concerning a check, in which case there are doubts on the correct localization, see HIRSCH, supra n. 26, at 154. Abt v. The American Trust & Savings Bank (1896) 159 Ill. 457, 42 N. E. 856 (draft).  
Cf. also Vol. IV (ed. 1) pp. 144 ff., 232 f.
to some dissenters, while the German courts look for circumstances suggesting a tacit assignment of the accessory right.

The prevailing simple solution was inserted in the Geneva Convention of 1930, adopting the controversial rule that rights once acquired by the first endorsee pass to each successor, without regard to the respective rule of the place of endorsement, and that such rights correspondingly revert in the case of recourse for nonpayment. Of course, the drawee has his normal defenses against any transferee; this is no exception to the rule.

The connection with the doctrine of negotiable instruments justifies this solution which, in itself, would be exorbitant.

A General Rule? Some statutes, that of Texas being apparently the last left in this country, provide that the beneficial interest of a spouse granted him in an insurance on the life of the other spouse automatically returns to the grantor in the event of divorce. In an older case, such effect of a Hawaiian divorce decree was disregarded in California in a matter of jurisdiction. In another case, it was held that the law governing the insurance determines whether the right of the beneficiary is lost by a divorce. But more

29 DIENA, 3 Dir. Com. Int. §§ 217, 223; GAETANO ARANGIO-RUIZ, "La cambiale nel diritto internazionale privato," 12 Studi di diritto internazionale (Milano 1946) 238, arguing on the analogy of voluntary assignment; see for other writings, GULDENER 50 f.

30 RG. (March 19, 1907) 65 RGZ. 357, and other decisions, see HIRSCH, supra n. 26, at 168 ff.

31 Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange etc., art. 6: "The question whether there has been an assignment to the holder of the debt which has given rise to the issue of the instrument is determined by the law of the place where the instrument was issued." HUDSON, 5 Int. Legislation 554.

32 McGrew v. Mutual Life Ins. Co. of N. Y. (1901) 132 Cal. 85, 64 Pac. 103, criticized by 2 BEALE 1254 because the woman and the policy had been under the jurisdiction of the Hawaiian court from the beginning.

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recently, the Second Federal Circuit Court decided by a majority that the designation of the wife as beneficiary in an insurance contract made in New York state, giving an irrevocable right under New York law, was destroyed as an effect of divorce in Texas where the spouses had moved. Judge Learned Hand based this decision on a general rule; he held that there was no reason why a legal transfer should not be subject to the same conflicts rule as a voluntary assignment, and thus to the law of the place of assignment, which he assumed should govern. That this rule should sanction the surprising effect of the exorbitant Texas rule on a right irrevocable under a New York insurance contract, has been convincingly criticized. In the rule itself, the reference to the mechanical law of the place of assignment should be eliminated. Apart from this, however, it may be contended that an expropriation of a debt does not depend upon the permission of the law governing the debt, unless the right is personal. But the local contacts appropriate in this matter can scarcely be stated in terms of one simple conflicts rule.

II. TRANSFER OF LIABILITY

The most important situations involving a change of debtor occur in connection with inheritance and transfer of an enterprise, both of which belong primarily to the doctrines of property.

35 See Clark, J., dissenting opinion id. 668 ff.; Note, 49 Yale L. J. (1939) 335.
36 Letzgus, 3 Z. ausl. PR. (1929) 852; Guldener 111 ff.; Rilling, supra Ch. 47 n. 1, 71.
38 RG. (March 27, 1905) 15 Z. int. R. (1905) 306 does not contribute much: a German bought a business in England taking over all assets and liabilities; the obligations arising have been naturally subjected to English law.

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By voluntary act of the debtor, an individual debt cannot be transferred to another debtor without the creditor's assent. He can, where his duty is not strictly personal, accept the promise of another person to perform the duty. Such assumption by agreement, taken as merely constituting a relation between the debtor and his substitute (the ex-promise) participates in the law of the sale, lease, or other transaction in which it is included, or may be subject to an independent law.

Modern laws, however, have brought forth various institutions resulting in the addition of a new debtor ("cumulative" assumption of liability), or the replacement of the old by the new debtor ("privative" assumption of liability). In the latter case, the idea that the new promisor succeeds in place of the old obligor without any other change of the substance of the obligation and its accessories, is more or less developed. Whereas the German Civil Code has established a fullfledged succession in the debt by agreement of the new promisor either with the creditor, or with the old debtor plus consent of the creditor, the French doctrine, in the absence of sufficient provisions of the Code, has approached the desired results by adjusting institutions like novation, delegation, third-party contracts. In the United States, direct action by the creditor against the new debtor has been provided by using novation and reducing the new obligation to the conditions and amount of the original liability, or by construing the creditor as the beneficiary.

39 This is what is usually termed assignment of liability; 7 Halsbury 302 § 420; Restatement of Contracts § 160 (3); German BGB. § 329: "Erfüllungsübernahme"; Swiss C. Obl. art. 175: usually termed "Interne Schuldübernahme."


41 Planiol et Ripert, 7 Traité Pratique (ed. 2) §§ 1142-1145; cf. in the Italian C. C. (1942) arts. 1272, 1273.

42 Restatement of Contracts §§ 427, 428; Williston, 3 Contracts § 1865.
of the assignment of liability, or under certain conditions by operation of law.

Again, in the German doctrine, the law of the original debt has been applied to determine conditions and effects of the acts and agreements in question.

Illustration. Two women, domiciled nationals of Czecho-slovakia, purchased in 1922 a house in Dresden, and by agreement assumed personal liability on a debt secured by a mortgage. Although they discharged it by payment in depreciated marks, they were held subject to the German law of revalorization, because the debt was governed by German law. Their domicil, important under other circumstances, was considered immaterial.

But, quite as a promise of suretyship and an assignment of right, any agreement introducing a new promisor of the original debt, has an independent existence. A proper law governing it may follow from a stipulation for the applicable law or be inferred from the circumstances. As in the other types of transactions mentioned, of course, the law governing the original debt is presumably the most closely connected law.

To presume, to the contrary, that the new promise should

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45 Germany: RG. (June 13, 1932) JW. 1932, 3810; Walker 494.
Switzerland: 2 Schnitzer (ed. 4) 660.
46 RG. (Oct. 17, 1932) IPRspr. 1932 No. 34. Nussbaum, D. IPR. 267. The case of assumption of a mortgage debt on the occasion of purchase of land, specifically regulated in BGB. § 416, has been simply subjected to lex situs by RG. (March 22, 1928) JW. 1928, 1447, but the mortgage debt is not necessarily under lex situs, cf. 2 Beale 946 and n. 7.
47 This view was propounded by 2 Zitelmann 395; 2 Frankenstein 268, although they postulated the personal laws of the two debtors and complicated the problem by their formulations.

In cases where the buyer of land has assumed the mortgage debt, the lex situs may reasonably apply; thus the German RG. (Jan. 12, 1887) 4 Bolze No. 22, and the Austrian OGH. (June 26, 1930) JW. 1931, 635.
be governed by the law of the domicil of the new promisor, as the Swiss Federal Tribunal has done,\textsuperscript{48} is an instance of exaggerated emphasis on the debtor’s domicil.

The law governing the original debt, it is true, determines whether the original debtor is discharged. But even when the new promise is governed by another law, practical difficulties are improbable since discharge and new promise are essentially connected, by one or the other construction, in every legal system.\textsuperscript{49}

III. Novation

The problem may be illustrated by adding foreign elements to an American case.\textsuperscript{50}

Sharp had a contract with the baker Voight to deliver flour. Voight sold his bakery to Manfre and notified Sharp that he had to deal exclusively with the successor. Sharp acknowledged this letter and wrote Manfre insisting on strict compliance with the contract terms. But later Sharp demanded cash payments and in their absence refused delivery. The court held that by his letters Sharp discharged the old contract totally and substituted a new contract of analogous content with Manfre. The court preferred the view that the old contract was rescinded to construing a novation as some courts would have done.

If Sharp should be in state X and Voight in state Y and the laws of X and Y differ on the question of interpreting

\textsuperscript{48} Swiss BG. (Nov. 11, 1941) 41 Bl. f. Zürch. Rspr. 100 reported by Briner, supra n. 37, 56, dealing with cumulative assumption of liability, but apparently applicable "a fortiori" to transactions freeing the original obligor, see Briner, supra n. 37, at 68.

\textsuperscript{49} See on these problems M. Wolff, IPR. (ed. 3) 153 f.; Briner, supra n. 37, 44 f.

\textsuperscript{50} Manfre v. Sharp (1930) 210 Cal. 479, 292 Pac. 465.
the intention of the parties or on a presumption of survival of the original debt, which law governs? The problem has come up in Europe in the case of the peculiar Swiss certificate of deficiency issued to a creditor who has not been satisfied because of the debtor's insolvency. This certificate creates a new title for enforcement, not subject to limitation of time.\footnote{Switzerland: A Federal Enforcement and Bankruptcy Act, art. 149 par. 5; on the international force of the imprescriptibility, see \textit{infra} p. 528.} A French court has termed this transformation a novation.\footnote{App. Colmar (May 31, 1933) \textit{Revue Crit.} 1934, 468.} In a Swiss case, the creditor of a French-governed debt claimed that the amount originally expressed in French francs was transformed by novation into Swiss francs as of the time when the certificate was issued. The French currency had declined afterwards. The Federal Tribunal, however, stated that the conversion of the sum had been made merely for the purpose of the first enforcement. It was then asked whether the fact that the defendant had consented to the conversion at the time created a contract of novation in favor of the amount in Swiss francs appearing in the certificate. The court denied this under Swiss law, held applicable either as that of the assumed place of contracting or as that intended by the parties.\footnote{BG. (June 3, 1947) 73 BGE. II 102, 105.}

The agreement, thus, was subjected to an independent law rather than to the (French) law governing the principal debt. But the problem concerned the interpretation of the agreement of the parties, not the permissibility of novation. Since novation is known in practice to every system, the Swiss solution is obviously correct in the case at bar of an agreement between the two original parties to the obligation.

More complicated cases may cause doubts. But it may be generally said that the extinguishing effect depends on the law of the debt, although the new obligation is governed
by its own law,\textsuperscript{54} that may or may not be identical with the first. It is important that we should treat all transactions modifying an obligation under analogous principles, since they are overlapping and varying in the different systems.

\textbf{IV. Jurisdiction for Garnishment}\textsuperscript{55}

Although enforcement of a claim is a topic of adjective law, forcible satisfaction of money obligations by resort to obligatory claims against third persons is frequently included in treatises on conflicts law. Certain problems of jurisdiction present international interest and have influenced other important subject matters, such as war seizures. Close historical and systematic connections with the traditional situs doctrines are evident.

However, this exceptional discussion of a jurisdictional and procedural subject merely involves the transfer, for the purpose of execution, of a debt from the creditor to his own creditor. This includes seizure of the debt only so far as it is preparatory to this transfer. We are not dealing with attachment in any other function, such as founding jurisdiction or as a conservatory measure, despite the historical and practical connections between these institutions.

Orderly garnishment proceedings (as contrasted with interim proceedings for conservatory\textsuperscript{56} purposes) should con-

\textsuperscript{54} \textsc{Pillet}, 2 \textit{Traité} 214, generally followed. A similar contrast between the effect of discharging the old and creating a new obligation is made with respect to deeds and judgments, see M. \textsc{Wolff}, Priv. Int. Law (ed. 2) 549 § 524, subjects not to be dealt with here. Private autonomy is recognized by \textsc{Rolin}, 2 Principes §§ 989 ff., \textsc{Despagnet} § 313; its limitation, 2 \textsc{Arminjon} § 156.

\textsuperscript{55} \textsc{Beale}, "The Exercise of Jurisdiction \textit{In Rem} to Compel Payment of a Debt," 27 \textit{Harv. L. Rev.} (1913) 107; \textsc{Rheinstein}, "Die inländische Bedeutung einer ausländischen Zwangsvollstreckung in Geldforderungen," 8 \textit{Z.ausi.PR.} (1934) 277; \textsc{Rabel}, "Situs Problems etc.," 11 Law and Cont. Probl. (1945) 118, 126, \textit{infra} n. 79.

\textsuperscript{56} As to this latter, the older Continental tendency connected with the situs theory regarding the court at the creditor's domicil as the competent forum (see also Chirkasky v. Pride, 41 \textit{Harv. L. Rev.} (1927) 924), has been given up. The forum makes its jurisdictional rules freely and largely, \textit{cf. Anzilotti}, Rivista 1908, 180.
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sist in a desirable system of three phases. The garnishee would be (1) forbidden to pay his debt to his creditor, the original debtor; he would be (2) finally ordered to pay it to the garnisher; and (3) the original debtor would at least be duly notified of any measure that may affect his interests.

If appropriate international co-operation existed, these three steps could be carried out conveniently even though two or three countries were involved. Such harmony, however, is far from being established, and not even within the United States is the justified postulate achieved, expressed by Stumberg, that the proceedings should be conducted against both the creditor and the debtor in their respective jurisdictions.57

1. Domicil of the Original Debtor

As things stand, the old idea that a claim is situated at the domicil of the creditor and therefore must be attached there, is often recognized in domestic law but is rarely observed in taking jurisdiction for garnishment. Some states of the Union seem still exclusively to permit garnishment at the domicil of the original debtor.58 The Swiss courts, considering a debt situated at the place of the creditor’s domicil, take jurisdiction when the original debtor is domiciled in the forum,59 and also when he is domiciled abroad and the garnishee is domiciled in the forum;60 but as a recent decision has made clear, garnishment is ordered only under

57 Stumberg (ed. 2) 109.
59 BG. (Dec. 9, 1930) 56 BGE. III 228, 230 referring to 53 id. III 45 and citations.
60 The older decisions of the Federal Tribunal on jurisdiction for attachment, up to (March 11, 1930) 56 BGE. III 49, 50, recognizing this, have been interpreted as including garnishment; really they deal with provisional attachment. See 2 Schnitzer (ed. 4) 889 n. 153 and Guldener, Internationales Zivilprozessrecht 180.
the condition that official notification to the debtor by letter rogatory is effected. 61

Most systems, at present, localize the debt in connection with the debtor's debtor rather than with the original debtor. They disagree, however, on the exact localization: whether the domicil of the garnishee or the place where he can personally be sued.

2. The Garnishee's Domicil

In the prevailing Continental doctrine, it is recognized by tradition from the statutists that the situs of a debt for the purpose of executive attachment is at the domicil of the debtor.

France. This proposition has found its clearest expression in France. 62 The reasoning rests on the old twofold ground that the court at the debtor's domicil has general jurisdiction over him (actor sequitur forum rei) and that his movable assets, the objects of enforcement, are deemed to be assembled there (mobilia ossibus inhaerent). Modern authors know that to speak of situs is figurative but add that the domicil is the most readily ascertainable of all places involved.

The French Court of Cassation has rigorously carried out this theory in international relations. On the subject of executive attachment and garnishment (saisie-arrêt and saisie-exécution), it maintains that the court of the garnishee's domicil has exclusive jurisdiction for seizing the debt. If the original debtor is domiciled in France but the garnishee is domiciled abroad, no French court has jurisdiction, just as in the case of seizure of other property situated

61 BG. (Feb. 20, 1942) 68 BGE. III 10, 14.
62 WEISS, 4 Traité 430; GLASSON, MOREL et TISSIER, 4 Traité de procédure civile (ed. 3, 1925-36) 1166; LEREBOURS-PIGEONNIÈRE (ed. 7) § 474.
in a foreign country.\textsuperscript{68} In a part of the literature, the situs theory is even taken more literally and either explained by a statute real\textsuperscript{64} or anchored in the territorial nature of enforcement.\textsuperscript{65}

\textit{Germany.} Section 23 of the German Code of Civil Procedure on jurisdiction, construed by the courts as a general principle for the situs of debts, localizes debts at the debtor’s domicil. On this basis, jurisdiction in attachment and garnishment\textsuperscript{66} is assumed when the garnishee has his domicil in the forum; this excludes recognition of foreign jurisdiction even at the domicil of the original debtor.\textsuperscript{67} Correspondingly, a garnishment at the domicil of the garnishee in a foreign country is recognized,\textsuperscript{68} when it is not in conflict with a domestic measure.\textsuperscript{69}

Where the garnishee is domiciled abroad but the original debtor has his domicil in the forum, in one opinion the forum on grounds of comity should not render a garnish-


On jurisdiction in the Netherlands, see POLENAAR, Procesrecht (1937) 273 ff., 83.

\textsuperscript{64} See LEREBOURS-PIGEONNIERE (ed. 4) § 357, criticizing this theory because local sovereignty, rather than the statute real, is respected. More recent editions of this treatise do not refer to, and comment on, the theory mentioned.

\textsuperscript{65} NIBOYET, Note, S. 1932.I.137.

\textsuperscript{66} “Forderungspfändung” and “Überweisung,” the latter either as assignment at the nominal sum in lieu of payment (an Zahlungsstatt) or for collection (zur Einziehung), ZPO. §§ 829, 835.


\textsuperscript{68} RG. (Oct. 12, 1895) 36 RGZ. 355; the debt is situated not at the place of performance in Germany, but at the domicil of the (debtor’s) debtor either in Rumania or in Vienna; RG. (June 18, 1907) 63 Seuff. Arch. 41 No. 27: the debt is situated in Switzerland at the domicil of the debtor’s debtor and subject to the local power of enforcement. RG. (May 16, 1933) 140 RGZ. 340 restates energetically the principle.

\textsuperscript{69} STEIN-JONAS, ZPO. § 829 I 3.
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ment order; this would even violate international law.\(^{70}\) This opinion has been rejected.\(^ {71}\) In the prevailing view confirmed by the Reichsgericht, the order, notified to the original debtor, is valid within the forum if notice can be served on the garnishee within the forum or abroad.\(^ {72}\) This service, however, is an essential part of the proceedings, the efficacy of which therefore normally depends upon the co-operation of the foreign state, which is not likely to be granted.\(^ {73}\)

The guaranties provided in the domestic sphere to safeguard the interests of all parties involved are deficient in the international field. \textit{Res judicata} and the effects of notice of suit to a third party and of failure to give such notice usually are not effective beyond the borders of the state where garnishment is sought or, on the other hand, the debtor is in litigation with the garnishor or the garnishee.\(^ {74}\) This may or may not be in the interest of the various parties.

Remarkably, in the United States, the emphasis on the domicil of the garnishee has had some following.\(^ {75}\)

3. Personal Jurisdiction over the Garnishee

The common law doctrine seems also to derive from certain statutist teachings. A basic difference from the Continental variant is due to interpretation of the Roman rule,

\(^{70}\) See Hugo Kaufmann, \textit{J.W.} 1929, 416; KG. (April 5, 1929) \textit{J.W.} 1929, 2360.

\(^{71}\) Jonas, \textit{J.W.} 1932, 668; Stein-Jonas, ZPO. \S 829 I 3; Rheinstein, \textit{supra} n. 55, 282–284.

\(^{72}\) RG. (May 16, 1933) 140 RGZ. 340.

Similarly, Austria: OGH. (Aug. 12, 1927) 9 SZ. 516 No. 174.

\(^{73}\) Austria and Czechoslovakia: Exekutionsordnung of May 27, 1896, RGBI. No. 79, \S 294; Walker 490; OGH. (Dec. 23, 1925) 7 SZ. 1006 No. 406.

Germany (itself): Stein-Jonas, ZPO. \S 829 I 3.

Switzerland: 2 Schnitzer (ed. 4) 890.

Other countries: 1 Z. ausl. PR. (1927) 407.

\(^{74}\) See RG. (July 3, 1903) 55 RGZ. 236, 239; (Sept. 26, 1913) 83 RGZ. 116.

\(^{75}\) Minor 287 \S 125.
actor sequitur forum rei, as basing personal jurisdiction upon the presence or submission of the defendant rather than upon his domicil. When the English courts in garnishment proceedings abandoned the in rem theory of the custom of London\(^7\) and analyzed the situation of simple debts in terms of personal jurisdiction, they emphasized the place where the debt is “properly recoverable.” It is not exact, however, that personal service on the garnishee is the only requirement. The courts consider, as it seems, all the circumstances. Thus, Lord Scrutton, in a leading case where the theory was applied to the war seizure of a deposit in a London bank,\(^7\) pointed out that the debt arose in London and that the original debtor made an appearance in the lawsuit and submitted to the jurisdiction, obtaining a benefit thereby. Lord Scrutton thought that any foreign country would recognize such jurisdiction. In fact, in another case of war seizure concerning life insurance policies, Atkins, then L. J., states as a rule derived from the ecclesiastical authorities:

“That in the case of an ordinary individual . . . for a long time the situation of a simple contract debt under ordinary circumstances has been held to be where the debtor resides; that being the place where under ordinary circumstances the debt is enforceable, because it is only by bringing suit against the debtor that the amount can be recovered.”\(^7\)

Hence, the mere fact that the third debtor, the New York Life Insurance Company, had a branch office in London was not held sufficient to locate the debt because this was only one of several places of business,\(^7\) but something more

\(^{7}\)BEALE, 27 HARV. L. REV., supra n. 55, at 112; \(^{1}\)BEALE 458.

\(^{71}\)Swiss Bank Corp. v. Boehmische Industrial Bank [1923] 1 K. B. 673, 682.


\(^{78}\)For a Dutch decision to the same effect, see H. R. (Nov. 26, 1954) N. J. 1955, No. 698, 4 Nederm. Tijds. Int. R. (1957) 56: the obligation of a Dutch corporation to pay salary to one of its employees working at a branch office in Indonesia was deemed not to be subject to garnishment in the Netherlands.
was needed for the localization of the debt; in the instant case, this additional element was found in the promise included in the policy to pay sterling in London. "That right is situate in this country, and only in this country." Uncertain as the law in England remains, it seems that a mere temporary sojourn of the garnishee, in the absence of the original debtor, would not induce an English court to render a garnishment order. All judges in the last-mentioned case regretted that they had to decide without having the policy holders in court, who should have been necessary parties—a point worth noting.

United States.79 American courts, in the great majority, have construed the proceedings as directed against a debt located for jurisdiction purposes wherever the garnishee could validly be served with process. The debt is where the garnishee may be sued personally by his creditor. Under the Full Faith and Credit Clause, as the Supreme Court has stated in approving this view, any other state must recognize the double effect of the proceedings, divesting the original debtor and investing the garnishor.80 The courts, conformably, take jurisdiction wherever the garnishee is found and process is personally served on him within the state, although it is sometimes required in addition that his debt be payable there.81

Normally, of course, a debtor is found at his domicil. Moreover, in several states domicil is sufficient for assuming jurisdiction even in the absence of the debtor; this approaches the Continental reasoning. As explanation, it is

79 When I wrote first on the matter ("Situs Problems in Enemy Property Measures," 11 Law and Cont. Probl. (1945) at 126), Professor Sunderland aided me with enlightening remarks, which I am using again with gratitude.
81 State ex rel. Fielder v. Kirkwood (1940) 345 Mo. 1089, 138 S. W. (2d) 1009.
said that the domicil is the situs of the debt fixed by the legislature, or that it is the actual, as distinguished from the legal, situs, or that the debt is treated as a fund in the hands of the debtor at his domicil. 82

But the fact that domicil does increasingly determine jurisdiction and that this seems to enjoy interstate effect if fair notice is given to the debtor, 83 only increases the number of jurisdictions having power to dispose of the debt.

The American writers 84 have noted two defects of this mechanism, more serious than the Continental shortcomings because they apply primarily to the relation among sister states.

The original debtor is not necessary to the essential judicial proceedings. It is generally desired that he should be notified of a garnishment proceeding. But not even this requirement of fair justice is rigorously observed in all courts. The Restatement is satisfied with a reasonable attempt to give notice. If notice is given, he is supposed to appear at any place in the vastness of the United States where his alleged creditor happens to find and sue his alleged debtor. Federal interpleader 85 may force him to similar sacrifices. If he is not made aware of the proceedings, he will probably be able to defend against full faith and credit of the judgment, and ought to be able also to deny that it is res judicata against him. 86 But not always is he certain of such protection.

The risk imposed upon the garnishee, on the other hand, is the following.

82 MINOR 287 ff. § 125; STUMBERG (ed. 2) 107 with citations.
83 See Mr. Justice Holmes in McDonald v. Mabee (1917) 243 U. S. 90 and comment by STUMBERG (ed. 2) 78.
84 BEALE, 27 Harv. L. Rev., supra n. 55, 120; GOODRICH § 68.
85 See the interesting complications described by CHAFEE, "Federal Interpleader," 49 Yale L. J. (1940) 377, 423.
86 GOODRICH 146 § 68; but cf. the restricted formula in 38 C. J. S. § 577.
4. Double Payment of the Debt

English and American courts have dealt with cases where a garnishee objected that he may be compelled to pay the same debt again if his creditor should sue him in a foreign country where the domestic garnishment is not recognized as res judicata. Where this danger was convincingly proved, the garnishment order has been denied.87 When proceedings are pending in another state, American courts are anxious to protect the garnishee against double proceedings by divergent methods, such as abatement of the action, stay pending foreign decision, or mere suspension of enforcement.88

The German Supreme Court did not believe that it possessed such discretionary power.

A German seller had a claim for the price of delivered locomotives against a Portuguese buyer and owed the commission fee to the Portuguese broker. The claim of the broker against the seller was garnished in Germany by a German creditor of the broker. The court rejected the defense of the garnishee seller that in Portugal the broker had garnished the price owed by the buyer who was forced to pay.89

In view of this situation, an authoritative German writer has contended that actual exercise of foreign jurisdiction should be recognized, when under its compulsion a debtor


89 RG. (Nov. 3, 1911) 77 RGZ. 250; cf. RHEINSTEIN, supra n. 55, 287 n. 1; 2 FRANKENSTEIN 265 who approves the decision.
has paid either to his creditor despite a German attachment or to the creditor of his creditor on the ground of foreign attachment.\textsuperscript{90}

5. Conclusion

Evidently, no system has been found suitable to organize harmonious international proceedings. One difficulty is non-recognition of foreign seizures, another the hardships for individual parties to appear in foreign jurisdictions. In both respects, however, improvements have been found in part and could be amplified. A common basis of recognition is afforded by the widespread idea that a debt may be seized at the domicil of the debtor.\textsuperscript{91} It seems exaggerated that in the United States mere feasibility of service of process, whatever its merits as a foundation of personal jurisdiction, suffices to create rights to the detriment of out-of-state creditors.

On the other hand, the methods by which the American courts are enabled to avoid the danger of double payment by the garnishee ought to be followed in the civil law courts. The promising development of federal interpleader is another progress mitigating the difficulties of the parties involved.

Notification to the foreign original debtor should be required more distinctly and more forcefully.

\textsuperscript{90} Jonas, JW. 1932, 668 and Stein-Jonas, 2 ZPO. § 829 n. VI 3; VII 1 b. On the defenses based on unjust enrichment, see Rheinsteirn, § Z. ausl. PR., \textit{supra} n. 55, at 288 and n. 1.

\textsuperscript{91} See particularly Rheinsteirn, \textit{supra} n. 55.