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THE UNIFORM PROBATE CODE AND THE INTERNATIONAL WILL

*William F. Fratcher**

EMILY Graham left her assets in England when she married a French naval officer and went to France to live with him. After her husband died, Emily announced that she was returning to England for the rest of her life and bundled her children and baggage aboard a channel ferry. Before the ferry cleared French waters she became ill and was taken ashore at another French port. While waiting impatiently to recover sufficiently for a final return to England, Emily executed a will of her English assets in the form prescribed by English law, that is, in writing, signed by her and attested by witnesses who signed in her presence. Emily never recovered; she died in exile on the coast of France, no doubt with her eyes gazing yearningly toward the white cliffs of Dover. The English Court of Probate held the will a nullity as to assets in England because it was executed in the form prescribed by English law instead of that prescribed by French law, which required the presence of a notary.¹ The rule laid down was that a will of movables must be executed in the form prescribed by the law of the testator's domicile at the time of his death. The court's opinion suggests that Emily's intent to abandon French domicile would have become effective had she succeeded in actually leaving France. In that event, Emily's will, executed in the English form, would have become valid as to movables in England.²

Benjamin Hunt executed a written will at his home in Charleston, South Carolina. He acknowledged his signature to two witnesses, who signed in his presence, which satisfied all requirements of South Carolina law. Colonel Hunt later moved to New York, where he died. The New York Court of Appeals held the will a nullity as to

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1. In the *Goods of Raffeneil*, 3 Swabey & T. 49, 164 Eng. Rep. 1190 (Prob. 1863), following *Bremer v. Freeman*, 10 Moore 306, 14 Eng. Rep. 508 (P.C. 1857) (testatrix a British subject throughout her life); accord, *Desesbats v. Berquier*, 1 Binn. 336, 2 Am. Dec. 448 (Pa. 1808) (will executed in San Domingo by a subject of the French emperor domiciled in San Domingo in a form which did not satisfy the law of San Domingo held not effective as to movables in Pennsylvania although the form was one permitted by Pennsylvania law).

2. *In re Beaumont's Estate*, 216 Pa. 350, 65 A. 799 (1907) (will executed in New York by testator domiciled in New York, which was void under New York law because not subscribed by attesting witnesses, became valid when testator changed his domicile to Pennsylvania, which does not require subscription by attesting witnesses).

personal property in New York because it could not be proved that the testator declared to the witnesses that the instrument was his will, a formality required by the law of New York, his domicile at the time of death.³ Putting the two cases together, it would seem to follow that, if Emily Graham had executed her will in the French form and had succeeded in leaving France, the will would have become void as to movables in England at the moment when the channel ferry crossed the French three-mile limit.⁴

Francis Coppin, an Englishman living in Persia, entered into a contract for the purchase of English land. Just prior to embarking for England, Mr. Coppin executed a written will in the presence of two witnesses, who signed in his presence. In this he directed his executor to pay out of his lands and goods certain debts of honor which the testator owed to Syrian creditors. The testator died on the return journey. Although the will was executed in a form which was probably sufficient to pass both land and movables under Persian law and was certainly valid as to movables under English law, it was held to be ineffective to charge the vendee's (Coppin's) interest under the English land contract because English law then required wills of land

3. *Moultrie v. Hunt*, 23 N.Y. 394 (1861). This requirement of publication, which has never been imposed for written wills by English law, exists in thirteen American states. Rees, *American Wills Statutes: I*, 46 VA. L. REV. 613, 620-21 (1960). The Wills Act, 7 Will. 4 & 1 Vict. c. 26, § 13 (1837), expressly provides that publication is not necessary. Cf. *Cone v. Donovan*, 275 Mo. 557, 204 S.W. 1073 (1918) (although publication is not required, witnesses must be informed in some way that the instrument is the testator's will).

4. This is true if English law is followed because, under it, a domicile of choice may be lost by abandonment without establishing a new domicile of choice. R. GRAVESON, *THE CONFLICT OF LAWS* 96-97 (4th ed. 1960). In the interim between abandonment of the old domicile of choice and establishment of a new domicile of choice, the domicile of origin (in Emily's case, England) governs. *Udny v. Udny*, L.R. 1 H.L. (Sc. & Div. App.) 441 (1869). In this case Colonel Udny was born in Italy at a time when his father was domiciled in Scotland. The colonel established a domicile of choice in England but later fled to France to escape his English creditors. During this sojourn in France the colonel's son was born in England. It was held that, at the time of his son's birth, Colonel Udny had lost his English domicile by abandonment but had not acquired a domicile in France because of lack of intent to remain there. This being so, his domicile was deemed to revert to that of origin, Scotland, in spite of the fact that the colonel had never resided in Scotland or intended to reside there.

Under what is probably the majority American rule, however, a domicile of choice continues until a new domicile of choice is established by residence with intent to remain. H. GOODRICH, *HANDBOOK ON THE CONFLICT OF LAWS* § 25 (Scoles 4th ed. 1964); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 15, comment c, at 79, § 19 (Proposed Official Draft 1967); *RESTATEMENT OF CONFLICT OF LAWS* § 23, comment b (1934). This rule gives an emigrant an opportunity to execute a new will before his old one becomes void. Under either view as to how a domicile may be changed, it would seem that a will of movables which was valid when executed but became void upon a change of domicile would again become valid if the testator made a second change of domicile to a place where the law recognizes the form in which the will was executed. See note 2 *supra*.

to be attested by three witnesses and a will disposing of an interest in land must be executed in the form prescribed by the place where the land lies.⁵

I. FORMAL REQUIREMENTS IN COMMON-LAW JURISDICTIONS

These decisions reflect the hoary common-law rules under which the place of execution and the domicile or nationality of the testator at the time of execution have no bearing on the validity of a will: a will disposing of an interest in land must be in the form prescribed by the law of the place where the land is situated; a will disposing of movables must be in the form prescribed by the law of the testator's domicile at the time of his death.⁶ The corollary to these rules, that a will of movables which was valid when executed may become void while the testator is asleep on a ferry boat if the boat happens to cross an imaginary boundary line, resembles the equally ancient common-law rule that a deed which was fully effective when delivered might become void if the seal should later be eaten by rats.⁷ The common-law rules are not well suited to a society in which ownership of property situated in several jurisdictions is common and change of domicile a frequent occurrence.

All common-law jurisdictions permit witnessed written wills in some form. The requirements of some are based on the English Statute of Frauds of 1677,⁸ which required signature by or for the testator and subscription in his presence by three witnesses. Those of others, including England, are based on the English Wills Act of 1837,⁹ which required that the testator sign at the foot or end of the will, that his signature be made or acknowledged in the presence of

5. *Coppin v. Coppin*, 2 P. Wms. 291, 24 Eng. Rep. 735 (Ch. 1725). The opinion does not mention the domicile of the testator, the exact place of execution, or the law governing the form of wills in the place of execution because these considerations were not deemed significant with respect to dispositions of interests in land. *Accord*, *Robertson v. Pickrell*, 109 U.S. 608 (1883); *White v. Greenway*, 303 Mo. 691, 263 S.W. 104 (1924) (unwitnessed holographic will executed in Kentucky by testatrix who was domiciled there at the time of execution and at her death, although in proper form under Kentucky law, was ineffective to devise Missouri land).

6. N.Y. ESTATES, POWERS & TRUSTS LAW § 3-5.1(b) (McKinney 1966); H. GOODRICH, *supra* note 4, at §§ 166, 168; GRAVESON, *supra* note 4, at 294; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 249, 306 (Tent. Draft No. 5, 1959); RESTATEMENT OF CONFLICT OF LAWS §§ 249, 306 (1934). *See also* ANNOTS., 113 AM. ST. REP. 215 (1905); 2 ANN. CAS. 591 (1906); 9 ANN. CAS. 44 (1908); 2 L.R.A. (n.s.) 408, 415-30 (1906); 57 A.L.R. 229 (1928) (change of domicile after execution); 111 A.L.R. 910 (1937) (whether law at time of execution or time of death controls); 131 A.L.R. 1023 (1941); 169 A.L.R. 554 (1947); *cf.* A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS §§ 247, 248 (1962).

7. J. PERKINS, PROFITABLE BOOKE TREATING OF THE LAWES OF ENGLAND ¶¶ 135, 136 (1st Eng. ed. 1642).

8. 29 Car. 2, c. 3, § 5 (1677).

9. 7 Will. 4 & 1 Vict. c. 26, § 9 (1837), *as amended*, Wills Act Amendment Act, 15 & 16 Vict. c. 24, § 1 (1852).

two or more witnesses present at the same time, and that the witnesses subscribe in the presence of the testator. A few American states require the testator to sign in the presence of the witnesses and the witnesses to sign in the presence of each other.¹⁰ Six states require three witnesses.¹¹ Sixteen have adopted the 1837 Wills Act requirement that the testator sign or acknowledge his signature in the presence of the witnesses and fourteen the requirement that he sign at the foot or end, but only six require the witnesses to be present at the same time.¹² Thirteen have added a further requirement, never applicable to written wills in England, that the testator publish the will by announcing to the witnesses that the instrument is his will.¹³ Despite these variations it is possible, by performing every ritual prescribed in any of them, to execute a witnessed written will in one common-law jurisdiction in a form which meets the requirements of every other common-law jurisdiction. Careful common lawyers who know or anticipate that their clients have or will acquire property or domicile in another common-law jurisdiction ensure that this is done.

Unfortunately, the execution of wills is not always supervised by such careful lawyers. At a minimum, lawyers usually see that the form satisfies the current requirements of the state in which the will is executed, but they sometimes omit an additional ritual act required by another jurisdiction in which the testator has or later acquires land or domicile.¹⁴ In an effort to remedy this situation, the British Parliament enacted the Wills Act of 1861,¹⁵ which provided in section 1 that the will of a British subject executed outside the United Kingdom in the form prescribed by the law of the place of execution, the law of the domicile of the testator at the time of execution, or the law at the time of execution of the testator's domicile of origin, was valid as to personal property situated in England. Under section 2, a will of a British subject executed within the United Kingdom was valid as to personal property if in the form prescribed by the place of execution. Section 3 provided that change of domicile did not invalidate a will. Section 3, in contrast to sections 1 and 2, was not by its own terms limited to wills of British subjects

10. *E.g.*, TENN. CODE ANN. § 32-104 (1955).

11. Rees, *supra* note 3, at 624. Pennsylvania does not require the witnesses to sign the will if the testator signs his own name. PA. STAT. ANN. tit. 20, §§ 180.2, 180.4 (1950).

12. Rees, *supra* note 3, at 619-20.

13. *See* note 3 *supra*.

14. *See, e.g.*, *White v. Greenway*, 303 Mo. 691, 263 S.W. 104 (1924); *Moultrie v. Hunt*, 23 N.Y. 394 (1861).

15. 24 & 25 Vict. c. 114 (1861). The Act is often referred to as Lord Kingsdown's Act.

but the title of the Act indicated that it was so limited. This Statute, then, would not have validated Emily Graham's will as to personal property in England, although that was her domicile of origin, because she was, by marriage, a subject of the French emperor.¹⁶ Nor would the Act, applying only to British subjects, preserve the validity of a will of movables like that of Benjamin Hunt, unless nationality is to be interpreted and determined as of the time of death, since that will was executed by a foreigner in accordance with the law of the place of execution and of his domicile at the time of execution but did not conform to the law of his domicile at death.¹⁷ Finally, the 1861 Act had no application whatever to a case like that of Francis Coppin, in which land was involved.¹⁸

In 1892, 1895, 1910, and 1940 the National Conference of Commissioners on Uniform State Laws recommended adoption of legislation providing that a will in writing, subscribed by the testator, executed outside the state in the mode prescribed by the law of the place of execution or of the domicile of the testator should have the same effect as if executed within the enacting state in the form prescribed by its law.¹⁹ This legislation, the Model Execution of Wills Act, does not validate any will executed within the enacting state; it merely extends to certain wills executed outside the state the same validity as if executed within the state in the local form. According to the strict common-law rule, a will of movables, although in the form prescribed by the laws of the place of execution and the situs of the property, is void if its form does not comply with the law of the testator's domicile at death. Hence the Model Act does not preclude the possibility that a will executed either within or outside the enacting state may be or become invalid as to movables within the state if the testator has or acquires a domicile in another jurisdiction which does

16. See text accompanying note 1 *supra*. The nationality status of women who were British subjects by birth but had married aliens was somewhat uncertain when Emily died. See *Doe ex dem. Miller v. Rogers*, 1 Car. & K. 390, 174 Eng. Rep. 860 (Worcester Assizes 1844). A later statute providing that a female born a British subject who married an alien became an alien and remained an alien when widowed probably stated the pre-existing common law. 33 & 34 Vict. c. 14, § 10 (1870).

17. See Morris, *The Choice of Law Clause in Statutes*, 62 L.Q.R. 170, 173-75 (1946); text accompanying note 3 *supra*.

18. See text accompanying note 5 *supra*. The 1861 Act did extend to wills bequeathing estates for years in land which, in the absence of legislation, are governed by the rule relating to land. See Morris, *supra* note 17, at 175.

19. MODEL EXECUTION OF WILLS ACT § 7 (1940); Historical Note, 9A UNIFORM LAWS ANN. 657 (1965); PROCEEDINGS, 20TH ANN. CONF. OF COMM'RS ON UNIFORM LAWS 74-76, 144-45, 223 (1910). The 1940 version gives wills executed outside the state in the form prescribed for domestic wills the force and effect as if executed within the state. It also provides that "domicile" means domicile at the time of execution.

not recognize the form in which the will was executed.²⁰ Some twenty-five states have adopted legislation which follows or is similar to that recommended by the National Conference but most do not specify whether "domicile" means domicile at the time of execution, death, or either.²¹ The Model Probate Code, prepared in 1945 for the American Bar Association Section of Real Property, Probate and Trust Law, incorporates the legislation recommended by the National Conference in 1940.²² Four states have legislation according local validity to wills executed outside the state in the form pre-

20. *In re Pretto*, 4 Phila. 380 (Pa. 1861), involved a will executed in New York in a form which would satisfy the internal law of both New York and Pennsylvania. It was held that the will was void as to movables in Pennsylvania in the absence of proof that the form satisfied the law of the Danish West Indies, where the testatrix was domiciled at the time of her death. In *Schultz v. Dambmann*, 3 Bradford 379 (N.Y. Surr. 1855), Herr Schultz, a subject of the King of Prussia domiciled in Prussia at the time of execution and at death, executed a will in New York in the form prescribed by New York law. It was held to be valid as to movables in New York on the ground that Prussian law recognized wills executed in the form prescribed by the law of the place of execution. This theory is premised on the common-law rule that the law of the domicile of the testator at death governs the validity as to form of a will of movables. See note 6 *supra*; cf. note 26 *infra*.

The possibility of invalidity mentioned in the text was precluded, as to wills executed outside the enacting state, by the UNIFORM WILLS ACT, FOREIGN EXECUTED (1910). The 1910 Act provided that a written will, subscribed by the testator, "executed without this state in the mode prescribed by the law, either of the place where executed or of the testator's domicile, *shall be deemed to be legally executed.*" (Emphasis added.) The italicized clause was omitted from § 7 of the MODEL EXECUTION OF WILLS ACT (1940), which superseded the 1910 Act. 9A UNIFORM LAWS ANN. 657, 664 (1965). Most of the state enactments, however, follow the language of the 1910 Act which, on this point, is better than the 1940 Act.

Section 7 of the MODEL EXECUTION OF WILLS ACT (1940) was criticized for the deficiencies mentioned in the text by the committee which drafted the UNIFORM PROBATE OF FOREIGN WILLS ACT (1940). 9B UNIFORM LAWS ANN. 618, 625 (1966). This committee recommended the following substitute:

A will is legally executed if the manner of its execution complies with the law, in force either at the time of execution or at the time of the testator's death, of

- (1) this state, or
- (2) the place of execution, or
- (3) the domicile of the testator at the time of execution or at the time of his death.

N.Y. ESTATES, POWERS & TRUSTS LAW § 3-5.1(c) (McKinney 1966) corrects the mentioned deficiencies of § 7 of the Model Execution of Wills Act:

A will disposing of personal property, wherever situated, or real property situated in this state, made within or without this state by a domiciliary or non-domiciliary thereof, is formally valid and admissible to probate in this state, if it is in writing and signed by the testator, and otherwise executed and attested in accordance with the local law of:

- (1) This state;
 - (2) The jurisdiction in which the will was executed, at the time of execution;
- or
- (3) The jurisdiction in which the testator was domiciled, either at the time of execution or of death.

21. 9A UNIFORM LAWS ANN. 657 (1965); Rees, *American Wills Statutes: II*, 46 VA. L. REV. 856, 905-06 (1960).

22. MODEL PROBATE CODE § 50 (1946).

scribed by the law of the place of execution.²³ Five have statutes which, like section 3 of the English Wills Act of 1861,²⁴ provide that a will valid at the time of execution is not invalidated by a subsequent change of domicile.²⁵

None of this American legislation would, of its own force, save Emily Graham's will.²⁶ It was executed in France in a form not permitted by French law and the testatrix was domiciled in France at the time of execution and at her death. The American legislation which is patterned after the Model Execution of Wills Act would, however, validate the wills of Benjamin Hunt and Francis Coppin²⁷ as to both land and movables situated within the enacting state. The legislation recommended by the National Conference is, therefore, beneficial in some situations but it leaves serious gaps which should be filled.²⁸

II. FORMAL REQUIREMENTS IN CIVIL-LAW JURISDICTIONS

If the form of a will meets all of the requirements of every system of law which might possibly govern its validity, the rules as to choice of law are not important. As has been mentioned, it is possible to execute a witnessed, written will in a form which meets all of the requirements of every common-law jurisdiction. Apparently, a will executed in this form would also satisfy the requirements of Danish, Islamic, Norwegian, and Quebec law.²⁹ The codes of the civil-law jurisdictions, on the other hand, usually recognize only three forms of execution of wills: (1) the holographic will, entirely written, dated, and signed in the handwriting of the testator, as to which attesting witnesses are not required;³⁰ (2) the public or open will, announced

23. Rees, *American Wills Statutes: II*, 46 VA. L. REV. 856, 906 (1960).

24. See note 15 *supra*.

25. Rees, *American Wills Statutes: II*, 46 VA. L. REV. 856, 906-07 (1960).

26. See text accompanying notes 1, 6 & 20 *supra*. The local statute prescribing the form of wills may, however, be interpreted to mean that wills executed in that form are effective to bequeath movables situated in the state even though the testator was never domiciled there. See Hopkins, *The Extraterritorial Effect of Probate Decrees*, 53 YALE L.J. 221, 254-55 (1944); Rees, *American Wills Statutes: II*, 46 VA. L. REV. 856, 905-06 (1960); Yiannopoulos, *Wills of Movables in American International Conflicts Law: A Critique of the Domiciliary "Rule"*, 46 CALIF. L. REV. 185, 202-05 (1958).

27. See text accompanying notes 3 & 5 *supra*.

28. See text accompanying notes 20 & 26 *supra*.

29. J. CASTEL, *THE CIVIL LAW SYSTEM OF THE PROVINCE OF QUEBEC* 101 (1962); DANISH AND NORWEGIAN LAW 63-64 (Danish Committee on Comparative Law ed. 1963); A. FYZEE, *OUTLINES OF MUHAMMADAN LAW* § 72 (3d ed. 1964). Under Danish and Norwegian law, however, a will executed in the common-law form with two attesting witnesses becomes void if an attesting witness predeceases the testator. Hence, it is safer in these countries to execute a will before a notary. *Id.*

30. REPUBLIC OF CHINA CIV. CODE art. 1190 [LAWS OF THE REPUBLIC OF CHINA, 1st Ser. 350 (1961)]; A STATEMENT OF THE LAWS OF THE DOMINICAN REPUBLIC 259 (Pan American Union 3d ed. 1964); FR. CIV. CODE art. 970 (E. B. Wright transl. 1908); GER.

orally by the testator to a notary in the presence of one or more other witnesses and reduced to writing by the notary;³¹ (3) the mystic or closed will, a writing that may or may not be in the handwriting of the testator, which he seals into a packet or envelope and declares to be his will in the presence of a notary and one or more other witnesses.³² Not only would the witnessed, written will ordinarily used in

Civ. CODE art. 2231(2) (W. Loewy transl. 1909); LA. CIV. CODE ANN. arts. 1574, 1588 (West 1952); A STATEMENT OF THE LAWS OF PARAGUAY 243 (Pan American Union 2d ed. 1962); CASTEL, *supra* note 29, at 101 (Quebec). Some civil-law jurisdictions impose additional requirements of form for the validity of holographic wills. *E.g.*, A STATEMENT OF THE LAWS OF BRAZIL 264 (Pan American Union 3d ed. 1961) (holographic will must be read before five witnesses who understand the language and signed by them); A STATEMENT OF THE LAWS OF CHILE 196-97 (Pan American Union 3d ed. 1962) (holographic will must state place of birth, nationality, residence, and age of testator, names of present and all previous spouses, names of children by each marriage and illegitimate children, whether each child is living or dead, and must be read aloud in the presence of five witnesses or a notary and three witnesses); A STATEMENT OF THE LAWS OF COLOMBIA 263-64 (Pan American Union 3d ed. 1961) (will must be read to witnesses as in Chile); MEX. FED. DIST. CIV. CODE art. 373 (J. Wheless transl. 1938) (testator must write out holographic will in duplicate, impress his fingerprint on each copy, and deposit it in a sealed envelope in the Public Register); A STATEMENT OF THE LAWS OF PERU 186 (Pan American Union 3d ed. 1962) (will must state the civil status, nationality, and domicile of the testator); R.S.F.S.R. CIV. CODE art. 425 in 2 V. GSOVSKI, SOVIET CIVIL LAW 225 (1949). It would seem that no will is valid in the Russian Republic, whether executed there or abroad, unless presented by the testator to a notarial office for notarial certification. 1 V. GSOVSKI, *supra* at 645-47. This would mean that it is impossible to execute a will in a jurisdiction which does not have civil-law type notaries in a form which would satisfy the Russian requirements.

31. A STATEMENT OF THE LAWS OF BRAZIL 263 (Pan American Union 3d ed. 1961); A STATEMENT OF THE LAWS OF CHILE 196-97 (Pan American Union 3d ed. 1962); REPUBLIC OF CHINA CIV. CODE art. 1191 [LAWS OF THE REPUBLIC OF CHINA, 1st Ser. 350 (1961)]; A STATEMENT OF THE LAWS OF COLOMBIA 263 (Pan American Union 3d ed. 1961); A STATEMENT OF THE LAWS OF THE DOMINICAN REPUBLIC 259 (3d ed. 1964); FR. CIV. CODE arts. 971-75 (E. B. Wright transl. 1908); GER. CIV. CODE art. 2238 (W. Loewy transl. 1909); LA. CIV. CODE ANN. arts. 1574, 1577-80 (West 1952); MEX. FED. DIST. CIV. CODE art. 370 (J. Wheless transl. 1938); A STATEMENT OF THE LAWS OF PARAGUAY 242 (Pan American Union 3d ed. 1961); A STATEMENT OF THE LAWS OF PERU 185-86 (Pan American Union 3d ed. 1962); CASTEL, *supra* note 29, at 101 (Quebec). There is considerable variation as to the number and qualifications of witnesses required and as to the manner in which the instrument prepared by the notary is to be authenticated.

32. A STATEMENT OF THE LAWS OF BRAZIL 264 (Pan. American Union 3d ed. 1961); A STATEMENT OF THE LAWS OF CHILE 197 (Pan American Union 3d ed. 1962); REPUBLIC OF CHINA CIV. CODE art. 1192 [LAWS OF THE REPUBLIC OF CHINA, 1st Ser. 350 (1961)]; A STATEMENT OF THE LAWS OF COLOMBIA 263 (Pan American Union 3d ed. 1961); A STATEMENT OF THE LAWS OF THE DOMINICAN REPUBLIC 259 (Pan American Union 3d ed. 1964); FR. CIV. CODE art. 976 (E. B. Wright transl. 1908); GER. CIV. CODE art. 2238 (W. Loewy transl. 1909); LA. CIV. CODE ANN. arts. 1584-87 (West 1952); MEX. FED. DIST. CIV. CODE art. 371 (J. Wheless transl. 1938); A STATEMENT OF THE LAWS OF PARAGUAY 242-43 (Pan American Union 2d ed. 1962); A STATEMENT OF THE LAWS OF PERU 186 (Pan American Union 3d ed. 1962); CASTEL, *supra* note 29, at 101 (Quebec). There is wide variation as to the number and qualifications of witnesses required, the number ranging as high as six, and as to the manner in which the outside of the packet or envelope is to be authenticated by the testator, the notary, and the witnesses. In some countries (for example, Brazil) the will is returned to the testator after execution. In others it is retained in official custody. *E.g.*, GER. CIV. CODE art. 2246 (W. Loewy transl. 1909). Under MEX. FED. DIST. CIV. CODE art. 371 (J. Wheless transl. 1938), the testator may keep the will or deposit it in the judicial archives. For the Russian Soviet Federated

common-law jurisdictions not meet the requirements of any of these civil-law forms of execution, but the public and mystic forms of execution cannot be performed at all in jurisdictions which do not have the civil-law type of notary. Conversely, these latter two forms of civil-law execution would not meet the requirements of most common-law jurisdictions. As to unwitnessed holographic wills only twenty-two American states validate them; the others do not.³³ It has been suggested that a holographic will, published and subscribed by the testator in the presence of three witnesses who subscribe their names in his presence, would satisfy the requirements of all common-law and most civil-law jurisdictions.³⁴ However, it would not meet the requirements of some important civil-law countries.³⁵ Moreover, it is scarcely practicable for an American estate planner to ask an octogenarian client to write a complicated thirty-page will in longhand.

If the form of a will does not meet all of the requirements of every system of law which might possibly govern its validity, the rules as to choice of law become important. Any will, then, is effective as to property in a given jurisdiction only if, under the choice of law rules of the forum, a system of law which permits the particular form used is applied to determine its validity. As has been mentioned, the common-law rules as to choice of law, when not modified by statute, require a will of land to be executed in the form prescribed by the law of the place where the land is situated; they require a will of movables to be executed in the form prescribed by the law of the testator's domicile at the time of his death.³⁶ The civil-law rules as to choice of law tend to look to the law of the place of execution at the time of execution and the law of the nationality of the testator at the time of execution—a will in a form permitted by either being treated as valid.³⁷ The civil-law rules as to choice of law have the great ad-

Socialist Republic, *see* R.S.F.S.R. CIV. CODE art. 425 in 2 V. GSOVSKI, SOVIET CIVIL LAW 225 (1949).

33. Rees, *American Wills Statutes: I*, 46 VA. L. REV. 613, 634-36 (1960).

34. 4 E. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 288-89 (1958). Dr. Rabel wisely added, "I do not pretend, of course, that this eliminates all pitfalls." *Id.* at 289.

35. *E.g.*, Brazil, Chile, Colombia, Mexico, Peru and Russia. *See* note 30 *supra*.

36. *See* authorities cited in note 6 *supra*.

37. RABEL, *supra* note 34, at 292-95 (1958); I. SZÁSZY, *PRIVATE INTERNATIONAL LAW IN THE EUROPEAN PEOPLE'S DEMOCRACIES* 372 (1964). *See also* German Imperial Act of August 18, 1896, Introductory Statute to the Civil Code, arts. 11, 24 (W. Loewy transl. 1909). Some codes, however, appear to recognize wills executed abroad only if in a form permitted by the code or by the law of the place of execution. *E.g.*, A STATEMENT OF THE LAWS OF CHILE 196 (Pan American Union 3d ed. 1962); A STATEMENT OF THE LAWS OF COLOMBIA 265 (Pan American Union 3d ed. 1961); MEX. FED. DIST. CIV. CODE art. 377 (J. Wheless transl. 1938); *cf.* LA. CIV. CODE ANN. art. 10 (West 1952); LA. REV. STAT. ANN. § 9:2401 (West 1965); R.S.F.S.R. CIV. CODE art. 425 in 2 V. GSOVSKI, SOVIET CIVIL LAW 225 (1949).

vantage of determining validity on the basis of the situation at the time of execution; a later change of domicile or acquisition of property does not affect the validity of the will. They operate uniformly as to land and movables. Moreover, by permitting execution in the form in use where execution takes place, they ensure the validity of most wills. It is usually possible to execute a will in the manner prescribed by the law of the place of execution; it may not be possible to execute it in some other form. The lawyer seeing to the execution knows, and is likely to follow, the law of the place of execution; he may not know or follow the law of some distant country.

Yet the civil-law rules governing choice of law do not work well in all cases. They would not save Emily Graham's will.³⁸ They do not validate as to German property a will executed in the German form in Michigan by a citizen of Michigan who intends to and does change his domicile to Germany.³⁹ They give no force in Germany to a will executed in Louisiana in the form prescribed by Michigan law by a Cuban citizen domiciled in Michigan.⁴⁰ They make no provision whatever for the will of a stateless person executed in Antarctica or any other area which has no law of wills or which has a law as to form of wills with which a person who is not a native or does not understand the local language cannot comply. A member of an invading or occupying army may not be in a position to execute a will in the form prescribed by enemy law. The civil-law choice of law rules tend to invalidate wills executed in forms dictated by the common-law choice of law rules, that is, in the form prescribed by the law of the place where devised land is situated and that of the intended lost domicile of the testator.

Insofar as they operate to defeat formally manifested testamentary intent, the existing choice of law rules, both common law and civil law, serve no useful purpose and do much harm. What possible good is served by a decision of an English court that a will of property in England is void because it was executed in the form prescribed by English law?⁴¹ Or by a decision of a German court that a will of property in Germany is void because it was executed in the form prescribed by German law?⁴² It seems evident that there ought to be international agreement on a uniform set of choice of law rules, on a single form of will to be recognized everywhere, or upon both.

38. See text accompanying note 1 *supra*.

39. RABEL, *supra* note 34, at 302.

40. *Id.* at 304.

41. See note 1 *supra*.

42. See note 39 *supra*.

III. THE HAGUE CONVENTION OF 1961

Two international organizations have devoted efforts to the solution of the problems created by the existing divergence in the forms prescribed for wills. The Hague Conference on Private International Law, which had its origin in a series of conferences of European states called by the Government of The Netherlands in 1893 and later years, adopted a charter in 1951 which made it a permanent organization with a secretariat at The Hague and membership open to states throughout the world. Twenty-three states are members. Its efforts are devoted to the unification of the rules of conflict of laws through the use of multilateral treaties.⁴³ The International Institute for the Unification of Private Law, commonly known as the Rome Institute or as UNIDROIT, was established in 1926 under an agreement between the League of Nations and the Government of Italy. Its members include more than forty states in various parts of the world and it devotes its efforts to the preparation of uniform laws for enactment by national states. The Hague Conference, which is primarily interested in securing international agreement on a uniform set of choice of law rules, and the Rome Institute, which is primarily interested in securing the enactment of uniform substantive law throughout the world, have co-operated on some projects.⁴⁴

Until the present decade the United States usually refused to participate, or to permit the states to participate, in international conferences aimed at the unification of either conflict of laws rules or rules of substantive law in fields traditionally governed by state law in this country.⁴⁵ This policy of non-co-operation was relaxed to the extent of sending observers to the Hague Conferences of 1956 and 1960,⁴⁶ and was abandoned altogether in 1964, when the United States became a member of both the Hague Conference and the Rome Institute.⁴⁷ Incident to joining these organizations, the Secre-

43. See S. MENTSCHIKOFF & N. KATZENBACH, REPORT OF THE AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON INTERNATIONAL UNIFICATION OF PRIVATE LAW 33-36 (1961); Nadelmann, *Ignored State Interests: The Federal Government and International Efforts To Unify Rules of Private Law*, 102 U. PA. L. REV. 323, 332-33, 348-55, 363-66 (1954).

44. See MENTSCHIKOFF & KATZENBACH, *supra* note 43, at 29-33; Nadelmann, *supra* note 43, at 323-62.

45. See MENTSCHIKOFF & KATZENBACH, *supra* note 43, at 37-41; Nadelmann, *supra* note 43, at 323-62.

46. *Eighth Hague Conference on Private International Law*, 5 AM. J. COMP. L. 650 (1956); Nadelmann, *The Hague Conference on Private International Law, Ninth Session*, 9 AM. J. COMP. L. 583 (1960).

47. 22 U.S.C. §§ 269g, 269g-1 (1964). See Bulletin, 12 AM. J. COMP. L. 629 (1963); *The Tenth Session of the Hague Conference on Private International Law*, 13 AM. J. COMP. L. 612 (1964).

tary of State appointed an Advisory Committee on Private International Law which included a broad range of distinguished attorneys, jurists, and legal scholars.⁴⁸

The Hague Conference addressed itself to the problem of unifying the conflict of laws rules relating to the form of wills as early as 1893, but achieved no marked success in solving the problem before the present decade.⁴⁹ Re-examination of the problem was proposed by the United Kingdom at the Eighth Session of the Hague Conference in 1956 and a Draft Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions was adopted unanimously at the Ninth Session in 1960.⁵⁰ The Draft Convention was concluded in October 5, 1961, and came into force among Austria, the United Kingdom, and Yugoslavia on January 5, 1964.⁵¹ Since then it has been ratified by Japan,⁵² West Germany,⁵³ Eire,⁵⁴ France,⁵⁵ and numerous British colonies.⁵⁶ Article 1 of the Convention provides:

A testamentary disposition shall be valid as regards form if it complies with the internal law:

48. See *id.* The committee is composed of representatives of the American Association for the Comparative Study of Law, the American Bar Association, the American Branch of the International Law Association, the American Law Institute, the American Society of International Law, the Association of American Law Schools, the Conference of Chief Justices, the Judicial Conference of the United States, and the National Conference of Commissioners on Uniform State Laws. The Legal Adviser of the Department of State is Chairman of the Advisory Committee.

49. RABEL, *supra* note 34, at 297. The 1928 Hague Draft would validate wills executed in a form permitted by the law of the place of execution, the law of the testator's nationality at the time of execution, or the law of the testator's nationality at the time of his death. *Id.* at 300-01.

50. See Nadelmann, *The Hague Conference on Private International Law: Ninth Session*, 9 AM. J. COMP. L. 583 (1960). The conference was attended by delegates of eighteen member nations. The United States was represented only by observers but they appear to have influenced the form of the Convention. See MENTSCHIKOFF & KATZENBACH, *supra* note 43, at 36. The English and French texts of the Convention are contained in CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, RECUEIL DES CONVENTIONS DE LA HAYE ADOPTÉES PAR LES 7^E, 8^E ET 9^E SESSIONS (1951, 1956 ET 1960) (1961), and in 510 U.N.T.S. 175-90 (1964). The English text is printed in 9 AM. J. COMP. L. 705-07 (1960).

51. 510 U.N.T.S. 177, n.1 (1964). As permitted by art. 9, the United Kingdom reserved the right, in derogation of art. 1, para. 3, to determine in accordance with the *lex fori*, the place where the testator had his domicile.

52. Effective August 2, 1964. *Id.* As permitted by art. 12, Japan reserved the right to exclude the application of clauses in testamentary dispositions which, under its law, do not relate to matters of succession.

53. Including West Berlin, effective January 1, 1966. Letter from the Permanent Bureau of the Conférence de la Haye de Droit International Privé to the writer, October 11, 1967.

54. Effective October 2, 1967. Letter, *supra* note 53.

55. Effective November 19, 1967. Letter, *supra* note 53.

56. *E.g.*, Barbados, effective May 8, 1965; Bermuda, effective February 14, 1965; St. Lucia, effective May 13, 1966; St. Vincent, effective August 13, 1966. Letter, *supra* note 53.

- (a) of the place where the testator made it, or
- (b) of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or
- (c) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or
- (d) of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or
- (e) so far as immovables are concerned, of the place of their situation.

For the purposes of the present Convention, if a national law consists of a non-unified system, the law to be applied shall be determined by the rules in force in that system and, failing any such rules, shall be that law within such system, with which the testator had the closest connexion.

The determination of whether or not the testator had his domicile in a particular place shall be governed by the law of that place.⁵⁷

In 1963 the British Parliament repealed the Wills Act of 1861,⁵⁸ and enacted a statute which differs in wording from, but carries out the intent of, this Convention.⁵⁹

It may be noted in passing that, even if the 1961 Hague Convention and the English Wills Act of 1963 had been in force at the time, the will of Emily Graham would still have been a nullity as to movables in England.⁶⁰ Emily's will was executed in France in the form prescribed by the "internal law" of England. She was, although unwillingly, a French subject, domiciled and resident in France at the time of execution and at the time of her death. She used the English form, presumably, because the property bequeathed and the legatees were in England and she planned to move to England permanently as soon as she could. Under such circumstances, her use of the English form is understandable. From the standpoint of convenience for purposes of probate and administration in England, the English form was superior to the French. Why should not a will disposing of an account in a Swiss bank be valid in Switzerland if in the form prescribed by Swiss internal law or a will disposing of furniture stored in Grand Rapids be valid in Michigan if in the form prescribed by

57. This is the English text as printed in 9 AM. J. COMP. L. 705 (1960). It differs slightly in wording, although probably not in meaning, from the official versions cited in note 50 *supra*. The final clause of the Convention, omitted from the version printed here, provides that the French text shall prevail over the English in the event of divergence.

58. See note 15 *supra*.

59. Wills Act 1963, c. 44.

60. See text accompanying note 1 *supra*.

Michigan internal law? The Hague Convention and the Wills Act of 1963 are good as far as they go but they need an additional provision, like that of the current New York statute,⁶¹ validating wills executed in the form prescribed by the enacting jurisdiction without regard to the place of execution or the nationality, residence, or domicile of the testator at the time of execution or at his death.

IV. THE UNIFORM PROBATE CODE

In 1962 the American Bar Association Section of Real Property, Probate and Trust Law appointed a Special Committee on Revision of Model Probate Code, and the National Conference of Commissioners on Uniform State Laws appointed a Special Committee on Uniform Probate Code. It was agreed that the two committees would co-operate in the revision of the Model Probate Code and existing uniform laws with a view to promulgation by the National Conference of a Uniform Probate Code (Code) designed for enactment by all of the states of the United States.⁶² Preliminary studies were conducted in 1963 and 1964⁶³ followed by the appointment of reporters to draft the proposed code.⁶⁴

61. N.Y. ESTATES, POWERS & TRUSTS LAW § 3-5.1(c) (McKinney 1966).

62. REPORT OF SPECIAL COMM. ON REVISION OF MODEL PROBATE CODE, 1963 PROCEEDINGS, ABA SECTION OF REAL PROPERTY, PROBATE & TRUST LAW pt. I, 17, 81; NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1963 HANDBOOK 73; NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1964 HANDBOOK 13.

63. See Fratcher & Straus, *Model Probate Code*, 35 PA. BAR ASS'N Q. 206 (1964); Fratcher, *Toward Uniform Guardianship Legislation*, 64 MICH. L. REV. 983, 984 n.5 (1966); Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U.L. REV. 1037, 1039 n.6 (1966).

64. The reporters are Professors Paul E. Basye of the University of California Hastings College of the Law (one of the draftsmen of the 1946 Model Probate Code), Richard W. Effland of Arizona State University College of Law, James B. MacDonald of the University of Wisconsin Law School, William J. Pierce of the University of Michigan Law School, Eugene F. Scoles of the University of Illinois College of Law, Allan D. Vestal of the University of Iowa College of Law, Richard V. Wellman of the University of Michigan Law School, Harold G. Wren of Boston College Law School, and the writer. Professor Pierce served as Project Director (chairman of the committee of reporters) until he became Chairman of the Executive Committee of the National Conference of Commissioners on Uniform State Laws in 1965 and, later, President of the National Conference. Professor Wellman succeeded him as Project Director. Professor Allison Dunham of the University of Chicago Law School, Executive Director of the National Conference of Commissioners on Uniform State Laws, J. Pennington Straus of the Philadelphia Bar, who succeeded Professor Basye as Chairman of the ABA Committee in 1965, and Judge Sverre Roang of Janesville, Wisconsin, who was Chairman of the National Conference Committee from 1963 to 1967, have attended many of the reporters' meetings and contributed a great deal to preparation of drafts of the Code. Professors Thomas L. Jones of the University of Alabama Law School and Thomas W. Mapp of the University of Oregon School of Law met with the reporters in the capacity of "observers" during five weeks of full-time work at the University of Colorado School of Law in the summer of 1967 and made useful contributions to

An early tentative draft of the portion of the Code relating to execution of wills proposed the incorporation of section 7 of the 1940 Model Execution of Wills Act⁶⁵ with an added provision that a will executed outside the state in a manner prescribed by the law of the testator's residence at the time of execution should have the same effect as if executed within the enacting state in the form prescribed by the Code.⁶⁶ During the summer of 1966 a complete draft of the portions of the Uniform Probate Code dealing with intestate succession and the execution and revocation of wills was prepared by two of the reporters working at the University of Michigan Law School.⁶⁷ Section 239 of the 1966 draft provided:

A will shall be treated as properly executed if its execution conformed to the law in force in the place where it was executed, or in the place where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or in a state of which, at either of those times, he was a national. In addition, so far as it disposes of interests in land and fixtures attached to land, a will shall be treated as properly executed if its execution conformed to the law in force in the place where the land was situated. A will executed outside this state in the manner prescribed by the law of this state shall be treated as properly executed.

It will be noted that this draft section was a paraphrase of the language of article 1 of the Hague Convention of 1961⁶⁸ with the addition of a provision that a will executed outside the enacting state in the manner prescribed by the law of the enacting state should be treated as properly executed. This provision would have been more satisfactory if, like the current New York statute,⁶⁹ it extended to wills executed within the enacting state as well as those executed outside the state.⁷⁰

During the summer of 1967 the reporters for the Uniform Probate Code worked together for five weeks at the University of Colo-

the project. Professor Lewis M. Simes of the University of California Hastings College of the Law, the principal draftsman of the 1946 Model Probate Code, has served as a consultant.

65. See notes 19 & 20 *supra*.

66. This draft, dated November 12, 1964, was prepared by Mr. Robert Battista of the Legislative Research Center at the University of Michigan Law School, under the supervision of Professor Pierce.

67. The writer was primarily responsible for the preparation of this draft. It was revised and perfected in consultation with Professor Wellman. The 1966 draft is described in Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U.L. Rev. 1037 (1966), the treatment of the conflict of laws problem being discussed at 1072-73.

68. See note 57 *supra*.

69. See notes 20 & 61 *supra*.

70. See notes 6, 20 & 26 *supra*.

rado School of Law preparing the 1967 Summer Draft.⁷¹ The reporters agreed that section 239 of the 1966 Draft could be improved, but there were some differences of opinion as to the best wording for a substitute section. A section with some features taken from section 7 of the Model Execution of Wills Act⁷² and some from article 1 of the Hague Convention of 1961⁷³ was inserted at the summer meeting. The section remains a subject of future study; what is needed is a section which recognizes the validity of wills executed in any of the forms permitted by the Hague Convention of 1961 and also categorically declares the validity of a will executed in the form prescribed by the internal law of the enacting state, without regard to the place of execution or to the nationality, domicile, or residence of the testator, either at the time of execution or at the time of his death. The current New York statute may serve as a model for such a section.⁷⁴

The 1967 Summer Draft of the Uniform Probate Code contains other provisions which may have a bearing on the form of wills. Section 3-204 (d) provides that if conflicting claims of domicile are made in probate proceedings conducted after notice in the enacting state and in another state whose judgments are entitled to full faith and credit, the proceeding in the enacting state shall be stayed, unless started first, and the decision as to domicile first made in any such state accepted as determinative in the enacting state. Section 3-227 provides that a final decree in a probate proceeding conducted after notice in another state whose judgments are entitled to full faith and credit, determining that the decedent was domiciled in that state, is conclusive as to the finding of domicile and the validity of any will involved "notwithstanding the possibility that the laws of this state otherwise applicable to determine the validity of the will or to determine heirs would produce a different result." In the absence of such legislation, a finding of domicile is conclusive under the full faith and credit clause as to property located in the state where the finding is made but not necessarily as to property located in other states.⁷⁵ The quoted language of the latter section appears to make clear that

71. Since published, with changes, under the title, "Third Working Draft, Uniform Probate Code, With Comments" (Chicago: November, 1967).

72. See notes 19 & 22 *supra*.

73. See note 57 *supra*.

74. N.Y. ESTATES, POWERS & TRUSTS LAW § 3-5.1(c) (McKinney 1966); see note 20 *supra*.

75. *Riley v. New York Trust Co.*, 315 U.S. 343 (1942); *Colvin v. Jones*, 194 Mich. 670, 161 N.W. 847 (1917); cf. *Williams v. Saunders*, 45 Tenn. 60 (1868) (probate at domicile conclusive as to movables, wherever located, but not as to land in other states).

if the form of a will satisfies the law of the state where the testator was domiciled at the time of his death and the will is admitted to probate there, it is effective to pass both land and movables located in the enacting state.⁷⁶

These sections have no bearing on determinations of domicile or decrees of probate made in a foreign country. Section 3-227 does not accord validity to a will unless it has been admitted to probate after notice, that is, in solemn form, in another state of the United States which has determined that the testator was a domiciliary at the time of his death. It would be of no use at all in a case like that of General John W. Clous, who came to this country from Germany at the age of twenty, enlisted immediately in the army, and did not acquire an American domicile until he retired at the age of sixty-four.⁷⁷ Many members of the armed forces and the foreign service are domiciled in states which they left at an early age to enter the service and with which they have no present contacts. General Eisenhower, for example, was probably domiciled in Kansas from the time he entered West Point until he retired from the army.⁷⁸ In order to secure any benefit under section 3-227 it would be necessary to probate the will in solemn form in the state of domicile even though the testator had no assets in that state. These limitations of section 3-227 are not mentioned as criticisms of the section, which is well-drafted and useful, but they do mean that it is not a satisfactory substitute for an adequate section governing choice of law as to the form of wills.

V. THE ROME CONVENTION OF 1966

Choice of law rules which validate wills executed in forms prescribed by foreign law are intended to prevent frustration of formally manifested testamentary intent like that which occurred in the cases

76. Statutes permitting probate of wills admitted to probate in the jurisdiction of domicile have sometimes been construed as merely reducing the requirement of proof in probate proceedings and not as validating devises of land in the enacting state made by a will executed in a form not permitted by the internal law of the enacting state. *Annots.*, 113 AM. ST. REP. 215 (1905); 131 A.L.R. 1023, 1039-48 (1941); 167 A.L.R. 554, 562 (1947). Section 3-227 would supersede the Uniform Probate of Foreign Wills Act (1950). 9B UNIFORM LAWS ANN. 618 (1966).

77. Fratcher, *History of the Judge Advocate General's Corps, United States Army*, 4 MILITARY L. REV. 89, 100, 113, 120 (1959). The War Department records listed General Clous' home as "United States Army" during his forty-four years of active service.

78. *Williams v. Saunders*, 45 Tenn. 60 (1868); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17, comment d, at 85, and illustrations 1 & 2, at 85 (Proposed Official Draft 1967). Even if a diplomat or an army officer acquires a domicile at an overseas embassy or a military reservation subject to exclusive federal jurisdiction, his will could not be admitted to probate at these places.

of Colonel Hunt and Mr. Coppin.⁷⁹ These rules can have their intended effect, however, only through the admission of the wills to probate. Unless a will executed according to a foreign form has already been admitted to probate in another state of the United States where the testator was domiciled at the time of his death, proof as of fact of the foreign law which prescribes the form is usually necessary for probate.⁸⁰ Proof of foreign statutory law is often difficult; proof of foreign case law or "jurisprudence" is likely to be more difficult; proof of foreign customary or tribal law may be virtually impossible. Widespread international agreement on a single form of will which would satisfy the internal law of every jurisdiction would virtually eliminate the need for proof of foreign law prescribing the form of wills. Probate of a foreign will and administration and distribution under it would be much simpler if it were in a form known to the internal law of the jurisdiction where the administration is conducted and understood by the lawyers who practice there. The existence of such an international agreement would make it possible to assure a client that his will executed in this country will have full effect even if he changes his domicile to or acquires property in a foreign country.

Late in 1966 the International Institute for the Unification of Private Law (UNIDROIT—Rome Institute)⁸¹ promulgated a Draft International Convention Providing a Uniform Law on the Form of Wills.⁸² The Institute had had the matter under consideration since

79. See text accompanying notes 3 & 5 *supra*.

80. The will involved in *In re Pretto*, 4 Phila. 380 (Pa. 1861), probably was executed in a form permitted by the law of the Danish West Indies, which governed its validity. Probate appears to have been denied in Pennsylvania solely because the proponent was unable to prove, as a fact, the applicable Danish West Indian law. Recent liberalization of the fact approach in the federal courts under Fed. R. Civ. P. 44.1 has been followed in some state courts as well. See generally Miller, *Federal Rule 44.1 and the "Fact" Approach To Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 615 (1967).

81. See text accompanying note 44 *supra*.

82. UNIDROIT: INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, DRAFT CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF WILLS WITH EXPLANATORY REPORT 8-15 (U.P.L. 1966. Paper: XLIII, Doc. 30; Rome, 1966) [the Draft Convention is hereinafter cited as DRAFT CONVENTION; the Draft Uniform Law is hereinafter cited as DRAFT UNIFORM LAW; the Explanatory Notes are hereinafter cited as EXPLANATORY NOTES]. Experts from Austria, Eire, England, France, Germany, Israel, Italy, Louisiana, Switzerland, and Yugoslavia participated in the drafting of the Convention and the annexed Draft Uniform Law on the Form of Wills. Professor B. A. Wortley of the University of Manchester Faculty of Law was Chairman of the Committee of Experts. Professor René David of the University of Paris, *Rapporteur* of the Committee, wrote the Explanatory Report (*id.* at 19-31), which is a commentary on the Draft Convention and Draft Uniform Law. *Id.* at 6-7. In its

1960. Its experts prepared the Draft Convention and the Draft Uniform Law annexed to it during the years 1963 to 1965. Early in 1967 the Secretary of State's Advisory Committee on Private International Law⁸³ recommended that a report on the Rome Institute's proposed convention and uniform law be prepared by reporters for the Uniform Probate Code. A committee of three of the reporters, designated for this purpose, submitted a report dated July 6, 1967,⁸⁴ later supplemented by remarks of the chairman of the committee at a meeting of the Secretary of State's Advisory Committee on Private International Law on September 28, 1967.

The Draft Convention provides that each nation which ratifies or accedes to it shall introduce into its law the provisions of the annexed Draft Uniform Law on the Form of Wills,⁸⁵ complete and implement the Draft Uniform Law by designating the persons who, within its territory, shall be qualified to receive international wills, and give notice of this or later designations of persons so qualified.⁸⁶ The Draft Convention further provides that a will executed in the form of an international will in the territory of a contracting party shall, in the territories of the other contracting parties, be considered as having been made in the presence of a person qualified to receive it whenever the person receiving is qualified according to the law of the party in whose territory it was executed.⁸⁷ It also provides that a will executed in the form of an international will in the territory of a state which is not a contracting party shall, in the territories of the contracting parties, be considered as having been made in the presence of a qualified person whenever, under the law of the state where execution took place, it was received by a person qualified to receive wills and was placed in his custody.⁸⁸ This last provision would enable a jurisdiction to secure most of the advantages of the Convention without becoming a contracting party, a matter which is of particular importance to states of the United States because they are prohibited

resolution approving the drafts, the Governing Council of the Institute directed that they be transmitted to the participating governments with requests for their opinions on the expediency and on the substance of the provisions. *Id.* at 38.

83. See text accompanying note 48 *supra*.

84. The committee consists of Professor Wellman, chairman, Professor Scoles, and the writer. See note 64 *supra*. The chairman prepared the report after correspondence with the other members of the committee.

85. DRAFT CONVENTION art. I.

86. *Id.* art. II. It is contemplated that the notice be given to the depositary of the original copy of the Convention. EXPLANATORY REPORT 30.

87. DRAFT CONVENTION art. III, ¶ 1.

88. *Id.* art. III, ¶ 2; EXPLANATORY REPORT 30-31.

by the Constitution from entering into treaties with foreign countries.⁸⁹

The Draft Convention further provides that the signatures of the testator, of the person qualified to receive the will, and of the witnesses of an international will "shall be exempt from legalization"⁹⁰ but that, nevertheless, "the competent authorities of the Contracting Parties may verify the authenticity of such signatures."⁹¹ It also provides that each contracting party may in its law provide for rules relating to the custody of international wills.⁹²

Appended to the Draft Convention is an unnumbered draft article "for possible insertion," concerning federal and other non-unitary states. This article would provide that the obligations of a federal government shall be the same as those of contracting states which are not federal states "with respect to those articles of this Convention and its Annex that come within the legislative jurisdiction of the federal authority." With respect to those articles "that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal government shall bring such articles with a favorable recommendation to the notice of the appropriate authorities of constituent states or provinces" and shall give notice of designations of persons qualified to receive international wills made by itself and by its constituent states or provinces.⁹³

89. U.S. CONST. art. I, § 10, cl. 1. Clause 3 provides: "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state, or with a foreign power . . ." As to whether a state could, with the consent of Congress, accede to a convention on the form of wills with foreign countries, see *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-72, 578 (1840); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 724-25 (1838); *Poole v. Fleeger*, 36 U.S. (11 Pet.) 184, 212 (1837); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833); *Lake Ontario Land Dev. & Beach Protection Ass'n, Inc. v. FPC*, 212 F.2d 227, 232-33 (D.C. Cir. 1954), cert. denied, 347 U.S. 1015 (1954); NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, REPORT OF THE COMMITTEE ON INTER-STATE COMPACTS, 1921 HANDBOOK 297, 321-50; F. ZIMMERMAN & M. WENDELL, *THE INTERSTATE COMPACT SINCE 1925*, 71-84 (1951); Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 695 (1925); Comment, *The Power of the State To Make Compacts*, 31 YALE L.J. 635 (1922).

90. DRAFT CONVENTION art. V, ¶ 1. For the probable meaning of this language, see note 121 *infra*.

91. DRAFT CONVENTION art. V, ¶ 2.

92. *Id.* art. VI. This would permit legislation authorizing the person who received the will to transfer custody to his successor or to a public office of record without causing the will to lose its status as an international will. EXPLANATORY REPORT 31, 36.

93. EXPLANATORY REPORT 12. This draft article was derived from art. XI of the New York Convention of June 10, 1958, on the recognition and execution of foreign arbitral awards. EXPLANATORY REPORT 31.

The annex to the Draft Convention is a Draft Uniform Law on the Form of Wills,⁹⁴ designed for enactment as part of the internal law of every power which ratifies or accedes to the Draft Convention and of any other jurisdiction, such as a state of the United States, which sees fit to adopt it. Article 1 of the Draft Uniform Law provides:

A will shall be valid as regards form, irrespective of the place where it is made, and irrespective of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out hereafter.

Article 1 also provides that a will which does not qualify as an international will may, nevertheless, be valid as some other form of will.⁹⁵ Hence the omission of some prescribed ritual in an attempted execution of an international will does not necessarily make the instrument ineffective. It could, for example, still satisfy the requirements of the jurisdiction whose law governs for a witnessed written will or, if wholly in the handwriting of the testator, for a holographic will.

Subsequent articles of the Draft Uniform Law require an international will to be in writing, but not that it be handwritten or written by the testator.⁹⁶ The testator must declare that the instrument is his will in the presence of two witnesses and of a person qualified to receive the will but he need not reveal the contents of the will.⁹⁷ The testator must sign at the end of the will in the presence of the witnesses and of the person qualified to receive it.⁹⁸ The witnesses and

94. EXPLANATORY REPORT 13-15.

95. DRAFT UNIFORM LAW art. 1, ¶ 2; EXPLANATORY REPORT 20, 21.

96. DRAFT UNIFORM LAW art. 2, ¶ 2 permits the will to be written or typed in any language. This was designed to supersede requirements imposed by the internal law of some countries that wills, or some forms of wills, be in the local language, or in a language understood by the testator.

97. *Id.* art. 3. As to the requirement of publication under the existing law of common- and civil-law jurisdictions, *see* notes 3, 13 & 32 *supra*; *cf.* note 30 *supra* and text accompanying note 31 *supra* (mentioning that civil-law public wills and, in some countries, holographic wills, must be read aloud to the witnesses). Article 9 of the Draft Uniform Law provides that, if the testator is unable to read, the will shall be read to him in the presence of the witnesses and the person qualified to receive the will, and that, if the testator does not know the language in which the will is written, a translation into a language which he knows shall be so read. In either case the circumstances must be mentioned in the instrument. *See* EXPLANATORY REPORT 35-36 (Supp.).

98. DRAFT UNIFORM LAW art. 4. As to existing requirements of signature at the end and signature in the presence of the witnesses, *see* text accompanying notes 9, 10 & 12 *supra*. It would seem that an international will could not be signed by another person for the testator, even if in his presence and by his direction. If a person can neither sign his name nor affix his fingerprint, he cannot make an international will.

the person qualified to receive the will must "there and then" sign the will in the presence of the testator.⁹⁹ Every correction in the body of the will and, if the instrument consists of several sheets, each sheet, must be signed or initialled by the testator, "unless the sheets follow each other and form a whole."¹⁰⁰ Additions following the signatures must be signed by the testator, the witnesses, and the person qualified to receive the will.¹⁰¹ The testator may use his fingerprint in lieu of his signature or initials.¹⁰² The fact that it contains a devise or legacy to a witness or to the person who receives the will, or to a relative or spouse of either, does not make the will void.¹⁰³ The person who receives the will is to satisfy himself as to the identity of the testator and of the witnesses.¹⁰⁴ The instrument must be left in the custody of the qualified person who has received it and it ceases to be valid, as an international will, if withdrawn from official custody by the testator.¹⁰⁵ The law of the place of execution may, however, provide for transfer to another custodian, including a public office, without affecting the character of the instrument as an international will.¹⁰⁶

EXPLANATORY REPORT 23 & 26. There is no requirement of a recital that the testator signed in the presence of the witnesses and of the person authorized to receive the will. *Id.*

99. DRAFT UNIFORM LAW art. 5. The words "there and then" mean "immediately" and the instrument is void as an international will if the signatures are not affixed immediately. EXPLANATORY REPORT 24. As to existing requirements that the witnesses sign in the presence of the testator, *see* text accompanying notes 8, 9 & 10 *supra*.

100. DRAFT UNIFORM LAW art. 7, ¶¶ 1, 2. As to the quoted clause, Professor David wrote:

It will be for the judges to interpret this formula, deciding above all if there is or is not a suspicious element which raises doubts whether the document produced really is the will as it has been made by the testator. Judges can easily admit that the sheets, for example, follow each other and form a whole, if the will has been written by the hand of the testator or if the sheets include indications on the manuscript by him, proving that they are his work.

EXPLANATORY REPORT 25. *See also id.* at 34-35 (Supp.).

101. DRAFT UNIFORM LAW art. 7, ¶ 3.

102. *Id.* art. 8; *cf.* MEX. FED. DIST. CIV. CODE art. 373 (J. Wheless transl. 1938) (requiring the testator's fingerprint on each copy of a holographic will).

103. DRAFT UNIFORM LAW art. 11, ¶ 2; EXPLANATORY REPORT 27. Art. IV of the Draft Convention permits each contracting party to provide in its law for forfeiture of such devises and legacies. *Id.* at 28.

104. DRAFT UNIFORM LAW art. 10. "National laws will settle the conditions in which a qualified person becomes liable for not having satisfied the obligation imposed on him." EXPLANATORY REPORT 27. This statement may mean that the will is not void as an international will merely because the receiver did not make adequate inquiry as to identity or it may mean that the will is void but the receiver may be liable for having caused the invalidity.

105. DRAFT UNIFORM LAW arts. 12, 13. "If the testator withdraws the will, the will may remain valid as a will of some other type . . ." EXPLANATORY REPORT 28; *see* note 92 *supra*.

106. Art. VI of the Draft Convention provides: "Each Contracting Party may in

The July 1967 report to the Secretary of State's Advisory Committee, mentioned earlier,¹⁰⁷ expressed approval of this proposal to secure international agreement on a single form of will which would satisfy the internal law of every jurisdiction. It mentioned three major advantages offered by the proposal. First, a person contemplating the possibility of being domiciled or owning property in another country could execute a will with the assistance of local lawyers without the necessity of securing expert advice on foreign law. Second, the problem of proof of foreign law incident to probate of a will executed in a form prescribed by that law would be eliminated.¹⁰⁸ Third, even if the proposal is not accepted in this country, its acceptance in non-common-law countries would encourage the execution there of wills in the form prescribed by the Uniform Law on the Form of Wills. As this form includes performance of all of the requirements imposed for witnessed written wills in every common-law jurisdiction, every will executed in this form would be effective, at least as to land, in all common-law jurisdictions.¹⁰⁹

The report mentioned difficulties, however, as to United States ratification of the Draft Convention in its present form. If the federal state article¹¹⁰ were not included in the Convention, United States ratification would obligate the federal government to federalize the law of the states governing execution of wills.¹¹¹ Although this would seem to be constitutionally possible under the treaty power,¹¹² its political acceptability is doubtful. Alternatively, if the federal state article were included in its present form, United States ratification would obligate the federal government to change the law relating to

its law provide for rules relating to the custody of international wills." Professor David wrote: "To keep the will does not necessarily signify that it be kept at one's residence. The person who has custody of a will may take steps to keep it by depositing it in a public record office where its custody may be assured by some public body." EXPLANATORY REPORT 28. *See also id.* at 31; *id.* at 36 (Supp.).

107. *See* note 84 *supra*.

108. *See* text accompanying note 80 *supra*.

109. For these requirements, *see* text accompanying notes 8-13 *supra*. A will in the international form might not, however, be effective as to movables in a common-law jurisdiction if the testator died domiciled in a place which did not recognize this form of will. *See* notes 1, 6 & 20 *supra*. This would be unlikely to occur, however, because most non-common-law countries recognize wills executed in a form permitted by the place of execution. *See* note 37 *supra*.

110. *See* text accompanying note 93 *supra*.

111. DRAFT CONVENTION art. I.

112. *See* *Asakura v. Seattle*, 265 U.S. 332 (1924); *Missouri v. Holland*, 252 U.S. 416 (1920); *Geofroy v. Riggs*, 133 U.S. 258 (1889); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796); S. MENTSCHIKOFF & N. KATZENBACH, REPORT OF THE AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON INTERNATIONAL UNIFICATION OF PRIVATE LAW 33-36 (1961).

the execution of wills in those areas where it has legislative jurisdiction over such matters of private law.¹¹³ Congress regularly enacts legislation changing the private law of the District of Columbia and the Canal Zone. It rarely exercises its power to legislate as to private law for military reservations subject to the exclusive jurisdiction of the United States, United States embassies overseas, territory controlled by United States armies of occupation, naval vessels, American island possessions, and the United Nations Trust Territory of the Pacific Islands. Congressional change in the private law of Guam, the Commonwealth of Puerto Rico, or the Virgin Islands, which have their own legislatures, might create resentment. Accordingly, the report suggested that the federal state article of the Draft Convention be modified so as to obligate a federal government to enact the Uniform Law on the Form of Wills only for those territories as to which it customarily legislates on such matters of private law. In making this suggestion, the report observed that, even if the United States does not ratify the Convention, one or more of the states could enact the Uniform Law on the Form of Wills.¹¹⁴ This would not, however, accord to a will executed in such a state the advantage provided by the Convention when notice of persons qualified to receive international wills has been given by a contracting party.¹¹⁵ Probate of such a will would involve proof that the person who received it had authority to do so under the law of the state where it was executed.

In addition to the difficulties attending ratification of the Draft Convention by the United States, the report mentioned several problems incident to enactment of the Draft Uniform Law by states of the United States. The chief of these is the requirement that an international will be executed in the presence, and retained in the custody, of a person qualified to receive wills under the law of the place where the will is made.¹¹⁶ Civil-law countries already have notaries who are qualified to receive wills in this sense. The civil-law notary is a specially trained lawyer engaged in private conveyancing practice. In Quebec, for example, he must have a law degree from a university, based on at least three years of study, plus a year of specialized university training in notarial work.¹¹⁷ In addition, he is a public officer with judicial and administrative powers within an assigned

113. See text accompanying note 93 *supra*.

114. See text accompanying note 88 *supra*.

115. See text accompanying notes 86 & 87 *supra*.

116. See notes 86-88, 97-99 & 104-06 *supra*.

117. QUEBEC REV. STAT. c. 248, § 40 (1964).

district and, as such, maintains a public office of record for conveyances, wills, and other important instruments. The manner in which he sees to the execution of instruments and the records which he must keep are minutely regulated by law. When he moves or ceases to practice, these records are turned over to his successor or a public office designated by law.¹¹⁸ Official acts bearing his signature, including certificates of execution of notarial wills, have approximately the effect of a judgment of a common-law court; they are self-proving and conclusive evidence of the facts stated unless impeached for falsity, and such impeachment is exceedingly difficult.¹¹⁹ The Draft Convention provides, as has been mentioned, that the signature of a notary who receives an international will shall be exempt from legalization.¹²⁰ This means, in effect, that when an international will is received by a notary in the territory of one party to the Convention, the courts of another party to the Convention will take judicial notice of the signature and the official character of the foreign notary without requiring an authenticating certificate by a diplomatic or consular official of their own country.¹²¹ Consequently, if two civil-law countries should ratify the Draft Convention, an international will executed in one would be fully effective in the other without proof of execution.

Common-law countries have no equivalent of the civil-law notary and wills are not fully effective in these countries until admitted to probate after proof of due execution. English solicitors who supervise the execution of wills tend to be conveyancing experts like the civil-law notaries, however, and they commonly retain custody of their clients' wills. Although the signatures and certificates of English solicitors do not have the self-proving and conclusive effect of those of civil-law notaries, the requirements for common form probate of wills in England are very much less than those imposed by most American states. In the absence of contest, a will is admitted to probate in England without any proof except a death certificate and an

118. *E.g.*, QUEBEC REV. STAT. c. 248, §§ 64, 65-71, 93, 136, 169-208 (1964).

119. BROWN, *The Office of the Notary in France*, 2 INT. & COMP. L.Q. 60, 66 (1953); M. AMOS & F. WALTON, INTRODUCTION TO FRENCH LAW 24-25, 318-19 (2d ed. 1963).

120. DRAFT CONVENTION art. V, ¶ 1.

121. The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents concluded October 5, 1961, provides in art. 2: "For the purposes of the present Convention, legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears." 9 AM. J. COMP. LAW 701, 702 (1960).

oath of the executor, which may be made upon information and belief without personal knowledge of the facts, that he believes the instrument presented is the last will of the deceased.¹²² The situation in this country is very different. In most states there is neither an equivalent of the civil-law notary nor a well-defined group of lawyers who specialize in conveyancing practice and habitually retain their clients' wills. Even when there is no contest, the states tend to require as a prerequisite of probate, the examination of the attesting witnesses to the will, either before the court or by deposition, as to the facts of execution and the testamentary capacity of the testator.¹²³ When the execution took place in a distant foreign country, such proof of execution and testamentary capacity may be very difficult and expensive to procure. With these considerations in mind, the report to the Secretary of State's committee made the following recommendations:

To give an international will approximately the same status in respect to post-mortem proof in Europe and in the United States, it is suggested that the Uniform Law and Convention be changed to provide that unless it is shown that some signature appearing thereon is a forgery, the certificate of a will custodian be accepted as *prima facie* proof of due execution, testamentary capacity and intention. A somewhat stronger and more desirable change would be that such certificate is the equivalent of *prima facie* proof that the requisite testamentary capacity and intention, and conclusive proof that the required formalities of execution were followed.¹²⁴

Adoption of the Draft Uniform Law on the Form of Wills by an American state would, of course, involve concurrent enactment of legislation designating the persons qualified to receive international wills and defining their powers and duties as custodians of such wills. American notaries public do not correspond to the notaries known to

122. Non-Contentious Probate Rules, Rule 6, 2 STAT. INSTR. 2202 (No. 796) (1954); T. TRISTRAM & H. COOTE, PROBATE PRACTICE 270 (21st ed. 1960); Fratcher, *Fiduciary Administration in England*, 40 N.Y.U.L. REV. 12, 49-50 (1965).

123. The report cites the New York Surrogate Court Procedure Act §§ 1404, 1405, which became effective September 1, 1967, as an example of legislation imposing this requirement. Under the latter section, when the testimony of the attesting witnesses, in person or by deposition, cannot be had, the will may be admitted on proof of the handwriting of the testator and the attesting witnesses.

124. In a letter of August 11, 1967, to Professor Wellman (*see* notes 64 & 84 *supra*), Professor Wortley (*see* note 82 *supra*) expressed approval of the suggestion that an international will carry a conclusive presumption of due execution but questioned the acceptability of a presumption of testamentary capacity. It would be advantageous to state these presumptions in the Uniform Law itself, rather than in supplementary legislation enacted in an American state adopting the Uniform Law. This would ensure that civil-law countries extended the presumption to certificates made by persons authorized by American state law to receive international wills.

the civil-law countries. Many American notaries public have neither the legal training nor the custodial facilities necessary for a receiver of international wills. American probate judges usually have the legal training and custodial facilities needed for the performance of this function but a requirement that wills be executed in the presence of a probate judge and retained by him would involve a drastic change in the habits of lawyers and clients. Both are accustomed, in common-law countries, to having the execution of a will conducted as a private transaction in a lawyer's office. Accordingly, the report suggested that the designation of practicing lawyers, perhaps those with five years' experience in practice, to receive international wills might be the most acceptable solution to the problem in this country.

The report also suggested that, in view of the tendency of Americans to move frequently across state lines, the international will scheme might operate here more satisfactorily if there were an alternative to leaving the will in the custody of the lawyer in whose presence it is made. One such alternative would be for the state to provide each person qualified to receive international wills with an official seal or mark to be placed on each sheet of wills executed in his presence and to provide that a will so marked would not cease to be an international will merely because it was removed by the testator from the custody of the person who received it.¹²⁵

The reporters for the Uniform Probate Code are agreed that international adoption of a single form of will which would satisfy the requirements of the internal law of all jurisdictions would be an important and valuable step toward encouraging international mobility of persons and their capital. As the Draft Convention Providing a Uniform Law on the Form of Wills and the annexed Draft Uniform Law¹²⁶ are not yet in final form, their definitive incorporation into the Uniform Probate Code is not yet feasible. Accordingly, the Draft Uniform Law on the Form of Wills was set out in an appendix to the 1967 Summer Draft of the Uniform Probate Code, with a view to incorporation into the Code when international agreement is reached

125. In the letter mentioned in the preceding note, Professor Wortley suggested that this scheme of marking and removal would lead to difficulties of proof. In his oral remarks to the Secretary of State's Advisory Committee (*see* text accompanying note 84 *supra*) Professor Wellman suggested that the person receiving and marking a will might be required to keep a photocopy to obviate such difficulties. He also suggested deletion of art. V, ¶ 2 of the Draft Convention (*see* text accompanying note 91 *supra*) because it might cast doubt on the effectiveness of the certificate of the person receiving the will as *prima facie* proof of the genuineness of the testator's signature.

126. *See* note 82 *supra*.

on the terms of the proposed uniform law.¹²⁷ Although more elaborate provision as to who may receive international wills and how he shall keep them is needed, it seemed undesirable to try to draft complete provisions on these subjects at this stage. The appendix provides only that "[a] person qualified to receive an international will is an attorney at law currently licensed to practice in this state."

Reform of private law is a slow and laborious process. International unification of private law is even slower and much more difficult. It is little more than a century since Her Britannic Majesty's Court of Probate found itself compelled to perpetrate a gross injustice by denying probate to Emily Graham's formally executed will of her English estate.¹²⁸ In the realms of geology and law reform this is but a short period. Perhaps before another century has passed the necessity for such injustices will have been removed. The Uniform Probate Code may play an important part in effecting the needed reform.

127. Tit. II, pt. 5, Tent. § 2-502B.

128. See text accompanying note 1 *supra*.