

PART THIRTEEN

INHERITANCE

CHAPTER 65

Present Conflicts Rules

I. TERMINOLOGY AND SOURCES

1. Terminology

IN the United States, the common terms employed concerning succession on death are "descent and distribution" (for intestacy), "wills," and "administration." But it is gratifying that the Restatement uses "succession on death" to cover the first two topics. In the civil law, the "law of inheritance" or "law of succession" is a general term which will be used here to include all incidents depending on the law governing a decedent's estate, with the exception of administration in the common law countries.

Another linguistic difficulty is caused by the lack in English of a word for the main beneficiaries of an estate. "Heir" *stricto sensu* is merely a successor to land *ab intestato*, as the *héritier* once was in French; it is desirable in conflicts law to stretch this term as has occurred in France, to comprehend all intestate and testate successors to ownership of all assets in the civil laws, not only those named *heres* (*Erbe*) in the Roman or German systems, but also the French *légataire universel* and the beneficiary *à titre universel*.

Moreover, devise of real estate and bequest of personal property are analogous gifts that fall short of easy correspondence in other systems. Since the residuary legatee who would not be heir *ab intestato* in the same state does not incur personal liability in Anglo-American law, the term "legatee" may be used to denote all beneficiaries directly

taking by will and not regarded as "universal successors."

Finally, readers may be reminded that in the civil law the estate in principle forms an entity without regard to geographical frontiers, although the consequence that only one law of inheritance should govern is not drawn in all civil law jurisdictions. The principle, nevertheless, applies, at least in the best theories, when the claims of creditors of the estate are regulated.

On the other hand, foreign readers have to bear in mind the system of state control of estates prevailing in common law jurisdictions and a few others such as Austria and Denmark, producing many complicated problems in connection with the sovereignty of 48 states in the United States.

Although in England the law reform of 1925 has unified this system by transferring the title to real as well as personal estate at death to the administration of "executors" or "administrators," most American states retain the principle that real estate goes directly to the heirs, but the powers of administration are more and more extended to all assets.

2. Sources ¹

Assets left by a foreigner at death in foreign territory are a frequent topic of treaties, statutes, court decisions, and consular activity. On the interstate and international

¹ A second edition of the excellent collection of sources of private international law by PROF. MAKAROV, while under press, has most kindly been made available to me during my writing. A remarkable discussion of the treaties on inheritance is to be found in PLAISANT, *Les règles de conflit de lois dans les Traités* (1946) 231-261.

Comparative conflicts law: FRANCESCO P. CONTUZZI, *Il Diritto ereditario internazionale* (1908); LEWALD, *Questions de droit international des successions*, *Recueil* 1925 IV 5 ff.; *id.*, *Internationales Erbrecht*, 4 *Rechtsvergl. Handwörterb.* 448; P. ANLIKER, *Die erbrechtl. Verhältnisse der Schweizer in Ausland und der Ausländer in der Schweiz* (1933).

level, many efforts to foster harmony have been undertaken, but with small success.

Treaties. A century ago, a series of bilateral agreements were concluded containing provisions on inheritance. Commonly, they stabilized court jurisdiction over inheritance claims and competency of consulates to take care of property owned by their nationals. Some outstanding treaties of this group remain in force, such as, among others, those concluded by the United States with France of February 23, 1853,² and with Switzerland of November 25, 1850,³ between France and Switzerland of June 15, 1869,⁴ Baden and Switzerland of December 6, 1856.⁵

These and other treaties, drafted with more good will than legal ability, seldom spoke of the applicable law; but when they laid down jurisdictional rules, they usually contemplated that every tribunal would apply its own domestic law, although this has often been forgotten. The American-Swiss treaty of 1850, Article VI, says succinctly though quite ineptly:

“Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property is situated.”

² Consular Convention, 10 Stat. 992, U.S. Treaty Ser. No. 92; materials in 6 MILLER, *Treaties* 169 ff.; also in DELAUME, *American-French Priv. Int. L.* (1953) 68-72 with comment.

³ 11 Stat. 587 No. 353; MALLOY, 2 *Treaties* 1763; NUSSBAUM, *American-Swiss Priv. Int. L.* (1950), *cf.* 47 *Col. L. Rev.* (1947) 186; ANLIKER 115 ff.

⁴ Convention on Jurisdiction, Swiss. Off. Coll. IX 1002; NIBOYET ET GOULÉ, 1 *Recueil* 735; ANLIKER 49 ff. with large literature; PILLET, *Les Conventions* 147 ff.; BATIFFOL, *Traité* 724 ff.

⁵ Swiss Off. Coll. V 661; the continued validity of the treaty, not formally assumed by Germany, has been challenged by SCHNORR VON CAROLSFELD, 12 *Z. ausl. PR.* (1939) 285 and 2 SCHNITZER 503.

But American decisions overlooked the provision on "the laws," and the recent decision *In re Schneider* has, without any reason,⁶ denied its effect.

The Franco-Swiss Treaty of June 15, 1869, Article 5, has no such express provision on the applicable law; it states merely that:

"Any action relating to the liquidation or partition of a succession, testamentary or intestate, and to accounting among heirs and legatees will be brought before the tribunal where the succession opens, that is, in the case of a Frenchman dying in Switzerland, the tribunal of his last domicile in France, and in the case of a Swiss dying in France, the tribunal of his place of origin in Switzerland. Nevertheless, the partition, auction, or sale of immovables must comply with the laws of the country of their situation."

This text, however, naturally for that time, was understood as meaning that the movable property of a Swiss national situated in France should be litigated by claimants to the inheritance before the French courts according to the French Code Civil, and vice versa. This construction has been preserved by the Swiss courts and recently has been reaffirmed.⁷ The French Court of Cassation, however, held in 1939 that the treaty in the main restricts itself to the jurisdictional problem.⁸

A divergent interpretation by an Alsatian decision⁹ has been called amazing.¹⁰

⁶ *In re Schneider* (1950) 96 N.Y.S. (2d) 652; Clunet 1950, 976; 16 Z. ausl. PR. (1951) 620 with note ZWEIGERT; 3 Rev. Hell. (1950) 310. Notes in many American Law Reviews.

⁷ BG. (June 29, 1928) 54 BGE. I 216. BG. (May 21, 1942) 68 BGE. II 155, 1 Schweiz. Jahrb. I.R. (1944) 222.

KG. Waadt (March 31, 1943) 41 SJZ. (1945) 106, 1 Schweiz. Jahrb. I.R. 221.

⁸ Cass. Civ. (June 19, 1939) S. 1940.1.49; to the same effect Clunet 1902, 567.

⁹ App. Colmar (June 15, 1949) Rev. crit. 1950, 62.

¹⁰ BATIFFOL, note Rev. crit. 1950, 64.

Even apart from such failure, these treaties raise controversies of many kinds. Where does the property "lie" for the purpose of the American-Swiss treaty? The Swiss Federal Tribunal assumes that movables are situated in the country of the last domicil,¹¹ whereas American courts for the most part have applied American law to assets belonging to decedents domiciled in Switzerland.¹²

On the other hand, in Switzerland two different theories arose concerning the law applicable to immovables under the Swiss-French treaty; it is either said to be the *lex situs* or the *lex domicilii*.¹³ The Federal Tribunal applies the latter opinion in favor of a single court and a single law;¹⁴ the French courts, with one recent exception,¹⁵ have not followed this.

A second comprehensive group of bilateral treaties was due to the hopeful international wave after the first world war. Their scope is more clearly defined; they rule on the functions of consuls, preliminary measures, and sometimes measures of liquidation; but they are commonly meager regarding conflicts rules. So far as they go, the European treaties, with the exception of the Austro-German and the German-Polish, differentiate between movables and immovables, and with the exception of the West-Scandinavian countries, are devoted to the nationality law.

The treaties relating to property and inheritance,¹⁶ con-

¹¹ BG. (Nov. 24, 1883) *in re Wohlwend*, 9 BGE. 507, 513 ff.; *in re Gem. Feldis* (May 5, 1898) 24 BGE. I 312, 319; 43 I 87; *cf.* App. Bern (March 5, 1885) 21 ZBJV. (1885) 361.

¹² ANLIKER 115; NUSSBAUM, Amer.-Swiss law 27.

¹³ See ANLIKER 50 ff.; WEISS, 4 *Traité* 175.

¹⁴ BG. (June 29, 1928) 54 BGE. I 216, 219.

¹⁵ Seine (Jan. 5, 1951) Rev. crit. 1951, 316, criticized by FLATTET in the note and in J.d. Trib. 1951, 604, refers to the Swiss courts for French immovables.

¹⁶ U.S. Department of State, Div. of Research and Publication, Treaty Section: Treaty Provisions relating to the Rights of Inheritance, Acquisition and Ownership, etc. Compiled March 31, 1943, revised September 4, 1944.

cluded by the United States from 1850 with a great number of countries, contain the usual clauses of equality with the nationals of the other power, and free disposal, ordinarily with the right of selling real estate if the acquirer is disqualified to possess,¹⁷ but with no conflicts provisions at all. Only the treaty with Thailand of 1937 declares that for the acquisition, possession, and disposition of immovable property the law of the situs exclusively shall be applicable.¹⁸

A different class consists of the conventions constituting uniform conflicts law, the Treaty of Montevideo, the *Código Bustamante*, the Northern Convention, and the drafts of the Hague Conference on the Law of Succession on Death.¹⁹ These enter into many particular questions and will be used here on par with the statutes.

The statutes are short. The most recent codifications are disappointing in their reiteration of principles of yesterday or the past century. Some are even difficult to understand. While the Hague drafts stimulated a certain progress, contemporary legislation seems not too much disposed to observe international courtesy.

The Hague Drafts aroused the greatest hopes. In 1903 Franz Kahn in his comment on the draft of 1902 expected "with fair certainty" that the convention on succession would be accomplished.²⁰ The draftsmen and the other delegates were highly interested and laborious and were believed to be largely conscious of the necessary "sacrifices." They were unable, however, to agree on a number of fundamental principles. The majority simply adopted

¹⁷ VIRGINIA M. MEEKISON, *Treaty Provisions for the Inheritance of Personal Property*, 44 *Am. J. Int. L.* (1950) 313 ff.

¹⁸ Treaty with Siam of Nov. 13, 1937, Art. 1, par. 7, 53 *Stat. Part 3*, 1731 ff., U.S. Treaty Ser. 940, 192 *L. of Nat. Tr. S.* p. 247 ff.

¹⁹ *Supra* Vol. I, pp. 29, 32, 33, 36.

²⁰ KAHN, 2 *Abhandl.* 35.

the principle of unity of succession and control by the last national law of the decedent, against the opposition of France and Switzerland, leaving the Anglo-American system entirely out of consideration. Comparative efforts have been made in the literature, but civilian and common lawyers regarded each other so much as complete strangers that, in the learned approach, mutual respect was expressed from a far distance and without a real resolution to unite.

II. SURVEY OF THE CONFLICTS SYSTEMS

The systems will be categorized by principles; there exist many exceptions to be mentioned subsequently.

A. Plurality of Successions

1. Immovables under *lex situs*

(a) *Movables under lex domicilii*. The law of the decedent's domicil as of the time of his death governs succession to movable property in the older system:

England and almost all common law jurisdictions of the British Commonwealth,²¹ United States,²² including Louisiana,²³ but only mistakenly extended to Puerto Rico,²⁴ and excluding Mississippi.

Argentina, court practice.²⁵

²¹ *Re O'Keefe* (1940) Ch. 124.

Canada: *Stuart v. Prentiss* (1861) 20 U.C.Q.B. 513 (C.A.); 10 Can. Abridgement 758 ff.

Australia: 17 Australian Digest 404 ff.

²² Mr. Justice Holmes in *Bullen v. Wisconsin* (1916) 240 U.S. 625, 632.

²³ Louisiana: Immovables: *Sevier v. Douglass* (1892) 44 La. Ann. 605, 10 So. 804. Movables: *Succession of Wells* (1849) 4 La. Ann. 522; *In re Lewis' Estate* (1880) 32 La. Ann. 385.

²⁴ *De los Angeles Melon v. Entidad Provincia Religiosa* (1951) 189 F. (2d) 163. See the penetrating criticism by EDER, 1 Am. J. Comp. L. 123.

²⁵ Argentina: C.C. Art. 10, 3283; see *Cám. civ. 2 Cap.* (July 13, 1931) 95 Gac. For. 90 Nr. 5106; (March 30, 1932) 98 *id.* 100 Nr. 5292; *Cám. civ. 1 Cap.* (May 28, 1934) 121 *id.* 105 Nr. 6693. And others see 2 ROMERO, Manual, 203; *Cám. civ. 1 Cap., Jur. Arg. 1942 I 715*; *Cám. civ. 2 Cap., Jur. Arg. 1943 III 723*; (Dec. 22, 1948) *Case Grimaldi*; *Jur. Arg. 1949 I 578*; *Contra* the writers *infra* n. 57.

Belgium.²⁶

Chile.²⁷

Costa Rica.²⁸

France.²⁹

San Salvador.³⁰

Siam.³¹

Treaty: Switzerland-Baden (1869), if the estate is in both countries.

The system of France, for a period, was in doubt with respect to the question whether the domicil was not superseded by the national law,³² but is now resettled.

(b) *Movables under lex patriae*. Movables follow the law of the decedent's national law as of the time of his death:

Austria.³³

Bolivia.³⁴

Iran.³⁵

Liechtenstein.³⁶

Luxemburg.³⁷

²⁶ Belgium: App. Bruxelles (June 16, 1926) *Revue Pratique du Notariat Belge* 1928 46, cf. GILON, Clunet, 1928, 1103; Trib. Verviers (Jan. 14, 1936) *Pasicrisie* 1936 III 133; Bruges (May 10, 1939) *Rechtsk. WB.* 1939-40, 105; Rb. Antwerp (June 16, 1950) *id.* 1950-51, 509.

²⁷ Chile: C.C. Art. 16, 997, 955.

²⁸ Costa Rica: C.C. Arts. 4, 5, 7 par. 2.

²⁹ France: Cass. civ. (June 19, 1939) *affaire Labedan*, *Rev. crit.* 1939, 480. Cass. Crim. (June 4, 1941) D. 1942.1.4, S. 1944.1.133; Trib. Seine (Feb. 6, 1952) *Rev. crit.* 1952, 494, have now also settled the exact point of contact, the place of "opening" the succession, which, of course, regularly in France is the last domicil.

³⁰ El Salvador: C.C. art. 994.

³¹ Siam: Int. Priv. L. (1939) arts. 37, 38.

³² *Infra*, 1 (b). On Peru C.C. (1936) art. V, see *infra* n. 56.

³³ Austria: *Verlassenschaftspatent* (Gesetz über Verfahren ausser Streit-sachen) of August 9, 1854, as amended, § 22 (immovables), § 23 (movables).

³⁴ Bolivia: C.C. art. 463, 464.

³⁵ Iran: C.C. arts. 7 and 8.

³⁶ Liechtenstein: Law on the estate of foreigners of Dec. 4, 1911, arts. 1 and 2.

³⁷ Luxemburg: Immovables: App. Luxemburg (Nov. 13, 1931) 12 Pas. Lux. 467. Movables: Trib. Diekirch (Feb. 22, 1900) 7 Pas. Lux. 41, Pas. Belge 1908 IV 119; Trib. Luxemburg (June 11, 1913) 9 Pas. Lux. 478. *Contra*: Trib. Luxemburg (June 20, 1932) 13 Pas. Lux. 466.

Turkey.³⁸

Treaties: Germany with Soviet Russia,³⁹ Estonia,⁴⁰ and Turkey.⁴¹

French courts temporarily.⁴²

Before their Sovietization and allegedly still at present:

Bulgaria.⁴³

Hungary.⁴⁴

Rumania.⁴⁵

2. Other Functions of *Lex Situs*

(a) *As principle for all assets.* That the *lex situs* should govern the totality of a succession including movables, was a widespread system before the movables were artificially deemed concentrated at the deceased's domicil.⁴⁶ More recently, it was adopted in a code of Latvia.⁴⁷ Recently abandoned in Illinois,⁴⁸ this system is represented by the law of Mississippi⁴⁹ and by the Treaty of Montevideo.⁵⁰

The inheritance is thus entirely dismembered, and the local position of each asset or debt is of decisive importance. The Mississippi court thinks along rigorous territorial

³⁸ Turkey: Law on the rights and duties of foreigners in the Ottoman Empire, 1915, art. 4; CARABIBER, 6 *Répert.* 432; BERKI, *La succession ab intestat dans le droit int. privé de la Turquie* (thèse Fribourg, Suisse, 1941).

Yugoslavia: Law of July 24, 1934, §§ 25, 26.

³⁹ Oct. 12, 1925, Annex to art. 22 §§ 13 ff.

⁴⁰ March 13, 1925, Art. XVIII § 14 ff.

⁴¹ May 28, 1929, Annex to Art. 20 § 14.

⁴² Decisions from (May 5, 1875) 2 *Clunet* 358; (May 8, 1894) 21 *Clunet* 562.

⁴³ Bulgaria: former Constitution, art. 63; DANEFF in 25 *Bulletin de l'Institut Intermédiaire International* 1; GHÉNOV, 6 *Répert.* 194.

⁴⁴ Hungary: SCHWARTZ, 50 *Z. int. R.* 67 f.; SZÁSZY, 11 *Z. ausl. PR.* (1937) 189; see also 6 *Répert.* 469.

⁴⁵ Rumania: Cass. (Feb. 20, 1901) *Clunet* 1902, 916; PLASTARA, 7 *Répert.*

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⁴⁶ FREYRIA, *infra* Ch. 65, n. 1, *passim*.

⁴⁷ Latvia: C.C. of Jan. 28, 1937, § 16, literally only referring to domestic estates; *cf.* 11 *Z. ausl. PR.* 484.

⁴⁸ Illinois: the rule coming from an Ordinance of 1787 and reproduced in *Stat. Annot. (Smith-Hurd)* 1935, c. 39 § 1, was replaced by the Probate Act of July 24, 1939, Rev. St. 1951, c. 3 § 162 (§ 11).

⁴⁹ Mississippi: 1 *C. Ann.* 1942, § 467, derived from Code 1857.

⁵⁰ Texts of 1889 and 1940, arts. 44, 45.

lines.⁵¹ Although notes and bonds of a foreign owner lying on deposit in Illinois were not held to be located in Illinois,⁵² the solution would not be analogous in Mississippi.⁵³

(b) *As exception for all domestic assets.* In Mexico, Panama, Peru, Uruguay, and Venezuela, all movable and immovable property situated in the country is submitted to the domestic law.⁵⁴ This attitude is sometimes taken as adopting the general principle of *lex situs*.⁵⁵ Other provisions in Venezuela and discussions in Peru, however, emphasize the law of the last domicil.⁵⁶ The latter seems to be accepted for foreign situated assets. But here as also in other Latin-American countries, the facts seem to point to a system where all domestic assets are subject to the *lex fori*, whereas foreign assets are ignored. Legal and factual exceptions seem to make this awkward scheme tolerable.

(c) *As exception for certain movables.* As noted above, the Argentine courts, defying a nearly unanimous learned

⁵¹ Heard v. Drennen (1908) 93 Miss. 236, 46 So. 243: "All the rights to be derived through the will must be derived from its terms administered according to the law of this state, so far as it affects property situated here" but concerns real property. Yet the decision in Bolton v. Barnett (1923) 131 Miss. 802, 95 So. 721 in all respects overrules the often cited case Slaughter v. Garland (1866) 40 Miss. 172, which restricted the *lex situs* to intestate succession.

⁵² Cooper v. Beers (1892) 143 Ill. 25, 33 N.E. 61, cf. 3 BEALE 1480; GOODRICH (ed. 1) 401 ff.

⁵³ Money deposited within the state is included, Ewing v. Warren (1926) 144 Miss. 233, 109 So. 601. The rule naturally includes a money lending business of an Italian domiciled in Italy, Jahier v. Rascoe (1885) 62 Miss. 699, and a negotiable warehouse receipt lying in Mississippi, Gidden v. Gidden (1936) 176 Miss. 98, 167 So. 785.

⁵⁴ Mexico: C.C. art. 14.

Panama: C.C. art. 631.

Peru: art. VI, 692; GARCÍA GASTAÑETA, Derecho Internacional Privado (ed. 2) 243.

Uruguay: C.C. art. 5.

Venezuela: C.C. art. 10.

⁵⁵ Thus, CAICEDO CASTILLA, 2 DIP. 34.

⁵⁶ Venezuela: C.C. arts. 894, 954.

Peru: JULIO DELGADO, Compendio de DIP. citing old theories, is doubtful, however; and see GARCÍA GASTAÑETA, *supra* n. 54.

opposition, follow the American principle in construing article 10 of the Code in the broad meaning of Story from whom it was borrowed. In consequence, it has been argued that article 11 ought likewise to apply; that is, movables in "permanent location" should also follow the law of the place where they are.⁵⁷ Against former cases, recent decisions have adopted this opinion⁵⁸ which transfers the contradictory statements of what is a permanent location⁵⁹ into the inheritance field. The same argument seems to apply to the Code of Uruguay, article 15.⁶⁰ Is this rule also meant to be applied by foreign courts? and also to foreign movables when Argentine inheritance law is referred to? I hope not.⁶¹

(d) *For domestic immovables only.* Although the Swiss statute recognizes foreign domiciliary inheritance law for movables of a Swiss national, if the foreign state prescribes it, Swiss immovables of a Swiss national are always governed by the law of the canton of origin.⁶²

The same rule seems to be accepted in Bolivia,⁶³ where a foreign will, so far as it disposes of domestic immovables, is subject to domestic law.

In all these cases, it might be argued that the statutes are inspired by *lex fori* rather than by *lex situs*. Nevertheless, it does not seem doubtful that the rules are applicable in foreign courts, as if they truly came from *lex situs*.

(e) *Otherwise on the ground of public policy.* Where

⁵⁷ BAQUÉ 87 ff.; see *supra* Ch. 54.

⁵⁸ Cám. civ. 1 Cap. (Dec. 30, 1941) Jur. Arg. 1942.1.717; Cám. civ. 2 Cap. (July 27, 1943) Jur. Arg. 1943.3.723; *contra* Cám. civ. 1 Cap (March 16, 1926) 27 Jur. Arg. 33.

⁵⁹ *Supra* Ch. 58.

⁶⁰ Uruguay: C.C. art. 15.

⁶¹ See the hypothetical assumptions by WALDEYER, *Sucesiones Argentino-Alemán ab Intestato*, Jur. Arg. 1951.I Doctrina 53, 55.

⁶² N.A.G. art. 28 par. 1.

⁶³ Bolivia: C.C. art. 464.

the interests of domestic creditors, beneficiaries, or forced heirs are involved, numerous exceptions in favor of the domestic law are made by the states in whose territories assets are situated. As illustration, it may here suffice to mention the California statute, disallowing gifts by a testator of more than a third of his assets to charity. While the courts of California reduce legacies correspondingly, the forum of the domicile tries to correct the result.⁶⁴

(f) *On the ground of comity.* In Germany since the early nineteenth century, the opinion has been maintained by some decisions and writers that the personal law adopted in principle should be barred in the case of foreign land subject to special rules of succession, such as feudal estates (family *fideicommissa*) or certain kinds of peasant land (*Anerbengüter*⁶⁵). The Civil Code of Zurich provides such an exception for family foundations.⁶⁶ The German Code formulates the general provision repeatedly mentioned in this work⁶⁷ whereby the German rules yield to "special provisions" on objects situated in a foreign state whose laws claim to govern these objects. After some controversy, it is settled that these foreign provisions do not refer only to substantive rules on successions such as farms, or homesteads, but also to the conflicts rules of the situs. Hence, the *lex situs* rule for succession to immovables in the common law countries and France, Argentina, etc., breaks the unitary German conflicts rules based on the national law of the decedent.⁶⁸

⁶⁴ E.g., *Whalley v. Lawrence's Estate* (1919) 108 A.C. 387; *infra* Ch. 66.

⁶⁵ Thus, of course, the American legislation on homesteads; Poland, IPR, art. 30; Liechtenstein: C.C. Pers. L. art. 828, 833, and others.

⁶⁶ 2 MEILI 139.

⁶⁷ E.G.BGB. art. 28; Vol. 1, 342, 601; *supra* Ch. 55.

⁶⁸ RG. (Oct. 4, 1911) Warn. Rspr. 1911, 484, n. 437; (Oct. 2, 1930) 85 Seuff. Arch. (1931) No. 18; IPRspr. 1930, 175 No. 88; Planck's Kommentar, E.G. art. 28, 2b; MELCHIOR 405; RAAPE 766; 4 FRANKENSTEIN 311 ff.; WOLFF, D. IPR. (ed. 3) 232.

The commentators, however, restrict this large reference to the *lex situs* by excepting problems of form and capacity, which have an independent conflicts rule in the continental doctrines. This leads to absurdities.⁶⁹ The German conciliatory gesture is excellent, provided it defers comprehensively to the foreign laws adopting the *lex situs*.

A similar provision is contained in the Swedish law and the treaty between Austria and Poland.⁷⁰

B. Unity of Succession

This principle brings the entire succession under the personal law of the decedent at his death. The *Código Bustamante*, which itself does not determine the connecting factor of the person, accordingly subjects the succession to the "personal law."⁷¹

1. All assets are subject to the law of the last domicile:

Brazil.⁷²

Chile.⁷³

Colombia.⁷⁴

Denmark.⁷⁵

Ecuador.⁷⁶

⁶⁹ These have been demonstrated by WILFRIED ZEUGE, *Das Recht der belegen Sache im Deutschen Internationalen Erbrecht* (Würzburg 1939) 59 ff., although he did not know how to remedy them.

⁷⁰ Cf. *infra* 373.

Sweden: Intestate Estate Law, art. 2.

⁷¹ Cód. Bustamante, art. 7.

⁷² Brazil: Ley Introd. (1942) art. 10.

⁷³ Chile: C.C. art. 955 and Cód. Organico de Tribunales, art. 148, with exceptions, notably C.C. arts. 15, 20 and 998 of controversial scope, see recently ALBÓNICO, 2 Manual § 501 ff.; MARIO GONZALEZ ALVARADO, *Le sucesión ante el DIP*, (Diss., Santiago, Chile, 1944) 95, 99-101.

⁷⁴ Colombia: C.C. art. 1012, but restricted by art. 1054, see COCK, *Tratado de derecho internacional privado* (ed. 2) 204 ff., and by other controversial exceptions; see RESTREPO-HERNANDEZ, 1 D.I.P. §§ 512, 598, CAICEDO CASTILLA, 2 DIP. 75 §§ 241-243 with an attractive solution.

⁷⁵ Denmark: 2 Z. ausl. PR. 866; *Revue* 1910, 508.

⁷⁶ Ecuador: C.C. art. 1017.

Federated Malay States.⁷⁷

Norway.⁷⁸

Quebec.⁷⁹

Peru (with exceptions).⁸⁰

Former practice in German common law and in Prussia.⁸¹

2. All assets are subject to the national law of the deceased at the time of his death:

Belgian Congo.⁸²

China.⁸³

Cuba.⁸⁴

Czechoslovakia.⁸⁵

Egypt.⁸⁶

Germany.⁸⁷

Greece.⁸⁸

Italy.⁸⁹

Japan.⁹⁰

Mexico.⁹¹

Morocco, French and Spanish.⁹²

Netherlands.⁹³

⁷⁷ Malay States: *One Cheng Neo v. Yar Kwan Seng* (1897), Digest of Rep. Cas. 1897-1925 (1929) 47.

⁷⁸ Norway: CHRISTIANSEN, 6 Répert. 580.

⁷⁹ Quebec: C.C. art. 7 as construed, see 3 JOHNSON 49, 52.

⁸⁰ Peru: C.C. art. 692, see *supra* n. 54.

⁸¹ Common Law: SAVIGNY 272 ff.

Prussia: Obertribunal, 10 Entsch. 143, 146; (May 8, 1865) 60 Striathorst 20 No. 6, at 66, 67; 1 REHBEIN 97; FÖRSTER-ECCIUS, 1 Preuss. Landr. (1892) 65.

⁸² Belgian Congo: C.C. art. 10 (wills).

⁸³ China: IPL. (of 1918) arts. 20, 21.

⁸⁴ Cuba: C.C. art. 10, par. 2; BUSTAMANTE, 1 DIP. (ed. 3, 1943) § 429.

⁸⁵ Czechoslovakia: IPL. (1948) § 40.

⁸⁶ Egypt: C.C. 1948, art. 17.

⁸⁷ Germany: E.G. art. 24, 25, extended to foreign nationals, 91 RGZ. 139 and unanimous doctrine.

⁸⁸ Greece: C.C. art. 28.

⁸⁹ Italy: C.C. Disp. Prel. art. 23; App. Napoli (Sept. 8, 1948), *Monitore* (1949) 117 emphasizes unity and indivisibility of the succession.

⁹⁰ Japan: IPL. art. 25.

⁹¹ Mexico: argument from C.C. Arg. arts. 12, 14, except domestic assets.

⁹² Morocco, French: IPL. art. 18; Spanish: Dahir 1913, art. 16.

⁹³ Netherlands: Hof Den Haag (Feb. 23, 1942), W. 1942, 327, aff'd H.R. (Jan. 8, 1943) W. 1943, no. 202; Hof Den Haag (Apr. 28, 1947) N.J. 1947, 743; cf. MEIJERS, W.P.N.R. 3494, 3555-8; VAN BRAKEL § 138; Official Com-

Philippines.⁹⁴

Poland.⁹⁵

Portugal.⁹⁶

Puerto Rico.⁹⁷

Spain.⁹⁸

Sweden (in relation to the non-Scandinavian countries).⁹⁹

Tunis.¹⁰⁰

Treaties: Austria-Poland,¹⁰¹ Austria-Germany.¹⁰²

France-Switzerland.¹⁰³

Italy-Switzerland (relating to jurisdiction).¹⁰⁴

Colombia-Ecuador.¹⁰⁵

With respect to double nationality, *apatrides*, national law divided according to local domicile, religion, race, or caste, the general principles apply. It is true that succession is not necessarily included, even in civil law countries, under the personal law. But in the divisions into classes

ment to the Benelux Draft p. 17 n. 32; DE WINTER, W. 1948, 405. The Hooge Raad maintains its own lack of jurisdiction to review non-enacted law, but certainly does no longer infer from art. 7 Alg. Bep. that immovables are subject to *lex situs* (H.R. (Apr. 5, 1907) W. 8524, Clunet 1910, 285, see the decision of Jan. 8, 1943) and is supposed to approve silently of the nationality principle.

⁹⁴ Philippines: C.C. art. 16, par. 2; SALONGA, Private International Law (Manila, 1952) 377.

⁹⁵ Poland: IPL. art. 28, par. 1.

⁹⁶ Portugal: Clunet 1913, 1355.

⁹⁷ Puerto Rico: C.C. art. 11, see EDER, *supra* n. 24.

⁹⁸ Spain: C.C. art. 10, par. 2; Trib. Sup. (June 6, 1873) Clunet 1874, 40, 82; TRIAS DE BES, DIP. (1932) 102 ff., (1939) no. 63ff.; 2 GOLDSCHMIDT 164 (against exceptions to the principle).

⁹⁹ Sweden: Law of March 5, 1937, (except within the Scandinavian Union).

¹⁰⁰ Tunis: Trib. Tunis (Mar. 31, 1899) Clunet 1900, 372; (Apr. 20, 1904) Revue 1905, 157; SLAMA, Conflits des Lois rel. aux successions ab intestat en Tunisie (th. Paris 1935) 61.

¹⁰¹ March 19, 1924, art. 28.

¹⁰² February 5, 1927, § 3 par. 1.

¹⁰³ June 15, 1869, art. 5, in contrast to the dual system of French conflicts law, PERROUD, Clunet 1934, 285.

¹⁰⁴ July 22, 1868; App. Ticino (June 21, 1950) 47 SJZ. 334 no. 118, 8 Schw. Jahrb. Int. R. (1951) 307.

¹⁰⁵ June 18, 1903, art. 23.

of persons such as in the now expired Egyptian system, succession pertained to the foreign or mixed jurisdictions.¹⁰⁶

3. Mixed systems

As mentioned earlier in this work,¹⁰⁷ the Swiss law applies Swiss substantive law to foreigners domiciled in Switzerland and subjects foreign domiciled Swiss citizens to the "foreign legislation" with two exceptions: their land situated in Switzerland is governed by the law and jurisdiction of their canton of origin, and "where these Swiss citizens according to the foreign law are not subject to the foreign law, they are subject to the law and jurisdiction of their canton of origin."

I described the latter provision as an admirable effort to avoid collisions regarding Swiss nationals abroad, as the statute applies Swiss law to them only if the law of the domicile so admits.¹⁰⁸ This was in conformity with the Swiss commentators;¹⁰⁹ in the meantime, the Swiss Federal Tribunal in a dictum formulated the rule expressly to the effect that "Article 28 NAG in the case of a foreign domicile of Swiss citizens concedes precedence to the *conflicts rules* there in force."¹¹⁰ This interpretation has been challenged recently on the ground that Swiss law should always govern when the law of the domicile *itself* does not claim to govern. The practical difference is significant when

¹⁰⁶ Similarly in the treaty United States-Persia of July 11, 1928, with respect to movables. See Vol. I, 104 ff.; Trib. Consulaire Français, Cairo (June 25, 1948) Clunet 1950, 608. On the present complicated law in Israel see MAKAROV no. 25; YADIN, 2 Am. J. Comp. L. (1952) 143.

¹⁰⁷ NAG. art. 28; Vol. I, 81, 115.

¹⁰⁸ I said "prescribes," which word was used in a somewhat related provision in Privatrecht. Gesetzbuch Zürich, § 4 par. 2.

¹⁰⁹ ANLIKER 2; SCHNITZER (ed. 3) 460, 465; VOUMARD 89: "das Recht welches das Konfliktrecht am Domizil anwendet."

¹¹⁰ BG. (Nov. 18, 1949) 75 BGE. II 280, 283 ff.: "Wohl räumt art. 28 NAG. bei ausländischem Wohnsitz von Schweizerbürgern den dort geltenden *Kollisionsnormen* den Vorrang ein."

the conflicts rule of the domiciliary state refers to a third law.¹¹¹ The result would be disastrous:

A Swiss citizen dying domiciled in England leaves immovables in England and France. Does the Swiss statute mean that the English immovable is governed by English law but the French immovable is governed by Swiss law?

Such far-fetched arbitrariness would not square with the comity inspiring the Swiss provision and the analogous German solution.¹¹²

Scandinavian Treaty. The Northern Union of 1933 calls for the law of the last domicile, if this has been in one of the states of the Union during five years; the draftsmen presumed that during this period the deceased would have adjusted himself to his surroundings. Otherwise, the national law at the time of the death generally governs, with various exceptions for different incidents of the succession.¹¹³

C. *Lex Fori*

1. As principle

Soviet Russia applies its own law to all but certain situations.¹¹⁴

2. In Favor of Domestic Beneficiaries

There exist powerful remainders of the most ancient conception that foreign inheritance laws should be ignored, and foreigners should not inherit. The Code Napoleon reserved rights in successions, as a part of "civic rights," to

¹¹¹ H. LEWALD in *Fragen des Verfahrens- und Kollisionsrechts*, Festschrift für Hans Fritzsche (Zürich 1952) 171 ff., ignoring the dictum by the Federal Tribunal of 1949.

¹¹² *Supra* 255, 256; see also LOUIS LUCAS, cited *infra* n. 137.

¹¹³ Scandinavia: Treaty of Nov. 19, 1934, art. 1, *cf.* UDDGREN, 92. Z. ausl. PR. 267 ff.

¹¹⁴ LUNTZ, *Meždunarodnoe častnoe pravo* (Moskow 1949) 320.

French citizens; aliens could not inherit. Moreover, it maintained the *droit d'aubaine, jus albinagii*, reserving the sovereign a part in foreigners' assets before they were allowed to emigrate.¹¹⁵

(a) *Reciprocity*. One popular modernization of the old xenophobia was the requirement of reciprocity for the application of foreign inheritance law. This idea¹¹⁶ is incorporated in the Austrian law of 1854,¹¹⁷ requiring equal treatment of Austrian movable estates with domestic estates as a condition of applying the national law to the movables of a foreigner domiciled in Austria. This exception recurs with various limits in modern codes¹¹⁸ and many treaties.

(b) *Prelèvement*. After the French Restoration, paradoxically, the spirit of the Revolution was more felt than during the Empire, but the Law of July 14, 1819, changed the old principle merely to the effect that domestic persons enjoy all rights derived from the domestic statute. The French courts are so intensely imbued with the force of the Law of 1819 that in the wide application of this *prelèvement*, heirs and legatees¹¹⁹ of French nationality¹²⁰ may claim so much of the value of assets situated in France as to provide them with what they would receive under French inheritance law from all French assets and foreign movables. The courts regard this rule as a means to

¹¹⁵ France: C.C. arts. 726, 912.

¹¹⁶ Formerly Prussia: A.L.R.I. 12, 40; Baden, Law of June 4, 1864, art. 2.

¹¹⁷ Austria: Verlassenschaftspatent (Gesetz über Verfahren ausser Streit-sachen) 1854 § 23.

¹¹⁸ Germany: E.G. BGB. art. 25 i.f.s. *infra* n. 130.

Liechtenstein: Law of Dec. 4, 1911, art. 2 (Austrian rule).

Mexico: C.C. art. 1328.

¹¹⁹ Not the "légataire universel," or a surviving spouse claiming under marital property law; BAUDRY LACANTINERIE ET WAHL, *Droit civil*, 1 Successions § 206; MAURY in PLANIOL ET RIPERT, *Successions* § 38.

¹²⁰ They must be citizens at the time of the testator's death, Cass. req. (May 10, 1937) Rev. crit. 1937, 677; Cour Paris (July 10, 1946) Rev. crit. 1947, 142.

protect a French national¹²¹ who would be heir or legatee according to the French law of succession.¹²² On the other hand, the right is accorded against all co-heirs, be they foreigners or Frenchmen.¹²³

Modern French scholars regard this "*éviction de la loi étrangère*" by the French system of devolution and the consequent split in the law of succession¹²⁴ with deep regret¹²⁵ as a "legislative mistake," strangely aggravated by the courts.¹²⁶

However, Belgium,¹²⁷ the Netherlands,¹²⁸ Argentina,¹²⁹ and other countries¹³⁰ have enacted provisions on this model. The German Code has adopted a more moderate but nevertheless cumbersome version, in case the deceased

¹²¹ CHARRON in 4 Foreign Law Series 111; 10 Répert. 280 ff.

¹²² Cour Paris (Jan. 6, 1862) S. 1862.2.338. A change of nationality does not extinguish this privilege, which brings the clash with foreign laws and even treaties to a climax; DELAUME, "De l'application et de l'interprétation des Traités . . . dans les relations franco-américaines," Clunet 1953, Nr. 3, § 16.

¹²³ Trib. Seine (Dec. 16, 1950) Clunet 1951, 906, Rev. Crit. 1951, 302; against the text of the Code, see LEREBOURS-PIGEONNIÈRE § 365.

¹²⁴ RENAULT, Clunet 1876, 21; NIBOYET, Manuel § 740 *bis*; ROBERT DENNERY, Le partage en droit international privé français (Paris 1935) 147.

¹²⁵ PLAISANT 246 f. discussing the French-Swiss Treaty.

¹²⁶ NIBOYET, 4 Traité 685 § 1254; LEREBOURS-PIGEONNIÈRE (ed. 6) 416; "institution exorbitante et archaïque."

¹²⁷ Belgium: Law of April 27, 1865, art. 4.

¹²⁸ Netherlands: Law of April 7, 1869, art. 1; but in KOSTERS' (636-642) interpretation the article serves only the case where a Dutch national suffers abroad because of his nationality.

¹²⁹ Argentina: C.C. art. 3470. ROMERO DEL PRADO, 2 Manual 182, observes that also a foreigner, son of a foreigner domiciled abroad, is privileged. Even the foreign *lex situs* of immovables is disregarded, Cám. civ. 2a (June 22, 1925) 57 Gac. Foro 98 Nr. 133.

¹³⁰ Chile: C.C. art. 998 for intestate succession.

Colombia: C.C. art. 1054.

Ecuador: C.C. art. 1056.

Honduras: C.C. art. 978.

Nicaragua: C.C. art. 1024.

El Salvador: C.C. art. 995.

Treaty of Lima (1878), arts. 20, 22. (MARTENS, Recueil (2d. ser.) vol. 16, 293).

was domiciled in Germany.¹³¹ Notably, under all these systems, nationals may claim their statutory portions, contrary to the applicable foreign law.¹³²

The Chilean Code, article 998, reserves "in the intestate succession of a foreigner" the rights of Chilean nationals to inheritance, marital portion, and aliments according to Chilean law. On the exact scope of this provision, at least three doctrines exist.¹³³ In any case, the Code is not content to maintain forced heirship as a territorial prerogative with respect to domestic assets.

In Brazil, as an exception to the domiciliary law, where a foreign domiciled person leaves assets in Brazil and a wife or children of Brazilian nationality, these share in the inheritance according to Brazilian law, if this law is more favorable to them than the foreign law.¹³⁴ The criticism directed against the corresponding provision in the older statute on account of its unprincipled invasion into the unity of the succession with no hope of foreign recognition, remains valid.¹³⁵

These nationalistic relics of old times were sharply criticized¹³⁶ and expressly rejected in the Hague drafts on succession.¹³⁷ The Report of the Commission of the

¹³¹ EG. BGB. art. 25, sentence 2.

¹³² France: Trib. Seine (Apr. 26, 1907) *Clunet* 1907, 1132, 1135.

Germany: RG. (May 31, 1906) 63 *RGZ.* 356; (Oct. 23, 1911) *JW.* 1912, 22; 24 *Z. int. Recht* 317; see also OLG. Hamburg (June 15, 1906) 18 *Z. int. R.* 146, where, however, German law applied also as *lex situs*.

¹³³ Chile: ALBÓNICO, 2 *Manual* 117; GONZALES ALVARADO, *supra* n. 73.

¹³⁴ Brazil: *Ley introd.* 1942, art. 10 § 1.

¹³⁵ BALMACEDA CARDOSO, *O Direito Internacional Privado* (São Paulo 1943) 151. The law of 1916 had been criticized also because the exception could work to the disadvantage of the Brazilian party, see BEVILAQUA, 1 *Codigo Civil Commentado*, Art. 14.

¹³⁶ LAINÉ, *Clunet* 1906, 990; MAURY ET VIALLETON in 4 *PLANIOL ET RIPERT* 61; BATIFFOL, *Traité* § 662 ff. KAHN, 13 *Z. int. R.* 342, followed by most German writers.

¹³⁷ Actes de la 3me Conférence pour le droit international privé, (1900) 58 ff., 122, 130; Draft 1904, art. 7, see Actes de la 5me Conf., p. 354; Draft 1925 art. 5 *ibid.* p. 283; Draft 1928 art. 5, Actes de la 6me Conf., p. 406.

Sixth Conference, after exhaustive discussion, summarized three methods of preferring the *lex fori* to the foreign law, repudiating all of them with the result that:

(1) A claimant may not invoke a domestic rule more favorable to him.

(2) Where the forum considers the foreign national law of the deceased as violating public policy, the ensuing complications prevail over the equitable considerations favoring the foreign law.

(3) It is absolutely objectionable that the *lex situs* should discard the national law in order to enforce its own order of distributing assets situated outside the territory.

The recent French draft maintains a right to *prélèvement* only where a French heir (that is, an heir according to the applicable law) is discriminated against solely because of his status as an alien.¹³⁸

Sometimes it is not clearly acknowledged where the obnoxious character of the criticized measure lies. No confusion should be made with similar results reached if the domestic law of the forum and a foreign law are in conflict, each considering itself competent to govern the same succession. Also in this situation, a system will try to defend itself by using the assets available in its territory.¹³⁹ This may be called a legitimate product of an unfortunate international conflict. But the *prélèvement* trespasses on a foreign law recognized as applicable.

(4) Special cases: Although the Hague and French drafts as well as the Restatement (§ 612) expressly re-

¹³⁸ Comité pour la Réforme du C.C., Travaux 1949-50, Projet, art. 55; 1 Am. J. Comp. L. 423; this restrictive interpretation, however, is doubted by LOUIS LUCAS, Rev. crit. 1952, 69. A similar restrictive meaning has been given in Luxembourg to the law of Feb. 29, 1872 by Trib. Diekirch (Feb. 22, 1900) 7 Pas. lux. 41.

¹³⁹ Benelux Draft convention, art. 16 (English translation in 1 Int. J. Comp. L. Q. (1952) 426).

serves public policy, it is gratifying that in the judicial approach remedial refusal of foreign inheritance law is exceptional.

It was only natural that old French decisions, when civil death had been abandoned in France, rejected similar foreign punishments¹⁴⁰ or that courts repudiate immoral dispositions.¹⁴¹

A doubtful problem, however, concerns the admission of binding agreements concerning inheritance.

Contractual disposal is recognized as an alternative to wills in a few systems, although, for the most part, it is prohibited. Even Sweden, conservative of old usages, forbids agreements to appoint an heir as well as pacts stipulating the succession of a third party.¹⁴² No doubt, if subjects of a country allowing the appointment of an heir by pact use this faculty within their own country, extra-territorial effect will in principle be accorded in other jurisdictions, according to their conflicts rules, provided that the subsequent succession is governed by the same law.¹⁴³ A pact between German spouses concluded in Germany is recognized in France with respect to movables, though not an immovable on French territory.¹⁴⁴ Opposition, in

¹⁴⁰ See French law of May 31, 1854, (abolition de la mort civile) and Cass. (Feb. 26, 1873) D. 1873.1.208.

¹⁴¹ Cass. (Jan. 24, 1899) Clunet 1901, 998.

¹⁴² Sweden: Law of April 25, 1930 (on inheritance pacts) § 3; PAPPENHEIM, 5 Z. ausl. PR. 306.

¹⁴³ England and United States: no case is known, but binding contracts to make a will are valid; see also BRESLAUER 194.

France: BATIFFOL, *Traité* 657 § 654, against contrary opinions.

Germany: Old practice rejecting the objection of public policy, see LEWALD 319; NUSSBAUM 364 ff.

Italy: Cass. Firenze (Dec. 12, 1895) S.1897.4.17.

Netherlands: Hof den Haag (Nov. 26, 1925) W.11623.

Sweden: Law of March 5, 1937, Ch. 1, § 7: "The question of the binding force of an inheritance pact with the deceased or a gift *mortis causa* is to be examined according to the law of the country, whose national the deceased was, when the transaction was made."

¹⁴⁴ App. Colmar (Feb. 19, 1949) *Nouv. Rev.* 1949, 222; *Rev. crit.* 1950, 52.

this case, under the theory of public policy seems to disappear. On the other hand, a prohibiting state seeks to prevent its subjects from disposing in this way everywhere. A pact between French spouses made in Germany is void in France.

Other questions, however, are not settled. In particular, whether the former-mentioned parties may transact abroad, is controversial. Certain laws exclude pacts in their territory absolutely. The adequate rule, making recognition likewise dependent on the law governing the succession of the deceased person, is formulated in modern laws.¹⁴⁵ The Czechoslovakian statute,¹⁴⁶ however, requires for capacity and intrinsic validity compliance merely with the national law of the first decedent, in other respects with both national laws at the time of execution.

We shall limit our discussions to wills. Here we shall encounter related problems concerning joint wills, renunciation of future shares, and promises to leave or not to leave by will.

¹⁴⁵ See preceding notes and *cf.* 2 BAR 340; KAHN, 2 Abh. 218, n. 140; 2 ZITELMANN 965; RAAPE 647.

Germany: KG. (April 10, 1941) Deutsches Recht 1941, 1611, no. 9: Dutch spouses domiciled in Germany concluded a "marriage and inheritance contract"; declared void under Dutch C.C. art. 977 ff.

¹⁴⁶ Czechoslovakia: PIL. (1948) art. 42.