

## CHAPTER 66

# Principles

### I. UNITY AND PLURALITY OF SUCCESSION

#### I. Historical Notes <sup>1</sup>

**B**ARTOLUS made the territorial scope of inheritance statutes dependent on their wording.<sup>2</sup> Later, the jurists discussed the nature of these statutes, to ascertain whether they were personal or real or determined by the place of death. Alberic de Rosate is credited with the merit of having first treated the problem of a unitary law of succession in the proper perspective. But *lex situs* for immovables was the prevailing teaching of the statutists, although the German "Mirrors"—the *Sachsenspiegel* and *Schwabenspiegel*—as well as decisions of the Parliament of Paris, 1392 and 1429, together with a host of learned writers <sup>3</sup> were partisans of the law of the deceased's domicile as a single law.

A decisive new impulse to create a unitary law governing succession came from Mancini who, as president of the Institute of International Law in Geneva, on August 31, 1874, urged universal and total acceptance of the national law. In the following period, the weight of the literature in all civil-law countries with great energy favored the

<sup>1</sup> Most valuable: FREYRIA, *La loi applicable aux successions mobilières* (thèse, Lille 1944); see also COULON, *Principes généraux sur la dévolution héréditaire* (thèse, Poitiers 1886, 1889) 35 ff.; for the latest periods see the book by DELAUME, *supra*, bibliography.

<sup>2</sup> BARTOLUS, *De Summa Trinitatis* VI § 42.

<sup>3</sup> In former centuries among the statutists, FROLAND, BOUHIER, and BOULLENOIS, as cited by WEISS, 4 *Traité* 535 ff.

national law as the single law of the decedent.<sup>4</sup> Most statutes, following the model of the Italian Code of 1865 and the German of 1896, adhered to this system.

However, opponents have been frequent in France, supporting the traditional split between immovables and movables.<sup>5</sup> During the Hague Conference of 1928, Professor Basdevant<sup>6</sup> declared it unacceptable that French land should be governed by a foreign law, a view traditionally shared by the French courts,<sup>7</sup> and that the national instead of the domiciliary law should govern movables. The Swiss delegate, Sauser-Hall, also advanced objections against the single national law. It was finally adopted by the majority, subject to exceptions, but the convention was never ratified, largely because of this division of opinions.

In the common-law countries, learned writers did and do acknowledge the theoretical superiority of the single law. Practically, however, the contrary firm position of the courts is usually regarded as reasonable—it is true, without much penetrating analysis of the situations arising from the coexistence of several laws governing the same succession. This is due to the prevalent attention given to probate procedure and the administration of decedent's estates, which includes the verification and discharge of debts. The problems produced by this system are different from ordinary choice of law, and the difficulties involved require remedies on a different basis.

The most acute controversy concerning this problem has been developing for a long time in Argentina. The case for

<sup>4</sup> See 2 BAR 304, and WEISS, 4 *Traité* 543, who was himself a most eloquent advocate of the single national law.

<sup>5</sup> There is a long list of French authors of the 19th century.

<sup>6</sup> *Comptes-rendus de la 6me Conférence* 277.

<sup>7</sup> Cass. (Dec. 8, 1840) S.1841.1.56 and many decisions leading to (May 7, 1924) *Revue* 1924, 406; (May 23, 1948) J.C.P. 1950.2.5241: irrespective of the testator's intention.

the single law (of domicil) has been fully pleaded by both exegetic explanation of the puzzling code provisions and rational appraisal of the contrasting theories. It is the prevailing scholarly view that there is a cleft between *catedra* and *jurisprudencia*, through the exclusive "fault of the courts."<sup>8</sup> Velez Sarsfield, the principal author of the code, according to his numerous notes, wanted to follow Savigny strictly.<sup>9</sup> But the code contains so many apparent contradictions that the courts may well shift a part of the "fault" upon the draftsmen.<sup>10</sup>

## 2. Rationale

Any legal conception of a hereditary unit is due to an advance of legal thought over the primitive separateness of assets and rights. The comprehensive bringing together of all chattels under the law of domicil, strongly emphasized in English law,<sup>11</sup> was in itself a lawyerlike achievement.

That in so many jurisdictions the process of forming a unit out of an aggregate halted without encompassing immovables, was caused, of course, by the high importance of the land and the political and economic interests of feudal

<sup>8</sup> ROMERO DEL PRADO, 2 Manual 187; see his excellent exposition 151-239; before him: MOLINA, *El Derecho Int. Priv.* (Buenos Aires, 1882) §§ 92, 103; WEISS-ZEBALLOS, 1 Manual de Derecho Internacional Privado (ed. 5, Paris, 1911) 345; 2 *id.* 367; 2 VICO (ed. 1927) 273 ff.; and see the impressive brief, published by DR. SANTIAGO BAQUÉ, Régimen sucesorio internacional según la ley Argentina (Buenos Aires, 1936). *Contra*: ALCORTA, 2 Curso de DIP. (ed. 2, Buenos Aires, 1927) 388; BIBLIONI, 4 Anteproyecto de Reformas al C.C. Argentino (1931) 26.

<sup>9</sup> Especially art. 3283 is taken as a clear declaration of the law of the last domicil. It was so understood by Trib. Seine (Apr. 17, 1912) Clunet 1913, 175, a foreign tribunal, but the only one to understand correctly as DÍEZ MIERES, *infra* n. 10, at p. 20 ironically states.

<sup>10</sup> ALBERTO DÍEZ MIERES, Las sucesiones en el Der. Int. Priv., Conferencia, 21 March 1927 (Madrid, 1927) repudiating the "preposterous" Montevideo solution, advocated an accord with Spain with adoption of the unitary law as in Spain, but with the domiciliary test as in Argentina.

<sup>11</sup> Lord Chancellor Westbury, in *Enohin v. Wylie* [1862] 10 H.L. Cas. 1, 11 E.R. 924.

and modern rulers. This basis of the several laws doctrine is intensely emphasized and glorified in France, while Anglo-American practitioners take the twofold system of their conflicts law in stride as the most natural thing.

There can be no hesitation in conceding the absolute superiority of the Roman-Byzantine concept and the refined modern doctrine of "universal succession."<sup>12</sup> It is a succession of heirs in the place of the deceased, continuing his rights as well as his debts, giving coheirs equal provisions, and including legatees and creditors in a comprehensively considered coherent system. Unwise as it was for the purpose of a world law to declare at the Hague simply that there should be unity of succession, the majority vote for this principle is well understandable.

What we have now is a stalemate with respect not only to unity and plurality, but also to connecting factors and accessory incidents. Every system in the checkered table believes in its own merits. All together have created chaos.

To be realistic, we must discard once more the subtle arguments, pompous phrasing, and disturbing dialectic of conflicts philosophy. Must the conflicts rules on inheritance really be territorial because of the sovereignty of the states over their territory?<sup>13</sup> Must they on the contrary apply the personal law of the deceased, because inheritance allegedly is still in close relation to personal and family relations?<sup>14</sup> Is it true at all that the continental Roman-

<sup>12</sup> On the concept of succession in the Italian Code, G. STOLFI, Note sul concetto di successione, in Riv. trim. dir. e proc. civ. 1949, 535.

<sup>13</sup> Thus NIBOYET, 4 Traité § 1318; LEREBOURS-PIGEONNIÈRE (ed. 6) 409 § 361.

<sup>14</sup> Thus with special regard to the national law, ANZILOTTI, in Actes de la 5me Conférence 203; Comment Benelux Draft p. 17; *contra* BASDEVANT in Actes de la 5me Conférence 202; and see App. Napoli (Jan. 23, 1924) Giur. Ital. 1924 I 2, 175; Italian citizens may divide foreign assets without regard to the national law of the testator, as only property, not status, capacity, or family law, is involved.

istic laws start from the personal sphere, whereas the common law of inheritance is allegedly built upon exclusive economic consideration of the assets?<sup>15</sup> A glance at the foregoing survey of systems with its shocking variety of combinations of "real" and "personal" statutes destroys the easy affirmation of any such pretense. History knew these ideas and overruled them.

In fact, all these systems are in force irrespective of reasons. Even though the Romanistic principle is sound in itself, its application to the divided world is not at all natural. When in England the land reform of 1925 abolished the dualism of descent and distribution to realty and personalty, many were expecting an automatic repeal of the dualism in conflicts law. Nothing of this sort happened, which is the more notable since the Anglo-American expansion of the *lex situs* is as extravagant in this field as in that of marital property.<sup>16</sup> That eight pieces of land need eight different systems of liberty or restraint in testation is bad enough in all jurisdictions of the split law; but that even the capacity to make a will and the formalities and construction of will are independent in principle in every jurisdiction where an immovable is found transgresses the borders of tolerable tradition.

A slight beginning of consciousness is noticeable. An enlightened dissenting vote of a strong minority of the Iowa Supreme Court has reminded us that the ancient difference between the will of real estate made before a court of law and the testament of personal property, pertaining to the ecclesiastical jurisdiction, has vanished; hence, a revocation of a will, involving movables and immovables,

<sup>15</sup> Theory of Dicey, much noted on the Continent. Another fruitless debate was conducted on the relation of universal succession to the personal law between 2 BAR 306, 623, and KAHN, 1 Abh. 38.

<sup>16</sup> *Supra* Vol. I, p. 337.

effective by the law of the domicile, ought not to be ignored at the situs of land, merely because its own domestic law requires a different mode of cancellation.<sup>17</sup>

On the other hand, the Hague, Benelux, and French drafts have been influenced by a doctrine of recent French writers, strongly narrowing the scope of national law: by these it is limited to the designation of the beneficiaries and their shares, and excludes administration, liquidation, and liability for debts, if not also partition as submitted to the *lex situs*.

To a critical mind and to a new legislator, the practical effects of the two fundamental systems should be decisive.<sup>18</sup> To this end, the results so far discernible will be collected here.

## II. PROBLEMS CONCERNING THE CONNECTING FACTORS

### I. Party Autonomy

Sometimes emphasis is laid upon the possibility that a person may select the law applicable to his succession by choosing his domicile—or for that matter, his nationality—or by buying land in an advantageous jurisdiction for purposes of succession. This we do not call autonomy of determining the law; it is individual freedom itself. The dubious French-Italian doctrine of *fraus legi facta*, fraud committed by using a foreign connection with the intention of evading the municipal law of the forum, was invoked where spouses abroad executed a joint will prohibited at

<sup>17</sup> Dissenting vote by Smith J. *in re Barries' Estate* (Iowa, 1949) 35 N.W. (2d) 658, 9 A.L.R. (2d) 1399 at 1407, citing *in re Goldsticker's Will* (1908) 192 N.Y. 35, and *Ellis v. Davis* (1883) 109 U.S. 485 (interesting but not really a support).

<sup>18</sup> In agreement, SAVATIER, *Cours de DIP.* (Paris, 1947) 304 § 436.

home; but only two French cases to this effect, both a century old, are known.<sup>19</sup>

A true option granted a testator, however, was once generally thought permissible. Some present enactments allow it under circumstances.

The outstanding provision of this sort is embodied in the Swiss law, directly intended to aid international relations. An alien domiciled in Switzerland is subject to Swiss inheritance law; nevertheless he may provide by will that his succession should be governed by his own national law (called *professio juris*).<sup>20</sup> It seems settled that by so doing the testator may exclude forced heirship granted by Swiss federal or cantonal law,<sup>21</sup> although other questions of construction are doubtful.<sup>22</sup> In the prevailing but controversial opinion, it is assumed that a Swiss national, domiciled abroad in a state recognizing the national (i.e. his Swiss) law of inheritance, may choose between the Swiss Civil Code and his cantonal law, particularly with respect to any differences in determining the forced heirs.<sup>23</sup>

In Peru, where domestic immovables are controlled by domestic law and movables by the law of the last domicil, the former code nevertheless allowed a foreigner to dispose at his choice of a "big business enterprise" in Peru under his national law<sup>24</sup> and of foreign-situated assets under either

<sup>19</sup> ANDRÉ TIRAN, *Les successions testamentaires en DIP.* (1932) 142 ff. at 154, in addition to the long-condemned decisions operating with fraudulent though serious change of nationality; *cf., supra* Vol. I, pp. 507-510.

<sup>20</sup> NAG. art. 22.

<sup>21</sup> SCHNITZER (ed. 3) 468; PAUL FISCHER, 64 *Z. Schweiz. R.* (1945) 129, 132. That, as Schnitzer contends, there may be a *renvoi* from the national law to the domiciliary Swiss law, sounds inconsistent with the apparent meaning of the statute.

<sup>22</sup> VOUMARD, *Transmission* 51-81 enumerates three theories on the scope of the rule and numerous controversies.

<sup>23</sup> See FISCHER, *id.* 132 against SCHNITZER (ed. 2) 428, (ed. 3, 472).

<sup>24</sup> Peru: C.C. (1852) art. 694; CARLOS GARCÍA GASTAÑETA, *Derecho Int. Priv.* (1930) 244 contended that an analogous rule was to be inferred for intestate succession; this seems to mean that the foreigner may write a declaration (or only a will?) so disposing.

his national law or the *lex situs*.<sup>25</sup>

Conversely, the Decedent's Law of New York,<sup>26</sup> continuing a former provision of the Code of Civil Practice, is always satisfied when the New York law is chosen to govern an inheritance:

"Whenever a decedent being a citizen of the United States or a citizen or a subject of a foreign country, wherever resident, shall have declared in his will and testament that he elects that such testamentary dispositions shall be construed and regulated by the laws of this state, the validity and effect of such dispositions shall be determined by such laws."<sup>27</sup>

The Treaty between Colombia and Ecuador permits the testator to choose national or domiciliary law.<sup>28</sup>

Finally, among the peculiar rules with which American statutes abound, there is a provision in Maryland that where the testator "originally" was domiciled in this state, his succession is governed by Maryland law, unless he should "expressly declare a contrary intention in his will or testamentary instrument."<sup>29</sup>

Apart from these exceptional legal rules, certainly freedom to dispose by will depends on the leeway left by the law governing succession. Lists of imperative rules in the national laws limiting this freedom were collected at the fifth Hague Conference.<sup>30</sup> Nevertheless, some eminent courts occasionally still separate on the old lines, resorting to the presumptive intention of the testator not only in

<sup>25</sup> Peru: C.C. (1852) art. 693; 27 *Anales Judiciales de la Corte Suprema de Justicia* (Peru, 1931) 24.

<sup>26</sup> Decedent Estate Law, § 47; cf. Davids N.Y. Law of Wills § 531.

<sup>27</sup> An analogous provision respecting movables was contained in the former C.C. of Mexico, art. 3286.

<sup>28</sup> Art. 18; cf. Cock, *Tratado de D.I.P.* (ed. 2), 209.

<sup>29</sup> Md. Publ. Gen. L.: art. 93 sec. 344. Nevertheless, this statute applies only if the will is submitted in Maryland for original probate.

<sup>30</sup> Documents 1925 p. 89, 185, 358, 502 ff.; for France see LEREBOURS-PIGEONNIÈRE (ed. 5) 501 § 370.



construing his will, which is natural,<sup>31</sup> but also in determining the applicable law. There are recent examples.<sup>32</sup>

## 2. Concept of Immovables

The general principle that characterization of things connected with land as movable or immovable is referred to the law of the place where the land is, has been discussed above (Chapter 54).

*Illustration:* The granddaughter of the famous writer George Sand, married to an Italian, bequeathed the castle of Nohant in France with its inventory and an amount of money to the French Academy to maintain a memorial for her grandmother. The French court, following the French law of situs, considered the furniture and the money as immovable and therefore subject to French law.<sup>33</sup>

<sup>31</sup> Also the recent decision *Amerige v. Attorney Gen.* (1949) 324 Mass. 648, 659, 88 N.E. (2d) 126 (against the rule that a power of appointment is controlled by the law of the donor, the perpetuity rule of Massachusetts is applied because of the presumptive intention of the donor) is explained by the specific nature of the matter, *infra* p. 352.

<sup>32</sup> England: *Re Allen's Est.* [1945] 2 All E.R., a most objectionable decision, criticized by MORRIS, 24 Can. Bar Rev. (1946) 528.

France: Cour Paris (Apr. 24, 1913) Clunet 1913, 1276; Mme. Nazare-Aga, wife of a Persian diplomat, was born in France, educated there and did not leave that country. Until near her death she only knew French law and usages. Her act was evidently a holographic will according to the French C.C. The court refrained from attributing her a French domicile, but nevertheless presumed her intention to apply French law and granted reserved portions to her children under French law.

Germany: Bay. Ob. LG. (Jan. 3, 1934) IPRspr. 1934 Nr. 24 assumed that the testator may choose the law and in absence of his choice *lex situs* governs. *Contra:* ECKSTEIN, 6 Giur. Comp. DIP. 229 Nr. 189.

Netherlands: Hof Amsterdam (July 11, 1946) N.J. 1947 no. 66, affirmed H.R. (March 21, 1947) W. 1947, 382, applied the law of the Netherlands where the testator was formerly a national from birth and had his last domicile, because of the particular circumstances of the case.

Therefore, recognition to an adopted child was refused. The H.R., however, expressly stated (Jan. 8, 1943) W. 1943, 202, that autonomy of the testator is limited by the applicable law.

It is interesting that the Kammergericht in Berlin (April 10, 1941) Deutsches Recht 1941, 1611, HRR. 1941, 846, had understood the Dutch law just as the Amsterdam court did, in the case of a Dutchman long domiciled in Germany.

<sup>33</sup> Trib. civ. La Châtre (July 5, 1910) Clunet 1911, 588.

Exceptions are made by the provisions in Chile, Argentina, and Brazil, assimilating movables in a "permanent" situation to immovables<sup>34</sup> in foreign countries. The French draft, submitting a *fonds de commerce*, an established business, to the *lex situs*,<sup>35</sup> applies the same treatment also to inheritance law.<sup>36</sup> The reporter proposed special contacts also for patents, trademarks, designs and models, maritime and fluvial vessels, and aircraft, but the committee declined to institute so many separate successions.<sup>37</sup>

### 3. Renvoi

The Hague Convention on renvoi,<sup>38</sup> drafted at the Conference of 1951, is much limited in scope. Nevertheless, it affirms the renvoi principle in its oldest and most important application, viz., to the conflict between the principles of the national law and the law of the domicil. It shows also the direction in which further development must be sought.

Since the first volume of this work<sup>39</sup> called for a sound positive stand in construing references to foreign law, world opinion has made a highly gratifying progress, leaving behind all the sterile negation of renvoi in the universal literature. Even the adversaries concede more and more "exceptions" to their denial of renvoi.

True, while the new approach has been initiated in the Netherlands, where rejection of renvoi was practically unanimous,<sup>40</sup> some writers dwell on the old futile arguments, extolling the pretended wisdom of their conflicts

<sup>34</sup> *Supra* Ch. 54.

<sup>35</sup> French Projet, art. 48.

<sup>36</sup> *Id.* art. 54.

<sup>37</sup> *Travaux de la Commission de Réforme du Code Civil (1949-1950)*, 635-637.

<sup>38</sup> Draft Convention to determine Conflicts between the national law and the law of the domicil, Engl. tr. in 1 *Am. J. Comp. L.* 275, 280-282.

<sup>39</sup> Vol. I, p. 79 ff.

<sup>40</sup> KOSTERS 135; MULDER (ed. 2) 94; MEIJERS W.P.N.R. 3555-3558; HIJMANS 157; VAN BRAKEL 66.

rules allegedly pointing directly to some internal law. More regrettably, a number of delegates, for one reason or another, refrained from voting, although it was carefully explained that, far from adopting the "theory of renvoi," the draft merely offered practical uniform rules indicating a specific law applicable, not the supremacy of foreign conflicts rules defeating those of the forum. This dreaded "theory of renvoi," especially in the form proclaiming total renvoi in all situations, may once have been favored by writers, but it now exists exclusively in the imagination of the anti-renvoyists. What writers of recent times who advocate acceptance of renvoi have had in mind has been exactly what the draft begins to teach, a sensible construction of the forum's own conflicts rules, certain complements to them, attaining uniformity, and references to foreign law just where they are sound.<sup>41</sup> The draft could very well call this by its name. The decisive point is whether a court insists on the literal or even narrow-minded interpretation of its conflicts rules at the cost of reasonableness, or looks to the international purpose of these same rules.

Perhaps it is allowed to hope, despite the remaining reluctance of some eminent scholars to abandon their old dogmas, that the field may be considered free for an unbiased discussion of the cases in which renvoi is sound and in which it is not.

We have to review the topic here, because the law of succession furnishes the most frequent field for renvoi. Of the numerous English cases in point, all but two involve succession.<sup>42</sup> Apart from the special rules on formal validity of wills, only two types of conflicts rules are in question,

<sup>41</sup> It may specifically be referred to the writings of MELCHIOR, RAAPE, GRISWOLD, and my own, as well as in this respect to PAGENSTECHE (cf., 1 Am. J. Comp. L. 166).

<sup>42</sup> CHESHIRE (ed. 4) 90.

the personal law, as tested either by nationality or domicile, and the law of immovables as it is a part of a unitary governing set of rules or an independent factor. The Hague draft deals merely with the first problem.

### *The Personal Law*

The draft provides as follows:

Article 1. When the State where the person interested is domiciled prescribes application of the national law, but the State of which such person is a national, prescribes application of the law of the domicile, each contracting State shall apply the provisions of the internal law of the law of the domicile.

Article 2. When the State where the person interested is domiciled and the State of which such person is a national, both prescribe application of the law of the domicile, each contracting State shall apply the provisions of the internal law of the law of the domicile.

Article 3. When the State where the person interested is domiciled and the State of which such person is a national both prescribe application of the national law, each contracting State shall apply the provisions of the internal law of the national law.

Article 4. No contracting State is obligated to apply the rules prescribed in the preceding articles, when its rules of private international law prescribe application in a given case neither of the law of the domicile nor of the national law.

Article 5. Domicile, for the purpose of the present Convention, is the place where a person habitually resides, unless it depends on that of another person or on the seat of an authority.<sup>43</sup>

The preference given to the law of the domicil confirms the practice of the German, French, and Swiss courts, contrary to all opinions still fascinated by the virtues of the

<sup>43</sup> Translation by 1 Am. J. Comp. L. 280.

nationality principle. E. M. Meijers has rediscovered a passage of Mancini's work in which the necessary concessions to foreign references to the law of domicil are masterfully stated.<sup>44</sup>

"Further references" are absolutely inevitable, if "each contracting state" has to follow the lead of the two nearest involved conflicts laws. The draft has not adopted the often repeated proposal that transmission of reference should depend on the consent of the two laws to which the reference would lead. In fact, such coincidence, desirable as it is in the interest of harmony, cannot be required for the purpose of renvoi, which in my opinion is simply the carrying out of the first and principal reference, that is, the reference contained in the conflicts rule of the deciding judge. What happens, otherwise, is illustrated by the French draft which states:

"If the foreign law applicable according to the French conflicts rules does not consider itself applicable, the foreign law, if any, to which this law refers shall be applicable if it considers itself applicable, otherwise French law shall apply."<sup>45</sup>

A French critic<sup>46</sup> refutes this doctrine with this illustration: If an Englishman died domiciled in Greece, and Greece refuses to accept the English reference, French courts may nevertheless have to apply Greek law, or (not very justifiably, in my opinion) English law; that French law should be substituted is perfectly arbitrary.

The favorite examples of the literature would be decided with more assurance.

*Illustrations:* (i) A Danish national lived and died in Brussels, but made his last will in the Netherlands before

<sup>44</sup> MEIJERS, *Recueil de lois modernes concernant le DIP.* (1947) 95.

<sup>45</sup> Art. 20, Engl. tr. by 1 *Am. J. Comp. L.* 420.

<sup>46</sup> LOUIS-LUCAS, *Rev. crit.* 1951 at 409.

a Dutch notary. The appeal court of The Hague, in a recent decision,<sup>47</sup> stated that a Danish court would apply Belgian inheritance law without accepting renvoi. Although the Belgian court of the domicile would accept the renvoi, the Dutch court felt forced by the Dutch legislation to apply Danish law. The Dutch legislator has defined his view on the applicable law, and foreign rules could not be obeyed.

The Convention would—and in the Dutch case, we hope it will—remedy this abstruse alleged legislative situation.

(ii) An English testator dies domiciled in Italy, leaving movable property in Italy. At present, the Italian courts reject the reference from the national state, England, to the domicile, Italy; hence, they apply the English law of inheritance. The English courts follow. In the same case, with France instead of Italy, at present, the French courts “accept” the English renvoi to the French domicile; the English again follow.

In the future, Italian courts would share the French attitude applying their own law of succession; the English courts would not have to ascertain the foreign view concerning renvoi and would always apply the law of the domicile. Moreover, where assets of an Italian-domiciled testator are situated in France, the French courts, thus far so adverse to transmissive reference,<sup>48</sup> would apply Italian rather than English law.

(iii) A Danish testator, domiciled in Italy, leaves movables in England and Germany. At present, Danish courts refer to Italian law, Italian courts to Danish law; both, allegedly, without admitting renvoi. Third states must divide according to their principle: England going the Italian way reaches the Danish inheritance law;<sup>49</sup> Germany

<sup>47</sup> Hof Den Haag (Feb. 23, 1942) W. 1942 no. 327.

<sup>48</sup> Vol. I, p. 78 n. 33; CHARRON, in 4 Cahiers de Droit Etranger (ed. fr., 1934) 138 claims that App. Alger (Jan. 12, 1931) Gaz. Pal. 1931.1.581 contains no true application of transmissive reference; but see BATIFFOL, *Traité* 331 on Cass. (Nov. 7, 1933) S.1934.1.321, Rev. crit. 1934, 440; Clunet 1935, 88.

<sup>49</sup> Cf. Re Achilopoulos [1928] Ch. 433.

after the Danish model applies Italian law—we are in the paradise of no-*renvoi*.

In the future, in both jurisdictions, Italian law would govern the entire succession, wherever the movables may be and whatever court would decide.

(iv) An Englishman dies domiciled in Boston, Massachusetts. This case has been used as proof that the English foreign court theory would break down if both jurisdictions involved attempted to apply it.<sup>50</sup> The case is expressly decided by the draft to the same effect as in my propositions; Massachusetts law, of course, governs. The English court theory does not break down but is confirmed if all courts adhering to the domiciliary principle adopt it in relation to jurisdictions of the nationality principle. Among themselves no conflict exists, except when an American court would assume a domicile not recognized in England, a disharmony independent of *renvoi* and remedied by another section of The Hague draft.

If *renvoi* is entirely rejected, the results are indicated by a recent Swedish decision.

(v) An immigrant to the United States lost his Swedish nationality without acquiring another and died domiciled in the state of Washington. The Swedish Supreme Court, influenced by a review article of Undén, reversed its stand and rejected *renvoi*. Hence, it applied the inheritance law of Washington even to Swedish land, against the conflicts law of Washington and the inheritance law of Sweden.<sup>51</sup>

### *Reference to Lex Situs*

In the Hague Conference of 1951, it was instinctively felt what is needed. The Italian delegate Perassi criticized

<sup>50</sup> Thus LEWALD, in *Festschrift f. Fritzsche* (Zürich, 1952) at 170 note, using a word used by M. Wolff against universal use of this theory. I take the opportunity to direct the author of that critical note to the list in Vol. III (1950) p. 593 correcting Illustration (c) in Vol. I, p. 79, where the typed manuscript was confused by three misplaced words.

<sup>51</sup> Sweden: S.Ct. Plenum (Feb. 28, 1939) *Nytt Juridiskt Arkiv* 1939 I p. 96, 13 *Z. ausl. PR.* (1942) 843.

the result of the draft in Italy: the courts would apply Italian inheritance law to the movables of a domiciled Englishman, according to the uniform rules, but would continue to apply English inheritance law to his Italian immovables, according to their anti-*renvoi* doctrine. Sauser-Hall replied that this is the consequence of the restriction of the draft to the conflict between domicile and nationality.<sup>52</sup> Time and again, it is the rejection of *renvoi* that troubles the solution.

On the other hand, it creates bad confusion if a reference to the *situs* is treated as if it were an agreement to the general conflicts law of the *situs*. This regrettably has been done by the English courts and is the main basis for the argument that *renvoi* leads to a vicious circle.

It may be recalled that the German Code by Article 28 of the EG., and its usual construction,<sup>53</sup> concedes that land situated in a foreign state is controlled by this state through *special* rules of descent and distribution. Between the United States and Germany, therefore, no conflict exists where a German testator leaves an immovable in American territory. Succession is governed by the law of the *situs*. Neither does a conflict exist in the inverse case, but this is due to *renvoi*; if an American testator leaves an immovable in Germany, American conflicts law refers to the German law, which *renvoi* back is accepted in Germany (EG., article 27). Hence, all third states, whether primarily referring to American or German law, are likewise directed to the German substantive rules.

Although adopted in the Swedish law on conflicts, this expressly stated difference is not shared anywhere else. An Italian court of appeals has rejected its very idea.<sup>54</sup>

<sup>52</sup> Actes de la 7me Conférence, 234 ff.; SAUSER-HALL, 8 Schweiz. Jb. Int. R. 121 ff.

<sup>53</sup> *Supra* Vol. I, 342; *supra* Ch. 65 n. 68.

<sup>54</sup> Italy: App. Napoli (Nov. 8, 1948) Mon. Trib. 1949, 117; see DE NOVA, Rev. crit. 1950, 351 (Offprint p. 31).



But the question, indeed, has never been examined. Where a unitary system and a special order of succession conflict, which should be granted preference? The German solution is based on the commonly accepted justification of *lex situs*—the state where the property lies commands respect—and warns against insoluble conflict. At the same time, this faculty of the situs, in fact, guarantees a uniform solution for all interested jurisdictions; a vicious circle is avoided.

It is submitted that the same result ought to be reached in both jurisdictions, on the one hand, by a reasonable construction at the forum of the reference and, on the other hand, by acceptance at the situs of the reference, that is, renvoi to the situs. We may remember that it is not an entirely new suggestion that *lex situs* may not refer to the whole law of the situs.<sup>55</sup>

*Illustrations:* (vi) An American citizen, domiciled in England, leaves a house in Norway. At present, Norway applies English inheritance law to all assets of the decedent. England and the United States primarily refer to Norway, but the English courts accept the Norwegian reference back.<sup>56</sup> A French court, if really excluding further reference, would probably have to look to "American" inheritance law (if they can find one).

But why should Norway, on the ground of the domiciliary principle in England, insist on the unitary doctrine in the teeth of the English system? On the other hand, Norway converted to renvoi should not be induced to carry this too far.

<sup>55</sup> GRISWOLD, 51 Harv. L. Rev. at 1196. My own suggestion, 4 Int. L. Q. at 406, "not understood" by LEWALD, *supra* n. 50 at 168, was moreover preceded by 4 FRANKENSTEIN 306.

<sup>56</sup> Re Trufort (1887) 36 Ch. D. 600; Re Duke of Wellington (1947) Ch. 506; CHESHIRE (ed. 4) 91 sub III accepts just this point among his now approved cases of renvoi.

United States: Restatement § 8, Re Schneider's Estate (1950) 96 N.Y.S. (2d) 652, much discussed with very questionable positive assumptions.

(vii) An American domiciled in England leaves a house in Rapallo (Italian Riviera). At present, England refers to Italy which refers to the United States which is said to refer back to Italy and so forth.

Here, Italy, as Norway in illustration (vi), is allowed to ruin a sensible order of succession by imposing its unitary system on the succession of an *American* citizen, domiciled in *England*. This result will be corrected, when Norway and Italy understand that their reference to the domicil or national law, respectively, means full abandonment of the treatment of succession, and England and the United States understand that they do *not* refer to the unitary systems of succession concerned.

(viii) A naturalized American citizen, having retained Swiss citizenship, dies at his last domicil in Illinois. He leaves a bank account in Switzerland and real property in Switzerland and New York. Two decisions of the Swiss Federal Tribunal<sup>57</sup> and the recent decision of the New York Surrogate *in re Schneider*<sup>58</sup> deal with these situations. They were to be decided on the ground of the American-Swiss treaty of 1850, as was recognized by the Bundesgericht, although disapproved by the Surrogate, with the result that the bank account and the American real estate were to be governed by the law of Illinois and the Swiss land by Swiss law.<sup>59</sup> If no treaty existed, the Swiss courts still would be entitled to treat the decedent as a Swiss subject<sup>60</sup> and apply the provision of their law of 1891 that succession to Swiss real property of Swiss citizens domiciled abroad is controlled by the law of the *Heimatkanton*.<sup>61</sup> In either case, the New York court erroneously assumed that renvoi to the domicil applied; but its decision together

<sup>57</sup> BG. (Nov. 24, 1883) *in re Wohlwend*, 9 BGE. 507, 509, 513, concerning the bank account; BG. (May 5, 1898) *in re Gemeinde Feldis*, 24 BGE. I 312, 319 concerning American and Swiss real estate; App. Bern (March 5, 1885) 21 Z. Bern J.V. 360: forum rei sitae for immovables.

<sup>58</sup> *In re Schneider's Estate* (1950) 96 N.Y.S. (2d) 652.

<sup>59</sup> See ANLIKER at 115; SCHNITZER, 501; NUSSBAUM, American-Swiss PIL. 1951, 21-23.

<sup>60</sup> *Supra* Vol. I, 81.

<sup>61</sup> NAG. art. 28 (1).

with another, likewise objectionable, holding of the Second Circuit Court, show nevertheless the changed climate.<sup>62</sup>

On the other hand, the reference to *lex situs* does include certain further references. In continental literature it is often forgotten what a healthy function in the American law is exercised by the references in the statutes of the situs to *lex loci contractus* and *lex domicilii* for validating the form of wills; an analogous recognition of foreign law is advisable for capacity to execute a will. These conflicts rules of the situs and whatever other foreign validating law may be invoked there, deserve application in any court applying *lex situs*. They are part of the "special law" in the right meaning of the German article 28 EG.

It is not suggested, therefore, that *lex situs* exclusively means substantive rules. They are the principal object, however.

*Renvoi*, as I understand it, is not a mechanical device. It serves to carry out the conflicts rule of the *forum*, and must not blindly run into any complications conditioned by the coincidence of foreign conflicts rules. Since our conflicts rules, commonly and fortunately, fail to explain their content, they permit interpretation in favor of a modicum of harmony. However, the harmony has to be sought in the spirit of the referring rule. This is in the first place the conflicts rule of the *forum*. If it refers to the national law in personal matters or in the matter of succession *in toto*, the entire conflicts law of the national state is invoked, and its further reference to the *lex situs* is susceptible of adequate application. Exactly the same is true where the *forum* is dedicated to the principle of the law of domicil, except that a reference back on the ground of the nationality principle must be eliminated, as the Hague Convention has well perceived.

<sup>62</sup> *Mason v. Rose* (C.C.A. 2d, 1949) 176 F. (2d) 486; criticized by Jerome Frank J. dissenting; see also BRAUNSCHWEIG, 31 Boston U.L. Rev. (1951) 74.