

CHAPTER 68

Substantive Requirements of Wills

I. TESTAMENTARY CAPACITY

CAPACITY of a person to make a will at all is distinguished from the right to dispose of assets free from restraint, which will be discussed separately.

The importance of this topic has been greatly diminished by the emancipation of married women. But the great differences in fixing the age at which juvenile persons may leave property by will, which varies from full age as in common law down to 12 years, according to sex, married status, and country, produce some conflicts.¹ Mental incompetence, prodigality, and undue influence raise well-known conflicts and questions of evidence.

The doctrine is split into three systems.

I. Law of Succession

At common law, capacity as an incident of the formation of a will is governed by the same law governing individual succession. This approach is congruous to the common-law treatment of formalities and, in fact, appears in old English decisions and in Beale's teaching: capacity is controlled by the *lex situs* respecting immovables² and by the

¹ E.g., Spain C.C. art. 663, 1°: 15 years; Germany Wills Act § 1 par. 2: 16 years; England: 21 years; United States for bequests 18 years, for devise 21 years, or no difference.

² England: *Coppin v. Coppin* (1725) 2 P. Wms. 291, 24 E.R. 725; *Re Hernando, Hernando v. Sawtell* (1884) 27 Ch. D. 284.

United States: Restatement § 249a; *Carpenter et al. v. Bell et al.* (1896) 96 Tenn. 294, 34 S.W. 209.

law of the domicile at the time of death³ respecting movables.

In the United States, the principle that the law of the last domicile governs capacity to dispose of personal property, is confirmed in case ancillary probate is granted upon the theory that a previous grant of probate by the court of the last domicile is conclusive. Such recognition is at times extended by the court of situs of immovables, and even a probate by a nondomiciliary may be held conclusive.⁴

An analogous reference to the national law as of the time of death is not entirely alien to civil-law authorities.⁵ Accordingly, the *lex situs* as of the time of death applies to every asset under the Montevideo Treaty.⁶

Once, Theobald wondered whether it was not a "ridiculous idea" that the testator's ability should depend on a domiciliary law unknown to him at the time of executing his will.⁷ It is now generally felt that a change of domicile or nationality after the execution should not invalidate a will valid when it was made.⁸ Hence, it has been sought to adopt the common-law rule to the effect that the law of the last domicile merely determines whether the testator had capacity at the time of execution.⁹ An identical sug-

³ In the goods of Maraver (1828) 1 Hagg. Eccl. 498; DICEY rule 179. United States: STORY § 468; Shute v. Sargent (March 17, 1893) 67 N.H. 305, 36 Atl. 282; Woodward v. Woodward, 2 BEALE Cases 794; Restatement § 306 b.c.

Quebec: C.C. art. 6.

⁴ See *infra* 419 ff.

⁵ Austria: for immovables, EHRENZWEIG I 1 (1951) 121.

Germany: EG. BGB., arts. 7 and 24, have been construed to this effect by 4 FRANKENSTEIN 419; RAAPE, 2 D. IPR. (ed. 3) 266; ARNDT in ERMAN, BGB. Komm. (1952) art. 7, n. 3a.

Spain: LASALA LLANAS 252, comment to art. 128.

⁶ Art. 44.

⁷ THEOBALD, On Wills (ed. 10) (Morris) 3.

⁸ BUSTAMANTE, 3 DIP. (ed. 3, 1943) 144 against RODRIGUES PEREIRA.

⁹ 4 BURGE (ed. 1) 580; in his example, capacity at the time of execution was lacking if judged under the law of the last domicile.

gestion has most recently and surprisingly been made relative to German law.¹⁰

2. Personal law

Civil law has traditionally classified capacity as a matter of the personal law, which extends to the making of a will.¹¹ This, again, implies an exclusive view to one moment, the time of the execution.¹² In this order of ideas, the German Code provides an exception for a testator who was an alien when he made a will and had not reached the age prescribed by his national law, but later acquired German nationality and was of full age under German law at death.¹³ That this exception should be enjoyed only by naturalized subjects of the forum, has been criticized as well as advocated.¹⁴

In England, Lord Kingsdown's Act would provide a correction, if it were considered applicable not only to form but also to capacity, which remains controversial.¹⁵ But recent writers, despite this possibility, think that a will

¹⁰ NEUHAUS, "Die Behandlung der Testierfähigkeit im deutschen IPR.," 18 Z. ausl. PR. (1953) 651, 656.

¹¹ Quebec (domicil): C.C. art. 835, cf. 3 JOHNSON 66, 69 f. (also for immovables).

Austria: A. BGB. § 575.

Czechoslovakia: IPL. § 41.

France: 10 Répert. 520.

Germany: EG. BGB. art. 7.

Italy: C.C. 1942, Disp. Prel. art. 17; MONACO, Manuale 565 against SCERNI 65.

Poland: IPR. § 29.

Siam: PIL. art. 39.

Spain: C.C. art. 9.

Sweden: PIL. § 2.

Switzerland: NAG. art. 7 par. 4 (for Swiss nationals).

Argentina: (domicil) C.C. art. 36, 45, 3611; 3613. Código Bustamante: (personal law) art. 144.

¹² WEISS, 4 Traité 671 n. 3; 10 Répert. 522 no. 140. Argentine C.C. art. 3613 expresses this contrast to "intrinsic" requirements art. 3612.

¹³ EG. BGB. art. 24 par. 3, sent. 1, phrase 2; Testamentsgesetz July 31, 1938, §§ 2, 33 par. 2.

¹⁴ Criticism by LEWALD 307; *Contra*: WOLFF, D. IPR. (ed. 3) 197.

¹⁵ See WORTLEY, Recueil 1947 II at 68, and cited authors. For negation: CHESHIRE (ed. 5) 680; FALCONBRIDGE, Conflict 464.

cannot be validly executed by a person lacking capacity at the time of execution. The applicable law in this view is necessarily the law of the domicile at the time of execution.¹⁶

3. In the variety of solutions, usual in conflicts law, while some English writers state the common-law rule that the domiciliary law of the time of death governs¹⁷ and preference goes to the time of execution, there are those who advocate cumulating both requirements,¹⁸ but it was stated long ago that modern private laws are loath to invalidate a will only because of an incapacity subsequent to execution.¹⁹

4. It is submitted that a fourth solution is available: *vel* instead of *et*—why not recognize a will made by a testator considered capable under his personal law either of the time of execution or at his death, in the latter event on the ground that he chose to let his will stand?

Assuredly, provisions recognizing foreign inheritance laws should be construed as including capacity to testate.

Illustration. A mentally insane person executes a will in a lucid interval. If he is a German national, he has no capacity under BGB. § 7, although he can dispose of his English immovables according to English law. The German statute subjecting English land to English inheritance law (EG. BGB. article 28) ought to be interpreted as derogating from EG. BGB. article 7.²⁰

II. OTHER SUBSTANTIVE REQUIREMENTS

The above mentioned conclusive force of a foreign probate judgment, if recognized, includes not only mental incapacity

¹⁶ CHESHIRE (ed. 4) 520; MORRIS in DICEY (ed. 6) 819 and new rule 179; GRAVESON (ed. 2) 240 would prefer this rule.

¹⁷ GRAVESON (*l.c.*) who invokes *In the Goods of Maraver* (1828) 1 Hagg. Eccl. 498.

¹⁸ NIBOYET, 4 *Traité* (1947) § 1340.

¹⁹ KAHN, 2 *Abh.* 204 n. 33.

²⁰ Quite as proposed *supra* 292, n. 19 respecting the rule on form, EG. art.

but also undue influence,²¹ fraud, and presumably all legal causes of lack of consent. It does not include the testator's power of disposal.²² Apart from this exceptional element, the law of succession governs.

Civil-law statutes, reserving the personal law as the test of bodily and mental capacity, distinguish invalidity because of error, fraud, duress, immorality, or illegality.²³

The area, thus differently described, is governed by the common principle that the law of the succession controls. In consequence, the technical effects of failure to comply with the intrinsic requirements of wills—nullity, relative nullity, voidability by action, collateral attack—are specified by the same law. This principle also furnishes the natural basis for all causes of restraints on alienation by will to be discussed hereafter.

Foreign laws are inclined to deny all effect to laws that govern succession if an essential requirement, not relating to form or capacity, of the governing law is missing.²⁴

Illustrations. (i) A Swiss citizen, domiciled in France, left a son whose legitimacy was contested. An English court referring first to French and further to Swiss law, followed a Swiss decision acknowledging the share of the son; this was not on the ground of *res judicata*, but because the force of the last domicil (in France) was expressly recognized.²⁵

(ii) A testator, domiciled in Ireland, set up a testamentary trust, disposing that a leasehold on English land should be converted into money. The English accumulation law, the *lex situs*, prohibiting extension of the limitation beyond

²¹ E.g., *Crippen v. Dexter* (1859) 79 Mass. (13 Gray) 330, *cf.*, *Hopkins* 5, 53 Yale L. J. at 229-231; Mass. Ann. L. (1933) § 192, 10.

²² The Hawaii decision cited by PAGE 711 n. 4 does not fit.

²³ Thus expressly, Argentina C.C. art. 3617 and Czechoslovakia, P.I.L. § 41 name both categories but treat them equally.

²⁴ KAHN, 2 Abh. 208.

²⁵ *In re Trufort* [1936] Ch. D. 600.

a certain period, made the trust invalid with respect to the leasehold.²⁶

The treaty between Austria and Germany of 1927, however, calls only for the national law of the deceased at the time of execution.

III. RESTRAINT ON POWER OF DISPOSAL

I. Law of Succession Governs

The rule that the law governing a succession decides whether the testator had the power of disposing in the manner he did, is well settled.²⁷ The same law determines the reasons and form of disinheriting a relative, including a deprivation *bona mente*, benevolently protecting his interests. The forum will not raise an objection of public policy against a system of legitimate portions or forced heirs different from its own. Usually, not even when the domestic law gives full liberty to the testator is a foreign restriction rejected.²⁸ Neither is a foreign unlimited disposal normally challenged as subject to domestic restraint,²⁹

²⁶ *Treke v. Carberry* (1873) L.R. 16 Eq. 461.

²⁷ England: *In re White* [1941] Ch. 200, 1 All E.R. 216, 360.

United States: STORY §§ 445, 475; Restatement § 201, 2 BEALE § 249.1; 4 PAGE 713 n. 5 and Suppl. § 1643; Note 91 A.L.R. 491; GOODRICH 512 § 168. France: Constant practice and modern literature, see BATIFFOL, *Traité* 655 § 651.

Germany: BAY OLG. Dresden (June 16, 1914) 37 Sächs. Ann. 92; Bay. Ob. LG. (Oct. 12, 1917) 27 Z. int R. 377.

Switzerland: BG. (Oct. 21, 1943) 69 BGE. II 362; (June 27, 1946) 72 BGE. III 104. The legal sources are contradictory respecting the application of the cantonal statutes on forced heirship of brothers and sisters and of their issue. See discussion in Trib. Cant. Vaud (May 5, 1939) 36 SJZ. (1939/40) 193 No. 35 and *cf.*, citations *supra* Ch. 66, n. 20-22.

²⁸ England: *In re Trufort* (1887) 57 L.J. 36 Ch. D. 600 (Ch.) 1135; *Enohin v. Wylie* (1862) 10 H.L. Cas. 1, 138 R.R. 1, and others; 6 HALSBURY (1907) 226; Dicey (ed. 6) 829.

United States: *Ennis v. Smith* (1853) 14 How. 400.

²⁹ Denmark: Copenhagen (Aug. 6, 1903) Clunet 1905, 1099: Father domiciled in London disinherits his son respecting Danish assets.

Germany: RG. (Feb. 26, 1911) JW. 1912, 22, 24 Z. int. R. 317, *Revue* 1914, 262 rejects expressly application of public order (EG. art. 30); RG. (March 4,

although contrary views have sometimes been expressed in Europe under the theory of public policy.³⁰

Illustrations. (i) A New York testator excludes his son from land he leaves in France. Since French law applies (according to both laws involved), the devise is reduced.³¹ Italy, on the contrary, would apply New York law, and New York would accept the *renvoi* back.

(ii) Thornton, a British subject, domiciled in France, made a will in England in English form, disregarding the reserve portions of French law. The English court in 1824 directed the property to be distributed according to the French law of intestacy.³²

(iii) A Frenchman domiciled in the United States may dispose of his personalty in France free from French restrictions.³³

The numerous statutory exceptions by *prélèvement* in favor of the domestic law, in some codes with extreme disregard of foreign control of assets (mentioned in chapter 64), are particularly undesirable in this matter.

In the United States, a line must be drawn between distributive shares and family allowances, which should not be confused as they sometimes are. In an increasing number of statutes, both categories appear side by side. A surviving widow, or as the statutes may state instead, a sur-

1915) 8 Warn. 1915, p. 455 applies American law without mentioning art. 30; RAAPE, *Komm.* 736; *cf.*, PETER KLEIN, 13 *Z. int. R.* 87; NIEMEYER, *IPR.* 16.

Spain: 2 GOLDSCHMIDT 256 refers to the freedom of testation in Navarra, Cortes de Pamplona of 1688, for excluding a public policy objection.

³⁰ France: App. Poitiers (July 4, 1887) S. 1888.2.194; Trib. Grasse (May 3, 1926) Clunet 1928, 1022.

Germany: KEIDEL, Clunet 1910, 265; HABICHT 195; RAAPE *Komm.*

³¹ Trib. Seine (July 13, 1910) Clunet 1911, 912; Cass. civ. (Apr. 4, 1881) S. 1883.1.65.

³² Thornton v. Curling (1824) 6 Sim. 360. Not affected by Lord Kingsdown's Act, according to Cheshire (ed. 2) 530. Identical solution in France: Trib. Seine (July 13, 1910) *Revue* 1912, 414, Clunet 1911, 912 (American domiciled in France).

³³ App. Lyon (Feb. 3, 1932) Clunet 1932, 930.

living spouse, may have a statutory intestate portion of a third, a half, or all the estate, which is frequently not barrable, but subject to election as against benefits under a will; at the same time, the spouse and minor children may have an emergency allowance for the time of the administration or a period following the death, with priority to the legatees or even creditors. Also, homestead exemptions combine with these two types of provisions.

As the Restatement seems to suggest, only the first kind of provision, if mandatory, falls strictly under the restraint depending on the law of succession; ³⁴ this characterization, however, is certain and justified. ³⁵

Change of the personal law is treated accordingly. Where a Dutch woman at home appointed her husband as sole heir, except for the legitimate rights of her children which amounted to three fourths of her estate, and subsequently acquired domicile in England, the husband was awarded the whole inheritance. ³⁶

Conversely, an English mother acquires a statutory heirship by the fact that her daughter dies domiciled in France, ³⁷ and an Englishman, acquiring a domicile in the English sense in Switzerland, becomes subject to the forced heirship of relatives who may or may not include, according to the canton of the last domicile, brothers and sisters or their issue.

United States. In the United States, the principle is

³⁴ Restatement § 301 compared with § 461.

³⁵ MARSH, *Marital Property in Conflict of Laws* (1952) 137-141 shows the quasi unanimity of the courts to this effect. His own reason for approaching the nonbarrable share to marital property because of related policies (p. 136) would lead to a theory similar to that of NEUNER, *Der Sinn* 66; and 5 *La. L. Rev.* (1943) 190; but in fact the reasoning is not convincing, the share is as much an inheritance right as any other.

³⁶ *In re Groos* [1915] 1 Ch. 572, *Clunet* 1915, 686, *Revue* 1919, 595. Accord: Germany: RAAPE, *IPR.* 269; Netherlands: H.R. (June 27, 1918) *Clunet* 1919, 426.

³⁷ *Trib. Seine* (June 14, 1901) *Clunet* 1901, 808.

said to be the same.³⁸ *Lex situs*, of course, governs at the time of the death without regard to any previous domicil.³⁹

2. Family Provision Acts

In the type of British statutes, first adopted in New Zealand, tempering the sheer freedom of disposition of the common law, the next relatives of the testator are entitled to a share not fixed by law but left to the discretion of the court, comparable to the *portio debita* as developed in the practice of the Roman tribunal of the *centumviri*. In Great Britain⁴⁰ and some Canadian provinces,⁴¹ as also in one recent Australian decision,⁴² this right is connected with the succession and is granted only at the last domicil of the testator⁴³ without regard to the situation of the assets and the beneficiaries.⁴⁴ The conflicts rule, hence, is almost the same as above described, although it is regretted that the English court has no jurisdiction to grant maintenance, if the testator died domiciled abroad.

In other British jurisdictions, however, the emphasis lies on the territory rather than on the domicil; the court may vary the will only with regard to domestic land and

³⁸ 4 PAGE § 1640.

³⁹ *Atkinson v. Staigg* (1882) 13 R.I. 725; *Staigg v. Atkinson* (1887) 144 Mass. 564, 12 N.E. 354.

⁴⁰ Great Britain: Inheritance (Family Provision) Act, 1938, amended by Intestate's Estates Act, 1952, sec. 7.

⁴¹ Ontario: Dependents' Relief Act, R.S.O. 1937, c. 214.

Alberta: Widow's Relief Act, R.S.A. 1922 c. 145; *Re Corlet* (Alta.) [1942] 3 D.L.R. 72, 2 W.W.R. 93.

Quebec: *Pouliot v. Cloutier* (1944) 3 D.L.R. 737, 740, [1944] S.C.R. 284.

Manitoba: The Wives and Children's Maintenance Act R.S.M. 1940 c. 235 (at the husband's lifetime) does not apply to persons resident in another province, *Smith v. Smith* (Man. 1953) 3 D.L.R. 682.

⁴² Australia: *Scholl J. in Re Paulin* [1950] Vict. L. Rep. 462; FLEMING, 4 Int. L. Q. 239.

⁴³ FALCONBRIDGE, *Conflict* (ed. 2) 656 ff.

⁴⁴ DICEY (ed. 6) 556, 889.

all movables, and this can be done also by a court not at the last domicil.⁴⁵

Also in the United States, the statutory allowances for support of the widow and children are not susceptible of a uniform characterization. In a number of instances, territorial limits are expressed or implied in the statutes, as when the domicil of the husband or even that of the widow must be in the state administering the statute or the benefit is due only out of property left in the state.⁴⁶ However, in some cases, the domiciliary statute or at least a judgment of allowance has been given extraterritorial effect in other states by enforcement on personal property.⁴⁷

The Restatement has made a courageous attempt to regulate on these advanced lines the conflict of these statutes.⁴⁸ It would seem that this maintenance of the surviving spouse, as in France the *pension alimentaire* of the surviving spouse,⁴⁹ and many provisions of support imposed on decedent's estates in other countries, rests on a legal obligation not itself of the nature of inheritance.

3. Restraint on Liberalities to Certain Persons

(a) Mortmain statutes prohibiting or subjecting to special authorization benevolence to charitable and other corporations, are here set aside; they concern the capacity of beneficiaries only.⁵⁰ Those restrictions that contain a

⁴⁵ New Zealand: *In re Roper* [1927] N.Z.L. Rev. 731. See BROWN, 18 Can. B. Rev. 456.

Saskatchewan: *Re Ostrander* [1915] 8 W.W.R. 367; *Re Elliot* [1941] 2 D.L.R. 71; *Re Herron Est.* [1941] 4 D.L.R. 203.

⁴⁶ DAINOW, "Restricted Testation in New Zealand, Australia and Canada," 36 Mich. L. Rev. (1938) 1107. Some American material is collected by ATKINSON, 3 Am. L. Prop. 749 n. 8, the survey by BORDWELL, "Statute Law of Wills," 14 Iowa L. Rev. (1929) 194 ought to be renewed.

⁴⁷ Note, 13 A.L.R. (2d) 973-980.

⁴⁸ Restatement §§ 302, 461.

⁴⁹ MILHAUD, *Clunet* 1896, 495, 501; WEISS, 4 *Traité* 584, note, differs only in selecting the law of the creditor instead of that of the debtor.

⁵⁰ See BRESLAUER, 27 Iowa L. Rev. 432-435, and *supra* Vol. I, p. 164 f.

protection of the testator's family, however, apply only as a part of the law governing the succession. As it was said in the New York leading case: "The prohibition operates upon the testator's capacity to give rather than upon the power of the legatee to take."⁵¹ Of course, the charter and general law of the corporation have to be consulted at the same time.

It deserves mention that also these prohibitions may be restricted to the assets found in the territory. Thus, a well-known California statute provides that no devise or bequest to any charitable or benevolent society shall exceed one third of the estate left by the testator to his legal heirs, and that foreign wills are subject to this restriction.⁵² Thereby, a gift is limited so far as property is located in California, and not limited elsewhere; a court of another state dealing with assets situated in its territory on a different ground ignores⁵³ and a court of the domicil corrects the distribution reached in California.⁵⁴ Thus, another case of several masses to be separately distributed is formed.⁵⁵

(b) "*Special Incapacity*," it has been said, is constituted by the much debated prohibitions, contained in the French

⁵¹ Chamberlain v. Chamberlain (1871) 43 N.Y. 421, 433. To the same effect Healy v. Reed (1891) 153 Mass. 197; Trustees of Amherst College v. Ritch (1896) 151 N.Y. 282, 45 N.E. 876. The statute was not applied in Crum v. Blits (1880) 47 Conn. 592, the testator having been domiciled in Connecticut. Cf., *supra* Vol. I, p. 165 and n. 195; BRESLAUER *id.* 434 f.; STUMBERG (ed. 2) 415.

Accord: Germany: OLG. Frankfurt and RG. (March 9, 1891) 46 Seuff. A. 418; LEWALD 308 § 374.

On France see Vol. I, 165 and n. 193.

⁵² California: Probate Code 1931, § 40. Foreign situated property bequeathed to charity must be considered, *In re Dwyer's Est.* (1911) 159 Cal. 680; followed by Decker v. Vreeland (1917) 220 N.Y. 326, 115 N.E. 989.

⁵³ Johns Hopkins University v. Uhrig (1924) 145 Md. 114, 125 Atl. 606, upon the statute mentioned *supra* 256.

⁵⁴ Whalley v. Lawrence's Est. (1919) 108 Atl. 387.

⁵⁵ On the position of third states, *Schultz v. Chicago City Bank & Trust Co.* (1943) 384 Ill. 148, 51 N.E. (2d) 140, Comment, 21 Chi. Kent L. Rev. 268, states that a restriction by the domicil is recognized, one made by another state is not.

Code and others following it, on gifts to witnesses to the will, the guardian, the physician and minister taking care of the decedent in his last illness.⁵⁶ In the constitutional Declaration of Rights of Maryland, the list of persons to whom gifts cannot be made without sanction of the legislature, in addition to religious orders and denominations, includes a minister, public teacher, or preacher of the gospel.⁵⁷ Recent French doctrine acknowledges that such prohibitions are not really concerned with incapacity of the testator to give or of the donee to take, but are simply a part of the law of succession, protecting the family.⁵⁸

4. Gifts Impairing Legitimate Shares

In many jurisdictions, a statutory portion gives rise to a claim against persons who received gifts *inter vivos* from the testator depleting the assets available at his death.⁵⁹ Such claims are considered based on obligations *ex lege* and therefore have been classified outside the conflicts rules on succession.⁶⁰ A contrary opinion, however, prevails.⁶¹ The attacks against gifts preceding death are a necessary complement to the protection awarded under the statutory rule of succession.

⁵⁶ France: C.C. art. 907 ff. and similar provisions of other codes, see 2 KAHN Abhandl. 208 ff., recently, e.g., Venezuela, C.C. art. 814.

⁵⁷ Maryland: Const. § 38.

⁵⁸ Trib. Nice (Dec. 28, 1903) Clunet 1904, 713; LEREBOURS-PIGEONNIÈRE (ed. 6) 419 § 369; TRASBOT in 5 PLANIOL ET RIPERT 265; this replaces the older reference to the personal law of the beneficiary, 2 BARTIN, 2 Principes § 241, 10 Répert. 521, no. 136 ff.

⁵⁹ On the generally scant protection of the surviving spouse in the United States, see Note, 40 Georgetown L.J. (1952) 109.

⁶⁰ 2 ZITELMANN 998; see also DEMANGEAT, note in 1 FOELIX 218 note (a).

⁶¹ Germany: 2 BAR 335; HEDEMANN, 23 Z. int. R. 229; RAAPE, Komm. 652. France: BATIFFOL 656 § 654.

5. Future Interests

A difficult question arises from the various provisions directed against the creation of future interests by will.

At common law and by the statutes against suspension of the power of testation and those against grants in perpetuity in the narrower sense, the testator is limited in the freedom of disposing of the future of his estate. The radical principle of the French Revolution, adopted in the *Code Napoléon* (article 896) and many Latin codes, did away with all feudal, rural, or fiduciary ties that would fetter the inheritance beyond the immediate successors. The German Code, on the contrary, brought the universal fideicommissary substitution to perfection; the pandectistic doctrine permitted charging of a beneficiary with delivery of his grant to future or conditional donees, whereas the Code made the first grantee and the subsequent takers all full heirs with temporary ownership. But at the same time, the period within which remaindermen may inherit is restricted in a manner comparable to the rules against perpetuity.

The starting point for forming conflicts rules on this matter is naturally the law governing succession. If this law rejects the limitation of a devise or bequest, the result ought to be accepted everywhere, for this is the purpose of establishing a governing law. The gift is either void *in toto* or the restriction is cancelled. Where, however, the law of the succession allows the testator's disposition, two obstacles to its extraterritorial effect may be encountered, although by no means generally occurring.⁶²

The French and Italian courts usually operate with a

⁶² 2 PONTES DE MIRANDA 338 states that, despite Brazilian C.C. art. 1734, which applies of course to Brazilian-governed successions, the provisions of a foreign inheritance law relating to substitutions are fully applicable; he enumerates twenty-four problems so involved.

wide concept of public policy. The principle of "equality" among the beneficiaries from which the prohibition of fideicommissary substitutions derived, has been opposed to any discrimination among successors.⁶³ Another approach, more emphasized in recent times, counteracts the law of succession by supporting the *lex situs*.⁶⁴ As a consequence, the ban on tying up assets is not applied to movables situated abroad.⁶⁵

Illustrations. (i) A Belgian national, domiciled in Switzerland, executed a valid Swiss will, leaving his daughter as universal legatee for life and his brothers or their issue as remaindermen. The daughter died domiciled in France, leaving a will appointing the Salvation Army as heir. The heirs of a brother of the testator sued for his share according to the original will. Their claim was dismissed on the ground of public policy.⁶⁶ *Lex situs* would have worked more satisfactorily.

(ii) Where under German law an heir is charged with an executory estate, passing title at his death to a reversionary heir, assets situated in Italy would be considered in an Italian court not as bound by the substitution but as a part of his free estate.⁶⁷

Should such exceptions based either on an extreme public policy or a preference for the domestic situs be followed in jurisdictions recognizing larger testamentary freedom? The German Reichsgericht once answered in the negative.⁶⁸ A fideicommissary substitution, valid under Roman law at the

⁶³ France: see citations in KAHN, 2 Abhandl. 271 f.

Italy: FEDOZZI (ed. 2) 600; PACCHIONI 321.

⁶⁴ France: Cass. civ. (June 24, 1839) D. 1839.1.257, S. 1839.1.57; req. (March 27, 1870) S. 1871.1.91.

Italy: FIORE, Sull'articolo 8 delle Disp. Prel., in Giur. Ital. 1901. IV. 193, 202, 208.

⁶⁵ Cour Paris (Aug. 7, 1883) Clunet 1884, 192.

⁶⁶ Trib. Seine (July 1, 1949) Nouv. Rev. 1949, 219.

⁶⁷ See authors *supra* n. 60.

⁶⁸ RG. (April 14, 1893) 4 BOLZE 4 No. 8.

testator's domicile, was extended to movables in Alsace notwithstanding the French law there in force. It is true that public policy had minor influence in this case, as Alsace was within the country. Nevertheless, neither the state controlling the entire succession nor another state following the same policy of freedom of testation has a compelling reason to bow before a diverse policy of *lex situs* if the treatment of the assets by the latter can be somehow corrected.

In the United States, the exclusive law of succession has been subjected to concessions to local interests, although on the other hand local prohibitions have been sacrificed in favor of charitable and other purposes. The most remarkable deviation, dispensing with the New York rules against remoteness of vesting interests in order to save a trust from invalidity, will be discussed below.⁶⁹

⁶⁹ Chapter 75.