## Chapter 70

# Scope of the Law of Succession

### I. In General

THE variety of conflicts rules has influenced the domain controlled by the law of succession. An essential characteristic and outstanding advantage of the unitary system is provided by its wide radius extending not only to all assets but also to all debts of the decedent and of the estate.[1] But at common law, the sphere of the law governing succession is limited to the problems of "descent and distribution" in contrast to "administration" of the estate.[2] Another exclusion of problems from the law of succession under the theory of territorial law is contemplated by a most recent French doctrine.[3]

The common ground of these groups, the scope of "distribution," is comprehensive enough. It includes the source of succession: will, contract, or intestacy, with all incidents such as validity and revocation of wills and the acts leading from the death of the deceased to the acquisition, though not the delivery, of the benefits. To quote the Hague draft of 1928, the national law of the deceased governs:

(Sec. 1) The designation of the beneficiaries, the order in which they are called, the shares attributed to them, their obligation to bring in advancements, partition, legitimate parts, (sec. 2) the intrinsic validity and the effects of testamentary disposition.

[1] E.g., Nussbaum 351; Wolff, D.I.P.R. (ed. 3) 228.
[2] E.g., Dicey (ed. 6) 535; Goodrich (ed. 3) 507.
[3] E.g., Lerebours-Pigeonnière (ed. 6) § 362; devolution is subordinated to the law of property (ed. 5) 320, § 256.

In this enumeration partition is a controversial point. In any case, beyond this the law of succession may or may not govern marshalling of assets, liquidation, ascertainment and payment of debts, and actual satisfaction of the heirs, legatees, and other beneficiaries.

We shall analyze the first, narrower, group of problems in this and the following chapters, principally as a task of classification of subjects in conflicts law. In the meaning of the traditional Romanistic system, of course, this exposition has an equal bearing on most of the matters pertaining to what is called administration of decedents' estates at common law.

## II. Delimitation of the Scope

### 1. Status of Beneficiaries

In the inchoate "general rules" that modern authors seek to establish in conflicts law, we find two separate topics which seem to this writer to form only one: the so-called incidental [4] or preliminary question and the requirement that a beneficiary must be able to share in the inheritance (capacity to enjoy rights) and not only that he be able to accept or renounce a part (capacity to act or dispose).

The opinions are divided on both subjects, which they should not be.

(a) *The incidental question.* If a "spouse," a "husband" or "wife" is called to succeed, by intestate or testate devolution, no court should be in doubt that the law applicable to determine whether a marriage exists, is defined in the conflicts rules of the forum on marriage and divorce. It would be too absurd to have two or more yardsticks in the same court for stating whether an identical marriage ceremony,

[4] This term, instead of "preliminary," was proposed by M. Wolff and accepted in England.

an annulment, or a divorce is recognized.[5] Even though a marriage celebrated at the forum is considered invalid at the domicil or by the national law of a party, the court is bound to consistency by the law of the forum.[6]

More doubt seems, at first blush, justified where testate or intestate succession is offered to the "children" or "issue," or also to the legitimate, recognized, or adopted children. Although the dominant opinion is that the normal conflicts rule of the forum defines the appropriate status of an individual claimant, an opposite doctrine stresses the circumstance that the law of succession predicates the status in question and therefore designates the persons benefited.

The first opinion has been almost a matter of course in Anglo-American conflicts law.[7] It is true that the English decisions on questions of legitimate birth and legitimation relevant to ascertaining benefits in English governed successions have caused much doubt; but the doubts refer to the structure of the English conflicts rules on legitimacy and illegitimacy and do not warrant a conclusion that English rules apply because the succession is governed by English law.[8] In the United States it is said that whether a child is legitimate "relates not to descent or distribution but to his status."[9] Likewise, the French courts use their regular tests to decide not only whether a person is a

[5] RAAPE, 50 Recueil 1934 IV at 493.

[6] *Supra* Vol. I, p. 235.

[7] CHESHIRE (ed. 4) 91; MORRIS, 54 L.Q.R. 611; 62 *id.* 89; in DICEY (ed. 6) 676; FALCONBRIDGE, Conflict 166. M. WOLFF, P.I.L. §§ 196-200, however, expounds arguments pro and contra.

[8] This subject has been thoroughly investigated by LIPSTEIN, Legitimacy and Legitimation in English Private International Law, in Festschrift für Ernst Rabel (1954) 611-630. On complications in Australia, see FLEMING, 1 Int. Comp. L. Q. (1952) 67.

[9] Note, 73 A.L.R. 941, 943.

"spouse," [10] but also a legitimate or natural child,[11] a child of a putative marriage,[12] or an adopted child.[13] In the same manner, courts decide likewise when full age is attained.[14] This is the prevailing view,[15] although the contrary argument has been presented in impressive reasoning [16] and has also been adopted by two Anglo-American authors.[17]

A different approach may be taken with respect to a declaration of death, as the following case [18] illustrates. A father died early in 1905; his son was three times declared dead: (1) in Vienna, the day of death being fixed on January 8, 1898; (2) in Leipzig as of December 31, 1905; and (3) in Dresden, dating the death on January 8, 1895. It appeared that the father was a millionaire, and the son's minor child had repudiated the son's succession with the assent of the orphan's court. The court in Dresden, apparently as probate court, could rely on its own statement of

[10] Trib. Seine (Jan. 17, 1924) Clunet 1925, 401; Revue 1925, 226: French *lex situs,* but common law marriage and marital property system of New York.

[11] Cour Paris (March 22, 1924) Revue 1924, 558; (Feb. 10, 1943) Nouv. Rev. 1944, 140, J.C.P. 1943 II 2438; (July 10, 1946) J.C.P. 1947 II 3392.

[12] Cass. (Jan. 6, 1910) Clunet 1911, 214; Cour Paris (Dec. 31, 1925) Gaz. Trib. 1926.2.306.

[13] Contra: for the law of succession, Cass. req. (Apr. 21, 1931) D. 1931.1.52, S.1931.1.377, Revue 1932, 526, much criticized, see BARTIN, Clunet 1932, 5; BATIFFOL, Revue 1934, 634, Traité 661 par. 658; disavowed by Cour Paris (July 10, 1946) G. Pal. 1946, II 141 on the report of FECHE, Av. gén., p. 142, J.C.P. 1947 II 3391.

*Cf.,* RAAPE, 50 Recueil 1934 IV 493, 506.

[14] Woodward v. Woodward (1889) 87 Tenn. 644, BEALE, 2 Cases 794.

[15] France: MAURY, 57 Recueil 1936 III at 560; SAVATIER, J.C.P. 1947.2.3392, Cours 309 § 441. Contra DESPAGNET 1046.

Germany: KAHN, 1 Abh. 22 ff.; LEWALD 300 and in Questions 74 ff.; and especially RAAPE, Komm. 653, IPR. 68; see Recueil 1934 IV 485 ff.

Italy: DIENA, 158 Arch. giur. 374, 420 ff., commonly followed. MONACO, Efficacia 190.

[16] MELCHIOR 246 ff.; WENGLER, 8 Z. ausl. PR. 206 ff.; OLG. Karlsruhe, IPRspr. 1931 no. 96.

[17] LORENZEN, Cases (ed. 2) 794 n. 62; WELSH, Legitimacy in the Conflict of Laws, L.Q.R. 1947, 65.

[18] BARING, "Dreimal für tot erklärt," 10 Zentralblatt für Freiwillige Gerichtsbarkeit und Notariat (1909/10) 630. See on the doubts regarding the international treatment of absentees, Vol. I, p. 162, 164-167.

facts, irrespective of the son's personal law in former proceedings.

(b) *Capacity of beneficiaries.* With as little doubt as the independency of the conflicts rule on family status is observed in the common law courts, the contrary view is held in the same courts with respect to the capacity of persons to be designated or appointed as heir, devisee, or other beneficiary. The law governing the succession has a very firm position, just because it determines the devolution. Not only is devise of land in the exclusive province of *lex situs* also in this repect,[19] but the decedent's domicil rather than the domicil of the legatee defines the latter's capacity to receive movable property. In England, this view has been laid down in the case of two persons dying in a common disaster, an air raid on London.[20] Under the ancient rule, however, that minors not only lack capacity personally to accept but even capacity to acquire legal estate in land, the English courts use an optional test; full capacity of the minor according to the law of his own domicil at the time when he reaches full age, suffices.[21]

In civil law, the situations where a *beneficiary's existence* at the decisive time is in doubt have been constantly debated.

An heir must be "in being" at the death of the decedent, or, the law of succession allowing substitutions or future interests, during the period of the rule of perpetuities, or

[19] United States: Restatement § 249 comment a; Starkweather v. American Bibl. Soc. (1874) 72 Ill. 50; 2 BEALE § 249.4; 2 L.R.A. (N.S.) 415.

[20] England: Re Cohn [1945] Ch. 5; it is true that mother and daughter killed in London in an air raid were not only domiciled in but also nationals of Germany; hence their personal law was German under both systems. On the principle see WOLFF, P.I.L. (ed. 2) 577 § 550.

United States: Restatement § 306 comment b.

[21] Re Hellmann's Will (1866) L.R. 2 Eq. 363. An English will contained legacies to each of the two children of a German, who were of full age by German law, but minors under English law; In re Schnapper (1928) Ch. 420 announced the rule definitively. On the reformed functioning of the other disabilities of a minor see JARMAN, Wills (ed. 8) 114.

within an analogous period, as e.g. established in the German Civil Code. Is a child *en ventre sa mère* "in being"? Originally the answer was negative everywhere, and there are remainders of this view in actual rules. The Roman corrected it: *nasciturus pro jam nato habetur quomodo de commodo eius agitur.* This rule is textually maintained in most jurisdictions of the United States: the child *en ventre* "will be treated as living or born or surviving where such a construction will be to his benefit." [22] Modern codes even consider the embryo simply as a person under the *"condicio juris"* that it be born subsequently.[23]

The older doctrine applied the personal law of the future person.[24] But more recent writers emphasize that the existence of the beneficiary is a condition of the devolution, and, therefore, depends upon the law of succession.[25]

Most discussed and striking are the cases of *commorientes,* that is, of two persons dying in a common disaster or otherwise, so that it cannot be ascertained who died first. For these cases, different presumptions have been developed in the various laws, but in some jurisdictions there is no presumption and therefore no evidentiary substitute favoring one or the other group of claimants.[26] England formerly had no presumption, but from 1926 it

[22] Note, 48 Harv. L.R. (1935) at 1235, with just criticism of the "startling" House of Lords decision, Elliot v. Joicey [1935] W.N. 43 [1935] 79 Scot. J. 144.

[23] E.g., Swiss C.C. art. 16, par. 2, *cf.,* RABEL, 4 Rhein. Z. (1912) 167 ff.

[24] SAVIGNY 283 §§ 377, 385; LAURENT, 6 Dr. Civ. § 203 ff.; WEISS, 4 Traité 553, 574.

Spain: C.C. art. 9, 745 *cf.,* 30; 2 GOLDSCHMIDT 258.

[25] 2 BAR 314 (tr. 807); DIENA, 58 Arch. giur. 376, 401; FIORE, 4 D.I.P. (French tr.) §§ 1417, 1420 in case of a single law of succession; PILLET, 2 Traité 382; BATIFFOL 662 § 660; NIBOYET, Manuel 728; ARMINJON, 3 Précis § 128; LEWALD 297 § 362; Paris (Apr. 8, 1938) Clunet 1938, 1038.

[26] Vol. I, p. 167 f. and the German controversy, p. 167 n. 24. The start to establish a uniform law, Convention on declaration of death of Missing Persons, Lake Success, April 6, 1950. U.N. Publ. 1950, V 1, 3 Rev. Hell. (1950) 391, was not felicitous.

has been presumed that the younger person survived, and in 1952 the law of 1925 in application to husband and wife was repealed.[27]

Supposing that a father and his son are killed in an airplane crash, in one system the son, in another the father is deemed to have survived temporarily and to have transmitted his share in his own succession, while in modern statutes considering all presumptions arbitrary, neither inherits from the other. Bar suggested that the law of each succession should apply its own method.[28] Weiss concluded that no presumption should apply,[29] and Pillet pointed to the law of the place of the misfortune.[30] In this unresolved state, the question still remains in Quebec.[31]

Corresponding to the division of writers, some statutes respectively determine "capacity" to inherit by will or *ab intestato* according either to the personal law [32] or to the law of succession.[33] Also cumulation of both laws has been tried.[34]

(c) *Rationale.* It may be assumed that many writers who have taken sides for one or the other contact in all these questions are nevertheless not adverse to a distinction, which cuts through and corrects the usual antithesis.[35]

[27] Intestate's Est. Act 1952, Part I and First Sched., amending Adm. of Est. Act 1925, sec. 46(3).

[28] 2 BAR 113 (tr. 805); 113 LEWALD, Questions 63.

[29] WEISS, 4 Traité 578; followed by BERKI 74; Cód. Bustamante, art. 29.

[30] PILLET, 2 Traité 362, § 577 in order to have a law common to both.

[31] 3 JOHNSON 72. On various recent attempts see Note, Rev. crit. 1954, 235.

[32] Brazil: L. Introd. art. 10 § 2.
Sweden: Int. Est. L. § 9.
Código Bustamante: art. 152.

[33] Treaty of Montevideo art. 45 (b).

[34] Poland: P.I.L. art. 28 par. 2.
Austro-German Treaty § 1.
2 PONTES DE MIRANDA § 10.

[35] Most clearly, FALCONBRIDGE, Conflict of Laws 582, criticizing the Australian decision In re Williams [1936] V.L.R. 223 (*cf.*, DICEY (ed. 6) 509 n. 65) separates the question of succession and the question of status. 4 FRANKENSTEIN 359 ff., 381 ff., dissatisfied with the alternative dividing the

Where an inheritance law eliminates the appointment of an *"incerta persona"* it eclipses the personal law. Likewise, how could the personal law of a child decide alone whether it is an heir in a foreign succession? How can the law of the succession determine alone whether A is a legitimate child of B, both subjects of a different jurisdiction? If it is correctly stated that the existence of an heir is a requirement for his acquisition, established by the law governing succession, does it follow that his personal law is totally excluded?

No cumulation of the two laws, of course, is desirable. They have rather to divide their domains.

The law governing the individual succession—not the *lex fori* or the law applicable to family matters—defines the *category* of intended beneficiaries. This is usually not done by express exact description and only exceptionally by implicit exclusion of certain classes, as when English land law understands by "lawful issue" only children born in wedlock.[36] Thus, commonly what is meant by such terms must be explained from other sources. It is quite true that no state need have an adopted child forced upon it as heir.[37] But this is no answer to our question.

Sound construction of the rule of inheritance needs complementation by a relevant set of other rules, and certainly not by the domestic law of the forum. The question, thus, is whether the conflicts rule of the state whose law governs the succession or the conflicts rule of the forum ought to apply. As seen above, the answer supported by the great weight of authority is in favor of the view that the forum

literature, suggests a distinction between the calling by the law of succession and ability to receive the offered gift, which would be governed by the personal law.

[36] *Supra* Vol. I, p. 654.

[37] Hood v. McGehee (1915) 237 U.S. 611; Restatement §§ 142, 143; 2 BEALE 427 § 142; § 305.1.

apply its own conflicts rule. Unity of the personal law at the forum prevails over unity of the succession.

*Illustration.* Suppose two orthodox Greeks domiciled in Greece were married in Belgium before an orthodox priest, validly under Greek, invalidly under Belgian law. One, dying, left land in England, Belgium, France, and Germany. The status of marriage is determined [38] according to Greek law in all courts in which the rule *locus regit actum* is optional, except the Belgian, and in the latter according to Belgian law. This is done, although France and Belgium, by normal conflicts rule, and Germany, because of EG. art. 28, recognize that the *lex situs* governs succession in Belgium, France, and England. Likewise, irrespective of the *lex situs,* English and American courts consider the marriage invalid according to the imperative principle, *locus regit actum.*

As furthermore submitted in the first volume of this work with special regard to adoption,[39] there may be a considerable variance in defining the class of persons called to share in the inheritance. "Adoption" may mean anything between full status of legitimacy and mere educational rights. If "adopted" children are admitted without qualification by the inheritance law, the effect of adoption on succession for either party of the adoption is indicated by the whole law of the state that according to the conflicts rule of the forum governs the adoption.

The problem of capacity, as represented by the requirement of personal existence, is not different.

Notwithstanding the evident trend toward the law of succession, the simple contention that it governs capacity to take is theoretically untenable and practically inadequate. It has been said that the problem does not concern capacity in the true meaning at all, but a requirement of

[38] Vol. I, pp. 233-236.
[39] Vol. I, pp. 653-658.

the succession. But being a requirement, capacity is nevertheless what it is. Why should the personal law not serve as usual to determine status once and for all? And whether there is a person certainly concerns status. A person should not be deemed living for one succession and dead or having never existed for another, possibly at the same court and in a split succession to the same decedent. He should not be considered continuing his marriage and being a decedent simultaneously. The Restatement and a part of the modern writers are clearly wrong in extending the law governing succession to such points. Practically, how can the law of the last domicil of a testator decide whether a remainderman twenty-one years after the death or twenty-one years after another measuring period of life, is validly declared dead?

Whether a certain beneficiary or the member of a certain class of beneficiaries fulfills the required condition, should be decided by his own personal law.

Devolution to future persons, such as children not yet conceived, if permitted by the inheritance law, is best construed so that their right, vested or contingent or whatever its nature, is acquired at once but materializes only under the *condicio juris* of their future conception and birth.[40] This corresponds exactly to the laws to be applied. The origin of the right is in the death of the decedent, its realization in the birth of the beneficiary.

Of course, especially in this case, not much may be left to the personal law. Some codes, such as the German and the Argentine, declare in the course of their specific dealing with inheritance that a conceived child has capacity to

[40] Italy: Cass. (Dec. 14, 1945) Foro Ital. 1944-46 I 289; (Aug. 10, 1949) *id.* 1949 I 905; accord by the literature cited in the notes.

inherit but one not yet conceived has not,[41] while other codes regulate the matter as one of general capacity of persons.[42] This insertion of a provision into a subdivision of a code does not mean much. But the German Code makes it a principle that a *nasciturus,* after being born, is retroactively immediate successor of the decedent, and that nonconceived children can merely be substitute heirs from birth on (*Nacherben*). Where the structure of the system of succession thus necessitates an extension of its rules to foreign beneficiaries, a question of legal technique is involved. In the mentioned case, the Bürgerliche Gesetzbuch, § 2101, provides that an appointment of a person not yet conceived at the testator's death is to be understood presumptively as an appointment as substitute heir after the legal heirs; if this does not agree with the testator's intention, the appointment is void. These are clearly rules of succession.[43]

Insofar as the conflicts rules of the forum obtain, of course, one more difference in the treatment of the same succession appears in consequence of the variety of tests for the personal and family law. Additional differences of classification from forum to forum—e.g., whether legitimacy involves the status of the father or that of the child—however might be avoided.

(d) *Public policy* of the forum has been urged in countries excluding adulterine and incestuous children admitted by the law of succession.[44] Natural or not recognized children without such stigma have been allowed foreign-derived

[41] Germany: BGB. § 1923 par. 2.
Argentina: C.C. art. 3290.
[42] E.g., Switzerland: C.C. art. 31 par. 2.
[43] Both personal and inheritance laws support the New York decision assuming civil death of a man convicted for murder, Matter of Lindewall (1942) 287 N.Y. 347, 39 N.E. (2d) 907, annotated 17 St. John's L. Rev. 46; only the place of the conviction was discarded.
[44] France: Trib. Seine (Aug. 13, 1894) Clunet 1895, 95.

benefits superior to the French equivalent.[45] On the other hand, where the foreign law denies natural children any share, a domestic substitute has been allocated.[46]

(e) *Unworthiness.* Loss of benefits from an inheritance by tort is naturally in the domain of the law governing succession.[47] But public policy has been urged.[48] On the other hand, a Federal Circuit Court admitted an heir who killed the decedent and was convicted for manslaughter in Kansas, because the court found that the Oklahoma statute presupposed a killing in Oklahoma;[49] this, of course, is a singular method of applying the statute governing succession. Nor is there necessity to favor delinquents by cumulating both laws in principle.[50]

(f) *Corporations.* It should be even more certain than for individuals that the existence of corporations is determined by their personal law and the law of successions as such has nothing to do with it.[51] *Lex fori,* of course, may deny recognition to a foreign-created corporation.

For acquisition by will, however, the common trend to require the consent of both the personal law and the law of succession has been noted in Vol. I, pp. 164 f.[52]

## 2. Marital Property

The relationship between the marital property system applicable to the estate and the law of succession has been

[45] France: Trib. Seine (Dec. 23, 1924) D. 1927.2.21.

[46] France: Paris (March 22, 1924) Gaz. Pal. 1924.2.148 with the correction by BATIFFOL, Traité 660 par. 658.

Germany: *cf.,* Vol. I, p. 622 n. 63.

[47] 2 BAR 316; KAHN, 2 Abhandl. 211; 2 ZITELMANN 941; PILLET, 2 Traité 383; NUSSBAUM 351 n. 3; BATIFFOL, Traité § 665; SCHNITZER 495.

[48] *In re* Hall [1914] P. at 5.; WEISS, 4 Traité 579; DESPAGNET par. 365; and others.

[49] Harrison v. Moncravie (1920) 264 Fed. 776.

[50] Thus BATIFFOL 663 n. 1 and cited authors.

[51] "This is entirely undisputed today," 4 FRANKENSTEIN 386 and n. 136. See recently Swiss BG. (May 16, 1950) 76 BGE. III 60, 65.

[52] Add Guaranty Trust Co. of New York v. Catholic Charities (1948) 141 N.J. Eq. 170, 56 Atl. (2d) 483, 489.

explained earlier.[53] The discussion included the difficulties and hardships arising because the municipal statutes provide for the surviving spouse or the widow either by marital or by inheritance law and the conflicts rules combine the systems so that the survivor may happen to take both or none of the benefits. Recently a valuable study added a very comprehensive analysis of the American statutes.[54] But so long as the draftsmen of marriage settlements and wills and the legislators of statutes on matrimonial property or inheritance persist in ignoring the conflicts problems, little help is in sight.

### 3. *Donatio mortis causa.*

A gift by the decedent in his lifetime, made conditionally in case the donee survives him, has a hybrid nature. Accordingly, opinions are sharply divided on the characterization of this transaction: does it belong by its origin to contracts *inter vivos* or by its effect to acts *mortis causa?*

(a) *Act inter vivos.* The Anglo-American approach is in favor of construing the entire transaction as a contract *inter vivos.* In the English case of *Korvine's Trust,* the question was squarely asked whether a gift upon death by a donor domiciled in Russia of movables situated in England was a gift, subject to *lex situs,* or concerned succession, subject to the law of the last domicil. The court applied the English law of the situation,[55] in accord with the common opinion,[56] also in the United States, where the

[53] Vol. I, pp. 374-382.

[54] HAROLD MARSH, Marital Property in Conflict of Laws (1952) with discussion of the conflicts difficulties, at 130 ff., 225 ff.

[55] In re Korvine's Trust [1921] 1 Ch. 343.

[56] FALCONBRIDGE 565; see also GRAVESON (ed. 2) 214.

place of actual delivery is accentuated.[57]

However, a deeper analysis of the contract of donation and its performance by delivery, in view of the condition inherent in both acts, may show this classification oversimplified. A more recent decision applied the law governing administration:

In *re Craven's Estate* [58] a lady domiciled in England had shares and money in a bank in Monte Carlo, Monaco. On July 15, 1935, facing a dangerous operation, she told her son he should have the shares and bank balance transferred to his name, to keep them in case of misfortune happening to her. The son wrote on her behalf, and the bank acted accordingly. She died on the 20th. An expert witness stated in the law suit that under the French Code (article 931), in force in Monaco, a gift must be made in a public instrument, or by certain so-called "indirect" methods allowed by the practice, which were missing in the case. But the judge, approaching the question as an incident of collecting the assets in the course of the administration, resorted to English law. Hereunder the peculiar elements of a donation *mortis causa*—a special institution of common law—were assembled,[59] since the requirement that the donor must

[57] Emery v. Clough (1885) 63 N.H. 552; and the cases cited 4 PAGE 734 par. 1655. The case cited as contrary, Gidden v. Gidden (1936) 176 Miss. 98, 167 So. 785, in reality holds the gift ineffective because delivery of the negotiable warehouse receipt was omitted.

[58] Lloyds Bank v. Cockburn [1937] Ch. 423, [1937] 3 All E.R. 312, "better report" (FALCONBRIDGE 564) in 53 T.L.R. 694 (1937).

[59] See ATKINSON, Wills 156, and the older English cases in RANKING (ed. 18) 145 ff. It is a special institution distinguished from gifts *inter vivos* and still considered revocable, not only conditional on the precedent death of the donor. In France, art. 893 C.C. permitting only gifts *inter vivos* and testamentary disposition is referred by the courts just to the old law of revocable *donationes mortis causa* so that irrevocable gifts under the condition of survival of the donee are recognized. Cass. req. (May 14, 1900) D. 1900.1.358, S. 1905.1.438; COLIN ET CAPITANT, (ed. 3) (1929) 796. There is no hint in the report that the mother reserved revocation.

part with the dominion of the right was evidently fulfilled at the situs, Monte Carlo.

Falconbridge criticizes the application of the English characterization as gift *inter vivos;* Monaco law should have controlled the entire transaction.[60] In fact, the question was not one of administration but one preliminary to administration.[61] But what law governs a gift *inter vivos* is highly controversial. Mother and son were domiciled in England and British subjects; they met in Paris, because the mother had fallen ill there. English law applied properly to the contract. The transfer of the bank account and the securities in Monte Carlo was subject to the local law. Yet, although no valid cause for a transfer existed under that law, the cause did exist under the English law, sufficient for any court, also in Monaco.

In an analogous New York case, a resident of France gave a friend a check on a bank in New York, asking him to deliver the check to the drawer's sister in New York. The drawer died "before the check was presented for payment," though presumably after delivery to the payee. The surrogate considered that "the original transaction" was in France and the gift was void under French law.[62]

Indeed, the operative facts of the gift are determined by the local law. This is the law governing the obligatory contract of donating, if it can stand alone—as, e.g., a promise in notarial form,[63] made and accepted. The law of

[60] FALCONBRIDGE, *ibid.* HELLENDALL, 15 Tul. L. Rev., uses the case for confused ideas on characterization.

[61] HELLENDALL, 16 Can. Bar. Rev. (1938) 143 objects to FALCONBRIDGE that the question whether the assets were a part of the inheritance, regarded the English administration rather than the *lex situs.* This begs the question; see *infra* Ch. 70.

[62] *In re* Bloch's Est. (1945) 186 Misc. 105, 54 N.Y.S. (2d) 57. Facts and decision seem doubtful. See on the check phase *supra* Ch. 63 pp. 229, 233.

[63] Sloan Adm. v. Gertrude Jones (1951) 192 Tenn. 400, 241 S.W. (2d) 506. A third law, that governing marital property, has been held superior in King v. Bruce (Texas 1947) 201 S.W. (2d) 803; Texas spouses could not change community property into severalty by transferring to and disposing of it in New York.

the situs controls the type of the right granted and the transfer of possession and title and accordingly the performance that may be necessary to make the promise actionable. However, what is needed to exclude the asset from the inheritance is naturally an incident of the law of succession.

(b) *Act affecting succession.* The modern civil law doctrine [64] enumerates *donatio mortis causa,* or all transactions [65] conditioned on death, among the incidents of the law of succession. The Italian courts followed this development; although the Codes of 1938 and 1942 merely prescribed that the "national law" of the donor governed,[66] the Italian highest court in 1947 made it clear that the institution belongs to inheritance law [67] and therefore the national law as of the time of the donor's death is meant.[68]

In favor of this classification, it has been argued that the law of succession must control for the safeguard of the legitimate portion.[69] But in the modern systems special attack is provided against gifts damaging the funds available for forced shares, and these remedies belong to the law of succession irrespective of the characterization of gifts.

In fact, total enrolment of this type of benefaction into inheritance law goes too far. That not only the form,[70]

[64] France: PILLET, Traité § 945; AUDINET 5 Rép. 641 no. 25.
Germany: RAAPE 653; M. WOLFF D. IPR. (ed. 3) 229; Bundesfinanzhof (Sept. 20, 1951) IPRspr. 1950-51, 245 No. 111 (confused reasoning).
Colombia: 1 RESTREPO HERNANDEZ § 841.
Egypt: C.C. 1948, art. 17 par. 1 for the content and effect, art. 17 par. 2 for the optional form.
Hague Draft: art. 6, 7.
Código Bustamante: arts. 146 ff.
Scandinavian Convention: arts. 9-12.
German-Austrian Treaty, art. II §§ 5, 6.
[65] For the treaties see PLAISANT 263.
[66] Italy: C.C. Disp. Prel. art. 24; Cass. (June 9, 1941) Giur. Ital. 1941 I 1, 780; Trib. Torino (July 28, 1948) *id.,* 1949 I 2, 273.
[67] Cass. (Feb. 10, 1947) Foro. Ital. 1948.1.636.
[68] BARTOLOMEI, note *ibid.* Disp. Prel. art. 23.
[69] BATIFFOL 656 par. 654.
[70] France: Cass. (June 29, 1922) S. 1923.1.249.

but also the other requirements, are those of contracts, is certain; the gift may exist at least until the death. We conclude that it is in the province of the law of succession to decide whether the donated assets are parts of the estate. This law may prohibit a condition of survival in order to protect the form of wills more effectively, but if it recognizes perfected gifts, it is in the province of the law of property to state whether the gift is perfected.

Where land is the object and the law of succession establishes a separate system for immovables, the problem is simple.

*Illustration.* García de la Palmira, of Spanish nationality, a long-time resident of Paris, died, leaving French immovables and movables and immovables in Spain. His daughter claimed a quarter share, under a gift by the father in her marriage settlement made at a notary in Rome. The tribunal of first instance held the gift void under old Spanish law. The French Court of Cassation applied French C.C., article 1082, authorizing parents to dispose of their free portions in favor of children. "Succession as well as gift fall under the French *lex situs* (C.C. art. 3. par. 2)." [71]

4. Life Insurance

It depends on the contract with the insurer and, if this allows beneficiaries to be designated, on the use of such clause, whether the debt is a part of the estate or not. In case the debt is not created for the benefit of the heirs as such (not individually to them) or the personal representatives, the proceeds remain outside the succession.[72] From this rule, the New Zealand statute deviates, in barring the creditors of the estate from any life insurance.[73] On the

[71] Cass. Civ. (Apr. 2, 1884) Clement 1885, 77.
[72] E.g., OLG. Kolmar (Dec. 10, 1912) Els. LZ. 1931, 576.
[73] On the conflicts aspects, FALCONBRIDGE 573.

other hand, some fiscal laws extend estate taxes to all life insurance benefits, which is a deterrent but otherwise does not affect the normal rule.

A testator permitted to change the beneficiary may validly exercise this right at a time when he is a subject of a jurisdiction not offering this choice;[74] his right to change had "crystallized at the time of the issue of the policy." [75]

### III. The Right of the State to Take Estates

In the municipal systems, usually the state—crown or fisc—or a body designated by the state may claim an estate that lacks any testate or intestate successor. But this right is based on two different theories. Either the state exercises the old *jus regale* of occupying ownerless property—*bona vacantia,* escheat; this is the doctrine of the common law, most American statutes, Austria, France, Belgium, and the majority of Latin-American countries. Or the last class in the order of intestate descent calls the state as heir, *jure hereditario,* as in Germany, Italy, Spain, Sweden, and Switzerland.[76]

The conflicts rules tend to follow the domestic characterization. Thus, in the first group it has often been taken for granted that every state should act according to its own principle. Notably in France, almost all courts[77] and

[74] *In re* Baeder and Canadian Order of Chosen Friends (Ontario 1916) 36 OLR 30 [1916] 28 D.L.R. 424.

[75] Falconbridge 573.

[76] In Brazil the former Introd. Law art. 14 left a doubt on the nature of the state's right, *cf.,* Bevilaqua (ed. 3) 398 f.; 2 Pontes de Miranda 307. The law of 1942 is silent but the common opinion is for the right to *bona vacantia.* This view has spread and finds some adherence even in respect to French and English law; see E. J. Cohn, 17 Mod. L. Rev. (1954) 381.

[77] C. Paris (Nov. 15, 1833) S. 1833.2.593, D. 1884.2.2; Cass. civ. (June 28, 1852) D. 1852.1.283, S. 1852.1.537; C. Paris (Jan. 20, 1923) Gaz. Pal. 1923.1.228; 10 Répert. 540 n. 72.

writers [78] have constantly permitted the French fisc to occupy heirless inheritances irrespective of the domicil or nationality of the deceased. This was suggested either by a formerly unconscious and later conscious characterization of the state's right according to the *lex fori,* or by an imperative application of the *lex situs.* Accordingly, assets situated abroad are not claimed at all.[79] But if "every court proceeds according to its own *lex fori,*" [80] another state may well occupy the assets of a foreigner, such as a Frenchman, and simultaneously appear as heir for foreign-situated assets of his own subjects when the situs agrees.

Even in view of this doctrine, it is certain that the estate must be without a successor according to the law governing succession and that the inheritance law of the forum as such is of no importance; [81] the domestic law determining the nature of the state right would be that of the situs of the assets.

With more effort to conciliate the two kinds of state rights, a widespread method makes the outcome dependent on the law applicable to the succession. If assets are in state X and the conflicts rule of X calls for the inheritance law of state Y, the law of Y appointing the state of Y (or any third state Z) as heir is obeyed in X. Only where the rule of Y is found to follow the doctrine of *bona vacantia,* would the forum in X prefer its domestic fisc.

[78] WEISS, 4 Traité 580; NIBOYET, Acquisition 256-281; MANUEL § 839; 4 Traité 291 § 1173; 777 § 1325; 3 PLANIOL ET RIPERT, by MAURY AND VAILLETON 193 par. 158 (still speaking of qualification by *lex fori* but also of the political and *regalia* nature of the territorial right); 10 Répert. 540, n. 73. Noteworthy the contrary opinion of C. Paris (Dec. 13, 1901) D. 1902.2.177 and COLIN, note *ibid.*

[79] App. Tananariva (Madagascar, June 30, 1909) Revue 1910, 881.

[80] PLANIOL ET RIPERT, 4 Traité (former ed.) § 158.

[81] See the exposition of LIPARTITI, L'acquisto delle eredità vacanti, 129 Arch. giur. (1943) 1 and § 9, against other Italian authors who contend that foreign public law is not included in the reference to foreign law of succession; on this point see also *supra* Vol. II, pp. 565 f.

In this manner, the English courts found that the Austrian code [82] and the Turkish law as of 1915 [83] shared the theory of the British law, and the Crown could take assets situated in Great Britain as ownerless. Again, by the same method, it was found that the Spanish state on the contrary is considered to be *ultimus heres*.[84]

This view has been followed in courts of both groups [85] and by Wharton.[86] True, the German theory implies that there is no *privilegium occupandi* as respects American assets left in Germany, which remain ownerless to anybody's occupation. But this would not be followed.[87] Nevertheless, extension of state power, however qualified, over the borders of another state encounters rejection in many cases. Such opposition may not only come from the state of the situs. A decision of the Reichsgericht dealt with the estate of a

[82] In re Barnett Trust [1902] 1 Ch. 847, Clunet 1904, 415.

[83] In re Musurus [1936] 2 All E.R. 1666, criticized 61 L.Q.R. (1945) 440.

Canada: In re Hole Est. (1948) 56 Man. L.R. 295; 27 Can. Bar Rev. (1949) 225.

[84] In re Maldonado [1953] 2 All E.R. 300; the method has been criticized by LIPSTEIN, Cambridge L.J. (1954) 22, because there is no difference other than in the name between the claims of the state.

[85] Austria: WALKER 923 n. 59.

Austria-Poland, Treaty of March 19, 1924; SATTER, Note to OGH. (June 8, 1932) 1 Giur. Comp. DIP. 301.

Austro-German Treaty of 1927, § 4.

Belgium, Cass. (March 28, 1952), Rechtsk. W. 1951-52, 1599, Rev. crit. 1953, 132, concerning Swedish law, states that the Belgian ordre public is not affected.

Germany: NIEMEYER, 13 Z. int. R. 38; NUSSBAUM 356; WOLFF, D. IPR. (ed. 3) 227 n. 4.

Italy: Min. Relazione to R.D. Oct. 26, 1939, n. 1586; Cass. Roma (Aug. 20, 1900) Annali giur. it. 1900, I 515; Cass. Torino (March 11, 1922) Giur. Ital. 1922 I 407.

Poland: IPL. art. 31.

Spain: 2 GOLDSCHMIDT 260.

Switzerland: N.A.G. art. 28; SCHNITZER 463.

Spanish-Greek Treaty of Sept. 22, 1903, art. 16: *lex situs* for immovables, national law of the decedent for movables.

Código Bustamante, art. 157.

[86] WHARTON § 603; see WOERNER §§ 134 ff.

[87] See M. WOLFF, D.IPR. (ed. 3) 57 § 13.4(a); *cf.*, RG. (May 16, 1940) 166 RGZ. 395.

Russian emigree who was stateless under the former German rule that stateless persons were subject to their former national law. The court discarded the Soviet inheritance law, terming it a noninheritance law, because this law restricted private succession so radically just to make place for succession by the state, closely resembling a right of escheat. A right of the situs was therefore denied, and the estate turned over to the normal order of distribution.[88]

Under these circumstances, a third thesis has appeared, to the effect that even in the jurisdictions construing their own privilege at home as a hereditary position, for the purpose of conflicts law the taking should be restricted to assets found in the territory. Following this lead, the Hague drafts recognize the national law of the deceased merely in favor of private beneficiaries, excluding the state and the corporations designated by it.[89] This approach saves examination of the nature of a foreign claim and eliminates claims practically defeated by an opposed *lex situs*. A recent American suggestion is in virtual agreement.[90]

In the relationship among common law jurisdictions, of course, only the question which state may exercise the right of escheat arises, and its decision depends on the situation of the assets.[91]

[88] RG. (May 16, 1940) 166 RGZ. 395.

[89] Hague draft convention on succession 1904, art. 2; 1928, art. 4. This model has been followed in some recent drafts, among them the Rumanian Civil Code art. 38 (the Code never entered into force). However, here the case is included where the relatives sharing under the national law of the deceased are not endowed with intestate rights by the Rumanian law. This seems a curious anticipation of Soviet mentality.

[90] JOSEPH MORSE, "Characterization, Shadow and Substance," 49 Col. L. Rev. 1027, 1038.

[91] Connecticut Mutual Life v. Moore (1948) 333 U.S. 541.