Chapter 71

Acquisition of Inheritance Rights

I. Devolution

1. Principle

MUNICIPAL Systems. The doctrine of common law contains two different systems of transmitting the decedent's assets. As the principle has remained in most jurisdictions of the United States, real estate is vested in the "heirs" from the decedent's death, whereas personal property first goes to the probate court, which in turn confirms or appoints the personal representative; only after administration is finished is the net surplus distributed to the beneficiaries.

In England since the Transfer Acts started in 1897, real property shares the treatment of the rest of the estate. Some American statutes have adopted the same regulation; most statutes provide the personal representative with important powers of sale, possession, income, or distribution of land, without disturbing the direct passing of the title to the heirs.

However, the variety of the statutes is so great and the desire for more uniformity so strong that the Model Probate Code could state the principle, a person's real and personal property passes to the persons to whom it is devised by his last will or it devolves by intestate succession, though subject to the possession of the personal representative.[1]

[1] Simes, Model Probate Code § 84.

In the ancient family organization, by the death of the father and the leader, the descendents who were thereby freed from his power—*sui heredes,* γνήσιοι, etc.—became actual instead of latent co-owners. When the property system hardened, this heirship was transformed into automatic—*"ipso iure"*—succession to the decedent's ownership. The pure spirit of feudal law would have insisted on the exclusive effect of new enfeoffment.

This principle, known in medieval and dynastic applications under the slogans: *le mort saisit le vif,* or *le roi est mort, vive le roi,* survives in the French group of legal systems principally with respect to the oldest group of "heirs," those *ab intestato,* and in the German Code and its group as the general rule, because it is the simplest method of transfer.

In Rome successors outside the "house," whether intestate or appointed by will, the *heredes extranei,* including collateral relations, did not acquire *ipso iure.* The beneficiaries were "called" (*delatio*), and had to acquire the legally offered position by acceptance, viz. formal (*cretio*) or informal express declaration (*aditio*) or conduct (*pro herede gestio*). This is in substance the general system in many countries.

Conflicts rule. What system governs the transfer of an estate, according to a view commonly taken for granted, depends on the law governing the succession. This is so universally settled that attention is required only by an incisive exception, that French decisions endeavor to consolidate. They dwell on the necessity of exempting a series of incidents from the law of succession and submit them to the law of the situs.[2] This discussion involves mainly the

[2] Most informative on the division of opinions in France in recent times, has been to me the subtle (though by no means convincing) monograph: ROBERT DENNERY, Le partage en DIP (Paris 1935). NIBOYET, who had much in common with the emphasis on territoriality, seems to have gained a critical and constructive view in his Treatise, vol. 4.

transfer of title and possession, undivided ownership of coheirs and partition, but affects fundamentals. This theory, indeed, exercised through the French delegates to the Hague Conference of 1928, influenced the fate of the Hague convention draft. Although the scope of the draft, article 1, does contain "partition," to the regret of some present French authors, everything concerning the practical handling of the inheritance or exceeding the ascertainment of the beneficiaries and their participation, especially all relations with the creditors or even all "third persons," was excluded and left to the extremely varied national systems. This would have been understandable in part, if Anglo-American doctrines had been taken into decisive consideration; as it was, an inter-European codification decapitated itself for the sake of a questionable theory.

Let us recall here merely the elementary phase of the problem.

It is no exception to the principle of the law governing succession at all that *lex situs* is itself the *lex successionis* in the United States, France, etc. Most decisions applying *lex situs* fall into this category.

In the case of movables, almost all systems agree in gathering them into one succession, whether determined by domicil or nationality of the decedent. What sense would this make, if the unity were to yield wholly to the *lex situs* for such important questions as title and possession? Is it not enough that the *lex situs* has final determination of the permissible kind of rights *in re* and the publicity required for their acquisition?

This important question will have to be faced in the following discussions.

2. Transmission

(a) *Title.* Apart from the case of coheirs, there is complete universal agreement that the title of heir as *successor* depends upon the law governing succession, be it *lex situs* or *lex domicilii* or *lex patriae.* It is likewise certain that his ownership in the individual tangible and intangible assets is conditioned by the law of situs in the two respects that the local law defines what rights the deceased owned and whether they are susceptible of being transferred to the heir. Of course, also publicity measures, such as registration, may be needed in relation to third parties.

But if under the law of succession the title vests in the court, should the situs ignore this and impose its own rule that the heir is owner; or vice versa? This question is fortunately quite generally answered in the negative. In many, not even published, cases it has been held, as a matter of course, on the Continent that during an English or American administration the beneficiaries were not owners, and, hence, not entitled to sue or apply for registration as proprietor of Italian land or a German automobile.[3] When at the end of the first World War an Italian national, heir to an Austrian inheritance, had not yet accepted and received judicial authorization according to the Austrian law, he was not admitted to sue the Austrian state at the Mixed Arbitral Tribunal.[4]

On the other hand, an heir in a French, German, or Italian succession has often, though perhaps not always,

[3] This does not mean that a European universal legatee in an American succession is considered in all respects as nonowner. The question of the time when he owes death duties in France has been discussed in Cass. req. (Nov. 19, 1941) S. 1942.1.129 and learned note by BATIFFOL (from which I dissent, however); German courts grant him a certificate of heirship, *infra* Ch. 71.

[4] TAM. Italo-Austriaco, Norlenghi v. Austria, 7 Recueil dec. Trib. Arb. Mixt. 266. On a dissident theory that common law refers to the *lex situs*, *infra* Ch. 71.

been recognized by American or English courts as "having title to and right of possession of the assets vested immediately" in him, as well as entitled to sue "on his own behalf and not in a representative capacity." [5] Or he has been appointed as ancillary administrator.[6] Even though a beneficiary does not obtain full property, he may acquire a "fixed and vested" [7] hereditary right; it is elementary that this depends on the law governing succession. For this and other reasons it has been justly urged that American banks and corporation registrars ought not always to insist on the appointment of an ancillary administration for allowing them to deliver deposits or transfer stock, respectively.[8]

(b) *Possession (seisin).*[9] According to the French and other civil codes, certain heirs,[10] and under the German and other codes all heirs,[11] by force of law succeed by the death of the decedent to the possession he had.

On this point, French and Italian opinions are clearly divided into two groups, one applying the law of the suc-

[5] England: Re Achillopoulos [1928] Ch. 483.

United States: *New York:* The Sultan of Turkey v. Tiryakian (1915) 213 N.Y. 420, 108 N.E. 72 (Turkish law); Ullmann v. Ullmann (1928) 223 App. Div. 636, 229 N.Y.S. 176 (German law); Roques v. Grosjean (1946) 66 N.Y.S. (2d) 348 (French law). *California:* Anglo-California Natl. Bank of San Francisco v. Lazard (CCA 9, 1939) 106 F. (2d) 693, 698, involving Californian land, with precedents.

[6] *Infra,* Ch. 71.

[7] Rowe v. Cullen (1939) 177 Md. 357, 9 Atl. (2d) 585.

[8] OPTON, "Recognition of Foreign Heirship and Succession Rights to Personal Property in America," 19 Geo. Wash. L. Rev. (1950) 156, 163. In Roques v. Grosjean, *supra* n. 5, the demand for ancillary letters is called untenable.

[9] GIAMBATTISTA MAZZOLINI, L'apprensione dell'eredita nel DIP., (Pavia 1930).

[10] *E.g.,* France and Belgium: C.C. art. 724; Italy C.C. art. 458; Netherlands: C.C. art. 880.

[11] *E.g.,* Germany: BGB § 857; Switzerland: C.C. art. 560; Venezuela: C.C. art. 995: very clearly in par. 2: If someone, not an heir takes possession of the hereditary assets, the heirs are considered ejected in fact, and may exercise all respective actions.

cession [12] and the other the *lex situs*.[13] The latter and more recent view is based on the power of the territorial law to regulate the legal situation of property. Although a French decision of 1939, speaking of the indivisibility of seisin, recognized the last domicil as governing,[14] the highest court invoked in 1941 the principle of territoriality.[15] If this is true, a foreign succession can never create seisin in France, nor a French succession possession in any foreign country. French immovables, of course, are out of the question.[16] For the other cases, reconciliation of views has been sought by the requisite that the consent of the *lex situs* is needed in addition to the law of the succession [17] or, more specifically, the foreign inheritance law should be recognized in the cases where the French Civil Code grants seisin.[18] Thus, a German testate heir could not claim seisin, while a German heir *ab intestato* could.

The entire discussion suffers from a confusion. In the German doctrine, it is understood that § 857 BGB. states a "succession" of the heir or heirs to the possession in a strictly limited sense.[19] It is the legal position of the de-

[12] France: WEISS, 4 Traité 594, 605; 4 PLANIOL ET RIPERT by VIALLETON ET MAURY 290 § 222; Trib. Seine (Dec. 8, 1924), Clunet 1925, 711, Revue 1925, 76; and NIBOYET, 4 Traité 864 f. against his former opinion.

Italy: Cass. Firenze (Nov. 17, 1874) Annali Jan. 8, 483, La Legge 1875 I 3; PACIFICI-MAZZONI, Instituzioni (ed. 5, 1925) 509; STOLFI, 1 Dir. Civ. (1919) 727 and n. 4.

[13] France: CHAMPCOMMUNAL, Successions 381, 384; PILLET, 2 Traité 386, 586, 449 § 618: everything concerning possession is territorial; LEREBOURS-PIGEONNIÈRE (ed. 6) 409 § 362, § 363, § 370.

Italy: FIORE, Elementi DIP. 526 and in Giur. Ital. 1901 IV 193 ff.; PACIFICI-MAZZONI *ib.* (*supra* n. 9); FEDOZZI, 4 Digesto Italiano 836; DIENA 218; GIAMBATTISTA, *supra* n. 5, 10 calls it the majority opinion; CAVAGLIERI, Lezioni (ed. 2) 258.

[14] Trib. Seine (Jan. 4, 1939) D.1939.2.17.

[15] Cass. req. (Nov. 19, 1941) S.1942.1.129, *cf.*, LEREBOURS-PIGEONNIÈRE (ed. 6) 411, 2°.

[16] Cour Paris (Oct. 25, 1952) Gaz. Pal. 1953.1.190.

[17] BATIFFOL, Traité 674 § 671.

[18] ARMINJON, 3 Précis (ed. 2) 149 § 135.

[19] STROHAL, Erbrecht 63 ff., 96 ff.; M. WOLFF, Sachenrecht 121; STAUDINGER, Komm. § 857 II.

ceased at his death, based on his physical or constructive possession of the assets, that passes, not the possession of the particular assets as such. The heir has the actions for recovery acquired by the deceased in his lifetime; he may take possession and sue any one who takes possession of the assets without his consent; the tangible assets so taken are in the category of things "taken away" which cannot be purchased by third persons in good faith; that is, the purchaser does not acquire a good title, although he does acquire good possession. The heir also enjoys the easier role as defendant in law suits affecting property. But between seisin and possession in the meaning of property law is a neat difference.

Some modern French civilists have admirably perceived a quite analogous distinction between *saisine* of a "natural *héritier*" and physical possession of the assets, "although the contrary is often said." [20] The heir may take possession and may sue others who do so; he may especially bring possessory actions. His position rules the estate rather than the components, the particular assets.[21]

From these facts it follows that the law of succession *alone* determines whether an heir has seisin. True, theoretically, consent by the *lex situs* is necessary to his protection; but why should it not be given?

That French courts should require a German widow, though not children, to request *envoi en possession* [22] would be scarcely worthwhile; with better reason it has been proposed to enlarge the scope of C.C. art. 724 to include all universal successors. Again, the law of the situs determines *alone* the cases of actual possession *("de fait")*.

It would seem that the above submitted distinction is

[20] MAURY ET VIALLETON in 4 PLANIOL ET RIPERT 262 § 196.
[21] BALLADORE PALLIERI, DIP. 176 f.
[22] Thus 4 FRANKENSTEIN 324, following the French doctrine.

suitable also to Anglo-American law, inasmuch as the personal representative (and in most American jurisdictions the heir to land) acquires *ipso jure*—in the words of the British Administration Act—"the same right of action as the deceased would have had alive . . . for any . . . right in respect of his personal estate," [23] (or of his land).

(c) *Specific Legacy*

Assuming that a Frenchman domiciled in New York is bequeathed by specific legacy a violin stored in a German safe, what law determines the nature of his interest? According to American law, a legatee has no right until the court order of distribution, and before this time his action at law needs the assent of the administrator; [24] under French law he is owner by the death (*legatum vindicationis*); [25] German law grants him merely an obligatory claim against the heir.[26] The prevailing opinion is that the effect of French law of succession is reduced in German territory to an obligation until some act of delivery intervenes.[27]

3. Acceptance and Repudiation

The law of succession determines whether acceptance is required to complete the acquisition, or renunciation is needed to annul it. An heir or a next of kin in the narrow meaning of the common law cannot even disclaim his inheritance, although he may lose or part with his share by other events. Devisees and legatees may renounce, except in certain jurisdictions when their creditors would be defeated.[28] Why the rule is different for descent by will

[23] Administration of Estates Act, 1925, sec. 26 (1).

[24] WOERNER § 561, 1910.

[25] France: C.C. art. 1014.

[26] BGB. § 1974; on the interpretation of legacies so as to satisfy the *lex situs*, see NUSSBAUM 301 n. 3. *Lex situs* determines the content of the devised right, RG. (Oct. 2, 1931) IPRspr. 1931, 175 No. 88.

[27] BGB. § 2174.

[28] ATKINSON, 3 Am. Property 629; § 14.15; 26 C.J.S. 1073 § 64 and Supp.

is explained by historical arguments, but is maintained only because it exists.[29] Also in China and Japan, as in ancient Rome, for religious reasons the "necessary" heirs cannot disclaim.

The inheritance law determines the time limits[30] and the address for express declarations[31] of acceptance or renunciation, as well as their form.[32]

However, this application not infrequently encounters rather unsatisfactory local laws with presumptions for acceptance, short time periods, heavy sanctions for silence, which may burden beneficiaries in foreign jurisdictions even without their knowledge. American statutes ordinarily have no time limits or allow a reasonable time; but an evident hardship occurs for instance when a five-year period of escheat runs against foreign heirs without their knowledge.[33] The case where a person became an heir by omitting renunciation and thereby incurred unlimited liability for debts has been noted in Germany.

Illustration. A laborer domiciled in Hamburg died without an estate; under the law of Hamburg the father in Holstein was *ipso jure* heir and could renounce only within six weeks, which elapsed. The father was sued by the guardian for alimony which his son promised to pay to an

[29] Bostian v. Milens (1946) 239 Mo. App. 555, 193 S.W. (2d) 797, 170 A.L.R. 424. As the annotation on p. 439 observes, the rule against renunciation is not adopted in Louisiana, Quebec, and Puerto Rico.

[30] In civil law, PILLET, 2 Traité applies the law of succession to these "modalities of the option," as condition of the devolution. In the codes, the time periods are spelled out; at common law renunciation, where permitted, may be made in reasonable time, 4 PAGE 1408.

[31] Usually the court at the last domicil of the deceased.

[32] *Cf.*, 4 PAGE 1406. If it is sometimes said that the formalities are determined by the law of the place where the acts are done, *e.g.*, SAVATIER 308, 441, the meaning must be the same.

[33] In re Apostolopoulos' Est. (1926) 68 Utah 344, 250 Pac. 469, 253 Pac. 1117, 48 A.L.R. 1322. Only where a treaty prescribes actual notice to consular authorities, is there prevention. The Supreme Court declares public notice to be adequate. Standard Oil Co. v. New Jersey (1950) 341 U.S. 428, 434.

illegitimate child. The court in Kiel held it "unthinkable that so long as the defendant, a subject of the forum, had not interfered with the inheritance or otherwise submitted to the foreign jurisdiction, he could be held liable for the debts." [34]

This decision followed precedents and a note by Bar.[35]

It has been suggested that the law of succession in such matters should be entirely excluded in favor of the personal law of the beneficiary,[36] but this would unduly disturb the system. Protection by public policy seems to be the only remedy so long as many inheritance laws are unmindful of the international complications.

The Hague Draft following a different suggestion omitted acceptance and renunciation from the incidents controlled by the law of succession (art. 1) for the reason that these acts "may exercise influence on third persons." [37] This confused idea, again, stems from the destructive belief in the *lex situs* as the great instrument of territorialism.

Another example of the present discord is caused by the reasonable rule that renunciation should be sent to the authority at the last domicil of the deceased. In the case of a Dutch testator, domiciled in Germany, the difficulty arose that Dutch law, governing the succession, prescribed that the declaration be directed to the court of the last domicil, whereas the German courts, under another well-meant principle, declined any jurisdiction in foreign-governed successions.[38]

Some discussion has turned around the French provision

[34] OLG. Kiel (Oct. 23, 1884) 40 Seuff. Arch. (1885) 257, accord OLG. Hamburg (Dec. 17, 1889) 1 Z. int. R. 55, Clunet 1893, 197.

[35] 2 BAR 343 n. 9: the decision of the Prussian Obertribunal erroneously cited by BAR and the courts probably is that of the Plenary, of Jan. 6, 1851, 20 Entsch. OT 10, insisting on the knowledge of the beneficiary of the devolution.

[36] 4 FRANKENSTEIN 535.

[37] Actes de la Sixième Conférence, 1928, p. 80.

[38] RABEL, Fachgebiete 178 ff.

that a minor heir may accept a share only under the benefit of inventory, i.e., limiting his liability for debts to the value of the estate inventory. It seems now agreed that the personal law fixes the time of full age, but that the French rule involves only French-governed successions.[39]

A future Conference would do well to search for implementation of the conflicts rules by international co-operation instead of cutting out an essential part of the subject.

II. Agreements on Inheritance Rights

1. Release to Ancestor

Distribution of the paternal estate among the sons (*divisio paterna*) [40] was a frequent event in ancient times when the father had reached the age of retirement. Entirely normal was the dismissal of a daughter from the house on marriage, a dowry replacing her share in the family property. A subsequent usage was the analogous emancipation of male descendants. There exists still a special institution in some Latin systems allowing pacts between an ancestor and a descendant releasing the latter's expectancy; [41] such agreements are similarly recognized in most states of the United States,[42] although in some jurisdictions the expec-

[39] For particulars see 10 Répertoire 514 no. 99; Charron 168; see also Fischer, 64 Z. Schweiz. R. at 139-141. It has been concluded that a French minor cannot accept any foreign succession where the law governing it does not permit just this means of limiting liability; Maury et Vialleton in 4 Planiol et Ripert 324 n. 3 § 240; *contra* ("absurd") 2 Pontes de Miranda 256.

[40] For antiquity see Rabel, Elterliche Teilung, in Festschrift 49. Versammlung deutscher Philologen (Basel 1907); for Italian history, Vittorio Polacco, Divisione operata da Ascendenti fra Discendenti (Padova 1884).

[41] *E.g.*, Venezuela: C.C. art. 1126 ff.

Spain: C.C. art. 833 in case of Mejora.

The provisions of French C.C. arts. 1078-1080, "Pacte d'ascendant," are distinguishable.

[42] Atkinson, 3 Am. Property 594 § 14.12 who notes that no cases are known relating to release by a collateral heir.

tancy cannot be released and the gift is treated as advancement on account of the hereditary share.[43]

These are exceptions either to the prohibition of agreements of future inheritance or to the requirement of consideration. In the German group, however, waiver of expectancy is allowed by transaction with any testator.[44]

In the case of marriage settlements in England, a release declared to the ancestor seems to be regarded simply as part of the contract *inter vivos* and valid as such.[45] Elsewhere, however, permission or prohibition belongs to the law finally controlling the estate,[46] which certainly is the correct characterization. An old Italian decision conformed to this conception in the face of the Italian prohibition, but emphasized that the daughter's release occurred in a marriage contract made in Zara, Austria, between Austrian parties, and the will declared Austrian law applicable;[47] perhaps for a daughter of Italian nationality the issue would have been different on grounds of public policy.

2. Release of Expectancy in General

In the late Roman law, *pacta de hereditate futura* were void in view of the exploitation of spendthrift heirs by speculators. This tradition was followed by Pothier. In the French revolution, renunciation of a future inheritance was prohibited as offending public honesty, and in the

[43] 26 C.J.S. 1085 § 62.

[44] See *infra* n. 52.

[45] BRESLAUER 80 cites old cases.

[46] *Cf., infra* sub 2.

[47] Italy: C.C. (1865) art. 954; Cass. Firenze (Dec. 5, 1896) Lanza v. Purkardhofer, Sirey 1897.4.17, Clunet 1897, 503 (Fedozzi). *Cf.,* (Senator) AUG. PIERANTONI, "La rinuncia alla successione nel DIP.," Rivista universale di Giurisprudenza e Dottrina, vol. 10, fasc. VII (Roma 1896); FEDOZZI, 22 Digesto Ital. IV 837; CONTUZZI, Dir. ereditario 486.

Code [48] as a means to prevent renunciations by daughters or younger sons under moral duress and to maintain equality among the relatives.[49] Any contracts of third persons between themselves without [50] the assent of the testator are commonly disapproved. In Louisiana, a most radical variant prohibits all releases and agreements on future inheritance even with the assent of the testator.[51] Other statutes recognize the validity of releases and other anticipated dispositions of future shares,[52] contrary to the French group, provided that there is no usury or lesion evident.

In the latter group, no obstacle exists to the application of the law of succession.[53] In the courts that consider an agreement of such sort not necessarily immoral, the decision should be the same. There seems not to be even a question on this point in the United States, as will appear presently.

3. Promise of Testamentary Disposal

In the larger part of the civil law, the Roman principle persists that *ambulatoria enim est voluntas testatoris;* the testator must be free, until the last moment of his capacity to make a will, to dispose of his property; the testament

[48] France: C.C. arts. 791, 1130 par. 2, 1600.
Italy: C.C. (1865) art. 954; (1942) art. 458.
Sweden: Law of April 25, 1930, with qualifications.
Spain: C.C. art. 816, 655.

[49] LAURENT, 9 Droit civil 418 ff.

[50] Thus Switzerland, C.C. art. 636.

[51] La. C.C. arts. 978, 1887, 1017; Alexander v. Gray (La. App. 1938) 181 So. 639.

[52] Austria: A BGB. 551 *cf.*, § 538; Germany: BGB. 2346, 2352; Switzerland: ZGB. art. 195.

[53] Czechoslovakia: IPL. 48 par. 2.
Denmark: S.C. Copenhague (June 25, 1902) Clunet 1904, 436, 15 Z. int. R. 605, Revue 1910, 508.
Germany: RG. (Jan. 29, 1883) 8 RGZ. 145; OLG. Stuttgart (May 19, 1893) 4 Z. int. R. 567; 2 ZITELMANN 966, 171; 4 FRANKENSTEIN 370; M. WOLFF, DIP. R. (ed. 3) 228 n. 1.
Switzerland: SCHNITZER 473.
Transvaal: Berman v. Winrow (1943) T.P.D. 213.

therefore is his "last will." In sharp contrast to this conception, common law has opened a vast domain to contracts whereby a person undertakes to make or not to make certain testamentary provisions.[54] The action for breach of such a contract arising at the death of the promissor directly affects the distributary shares. The modern state statutes, however, eliminate at least oral promises of this kind, which raise doubt and litigation, if opposition to the old custom does not go further. These laws are now really in conflict.

A recent case that went through all New York courts [55] dealt with an oral promise of the testator not to change his will involving certain stock. The agreement was valid at the place of the alleged contracting in Florida, but was held invalid under c. 31, § 7, of the Personal Property Act of New York. With a former decision, the fundamental public policy of this statute to prohibit oral bindings that "threatened the security of estates" was stressed. However, New York was the state presiding over the estate. What was explicitly, but only secondarily stated by the Court of Appeals that the domicil was and had been for a long time in New York, should have been the decisive ground. With the present division of statutory rules in this country, there is not much room for intransigent policy. In addition, the Court used as a different approach the proposition that New York was the place "of performance" for the agreement not to change the will. Those mechanical connecting factors generate curious ideas! The contract may well be considered centered in New York for the reason that the testator had merely temporarily sojourned for recovery in Florida and both parties lived in New York.

[54] 68 C.J. 565 ff. §§ 187 ff.; 17 C.J.S. 646 § 263.

[55] *In re* Rubin's Will, Rubin v. Irving Trust Co. (1953) 305 N.Y. 288, 113 N.E. (2d) 424, affirming App. Div. 113 N.Y.S. (2d) 70; the decision provokes once more the question of the scope of the law of administration, see *infra* Ch. 73.

In civil-law countries distinctions are made, as in a French case:

Frederic Meyer, of Hamburg, lived in Bordeaux from 1805 to his death in 1878, but supposedly remained a non-domiciled German, as also his son. When the latter married, the father promised in the marriage settlement before a notary that he would not give any advantage to his other children to the detriment of his son. The Court of Cassation held the promise valid, because it conformed to the French principle of equality, even though it might be considered immoral in Germany. Hence the agreement prevailed over the subsequent will that was governed by German law.[56]

This is exactly how an American court evaluates the breach of a joint reciprocal will in terms of damages.[57]

As a result, it would seem that a valid contract binding the testator under its "proper law" should be respected even in courts taking a strict view of freedom of testation insofar as a reasonable construction of their statutes permits.

III. Advancements (*collatio bonorum*)

Again, it is settled in principle that the law of the succession determines whether and by which method a gift made by the deceased in his lifetime to a beneficiary must be brought to account by him.[58]

In fact, the problem concerns the collection of the distributable estate and the access of the heirs to it.

[56] Cass. req. (Jan. 9, 1882) D. 1882.1.119.

[57] *Supra.*

[58] France: Cass. req. (June 28, 1882) Clunet 1882, 415; Weiss, 4 Traité 688; Pillet, 2 Traité 400 § 596; Arminjon, 3 Précis (ed. 2) 160 § 144 and the great majority.
Germany: OLG. Hamburg (Jan. 24, 1882) Hans. GZ. 1882 B Bl. 33 Nr. 27.
Italy: 4 Fiore 457; Contuzzi, Dir. ered. 543.
Hague Draft, art. 1.
Montevideo Treaty, art. 50 par. 1.

Of course, the law governing the gift—*e.g.*, the law of the parent-child relation or of an obligatory contract—imposes its own conditions for validity and effects; these may constitute a duty or a dispensation from a duty to account for the gift at the death of the donor. Therefore, the Hague drafts (1929, art. 2) insist that where the gift was originally exempted from collation under its own law, it should not be considered an advance on the hereditary share, even though the law of the last domicil were to the contrary; but this unratified rule is not beyond doubt.[59]

The very elaborate but much divided statutory doctrine of advancement in the United States,[60] apparently unknown outside this country, has taken no position in conflicts matters. It is evident only that, in the absence of statutes defining expressly what is to be considered an advancement, courts are inclined to look to the intention of the transferor at the time of making the transfer.[61]

Correspondingly, it certainly may be said with the civilian doctrine that where a rule of the law governing a gift or an acknowledgeable intention of the donor implies a duty of adjustment, this is binding so long as the donor by his will, or the law of the succession in his place, does not change the situation. The law governing the succession has the nearest claim to dominate [62] and the law of the transaction

[59] The case of French Cass. civ. (March 16, 1880) D. 1880.1.201, S. 1880.1.174, Clunet 1880, 195 contributing to this rule, involves the special case of the annexion of Savoy, an intertemporal problem independent of the donor's intention, and does not warrant broad generalizations.

[60] WOERNER (ed. 3) 1879; ATKINSON, 3 Am. Prop. 14.10; 26 C.J.S. 1164 93-115.

[61] 28 C.J.S. § 98 n. 94.

[62] France: Cass. (Aug. 8, 1921) Clunet 1923, 108: An Alsatian wife having made gifts to her husband under the French Code died under the German Code; the latter, not imposing a duty of accounting, governed.

Italy: Cass. Roma (Jan. 4, 1902) Foro Ital. 1902 I 558. A Turk made a gift to his son, but died as an Italian. The Italian law imposed accounting, despite the Turkish law.

inter vivos applies only in virtue of a renvoi to it.[63] The same law determines how far the intention of the donor and testator is decisive.[64]

Courts do have some difficulty in reconciling the two laws, but the clue should lie in a reasonable interpretation of the law of succession.

Illustration. In an old case, a Swiss widow, remarrying a Frenchman, obeyed a statute of the canton of Bern, and transferred a part of her property to her children. French law governed her estate, but because article 843 C.C. speaks only of "donations" to be brought to *"rapport,"* the Paris court denied the advancement,[65] a literal construction instead of possibly better reasons.

If, against the present usual method, the contribution to the estate must be made in nature, *e.g.,* because of a stipulation by the donor, the rights of third persons will be protected by the *lex situs.*

Trouble starts when there is more than one law of succession, as in the United States in the case of land, when the land is made subject to adjustment at all.[66]

IV. Partition

1. Coheirship

By the various systems, the several successors to a decedent are made either co-owners of the assets *pro diviso* (*pro rata parte*) as for instance in Roman and French law with respect to debts due to the decedent (*nomina sunt*

[63] Such renvoi is assumed by Pillet, 2 Traité 381 under the theory of vested rights.

[64] This, of course, does not exclude the dictum of Weiss, Traité 688: only the giver's personal law at the time of the gift can control the interpretation of his intention, irrespective of the situs.

[65] Cour Paris (Jan. 7, 1870) S. 1870.2.97.

[66] *Infra* Ch. 72.

ipso jure divisa),[67] or joint tenants as under German law [68] and in certain cases in the United States, entitled or not to dispose each of his part in the estate as a whole or only by majority or unanimity.

This structure of the shares is commonly considered a succession problem.

The new French territoriality theory, however, subordinates the question to the *lex situs* and a Report of the Sixth Hague Conference states that partition pertains to the law of succession covered by the draft only so far as it concerns the coheirs *inter se*. As an illustration, Basdevant invoked in the Hague Conference the much discussed agreement of coheirs respecting movables in France and Italy, that they should remain undivided through ten years; the then Italian Code (art. 984) permitted this period, the French (C.C. art. 815) only one of five years.[69] Why this case should prove the necessity of the *lex situs* for the relationship among coheirs or for partition has never been demonstrated.[70]

Clearly, the law governing succession is indispensable for determining not only the distributive parts but also the persons replacing the deceased in the ownership of the tangible and intangible assets and who can dispose of them between the decedent's departure and partition. Thus, with-

[67] C.C. art. 1220; formerly it was thought that this article applies before partition and art. 883 (*infra*) afterward; now art. 1220 is referred to third persons and art. 883 to the internal relationship. 3 COLIN ET CAPITANT (ed. 9) 300 § 535; MAURY ET VIALLETON in 4 PLANIOL ET RIPERT 754 § 655.

[68] BGB. §§ 2032 ff.

[69] Actes de la Sixième Conférence (1928) 88f. and Rapport de la Troisième Commission p. 297; also Actes de la Cinquième Conférence, Rapport p. 271, no. 1.

[70] *Cf.*, 2 BAR 348. Trib. Seine (May 25, 1935) Clunet 1936, 875 and the older authors (WEISS, 4 Traité 683 and others) invoke public policy; in 10 Répert. 101 No. 11 both *lex situs* and *lex successionis* are considered applied. BATIFFOL 683 contends that the French conception of undivided co-ownership (indivision) requires the limitation on its duration (just to five years?). BIBLIONI, Anteproyecto 252: "La divisione forzata es el disastro."

out hesitation, the Mixed Arbitral Tribunals followed this law in order to ascertain the nationality of the persons entitled by it.[71] It is difficult to see why the old condition for a real right, namely, that it needs recognition, though not creation, by the *lex situs,* should not suffice again.

Is this not also true of real subrogation? In France itself, the Court of Cassation in plenary session has held that where land or an estate is sold, the debt of the price replaces the land in the mass of the estate as an "effect of succession," for the purposes of jurisdiction and advancement.[72] Real subrogation in fact is a phenomenon of a law governing an estate,[73] whereas the *lex situs* claimed here [74] governs merely the individual objects.

2. Partition

(a) *Voluntary partition.* The civil law systems distinguish three kinds of dissolution of a coheirship: by agreement, by a nonlitigious judicial act, or by judgment in contentious proceedings. Division by contract is more usual in Central Europe than in the Latin countries.

In a widely noted decision of 1932, the French Court of Cassation recognized freedom of party disposal for a voluntary partition among the heirs of the Duke of Bourbon concluded before the Grand Marshal of the Vienna Imperial Court with discrimination against the female sex and

[71] TAM. Franco-Austrian (Dec. 9, 1927) 7 Recueil dec. Trib. Arb. Mixt. 659; Germano-Rumanian and Franco-German decisions, see *infra* n. 82, though with the former construction of French C.C. art. 1220. Thus far also the Italian writers, such as CAVAGLIERI, Lezioni (ed. 2) 249; FEDOZZI (ed. 2) 632 seem to agree with the text against FUSINATO, Della legge regulatrice della divisione de beni ereditari situati in territorio straniero (Torino 1898). But see *supra* n. 10.

[72] Cass., Chambres Réunies (Dec. 5, 1907) D. 1908.1.113, S. 1908.1.1.

[73] *Cf.,* 3 COLIN ET CAPITANT (1945) § 1127 (d). It is integrated in a particular legal institution, LAURIOL, Subrogation réelle (1954) § 698, §§ 720 ff.

[74] PICARD in 3 PLANIOL ET RIPERT 50; DENNERY, Partage 54; BATIFFOL 663.

including succession to the castle of Chambord in France.[75] Despite much criticism respecting the various aspects of the case, it certainly has authority wherever a voluntary partition agrees with the law governing succession. This point was questionable in the case; but if no asset subject to the separate *lex situs* is included, the local situation as such has no claim for an exception.

It has been noted that in this and another case the French courts characterized proceedings occurring in Vienna according to the French distinction of judicial and voluntary partition.[76]

Private partition: Waiver of partition. Where administration is not compulsory, private agreements are naturally allowed if all participants are adults or represent a minor with authorization.[77] Nothing in principle prevents them from disregarding the distribution provided by the will or the statute of distribution.[78] The same rules obtain even despite the difference of organization in the United States, provided the creditors are paid or not endangered. The beneficiaries may agree among themselves on a division without any probate. Most courts consider this method

[75] Cass. civ. (April 13, 1932) S. 1932.1.361; Clunet 1932, 997; AUDINET, Revue 1932, 549; DENNERY, Partage 135.

[76] Trib. Seine (July 13, 1909) S. 1910.2.263, Cass. (Oct. 22, 1913) S. 1918.1.61, D. 1921.1.219, Rev. 1914, 139; TRONCHON, Le partage successoral en DIP. (1938) 40: here a voluntary partition approved by a tribunal was assimilated to a judgment.

[77] France: 3 COLIN ET CAPITANT (1945) 606 § 1173.

Germany: 4 FRANKENSTEIN 562.

Italy: App. Napoli (Jan. 23, 1924) Giur. Ital. 1924 I 2: 175 C.C. (1942) art. 713.

Spain: S. T. (Feb. 10, 1826) 87 Coll. Leg. 466 at 509.

[78] Trib. Rabat (April 24, 1918) Revue Algérienne, 1922/23 II 142 held valid a division concluded in Algiers by parties subject to French law, whereby they adopted Jewish law. AUDINET, Note *ibid.* criticizes the decision only because the women did not understand to what impairment they consented.

which saves the costs and loss of time of an official intervention valid and the agreement enforceable.[79]

While the *lex fori* governs a court's proceeding, what law governs such voluntary act? The Hague Draft, article 1, enumerates *"partage"* among the incidents of the law of succession, and this presents certainly the prevailing civil law view. The French delegate, Basdevant, protested against adoption of a law different from that governing the relationship of the heirs until division, which in his opinion is the *lex situs*. But although the latter opinion is shared by other French scholars, we have just insisted on its fragility.

(b) *Effect.* Another much discussed difference concerns the effect of partition. In France and other states, the assets finally assigned to a coheir are deemed retroactively to have been his property from the decedent's death.[80] This "declaratory" effect, originally intended to avoid double enfeoffment, is favored as a protection against detrimental dispositions by other coheirs during indivision. In the German system, no such danger exists and partition is traditionally construed as mutual transfer of the shares *pro indiviso* so as to complete full ownership in the specific assets assigned; a coheir who inherited one third, receives the two thirds missing in his asset from his two coheirs.[81]

An instructive contribution to the required criticism of the "declaratory effect" in the international field was once

[79] ATKINSON, Wills (ed. 2) 565 § 103; 3 BEALE 144 § 465.4.
Contrarily, a few courts declare that the testator's wishes ought not to be frustrated. Taylor v. Hoyt (1932) 207 Wis. 120, 242 N.W. 141; Cochran v. Zachery (1908) 137 Iowa 584, 115 N.W. 486 (an heir and trustee may not give up his duties as trustee even though before probate they are merely moral).

[80] *E.g.,* France: C.C. art. 883; Italy: C.C. (1865) art. 1034, (1942) art. 757; Chile: C.A. (May 20, 1931) 29 Rev. Der. (1932) II 70: Where a coheir sold his share in the estate, and another coheir in the partition receives the asset in litigation, the seller never had any title to it.

[81] BGB, § 2048; partition must be followed by conveyance.

delivered in the Mixed Arbitral Tribunals of the 1920's.

The Tribunals repeatedly encountered cases where the coheirs were of different nationality and attempted to profit by the declaratory effect of partition under the French, or Belgian, or Rumanian law governing the succession; they assigned shares, bank deposits, etc., to the participant protected against the seizure of enemy property.

The tribunals,[82] as well as a Belgian decision,[83] used various shades of embarrassed arguments in their effort to eliminate such declaratory effect on the right of liquidation under the Treaties. In simpler form, it was stated that a private partition could not affect the official clearing procedure between states.[84]

However, if the "declaratory effect" is set aside where it is disagreeable to a state, what role should it have in international relations in general? In fact, it is recognized that it has no extraterritorial effect,[85] nor effect in relation to third persons. The difficulty of its application is noticeable in a long discussion of French writers. Opinions have been divided between the law of succession [86] and the law of the situation; [87] middle solutions have also been sought.[88] But the need in this case to distinguish the cause for acquiring title in tangible objects and its acquisition is evident; the first must be governed by the law of succession.

[82] TAM. Franco-German (April 26, 1927) De Lyrot v. Mendelssohn & Cie., 7 Recueil dec. TAM., 587; TAM. Franco-Austrian (Dec. 9, 1927) Goldwasser v. Merkurbank, *id.* 656; Goldwasser v. Banque des Pays de l'Europe Centrale, *id.* 659; Germano-Belgian (Oct. 22, 1929) De Molinari v. Deutsche Bank, 9 *id.* 661; Germano-Rumanian (April 8, 1930) 5 Z. ausl. PR. (1931) 202; *cf.,* RABEL *ibid.* DENNERY 84 thinks that some of these decisions have not "seen the problem of qualification;" this is beside my point.

[83] 67 Trib. Liège (March 12, 1921), Clunet 1922, 1033.

[84] TAM. Germano-Belge, 9 Rec. 661, *supra* n. 1.

[85] PLAISANT 266.

[86] PILLET, 2 Traité 404 § 597; NIBOYET, Manuel 733.

[87] BROCHER 439 § 136; 7 LAURENT 52; 2 ROLIN § 769; DESPAGNET § 370; CHAMPCOMMUNAL 412; MAURY ET VIALLETON, 4 PLANIOL ET RIPERT § 640; 10 Répert. 197 No. 73; FEDOZZI (ed. 2) 633 f.

[88] ARMINJON, 3 Précis (ed. 2) 155 § 141 bases the effect of the partition on the law of succession but restricts it to the assets situated in territories recognizing the same effect.