

PART FOURTEEN

TRUSTS

CHAPTER 75

Trusts

I. TRUST IN GENERAL

IF there should be any part of the conflict of laws free from "confusion," it is not the treatment of trusts. According to Bates it is "highly uncertain."¹ Griswold states that in that great maze which we know as conflict of laws, there are few fields more uncertain in the cases and difficult in principle than trusts.² Cavers describes the numerous hazards for the creation of trusts which even may shift in the perhaps long period during which a trust should run.³ Beale's attempt to mold the liquid case material into firm rules⁴ had too little support in the decisions and not enough practical appeal. It would seem that the very territorial principles of the law of property from which Beale started, appear unsatisfactory to the courts.

Curiously enough, in view of the scarce and not too reliable authority in England,—“scanty and often misleading”—writers look for enlightenment to the American cases.⁵

However, no new examination of the decisions would

¹ BATES, "Common Law Express Trusts in French Law," 40 *Yale L.J.* (1926) 34.

² GRISWOLD, Book Review, 55 *Harv. L. Rev.* (1947) 163.

³ CAVERS, Book Review, 20 *North Car. L. Rev.* (1947) 231.

⁴ BEALE, "Living Trusts of Movables in the Conflict of Laws," 45 *Harv. L. Rev.* (1932) 969; 2 BEALE and Restatement §§ 241-244, 294-299; BEALE, "Development in the Law of Conflict of Laws (1935-1936)," 50 *Harv. L. Rev.* (1937) 1156 f.

⁵ CROUCHER, "Trust of Movables in Private International Law," *Mod. L. Rev.* (1940) 111.

help. In the words of Chief Justice Layton of Delaware speaking of the "vexed question" of trusts *inter vivos*, the diversities are "such that no useful purpose will be served by an attempted analysis of the decisions."⁶ The profound uneasiness these tentative efforts of the judiciary evoke is caused by a struggle against mechanical rules without resolute acceptance of the hints given by the prominent writers on this subject.

I. Municipal Systems

Trust, the most typical and most advertised institution of the Anglo-American law, has engendered numerous specialized applications which have grown into autonomous types. In its general form, apt to serve almost any purpose of property transactions, the trust survives; but its particularly brilliant employment in recent periods lies in certain functions among which in the United States long term dispositions of wealth take the foreground.

In the civil law sphere, identical factors have been active since the very earliest times, to build up new types of transactions by the medium of fiduciary transfers of persons and property. As a final result, however, the compact civil codes laid down the specific fruits of this development but ignored the oldest and central institution. This was not done by oversight but was felt as a necessity.

The reasons have been thoroughly investigated by recent scholars. Those who protest against introduction of the Anglo-American trust believe that this institution violates

⁶ *Wilmington v. Wilmington* (1942) 27 Del. 243, 24 Atl. (2d) 309. See also Note, 139 A.L.R. (1942) 1129 on the "near impossibility of deducing a uniform rule."

Every feasible analysis has been made at their times by CAVERS, "Trusts Inter Vivos and the Conflict of Laws," 44 Harv. L. Rev. (1930) 161-202, and in the special monograph by WALTER LAND, *Trusts in the Conflict of Laws* (1940).

the principle—itself contested in many jurisdictions—that the number of property rights is closed, and if not this, at any rate, that it is incompatible with sure and neat definition of *jura in re*, since the right of *cestui que trust* defies any clear classification of proprietary and obligatory interests. Furthermore, the assets constituting the *res* are inalienable through normal transfer, although a widespread axiom declares ineffectual in principle, or even without exception, restraint on alienation by contract or any private transaction. Finally, the group of codes, led by the Code Napoléon, prohibiting fideicommissary substitutions, is more or less hostile to fiduciary transfers of rights with obligation to ulterior transmissions under condition or terms of time.⁷

Thoughtful opposition to these arguments has been expounded with equally learned historical, logical, and economical reasons.⁸

Whatever the merits of these considerations have been in the past and present stage of the main European systems, there is a distinct tendency to lower the defenses against the trust. Louisiana and Quebec, partly by statute and greatly by practice, have emulated their common law surroundings.⁹ An increasing and already long series of Latin-American statutes, since Alfaro's Panamanian statute,

⁷ See in particular MOTULSKI, "De l'impossibilité juridique de constituer un 'Trust' anglo saxon sous l'empire de la loi française." *Rev. crit.* 1948, 451-468; GARRIGUES, "Law of Trusts," 2 *Am. J. Comp. L.* (1953) 25.

⁸ Especially LEPAULLE, *Traité théorique et pratique des trusts* (1932) (extracts by CHAFFEE, 46 *Harv. L. Rev.* 535); *id.*, "La notion du trust et ses applications dans les divers systèmes juridiques," 2 *Actes du Congrès Int. de Droit Privé* (Rome 1951) 197; VERA BOLGÁR, "Why No Trusts in the Civil Law?" 2 *Am. J. Comp. L.* (1953) 204.

⁹ Louisiana: Trust Estate Act, L. 81 of 1938; *cf.*, F. F. STONE, "Trusts in Louisiana," 1 *Int. Comp. L. Q.* (1952) 368.

Quebec: C.C. 1866, arts. 981-981n; *cf.*, MIGNAULT, "La Fiducie dans la Province de Quebec," *Sem. Int. de Droit* (Paris 1937).

have incorporated either in part¹⁰ or in principle the trust,¹¹ as a legal institution, and a very vivid discussion continues in the Spanish-speaking countries.¹² Continental Europe offers little prospect for wholesale conquest, but it is more acutely than ever remembered that the Romanistic system retained, in addition to all the special devices for acting by an intermediary, (1) the fiduciary disposition of property rights, from which source German practice, immediately after the Civil Code came into force, took inspiration for a vast development of transfer of title for security purposes, and (2) fiduciary agency in the agent's own name, used in varied fields, often under the very term of trustee (*Treuhänder*). Especially have German business and judicial practice and German science devoted a high degree of attention to these transactions and institutions, but a number of similar efforts are noticeable everywhere.

This is not the place to go into the municipal legislative problems. We may, however, for the benefit of understanding the conflicts problems, draw from the recent animated debates a two-fold inference.

On the one hand, the main argument against the plain adoption of the trust in civilian systems is neither the lack of kinship nor the lack of an adequate place in the statute book. It is rather the fulfillment of most of the

¹⁰ ALFARO, *Adaptacion del trust del derecho anglo-sajón al derecho civil*, 1 *Cursos Monograficos*, Acad. Interamer. (1948) 67; *id.*, "The Trust in the Civil Law with Special Reference to Panama," 33, Ser. 3, *J. Comp. Leg.* part III/IV, 25-31.

¹¹ Panama: L. Jan. 6, 1925, amend. L. No. 17, Feb. 20, 1941.

Puerto Rico: L. April 23, 1928. SANCHEZ VILLELAS, "The Problem of Trust Legislation in Civil Law Jurisdictions; The Law of Trusts in Puerto Rico," 19 *Tulane L. Rev.* (1945) 374.

Mexico: Ley General de Inst. de Credito etc. 1926/1932/1941.

¹² See PATTON, "Trust Systems in the Western Hemisphere," 19 *Tul. L. Rev.* 398; *id.*, "The Nature of the Beneficiary Interest in a Trust," (1949) *Interamer. Bar Ass. S. IV Sixth Conf.* with rich documentation; POMPEYO CLARET Y MARTI, "De la Fiducia y del Trust," *Estudio de Der. Comp.* (Barcelona 1946).

salutary functions of trusts by special devices that make a revolutionary change of existing sets of rules less imperative.

On the other hand, experience has shown that by a really skillful new statute, though not without it, trust can be integrated in a civilian body of legislation. At the same time, in my opinion, a close analysis of the individual incidents of Anglo-American law would show a much greater approximation to the Continental thought than is commonly supposed by the opponents.

Hence, being well aware of the fundamental differences of approach, we ought to avoid, once more, the rash impression of an irreconcilable contrast.¹³ This observation should facilitate at least the unreserved recognition of rights and duties arising from common law trusts in the countries of civil law.

2. Categories in Conflicts Law

(a) *Testamentary and inter vivos trust.* Evidently, a fundamental distinction between the sources creating a trust has always been believed natural, on the assumption that creation by a will is a part of inheritance law and belongs to the jurisdiction of the probate court, whereas creation by settlement is subject to the law of contract and jurisdiction is taken by some undefined court *in personam*, or on the ground of the situation of the assets. It is worthwhile to recall these assumptions, apparently long forgotten by some courts and writers. To bring them to recollection means to reveal their patent inconvenience under present circumstances, which explains the inconsistency of their

¹³ A cautious advance of the French to the English idea of administration is stated by BARIFFOL, "The Trust Problems as Seen by a French Lawyer," 33, ser. 3, J. Comp. Leg. III/IV 18, 24.

application. With such basic principles, the courts labor in vacillating efforts.

(b) *Trust of land and trust of movables.* The Restatement superimposes on the just-mentioned distinction between testamentary and living trusts the division of trusts according to their object. The matter, therefore, is created as a part of property law. By further subdivisions, the scheme respecting "creation" of trusts results as follows:

Creation *inter vivos*: for chattels: *lex situs* (§ 294 par. 17)

for choses in action: *lex loci* (§ 294 par. 2)

for land: *lex situs* (§ 241)

by will: of land: *lex situs* (§ 241)

of movables: *lex domicilii* (§ 295)

The "Corpus Juris" supposes a different system to exist in fact. In general the law of the domicil of the settlor would control trusts of tangible movables, which in the case of wills would be the domicil at the time of death; intangibles would be governed by the law intended by the settlor and only in the absence of an intention his domiciliary law.¹⁴

The distinctive treatment of intangibles in both systems seems to be prompted by the awkward primary tests for tangibles. Narrow territorial and materialistic connections are utilized to support the *lex situs* in this application; only a merely mechanical extension of the adage, *mobilia sequuntur personam*, can justify a principle that trusts are dependent on the settlor's domicil.

That a fiduciary transaction comprehending an entire estate should be recognized and nevertheless torn asunder because of the local situation of its components, is the hard core of the principal difficulties experienced in the matter.

(c) *Creation and administration.* The prevailing opinion

¹⁴ 15 C.J.S. 936, § 18 g.

divorces creation and administration of trusts. In the case of a testamentary trust, the main rule of jurisdiction is taken from the law of decedents' estates; the law of the state of the testator's domicile at his death governs administration also of the testamentary trusts. The Restatement, repeating this rule (§ 298), however, grants an exception if "the will shows an intention that the trust should be administered in another state" (§ 297). A trust of movables created *inter vivos* is administered at the place located by the trust deed. A trust of land is always administered under "the law of the state where the land is and can be supervised by the courts of that state only" (§ 243). This, again, is a system built up by a sense of geometry rather than wisdom.

In contrast to this formulation, "American Jurisprudence" states that the courts gradually are subjecting trusts of movables to the law of the place of administration and scrutinize every hint of intention in the fixing of this place.¹⁵

(d) *Voluntary and legally-implied trusts*. Conflicts discussions ordinarily do not include statutory and constructive trusts which in fact belong in the vicinity of extracontractual obligations. They seldom refer to resulting trusts,¹⁶ which certainly are not typical of the chief problems.

With this negative exception, however, the great variety of trust purposes has not provoked any attempt to differentiate the conflicts rules. Yet we may take it that the field of these rules is and must be restricted to the current main use of trust, that is, dispositions of wealth for long periods for the benefit of the settlor's family and charitable corporations. They have no connection, for instance, with representation of shareholders or bondholders by a trustee

¹⁵ 11 Am. J. 382 § 95; 139 A.L.R. 1129, 1134.

¹⁶ *In re Smith's Will* (Surr. 1947) 67 N.Y.S. (2d) 330 contains a very short mention.

appointed in accordance with the bylaws of a corporation or by a bond deed, with bankruptcy trustees, Massachusetts business trusts, and so forth.

Nor are the incidents included in the law of trusts differentiated for conflicts treatment (with the exception of two marginal questions).¹⁷

3. Judicial Favor

Although no exception to the prohibitory statutes of the situs of land seems to have been allowed,¹⁸ a common phenomenon of American judicial attitude to trusts of movables is the favor shown by the courts in upholding their validity. Charitable testamentary trusts have most often been so privileged, but courts have expressly extended their benevolence further.¹⁹

Thus, a regular conflicts rule is adopted, and prohibitions contained in the statutes so invoked are the cause for choosing a different statute. The New York courts, but not they alone, by recognizing a foreign governing law validate the creation of trusts that would have been invalid under the law of the forum. This practice eliminates the adverse effect of the domestic rules against remoteness of vesting interests²⁰ when no such obstacle is raised by the presumable situs of the funds, against accumulation of income when the law of the place of administration is more favorable,²¹ and against indefiniteness of beneficiaries in gifts to charities.²² As the courts state, the purpose is to uphold the

¹⁷ *Infra* n. 56.

¹⁸ LAND § 12.

¹⁹ *Lanius v. Fletcher* (1907) 100 Tex. 550, 101 S.W. 1076; *Hope v. Brewer* (1892) 136 N.Y. 126, 32 N.E. 558; LAND 57 § 17.

²⁰ *Chamberlain v. Chamberlain* (1871) 43 N.Y. 424.

²¹ *Manice v. Manice* (1871) 43 N.Y. 303, 388, erroneously also speaking of the place of the beneficiary, 4 PAGE 725 n. 5.

²² *Hope v. Brewer* (1892) *supra* n. 19.

trust rather than to support the trust corporations of New York; the New York courts have attempted it was said,²³ "wherever possible to uphold the validity even of charitable testamentary trusts which were to be administered in another state."

This practice does not think highly either of the traditional restrictions on free disposal or of the traditional conflicts rules on trust creation. In the first regard, "in the age of endowment campaigns and trust advertising the spectre of the dead hand no longer troubles the judge or legislator."²⁴ In the second aspect, the usual excuse is the implied intention of the testator or settlor, which, however, in these cases is more fictitious than ever, since it is the court that after the event compares the two or more statutes possibly in question and does the choosing. Indeed, the courts are dissatisfied with their own substantive statutes as well as with their own conflicts rules.

How the courts help themselves, however, is one more instance in the list of situations where exceptional liberal conflicts rules are gradually invented to obviate antiquated difficulties for *interstate* transactions.²⁵ The conclusion must be the same as we submitted earlier, that the exceptions are unfit for *international* use.

4. Changes of Contact

The law governing creation is naturally invariable, but also the court supervising the administration under its own *lex fori* is ordinarily not deemed to lose jurisdiction because of supervening events. Even the transfer of the funds to a different location has been held no ground for a change

²³ *Hutchison v. Ross*. (1933) 262 N.Y. 381, 394, 187 N.E. 65.

²⁴ CAVERS, 44 Harv. L. Rev. at 167, 168 n. 24; LAND 74.

²⁵ Usury contracts, Vol. II, pp. 408-412, 427 ff.; Sunday contracts, Vol. I, p. 564 ff.; liquor sales, Vol. III, p. 177; Statute of frauds, Vol. III, p. 54 (c).

of law, unless the settlor has reserved the right to change the place of administration.²⁶

II. TESTAMENTARY TRUSTS

Where a trust is set up by a will, it is obvious that the formal requisites of this will must be observed. The *lex fori* is of no importance, but the conflicts rule of the forum tells whether the inheritance law of the last domicile or nationality or that of the place of execution or of the situs, or any one of them, validates the testament. Natural as this solution is, the effects may not always satisfy, particularly in the international field, because even with respect to formal validity a will and a trust are different things.

This is more evident if we think of material validity.

The American doctrine has generally assumed that intrinsic validity is governed by the law of the situs of immovables and by the law of the last domicile of the decedent respecting movables.²⁷ In numerous cases, however,—Land estimates one-fourth²⁸—the American decisions have deviated from this principle. Mostly it has been done in favor of the validity of the trust. But the New York leading case, *Hutchison v. Ross*,²⁹ marked in 1933 the formal repudiation of the rule of domicile in the field of living trusts and affected its application to testamentary trusts from whence the rule came. Technically the application of a non-domiciliary law was based on statutory construction restricting domestic prohibitions to domestic wills, or on the intention of the testator, which in the usual manner is described either as his real, presumed, or assumed intention. It is assumed where the will determines a place other than

²⁶ LAND § 26.1.

²⁷ Restatement §§ 241, 295; FALCONBRIDGE 560; LAND §§ 9, 17.

²⁸ LAND § 17.

²⁹ *Supra* n. 23; BEALE, 50 Harv. L. Rev. at 1156.

his domicile for the administration of the trust, and—for the sake of upholding a trust—especially where the trust would be invalid at the domicile but valid at the place of administration. The Massachusetts court reviewed the problem with this result in 1949 when a testator domiciled in New York left personal property in trust in the forum; in this individual case under Massachusetts law, invalidity followed for an appointment to a remainder and the funds reverted, by “capture,” to the first appointee for life.³⁰ Some decisions use the familiar argument that the testator is supposed to have chosen a law validating his will.³¹ The New York practice described above leads to the domicile against the place of administration, although the latter is in New York,³² or to the place of administration against New York law.³³

The process of veering away from the last domicile is so well-advanced that it has been observed that the domicile is no longer determinative of the applicable law, if it stands alone in the congeries of elements pointing to other contacts.³⁴ More radically, the very function of the law of the domicile has been explained by the “theory that such trust is to be administered at testator’s domicile” so that the intention of the testator now would be the uniform test.³⁵ But on the other hand, no case seems to recognize even the express choice of law in a will unless some “substantial connection” with the selected place is noted.³⁶

³⁰ *Amerige v. Att. Gen.* (1949) 324 Mass. 648, 88 N.E. (2d) 126. Note, 63 Harv. L. Rev. (1950) 699; 50 Col. L. Rev. (1950) 239.

³¹ *Lanius v. Fletcher* (1871) 100 Tex. 550, 101 S.W. 1076; *cf.*, 4 PAGE 731 § 1647.

³² *Cross v. United States Trust Co.* (1892) 131 N.Y. 330, 30 N.E. 125; *Dammert v. Osborn* (1893) 140 N.Y. 30, 35 N.E. 407.

³³ *Supra* n. 19-21.

³⁴ SWABENLAND, “The Conflict of Laws in Administration of Express Trusts of Personal Property,” 45 Yale L.J. (1936) 438.

³⁵ 4 PAGE 722 and n. 8.

³⁶ SWABENLAND, 45 Yale L.J. at 450.

Rationale. It is remarkable what progress the American courts have made without any sure guidance by principles, merely weighing the traditional contacts such as the testator's domicile at the time of his death, his intention—both taken from inheritance law—and the doctrine of prevailing elements—taken from the law of contracts; thirteen such elements have been counted in the decisions.³⁷ However, only a few scholars have pointed to a role of the place of administration superior to the rest of the “elements.”³⁸

Validity and administration. Is it a conception suitable to a sound treatment of testamentary trusts, that the stipulations producing it are exactly like any other postmortuary disposition?

A will regulates the order of the beneficiaries; a trust ties down the assets for satisfying the beneficiaries. The rules of succession attach to the death of the testator; even fideicommissary substitutions as such are related in some manner to the time of death. Trust rules serve the ulterior fate of the estate and have nothing to do with the personal relations of the deceased; they are impersonal. Administration of a decedent's estate is a short-range management to liquidate and distribute assets after payment of the debts; administration of a trust fund is a matter mostly of decades under the economic requirements of care during a life time. The further time advances, the more the one-time domicile of the testator falls back into remote memory. That its law should be the cornerstone of validity and effect for this entire period, is no matter of course.

Confirmation of this difference has always been afforded by the language distinguishing executor and trustee, although the executor is a trustee himself, and substantially

³⁷ LAND 210.

³⁸ Especially GOODRICH and CAVERS, 44 Harv. L. Rev. 190.

by the scope of trust administration, as it has developed. Whereas the field of estate administration is occasionally exaggerated, as observed earlier,³⁹ it never reaches the width of the attributes of trust courts and trustees. The law of the place of administration is said to govern the questions: to whom the trustee may pay income or capital; whether the interest of the beneficiary is assignable; and the power of creditors to reach the trust *res* or its income.⁴⁰

Finally, but not least, the difference in the nature of ordinary and trust dispositions is demonstrated by the fact that trusts of movables are supervised by one court alone; "no other court can discharge a trustee and no other courts will give him instructions."⁴¹

Hence, the mere circumstance that our law permits a person to establish a trust not only by deed among living persons but also by will, ought not to cause rational conflicts rules to assimilate just in the latter case the source of the trust with the will. The German doctrine has developed an instructive terminology. A man may change the beneficiary of a life insurance in his will without declaration to the insurer; he may appoint a testamentary executor or a guardian for his minor children in a pact on his succession.⁴² However, these acts may be done *in* the instrument; they are not done as parts of testamentary disposition, or binding pact, respectively. *The testament provides the form, nothing else.* It seems to me that this is exactly the situation also of testamentary trusts. Apart from formal requirements, they should share the law applicable to living trusts.

³⁹ *Supra* Ch. 71.

⁴⁰ 3 BEALE 1024 § 297.2.

⁴¹ Restatement § 299; 2 BEALE § 299.1.

⁴² BGB. § 332; § 2278 par. 2: only devices and bequests can be made by a binding successorial pact, but other unilateral dispositions may be inserted in the document, 116 RGZ. 32.

What rule? If the foregoing exposition is correct, the answer to the questions of what importance the intention of the testator has and whether the place of administration is the most adequate localization, must be deferred until living trusts are discussed. It is of outstanding interest to ascertain whether the courts which empirically experiment are right in substituting a kind of party autonomy to the traditional law of domicile. This question depends on general conceptions. It should be recognized, indeed, that creating a trust, at least in the Anglo-American orbit, is permitted as an attribute of personal freedom of transacting. The territorial limits of this freedom, if some exist and whatever they contain, are certainly not a particular problem of testamentary trusts.

III. TRUST INTER VIVOS

I. England

Although the English decisions are limited to trusts created in marriage settlements, their criteria are so varied that the underlying principle could only be found in the search for the proper law.⁴³ Thus the intention of the settlor is sought through the evaluation of all factors. Also, as in contracts, usually English law is found to have been in the settlor's mind. No limitations upon free choice are known. Accordingly, it is held in Canada that a marriage contract made in Quebec may prescribe that the deed and stipulations as well as administration and disposal of the funds shall be construed and governed by the law of England.⁴⁴

⁴³ CAVERS, 44 Harv. L. Rev. at 185 f.; CROUCHER, "Trust of Movables in Private International Law," 4 Mod. L. Rev. (1940) 111.

⁴⁴ *In re Jutra's Est.* (Sask. App. 1932) 2 W.W.R. 533, 536; 3 JOHNSON 389.

2. United States

Former decisions, in varying choice of law, preferred to take either the domicile of the settlor or the place where the deed was delivered, as the decisive criterion. The domicile, however, has been demoted, especially since 1933,⁴⁵ to one of many elements for the search of the allegedly intended law. *Lex loci contractus*, favored by Beale for intangibles,⁴⁶ has been sometimes adopted, when the funds were delivered simultaneously with the execution of the contract.⁴⁷ More important, the "situs" of the trust, that is, the place where the funds are located at the time of the delivery of the trust deed, or where they are intended to be brought, enjoys attention. Factors are also the residence or establishment of the trustee, the domicile of the beneficiaries, and others.⁴⁸ The group of living trusts, thus, has been more clearly than trusts by will brought under the dominance of choice of law from case to case, according to express or assumed intention, the equivalent of the English proper law, but with better emphasis on the objective evaluation of the closest connection of the case with a statute. This doctrine is unambiguously adopted in such decisions as in New York by *Shannon v. Irving Trust Co.* (1937),⁴⁹ in Illinois by *Riggs v. Barrett* (1941),⁵⁰ and in Delaware by *Wilmington v. Wilmington* (1942).⁵¹

It is true, neither is this yet a rule recognized throughout

⁴⁵ *Hutchison v. Ross* (1933) 262 N.Y. 381, 394, 187 N.E. 65.

⁴⁶ *Hutchinson v. Hutchinson* (1941) 48 Cal. App. (2d) 12, 119 Pac. (2d) 214 invokes *lex loci contractus* (Illinois) for illegality, but all factors of the transaction were in Illinois.

⁴⁷ 139 A.L.R. (1942) 129 ff. no. 4.

⁴⁸ LAND § 37.1: eight "elements."

⁴⁹ *Shannon v. Irving Trust Co.* (1937) 275 N.Y. 95.

⁵⁰ *Riggs v. Barrett* (1941) 308 Ill. App. 549, 32 N.E. (2d) 382.

⁵¹ *Wilmington Trust Co. v. Wilmington Soc. of the Fine Arts* (1942) *supra* n. 6; *cf.*, GOODRICH, 32 Va. L. Rev. 323; ann. 30 Geo. L.J. 788.

the country nor is the scope of this rule clarified. It does not seem to have been extended to trusts of land.

Creation and Administration. Writers and courts are still accustomed to distinguish also in living trusts the questions of the birth of the trust and of its management. Thus, it is commonly stated that the rules on perpetuity and accumulation pertain to administration because they restrict the holding in trust rather than the giving.⁵² I respectfully disagree. The grant in trust is restricted quite as it is altogether prohibited in other countries; there is a difference only in degree. So far as a trust fails, there is nothing to administer by the appointed trustee. Other incidents, as seen before, attributed regularly to the law of administration, affect likewise the substance, the object of the creation.

This difficult tracing of the borderline is eliminated if both phases are placed under the same law. Such unique law, of course, can only be the law of the place of administration, already controlling most of the really significant causes of litigation.⁵³

This place is determined, in the actual opinion of many courts and writers, by the intention of the settlor. This is the hub of the entire problem. If the intention of the settlor *inter vivos* as well as of the testator is decisive, it cannot go to two places; and, again, it cannot be supposed to dwell on a temporary place of domicil rather than on the locality where he wants the trust to live, at the place of its management.

IV. CONCLUSIONS

This writer continues to recommend the largest latitude for parties to a contract, to select the law applicable to

⁵² CAVERS, 44 Harv. L. Rev. at 1164 and n. 13.

⁵³ *Supra*, Vol. II p. 14.

their transaction. Creation of a trust ought to be an analogous subject. But the situation is not quite the same as with business contracts.

A trust of the kinds here in question rests on a gift, a liberality, which may be useful but never is necessary in the sense business is needed. Indeed, it is alien to a great number of legal systems, and even repugnant to numerous civilians. Above all other considerations, there is no other party to the transaction whose confidence in the contract or testament would deserve protection. Therefore, the great principle of freedom of transacting is more likely to suffer restrictions, if a subject of one state creates a trust in another state, than when he sells merchandise in that other state. Restrictions may be of two sorts. Although it is a rather empty requirement in the law of contracts that party choice of the applicable law should have a "substantial connection" with the chosen law, a similar requirement may perhaps make sense here in certain cases. And, reaching deeper, it is possible to argue that in view of the opposed principles of the systems the subject of one country has not always unlimited freedom to create a trust in another country.

If English courts tend to apply simply English law to trusts on English soil, if New York courts simply acknowledge the validity of a living trust created by a Cuban or Frenchman, domiciled in his native country, wishing to have the trust administered in New York and the *res* is there, a problem is raised that does acutely exist in the face of the various but essentially kindred American or common law rules against restraint of disposal and suspension of ownership. On the international plane, neither indifference to the foreign brand of prohibitions nor favor of validity can stand unchallenged without qualification.

This is a new problem and it can only tentatively be solved. To be true to the accepted standards of private international law, a division is probably inevitable. Property law depends on the *lex situs*, personal law on domicile or nationality. Under the rules of *lex situs*, a Frenchman may, in fact, dispose of assets situated in New York, according to the law of New York. This is energetically questioned in France, as we shall see; in some decisions the creation of trusts is considered a part of personal law. But from the internationally prevailing view, there is no doubt, and the New York courts are correct so far.

Nevertheless, if the French national is domiciled in France, under the American principles themselves his marital and family relations and, when he dies, his movable succession are governed by French law. It is true that a provision of the New York Decedents' Law allows him to declare for New York inheritance law, but this is a very anomalous rule, while we are looking for principles. In no case can he evade French marital property law nor the legitimate shares—*la réserve*—of his forced heirs.⁵⁴ The conflict appearing in *Hutchison v. Ross* with the marital property law of Quebec may be recalled.⁵⁵

Within the United States, in the stupendous growth of trust business, the new development of unbarrable shares has been widely neglected. In the case of succession, this omission may be repaired to a degree, but trusts *inter*

⁵⁴ CAVERS, 44 Harv. L. Rev. 198 assumes the contrary. A different case was that of the decision in *Prince de Bearn v. Winans* (1909) 111 Md. 434, where a resident of Maryland executed a trust in Paris, in contemplation of the marriage of his daughter to a Frenchman, granting her a power of appointment. She appointed, by will, her husband in trust of her entire estate. After her death, against contrary advice received by the widower in Paris and Baltimore, the court held that the French *réserve* for their children was inapplicable; Maryland rather than French law applied to the execution of the power of appointment under a trust deed made by a resident of Maryland where also the funds were situated.

⁵⁵ *Supra* Vol. I, p. 369.

vivos make a *fait accompli* and do not even seem easily vulnerable to attacks on the ground of violated forced heirship. Filling this gap needs more than a conflicts rule. It should not be expected, however, that foreign courts will agree to the present treatment.

That American trust corporations are rather unwilling to administer trusts established by foreigners, is well justified under these circumstances.

Party autonomy, finally, has no place where all relevant facts are united in one jurisdiction. This case forms a natural exception quite as in the matter of contracts.⁵⁶ As there, only one decision deals with such a situation. All elements were in New York: the securities and the cash, their delivery, the bank; nevertheless the deed declared for Tennessee law in considering the violated perpetuity rules of New York.⁵⁷ No foreign element was in cause.

By standard forms and also judicial opinion, the application of a law other than that of the place of administration is qualified by an exception; the latter law applies normally to the commission of the trustee and to suits for termination of the trust.⁵⁸

With a license claimed by all writers on this subject, the American conflicts law on trusts may optimistically be resumed in the following assumptions.

Testamentary trusts are formally valid, if the form of their documentation complies with one of the laws on the execution of wills recognized by the law of the forum.

Validity and effect of all trusts and the formal requirements of living trusts are governed by the law of the place of administration. The administration is conducted at one place for all movables, which is determined by express

⁵⁶ *Supra* Vol. II, p. 400 (b), case of 44 RGZ. 300.

⁵⁷ *City Bank Farmers Trust Co. v. Cheek* (1935) 93 N.Y.L.J. 2941.

⁵⁸ LAND § 36.4.

or tacit statement of the settlor. In the absence of his ascertainable intention, the trust is administered at the place that has the most characteristic connection with its management; a bank carrying on trust administration, of course, presents such connection.⁵⁹

V. RECOGNITION OF FOREIGN TRUSTS

I. Common Law Countries

English courts have recognized Italian restrictions on the creation of future interests,⁶⁰ and a Scotch trust against the English restraint on anticipation.⁶¹ The invalidity of an English trust in Argentina was taken into account.⁶² Jurisdiction *in personam* is taken in order to fulfill an obligation to create a trust abroad.⁶³

American courts show their benevolence also to foreign trusts under correct reservations for foreign jurisdiction. Where real and personal property was situated in Canada, the surrogate judge in New York left the determination of the validity of the trust to the court in Canada,⁶⁴ and when a trust was to be administered in New South Wales, as was said: if the trust is valid there, it will be upheld in New York.⁶⁵

That objection of public policy contrary to validity has been singularly reduced in New York and other—though not all—courts, has been mentioned before. In Louisiana,

⁵⁹ CAVERS, 44 Harv. L. Rev. at 164 n. 12.

⁶⁰ *In re Piercy* [1895] 1 Ch. 83, with respect to the part of the land in Sardinia not yet sold by the trustees, Italian law governs (without any consideration to the question of renvoi), evidently as *lex fori*.

⁶¹ *In re Fitzgerald* [1904] 11 Ch. 573.

⁶² *Brown v. Gregson* [1920] A.C. 860 H.L.

⁶³ KEETON, *Law of Trusts* (ed. 5, 1950) 13; HALSBURY-HAILSHAM, Vol. 13, p. 79 § 75; Vol. 6, p. 224 § 273.

⁶⁴ *In re Smith's Will* (1947) 67 N.Y.S. (2d) 330.

⁶⁵ *In re Grant's Will* (1950) 200 Misc. 35, 101 N.Y.S. (2d) 423.

long before the trust was introduced into legislation, a trust valid in another state was approved.⁶⁶

2. Civil Law Countries

(a) *In general.* A national of a country where trusts are unknown and which follows the nationality principle, would perhaps not find agreement in his national courts, if he established a trust abroad, and certainly not, if he attempts it within his country. But authority is scarce. There is no case in Germany deciding the question in general.⁶⁷

In France, foreign-created trusts have sometimes been recognized. The Court of Cassation, Criminal Section, held in 1941 that the validity of a testamentary trust of the common law type is governed by the law of the succession.⁶⁸ Prevailing opinion concludes that estates under French inheritance law are inaccessible to administration as trust funds.⁶⁹ On the other hand, where an English or American national dies domiciled in a common law jurisdiction, movables left him in France may be possessed by his trustees, though only on authorization.⁷⁰

Two older decisions of French tribunals sanctioned trusts. In one case, the widow of the sewing machine manufacturer Singer, about to be remarried and wanting to act in the spirit of a trust deed of the deceased, gave her shares in the family concern in trust for the benefit of her children. The Tribunal de la Seine recognized this living trust on the ground that she was then an American citizen and domiciled in England, hence living under English law.⁷¹

⁶⁶ *Heirs of Hullin v. Fauré* (1860) 15 La. Ann. 622.

⁶⁷ Professor Makarov has kindly confirmed his corresponding negative result.

⁶⁸ Cass. Crim. (June 4, 1941) D.1942.1.4, S.1944.1.133, J.C.P. 1942 II.2017.

⁶⁹ MOTULSKI, *supra* n. 7 at 467 § 19 and citations.

⁷⁰ BATIFFOL, *Traité* 673 § 668.

⁷¹ Trib. civ. Seine (May 16, 1906), *Clunet* 1910, 1229.

In the other case, included in a testamentary trust was a villa in Beaulieu on the French Riviera. The Tribunal of Nice construed the will to the effect that the beneficiary should be absolute owner, avoiding thus unconformity with French law.⁷²

From these fragmentary and often criticized pieces, no comprehensive picture can be drawn. Especially, that a Frenchman could create a living trust in New York with French recognition as has been believed in this country, has been, until now, an unwarranted assertion. The courts have taken great pains, it is true, to demonstrate that trusts do not offend the French prohibitions on fideicommissary substitution: the assets do not go first to the trustee as owner; he is only a "mandatory," and the beneficiary is vested at the time of death; nor of agreements on future inheritance nor of donations *mortis causa*.⁷³ Yet, the emphasis on the nationality of the settlor or on his domicil has sometimes been climaxed by classifying the creation of trust under the personal law.⁷⁴

Italian and Belgian views seem to coincide with the French attitude.⁷⁵ The climate is certainly more favorable than it was, but the development has only started.

(b) *Powers of trustee*. Although the substantive rules involving the powers of trustees of a bond issue are a special

⁷² Trib. Nice (May 5, 1905) Clunet 1911, 278.

⁷³ Trib. Seine (May 16, 1906) Clunet 1910, 1229; (Dec. 19, 1916) Clunet 1917, 1069.

⁷⁴ Same decisions; see for older cases the digest in Clunet 1911, 134-139.

⁷⁵ Belgium: Trib. civ. Bruxelles (Nov. 27, 1947) Pas. Belge 1948, 3.51; Evans v. Evans, although the settlor, an Englishman, was domiciled in Belgium and the immovables situated there: criticized by MOTULSKI (*supra* n. 4) 458.

Italy: see PALLICIA, "Trusts testamentari inglesi riferentisi a beni situati in Italia," Rivista 1932, 347; FEDOZZI, D.I.P. 593 ff. citing old decisions; the judge *in re Piercy* (1895) *supra* n. 60, stated on the basis of the expert witness reports that the English trust, so far as the Italian land was sold by the English trustee, was not opposed by Italian law which recognized the power of the trustees to sell and the use of the proceeds.

matter not here in discussion, the procedural right to appear in court on behalf of the bondholders is usually assimilated to the right of trustees in general to represent the beneficial interests in court: as in the case of bond trustees,⁷⁶ now very widely known to the municipal statutes, it may be taken as commonly recognized that a trustee of the Anglo-American type can exercise his powers in civilian territory.⁷⁷ It is a useless speculation whether he should be considered as an owner under restriction or an agent or a composite of depositary and mandatory (which is the Scotch translation into the domestic system).⁷⁸ Scientific interest, aroused by such debates, has submitted the nature of the rights of trustee and beneficiary to penetrating analysis. There is no easy way beyond Maitland's resigned judgment: the beneficiary's right may appear as obligatory, but for many practical purposes of great importance it has been treated as if it were *in rem*.⁷⁹

It is the practical aspect that dominates the question of exercise of the rights of both the trustee and the beneficiary in foreign jurisdictions. No real difficulties involving this exercise have turned up, with one exception to be discussed presently.

⁷⁶ Cuba: Trib. Sup. (Feb. 19, 1938): trustees of a New York bond issue are entitled to appear in court in Cuba.

France: Cass. civ. (Feb. 19, 1908) *infra* n. 75.

⁷⁷ France: Trib. Seine (Dec. 10, 1880) Clunet 1881, 439; (June 28, 1901) Clunet 1901, 812, affirmed Cour Paris (Jan. 27, 1904) D. 1905.2.356; Cass. civ. (July 29, 1901) Clunet 1901, 971 (semble); Cass. civ. (Feb. 19, 1908), KERR, Clunet 1912, 243; LEPAULLE, *Traité des trusts* 363, 409.

Italy: Cass. Roma (Feb. 21, 1899) Foro Ital. 1899.I 332, Giur. Ital. 1899 I 1.216.

Germany: constant practice in unpublished decisions of the probate courts (*Nachlassgerichte*).

Netherlands: KOSTERS 631; VAN BRAKEL 186 § 142 and n. 4.

Scotland: *Croskery v. Gilmoour Trustees* (1897) 17 Session Cas. 697.

⁷⁸ See n. 77.

⁷⁹ MAITLAND, 3 *Collected Papers* at 26, 25 *Grünhuts Zschr.* 32, also cited for final analysis by SIEBERT, *Das rechtsgeschäftliche Treuhandverhältnis* 98.

(c) *Inalienability of the fund.* A considerable space in the arguments against recognition of trusts in civilian countries is taken up by the incapacity of trustees and beneficiaries to dispose of the property tied up in a trust. This feature of the trust institution has often been presented as incompatible with systems where the establishment by private transaction of restraints on free circulation is either exceptional or totally prohibited, as by the German Code, § 137. Some French authors, less negative, point to the situations where French law does prescribe inalienability, as for dower, substitutions in favor of children during the life of the first beneficiary, and contract clauses in certain judicially excepted cases.⁸⁰ Batiffol contends that the *lex situs* may allow or disallow the common law restraint on alienation.⁸¹ Commonly it is felt that French law, i.e., *lex situs*, raises no objection against the inclusion of French assets in a foreign trust as such but objects to the lack of protection enjoyed by purchasers who in good faith acquire the property in French territory. This is a popular argument occasioned by a decision of 1901.

Illustration. The fourth Baronet Sir Robert Paul sold paintings out of the family trust fund to a dealer in Paris for 90,000 francs. The trustees sued for annulment of the sale. The Tribunal de la Seine and the Court of Paris dismissed the suit. Considering the trustees as mere mandataries, the seller was held to have been the true owner and the sale valid. Moreover, prohibition of alienation is against public order.⁸²

When English trustees, sued by creditors of the beneficiary, opposed the inadmissibility of disposing of capital

⁸⁰ PICARD in PLANIOL ET RIPERT (ed. 2, 1952) §§ 222 ff.

⁸¹ Traité 644 § 645.

⁸² Trib. Seine (June 28, 1901) Clunet 1901, 812, affirmed Paris (Jan. 27, 1904) D.1905.2.356.

or income by anticipation, as well as of seizing these interests, two sections of the Tribunal de la Seine split. One division accepted this plea and lifted the seizure.⁸³ The other rejected it, since such an absolute restriction offends public order and lacks the publicity provided by the local law of property.⁸⁴ The Appeal Court of Paris reversed the first decision. It recognized an English marriage settlement including a trust but held that capital and income when brought to France entered into free commerce.⁸⁵ The annotation repeats the necessity of protecting the public against invisible fetters.

Why all these authors and judges have believed it necessary to set up a barrier against the application of English law is difficult to understand. In the common law countries, respect for the law of the situation of property has always been very high. English trust law is inherently modified by the conflicts rules on *lex situs*. But moreover, in England and the United States themselves, a bona fide purchaser of trust property is treated no worse than ordinarily. In New York, for instance, the principles have been laid down since 1823.⁸⁶ Of course, a trustee cannot sell trust property or allow its seizure without a court order. Neither can a French husband dispose of the dower. Hence, the objects can be recovered from a purchaser knowing the nature of the property. Yet, "equity will not aid a cestui que trust against a bona fide purchaser (from a trustee) without notice of the trust."⁸⁷ The seller is estopped and the beneficiaries have only an equitable interest against which "the transferee is entitled to hold the property free of the

⁸³ Trib. Seine (Dec. 22, 1926) *Revue* 1927, 70.

⁸⁴ Trib. Seine (Feb. 23, 1927) *Revue* 1927, 263.

⁸⁵ Cour Paris (April 18, 1929), *Bear v. Humphries*, *Rev. crit.* 1935, 149.

⁸⁶ *Galatian v. Erwin* (Ch. N.Y. 1823) 1 *Hopk. Ch.* 48, *aff.* 8 *Cow.* 301.

⁸⁷ *Petrie v. Myers* (1877) 54 *How. Prac.* 513, 516.

trust and is under no liability to the beneficiaries.”⁸⁸ The doctrine of bona fide purchase is also applicable to persons taking the property from the first purchaser.⁸⁹

In Germany, it would seem questionable whether the prohibition of contractual restraints on alienation (BGB. § 137) is a part of unyielding public policy or only applicable to German-governed contracts and to property on German soil. Before introducing trusts into the German system, § 137, of course, would have to disappear.⁹⁰ But the courts deny protection also to foreign trust property, when a trustee alienates assets in breach of trust.⁹¹ This practice, again, can be justified so far as the property is dealt with in the German territory.

The law of the new situation, according to the general rule, governs property transactions.⁹²

⁸⁸ SCOTT, 2 Trusts 1573 § 284.

⁸⁹ *Id.* 1595 § 287.

⁹⁰ SIEBERT, Das rechtsgeschäftliche Treuhandverhältnis 420.

⁹¹ RG. (Feb. 19, 1937) 153 RGZ. 370; WÜRDINGER, "The German Trust," 33 ser. 3 J. Comp. L. part III/IV, 31, 34.

⁹² *Supra* Ch. 56.