

PART SIXTEEN

INTERTEMPORAL RELATIONS

## CHAPTER 77

# Transitory Relations of Conflicts Law

### I. CHANGE OF FOREIGN LAW <sup>1</sup>

*Change of the applicable substantive law.* When the foreign law invoked by a conflicts rule has been altered, the question arises whether the former or the more recent foreign rule applies. The primary solution is commonly taken from the transitory rule of the applicable legal system itself.<sup>2</sup> This is so evidently correct that the insistence of many writers on a broad exception in the name of public policy of the forum appears exaggerated. Frequently the new rule rather than the change is what may disturb the sensitivity of a court. If state X bans miscegenetic marriages and makes the prohibition retroactive, the court in

<sup>1</sup> Special literature in addition to the major works, mostly comparative: ZITELMANN, "Das Verhältnis der örtlichen und zeitlichen Anwendungsnormen zu einander," 42 Jh. Jahrb. (1900) 189; FRANZ KAHN, 43 Jh. Jb. (1901) 299, 1 Abhandl. 363-479; KARL NEUMEYER, "Die zeitliche Geltung der Kollisionsnormen," 12 Z. int. R. (1903) 39-50; ANZILOTTI, La questione della retroattività (1905) 115, 128; MARIN, Essai sur l'application dans le temps des règles de conflit dans l'espace (Paris 1928); PAUL ROUBIER, "Les conflits de lois dans le temps en D.I.P.," Revue 1931, 38; BALDONI, "La Successione nel tempo delle norme di D.I.P.," 24 Rivista (1932) Nr. 1-2; Full bibliography on transitory law is given by PACE, Il diritto transitorio (Studi di diritto privato italiano e straniero, ser. II, vol. II, 1944).

<sup>2</sup> France: Cass. req. (Nov. 18, 1912) S. 1914.1.258, Revue 1913, 492, follows art. 2 of the Italian Civil Code of 1865 and therefore applies the provisions of the former Codice Albertino on natural children.

Germany: ROHG. (June 28, 1878) 24 ROHGE. 170, 190; KG. (June 14, 1913); 27 ROHGE. 108; RG. (July 2, 1925) Jur. Woch. 1925, 2142; MELCHIOR 68 § 43.

Hungary: Draft PIL. (1947) § 127.

Italy: DIENA, Clunet 1900, 925; *id.*, 10 Z. int. R. (1900) 383; 2 Principii 90; BALLADORE-PALLIERI, D.I.P. 55.

Switzerland: 1 SCHNITZER IPR. 176.

Y, finding the prohibition repugnant, will probably reject it entirely, irrespective of the date of the marriage in question. Of course, a foreign marriage valid at the time and place of its celebration is considered valid in any case by the normal conflicts rule.<sup>3</sup>

If the applicable law is silent on the question of retroactivity, the general principle seems to favor the new rule. Thus, in a famous decision, the court of Bordeaux<sup>4</sup> held that a marriage celebrated in religious form in Mexico during a period when such form was prohibited, was validated by a subsequent decree of the Emperor Maximilian. That the victorious republicans, again retroactively, reinstated the prior rule nullifying ecclesiastic marriages, and that the French court refused application of the later enactment, in favor either of marriage or of a French national, involved in the cause, transcends the matter of retroactivity.

Although obligations once regularly acquired are assured against impairment by the new law if not by the constitution, it has been submitted earlier that current foreign-governed contracts are subject to the latest formulation of the applicable law, unless a preceding contrary party agreement, is ascertainable and permitted by the law of the forum.<sup>5</sup>

As is well-known, no change of private law is assumed as an automatic effect of annexation, cession, or merger of territories.

*Change of foreign conflicts rules.* The answer is the

<sup>3</sup> *Supra*. Vol. I, p. 273 f. and n. 132.

<sup>4</sup> App. Bordeaux (Feb. 5, 1883) S. 1883.2.137, Clunet 1883, 621; controversial comments by BARTIN, 1 *Principes* 299, ROUBIER, *Revue* 1931, 38 ff.; 1 *PONTES DE MIRANDA* 339.

<sup>5</sup> *Supra* Vol. II, pp. 546-548. The discussion on the 7th Hague Conference, 1951, Actes 78-81, produced different opinions and a prevailing tendency to leave the questions involved to the interpretation of the contract by the court. But judges need guidance.

same when a foreign conflicts law to which the forum resorts in the course of *renvoi* is modified during the relationship subject to it.<sup>6</sup>

## II. CHANGE OF THE CONFLICTS RULE OF THE FORUM

*Occurrence.* Much more serious is the difficulty inherent in the rivalry of older and newer rules in the applicable law of the forum itself. Previously recognized,<sup>7</sup> this question was explored in numerous decisions and a massive literature when, on January 1, 1900, the German Introductory Law to the Civil Code replaced the international private laws of the particular German territories by a unified, fundamentally different regulation. The theories developed on this occasion in the German and international literature continue in the center of discussion. Analogous problems were raised by the Hague Conventions on private international law, and again by the termination of membership in them and by the statutes and codes appearing in considerable number in the recent decades. The Introductory Law of Brazil of 1942, changing from national law to the domiciliary principle, provides an interesting counterpart to the inverse German reform of 1896. However, neither of these events has been given much attention.

The problem ought to be the same for other than statutory amendments, for instance, when a court passes from *lex loci contractus* to *lex loci solutionis* or from *lex domicilii* to *lex situs*. But judicial decisions seem rarely to be regarded as involving the creation of new conflicts rules. No one has ever thought of excepting former legal situations after the Supreme Court of the United States took

<sup>6</sup> I FRANKENSTEIN 241; MELCHIOR 45.

<sup>7</sup> J. C. MEYER, *Principes sur les questions transitoires intertemporels*, nouv. ed. par A. A. De Pinto (Leyde 1858) 36-42, stating differences and analogies between intertemporal and international private law.

the momentous step from federal conflicts law to state law in diversity of citizenship cases.

Because the questions raised by these changes are of only temporary importance, the remarkable fact that no convincing solution has been discovered in an abundance of learned proposals is partly explained by short-lived practical interest. Repeated attempts to deduce positive transitory rules, that is, a division of application among successive sets of rules, from the "nature" of private international law naturally have been futile.

### 1. Court Decisions

The judicial materials include very few reports other than German of the decade after the Civil Code came into force. The courts in Germany resorted without hesitation to the copious intertemporal rules included in the Introductory Law, following articles 7-31, which deal with private international law. These rules were first applied as if they were also intended for conflicts law. When the writers noted that the "laws thus far in force" (*die bisherigen Gesetze*), which were to be continued in effect, meant only the substantive rules, the weight of authority, both judicial and theoretical, turned to analogous application. The result was much the same, since cases where such analogies could be refuted rarely materialized in litigation.

Out of a considerable series of cases,<sup>8</sup> the following may illustrate the method used.

*Illustrations.* (I) In a suit decided in 1906 in Hamburg,<sup>9</sup> the testator Schiegel, a naturalized American citizen, had married in Bremen under the local unlimited community

<sup>8</sup> MELCHIOR 64 ff.; ROUBIER, *Revue* 1931, 79.

<sup>9</sup> OLG. Hamburg (June 15, 1906) 18 Z. int. R. (1908) 146; accord: OLG. München (Feb. 17, 1909) 21 ROLG. 233 (former immutability of marital property upheld); KG. (Sept. 30, 1915) 34 ROLG. 32 (first marital domicil decisive).

property system. Before 1900 the conflicts rule of the courts in Hamburg referred to the first matrimonial domicil, which was Bremen. The new rule of the Introductory Law, E.G., article 15, invokes primarily the national, American, law of the husband. But since article 200 maintains the marital property system that existed on December 31, 1899, this provision takes precedence, including the consequence that the old conflicts rule of the court in Hamburg still points to the law of the first matrimonial domicil, Bremen.

In this case, Bremen was the first domicil of the spouses, a German territory whose substantive marital property law after 1899 was expressly continued by article 200 of the Introductory Law. The new conflicts rule of article 15 E.G. is held superseded by this article 200, from which it is concluded that the former conflicts rule referring to Bremen as the first matrimonial domicil is also maintained. To allow an immediate word of criticism: why is the old conflicts rule of the court of Hamburg held competent instead of that of Bremen, which would have the same result? And what would have happened if the court of Baden, which applied the national law also under the older system, had to decide? Could it not be that article 200, irrespective of any conflicts rule, was destined to salvage any marital property system based on the law of *any German territory*? However, the courts did not decide otherwise even though the parties at the time of the marriage were domiciled abroad.

(II) A married couple of Bavarian nationality were first domiciled in Corfu, where since 1856 the Roman-Greek dowry system, involving separation of property estates, had obtained. The court of Nuremberg, Bavaria, in 1909 excluded the application of the Bavarian transitory provisions because the parties had never lived in Bavaria. It applied its own former conflicts rule of the Pandectistic system leading to the Corfu law. This, however, contained an excep-

tional conflicts rule for foreigners to the effect that the national law of the husband should govern marital property; this renvoi would have led to the former community property system of the city of Nuremberg. But since the court followed the Pendectists rejecting renvoi, the reasoning ended with the dowry system.<sup>10</sup>

Thus, an artful combination of artificial principles succeeded in avoiding the identical result which the conflicts rules of the national German law, article 15, paragraph 1, E.G., and of the domiciliary law, the Greek Code of 1856, would have reached.

(III) An illegitimate child was granted a decree of legitimation in Czarist Russia after the father's death. The former conflicts rule of the lower court was that the father's domicile governs legitimacy. But there was an obscure renvoi and uncertainty where the domicile as of the decisive time should be located. The Reichsgericht went to great pains on both questions and after reviewing a series of possible connections wound up with the ruling that Russian law applied and the legitimation was void.<sup>11</sup>

The same result could have been reached by the simple statement that a foreign public act must be valid under its own law before being recognized elsewhere.

In France, *Bartin* noted with approval<sup>12</sup> that the French courts believe it is "natural" that the principle of nonretroactivity of laws covers conflicts law. But since the three main decisions commonly cited deal with changes of substantive law,<sup>13</sup> authority to support such a rule is very thin. While a French tribunal, as well as the Franco-German Mixed Arbitral Tribunal, have treated events affecting marriage or marital property occurring before France de-

<sup>10</sup> OLG. Nürnberg (Jan. 22, 1909) 20 Z. int. R. (1910) 548.

<sup>11</sup> RG. (Nov. 12, 1906) 18 Z. int. R. (1908) 165.

<sup>12</sup> *BARTIN*, 1 *Principes* 286 No. 117, criticized by 1 *PONTES DE MIRANDA* 336.

<sup>13</sup> *Supra* notes 2 and 4.

nounced the Hague Conventions on these matters, in accordance with the Conventions,<sup>14</sup> this follows better than from a general principle from the special conflicts rules used everywhere in marital matters.

## 2. Theories

(a) *Applying the substantive intertemporal rules of the forum.* The German practice of the early century is not only favored by most German writers<sup>15</sup> but also by leading authors elsewhere. Thus, Batiffol, rejecting all other doctrines, writes: "If the internal transitory law subjects a marriage or a contract to the law in force at that date (of the act), there is a priori no reason to exclude from this law the conflicts rules on marriage or contracts."<sup>16</sup>

However, it is recognized since Zitelmann's article that the sections of the German Introductory Law, stating in detail what provisions of the new code are inapplicable to previously created legal relations, do not include conflicts problems; allegedly they apply by analogy, but reasons for analogy may fail to exist,<sup>17</sup> and the analogy itself has often been attacked with good reasons.

On the other hand, though the "former laws" maintained do not encompass conflicts law, they do include in the dominant German opinion foreign substantive laws.<sup>18</sup> Hence, it is commonly taught that where laws conflict simultaneously in space and in time, the intertemporal problem must be solved before the international one. A case belonging to the former substantive law is subject also to the former conflicts rule of the court seized with the case.

<sup>14</sup> Trib. St. Etienne (Jan. 1921, 1914) 583; TAM. Franco-Allemand (Feb. 12, 1927) 6 Rec. Trib. Arb. Mixtes 922.

<sup>15</sup> ZITELMANN, Jh. Jb. 1900, 189; NEUMEYER, 12 Z. int. R. No. 14; MELCHIOR 64 ff.; LEWALD 4; WOLFF, D. IPR. (ed. 3) 2.

<sup>16</sup> BATIFFOL, Traité 339 § 316; ARMINJON, 1 Précis (ed. 3) 301; SCHNITZER 176.

<sup>17</sup> ZITELMANN, *supra* n. 1.

<sup>18</sup> NEUMEYER, 12 Z. int. R. at 48.



The Brazilian Introductory Law of 1942 has a short article 6 at the end of the general provisions preceding the conflicts rules in articles 7-18, which states that laws have immediate effect with the exception of legal situations definitively constituted and the execution of acts legally perfected. This provision, like the German transitory articles,<sup>19</sup> again leaves in doubt whether it extends to conflicts laws.

(b) *Distinguishing foreign cases.* In one of his most penetrating, though not entirely happy studies, Franz Kahn opposed two main theses to the view just described. He observed that private international law is essentially different from substantive law and ought to have its own transitory rules.<sup>20</sup> As a rigid positivist, he coupled this statement with the assertion that this transitory system must be established under the isolated viewpoint of a determinate national legislation.<sup>21</sup> Kahn himself began the elaboration of special intertemporal rules in this sense. Much more attention has been devoted to his second proposition envisaging cases that had no connection with the German law until the code came into force; these should not be treated under the old German conflicts rules.<sup>22</sup> A marriage of two foreigners domiciled abroad and lacking assets in Germany, having nothing to do with the former German law, would be subject to the new conflicts law.

These conceptions have often been criticized, especially because of the vacuum they leave and the uncertainty of the ties that the case should have with the forum. As Neumeyer objected, the sway of a conflicts rule cannot depend on the time when a relationship is brought before the court of

<sup>19</sup> KAHN, 1 Abh. 367 f.

<sup>20</sup> *Ib.* 385, followed by NEUMEYER 39 ff. and others.

<sup>21</sup> *Ib.* 394 ff., followed by ZITELMANN, NEUMEYER, ANZILOTTI, and others.

<sup>22</sup> *Contra* NEUMEYER, *ib.* 42 ff.; other polemics against KAHN, e.g., MELCHIOR § 40; ROUBIER 69-73.

the forum instead of the time of its origin or modification.

Raape attempts to combine the prevailing doctrine with Kahn's view, which he improves. According to him, the provisions of the "*Einführungsgesetz*" do extend to conflicts law, but only where the relationship was "imprinted" with the law of the forum during the former legislation. He seems to require a substantial connection of the parties with Germany before 1900. Thus, the marital property system is subject to the old, mostly domiciliary criterion when the parties before 1900 had German nationality or domicil. If neither, the application of the old rules is "outright senseless."<sup>23</sup>

(c) *Establishing general transitory rules.* Some scholars look for general principles valid for the change of conflictual as well as municipal law. In France and Brazil, this approach has been strengthened by invoking the constitutional maxim that new laws do not have retroactive effect on *facta praeterita* but only on *facta pendentia*; they may not impair existent contracts.<sup>24</sup>

These writers, however, join Kahn in recognizing that the new conflicts rule may state that it operates retroactively and such effect may be presumed in a number of situations. This is the case when public policy at the forum changes; thus the Spanish courts after 1936 have refused to recognize foreign divorces that they would have recognized in 1934; or the rules of the forum on evidence, qualified as substantive law, are altered, e.g., the means of proving illegitimate paternity.<sup>25</sup>

(d) *Applying the new conflicts rules.* All theories pre-

<sup>23</sup> RAAPE, Komm. 350.

<sup>24</sup> ROUBIER 79; PONTES DE MIRANDA 335; DE CASTRO Y BRAVO, Der. Civil de España, Vol. I (1949) 651 ff. contrasts legal transactions with suspended situations; similarly MACHADO VILLELA, DIP. 479; BALMACEDA 220.

<sup>25</sup> See the various proposals by KAHN 394 ff.; ROUBIER 678; DE CASTRO, *supra* n. 24, 646; YANGÚAS, D.I.P. 221.

servicing in principle the former conflicts rules of the forum in order to connect old events with a certain legal system are opposed by the contrary principle that new conflicts rules immediately reach all cases. An early attempt by Niedner to deduct retroactivity from the nature of conflicts law as an alleged branch of public law<sup>26</sup> has been unanimously rejected. But Anzilotti has had an important following, particularly in Italy, when, instead of connecting the problem with the intertemporal rules of the forum, he attributed it to the intertemporal rules of the legal system to which the new conflicts rules refer.<sup>27</sup>

While, he argues, situations entirely liquidated belong to the old set of rules and future situations are reserved for the new rules, the remaining problems consist simply in the replacement of one substantive law (viz. that invoked by the old conflicts norm) by another substantive law (viz. the law referred to by the new conflicts norm), a problem to be solved by the transitory law of the newly invoked system.

This is an astonishing mistake of a great scholar, illustrating the enormous difficulty of the matter. Criticizing with mastery all the other solutions, Anzilotti directly violates the thesis defended by himself following Kahn that substantive and conflicts rules follow heterogeneous principles, the latter being merely formal. What the foreign system thinks of a sequence of its own substantive rules would not even afford a model for the change of its own conflict rules and must be completely immaterial to the application of the forum's conflicts law. The impracti-

<sup>26</sup> NIEDNER, "Kollision der örtlichen und zeitlichen Kollisionsfragen," in *Das Recht* 1900, 250. Inversely, 1 FRANKENSTEIN 241 ff. advocates retroactivity as principle.

<sup>27</sup> ANZILOTTI, *supra* n. 1, 2 *Rivista* 115, 126, followed by AGO, *Teoria* 178 ff.; ARMINJON, 1 *Précis* 188; MONACO, *Efficacia*; PACCHIONI, *Elementi* 245 ff. The partial opposition by BALDONI (*supra* n. 1) § 7 rests on his theory on the nature of conflicts law; against him AGO, *Teoria* 179 n. 1, 184; BATIFFOL, *l.c.*

ability of this theory is, of course, manifest when the foreign system has never been changed and has no transitory rules at all.

Eliminating this theory, opposition to the transitory rules of the forum results in the principle that the new conflicts rules apply, subject to some exceptions, particularly on the ground of public policy.<sup>28</sup>

Pace, the author of a voluminous new treatise on the general subject of transitory law, rightly places emphasis on what he calls the structure, and what we call the construction, of the *new* rule.<sup>29</sup> Conflicts rules are not included, and the author's insistence on the adaptability of his formula *tempus regit factum* has deviated too much attention from the details of the matter. Nevertheless, his extended polemics and his starting point in the new law seem closely to associate his effort to the spirit of Kahn's search for specialized rules, which despite all its defects is still the best method of approaching the desperate problem.

An original and enlightening idea has been expressed by E. M. Meijers and the Benelux draft. In principle, the present rules apply; by exception foreign legal relations are recognized as they were determined by the conflicts laws—all of them—of the countries essentially connected with these relations at the time of origin or extinction.<sup>30</sup>

### III. RATIONALE

The divergent theses of the leading writers arrive at the application of four different sets of rules, existing or planned:

- (1) The substantive transitory rules of the forum, either by direct application or by analogy;

<sup>28</sup> Thus, YANGÚAS 217 f.

<sup>29</sup> PACE, *supra* n. 1, and a summary in Rivista dir. com. 1947, 256-267.

<sup>30</sup> Benelux draft, art. 25 par. 2; cf., MAKAROV, 18 Z. ausl. PR. (1953) 218 f.

- (2) An inceptive system of transitory rules of the forum, either for the special purpose of conflicts law, or involving the change of both substantive and conflicts rules;
- (3) The substantive transitory rules of the applicable system; or perhaps certain parts of this law;
- (4) The present conflicts rules of the forum as retroactive with exceptional cases of nonretroactivity.

I am unable to subscribe in full measure to any of the doctrines suggesting these solutions. Each has some merits and some severe drawbacks. In my opinion, the following considerations are decisive.

1. With Kahn and Raape, we must deny by all means the influence of a former conflicts rule on a relationship which had no connection with this rule during its time. If two Spaniards domiciled in France had married there, the intrinsic requirements were subjected, respectively, by the old German and the new Brazilian conflicts law to the law of the domicil and by the new German and the old Brazilian conflicts law to the national law. Who would dare to say that the old or the new conflicts rule is "right," just, adequate, and better protects the interest of the parties than the other? Naively, it has been presumed that the law of the former time was preferable because the parties trusted it—a very strange idea that these Spaniards should confide in a conflicts law of whose existence they never knew. It is likewise rather absurd to discriminate foreign-governed family relations according to the deadlines of January 1, 1900, of Germany or 1942 of Brazil. Contrary to Kahn and Raape, however, this is not only true when the parties never had a domicil and never brought an action in the forum; it is always true in foreign-governed relationships. The German transitory rules themselves were adequate only for such legal situations as would have been governed

by the new Civil Code, if it were applied retroactively. In these cases, it could possibly—inconvincingly as we have seen—have been argued also that the former conflicts rules pointing to the relevant particular territorial laws had to be preserved. But if French spouses fixed their first matrimonial domicile in 1899 in a German town in which separation of property obtained, a French court would tend to presume that the parties agreed on the French community system. Could they be presumed instead in Germany or in a third country to have “trusted” the local system so that this system must be perpetuated after 1900?

Even considering the relationships with which they were connected in a drastic way, is there any “expectation of the parties” to protect when their transaction is *void* under the law applicable under the old conflicts rule? Moreover, expectation of laymen based on conflicts law is a fantastic invention; if the parties did not care to agree on an applicable legal system, there must be another solid ground for exempting the case from the conflicts law in force.

*Illustration:* In a case decided in 1907 by the Reichsgericht a married woman signed a release to her husband in 1896 in Wiesbaden, where under German common law the domicile, namely, Baden, determined the validity of contracts. Nevertheless, as the question whether the wife had made a valid gift between spouses belonged to marital property law according to the conflicts rule of Baden, the national law seemed to apply. This would have been the law of Mark Brandenburg and “subsidiarily the Prussian Landrecht.” According to the “more recent practice” of the court, however, further reference would be made from Prussian to Baden law whose article 1096 allowed revocation.<sup>31</sup>

What law, we may ask again, did the parties trust?

<sup>31</sup> RG. (Oct. 11, 1907) 19 Z. int. R. (1909) 222, Schall v. Schall.

The right solution, therefore, cannot lie in simply going back to the old conflicts rules, for the only reason that important elements of the case happened to appear in the past, or even some substantial connections with the forum then existed.

2. On the other hand, "respect for the past" has always been paid to what was called *jura adquisita*, vested rights, *wohlerworbene Rechte*. Despite Pillet, Dicey, and Beale, this category has lost its charm. It is also settled that conflicts law itself never creates any indefeasible right, only to be constituted "by the just meaning of the competent legislation."<sup>32</sup> Unfortunately, the misused and demolished vested rights doctrines have left a vacuum to this day. In the intertemporal field, at this time, merely two assumptions seem assured:

(a) A foreign judgment recognized as *res judicata* by a decision of the forum at the time of its previous conflicts rules remains binding, although this recognition required that a conflicts rule of the forum, now repealed, was observed by the foreign court. We re-enter the problem, however, where no recognition was sought at the time of the old conflicts rule.

(b) An obligation fulfilled, a marriage dissolved, an inheritance right won or lost by the death of the decedent, in short, a legal relationship finished under the old set of rules remains liquidated.

(c) While these propositions are confined to the forum's own conflicts rules, there is clearly a need for a broader respect for the past, as in the "immemorial" prescription of the Pandectists. A few suggestions have been made

<sup>32</sup> ANZILOTTI, 2 *Rivista* at 131. The "vested right" of a natural child, born in the period when Austrians were considered German nationals, assumed in German decisions 1950 and later (16 *Z. ausl. PR.* 509) eliminates EG. art. 212, but is based on substantive law.

recently to fill some gaps left by the disappearance of the vested rights category. Thus, the Benelux draft preserves the relations recognized by the conflicts laws of "the laws" with which they are connected,<sup>33</sup> and Niederer proposes to allow the court's discretion for maintaining exceptionally the products of a legal system that would not be competent under the court's normal conflicts rules.<sup>34</sup> On these questions, transcending by far the field of private international law, further discussions are highly desirable.

3. In a series of existing conflicts rules, reference is made to the law of a specific time, and in particular that of a past event. When the form of marriage, a contract, a conveyance, a will is governed by the law of the place of celebration or execution, also the law of the time is meant. The first matrimonial domicile or the nationality of the husband or the spouses refers primarily to the initial stage of the marriage. The status of a child is determined according to the moment of its birth or legitimation. Tort is subject to the law of the place where, at the time when, the harm is done. Possession and property comes into existence at a certain time under the law of this time. Construction of agreements and wills must take into consideration the law of the time of execution.

These and other references to the past, developed within the framework of the conflicts rules of one system, should be greatly and consistently enlarged, especially in the interest of the validity of transactions. They serve better than transitory rules when they concede optional application in favor of validity or when the transaction depends on a future event, as a testamentary will does.

<sup>33</sup> *Supra* n. 30.

<sup>34</sup> NIEDERER, Einführung in die Allgemeinen Lehren des int. Privatrechts (1954) 320.



*Illustrations:* (I) Suppose a German when domiciled in Brazil executed in 1941 in Cuba a will in German holographic form and died domiciled in Cuba in 1953. The will was valid in the eyes of a Brazilian judge when his old conflicts rule referred to the national, German, law of formal requisites. Under the new domiciliary approach, a Brazilian court would regard the will as invalid if no help were forthcoming. The transitory rule of the 1942 Law does not help.<sup>35</sup> But the rule, *locus regit actum*, would, provided that we suppose that the Brazilian law has merely forgotten to mention it<sup>36</sup> and, moreover, that the unsound rejection of renvoi in article 16 were relaxed to permit further reference from Cuban to German law.

(II) Suppose a seventeen-year-old Italian boy, domiciled in Florida, made there a will in 1941, then moved to England where he died in 1944. Capacity to execute a will is given in Italy at 16, in Florida at 18, and in England at 21 years, and must exist in Italy at the time of execution and in Florida and England at the time of death. A Brazilian court formerly looked to Italian law and held the will valid. Now it must find capacity at the time of execution missing and at the time of death still missing. Any transitory law depends on the time of the death. But if Brazil were to recognize validity of a foreign will also in a case where the testator had capacity by his national law at the time of execution, conflicts law would take care of the situation.

4. That the contacts preferred by a new determination of choice of law should generally yield to the abandoned standards without appropriate direction by the lawmaker is not a very attractive idea. It has been a strange idea when the new rules substituted a congeries of dubious provincial case laws, as in the German, Polish and other legislations. Even elsewhere there is not much substance

<sup>35</sup> *Supra* 510.

<sup>36</sup> *Supra* 517.

to suggest a presumption for the old setup, nor, it is true, for any other a priori considerations. Discovering individual solutions needs much more detailed studies than have been afforded thus far. To resume the principal experience of this work in a caveat as used in the Restatements, our last word may call once again for prudent research.