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THE FORM OF WILLS*

ERNST RABEL†

"Yielding Place to New: Rest Versus Motion in the Conflict of Laws"[1] — under this headline Herbert F. Goodrich, the eminent leader, recently reviewed improvements of judicial attitudes. Concluding his stimulating essay, he states that "motion and rest" must stay balanced; no total codification of uniform conflicts rules will be feasible until our experience is much enhanced. I fully agree. It is also my own impression that conflicts law needs infinitely more study and effort, not only by the courts, but also, and in the first place, by the scholars. But could not the approach toward reasonable and uniform judicial rules be speeded up a bit? Could the partial legislative activity, which Goodrich does not fail to mention, not enjoy more favor with draftsmen and legislatures?

A very small but, in its close limits, rather significant piece of illustration may be offered here.

When the National Conference of Commissioners on Uniform State Laws was founded in 1892, practically their first work was the drafting of an act relating to the execution of wills.[2] The wording was identical with the text agreed upon in 1896[3] and again with that promulgated in 1910[4] as the Uniform Wills Act, Foreign Executed. Among the many subsequent uniform bills this is a *rara avis*, belonging to the "conflictual" kind. It provided that wills executed in a foreign state in a manner recognized at the forum or at the testator's domicil should be considered as if they were executed in the mode of the forum. This rule extended to interests in land.

The draftsmen stated in 1892 that there was no real reason for the differences of formal requirements in disposing by testament of personalty and real estate, "the effect of which has been in many cases to defeat the purpose of a testator." Since divergence of the laws of real and personal property had been abolished in most states, "there would seem to be every reason why a similar simplification of the law should be accepted." However, the success was limited. The Wills Act,

* The substance of this article will appear in the fourth volume of the author's *Conflict of Laws: A Comparative Study*.

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1. 50 COL. L. REV. 881 (1950), 22 OKLA. BAR ASS'N J. 208 (1951), 5 RECORD OF ASS'N OF BAR OF CITY OF N.Y. 327 (1950).
2. [1892] HANDBOOK OF NAT. CONF. OF COMM'RS ON UNIFORM STATE LAWS 9.
3. [1896] *id.* at 19.
4. [1910] *id.* at 144.

Foreign Executed has been adopted by only thirteen jurisdictions.[5] In a new draft of an Execution of Wills Act, intended to unify the domestic formal requirements of wills themselves, the old text was inserted with certain modifications to be discussed later.[6] This broadening of the scope was balanced by changing the "uniform" law into a "model law." Although this Act's influence has certainly been notable, in the past twelve years only Tennessee has joined the ranks of the adopting states.[7] The draftsmen consider their work useful rather than necessary. Yet at least the conflicts rule of section 7 concerns one of the numerous points where the local differences are devoid of any territorial, moral, social or other justifications and are plainly apt to irritate the people involved. Legal formalities are indispensable, but to allow their local shades to disturb otherwise unimpeachable postmortem dispositions compromises the law. At the same time, I need not prove once more the desirability of a generous recognition of foreign forms of testaments; this has been stated in this country in a masterful exposition by Lorenzen as early as 1911[8] and in Canada by Dean Falconbridge, who shaped a Uniform Law paralleling the American and improving Lord Kingsdown's Act — the latter a drastic movement itself to the same goal — and by a steady development all over the world which will be sketched presently.

It was not by accident, indeed, that the Hague Conferences on private international law from their beginning in 1893 — almost the same year that the American Uniform Laws started — until the sixth conference in 1928, concerned themselves with the conflict of inheritance laws and in particular with those respecting the form of wills.

BASIC TESTS

In the curiously involved history of doctrines from the Twelfth to the Eighteenth Century, the ancient law of the person was replaced by the territorial *lex situs* of the feudal regimes until the personal law came back openly or in the disguise of a *statutum reale*. In this development, the form of wills from the Thirteenth Century on was

5. Alaska, Hawaii, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Nebraska, Nevada, New York, South Dakota and Wisconsin. See 9 U.L.A. 419 (1951). Washington repealed the Act. Tennessee acceded to the new draft (see note 7 *infra*). Kansas revised in accordance with § 7 of the new Act (see note 41 *infra*).

6. MODEL EXECUTION OF WILLS ACT, 9 U.L.A. § 7 (1951). This has been adopted in the Model Probate Code § 50. SIMES, PROBLEMS IN PROBATE LAW 82 (1946).

7. TENN. CODE ANN. §§ 8098.1 — 8098.9 (Williams Supp. 1952). Section 7 has been called an excellent provision against pitfalls for the unwary lawyer where testator has property in more than one state. Blackard, *The Effects of the Enactment of the 1941 Wills Act*, 17 TENN. L. REV. 447, 449 (1942).

8. Lorenzen, *The Validity of Wills, Deeds and Contracts as Regards Form in the Conflict of Laws*, 20 YALE L.J. 427 (1911).

a subject of controversies in which domicil and *lex loci actus* were often in rivalry.[9] The Nineteenth Century saw the domicil as of the time of the death of the testator at common law, and *lex loci actus* at civil law dominate the choice of law for the form of succession to movables.

At common law, the formal requirements of a will, like all other requisites and effects of wills, are determined by the law governing succession. This is the law of the situs for immovables and the law of the testator's domicil at the time of his death for movables. The purest, unadulterated expression of these rules is to be found in the *Restatement*.[10] A will affecting immovables must observe the domestic law of the place where they are situated or else be void.[11] As to movables, a will complying with the law of the place of execution, or even with the requirements at the testator's domicil at the time of execution but not with what is law at the last domicil of the deceased, is void.[12] On the other hand, a will invalid where it originated may attain validity under the law of the domicil of the testator when he died.[13] In a well-known criticism, Phillimore called this system of compulsion "unwisely, arbitrarily and unphilosophically" made.[14]

The civil law tradition, here, as in the matter of contracts, detaches the formal elements from the whole transaction and treats them in accordance with the maxim, *locus regit actum*. Not in the old Italian school, but since the French statutists, this principle was prevailingly observed in full rigor, with imperative force. The will had to conform to the formal provisions of the law governing at the place of execution or be considered void under the law governing succession. Thus, the Grand' Chambre du Parliament of Paris invalidated in 1721 a holographic will that the Governor of Douai, M. de Pommereuil, had made in that town in the holographic form of the Coutume de Paris.[15] This remained the French approach during the Nineteenth Century. Hence, a foreigner could not employ the forms of his home state. In the numerous cases of wills made in France by Englishmen in the English manner with two witnesses, a manner unknown to French

9. LAINE, DE LA FORME DU TESTAMENT PRIVE EN DROIT INTERNATIONAL (1908).
10. RESTATEMENT, CONFLICT OF LAWS §§ 249, 306 (1934). See also 4 PAGE, WILLS §§ 1633, 1637 (3d ed. 1941); GOODRICH, CONFLICT OF LAWS 505, 512 (3d ed. 1949).
11. United States: *In re* Irwin's Appeal, 33 Conn. 128 (1865); 2 BEALE, CONFLICT OF LAWS § 247.3 (1935). England: Pepin v. Bruyere, [1900] 2 Ch. 504, *aff'd*, [1902] 1 Ch. 24 (1901). Canada: *In re* Howard, [1924] 1 D.L.R. 1062.
12. Nat v. Coons, 10 Mo. 543 (1847); Moultrie v. Hunt, 23 N.Y. 394 (1861); Bremer v. Freeman, 10 Moo. P.C. 306, 14 Eng. Rep. 508 (1857).
13. *In re* Beaumont's Estate, 216 Pa. 350, 65 Atl. 799 (1907).
14. PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 627 (3d ed. 1879-89).
15. 2 LAINE, INTRODUCTION AU DROIT INTERNATIONAL PRIVE (1892). In analogous cases since 1615, the Parliament of Paris has held to the same effect. See DUBRUJEAUD, DES CONFLITS DE LOIS RELATIFS A LA FORME DU TESTAMENT SOUS SEING PRIVE (These pour le Doctorat, Paris 1908).

law, it happened that the will was invalid in England because France was the last domicil,[16] and was equally void in France, because it was executed in France.[17]

A third connecting factor is the oldest of all: *lex situs* governing all assets including movable property. Recently abandoned in Illinois, this approach obtains in Mississippi.[18] It is found in the Treaty of Montevideo which remains true to *lex situs* even in the revised draft of 1940, the only mitigation being that authentic wills executed in a member state are recognized.[19]

These three basic tests, if standing unrelated, are a monument of isolationism. They are inexcusable where the ultimate penalty of invalidity befalls an instrument as the effect of one of the innumerable variants in the formalities, involving number of witnesses, attestation and signing, acknowledgment of presence, officials in public wills, dates and location of signature in holographic wills, and so forth.

Enlargements

Even before the belief of the lawyers in the necessity of rigorous formality began to decline, the international intolerance shown in our matter aroused astonishment. It is well known how the decision in *Bremer v. Freeman*[20] alarmed the British colony in France and led to Lord Kingsdown's Act[21] which created an extensive faculty for British subjects to make wills abroad. According to this law, which despite its record for bad drafting[22] is still in force, the formal validity of the will may derive from the law of the place of execution, or that of the testator's domicil at the time of execution or that of his domicil of origin. (Section 1). Of course, the law of the testator's last domicil may continue to validate his will. (Section 4).

The British Act was amended by the Uniform Wills Act in Canada in several points, particularly by including alien testators. The list of references is increased by the law of the Act, *i.e.*, the enacting state.[23] This Act was only adopted by two provinces.[24] The wording was

16. Bremer v. Freeman, 10 Moo. P.C. 306, 14 Eng. Rep. 508 (1857).
17. This line of decisions reached to the lower courts in the complicated case of Gesling v. Viditz, Cour Paris, Dec. 2, 1898, D. 1899, 2.177; and Cour Orleans, Feb. 24, 1904, [1909] Revue D.I.P. 900. This case was later reversed. See note 30 *infra*.
18. Miss. Code Ann. § 467 (1942).
19. Art. 44.
20. 10 Moo. P.C. 306, 14 Eng. Rep. 508 (1857).
21. Wills Act, 1861, 24 & 25 Vict., c. 114.
22. See the criticism in Morris, *The Choice of Law Clause in Statutes*, 62 L.Q. Rev. 170, 173 (1946). Among other doubts, it is controversial whether or not § 3 of the Act, protecting a valid will against change of domicil, extends to aliens. For a recent article answering this question in the affirmative, see Breslauer, *The Scope of Section 3 of the Wills Act, 1861*, 3 Int'l L.Q. 343 (1950).
23. 14 Minutes of the Proceedings, Canadian Bar Ass'n, 1929 at 323 332 *et seq.* (1930). Also printed in Morris, *supra* note 22, at 185.
24. Saskatchewan and Manitoba.

further improved recently by a draft of its principal author, Dean Falconbridge.[25]

In the civil law countries of the later Nineteenth Century another enlargement took place. The *lex loci actus* lost its mandatory character and permitted the personal law to govern formalities, either in disposing of movables or, in accordance with the principle of unity of successions, of the entire inheritance. Personal law to the Continental European mind was in this period the national law at the time of executing the will. Thus the old test of *lex loci actus* was replaced by the option, *lex loci actus* or *lex patriae*, as early laid down in the Italian Code of 1865.[26] The German Civil Code of 1896 inverted the order: *lex patriae* or *lex loci actus*.[27]

In France, two sections of the Civil Code raised difficulties. Article 999 permits Frenchmen abroad to make a will by the French form of a holographic will or by local authentic testament. The courts rejected foreign-executed oral wills of Frenchmen[28] but soon argued that authentic wills did not need intervention by one or two official, solemnizing persons as the French Code demands. The definition should rather be taken from the foreign place of execution. Use by Frenchmen in a common law jurisdiction of the private and secret Anglo-American forms was therefore admitted,[29] a nice legal trick to obviate hardships. On the other hand, foreigners in France were finally allowed, despite the categoric rule *locus regis actum* of Civil Code, Article 3, to make wills in France in their national forms. The Court of Cassation announced the facultative, optional function of this maxim, in a decision in 1909, dealing with the will of a foreigner.[30] After this was secured, the authors went further in construing Article 992 as merely "enunciative"; Frenchmen should be able to use any forms of the local law, for instance a holographic will in an easier form than Civil Code, Article 570, allows.[31]

An analagous development may be noted in Quebec and Chile. When a testator domiciled in Quebec executed a holographic will in New York, the old interpretation of the Quebec Civil Code, Article 7, imperatively required compliance with New York law which did not recognize holographic wills. But the Court of Appeals unanimously,

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25. FALCONBRIDGE, CONFLICT OF LAWS c XXIII (1947); 34 MINUTES OF THE PROCEEDINGS, CANADIAN BAR ASS'N, 1951 at 42-45 (1951); Falconbridge, Note, 62 L.Q. REV. 328 (1946).

26. Former Civil Code 1865, Disp. Prel. Art. 9, ¶ 1.

27. E.G.B.G.B. Art. 11, ¶ 1, as well as some treaties of Germany. A similar doctrine is found in Austria, Japan, Poland, Siam and Sweden.

28. Trib. Civ. Lyon (without date), [1877] CLUNET 149 (France).

29. Cass. Civ., Feb. 6, 1843, D.1843, 1.208, S.1843, 1.200; App. Rouen July 21, 1840, S.1840, 2.515; Seine, Feb. 6, 1919, [1920] REVUE D.I.P. 476.

30. Cass. Civ., July 20, 1909, D.1911, 1.185, S.1915, 1.165, [1909] CLUNET 1007 (France), [1909] REVUE D.I.P. 900.

31. BATIFFOL, TRAITE DE D.I.P. § 581, p. 582 *et seq.*

and the Canadian Supreme Court by majority, applying Quebec law as the law of the last domicil and superadding, as a second theory, validity by renvoi from New York to Quebec,[32] validated the will. Article 18 of the Chilean Civil Code requires that every will be a public and solemn instrument and Article 1027 again recognizes a foreign will only if it is written and "solemn." But the views of the commentators and a decision of 1864 rejecting foreign holographic wills were superseded by a decision of the Supreme Court of 1927 which recognized them.[33]

Among the statutes which followed the French lead,[34] an analogous trend is noticeable although often the required authentic form is more rigorously insisted upon. Frequently the domestic forms must also be observed by foreigners, and holographic wills may be excluded altogether.

Nevertheless, the most familiar formula of the civil law countries can be stated as referring alternatively to *lex loci actus* or the national law of the testator. Nationality is sometimes replaced by domicil as the test of personal law, for instance, in Brazil. However, in France where the law of the last domicil governs successions to movables, formal validity is yet subject to *lex loci actus* or *lex patriae* as of the time of execution.

To complete the world survey, one would have to distinguish at least a dozen different references: *lex situs; lex situs* or last domicil, respectively; *lex loci actus;* domestic law or *lex loci actus,* respectively; domestic law or authentic wills under *lex loci actus,* respectively; law of the enacting state or *lex loci actus; lex loci actus* or domicil at the time of execution; *lex loci actus* or nationality at the time of execution; and larger combinations.

Among these combinations a few are outstanding. The Hague draft of 1928 of a convention for conflicts rules on succession sets an example for adding to the *lex loci actus* and the national law of the time of execution the national law at the time of death.[35] The recent civil codes of Italy and Greece are amenable to this type.[36]

On the other hand, both nationality and domicil are considered in a few jurisdictions. The Scandinavian Convention of 1934, taking into account both the west Scandinavian time-honored principle that the personal law is determined by the domicil and the nationality

32. Ross v. Ross, 25 Can. Sup. Ct. 307 (1893). *Cf.* FALCONBRIDGE, CONFLICT OF LAWS 113 (1947); 3 JOHNSON, CONFLICT OF LAWS 5.

33. App. Santiage, June 27, 1864, [1864] Gaz. Trib. 1194 n.436; Corte Supr., Jan. 14, 1927, 25 Rev. Dir. y Jur. I, p. 106; FERNANDO ALBONICO, VALENZUELA EL DERECHO INT'L PRIV. ANTE LA JURISPRUDENCIA CHILENA 166 (1943).

34. Belgium, Bulgaria, Congo, Cuba, Dominican Republic, Egypt (Code 1948 Art. 17), Haiti, Puerto Rico, Panama and Venezuela.

35. Actes de la Cinquieme Conference de la Hague p. 283, Art. 6 (1925); Actes de la Sixieme Conference p. 405, Projet Art. 6 (1928).

36. Italy: Civil Code 1942, Disp. Prel. Art. 26; Greece: Civil Code 1940-1946, Art. 11.

principle of Sweden and Finland, considers a will formally valid if it complies with the law of the place of execution or the law of the domicil or the national law at the time of the execution,[37] but omits, like the continental codes, the last personal law.

The Swiss law of 1891, enacted at a time when legislative power on private law was with the cantons, allows the forms of the place of execution, of the canton of domicil at the time of execution or of death and of the home canton. In the international application this means option among the place of execution, the domicil at either time and the nationality.[38] The Civil Code of Argentina admits foreign executed wills in the form permitted at the testator's residence or nation or by the Argentinean law.[39]

Within the United States, five or more groups of conflicts rules are distinguishable.[40] It is highly significant that in most jurisdictions foreign executed wills on movables agreeing with the formalities of the place of execution, are recognized. The variants include, in addition, the law of the enacting state or the domicil at the time of execution, or both. On the other hand, six states name only their own law and the *lex loci actus,* and eleven states retain exclusively the common law criterion of *lex domicilii* as the time of death.

We are, of course, most interested in the Uniform Act. In its version of 1910, it permitted adjustment to the law of the enacting state, or the *lex loci actus,* or the law "of the domicil" without specifying the decisive time of the latter. The draft of 1938 supplied a broader option, referring to the domicil either of the time of the execution or at the death. This version was adopted by Kansas.[41] But, without discussion,[42] the commissioners abbreviated the wording, leaving only the domicil at the time of the execution:

> "A will executed outside this state in a manner prescribed by this Act, or a written will executed outside this state in a manner prescribed by the law of the place of its execution or by the law of the testator's domicile at the time of its execution, shall have the same force and effect in this state as if executed in this state in compliance with the provisions of this Act."[43]

37. Art. 8, Convention on Inheritance and Succession of Nov. 12, 1934, 164 LEAGUE OF NATIONS TREATIES SERVICE 247; 6 HUDSON, INTERNATIONAL LEGISLATION 947 n.397.
38. Niedergelassenen und Aufenthalter Gesetz, Art. 24.
39. Argentina: Civil Code Art. 3638. The same trend is noticeable in the law of French Morocco, Dahir of April 12, 1913, Art. 10.
40. A detailed survey has been give in a remarkable article by Hopkins, *The Extraterritorial Effect of Probate Decrees,* 53 YALE L.J. 221, 254 *et seq.* (1944).
41. KAN. GEN. STAT. ANN. § 59-609 (1949).
42. The 1938 version was written: "either at the time of its execution or of the testator's death. . . ." [1938] HANDBOOK OF NAT. CONF. COMM'RS ON UNIFORM STATE LAWS 314. The 1939 version appeared: "at the time of its execution. . . ." [1939] *id.* at 227. Mr. Barton H. Kuhn, Omaha, obliges me by stating that no discussion of this omission is noted in the files.
43. MODEL EXECUTION OF WILLS ACT, 9 U.L.A. § 7 (1951).

Probably the old text already meant to refer to the domicil at the time of execution, and was silent on the last domicil because this was the old accustomed device of which no lawyer needed to be reminded. Section 1 of Lord Kingsdown's Act may have been too closely followed. The final text expresses what the old wording omitted to specify. The formulation this time, it is true, sounds so exhaustive that it has been understood by competent interpreters as excluding the last domicil.[44] If so, the common law rule would have entirely yielded to the civilian thought. This is unlikely in itself and seems not to have come to the mind of the draftsmen. The omission also of *lex situs* reinforces the argument that the draftsmen cannot have intended to exclude the old criteria. This interpretation is approved by a leading commissioner.[45]

However, most recently the Commissioners informally suggested a new version, covering wills of nonresidents executed in the states, mentioning the last domicil, and even indicating that the various laws referred to may be those at the time of the execution or of the death.[45a] This is the most recommendable text proposed in this country.

OBSERVATIONS

The preceding survey suggests a few remarks.

1. The largest lists of permissible forms effectively diminish the dreaded pitfalls for testators by allowing unitary wills for movables and immovables and in other respects. Yet, in the entire checkered picture, there are enough dangers left at present to cause concern when a testator changes his domicil or his assets transcend state lines. Practitioners must look for remedies.

It is old advice in the civil law sphere that a will should be clothed in the most exacting public form available so as to suffice any law requiring "authentic" testaments. It is well known, however, that formal invalidity, strikingly enough, is often encountered just in notarial instruments.

In the United States and elsewhere, advantage has been seen in separate wills with respect to every state where immovables are left. These wills have to be altered according to changes of circumstances or of fancies. They may also be construed by different methods.

A relatively helpful private form may be suggested, combining a holographic will with the Anglo-American attestations of witnesses, both complying with the most severe standards. I do not pretend, of course, that this eliminates all pitfalls.

44. Thus Hopkins, *supra* note 40, at 268 with regret.
45. Mr. Willard Luther, Boston, kindly authorizes me to state his personal interpretation of § 7 to this effect.
45a. Note to the Uniform Probate of Foreign Wills Act (1950), 9A U.L.A. 33 (Supp. 1952).

2. Experience in this country and abroad has brought to evidence that the personal law neither at the time of death nor at the time of execution, taken alone, suffices. Lord Kingsdown's Act and the American Uniform formula had to add the time of execution, while the Hague draft added the time of death. The two great groups did join, for once. But most statutes are lagging, and the text of the Model Act ought to be clarified.

3. The American proposal, Lord Kingsdown's Act and a considerable number of American and foreign laws include "this law" — the law of the enacting state — in their lists. "This law" may, but need not, be identical with the last domiciliary or national law. The reference covers the cases where assets are situated at the forum, while the other local contacts may be foreign; for instance, it obviates hard proof of compliance with the law of the place of execution.[46] In systems tending to a strong territorialism, this is a natural device. Another unsuspected use may appear in the following situation. An American citizen, formerly domiciled in Tennessee, takes a new domicil in Cuba (or the Netherlands, Japan, etc.), executes there a will conforming to the law of Tennessee, *i.e.*, the Model Probate Code, with two witnesses, and dies there. An American, domiciled abroad is no longer a citizen of a particular state;[47] the United States has no substantive law of succession. Thus, there simply is no "national law" of succession for him. The domicil and the place of execution refuse recognition. But the court of Tennessee and others, if not demanding more exacting formalities, may admit the will to probate under "this," their own statute.

Yet such probate judgment, since not even rendered at the last domicil, will not have smooth effect outside the state. The only real remedy would be a substantive all-American rule applicable by any foreign court that looks to the national law. Americans abroad are a new event in American law making!

4. The American provisions and many others are merely concerned with foreign executed wills. A considerable number of states, indeed, insists on their own formalities for wills executed locally. This occurs not only with respect to the subjects of the forum and to domestic immovables, but *locus regit actum* is also likely to be applied to all assets in the imperative meaning when the will is executed at the forum. French practice and the German Code advanced to a general option between the *lex loci actus* and the personal law. This development

46. *In re* Hart's Estate, 160 Misc. 198, 289 N.Y. Supp. 731 (Surr. Ct. 1936), *aff'd*, 250 App. Div. 753, 295 N.Y. Supp. 765 (1937).

47. Hammerstein v. Lyne, 200 Fed. 165 (W.D. Mo. 1912); 1 RHEINSTEIN, GIURISPRUDENSA COMPARATA DI D.I.P. 144; 1 RABEL, CONFLICT OF LAWS 134 (1945).

has been followed in many other countries but lacks general acceptance.

We need, in addition, better mutual knowledge of the options permitted by the foreign, primarily applicable law.[48]

5. It is gratifying to see that the conflicts rule of the common law has so largely been enriched by allowing consideration of the law of the place of execution. Again, most American statutes and the great majority of all other laws are now united under this old rule.

Will, however, this introduction of *lex loci actus* into the common law structure, be accompanied by a renascence of the continental controversy on the relationship between *lex causae* and *lex loci actus?* To be sure, when *locus regit actum* was an imperative rule, it was naturally an independent rule; the formalism that surrounded it was strong enough to assure extraterritorial recognition to a transaction complying with the form of the territory where it originated. Only when, at the height of the nationality principle, the national law came to create contracts and testaments in competition with the law of the place of acting, did the idea prevail that the national law is the superior instance. At the beginning of our century, it was believed to be the common opinion that a will, though agreeable to the form of the law of the place where it was executed, is void if this form is not recognized by the law governing the succession.[49] In this sense, the first drafts of the Hagne Conferences on succession, since 1894, restricted the force of *lex loci actus*. This was aimed particularly at a general recognition of a famous section of the Dutch Civil Code (Article 992) prohibiting in no uncertain terms a Dutch national to make a will abroad in nonauthentic form. However, this theory has since become the view of a small minority, at least in France and Germany. Literature and courts there have reverted to the original independence of *locus regit actum* in controlling form and have no longer doubted that the Dutch prohibition concerns a pure problem of "form" rather than capacity.[50] In accordance with this result of a long debate, the last Hague draft on succession (1928) has no more than a reserve

48. The Tribunal de la Seine, July 13, 1910, [1912] REVUE D.I.P. 414, [1911] CLUNET 917, rejected — it is true, in a suspicious affair — the will of a naturalized American, domiciled in France and yet regarded as a citizen of New York, because it was in the American style and New York was supposed to recognize exclusively *lex loci actus!* See also Cour Alger, May 26, 1919, [1921] REVUE D.I.P. 117.

49. CONTUZZI, IL DIRITTO EREDITARIO INTERNAZIONALE (1908).

50. France: Cass. Civ., Aug. 25, 1847, D. 1847, 1.273, S.1847, 1.712 (holographic will of an Englishman); Orleans, Aug. 4, 1859, D.1859, 2.158, S.1860, 2.37 (holographic will of a Dutchman); Trib. Seine, Mar. 23, 1944, S.1944, 2.44; 10 REPERTOIRE DE DROIT INTERNATIONAL PRIVE ET DE DROIT PENAL INTERNATIONAL FONDE 545 n.79; LEREBOURS-PIGEONNIERE, PRECIS DE DROIT INTERNATIONAL PRIVE 258 n.233 (5th ed. 1951). Germany: R.G. Apr. 24, 1894, 5 Zschr. Int'l Recht 58, S.1895, 4.12; O.L.G. Hamburg, May 2, 1917, 35 ROLG. 295, I KAHN, ABHANDLUNGEN ZUM INTERNATIONALEN PRIVATRECHT 43 (1928); 2 *id.* at 226; and the great majority of recent writers.

for the national law: a holographic will of a Dutchman executed abroad in a country admitting this form may be void in The Netherlands, but is valid in a third state.[51] International security of transactions must be preferred to the best-meant protective restrictions to freedom of acting abroad.

Although the practically abandoned theory that *locus regit actum* needs the approval of *lex causae* has been inserted in the French reform draft,[52] a special provision (Article 60) maintains the present rule concerning wills. The "Benelux" codification of conflicts law, however, took up the original idea of the Hague drafts, giving extraterritorial effect to the Dutch provision.[53]

6. Finally, comparing the advanced lists in the Model Law, adopted in Tennessee, and the Hague Draft, a striking parallelism is revealed with the difference that here domicil, there nationality, alternates with the *lex loci actus*. Manifestly, most draftsmen do not even think of the connecting factor in the other half of the world. The Scandinavian countries and Switzerland (when it has legislated in the matter) made a readily explainable exception, in view of the diverse systems of their own component states or cantons. However, Argentina did consider the two principles of domicil and nationality in force on the American continent. To be sure, that contrast of reference points dividing the other conflicts laws affects more the idea of harmony than that it creates practical gaps.

Nevertheless, there are difficulties. Suppose a Frenchman, domiciled in England, executes in Portugal a holographic will according to the French Civil Code, Article 570. Valid under French law (Civil Code Article 992), the will is invalid in Portugal.[54] In an American court such as New York, neither *lex loci actus,* nor domicil as of any time nor "this" law justifies recognition. But all jurisdictions looking to the national law must hold the will valid by a kind of renvoi natural in this matter.[55] Ought not England and the United States join them?

On the other hand, suppose a Cuban, domiciled in Detroit, on a trip to Louisiana executes there a will with two witnesses conforming to Michigan law. Michigan and Louisiana (under the Uniform Law) consider the will valid, although Louisiana requires 3 to 5 witnesses. Should it not be valid also in Cuba or Germany or Japan?

51. Actes, *supra* note 29, Art. 6, ¶ 2.
52. Comite pour la Reforme du Code Civil, Travaux 1949-50 at 673, Projet Art. 59. The late Professor Nibeyet invoked for this theory the German law, which is very clearly to the contrary, despite some isolated opposition.
53. See 1 INT'L & COMP. L.Q. 426 (1952); Uniform Law between Belgium, Netherlands and Luxembourg, Art. 23.
54. Portugal: Civil Code, Arts. 1910, 1961, 1965; Sup. Ct. Lisbon, May 28, 1912, [1913] REVUE D.I.P. 220; Jan. 23, 1917, [1920] CLUNET 278.
55. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1191, 1201 (1938), demonstrated the renvoi aspect of the references to foreign law discussed in this article.

CONCLUSIONS

Leaving divergences of less frequent occurence aside, we found a universal tendency for exactly the last sixty years to lessen the burden of testators and their counsel by allowing formal validity to be supported by more than one state law. The trend goes most strongly toward an optional function of the law of the place of execution and of the law of the domicil or nationality, respectively, at the time of the execution. Outstanding laws permit a broader option, particularly in, referring to both times, that of execution and that of death. Our suggestions are mainly the following:

1. Within the United States, the uniform provisions, now in section 7 of the Model Execution of Wills Act, should be amplified, as recently proposed, and its general adoption throughout the country should be pursued with energy.

2. In the British Empire, the analogous Canadian formulation as proposed by Dean Falconbridge should be adopted everwhere.

3. In those civil law countries that admit wills in private form, the proposal of the Hague Conferences, as last expressed in the 1928 Draft, Article 6, ought to be generally adopted, irrespective of the rest of this Draft.

4. All these lists should be increased by adding the national law here and the law of the domicil there.

But all this, I venture to repeat, is but an exemplification of the very many points in conflicts law where needs of reform are well known and recognized, but action is missing. To impress the legislatures with the importance of the conflict of laws would be a very worthy undertaking.