THE VALIDITY OF WILLS, DEEDS AND CONTRACTS AS REGARDS FORM IN THE CONFLICT OF LAWS

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I.

Is a will complying with the requirements of form where made to be regarded as valid in other places? This was a mooted question in Italy during the fourteenth century. Through the great influence of Bartolus, the founder of the science of Private International Law, the doctrine that such a will was sufficient, regardless of the domicile of the testator or the nature of the property disposed of, became the established view in Italy, from which there has never since been a departure. This doctrine

1 The Journal du Droit International Privé will be referred to in this article by "Journal"; the Revue de Droit International Privé et de Droit Pénal International, by "Revue"; and the Zeitschrift für Internationales Privat- und Strafrecht, by "Zeitschrift."

2 The following account is based largely upon Lainé, Introduction au droit international privé, II, 328-438. See also Buzzati, L'Autorità delle leggi straniere relative alla forma degli atti civili, I-40.

The stock example discussed by the early Italian jurists was a will executed by a foreigner at Venice before two witnesses in accordance with the local statute, but not complying with the requisites of the common law (Roman law). The discussion involved, (1) The validity of the local statute; (2) the right of foreigners to avail themselves of the local statute; (3) the validity of the will at the domicile of the testator. The point most hotly controverted was the first, owing to the fact that the Lombard cities of northern Italy, though practically independent, were nominally subject to the Emperor. When an affirmative answer was
met with strong opposition in northern France, the stronghold of feudalism, where the principle of the absolute territoriality of the law ("toutes coutumes sont réelles") was firmly fixed. It was not until the weakening of feudalism that, notwithstanding the opposition of d'Argentre, the doctrine of Bartolus was accepted in France through the powerful support which it received from Dumoulin. D'Argentre's followers in Belgium succeeded in restoring the supremacy of the law of the situs with respect to immovables through the Edict of Albert and Isabella of 1611. This triumph, however, was only of short duration for the traditional rule was re-established in 1634, when the Privy Council of the Belgian Provinces, yielding no doubt to public opinion, held, contrary to the express wording of the Edict, that a will relating to immovables in Italy, executed at Brussels in the local form, was valid though it did not meet the requirements of Italian law. No other attempt was made to question the rule. Since the end of the eighteenth century it has prevailed in Holland and Germany as well as in Italy, France and Belgium.

Dumoulin was the first to maintain that all legal acts should be regarded as valid if they complied as regards form, with the law of the place of their execution. This view, according to Lainé, became the general rule.

Practical and not theoretical considerations led to the adoption of the rule that compliance with the law of the place of execution must be deemed sufficient. Bartolus clearly saw the importance given to the first point little hesitancy was felt in giving a like answer to points two and three. In view of the fact that the absolute principle of territoriality had not become firmly established in Italy no serious objection could be found to the recognition of a will so executed by the courts of the domicile of the testator. The local laws were a mixture of Roman law and feudal rules and were based, to a considerable extent, upon the principle of the personality of the law. See Lainé, Introduction au droit international privé, I, 139-141; II, 335-342.

This rule became later known as that of locus regit actum. The maxim, it seems, was for the first time formulated in connection with the case In re Pommerswil, decided by the Parliament of Paris in 1721. Brillon, commenting upon the decision, began as follows: "Locus regit actum for the formality of wills. This maxim has certainly been established by this decision." See Naquet, S. 1903, 1, 75 n.

Bar states that, while the rule locus regit actum was recognized with respect to wills disposing of immovables in jurisdictions where universal succession obtained, it became never firmly established with respect to transfers of immovables inter vivos. Bar, Private International Law (Gillespie's transl.), I, Nos. 227, 370.
of allowing foreigners to execute their wills in the local form. John Voet and Rodenburgh expressly recognize it as an exception, demanded by the necessities of the case, to the principle that the law of the situs controls the transfer of immovables.

"If we consider strict law," says J. Voet, "the magistrates of our country are by no means bound, as to property within their territory, to sanction dispositions which conform to the law of the place where they have been executed, but fail to comply with the solemnities required by the statutes of the place where the property is situated. * * *"

"Notwithstanding these principles, the usage of recognizing the observance of the form required by the law of the place where an act occurred as sufficient for its validity has prevailed, so that an act executed in this mode is effective with respect to movables and immovables, even though they be situated in territories whose laws require very different and much greater solemnities. The usage resulted from two considerations: First, it seemed desirable to relieve individuals of the necessity of executing several wills or contracts, by reason of the situation of the property and the diversity of the laws, and to protect them against injury, embarrassment and inextricable difficulties; secondly, it was feared, that many acts performed in good faith would be too easily invalidated with scarcely any fault imputable to the parties. Indeed, the most experienced practitioners—not to speak of those less skilled in the science of law, do not possess sufficient knowledge—and scarcely can the most able acquire such knowledge—of the formalities required in each place for the execution of acts, and the innovations made with respect to these solemnities from one day to another."

Rodenburgh adds: "To oblige a testator to make as many wills as he has property situated in different places, or to execute his will in the form prescribed by several laws is absurd, oppressive, and incompatible with the freedom of disposing by will. In other words, strict law imperatively demands observance of the lex

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9 "Non obstat quod dictur, quod est temeraria; quia ino utilis et bona, et favorabilis, facta tam ratione testantis, sicut jura statuunt in militantis, quam etiam ratione eorum quibus relinquitur sicut jura faciunt inter liberos, etiam ratione testium ne a suis negotiis avocentur." In leg. Cunctos populos, No. 23. See Savigny, Conflict of Laws (Guthrie's transl.), 438.

rei sitae; but justice authorizes a non-compliance with this rule and the substitution of the lex loci actus. 7

England did not adopt the continental view as regards immovables. The feudal principles were too strongly entrenched there to allow effect to be given to a foreign law affecting title to English lands. 8

The recognition of the rule being a concession to foreigners, to enable them to execute their legal transactions in the form familiar to the local lawyer, compliance with such law could not be regarded as obligatory.

Says Rodenburgh: “Although wills, like transfers inter vivos, are modes of transmitting title to property, and consequently should be likewise subject to the law where the property is situated, reasons of necessity and of supreme favor have led to the view that conformity to the law of the place of execution should be sufficient. It follows that if any one has not cared to avail himself of the facilities accorded to him, for the reason that, perhaps, it was easier for him to express his last will in the form prescribed by the law of the situs, I do not see what should prevent his will from being valid. No reason of law or equity requires that measures introduced for the benefit of a person should be interpreted to his detriment.” 9

The question whether a will or other legal act might be executed in the form required by the lex domicilii or the lex rei sitae was rarely discussed by reason of the fact that the cases actually presented to the courts or to the jurists in their practice were wills executed in conformity to the lex loci. The validity of a will meeting the requirements of the lex domicilii was assumed by the early writers on the subject. “It is doubtful,” says Lainé,10 “that the nullity of an act contrary to the lex loci actus was ever asserted by the Italian jurists.” Many jurists of other countries

7 De jure quod oritur ex statutorum vel consuetudinum diversitate, tit. 1, cap. 3, Nos. 1 fg.
8 “The institution of public notaries fell early in this country into great disuse, and deeds and wills were drawn in private, with such legal assistance as the parties might think fit to obtain. Hence, it did not easily occur to the mind of an English lawyer that the necessity of recourse to a public officer, who would of course adopt the form of his own country, might make the forms of the locus actus unavoidable.” Westlake, Private International Law, 4th ed., 10.
9 De jure quod oritur ex statutorum vel consuetudinum diversitate, tit. 1, cap. 3, Nos. 1 fg.
10 II, 400.
lost sight in the course of time of the fact that the rule locus regit actum was merely a concession to foreigners and held that a legal transaction, as regards form, must satisfy the requirements of the law of the place of execution.11 Through the celebrated case of In re Pommereuil, decided by the Parliament of Paris in 1721, the imperative character of the rule became established in France.

II.

The rule that the lex rei sitae must govern the validity of all instruments disposing of immovables has never been questioned by English and American courts12 or text-writers.13 The exclusiveness of the law of the situs has been deemed to rest upon such a strong foundation of public policy that there is to this

11 See Pothier, Traité des donations testamentaires, ch. 1, art. 2, sec. 1, No. 9 (ed. Bugnet, VIII, 228); Merlin, Répertoire, Testament, Secs. 2, 4, Art. 2.

12 Coppin v. Coppin, 1725, 2 P. W. 291; Adams v. Clutterbuck, 1883, 10 Q. B. D., 403.

date no exception to the rule in England. In the United States a good many states have modified the common law by statute in favor of the continental view. The following jurisdictions allow a will executed in another state to conform to the lex loci: Alaska, Arkansas, Connecticut, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, and Wisconsin. The following allow it where the will is executed in a foreign country: Connecticut, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Mexico, North Dakota, Oklahoma, South

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14 Under sections 1 and 2 of the English Wills Act a will made by British subjects disposing of chattels real in the United Kingdom need not comply with the formalities required by the law of the situs.

As to the decreasing influence of the lex situs in general in English law, see Dicey, Conflict of Laws (2d ed.), 728-729.

15 Carter's Annotated Codes, 1900, Part V, Sec. 150.
16 Kirby's Digest of the Statutes, 1904, Sec. 8049.
17 General Statutes, 1902, Sec. 201.
18 Annotated Code, 1897, Sec. 3309.
19 Merrick's Rev. Civil Code, 1900, Art. 1596.
20 Revised Statutes, 1903, ch. 66, Sec. 13.
21 Code, 1904, Art. 93, Sec. 327.
22 Revised Laws, 1902, ch. 135, Sec. 5.
23 Revised Laws, 1905, Sec. 3662.
24 Revised Codes, 1907, Sec. 4734.
25 Public Statutes, 1901, ch. 186, Sec. 5.
26 Compiled Laws, 1897, Sec. 1976.
27 Revised Code, 1905, Sec. 5097.
28 Compiled Laws, 1909, Sec. 8901.
29 General Laws, 1909, ch. 284, Sec. 36.
30 Revised Code, 1903, Civil Code, Sec. 1010.
31 Compiled Statutes, 1907, Sec. 2744.
32 Public Statutes, 1905, Sec. 2750.
33 Statutes, 1898, Sec. 2283.
34 General Statutes, 1902, Sec. 293.
35 Annotated Code, 1897, Sec. 3309.
36 Merrick's Rev. Civil Code, 1900, Art. 1596.
37 Revised Statutes, 1903, ch. 66, Sec. 13.
38 Code, 1904, Art. 93, Sec. 327.
39 Revised Laws, 1902, ch. 135, Sec. 5.
40 Revised Laws, 1905, Sec. 3662.
41 Revised Codes, 1907, Sec. 4734.
42 Public Statutes, 1901, ch. 186, Sec. 5.
43 Compiled Laws, 1897, Sec. 1976.
44 Revised Code, 1905, Sec. 5097.
45 Compiled Laws, 1909, Sec. 8901.
Dakota, Utah, Vermont, Wisconsin. In Montana, North Dakota, Oklahoma, South Dakota, and Utah, the lex loci can be followed only when the testator's domicile is not within the state. In Iowa and Wisconsin a proviso is added that the will must be in writing and subscribed by the testator.

Fewer jurisdictions have adopted a similar modification of the common law in regard to the transfer of immovables inter vivos. Alaska, Connecticut, Illinois, Kansas, Michigan, Minnesota, Nebraska, Ohio, Oregon, Rhode Island, Vermont, and Wisconsin allow compliance with the lex loci when the in...

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46 Revised Code, 1903, Civil Code, Sec. 1010.
47 Compiled Statutes, 1907, Sec. 2744.
48 Public Statutes, 1906, Sec. 2750.
49 Statutes, 1898, Sec. 2283.
50 Revised Codes, 1907, Sec. 4734.
51 Revised Code, 1908, Sec. 9927.
52 Compiled Laws, 1909, Sec. 8901.
53 Revised Code, 1903, Civil Code, Sec. 1021.
54 Compiled Statutes, 1907, Sec. 2744.
55 Annotated Code, 1897, Sec. 3399.
56 Statutes, 1898, Sec. 2283.

In Arkansas the statutory modification exists only in favor of citizens of the United States. (Kirby's Digest of the Statutes of 1904, Sec. 809.) In Maryland there is the following proviso with respect to testators originally domiciled in Maryland: "If the testator was originally domiciled in Maryland, although at the time of making the will or at the time of his death he may be domiciled elsewhere, the said will or testamentary instrument then so executed shall be admitted to probate by the orphans' court of this State; and when so admitted shall be governed by and construed and interpreted according to the law of Maryland, without regard to the lex domicilii, unless the testator shall expressly declare a contrary intention in said will or testamentary instrument. Code, 1904, Art. 93, Sec. 327.

58 Carter's Annotated Codes, 1900, Part V, Sec. 83.
60 Revised Statutes, 1908, ch. 30, Sec. 20.
61 General Statutes, 1909, Sec. 1676.
62 Compiled Laws, 1897, III, Sec. 8963.
63 Revised Laws, 1909, Sec. 2691.
64 Compiled Statutes, 1909, Annotated, 4737, Sec. 4.
65 Bates' Annotated Statutes (6th ed. by Everett), 11, Sec. 4111.
66 Code, 1902, Sec. 5343 (Amended by Act of Feb. 25, 1907).
67 General Laws, 1909, ch. 253, Sec. 8.
68 Public Statutes, 1906, Sec. 2598.
69 Statutes, 1898, Sec. 2218.
instrument is executed in another state. Illinois,10 Kansas,11 Michigan,12 Minnesota,13 Nebraska,14 Ohio,15 Oregon,16 Vermont,17 and Wisconsin,18 have extended the rule to instruments executed in foreign countries. The acknowledgement of the instrument before a proper officer is prescribed by all of these states.

The rule of the English law governing the validity of wills disposing of moveables was not certain until 1830. Wills of Englishmen, apparently domiciled abroad, had been admitted to probate when they were executed in the English form.19 In Curling v. Thornton the learned judge strongly intimated that an English testator domiciled in a foreign country must comply with the law of England.20 The English law was settled by the decision of the House of Delegates in Stanley v. Bernes,81 which held that the lex domicilii at the time of death must determine the formal validity of a will disposing of movable property. The same rule has prevailed in this country from the earliest time.82 The conclusion has been drawn therefrom that a will validly executed according to the law of the domicile of the testator at the time of such execution may be invalidated by a subsequent change of domicile.83

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10 Revised Statutes, 1908, ch. 30, Sec. 23.
11 General Statutes, 1909, Sec. 1676.
12 Compiled Laws, 1897, III, Sec. 8965.
13 Revised Laws, 1905, Sec. 2691.
14 Compiled Statutes, 1908, Annotated, 4761, Sec. 6.
15 Bates' Annotated Statutes (6th ed. by Everett), II, Sec. 4111.
16 Code, 1902, Sec. 5345 (Amended by Act of Feb. 25, 1907).
17 Public Statutes, 1906, Sec. 2998.
18 Statutes, 1898, Sec. 2220.
20 "It may be doubted whether a British subject is entitled so far 'exuere patriam,' as to select a foreign domicile in complete derogation of his British; which he must, at all events, do, in order to render his property in this country liable to distribution according to any foreign law," 2 Add., 171.
22 Dessebats v. Berquier, 1 Bin. (Pa.), 336 (1828); Gratian v. Appleton, 3 Story, 755 (1846); Harvey v. Richards, 1 Mason, 381 (1818).
23 Nat v. Coons, 10 Mo., 543 (1847); Moultrie v. Hunt, 23 N. Y., 394 (1861); In re Beaumont's Estate, 216 Pa., 350 (1897). See also Nelson, Private International Law, 194, 195; Phillimore, International Law, IV, 629-630.
The hardship of the imperative character of the rule was not sufficiently felt in England until 1857, when the will of an Englishwoman, executed in Paris in the English form, was declared void by the Privy Council, because it did not conform to the law of France, where she was domiciled. As a result of this case, Lord Kingsdown secured the passage of an act of Parliament, through which extremely liberal doctrines with respect to the formal execution of wills disposing of movables and chattels real were introduced into English law. According to its provisions, "Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin.

"Every will and other testamentary instrument made within the United Kingdom by any British subject (wherever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

"No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same."

In the United States, Connecticut, Iowa, Louisiana,

84 Bremer v. Freeman, 1857, 10 Moo. P. C., 366.
85 Phillimore, International Law, IV, 226.
87 General Statutes, 1902, Sec. 293.
88 Annotated Code, 1897, Sec. 3309.
89 Merrick's Rev. Civil Code, 1900, Art. 1596.
Maine,90 Maryland,91 Massachusetts,92 Minnesota,93 Missouri,94 Montana,95 New Hampshire,96 North Dakota,97 Oklahoma,98 Oregon,99 Rhode Island,100 South Dakota,101 Utah,102 Vermont,103 and Wisconsin,104 have by statute changed the rule that the lex domicilii of the testator at the time of his death must govern the formal validity of wills disposing of personal property. They allow the testator to conform to the lex loci, regardless of the fact whether the will is executed in one of the United States or in a foreign country.105 Alaska106 and Arkansas107 allow it only where the will is executed within the United States. New York108 allows it only where the will is executed within the United States, the Dominion of Canada, or the Kingdom of Great Britain and Ireland. Alaska,106 Montana,110 North Dakota,111 Oklahoma,112 Oregon,113 South Dakota,114 and Utah,115 permit compliance with the lex loci only when the testator is domiciled without the state. Iowa,116 Minnesota,117 and Wis-

90 Revised Statutes, 1903, ch. 66, Sec. 13.
91 Code, 1904, Art. 93, Sec. 327.
92 Revised Laws, 1902, ch. 135, Sec. 5.
93 Revised Laws, 1905, Sec. 3662.
94 Annotated Statutes, 1906, Sec. 4634.
95 Revised Codes, 1907, Sec. 4734.
96 Public Statutes, 1901, ch. 186, Sec. 5.
97 Revised Code, 1905, Sec. 5097.
98 Compiled Laws, 1909, Sec. 8901.
99 Bellinger & Cotton's Annotated Codes & Statutes, 1902, Sec. 5561.
100 General Laws, 1909, ch. 254, Sec. 36.
101 Revised Code, 1903, Civil Code, Sec. 1010.
102 Compiled Statutes, 1907, Sec. 2744.
103 Public Statutes, 1906, Sec. 2750.
104 Statutes, 1898, Sec. 2283.
105 Arkansas limits the right to citizens of the United States (Kirby's Digest of the Statutes, 1904, Sec. 8049). Maryland contains the proviso above mentioned. See, ante, note 57.
106 Carter's Annotated Codes, 1900, Part V, Sec. 150.
107 Kirby's Digest of the Statutes, 1904, Sec. 8049.
108 Consolidated Laws, 1903; Decedent Estate Law, Wills, Sec. 23.
109 Carter's Annotated Codes, 1900, Part V, Sec. 150.
110 Revised Codes, 1907, Sec. 4734.
111 Revised Code, 1905, Sec. 5097.
112 Compiled Laws, 1909, Sec. 8901.
113 Bellinger & Cotton's Annotated Codes & Statutes, 1902, Sec. 5561.
114 Revised Code, 1903, Civil Code, Sec. 1010.
115 Compiled Statutes, 1907, Sec. 2744.
116 Annotated Code, 1897, Sec. 3309.
117 Revised Laws, 1905, Sec. 3662.
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consin, require that the will shall be in writing and subscribed by the testator.

In Maryland, Montana, North Dakota, Oklahoma, Rhode Island, South Dakota, and Utah, a will may be validly executed in conformity with the law of the testator's domicile at the time of the execution. Rhode Island allows this only where the will is executed within the United States. In Arkansas, Illinois, Missouri, New York, and Oregon, a will is entitled to probate if it satisfies the requirements of the lex fori. Montana, New York, North Dakota, Oklahoma, and South Dakota expressly provide that a will executed according to the lex loci or the lex domicilii of the testator at the time of its execution shall not be invalidated by a subsequent change of domicile.

With respect to contracts a distinction is made between formalities going to the existence of the contract and those relating merely to the evidence by which such contract is to be established. A contract, void under the lex loci for want of a stamp, is unenforceable everywhere. An exception to this rule has been introduced by Sec. 72, I, a, of the English Bills of Exchange Act, which provides that "where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in

118 Statutes, 1898, Sec. 2283.
119 Code, 1904, Art. 93, Sec. 327.
120 Revised Codes, 1907, Sec. 4734.
121 Revised Code, 1905, Sec. 5097.
122 Compiled Laws, 1907, Sec. 8901.
123 General Laws, 1909, ch. 254, Sec. 36.
124 Revised Code, 1903, Civil Code, Sec. 1010.
125 Compiled Statutes, 1907, Sec. 2744.
126 Maryland contains the proviso above mentioned, ante note 57.
127 General Laws, 1909, ch. 254, Sec. 36.
128 Kirby's Digest of the Statutes, 1904, Sec. 8049.
129 Revised Statutes, 1909, ch. 148, Sec. 10.
130 Code, 1904, Art. 93, Sec. 327.
131 Annotated Statutes, 1907, Sec. 4634.
132 Revised Statutes, 1909, Sec. 5099.
133 Compiled Laws, 1907, Sec. 8049.
134 Arkansas allows it only where the testator is a citizen of the United States. (Kirby's Digest of the Statutes, 1904, Sec. 8049.) Maryland contains the proviso above mentioned. (Ante, note 57.)
135 Revised Codes, 1907, Sec. 4735.
136 Consolidated Laws, 1909; Decedent Estate Law, Wills, Sec. 24.
137 Revised Code, 1905, Sec. 5099.
138 Compiled Laws, 1909, Sec. 8903.
139 Revised Code, 1903, Civil Code, Sec. 1012.
accordance with the law of the place of issue." If the contract exists under the lex loci, although it cannot be proved under such law without the stamp, effect will be given to it by English and American courts, subject to any stamp law of the forum. The requirement of the stamp would be regarded in this case as relating merely to the proof of the contract and as falling within the rule that all matters relating to procedure are governed by the lex fori.140

The case of Leroux v. Brown141 suggested a distinction similar to the above with respect to the fourth and seventeenth sections of the English Statute of Frauds. It was held in that case that the fourth section of the English Statute of Frauds ("no action shall be brought") applied to a contract made in France which was not to be performed within the space of one year from the making thereof, so as to prevent its enforcement in England, for want of a written memorandum, notwithstanding the validity of the contract according to French law. The court intimated, however, that the seventeenth section ("no contract for the sale of any goods, wares, merchandise, for the price of 10 pounds or upwards, shall be allowed to be good") must be deemed to relate to the existence of the contract and not merely to the evidence thereof.142 The English Sales of Goods Act of 1893,143 by sub-


The early English cases did not recognize the above distinction on the ground that the revenue laws of a foreign country would not be enforced. James v. Catherwood, 3 Dowell & Ry., 190 (1853); Wynne v. Jackson, 2 Russ., 351 (1826). The same view was adopted also by the early American cases. Ludlow v. l'an Renssaelar, 1 Johns. N. Y., 93 (1806); Skinner v. Tinker, 34 Barb., 333 (1861).


142 Jervis, C. J.: "The statute, in this part of it, does not say, that, unless those requisites are complied with, the contract shall be void, but merely that no action shall be brought upon it * * * * 'unless the agreement, or some memorandum or note thereof, shall be in writing.'—words which are satisfied if there be any written evidence of a previous agreement—shows that the statute contemplated that the agreement may be good, though not capable of being enforced if not evidenced by writing.'

Maul, J.: "But we have been pressed with cases which it is said have decided that the words 'no action shall be brought' in the fourth section, are equivalent to the words 'no contract shall be allowed to be good' which are found in another part of the statute. * * * * It may be, that, for some purposes, the words used in the fourth and seventeenth sections may be equivalent; but they clearly are not so in the case now before us; for, there is nothing to prevent this contract from being enforced in a French Court of law."

143 56 and 57 Vict., ch. 71, Sec. 4.
stituting the words “shall not be enforcible by action” for those formerly found in the seventeenth section, has removed every basis for such a distinction between the two sections in England.

The view expressed, by way of dictum, in Leroux v. Brown, in regard to the seventeenth section, has been adopted by the courts of the United States.144 The actual decision of Leroux v. Brown in regard to the fourth section has also met with the approval of our courts.145 One or two recent cases seem to regard this section as relating to the existence of the contract.146

Where the formality is deemed to relate to the validity of the contract the problem is presented: What law shall govern in this respect?

It is generally said that the law of the place of making governs.147 The case most frequently relied upon in the United

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So as to contract for the sale of realty. Wolf v. Burke, 18 Col., 264, 32 Pac., 427 (1893).

In view of the fact that the statute may be satisfied by a note or memorandum made subsequent to the time of the making of the contract, by an acceptance and receipt of part of the goods, or by the giving of something in earnest to bind the contract, or in part payment, it is evident that the contract exists without such writing, though it can be enforced only when the statute has been satisfied. The cases must, therefore, be regarded as limiting the term “procedure” so as to permit the enforcement of a contract which is valid where made.


146 Cochran v. Ward, 5 Ind. App., 93, 29 N. E., 795 (1892); Miller v. Wilson, 146 Ill., 533, 34 N. E., 1111 (1893).

The question arose in these cases with respect to contracts for the sale of real property. There is nothing in the opinions to indicate whether the same conclusion would have been reached with respect to the other classes of contracts within this section.


Story's position is not clear. In Sec. 260 he says: "The rules already considered suppose that the performance of the contract is to be in the
States in support of this statement is *Scudder v. The Union National Bank*,\(^{148}\) in the opinion of which the Supreme Court says: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made." This statement was purely dictum. According to the view taken of the facts by the learned court no conflict of laws was involved in the case.\(^{149}\) Moreover, the Supreme Court has not adopted the rule that the lex loci will under all circumstances govern the "execution, the interpretation and the validity" of contracts.\(^{150}\) That it has not done so in regard to the formal requisites of contracts is made perfectly plain by the case of *Hall v. Cordell*.\(^{151}\)

place where it is made, either expressly or by tacit implication. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance."

\(^{148}\) 91 U. S., 406 (1875); see also *Hunt v. Jones*, 12 R. I., 265 (1879); *De Costa v. Davis*, 24 N. J. Law, 319 (1854); *Perry v. Mount Hope Iron Co.*, 15 R. I., 380 (1886).

\(^{149}\) The facts of the case were as follows: A member of a Missouri firm, while in Chicago, verbally agreed on behalf of his firm to pay a draft which had been drawn upon his firm by Leland & Harbach, of Chicago. Under Missouri law an acceptance of a bill of exchange or an agreement to accept bills of exchange to be drawn in the future must be in writing. The opinion of the Supreme Court clearly shows that the court did not consider the question whether the law of the place of making or the law of the place of performance should govern the validity of a contract as regards form, for the learned court says: "There is no statute of the State of Illinois that requires an acceptance of a bill of exchange to be in writing, or that prohibits a parol promise to accept a bill of exchange; on the contrary, a parol acceptance and a parol promise to accept are valid in that State, and the decisions of its highest court hold that a parol promise to accept a bill is an acceptance thereof. If this be so, no question of jurisdiction or of conflict of laws arises. The contract to accept was not only made in Illinois, but the bill was then and there actually accepted in Illinois, as perfectly as if Mr. Scudder had written an acceptance across its face, and signed thereto the name of his firm. The contract to accept the bill was not to be performed in Missouri. It had already, by the promise, been performed in Illinois. The contract to pay was, indeed, to be performed in Missouri; but that was a different contract from that of acceptance."


\(^{151}\) 142 U. S., 116 (1891).
Where the contract is entered into by correspondence the law of the place where the last act is done to make it a binding obligation will govern its validity as regards form.102

Certain English cases can be best sustained by a recognition of the principle that a contract may conform to the law with reference to which the parties must be deemed to have contracted, though such law be not that of the place of execution.103 Dicey104 is disposed to recognize this as an exception to the general rule that the lex loci governs. Certain cases in this country are to the same effect. In Hall v. Cordell,105 the defendants of Chicago, at Marshall, Mo., verbally agreed with plaintiffs, bankers at the latter place, that defendants would accept and pay all drafts drawn upon them by Farlow for cattle bought by Farlow and shipped by him to defendants from Missouri. Defendants refused to pay upon presentation a draft drawn upon them under this agreement. By statute in Missouri an agreement to accept bills of exchange must be in writing. Defendants contended that by reason of that statute the contract could not be the basis for a recovery in Illinois. The Supreme Court held: “We are, however, of opinion that, upon principle and authority, the rights of the parties are not to be determined by the law of Missouri. The statute of that state can have no application to an action brought to charge a person, in Illinois, upon a parol promise, to accept and pay a bill of exchange payable in Illinois. The agreement to accept and pay, or to pay upon presentation, was to be entirely performed in Illinois, which was the state of the residence and place of business of the defendants. They were not bound to accept or pay elsewhere than at the place to which, by the terms of the agreement, the stock was to be shipped. Nothing in the case shows that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance. That

103 Van Grutten v. Digby, 1862, 32 L. J., Ch. 179; Re Marseilles Extension Co., 1885, 30 Ch. D., 598.
104 “Possibly a contract made in one country, but intended to operate wholly in, and to be subject to the law of, another country, may be valid, even though not made in accordance with the local form, if it be made in accordance with the form required, or allowed, by the law of the country where the contract is to operate, and subject to the law whereof it is made (?).” Dicey, Conflict of Laws (2d ed.), 543. See also Nelson, Private International Law, 258.
105 142 U. S., 116 (1891).
law, consequently, must determine the rights of the parties.\footnote{158}

It cannot be said that the English and American cases have definitely adopted the lex loci as determining the validity of contracts as regards form, with the qualification that, where under the general rules of the forum governing the validity of contracts in general some other law is applicable, the contract may conform also in the matter of form to such other law. The chief point in controversy in most American cases relating to form has been whether the requirement of form related to procedure or to the substance. The question whether a contract with respect to a formal requirement admittedly relating to the substance should be subject to the lex loci contractus as distinguished from the lex loci solutionis has been rarely considered. The law applied in these cases was the law deemed by the courts to govern the validity of the contract in general. The thought that the parties had an option in regard to the formal requirements of contracts to comply either with the law of the place of making or with that of the place of performance did not occur to any court. There are dicta in English cases to the effect that capacity to contract shall be subject to the law of domicile, irrespective of the law applicable to the validity of the contract in other regards;\footnote{157} whereas the courts of this country are agreed that the law governing contractual capacity is the lex loci contractus.\footnote{158} But there are no decisions, or dicta, in England or the United States, to the effect that the requisites of form shall be controlled by a distinct law. The question as to what law shall govern the formal validity of contracts is still regarded by the Anglo-American courts as a part of the larger and more complex problem relating to the obligation and validity of contracts in general. As long as this attitude continues, the rule applicable to the "form" of contracts must remain in the same state of uncertainty as is the law governing the validity of contracts in other respects.\footnote{159}

\footnote{158} Nichols & Shepard Co. v. Marshall, 108 Ia., 518 (1899); Milliken v. Pratt, 125 Mass., 374 (1878); Thompson v. Taylor, 66 N. J. Law, 253 (1901).
In regard to bills of exchange, the English Bills of Exchange Act provides that "the validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form, of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made." (Sec. 72.) To this rule two exceptions are made. One relates to bills issued out of the United Kingdom which, as seen above, are to be regarded as valid though they do not comply with the stamp laws of the place of issue. The second exception, modeled after Art. 85 of the German Bills of Exchange Act, provides that "where a bill, issued out of the United Kingdom, conforms as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom."

Before the Act it was uncertain whether an indorsement which did not comply with the lex loci should not be regarded as sufficient with respect to an acceptor, if it satisfied the law governing the acceptor's contract. In the United States there are no cases on this point. The Negotiable Instruments Law, which has been adopted by most of the United States, fails to lay down any rules governing the Conflict of Laws.

Dicey mentions two other possible exceptions to the rule that the lex loci is paramount with respect to the formal requirements of contracts. He says:

"(1) The formal validity of a contract with regard to an immovable depends upon the lex situs (?).

"(2) A contract made in one country in accordance with the local form in respect of a movable situate in another country may possibly be invalid if it does not comply with the special formalities (if any) required by the law of the country where the movable is situate at the time of the making of the contract (lex situs)."

The second of these exceptions will probably be recognized by the courts of the United States in view of the tendency of the more recent cases to follow the English and continental view,

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160 Lebel v. Tucker, 1867, 3 Q. B., 77; Bradlaugh v. De Rin, L. R., 3 C. P., 538 (1868).
161 Dicey, Conflict of Laws (2d ed.), 542-543.
which makes the transfer of title to personal property inter vivos dependent upon the law of its situs. 162

American courts are divided in regard to the first exception. It has been held that where the formality relates to the substance the law of the situs of the property must govern. 163 Other case show a preference for the lex loci. 164


The formality would probably consist of the necessity of delivery or registration in some public office. Its purpose would be to protect creditors or purchasers and not to guarantee the free expression of the parties' will. Formalities of the latter kind or alone under consideration for a discussion of the different kinds of formalities from the standpoint of the Conflict of Laws, see Audinet, Droit international privé. (2d ed.), 261; Bar, Private International Law, Sec. 121; Esperson, Journal, IX, 157; Fuzier-Herman, Répertoire, Formes des Actes, Nos. 15, 16; Lainé, Introduction au droit international privé, II, 330; Fillot, Principes de droit international privé, 474, 475.

163 Meylink v. Rhea, 123 Ia., 310 (1904).

Speaking of English law, Dicey says: "On this last point it is necessary to speak with considerable hesitation. The language of authors, such as Westlake or Story, certainly suggests that every question with regard to an immovable, and therefore the formal validity of a contract having reference to land, is governed by the lex situs. No reported case, moreover, it is submitted, contradicts this conclusion, and Adams v. Clutterbuck is in its favor." Dicey, Conflict of Laws (2d ed.), 322.

See also Nelson, Private International Law, 326; Phillimore, International Law (3d ed.), IV, 396; Story, Conflict of Laws (8th ed.), Sec. 372 f.

The Court of Appeal recently held that the question of capacity to execute a contract affecting land must be determined by the lex rei sitae. Bank of Africa v. Cohen (1909), 2 Ch., 129; 78 L. J. Ch., 767.

164 It is held that if the plaintiff waives his right to the land and sues for breach of contract the lex loci and not the lex rei sitae will determine the measure of damages. Atwood v. Walker, 179 Mass., 514 (1901); Finnes v. Selover, Bates & Co., 102 Minn., 334 (1907). The lex loci has been held to govern also the question as to the implied existence of covenants not running with the land. Bethell v. Bethell, 54 Ind., 428 (1876). Specific performance of a personal covenant valid under the lex loci, but not under the lex rei sitae, has been granted by the courts of the state in which the land is situate where it appeared that the acts called for could be done consistently with the law of situs. Polson v. Stewart, 167 Mass., 211 (1897).

See also Minor, Conflict of Laws, 32, 416; Rorer, American Interstate Law (2d ed.), 290, 290; Story, Conflict of Laws (8th ed.), Secs. 363, 364, 372 d; Wharton, Conflict of Laws (3d ed.), Secs. 276 a, 276 d, 693 b.
The English and American rules governing the formal validity of wills, deeds, and contracts, refer to the territorial law of the state or country in question. There is only one English case (an ex parte decision) decided under the Wills Act, which holds that the lex loci, as regards form, meant foreign law in its totality, inclusive of its rules relating to the Conflict of Laws.\footnote{In the \textit{Goods of Lacroix}, 1887, L. R., 2 P. D., 94. See Lorenzen, \textit{The Renvoi Theory and the Application of Foreign Law}, Col. L. Rev., X, 190-207, 327-344; Dicey, \textit{Conflict of Laws}, R. 150 ("Any contract is formally valid which is made in accordance with any form recognized as valid by the law of the country where the contract is made.")}

It may be said, then, that in England and the United States, the law governing the validity of a will or deed in general, determines also, in the absence of statute, its requirements as to form. In the case of contracts the lex fori will govern if the form in which the contract must be clothed relates merely to its proof. Where the formality relates to the validity of the contract, the governing law is not entirely clear, owing to the uncertainty of the English and American law with respect to the law applicable to the validity of contracts in general. It would seem that the law governing the validity of the contract in other respects will determine also its validity in the matter of form.

III.

Continental courts are agreed that the "means of proof" should be determined by the law governing the legal acts in question, and that only the "administration of proof" should be subject to the lex fori.\footnote{So expressly Art. 10 Prel. Disp. Italian Civ. Code; so France, Cass., Aug. 24, 1880, S. 1880, 1, 413; Cass., May 23, 1892, S. 1892, 1, 521; Cass., June 14, 1890, S. 1900, 1, 225.} The mere fact, therefore, that the law of the forum requires written evidence where the amount involved exceeds a certain sum is of no consequence. On the other hand, no action will be given where none will lie, for want of written evidence, under the law applicable to the creation of the legal act. They are also generally agreed that dispositions of property by will, whether movable or immovable, shall be valid as regards form if they comply with the law of the place of execution.\footnote{In these jurisdictions universal succession prevails. The testator is regarded as disposing of a \textit{universum jus} and not as conferring an immediate right to property, movable or immovable. See Bar, \textit{Private International Law} (Gillespie's transl.), 501 n.} In other re-
spects there is a wide difference of view. The rules obtaining in France, Italy, Spain and Germany are of interest for purposes of comparison. 168

France. The first draft of the French Civil Code contained the following provision: “The form of legal transactions is governed by the law of the country in which they are executed or take place.” 169 A special application of this general rule was found in Arts. 47, 170, 999. It seems that the framers of the Code did not intend to prescribe this rule absolutely, but to make compliance with the lex loci merely permissible. The article itself was dropped at the last moment because it was feared that its sweeping generality and laconic form might prove an embarrassment to the courts. The other articles, however, have found a place in the Code. In interpreting Art. 999, the courts have found no difficulty in allowing Frenchmen abroad to execute their wills either according to the local law or according to French law. 170 As to foreigners executing their wills in France, it was held, on the other hand, following the doctrine of In re Pommerœul, that their wills must conform to French law. 171 In the recent case of Gesting v. Viditz, 172 the Chambre de Requêtes reached a different conclusion, holding that it was the intention of the framers of the Code to overthrow the doctrine introduced by the Parliament of Paris in In re Pommerœul. The present law of France may thus be said to sanction the general rule that a will, whether executed by a French subject or a foreigner, may,

168 For a comparative statement of the law of other countries see in general Contuzzi, Il Codice Civile nei rapporti del diritto internazionale privato, II, 428-519; Contuzzi, Diritto internazionale privato, 299-385; Neumann, Internationales Privatrecht, 194-203. For the older law, see Foelix, Traité de droit international privé, I, 186-196. As to wills, see Contuzzi, Diritto ereditario internazionale, 60-141, 151-210.

169 For the history of the article, see Fenet, Recueil complet des travaux préparatoires du Code Civil, II, 6; Merlin, Répertoire, Loi, Sec. 6, Nos. 7 and 8; Laine, Revue, III, 857-866; Revue, I, 456-475. As to French law preceding the present Civil Code, see Febvre, De la forme des actes (thesis), 93-106.

170 Cass. (Req), July 3, 1854, P. 1856, 2, 171; Cass. (Req), Aug. 19, 1858, P. 1859, 64.


as regards form, comply with the provisions of the lex loci or with those prescribed by his national law. This rule seems to apply to wills disposing of movables or immovables. A will disposing of immovables will probably be valid also if it is executed in conformity with the law of the situs of the property, and a will disposing of movables if it satisfies the requirements of the lex domicilii.

The rule locus regit actum is applicable to the formal validity of contracts in general, including bills and notes. It is said to apply also to contracts relating to immovables and to transfers of immovables except as to recording and matters directly affecting the property régime. An option is allowed in the case of contracts between the lex loci and the national law, if common to the parties, and, in the case of transfers of, or of contracts relating to, immovables, between the lex loci and the lex rei sitae. Whether the courts will allow a greater selection is uncertain. By an express provision of the Civil Code (Art. 2128), based, it would seem, upon a legislative mistake, the lex rei sitae is made obligatory with respect to the execution of mortgages on immovables situated in France.

Where a will has been executed in accordance with the lex loci (French law) and the national law of the testator has expressly

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175 Audinet, Principes élémentaires du droit international privé (2d ed.), 355; Cohendy, D., 1892, 1, 474 n.; Despagnet, Précis de droit international privé (4th ed.), Nos. 216, 217; Foelix, Traité de droit international privé, 1, Nos. 76, 84; Milhaud, Principes de droit international privé dans leur application aux privilèges et hypothèques, 244-294; Pillet, Principes de droit international privé, 475-476 n.; Surville et Arthuys, Cours élémentaire de droit international privé (3d ed.), 235; Vincent & Penaud, Dictionnaire de droit international privé, Formes des Actes, No. 20.

176 There is much difference of opinion among the French authors in regard to the application of the rule locus regit actum to contracts. See Audinet, Principes élémentaires du droit international privé (2d ed.), No. 354; Fuzier-Herman, Répertoire, Forme des Actes, Nos. 62, 73; Huc, Code Civil, I, 161; Massé, Le droit-commercial dans ses rapports avec le droit des gens et le droit civil, I, Nos. 572, 573, 574, 579; Vincent & Penaud, Dictionnaire de droit international privé, Formes des Actes, Nos. 33-36; Weiss, Traité théorique et pratique de droit international privé, IV, 345-327.

177 Fèvre, De la forme des actes (thesis), 169-172; Pillet, Résumé du cours, 342.
prohibited the use of such form by its subjects abroad, French courts will not give effect to the prohibition, but will uphold the will.  

Whether the above rules are to be understood in a renvoi sense is undecided.  

Italy. Art. 9 of the Preliminary Dispositions of the Italian Civil Code provides: "The extrinsic forms of acts inter vivos and of last will are determined by the law of the place in which they are made. It is within the power of the testator or of the contracting parties, however, to follow the form of their national law, provided it be common to all of the parties."

The rule locus regit actum accordingly is obligatory, with an exception in favor of the law of nationality. A will is valid, irrespective of the nature or the situs of the property disposed of, if it complies with the lex loci or with the national law of the testator. A contract is valid, as regards form, if it satis-


\[^{179}\text{The Civil Tribunal of Tunis (March 25, 1890, Journal, XVIII, 238) applied renvoi to the form of a donation. The question does not seem to have been presented to the higher courts of France. For a discussion of the French cases relating to renvoi in general see Lorenzen, The Renvoi Theory and the Application of Foreign Law, Col. Law Rev., X, 191-192. The French court of Cassation has recently reaffirmed the doctrine of the Forgo case which introduced the renvoi doctrine into France. See Cass. (Req.), March 1, 1910, Journal, XXXVII, 888. If the doctrine should be limited to cases governed by the national law renvoi might become applicable to the formal validity of legal acts in so far as they depend upon the national law of the parties.}

\[^{170}\text{For the history of this provision see Buzzati, L'Autorità delle leggi straniere relative alla forma degli atti civili, 170-171; Esperson, Journal, IX, 157-160; Lomonaco, Trattato di diritto civile internazionale, 192-194.}

With regard to commercial obligations the Commercial Code, Art. 58, contains the following:

"The form and essential conditions of commercial obligations, the form of acts required for the exercise and preservation of rights springing therefrom and for their execution, as well as the effect of the acts themselves, shall be governed by the laws and usages of the place where said acts take place or are to be performed, reserving in all cases, however, the exceptions established by article 9 of the Preliminary Dispositions of the Civil Code with respect to persons subject to the same national law."

\[^{181}\text{See Cass. Turin, May 31, 1881; Monitore, 1881, 673; App. Lucea, June 23, 1881; Annali, 1882, III, 408.}
fixes the lex loci or the national law common to the parties.\textsuperscript{182} Art. 1314 of the Civil Code requiring under the penalty of nullity all agreements for the transfer of immovables to be in writing, is held to be obligatory upon Italians as well as upon foreigners. The instrument itself may be executed in the form customary in the place of execution.\textsuperscript{183} The same rule probably applies to mortgages on Italian immovables.\textsuperscript{184}

The Italian courts will recognize an express provision of the national law of a party forbidding the execution of an act in the form authorized by the lex loci and will hold such an act void.\textsuperscript{185}

As the renvoi doctrine has found no place in Italian jurisprudence the above rules are to be understood as referring to the territorial law of the foreign state or country, exclusive of the rules relating to Private International Law.\textsuperscript{186}

\textit{Spain}. The Spanish Code provides in Art. 11: "The forms and solemnities of contracts, wills and other public instruments are governed by the laws of the country in which they are executed."

The lex loci is obligatory and compliance with some other law, in the matter of form, is not allowed.\textsuperscript{187}

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\textsuperscript{184} See Art. 1978, Civil Code.

\textsuperscript{185} See Cass. Turin, April 12, 1892; \textit{Monitor}, 1892, 346. See also Buzzati, \textit{L'Autorita delle leggi straniere relative alla forma degli atti civili}, 423; \textit{Enciclopedia Giuridica Italiana, Atti all' estero}, 35.


Germany. Art. II of the Law of Introduction of the German Civil Code lays down the following rule in paragraph 1, sentence 1: "The form of a juristic act is determined by the law governing the legal relation forming the object of the juristic act."

Paragraph 2 of the same article prescribes this rule absolutely for the creation or transfer of real rights. In regard to all other acts an exception to the general rule is authorized by sentence 2, of paragraph 1, according to which "compliance with the laws of the place at which the legal transaction is entered into is sufficient."

Paragraph 2 does not say that if the law of the situs of the property should allow the creation of real rights in such property by the mere agreement of the parties the lex loci will not be applicable to the agreement, nor that executory contracts relating to land shall be governed by the law of the situs. Both questions will have to be answered by the German courts in the light of the general principles underlying the Conflict of Laws laid down in the Civil Code.

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For the history of this article see Mugdan, Die gesamten Materialien zum bürgerlichen Gesetzbuch für das deutsche Reich, Vol. I, pp. XLV, 272-275. For the law prior to the adoption of the Civil Code, see Niemeyer, Das in Deutschland geltende internationale Privatrecht, 75-103.

In order to appreciate the real import of the German provision it is necessary to bear in mind that under German law, contrary to the law of England, the United States, France and Italy, the agreement of the parties does not operate as a transfer of property rights. For the transfer of title, a so-called real contract (dinglicher Vertrag), which, in the case of personal property, consists in the delivery of the article, and, in the case of realty, in its Auflassung, is required. These acts in the nature of things must be done at the situs and must conform to its law.

"In so far, however, as public instruments are necessary for the transference of real rights in immovables," says Bar, "these may, according to the general rule, be executed in a foreign country, and then as regards their form the rule 'locus regit actum' will apply." Bar, Private International Law (Gillespie's transl.), Sec. 227.

One or two cases before the adoption of the present Civil Code held that the lex rei sitae would govern the formal validity of contracts for the sale of immovables. Oberhofgericht Mannheim, Feb. 1, 1866, Seuffert's Archiv, XXII, No. 204; O. A. G. Lübeck, Dec. 30, 1839; Seuffert's Archiv, VIII, No. 2. This view was expressly sanctioned by the Prussian law (A. L. R., I, 5, Sec. 115). The Imperial Court seems inclined to adopt this view under the present Civil Code. It held in a recent case (R. G. LXIII, 18, March 3, 1906) that Sec. 313 of the Civil Code was not applicable to a contract made in Germany for the sale of foreign realty.
Wills disposing of either movables or immovables may, as regards form, comply with the lex loci or with the national law of the testator at the time of the execution of the will. A will validly executed according to either of these laws will not be invalidated by a subsequent change of nationality.

Contracts may conform to the law of the state with reference to which the parties must be deemed to have contracted, or to the law of the place of performance. The case did not call for a decision of the question whether the lex rei sitae was imperative nor whether a contract made abroad with reference to German realty must conform to German law. The only point decided was that such a contract may conform to the lex rei sitae. The court, by way of dictum, suggested, however, that the lex rei sitae governs absolutely, observing that, while the legislator had not in express terms prescribed the application of the lex rei sitae to executory contracts, an intention so to do could be gathered from sentence 1, par. 1, of Art. II. See note to case in Zeitschrift, XVI, 331.

The German jurists are generally agreed that a contract to sell land should be sufficient as to form if it satisfies the lex loci. Bar, Private International Law, Sec. 228; Barazetti, Das internationale Privatrecht im bürgerlichen Gesetzbuch, 54; Dernburg, Das Bürgerliche Recht, I, 109; Gierke, Deutsches Privatrecht, I, 231 n. 61; Keldal, Journal, XXVI, 45; Savigny, Conflict of Laws, Sec. 381; Zeitschrift, XVI, 331. Contra: Endemann, Lehrbuch des Bürgerlichen Rechts (9th ed.), I, 99 n., 21.

A contract intended to create a real right but not complying with the lex rei sitae may be binding as an obligatory contract under the lex loci. Bar, Private International Law, Sec. 228; Crome, System des deutschen bürgerlichen Rechts, I, 147.

101 Art. 24, par. 3. Law Introduction Civil Code; Rundstein, Archiv für Bürgerliches Recht, XX, 198.

102 While par. 3 is framed especially with regard to Germany, it embodies in fact a general principle. Planck, Bürgerliches Gesetzbuch (3d ed.), VI, 94.

103 The present Code contains no provisions relating to the law governing the validity of contracts. The Imperial Court has since the adoption of the Code followed its former practice, holding that the intention of the parties shall control and that in case of doubt, the parties shall be deemed to have contracted with reference to the law of the place of performance. R. G. XLIII, 156 (Jan. 16, 1899); R. G. LIV, 311 (April 23, 1903); R. G. LXXIII, 370 (April 19, 1910). In favor of the lex domicilii, see R. G. LXI, 243 (Oct. 12, 1905).

Under what circumstances a bilateral contract which does not comply, as regards form, with the lex loci will be valid, is not settled. German courts tend to divide a bilateral contract into two unilateral obligations which may be governed by different laws. See R. G. LXVIII, 203 (April 4, 1908); R. G., Jan. 21, 1908, Juristische Wochenschrift, XXXVIII, 192; R. G. LI, 218 (April 21, 1901); R. G. XLVI, 193 (April 28, 1900); R. G. XXXIV, 191 (Oct. 13, 1884); Bar, Private International Law (Guthrie's transl.), Sec. 123.
to the lex loci contractus.\textsuperscript{104} Art. 85 of the Bills of Exchange Act, which is not superseded by Art. 11 of the Law of Introduction to the Civil Code,\textsuperscript{105} does not allow such an option with respect to bills and notes. The lex loci is made compulsory by this article with the qualifications: (1) that where a bill or note, issued out of Germany, or any supervening contract placed thereon out of Germany, conforms as regards requisites of form to German law, such note or contract shall be treated as valid with respect to all who become parties to such a bill or note in Germany; (2) that where the parties to a bill or note executed without Germany are Germans, compliance with German law shall be sufficient.

The question whether the German courts will recognize the superior authority of the law governing the validity of the legal

\textsuperscript{104} Where the contract is entered into by correspondence the older doctrine was that the law of the place where the acceptance was mailed should be regarded as the lex loci of the contract. Savigny, Conflict of Laws, 214. The modern German jurists agree in holding that it is improper to assign to such a contract a fictitious situs in either of the states concerned, the contract having as close a connection with the law of the state of the offeror as it has with that of the state of the offeree. Unless the contract satisfies the formal requirements of the law otherwise applicable to the contract it is necessary under this view that it comply with the law of both countries. See Aman, \textit{Über die Bedeutung und Tragweite der Regel “locus regit actum” im internationalen Privatrecht (thesis)}, 14; Bar, \textit{Private International Law} (Guthrie's transl.), Sec. 125; Barazetti, \textit{Das internationale Privatrecht des bürgerlichen Gesetzbuches}, 54-55; Böhm, \textit{Die räumliche Herrschaft der Rechtsnorm}, 101; Crome, \textit{System des bürgerlichen Rechts}, I, 146, n. 31; Endemann, \textit{Lehrbuch des bürgerlichen Rechts}, I (5th ed.), 97, n. 13; Niemeyer, \textit{Vorschriften u. Materialien zur Kodifikation des internationalen Privatrechts}, 100; Planck, \textit{Bürgerliches Gesetzbuch} (3d ed.), VI, 45; Regelsberger, \textit{Pandecten}, I, 171; Rundstein, \textit{Archiv für bürgerliches Recht}, XX, 202; Staudinger, \textit{Kommentar zum bürgerlichen Gesetzbuche} (2d ed.), VI, 43; Zitelmann, \textit{Internationales Privatrecht}, II, 163-164; Stobbe, \textit{Handbuch des deutschen Privatrechts} (3d ed.), I, 260-261.

In case of unilateral obligations the contract will be deemed valid if it complies with the national law of the obligor. Bar, \textit{Private International Law} (Guthrie's transl.), Sec. 125; Gierke, \textit{Deutsches Privatrecht}, Sec. 26, n. 62; Regelsberger, \textit{Pandecten}, I, 171; Stobbe, \textit{Handbuch des deutschen Privatrechts} (3d ed.), I, Sec. 33, n. 10. The Prussian law provided that the law of the domicile of the party which would validate the contract should govern. A. L. R., I, 5, Secs. 113, 114. A recent case decided by the Imperial Court shows its inclination to follow the older view, viz., the law of the state in which the offer is accepted. R. G., Feb. 2, 1905, \textit{Zeitschrift}, XVI, 326.

\textsuperscript{105} Aman, \textit{Über die Bedeutung und Tragweite der Regel “locus regit actum” im internationalen Privatrecht (thesis)}, 15.
VALIDITY OF WILLS, DEEDS, CONTRACTS

IV.

Two principal questions are suggested by the preceding comparison of the law of England, the United States, France, Italy, Spain and Germany.

1. Which is the law governing upon principle, wills, deeds, and contracts in the matter of formal requirements?

2. Is it practicable and, if so, to what extent, to allow the parties a choice in this regard between different laws?

In regard to the first question there are two views: (1) the view adopted by France, Italy and Spain, that the lex loci is the governing law; (2) the view adopted by Germany, England and the United States, that the law applicable to the validity of the transaction in general shall control. Upon principle it would seem that the latter view is correct. A requisite of form prescribed for the existence of a legal act is an element entering into its validity, which in the nature of things should be governed by the law determining the validity of the act in other respects. Savigny was the first writer to lay down this rule. He says: "What local law is applicable to the particular legal act in respect to its form? From this alone, in many instances, is the validity or invalidity of the act to be discovered.

"If we consider this question from the general point of view, from which the whole foregoing inquiry has been conducted, we can hardly hesitate as to the answer. We must, as it seems, judge

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184 See Bar, Private International Law (Guthrie's transl.), Sec. 370; Bar, Holtzendorf's Encyklopädie der Rechtswissenschaft (6th ed. by Kohler), II, 37; Kahn, Ihering's Jahrbücher für die Dogmatik, XXX, 49-53.

185 Aman, Über die Bedeutung und Tragweite der Regel "locus regit actum" im internationalen Privatrecht, 21-24; Niedner, 31, 33 (in 45 Grüchof's Beiträge zur Erläuterung des deutschen Rechts, XLV, 696); Rundstein, Archiv für bürgerliches Recht, XX, 202.

The German Bar Association has placed itself on record as opposed to renvoi in connection with the law of obligations. Verhandlungen des 24. Deutschen Juristentages, IV, 127.

186 Private International Law (Guthrie's transl.), Sec. 381.
of the requisite forms according to that local law to which the juridical act is itself subject according to the rules already laid down."

The same view is supported by a consensus of juristic opinion in Germany and by a considerable number of jurists in other countries. 189

Against the above view the general argument may be advanced, that with the development of the science of Private International Law there is a tendency to separate certain elements entering into the validity of a legal transaction and to subject them to a law of their own, and that in accordance with such tendency the formality of a legal transaction, like capacity, might be placed under a distinct law. That such a view should find support in countries in which capacity has been raised to a status fixed by the party's national law, or law of domicile, regardless of the law otherwise governing the legal act, is natural. The most thorough attempt to justify this view upon principle has been made by Buzzati. 200

He regards all laws concerning the form of acts as relating to the morals, the religion, the political and the economic interests of the country in which they are done and to be laws of public order, binding upon all parties within the jurisdiction. 201

This conception of the fundamental nature of the formal requirements of legal acts may be true in particular classes of cases, but it cannot be supported as a general proposi-

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200L'Autorità delle leggi straniere relative alla forma degli atti civili, Turin, 1894.

201Pages 118 and 119.
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Of what possible interest, for example, can it be to a state in which a testator is not domiciled, and in which he leaves no property, whether a will executed within its territory is subscribed by two or by three attesting witnesses, before one notary and two attesting witnesses or before two notaries? Nor can it be contended that the local law must be followed in the interest of the party and his family, for the local law may actually furnish less guaranty that the act in question represents the free expression of the party's will than if the law governing the transaction in general had been followed.

Most authors do not attempt to justify the rule locus regit actum upon principle, but base it upon mere tradition or upon grounds of utility. They are generally of the opinion that the rule is not obligatory, so that the parties may follow some other law. Most French and Italian authors restrict the option allowed to the lex loci and the national law of the parties, excluding the law governing the validity of legal acts in other respects. In so doing they depart both from principle and from the true historical basis of the rule locus regit actum. Were the utmost freedom permissible in the matter of form, no fault could be found with the view that the parties might choose, among others, the form sanctioned by their personal law (lex patriae or lex domicilii). But no valid reason, it is submitted, exists for a substitution of the national law of the parties for that governing the legal act in general.

The rule that legal transactions as to form are subject to the law governing the validity of the transaction in other respects is thus the only one resting upon a scientific basis. The German legislator deserves credit for having established this principle in the Civil Code.

The question remains: To what extent, if any, should compliance with a law other than that governing the validity of the transaction in general be deemed sufficient? The common law of

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203 "This competence (lex patriae)," says Pillet, "it must be admitted, is not so clear in the present case as it is in other branches of the law, but the protective character of laws of this sort is sufficiently marked to permit a subject to take advantage of them abroad." *Principes de droit international privé*, 486.

204 Japan has followed the German example in its *Law of Ho-rei*, June 15, 1898 (Art. 8). See Yamada, *Journal*, XXVIII, 636.
England and of the United States, if we leave out of consideration the cases relating to procedure, recognizes, as we have seen, no clear exception to, or qualification of, the general rule. Statutes, however, have modified the common law rule in the matter of wills, and in several of the United States also with respect to the transfer of immovables. Let us consider the extent to which such legislation may properly go.

All elements of a legal transaction affecting its validity, including provisions relating to its form, are fixed by law. Parties to the transaction have no choice in the matter. Upon principle, therefore, only one law should govern the validity of legal transactions in the matter of form. An exception to this rule has been recognized on the continent of Europe, however, on grounds of necessity, so that an act executed in the form prescribed by the lex loci might be valid everywhere. Without such a concession a person living in a foreign country may be actually deprived of his right to dispose of his property by will, and subjected to great inconvenience and loss in connection with other legal acts. In view of the fact that the rules in the Conflict of Laws are designed to facilitate international relations compliance with the lex loci should, as far as practicable, be allowed. The expediency and justice of allowing parties to comply with the lex loci is attested by the sanction which the rule locus regit actum has received in many countries by legislation and its acceptance by practically all jurists.

An option between the lex loci and the national law is sanctioned also by Art. 3 of the Convention of the Hague, relating to wills, of July 17, 1908.

In the United States there is precedent for the introduction of an option in regard to a matter affecting the validity of a legal transaction. The prevailing doctrine relating to the defence of usury is that the parties may contract either with reference to the law of the place in which the contract is executed, or with reference to the law of the place in which the contract is to be performed, or even with reference to the law of some third state with which the contract has a direct relation. Andrews v. Pond, 13 Pet., 65 (1839); Miller v. Tiffany, 1 Wall., 298 (1863); Arnold v. Potter, 22 Ia., 194 (1867); Scott v. Perlee, 39 Oh. St., 63 (1883); see Akers v. Demond, 103 Mass., 318 (1889).

The following jurists are in favor of allowing such an option: Alcorta, Curso de derecho internacional privado, 1, 259; Algara, Lecciones
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There would appear to be no sufficient reason why the rule locus regit actum, with certain provisos, should not be adopted by legislation with regard to the formal execution of contracts, wills, and deeds. There can be no doubt as to contracts. A contract should be valid as regards form in every jurisdiction, if it satisfies the requirements of the lex loci. If under the view prevailing in the Conflict of Laws of the forum another law governs the validity of the contract in general, compliance with the formal requisites of such law should be sufficient. An exception should

de derecho internacional privado, 193; Antoine, De la succession légitime et testamentaire en droit international privé, 112; Audinet, Principes élémentaires du droit international privé, No. 628; Aubry et Rau, Cours de droit civil français (5th ed.), I, Sec. 31; Baudry-Lacantinerie et Colin, Des donations entre vifs et des testaments (2d ed.), X, 176; Baudry-Lacantinerie et Houques-Fourcade, Des Personnes (2d ed.), I, No. 247; Bard, Private International Law (Guthrie's transl.), Sec. 123; Bard, Précis de droit international, 271; Baudouin, Journal, XXXVI, 1098-1131; Bileuresco, De la forme des actes en droit international privé (thesis), 30-43; Bevilacqua, Principios elementales de direito internacional privado, 187; Brocher, Cours de droit international privé, I, 134; Claro, D., 1899, 2, 177; Colin, Journal, XXIV, 941; Despagnet, Précis de droit international privé (4th ed.), No. 217; Diena, I diritti reali considerati nel diritto internazionale privato, 94-95; Durand, Essai de droit international privé, 246-248; Dernburg, Pandektion (7th ed.), I, 105; Espenson, Journal, IX, 156; Fiore, Elementi di diritto internazionale privato, 415-417; Fiore, Diritto internazionale privato (4th ed.), I, 231-233; Fiore, Le droit international privé (4th ed.), 250-253; Foelix, Traité de droit international privé, I, No. 83; Fuzier-Herman, Répertoire, Forme des actes, No. 63; Gierke, Deutsches Privatrecht, I, 230-231; Haus, Du droit privé qui régît les étrangers en Belgique, 240; Hıc, Code Civil, I, No. 170; Labbé, S. 1883, 2, 250 n.; Lainé, Revue, III, 866-872; Laurent, Droit civil international, II, No. 238. (According to Laurent the rule locus regit actum is not applicable to solemn acts—see II, No. 240); Lomonaco, Trattato di diritto internazionale, 192; La massima “locus regit actum” in tema di atti solenni, in Rivista di diritto internazionale e di legislazione comparata, I, 5; Massé, Le droit commercial dans ses rapports avec le droit des gens et le droit civil, I, Nos. 571, 572; Meili, Das internationale Civil- und Handelsrecht, I, 205; Milhaud, Privilèges et hypothèques en droit international privé, 247-248; Neumann, Internationales Privatrecht, 68; Niemeyer, Vorschriften u. Materialien zur Kodifikation des internationalen Privatrechts, 94-99; Naquet, La règle “locus regit actum” est-elle intrusive ou facultative, Journal, XXXI, 39-58; S., 1903, 1, 73; Picard, Journal, VIII, 468; Pillet, Principes de droit international privé, 473; Pillet, Résumé du cours, 337-346; Pimenta Bueno, Direito internacional privado e aplicação de seus principios com referencia às leis particulares do Brazil, 107; Regelsberger, Pandekten, I, 170; Rivier, in Asser & Rivier, Éléments du droit international privé, No. 30 n.; Rolin, Principes du droit international
be made with respect to commercial paper.207 The nature of the instrument is here essentially dependent upon its form. Absolute certainty in regard to its character is of the utmost importance. A fixed rule must therefore apply, which in the nature of things, is the law of the place of issue. The qualifications contained in the English Bills of Exchange Act might properly be followed.208

Nor can there be doubt as to wills disposing of personal property. Compliance with the lex loci should be allowed whether the will be executed in one of the United States or in a foreign country, provided the will be in writing and subscribed by the testator. The limitation of the rule locus regit actum to cases where the testator is a non-resident of the state, contained in the statutes of some states, rests upon no solid foundation.

207 See Ottolenghi, La cambiale nel diritto internazionale, 52.
208 "(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.

(b) Where a bill issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom." (Sec. 72.)
A reasonable doubt may be felt in regard to the extension of the rule locus regit actum to contracts affecting land and to transfers of land. Story considered the objections to the application of the lex loci in this class of cases as insuperable. He says: "They seem wholly to have overlooked, on the other side, the inconvenience of any nation suffering property, locally and permanently situate within its own territory, to be subject to be transferred by any other laws than its own; and thus introducing into the bosom of its own jurisprudence all the innumerable diversities of foreign laws, to regulate its own titles to such property, many of which laws can be but imperfectly ascertained, and many of which may become matters of subtle controversy." These objections are clearly inapplicable to deeds or wills executed in one of the United States, or in countries in which the law of real property and the modes of conveyancing are substantially identical with those obtaining at the situs. As to these, certainly the lex loci could be safely adopted. Nor would the adoption of this rule for wills executed in foreign countries result in serious inconvenience. Self-interest would prompt parties residing abroad to execute their wills relating to such property in the form prescribed by the law of the situs in all cases where it is practicable for them to do so. Recourse to the local law would be had only in rare cases of extreme necessity.

Similar considerations would suggest that the lex loci should be adopted also with regard to deeds. According to Foote, the doctrines of the common law governing the transfer of realty resulted, not so much from the fear of difficulties in the interpretation of foreign wills or deeds, as from its "spirit of exclusion which has applied the lex situs in England to every conceivable question affecting the soil." Notwithstanding the fact that the reasons of necessity advanced for the adoption of the lex loci in regard to wills are less strong in the case of conveyances inter vivos, it would seem that the liberal policy of allowing the formal execution in accordance with the lex loci, which has been adopted by Illinois, Kansas, Michigan, Minnesota, Nebraska, Ohio, Oregon, Vermont, and Wisconsin, should be approved. In the case of both wills and deeds, the legislator should require

209 Story, Conflict of Laws (8th ed.), Sec. 440.
211 Ante, Notes 70-78.
the instrument to be in writing. In the case of deeds he should further require that the signature be acknowledged before a proper officer.

There is no reason why in certain cases the legislator should not go beyond the views above expressed and allow compliance with the lex domicilii and the lex fori. Following the example of Lord Kingsdown's Act, compliance with the lex domicilii of the testator at the time of the execution of the will may very well be regarded as sufficient for the formal validity of a will disposing of movable property. As far as the lex fori is concerned, we have seen that in England and in some of the United States, the statute of frauds of the forum is held to apply to contracts executed in another jurisdiction, on the theory that the requirement of form relates merely to the evidence of the contract. From the standpoint of the Conflict of Laws, this doctrine is unfortunate since it makes the enforceability of the contract dependent upon the law of the place in which plaintiff may happen to bring the suit. The doctrine can be sustained, of course, on the theory that the statute of frauds of the forum establishes a rule of public policy to which all foreign acts must yield. It would have been preferable had our courts held that the statute of frauds did not establish such a policy and was applicable only to contracts executed within the enacting state. A change in our law in this sense by legislation is desirable.

In another direction the lex fori could properly be given a wider application. The legislative purposes underlying the provisions as to form are various. In the case of contracts and wills disposing of movables, the principal object would seem to be to furnish a certain guaranty that the act in question is the deliberate and voluntary act of the party. In the case of dispositions of realty inter vivos or by will, on the other hand, security of title to land plays a prominent part. Whenever the requirements of form rest essentially upon considerations of the former sort, there is no good reason why a transaction should not be sustained if it satisfies the lex fori. Whenever an act complies with the formalities required by his own legislator, the judge of the forum must regard it as the deliberate, voluntary, and binding act of the party.\footnote{Lainé was the first jurist to advance the theory that an act should be regarded as valid as regards form if it satisfied the lex fori. \textit{Journal,} XXXV, 681-685; see also, Pillet, \textit{Principes de droit international privé}, No. 263.} If the formal validity of a legal transaction
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in the Conflict of Laws is not to be tested by a single law, it would seem that the lex fori has a strong claim to consideration in this class of cases. The statutes in several of the United States, providing that a will shall be entitled to probate if it is executed in the form prescribed by the lex fori, are in harmony with this view. It is far better that a legislator shall lay down the most liberal rules with respect to mere matters of form in the Conflict of Laws, than that courts, as a result of too stringent rules, should attempt to sustain legal transactions by resorting to the pernicious renvoi doctrine. The rules relating to form, like all the other rules in the Conflict of Laws, designate the territorial law of the country referred to, and not the foreign law in its totality inclusive of its rules relating to the Conflict of Laws.\textsuperscript{211} When the law of a state or country (lex fori) prescribes certain rules which shall govern the formal validity of legal transactions in the Conflict of Laws, they will be binding upon the judge of the forum, notwithstanding contrary provisions in the Private International Law of the country to which the lex fori refers.

The results of this study in regard to the formal validity of contracts, deeds, and wills may be summarized as follows:

1. The rule of the English and American courts that the Statute of Frauds applies to foreign contracts should be modified, because it is unjust and is not required by paramount considerations of policy.

2. The view sustained by the English and American cases that the law otherwise determining the existence of a legal act should control also its formal requirements is correct upon principle.

3. Practical considerations, based upon the requirements of international intercourse, suggest a modification of this rule to the end that compliance with the lex loci shall be regarded as sufficient. The reasons advanced for the non-application of the lex loci to acts affecting immovables are insufficient. For the sake of security in dealings relating to commercial paper, compliance


Art 3 of the Convention of the Hague, July 17, 1905, relating to wills, provides:

"If the national law of a person prescribes or prohibits a certain form for a will executed outside of his country, a failure to comply with such provision may render the will void in the country of which the testator was a subject; provided, that if the will conforms to the law of the place where it was executed, it shall be valid in the other countries."
with the requirements of form of the place of issue should be obligatory, subject to the qualifications suggested by the English Bills of Exchange Act.

4. Inasmuch as the law should be liberal in matters relating to mere form, contracts which do not comply with either of the above rules should be regarded as valid if they satisfy the lex fori and wills disposing of personal property if they satisfy the lex fori or the law of the domicile of the testator at the time of the execution of the will.

5. All of the preceding rules must be understood as referring to the formal requirements prescribed for the act in question by the territorial law of the state or foreign country referred to, and not to their law as a whole inclusive of the rules governing the Conflict of Laws.