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French Rules of the Conflict of Laws (Part 3)

Ernest G. Lorenzen

Yale Law School

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THE FRENCH RULES OF THE CONFLICT OF LAWS:

ERNEST G. LORENZEN

CONTRACTS

1. Capacity. Capacity to contract is regarded by Anglo-American law as one of the operative facts of a legal transaction, and as subject to the law governing the validity of the particular transaction in general. On the continent it is felt that, insofar as any disability to contract is intended for the protection of the party in question, it should follow such party into other states. For this reason the capacity of persons to contract was controlled in France, until the adoption of the Code Napoléon, by the law of domicil. Since then the law of nationality has been in force.

Article 3, paragraph 3 of the French Civil Code provides:

"Laws relating to status and capacity of persons apply to French people, even residing in a foreign country."

Contracts entered into by French citizens abroad, whether they be minors or married women, are governed therefore, as regards capacity, by French law. The same rule holds true where a person of age has been placed under guardianship in France, for example, on account of prodigality. Such a disability, imposed by the national law, binds the citizen in foreign countries. It ceases, however, if the French citizen becomes naturalized in a country which does not recognize such artificial disabilities. The courts add the proviso that the naturalization must have been obtained in good faith, and not for the purpose of getting rid of the disability imposed by the French law.

The rule of Article 3, paragraph 3 of the Civil Code is generally interpreted as applicable also to foreigners, so that their capacity in France is governed by their national law. A for-

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2 In re Weill, Trib. civ. Seine, Dec. 31, 1910, and May 6, 1911, 7 Rev. Dr. Int. Fr. 348.
eigner having capacity to contract according to his national law will be able, therefore, to bind himself in France on a contract, although he would have no such capacity under the local French law. The converse of this proposition, however, is not true. Disabilities existing under the national law do not necessarily follow the foreigner into France. Foreigners have been held on contracts entered into in France, when sued by French citizens, if they had capacity to contract under local French law, although not under their national law. This has been done where the foreigner misrepresented or actively concealed his nationality. Even in the absence of active concealment or misrepresentation, such foreigners have been held where the other contracting party was a French citizen, who was ignorant without negligence of the fact that he was dealing with a foreigner. Thus far the exception to the general rule has been recognized only in favor of French citizens. No case has been found where the same protection was extended to foreigners.

2. Formalities. Whenever the formalities of a legal transaction are regarded in Anglo-American law as pertaining to the "substance" of a legal transaction, instead of relating to "procedure," they are deemed to belong to the operative facts which go to make up the validity of the legal transaction, and are governed by the law determining the validity of the legal transaction in general. No special rules have been developed relating to "formalities" in general. Since the Middle Ages, legal transactions have on the continent been considered valid, as regards formalities, if they satisfied the law of the place where they were entered into. In more recent times this rule has been expressed by the maxim locus regit actum. Introduced as a matter of convenience, the maxim has retained in some countries its original optional character, at least with respect to certain transactions. In others it has become a mandatory rule.

The rule locus regit actum was adopted in the draft of the Code Napoléon in the year VIII, but disappeared as a general formula in the subsequent deliberations. There is no doubt, however, that with respect to contracts it represents the existing

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4 Fiocca v. Fiocca, Trib. civ. Seine, April 5, 1895, 22 Clunet 607.
6 Lorenzen, The Validity of Wills, Deeds, and Contracts as regards Form in the Conflict of Laws (1911) 20 YALE L. J. 427 et seq.
There is some authority in support of the proposition that foreigners may execute contracts in France also in the form prescribed by their national law. The Court of Cassation, which established in 1909 the optional character of the rule *locus regit actum* with respect to foreigners executing wills in France, has not yet had an opportunity to pass upon the question with respect to contracts. Where a particular contract has to be executed in notarial form, compliance with the local law becomes in the nature of things compulsory.

Article 1341 of the Civil Code requires a written memorandum for contracts involving more than 150 francs. This provision is deemed to affect the substantive rights of the parties and is applicable, therefore, only to contracts made in France.

The rule that a contract is sufficient, as regards formalities, if it satisfies the law of the place of contracting, does not apply to so-called "habilitating" forms. "Habilitating forms," according to Pillet and Niboyet, "are the rules to be followed in order that an act affecting a person under a disability may be properly done. For example, a guardian, in order to convey property belonging to his ward, must comply with certain formalities; a married woman needs the authorization of her husband to render valid certain juridical acts." Such requirements as those mentioned, being intended for the protection of the minor or married woman, are governed by the national law of the person.
under disability, and not by the law of the state where the contract may have been entered into.

3. **Intrinsic validity and effect.** The fundamental rule here is that the intention of the parties controls, following the theory of the autonomy of the will. Dumoulin advanced this view with respect to the effect of contracts, but since his time the rule has been extended also to matters relating to the formation of contracts apart from "capacity" and "formalities." Like all other rules of the conflict of laws, the intention of the parties will not be given effect, if it would run counter to some strong local policy. If the contract providing for the application of the law of a foreign country was entered into in France, the courts may decline to enforce it on the ground that there was an evasion of the French law. Where the intention of the parties is not expressed, the trial court may presume it from the surrounding circumstances, and such finding will not be disturbed by the Court of Cassation.

If the contract is entered into between co-nationals, the courts sometimes say that there is a presumption that they contracted with reference to their common national law, which may be overcome, of course, by other facts in the case. If the contracting parties are citizens of different countries, they will be deemed, in the absence of special circumstances, to have contracted with reference to the law of the place of contracting. Where goods were shipped from New York to France, and the steamship company issued a bill of lading which stipulated against liability for the negligence of the captain and crew, which stipulation was invalid under the American law, but was valid under French law, the conclusion was reached that the

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15 Some writers hold that matters affecting the consent of the parties should be governed, like capacity, by the national law of the parties. See note by Perroud (1922) 50 Clunet 281.

10 For example, a stipulation against negligence on the part of a carrier by water in a contract governed by foreign law, and valid according to such law, will not be enforced in France on this ground. Crowley v. Saint Frères, Cass. (civ.), June 12, 1894, S. 1895, 1, 161.

17 See note by Perroud, supra note 15.


parties had contracted with reference to French law.\(^{24}\) Where an agreement was entered into in France providing for the submission of all disputes arising from a contract to arbitration, which stipulation was invalid under French law, the agreement has been recognized as valid, if the parties contracted bona fide with reference to the law of some other country, under the law of which such stipulation was enforceable. Such a stipulation has been sustained not only where the contract was entered into between two foreigners,\(^{22}\) but also where it was between a French citizen and a foreigner,\(^{23}\) or two French citizens.\(^{24}\)

The above rules are applicable where a contract is concluded by correspondence. Many courts hold that such a contract is made in the state where the offer is accepted.\(^{26}\) Others maintain that it is not concluded until the acceptance reaches the offeror.\(^{26}\) The \textit{lex loci} will not control if the parties must be deemed to have contracted with reference to some other law, as for example, their common national law.\(^{27}\)

In matters relating to the mode of performance, the parties are deemed to have contracted with reference to the law of the state of performance.\(^{28}\)

### Torts and Workmen's Compensation

As regards wrongful acts taking place in France, the rights


\(^{22}\) Ospina v. Ribon, Cass. (req.), July 17, 1899, D. 1904, 1, 225 and note by Pic; 26 Clunet 1024.


\(^{27}\) See \textit{supra} note 19.

and duties arising therefrom are governed by French law. All wrongful acts fall within the police laws of the state, which, according to Article 8, paragraph 1 of the Civil Code, apply to foreigners and natives alike. The position of the French courts with respect to wrongful conduct in foreign countries is not so well defined. In one of its decisions, the Court of Cassation held that, although a tort was committed in a foreign country, it would not be enforced in France if the act in question would not be wrongful under the local French law.

In another the Appellate Court of Angers held the defendant, without reference to the local English law, for acts done in England, which constituted unfair competition from the viewpoint of the French law. In collision cases, the lex loci delicti has been applied.

Because of the absence of any local law, great difficulty has been experienced in connection with the collision of vessels on the high seas. The matter is governed in France today by the Brussels Convention of September 23rd, 1910.

The Law of April 9, 1898, on workmen's compensation, as modified by Article 15 of the Law of March 31, 1905, provides that, where an accident occurs in a foreign country, the French courts of the place of location in France of the establishment or branch to which the victim was attached shall have jurisdiction. It has been inferred from this provision that the French act is applicable to accidents occurring abroad, if French law governed the contract of service, and this conclusion has since met with the approval of the United Chambers of the Court of Cassation.

Whether a foreign workmen's compensation act will be held

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33 See "Aborage," RÉPERTOIRE DE DROIT INTERNATIONAL PRIVÉ (1914).
34 Note (1912) 8 REV. DE DR. INT. PR. 184-186.
FRENCH CONFLICT OF LAWS

PROPERTY

1. Immovables. Article 3, paragraph 2, of the Civil Code provides:

"Immovables, even when owned by foreigners, are governed by French law."

The law of the situs governs the rights of ownership and possession of French immovables, and the interests that can be created therein. It determines also whether the property in question is to be regarded as immovable or movable property.

As regards the validity of a conveyance of French immovables, all are agreed that the requirements of the French local law must be satisfied, except as to "capacity" and "formalities." With respect to the latter it is frequently said that the general rules governing contracts control, so that the national law of the party would govern "capacity," and the law of the place where the transaction took place, the "formalities." The contention is made, on the other hand, that the courts apply the law of the situs even as regards "capacity" and "formalities."

So far as "formalities" are concerned, the local French law differs from our own in that it does not require any formal document for the conveyance of land. No distinction is made in this respect between a sale of immovables and of movables. If the value of the property involved, whether land or chattels, exceeds 150 francs, the contract must be in writing, but this provision applies only to contracts entered into in France. Any conveyance satisfying the law of the place of execution, as regards formalities, will be sufficient, therefore, to pass title to French immovables.

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40 I PILLET, op. cit. supra note 19, at 715-816; D WEISS, TRAITÉ DE DROIT INTERNATIONAL PRIVÉ (2d ed. 1912) 202.
41 Supra notes 1-3.
42 Supra note 7.
43 Note (1912) 39 Clunet 115.
44 2 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL (8th ed. 1921) 452.
movables. No cases have been found where the contract of sale was made in a foreign country, and the French local law was not satisfied. Difficulties have arisen only where the conveyance was by persons under disability, such as minors, insane persons, etc. Article 459 of the Civil Code prescribes special formalities to be observed by a guardian in the sale of immovables belonging to his ward. These provisions are regarded by the text-writers as being intended solely for the protection of the minor, and hence as not applicable to foreign minors whose national law does not contain similar provisions. The decisions of the French courts, however, are less certain in this regard.

To what extent is the statement that the "capacity" of a party to convey French immovables is governed by his national law supported by authority? No case has been found where a foreigner, a minor under French local law, but of age under his national law, made a conveyance of French realty. A conveyance of land belonging to a minor must be by the guardian, who must be authorized both by the family council and the court. Has the guardian of a foreigner power to convey French realty belonging to his ward if he was duly authorized in accordance with the requirements of the ward's national law? The powers of a foreign guardian are governed in general by the ward's national law. As regards the special authorization required for the conveyance of land, the law is not so clear. The authority of a foreign guardian to sell French realty, conferred by a national court, has been recognized in France after an exequatur had been obtained for the foreign judgment in France.

Similar rules govern where the disability of an owner of French realty results from the appointment of a guardian on account of prodigality or insanity.

Apart from the above cases involving a general disability, the "capacity" to dispose of French realty is governed by the French local law. Thus, the "capacity" of one spouse to make a valid gift of French realty to the other, depends upon French law, and not upon the national law of the spouses.

In the light of the foregoing, Article 2128 of the Civil Code

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45 "The sale shall take place publicly at auction in the presence of the assistant guardian and before a member of the Tribunal of First Instance or of a notary appointed for that purpose, and after three notices have been posted at the usual places in the District for three consecutive Sundays." Art. 459, par. 1, Civ. Code.

46 Notes (1878) 5 Clunet 520; (1912) 39 Clunet 115, 116.


49 Buxton v. Moreau, Trib. civ. Seine, Aug. 6, 1885, 12 Clunet 683.

50 Zammaretti v. Zammaretti, Cass. (req.), May 9, 1894, 21 Clunet 662.
relating to the mortgaging of French realty stands out as containing a most extraordinary provision. It enacts that, in the absence of a treaty provision to the contrary, a mortgage of French realty must be executed in France before a French notary.

2. Movables. The old rule that movables are subject to the domiciliary law of the owner, mobilia personam sequuntur, has been abandoned completely in the modern French law, as regards juristic acts inter vivos affecting movables, in favor of the law of the state where the movable is situated at the time of the transaction in question. The law of the situs determines what “property” rights can be created with respect to movables in France, and the mode required for their creation. As a chattel mortgage is not recognized under the local French law as regards ordinary chattels, none can be validly established as regards such chattels located in France.

Whether the “title” to a chattel in France has passed as a result of a sale or gift, or whether some other property right, for example, a lien, can be claimed by reason of some juristic act with respect thereto, depends solely upon the law of the situs.

So far as a contract of sale is concerned, for example the capacity of the parties to contract, or the formalities required for the contract, the ordinary rules governing contracts are applicable.

The law governing movables is controlled in France by the rule that “as regards movables, possession is equivalent to title.” A person to whom the owner of a movable has intrusted its possession, has the power to pass a good title thereto to any bona fide purchaser. If the owner lost the movable, or it was stolen from him, he has no right to its return as against a bona fide purchaser, except upon payment of the purchase price, provided such purchaser acquired it in a store or a public market. These rules apply to all movables in France, it seems, without reference to whether or not the movable came to France with the consent of the owner.

When at the time of the juristic act the movable was in a for-
eign country, the French courts apply the law of the situs with respect to the creation of any "property" rights therein. Such rights will be respected after the movable is brought into France, except so far as the French rules of public policy may be opposed. Thus, a chattel mortgage validly created in a foreign country will not be respected with reference to the owner's creditors in France, after the property is removed to French territory. The Court of Cassation has invoked the doctrine of public policy even as regards foreign vessels mortgaged in foreign countries. In the year 1874, the mortgaging of French vessels was sanctioned by statute in France, and since that time the rights of mortgagees of foreign vessels, the mortgage having been validly established according to the home law, have been respected in France.

The sale of vessels is governed everywhere by special rules. From the standpoint of the conflict of laws, the law of the flag has been deemed by many to furnish the most satisfactory rule. The French courts have been inclined to apply this rule to French vessels, but not to foreign vessels as against French creditors.

An extreme position has been taken by the French courts in the matter of bonds and other instruments payable to bearer which have been lost or stolen. Under the Law of June 15th, 1872, the owner of such paper is protected if prior to its acquisition by a bona fide purchaser, he has notified the French stock exchange of such loss or theft, and such notice has been duly published in the Bulletin. This law is applied to all subsequent negotiations of French bearer paper, without reference to the fact whether such negotiation took place in France or in a foreign country. As such paper is commonly negotiated abroad, the French courts were obliged, if the law was to be effective, to apply it to such negotiations abroad.

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   Where a French vessel, mortgaged in France, was sold in England by order of a Court of Admiralty, the discharge of the mortgage under English law was not recognized. Société de Saint-Nazaire v. Bureau Frères et Baillargeau, Cass. (civ.), June 24, 1912, S. 1912, 1, 433 and note by Lyon-Caen.
ever, much beyond this and have held (1) that the owner of foreign bearer paper can recover it in France from the purchaser who has acquired it in France subsequent to the publication of the notice in the Bulletin; (2) that the owner of foreign bearer paper dealt with on the French Stock Exchange can recover it in France from the purchaser who has acquired it abroad subsequent to the publication of the notice in the French Bulletin.

With respect to intangible property it may be stated that a debt can be garnisheed in France although the garnishee is not domiciled there. Before the garnishee is required to pay the plaintiff in the garnishment proceeding, the latter is required to bring a personal action against the principal debtor to establish his claim.

MATRIMONIAL PROPERTY

1. Marriage contract. The rules governing marriage contracts are said to be those governing contracts in general, and to apply irrespective of the nature of the property as movable or immovable. It must be borne in mind, however, that this general statement is subject to two qualifications: (1) that any matter directly affecting the French “property” régime as such is governed by the law of the situs; (2) that the rules of public policy may not necessarily operate in the same manner with respect to movable and immovable property.

(a) Capacity. It is said that as to capacity the national law of each party controls. The provisions of the Civil Code will apply, therefore, to French citizens executing a marriage contract abroad.

The national law governs also the capacity of foreigners to execute a marriage contract in France. But if the parties whose matrimonial domicile is in France adopt the French community

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64 Gay-Dubois v. Donnat, App. Lyon, July 25, 1874, 3 Clunet 273; see also Férand-Girand, De la Compétence des Tribunaux Français pour Connaître des Contestations entre Étrangers (1880) 7 Clunet 225, 234-235.

65 Palacios v. Galichon, Trib. civ. Seine, Aug. 20, 1884, 12 Clunet 76. A French minor is therefore subject to the provisions of Art. 1398 of the Civil Code.
system, a prohibition on the part of the national law against the adoption of such a régime will not be enforced by the French courts. 66

Under the provisions of the Civil Code, and under the law of some other foreign countries, a matrimonial property régime adopted either expressly or by implication at the time of marriage cannot be changed during the marriage. Will the national law of the parties govern also in this respect? This question has been variously answered by the French courts. Some have looked upon the problem as one relating to the "form" of legal transactions and as subject, therefore, to the law of the place where the transaction occurred. 67 Others hold that the question should be determined by the law governing the matrimonial property régime itself, that is, by the principle of autonomy. 68 Others still deem the doctrine of the immutability of marriage contracts as affecting the capacity of the parties, and controlled, therefore, by their national law. 69 Those taking the latter view hold that where a new nationality has been acquired by both spouses, the power to change the matrimonial property régime will depend upon the law of the new nationality. 70

(b) Form. A marriage contract is valid, as regards form, if it satisfies the law of the place of execution. 71 It has been held that the law of the place of execution is not mandatory with

66 In some cases they do so on the ground that the foreign law applied only to property situated in the foreign country, and was not applicable, therefore, to property in France. Fraix v. Fraix, Cass. (civ.), March 4, 1857, S. 1857, 1, 247; D. 1857, 1, 102; Zammaretti v. Fraissard, App. Bourges, July 18, 1904, S. 1905, 2, 8; Gortchakov v. De Guichriant, Trib. civ. Seine, July 16, 1910, 38 Clunet 222; 7 REV. DE DR. INT. Pr. 380. And in other cases, on the ground that the choice of the matrimonial property régime depended, from the French point of view, upon the intention of the parties and not upon their personal law, so that the French qualification of the legal transaction should control. Forno v. Forno, App. Grenoble, July 3, 1907, 4 REV. DE DR. INT. PR. 813; Bondetti v. Bondetti, Trib. civ. Saint Etienne, Jan. 21, 1914, 10 REV. DE DR. INT. Pr. 683, and note. Contra: In re Albertini, Trib. civ. Seine, April 25, 1910, 6 REV. DE DR. INT. Pr. 863.
respect to foreigners executing a marriage contract in France, and that they may follow the form prescribed by their national law.\textsuperscript{72}

(c) \textit{Intrinsic validity, interpretation and effect}. The principle of the autonomy of the will, according to which in the law of contracts the intention of the parties controls, is applied by courts and writers to marriage contracts. The law governing, therefore, is the one chosen by the parties, expressly or by implication, subject to the rules of public order.\textsuperscript{73} The rules of public order loom very large in the field of matrimonial contracts, however, so that little can be definitely stated.

So far as a particular question relates, not to the validity of a stipulation, but to its meaning or effect, the intention of the parties, either expressed or derived from the surrounding circumstances, will of course prevail.\textsuperscript{74}

2. \textit{No marriage contract}. Under the local French law, the provisions of the Code relating to the community property régime become applicable if the parties have not executed a marriage contract.\textsuperscript{75} According to this régime all the movable property owned by both spouses at the time of the marriage, and all future acquisitions, including both immovable and movable property, become community property. Since the days of Dumoulin (1500-1566), the French courts and writers have talked as if the rights of the parties resulted from a tacit contract.\textsuperscript{76} Dumoulin invented the tacit contract theory for the purpose of avoiding the inconvenience that had arisen from the principle of territoriality. He desired to bring the subject within the "personal statute," in order that the property rights resulting from marriage might be governed by one law throughout the married life of the parties. According to Dumoulin, the law of the matrimonial domicil at the time of marriage controlled the effect of marriage upon the matrimonial property rights of husband and wife, without reference to the nature of the property as movable or immovable, or the time of its acquisition, whether before or subsequent to a change of domicil.\textsuperscript{77} The intention of the parties was considered only so far as it would help in determining the matrimonial domicil. The law of matrimonial domicil governed by way of legal presumption, which could not be contradicted.

Dumoulin's doctrine was opposed by d'Argentré, according to

\textsuperscript{72} Selby v. Logette, App. Douai, Jan. 13, 1887, 14 Clunet 57.
\textsuperscript{73} PILLET ET NIBOYER, op. cit. supra note 13, at 691.
\textsuperscript{75} \textit{Art. 1400, Civ. Code.}
\textsuperscript{76} \textit{Ibid. 233-234.}
\textsuperscript{77} \textit{Ibid. 233-234.}
whom the property rights resulting from marriage belonged to the law of property, the "real statute." Dumoulin's views, however, were accepted by the courts and writers, and prevailed completely during the 18th century.

Until the middle of the nineteenth century the intention of the parties was invariably interpreted as having reference to the law of the matrimonial domicil, 78 that is, the place where the spouses intended to spend their conjugal life. 79 This law governed the respective rights of the spouse as to all property, movable or immovable, owned by them at the time of the marriage, or subsequently acquired by them. A change of domicil to a new province, in which a different property régime obtained, did not affect the rights of the parties, which were controlled throughout the marriage by the law of the original matrimonial domicil.

During the third quarter of the nineteenth century, a different interpretation was given to the tacit contract theory. The conviction had grown up that if the rights of the parties resulted from a tacit agreement, their intention should control, so that the law of the matrimonial domicil should not be a compelling law, but only presumptive evidence of the parties' intention, which might be overcome by other facts. The law of the matrimonial domicil governed during this period not as a rule of law, but merely as a legal presumption. During the last quarter of the nineteenth century this position was abandoned in turn. The law of the matrimonial domicil lost its position of pre-eminence, even as a mere legal presumption. It became applicable only if in the light of the facts the court concluded that the parties must have intended to accept the law of such place. Since that time, the matrimonial property rights in France depend upon what the courts conceive to have been the probable intention of the parties. It is a question of fact, to be determined by the trial court, without interference by the Court of Cassation. 80

According to some cases the trial judge must ascertain the intention of the parties from the facts existing at the time of the marriage; 81 but the prevailing view is that he may consider

also subsequent events, so far as they throw light upon the probable intention of the parties at the time of their marriage, with respect to their matrimonial property régime.\textsuperscript{52}

In ascertaining the presumptive will of the parties from all the circumstances in the case, various facts are emphasized. In recent times, especially since the Fourth Conference on Private International Law at the Hague in 1904,\textsuperscript{63} greater weight has been attached to the common nationality of the parties.\textsuperscript{64} The law of the matrimonial domicil, however, still plays a preponderating role, especially when the parties have different nationalities, as an expression of the presumptive intent of the parties.\textsuperscript{65} Even where the parties are of the same nationality, they will often be deemed to have adopted the property régime of their matrimonial domicil, especially where such domicil is in France.\textsuperscript{66}

The great uncertainty to which the intention theory, as at present interpreted, has led, has given rise to much criticism.\textsuperscript{57} After a very thorough study of the subject by the Société d'Etudes Législatives, the following addition to the articles of the Civil Code has been suggested: \textsuperscript{58}

"In the absence of a marriage contract, the matrimonial régime of foreigners married in France, and of Frenchmen married abroad, shall be the legal régime adopted by the national law of the husband."

The tacit contract theory still embraces both movable and immovable property.\textsuperscript{59} If the immovable property is situated in


\textsuperscript{53} This Convention adopted as the governing rule the national law of the husband.


\textsuperscript{56} Dorati-Thirion v. Dorati, Tisserandot, App. Paris, Feb. 5, 1887, 14

\textsuperscript{57} 1 PILLET, \textit{op. cit.} \textit{supra} note 10, at 222 \textit{et seq.}

\textsuperscript{58} Note, D. 1912, 2, 25, 27.

\textsuperscript{59} Duroni-Thirion v. Duroni, Tisserandot, App. Paris, Feb. 5, 1887, 14
France, effect will be given to the matrimonial property régime tacitly agreed upon abroad, except where particular provisions are deemed to conflict with the French rules of public policy.

Where the spouses were citizens of the United States, and married in a non-community state, the appellate court of Montpellier has held that they must be regarded as having tacitly agreed upon the régime of separation of property. This régime, it has been held, will relate not only to all property owned by the spouses at the time of the marriage, but also to all property subsequently acquired by them, even after a change of domicil to France.90 The court did not refer to the renvoi doctrine, which has been accepted by the Court of Cassation and most French courts.91 If this doctrine had been applied, the French courts would have adopted the rules of the conflict of laws of this country, and determined by French local law the rights of the spouses in French realty, and in any personal property acquired in France subsequent to a change of domicil to that country.

The French Court of Cassation has held that no dower rights in our sense can be claimed in French realty by virtue of such a tacit contract, such dower rights not being recognized by French law.92

Under the French law the husband is administrator of the community property, and the married woman is given for her protection a lien upon her husband’s property.93 However, where the married woman was a foreigner at the time of the marriage, or acquired a foreign nationality in consequence of her marriage, such a lien on property in France has been denied her, although the marriage contract was executed in France and the French community system was adopted. Such a lien has been regarded as a strict civil right,94 to which foreigners were not entitled in the absence of an “authorized” domicil,95 or a treaty provision. The Law of August 10, 1927 has abrogated Article 13 of the Civil Code which conferred upon foreigners, who had acquired an “authorized” domicil, all civil rights.


91 Lorenzen, op. cit. supra note 12, at 735.
93 Art. 2121, Civ. Code.
96 Lorenzen op. cit. supra note 12, at 732.
SUCCESSION

1. Intestate succession. (a) Immovables. Article 3, paragraph 2 of the Civil Code, providing, that “immovables, even when owned by foreigners, are governed by French law,” is deemed applicable to the transmission of property upon death. The devolution of immovable property situated in France is controlled, therefore, by French law. 57

(b) Movables. For a long time prior to the adoption of the Civil Code, personal property upon death was said to be governed by the law of the decedent’s domicile at the time of death, in accordance with the maxim *mobilia sequuntur personam*. According to some writers, 58 this rule belonged to the “personal statute;” according to others, to the “real statute,” 59 the situs of the property being conclusively presumed to be at the domicile of the owner. The Code Napoléon adopted the law of nationality as governing the “personal statute,” instead of the traditional rule, the law of the domicile, 60 but laid down no express provisions regarding the distribution of personal property upon death. If the above maxim belonged to the “personal statute,” the Code would have substituted in this regard the national law of the decedent for the law of his domicile. 61 The courts have held, however, that the maxim belonged to the “real statute,” and that the Code did not intend to make any change in the law of succession as regards personal property. 62 Personal property belonging to a French citizen domiciled abroad will be distributed, therefore, in accordance with the law of his domicile. 63 If the law of his domicile should apply French law, the French courts would do the same thing. 64


If the immovable property is situated in a foreign country, under the law of which immovables devolve upon death in accordance with the personal law of the decedent, the latter law will be applied also by the French courts, on principles of renvoi. Bitton v. Bitton, App. Aix, Jan. 28, 1920, 50 Clunet 99; Raineri v. Bourillon, App. Aix, July 19, 1906, 34 Clunet 152.

58 See 1 LAINÉ, op. cit. supra note 76, at 243.

59 Ibid. 244.

60 Art. 3, par. 3.

61 Forgo v. L’Etat, Cass. (civ.), May 5, 1875, S. 1875, 1, 409; D. 1875, 1, 343; In re Greek, Cass. (civ.), supra note 97.


Prior to the Law of August 10, 1927, abolishing Article 13 of the Civil Code relating to "authorized" domicile, personal property belonging to a foreigner in France had been held governed by French law, if the decedent had an "authorized" domicile in France. If he had only a de facto domicile in France, the law of his domicile or country of origin controlled. The personal property of a citizen of the United States, formerly domiciled in Connecticut, but domiciled in France at the time of his death, would be distributed in accordance with the law of Connecticut. But as the law of Connecticut would distribute such personal property in accordance with the law of the domicile of the decedent at the time of his death, the French courts, under the principles of renvoi, would apply the provisions of the Civil Code. French law will be applied also if the decedent, a resident of France, possessed no nationality at the time of his death.

The general rules above mentioned governing succession are modified in favor of French citizens by the Law of July 14th, 1819, which will be discussed below.

Property, movable as well as immovable, left in France by a decedent who is survived by no heirs or next of kin will escheat to the French government.

2. Testamentary. (a) Capacity. Article 3, section 3 of the Civil Code provides in express terms that the capacity of French citizens, even when they reside in foreign countries, shall be subject to French law. In like manner, foreigners are governed by their national law in the matter of capacity. This rule is said to apply to the execution of wills, without regard to whether the will disposes of movable or immovable property. It is not clear, however, what will be regarded by the courts as relating to the "capacity" of the testator, instead of to the law


105 In re Forgo, Cass. (civ.), June 24, 1878, S. 1878, 1, 429; Hermann v. Soulité, supra note 103; 6 REV. DE DÉN. INT. PR. 870; S. 1913, 1, 105; D. 1912, 1, 262.

106 In re Schwarz, App. Pau, May 14, 1907, 34 Clunet 1109.


of "succession" as such. It may be assumed perhaps that the question whether a minor can execute a will and, if so, at what age, will be determined by his national law, both as to movable and immovable property. On the other hand, it is settled that the power of a testator to dispose freely of all his property, or only of a certain share, because certain heirs are entitled by law to compulsory portions, is not regarded as a matter relating to "capacity," but to "succession," and therefore subject to the law of the situs, so far as immovable property is concerned. Should the testator be a citizen of a country, the law of which regards the heir's compulsory portion as relating to the "capacity" of the testator, the French courts will follow their own "qualification" of the legal transaction. If foreign law is applicable by virtue of this rule, and such foreign law in its turn refers the question to French law, as one of capacity, the French courts would accept this renvoi.

(b) Formalities. Since the Middle Ages, the rule has been established in Europe, on grounds of convenience, that any will is valid, as regards formalities of execution, if it satisfies the law of the place of execution. Originally, this was merely an optional rule, but in the course of time it became mandatory in some countries. The mandatory character of this rule became settled in France through a decision of the Parliament of Paris in the case of In re Pommereuil, decided in 1721.

Article 999 of the Civil Code provides:

"A Frenchman who is in a foreign country can make his will by instrument under private signature, as is specified in Article 970, or by public instrument (acte authentique), according to the form in use in the place where such instrument shall be made."

A French citizen, therefore, may execute a holographic will, that is, an instrument wholly written, dated and signed by the testator, without reference to the law of the place of execution, in accordance with the provisions of the French Code relating to such wills. He may likewise execute a "public" will, according to the requirements of the law of the place of execution. May he execute his will also in any form authorized by the law of

100 See Witty v. Lecaan, Trib. civ. Seine, Dec. 23, 1881, 9 Clunet 322.
101 10 Aubry & Rau, COURS DE DROIT CIVIL FRANÇAIS (5th ed. 1918) 531.
102 Infra note 134.
103 Lorenzen, op. cit. supra note 12, at 735.
105 Lorenzen, op. cit. supra note 6, at 427-431.
106 2 Lainé, INTRODUCTION AU DROIT INTERNATIONAL PRIVÉ (1892) 417 et seq.
the state of execution, in accordance with the traditional maxim locus regit actum? The first draft of the Code had an express provision to this effect, but it was dropped because it was deemed too general and might lead to abuse.117

In accordance with Article 999, a Frenchman may execute a "public" will in the form prescribed by the law of the place of execution. What is a "public" will within the meaning of that article? Is a will executed by a Frenchman in the United States before witnesses, in conformity with the laws of the place of execution, a valid will in the eyes of the French law? The French courts have given an affirmative answer to this question, thus interpreting the word "public" will as including any kind of "solemn" will authorized by the law of the place of execution.118 Whether the courts will go beyond this, and allow French citizens to execute their wills abroad in any form authorized by the law of the place of execution cannot be predicted with any degree of confidence. Suppose, for example, the local law recognizes oral wills, or that it does not require the holographic will to be dated.110 The case of Gesling v. Viditz120 liberalized the French law as regards formalities, in its application to foreigners executing wills in France, by authorizing them to execute them either in the French form, or in the form prescribed by their national law. It does not follow, however, in view of the

117 2 Fenet, Recueil Complet des Travaux Préparatoires du Code Civil (1827) 6; Merlin, Répertoire (1827) "Loi," § 6, Nos. 7, 8; Lainé, La Rédaction du Code Civil en Matière de Droit International Privé (1905) Rev. de Dr. Int. Pr. 443, 465-475.
119 A French citizen abroad may execute his will in the French form before a French consul. See Dalloz, Codes annotés, Nouveau Code Civ., Art. 999, Nos. 34 et seq. Most courts hold that Art. 999 of the Civil Code has not abrogated Art. 24, tit. 9, bk. 1 of the Marine Ordinance of 1681, according to which a will might be "received" by the Chancellor of a French consulate in the presence of a consul and two witnesses and signed by them. Lafont v. Lafont, App. Aix, Feb. 16, 1871, D. 1872, 2, 52; Nectoux v. Nectoux, App. Dijon, April 9, 1879, D. 1879, 2, 108; Vidal v. Bertgen, Cass. (civ.), March 20, 1883, D. 1883, 1, 145. As the Ordinance does not specify the formalities in detail, it is held that the provisions of the Civil Code and those governing notaries (25 Vent., an 11, art. 68) apply. Vidal v. Bertgen, Cass. (civ.), March 20, 1883, D. 1883, 1, 145; Ville de Châteaubriant v. Gouël, Cass. (req.), Jan. 23, 1893, D. 1893, 1, 83.
120 Cass. (civ.), July 20, 1909, 36 Clunet 1097; 5 Rev. de Dr. Int. Pr. 900; D. 1911, 1, 185.
positive provision of the French Code relating to the execution of wills by French citizens abroad, that the Court of Cassation will recognize all wills executed by Frenchmen abroad in accordance with any form prescribed by the local law.

A joint will is not authorized by the local French law. But where two French spouses execute such a will, in the “public” form in a country recognizing such wills, it has been held valid in France, the matter being deemed to relate to the “formalities,” and not to the “capacity” of the parties.

In what form may foreigners validly execute wills in France? The Civil Code has no specific provisions applicable to this situation. It is well settled, however, that a foreigner may execute his will in France in the French holographic form. He may do so even if his national law should have a provision to the effect that holographic wills executed by citizens abroad shall be invalid. If the foreigner knows the French language, he may execute also a public will in France before a French notary.

May an American, domiciled in the state of Connecticut, execute a will in France, disposing of French property, by complying with the requirements of the Connecticut law? Such a will can be upheld, of course, only if the rule locus regit actum is optional with respect to foreigners, so that they may follow the provisions of either the local law or their national law. Until 1909 it was held by most of the French courts, including the Court of Cassation, that such a will was invalid, but in that year the optional character of the rule was established by the Court of Cassation with respect to foreigners making wills in France.

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121 Art. 968, Civ. Code.
122 Witty v. Lecaan, supra note 109.
125 If the testator is unfamiliar with the French language he cannot execute a public will in France unless he can find a notary and witnesses who understand his own language. Weiss, op. cit. supra note 40, at 663 n.; Raphaelen v. Raphaelen, App. Rennes, Jan. 8, 1884, S. 1885, 2, 214; Dréau v. Penne, Trib. civ. Quimper, March 14, 1900, 27 Clunet 805; see also Santelli v. Potentini, Cass. (req.), Aug. 3, 1891, D. 1893, 1, 31. Some earlier decisions have allowed the use of an interpreter. See also Colin, De la Forme des Testaments Passés par des Etrangers (1897) 24 Clunet 929, 932.
It may be said, therefore, that a foreigner may execute his will in France, so far as formalities are concerned, by complying (1) with any of the forms prescribed by the local French law; (2) with any forms prescribed by the national law. The cases in which wills executed in the national form were recognized in France were "solemn wills," executed before witnesses. Would the same rule be applied if the will was oral or would considerations of public policy prevent the recognition of such a will?

As regards formal requirements, no difference is made in France between wills disposing of movable or immovable property. A will, executed in France by a citizen of the United States domiciled in Connecticut in the Connecticut form, would pass title, therefore, to both kinds of property in France.128

If a will disposing of French movables or immovables is executed by a foreigner in some country other than France, the will is effective to pass title to such property, if it is executed in the form prescribed by the law of the place of execution, or by his national law.129 The question, however, whether an oral will validly executed in accordance with the above rules would be recognized has not been before the French courts.

Suppose a will disposing of French immovable property, is executed by a foreigner in a country other than France in the holographic form of Article 970 of the Civil Code, but that it is invalid, both by the testator's national law and the law of the place of execution. Although the question has not come before the French courts, it is hardly credible that a will satisfying the law of the situs and of the forum would be regarded as invalid.130

Whether a will executed by a foreigner abroad would be recognized in France with respect to French property, if executed in accordance with the law of his domicil, but not satisfying the testator's national law, the law of the place of execution, nor the law of the situs of the property, is more doubtful.

Another doubtful question is the extent to which the doctrine


130 In favor of its validity, see Aubry & Rau, op. cit. supra note 110, at 599.
of renvoi may be invoked with reference to the formal execution of wills. The Civil Tribunal of the Seine applied it in the case of a testator, assumed to be a citizen of the United States, formerly domiciled in New York, but domiciled in France at the time of his death, who had executed his will in Paris in the New York form. The will was held invalid, because the law of New York would apply the law of the testator's domicil, and the will did not satisfy the local French provisions regarding the execution of wills.\(^\text{131}\)

(c) **Intrinsic validity.** So far as the intrinsic validity affects the property régime, the law of the situs will control. A prohibition against the alienation of property situated in France, being illegal under the French law, will therefore be ineffective.\(^\text{132}\) Trusts executed in foreign countries with respect to property in France have been recognized in many instances, on the false assumption that no title was vested under the will in the trustee,\(^\text{133}\) although they were opposed to mandatory provisions of the Civil Code. If a particular provision relating to intrinsic validity does not affect the French property régime, it will be governed by the rules controlling intestate succession. With respect to French immovables, the law of the situs will therefore control, and with respect to movable property, the personal law of the testator, subject to the rules of public policy.\(^\text{134}\)

Much difficulty has been experienced where property has been left to a charitable organization, either existing or to be created. The French rules governing such organizations differ so greatly from those recognized by Anglo-American law, that it is not practicable to enter upon a discussion of the subject in this place.\(^\text{135}\)

3. **Legal reserve.** According to Article 913 of the Civil Code, a person having certain heirs cannot dispose of more than a portion of his estate by gifts inter vivos, or by testamentary dispositions. The French courts do not regard this question as relating to the “capacity” of the testator. If it did so relate, they

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\(^{131}\) Sanchez v. Wallerstein, Trib. civ. Seine, July 13, 1910, 38 Clunet 912; 8 Rev. de Dr. Int. Pr. 414.


\(^{134}\) So as to contractual institution of an heir. Antonelli v. García de la Palma, Cass. (civ.), April 2, 1884, S. 1886, 1, 121 and note; Sandri Volpi v. Peduzzi, Cass. (reg.), May 7, 1924, 52 Clunet 126.

\(^{135}\) See De Renesse v. Robineau, Trib. civ. Seine, Dec. 8, 1924, 20 Rev. de Dr. Int. Pr. 6, and note; see also Note (1909) 5 Rev. de Dr. Int. Pr. 849-862; Travers, De la Validité, au Point de Vue de Droit Français, des Trusts Créés par des Etrangers sur des Biens Soumis à la Loi Française ou par des Français sur des Biens Situés hors de France (1909) 5 Rev. de Dr. Int. Pr. 521-535.
would hold, consistently with their general point of view, that the national law of the testator should govern, both as to French movable and immovable property. Other policies than those underlying the subject of "capacity" are deemed to control this question, and to require the application of the ordinary rules applicable to intestate succession. With respect to French immovable property, therefore, the rights of the compulsory heirs are determined with reference to French law.\textsuperscript{130} As regards movable property left in France, by a French citizen domiciled at the time of his death in New York, the New York law would govern.\textsuperscript{137} Whether the heirs of a foreigner would have compulsory rights with respect to movable property left in France has been held to depend upon the "legal" domicil of the testator. If he had an "authorized" domicil in France, French law would control; if he had only a de facto domicil in France, the law of his domicil of origin, or national law, would govern.\textsuperscript{138} Assuming the decedent left immovable property in a foreign country, and that according to the law of such country, French law would control as decedent's national or domiciliary law, the French courts would apply the French provisions by way of renvoi.\textsuperscript{139}

4. \textit{Law of July 14th, 1819}. Article 2 of the Law of July 14th, 1819, provides as follows:

"Where a succession is to be divided between foreign and French co-heirs, the latter shall receive by way of preference such a share of the property in France as shall be equivalent to the value of the property situated abroad, from which they have been excluded for any reason whatever, on account of some local law or custom."

From the terms of the Act, it would appear to be applicable only if (1) French and foreign heirs co-exist; and (2) property is left by the decedent, both in France and in a foreign country. French courts have given to the law, however, a wider application. The Court of Cassation, for example, has held that Ar-
article 2 would apply where all the heirs are French citizens.\textsuperscript{140} The statute has been held applicable, also, where all of the decedent's property was in France, and the decedent was a foreigner whose personal estate was to be distributed according to his national law.\textsuperscript{141}

The Law of 1819 is applied where the prejudice to a French citizen results from the operation of a rule of law, for example, from the application of the law of the situs, as regards immovable property.\textsuperscript{142} It is applied also when the prejudice to the French citizen results from a testamentary disposition. For example, the foreign law may confer upon a testator a wider power of testation than the French law; or a French citizen, instituted universal legatee in a foreign will, may be prejudiced by the fact that the foreign law provides for a more extensive reserve than the French law. In either case the French citizen will be entitled, to the extent of his prejudice, to a preference with respect to the French property.\textsuperscript{143} The French courts tend to hold, therefore, that whenever a French citizen gets under the foreign law less than he would obtain under the French local law, he shall be preferred to the extent of such difference with respect to French property. In ascertaining the amount to which the French heir or legatee is entitled, the value of the entire estate, wherever situated, is taken into consideration.\textsuperscript{144}

The above rules in favor of French heirs modify the ordinary rules of the conflict of laws governing the devolution and disposition of property upon death. In order to be entitled to the benefit of the Law of July 14th, 1819, it is sufficient that the heir has become a naturalized French citizen prior to the decedent's death, provided the naturalization was in good faith, and not for the purpose of getting an advantage over the other heirs by virtue of the Law of 1819.\textsuperscript{145}

5. \textit{Administration of estates.} Suits with reference to a suc-

\textsuperscript{141} \textit{Lazare-Lyon v. Angelici}, Trib. civ. Seine, April 26, 1907, 36 Clunet 1132; \textit{In re Alfaro}, supra note 140.
\textsuperscript{142} Suppose, for example, an Italian owns immovables in Italy at the time of his death and movables in France, and leaves as heirs an Italian father and a French brother. Under the Italian law of succession the brother would get only one-half of the estate, whereas he would get three-fourths under the French law. To the extent that the brother is prejudiced by Italian law, he is entitled to a preference out of the property left in France. \textit{Diederichs & Weber v. Rey & Darlies}, App. Aix, March 7, 1910, 38 Clunet 245; \textit{Axling v. Axling}, App. Alger, May 31, 1910, 38 Clunet 1274.
\textsuperscript{143} \textit{Peacan v. Leboeuf}, App. Douai, April 28, 1874, 2 Clunet 274.
\textsuperscript{144} \textit{A v. D}, App. Chambéry, June 11, 1878, 5 Clunet 611.
\textsuperscript{145} \textit{In re Zermati-Suissa}, App. Alger, Feb. 9, 1910, 9 \textit{REV. DE DR. INT. PR. 103}. 
cession must be brought on principle at the place where the succession "opens." As regards immovables in France, the succession is deemed to "open" in France,¹⁴⁸ and as regards movable property, at the place of the decedent's domicile.¹⁴⁷ Many qualifications to these rules exist, resulting mainly from the principle of renvoi,¹⁴⁵ from Articles 14 and 15 of the Code of Civil Procedure,¹⁴⁹ from the Law of July 14th, 1819, and from treaties.

In the absence of a will, the entire estate goes to the heir under the local French law. The heir may accept or renounce the succession, or accept it under benefit of inventory. As universal successor to the decedent, the heir becomes personally responsible for the debts of the decedent, unless he accepts the succession under benefit of inventory, in which event his responsibility is limited to the amount of the assets received. Many problems may arise from the standpoint of the conflict of laws touching the above matters, but as they are dissimilar to those arising under the Anglo-American law, no attempt will be made to state the solution given to them by the French courts.¹⁵⁰ Because of its direct interest to American lawyers, it should be stated, however, that the notion that a foreign executor or administrator cannot sue is unknown to French law.¹⁵¹

DONATIONS

The Civil Code deals with wills and donations under the same title. The term "donation" includes both executed gifts and agreements to give. In order that an agreement to make a donation be valid, it must be executed before a notary and accepted by the donee in the same manner.¹⁵² Except in the case of marriage agreements,¹⁵³ a donation inter vivos is invalid with respect to future property.¹⁵⁴ It may become revocable on ac-

¹⁵⁰ See 2 PILLET, op. cit. supra note 10, at 388-424.
¹⁵³ Arts. 1082 et seq., Civ. Code.
count of ingratitude, and in the event of the subsequent birth of children. All donations made between husband and wife are revocable during the lifetime of the spouses.

To the extent that the donations made impinge upon the legal reserve, they will be reduced; if executed, the excess can be recovered.

The problems raised by the subject of donations from the standpoint of the conflict of laws are very troublesome, because they concern at the same time the law of contracts in general, and of marriage contracts in particular, the law of succession and the law of property. It is not surprising, therefore, that very few definite conclusions can be drawn from the decided cases. As regards formalities and mode of proof, it may be said that the law of the place where the contract was made, or the gift executed, controls. It has been held, also, that a contract of donation might be executed in France in the form authorized by the national law of the parties; but Pillet doubts whether the optional character of the rule *locus regit actum* extends to the subject of donations.

The capacity to execute a contract of donation is governed by the national law of the parties. It is not certain, however, to what extent this rule applies to donations of immovable property situated in France. The validity of donations between husband and wife have come before the French courts in a number of instances. It appears to be settled that the national law of the parties determines whether such a donation is authorized as regards movable property, and the law of the situs, so far as it concerns French immovable property. The requirement of judicial authorization for the validity of a donation between husband and wife has been held to relate to “capacity,” and not to “formalities.”

There is a tendency to assimilate contracts of donation to testamentary dispositions, rather than to contracts. The validity of such contracts, apart from “capacity” and “form,” appears to be governed therefore by the personal law as regards movable

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256 Arts. 953, 960 et seq., Civ. Code.
261 2 PILLET, op. cit. *supra* note 10, at 459.
property, and by the law of the situs as regards immovable property.\textsuperscript{164}

The reduction of donations at the instance of heirs entitled to a compulsory portion, because of their encroachment upon the legal reserve, is controlled likewise by the law governing succession, that is, by the personal law of the decedent as regards movable property, and by the law of the situs as regards immovable property. Whether the revocability of donations on account of ingratitude, or the subsequent birth of children, is governed by the same rules is not certain.\textsuperscript{165}

\textsuperscript{164} Antonelli v. Garcia de la Palmira, Cass. (civ.), April 2, 1884, 12 Clunet 77.

\textsuperscript{165} Note (1913) 9 Rev. Dr. Int. Pr. 116, 121.