EVIDENCE IN COMPARATIVE PRIVATE INTERNATIONAL LAW.

I.

In any particular field of private international law the differences between legal systems which, like those existing in the countries of European civilization, are based on mainly similar principles,[1] may usually be found in the two elements of characterization of facts and of the selection of the law which ought to govern the facts pertaining to each characterization.

In the Anglo-American, as well as in the continental systems,[2] the rule is established that all matters of procedure must be submitted to the *lex fori,* but, while the former systems include matters of evidence in the characterization of procedure, in the latter systems the view commonly, if not universally,[3] prevailing is that a clear distinction must be drawn between formalities of adducing evidence, which pertain to the field of procedure, and admissibility of particular pieces of evidence which specially affect substantive rights.[4]

1 This statement must naturally be accepted in a rather broad sense. The difference between the various systems concerning the conceptions of *renvoi,* primary and secondary classification, public policy, etc., are well known to any student of private international law.

2 When we refer to continental systems we mean mainly, as being the more familiar to us, the French and the Italian. The German doctrine, as far as matters of evidence are concerned, is closely similar to the English: Cf. Jettel, *Handbuch des Internationalen Privat- und Strafrechts* (1893), 150; Gierke, *Deutsches Privatrecht* (Liepzig, 1895), 247; Walker, *Internationales Privatrecht* (Vienna, 1921), 198; Wach, *Handbuch des Deutschen Civil-prozessrechts,* Vol. 1, 121 ff.; Schoch, *Klagbarkeit, Prozessanspruch und Beweis im Licht des internationalen Rechts* (Leipzig, 1934), 150 ff.; Neumeyer, *Der Beweis im internationalen Privatrecht,* in "Melanges Streit" (Athens, 1940). *Contra,* von Bar, *Theorie und Praxis des internationalen Privatrechts,* Vol. II (Hanover, 1889), 377 ff.

3 *Cf.* on the subject our article: *La Legge Regolatrice dei Mezzi di Prova nel Diritto Internazionale Privato,* in Archivio Giuridico (Modena, 1948), Vol. CXXXV, 196 ff.

4 This is the view almost unanimously accepted by French authors. See, among many others: Masse, *Le Droit Commercial dans ses Rapports avec le Droit des Gens* (2nd ed., 1861), 42; Asser et Rivier, *Elements de droit international prive* (Paris, 1884), 167-168; Pillet, *Principes de Droit International Prive* (Paris, 1903), 489; Audinet, *Principes Elementaires de droit International Prive* (2nd ed., Paris, 1906), 364. For the Belgian doctrine see: De Vos, *Les Problemes des Conflits de Lois* (Brussels, 1946), Vol. I.

For the Italian doctrine see: Catellani, *Il Diritto Internazionale Privato* (1888), 585; Diena, *Principi di Diritto Internazionale Privato* (1910), 374, 376-377; Carnelutti, *Sistema del Diritto Processuale Civile* (Padua, 1936), 105; Bassano (*Appunti sulla Legge Regolatrice della*

II.

This tendency of the continental systems to regard matters of evidence as matters of substance[5] has led specially to their inclusion in the classification of "form". In the more recent Italian doctrine, for instance, Professor Ago[6] and Professor Bosco[7] both maintain that the law which must govern the means of proof is the same as that which governs the form of the transactions.

The assimilation of "evidence" with "form" is justified on the ground that "the form and the proof of the transactions, though not liable to be confused with each other, are closely related. What would be the use of recognising everywhere, on the basis of the principle *locus regit actum,* as extrinsically valid a contract completed in accordance with the local rules, in a mere verbal form, if the right of the parties should not be recognised to prove its existence by the means of proof admitted by the law of the place where the transaction was made, and, in particular, by the evidence of witnesses admitted by that law?"[8]

This argument cannot, we think, be unconditionally accepted.

Prova in Diritto Internazionale Privato, in Rivista di Diritto Civile (1935), 481 ff.) maintains, on the ground of the necessity for a single regulating system for each transaction, that substantive rights, the right to the action, and evidence must be governed by the same law.

Among Spanish authors see: Carrio, *Apuntes de Derecho International Privado* (1911), 384.

For the older English doctrine (before the case of *Leroux v. Brown*, (1852), 12 C.B. 801, 138 E.R. 119) see Story, *Commentaries on the Conflict of Laws* (1st ed., 1834), sec. 262.

5 Meaning here "substance" as opposed to "procedure" and including, therefore, "form", "capacity", etc.

6 *Le Norme di Diritto Internazionale Privato nel Progetto di Codice Civile,* in Rivista di Diritto Internazionale (1931), 343 ff. The thesis is naturally limited to the transactions which require a particular form. For the mere facts the competent law is, according to Professor Ago, the *lex fori.* For Arminjon, on the contrary, while the proof of a transaction is still submitted to the law which governs the form, the proof of the facts is submitted to the *lex substantiae.* The *lex fori* applies only to those facts which produce mere material consequences without any direct connexion with the juridical effect. See *Precis de Droit international prive* (Paris, 1931), Vol. III, 410 ff.

7 *Le Norme di Diritto Internazionale Privato nel Progetto di Codice Civile,* in Rivista di Diritto Civile (1932), 220.

8 Diena, *Trattato di Diritto Commerciale Internazionale* (Florence, 1900), 514. The tendency to incorporate matters of evidence in the characterization of "form" has sometimes led to a real confusion. For instance, Niboyet (*Manuel de Droit International Prive* (Paris, 1928), 679) writes:—"When two persons contract together in the presence of witnesses and without any writing, where these agreements give rise to real obligations, so that the evidence of witnesses is admitted even for con-

The rules of evidence, when they really are of this nature and not only apparently such, are strictly connected with the function of the Courts in the administration of justice[9] and have their particular purpose in leading the judges to come to a conclusion about the facts brought before them.[10]

tracts which exceed the sum of one hundred *livres*, if they afterwards appeal to a court in a country where the evidence of witnesses is not allowed, it is not difficult to maintain in such a case that it is necessary to admit that means of proof, because it belongs *ad vinculum obligationis et sollemnitatem.*''

The misunderstanding is here evident; the requirements of form are independent of the means of proof. To maintain that evidence belongs to the *vinculum obligationis* has no meaning. The purpose of evidence is to demonstrate the facts which give rise to the pre-existing *vinculum obligationis;* if it were an integral part of that *vinculum* it would be an element of fact from which the right derives and not an element of evidence. (For a statement on the same lines as that of Niboyet, see Fisce, *Diritto Internazionale Privato* (1888-93), Vol. 1, s. 184).

9 The usual English distinction, according to which procedural rules are concerned with the remedy and substantive rules with rights, has sometimes been criticized for what, we think, is an incorrect reason.

A case, for instance, in the discussion of which some confusion has been created, is that of *Huber v. Steiner*, (1835) 2 Bing. N.C. 202, 132 E.R. 80, Beckett, *The Question of Classification (''Qualification'') in Private International Law*, in (1934) 15 B.Y.I.L. 46, at 75, notes that the court wrongly classified the rule set out in Article 189 of the French Commercial Code (''All actions relating to bills of exchange are prescribed after five years'') as a rule of procedure. He says, ''There is, however, no doubt . . . that this French rule is not regarded by the French courts as a rule of procedure'', and adds ''that is not because the article extinguishes the right, but because the French Courts do not adopt this test.''

It seems to us that the French distinction is not as far removed from the English as Beckett thinks—it is only that the views of the French Courts have somewhat changed and, while at the time of the decision (1835) prescription, *as barring the remedy*, was considered as a matter of procedure, the contrary view has since been adopted and prescription has been classified as a matter of substance, *as extinguishing the right.* (For the modification of the construction of the rule in continental systems from a procedural to a substantive one, see Rabel, *The Conflict of Laws: A Comparative Study* (Chicago, 1950), Vol. III, 495 ff.).

Though Rabel (*op. cit.* (1945), Vol. 1, 64, note 64) points out the incorrectness of Beckett's statement, he thinks that the French conception is that limitation bars the action only. The provision should be considered substantive because ''it provides the debtor an exception to his obligation, a material right of defence'', which, though with some qualifications, brings it again within the terms of the usual distinction.

On the case see also Mendelssohn Bartholdy, *Delimitation of Right and Remedy in the Cases of Conflict of Laws*, in (1935) 16 B.Y.I.L. 33 ff.; Schoch, *op. cit.*, 110 ff.

10 See: Vareilles-Sommieres, *La synthese du droit international prive* (Paris, 1897), Vol. II, 282 ff.; Mittermeyer, *Ueber die Kollision der prozess-*

The admission of a particular means of proof is based on the extent to which it is, according to the legal system, to be deemed reliable and it is rather difficult to know why this estimate should be modified by the fact that another system attributes a different degree of reliability to that particular means of proof, an attitude that might, in any case, be based on quite different social and legislative grounds.

Moreover the fact that the argument is not strictly consistent is also shown by the consideration that, were it completely valid, it would affect not only private international law, but also the field of pure internal law.

Cases in which a transaction, brought into being in a valid form, may not be practically proved sometimes exist, also, when only the municipal law is concerned.[11]

Form and evidence are different in nature and aim at different results.

The purpose of the provisions relating to form is mainly to impress on the parties the importance of the transaction and furnish certainty as to the terms thereof. They mean that, for one reason or another, the legal system does not consider the transaction valid unless the intention to enter into it has assumed such a degree of significance as to make the parties ready to overcome the difficulties and to assume the precise obligations which derive from the given form. They aim at putting the transaction beyond the reach of future controversy, bad faith or treacherous memory.[12] These are the forms *ad sollemnitatem,* whose evidentiary value is only a consequence.

The purpose of evidence is, on the contrary, as we have already observed, to offer the court convincing proof of the facts. For that purpose the parties might chose a form *ad probationem,* which, though not required to give validity to the transaction will, neverthe-

gesetze in Archiv fur civilistische Praxis (Heidelberg, 1830, Vol. XIII, 316; Menger, *System des oesterreichen civilprozessrechts* (Vienna, 1876); Kuhn, *Comparative Commentaries on Private International Law* (New York, 1937), 87; Chiovenda, *Istituzioni di Diritto processuale civile* (Naples, 1940), 81 ff.

11 These cases are common in continental systems; and in English law also the Statute of Frauds when interpreted, as it usually is, as a rule of procedure (on which see note 13) does not state that a transaction in oral form is invalid, but only requires written evidence, which might be subsequent to the contract.

12 Phipson, *Manual of the Law of Evidence* (London, 1943), 265.

less, put the party concerned in a better position to prove his case if the occasion arises.[13]

[13] Though theoretically it may be very clear, practically it might prove very difficult to decide if a particular provision pertains to the field of substance or to that of procedure. Taking into consideration the much discussed 4th section of the Statute of Frauds, which provides that "no action shall be brought . . . . upon any agreement which is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised," Lorenzen (*The Statute of Frauds and the Conflict of Laws*, in Selected Articles on the Conflict of Laws (New Haven, 1947), at 333 ff.) has listed the following propositions as stated by the internal courts:—

1. (a) The note or memorandum may be executed at any time before suit is brought,
   (b) but not later.
2. The Statute may be satisfied although the writing is not made by the parties as the expression of their agreement. A letter to a third party may be sufficient or a letter repudiating the agreement after stating the terms of the bargain.
3. An oral agreement coming within the Statute of Frauds will be enforced unless the Statute is affirmatively pleaded.
4. The defendant may admit that there was an oral contract and yet rely on the Statute.
5. Although the contract is not enforceable, it may be proved, if its relation to the suit is collateral only.
6. The Statute of Frauds does not affect contracts made prior to its enactment.

The above propositions do not seem at first to be consistent with one another. Propositions 1 (a) and 2 have a clearly procedural nature. Not so 1 (b), 4 and 6, which seem to deal with an element of form.

But on the basis of propositions 3 and 5 it seems better to state that the lack of writing gives rise only to a defence, that is to say, that it constitutes a fact which impedes the right and which can be set up against the agreement.

This construction which is, as far as we see, the only one that makes the different statements self-consistent, suggests that the rules of the Statute of Frauds relate to substance. This is suggested, moreover, by the actual letter of the provision, which does not deal with evidence but with the substantive conditions of the action ("no action shall be brought unless . . . . "), which affect substantive rights themselves.

It is clear that in these cases the test of distinction between form and evidence cannot be applied, because the 4th section of the Statute of Frauds deals neither with evidence nor with form, but is concerned with a matter of substance completely independent of both of them—absence of a written note or memorandum as a defence to be set up against the action based on the agreement.

Lorenzen (*op. cit.*, 338) says: "One additional fact is required to make the contract perfect—the signing of the memorandum." Though he is very near what we consider the right solution it is our view that the contract is already perfect (proposition 3) but that a defence can

III.

Still another approach which has been advocated and has also sometimes found legislative approval on the continent, is that of making matters of evidence the subject of a separate characterization independent of any other. Often enough, indeed, the expressions of this principle have sprung unrecognised from another source entirely, namely the above-mentioned view of evidence as a matter of form.

According to Laurent, for instance, the law which must govern the admissibility of the means of proof does not depend on the wish or the free choice of the parties themselves, so that, while they may properly be concerned with determining the law which must govern the substantive transaction, they cannot intervene in the question of the means of proof, and this leads him to decide in favour of the law of the place where the transaction took place.[14]

In this way, actually, though the law which must be applied will, more often than not, coincide with the law which governs the form and which is usually, in the continental as well as in the English system, the *lex loci,* the characterization of "evidence" is not completely made to correspond with that of "form." It remains a characterization by itself, whose *regle de rattachement* only is the same as that of the form of the acts. And even this is not always true.

A sufficiently clear demonstration of this position, leaving the necessarily vague field of doctrine and dealing now with precise

be raised to an action based on it (especially proposition 4), just as in the case of the obligation arising from a purchase, against which might be raised the *exceptio inadimpleti contractus.*

On the substantive character of the Statute of Frauds, see also Fleming, *Substance and Procedure,* (1950) 23 Aust. L.J. 487 ff.

14 *Droit civil international* (Paris, 1881-82), Vol. VIII, No. 24, 47 ff. See also rule of the International Institute of International Law (at Zurich in 1877) in *Annuaire de l'Institut de droit international* (1878), Vol. II, 150 ff.; rule of the Congress of Lima of 1878; rule of the International Institute (at Lausanne in 1927) in *Annuaire de l'Institut de droit international* (1927), 330. For the application of the *lex substantiae,* see Congress of Montevideo, 1889 (cf. Ramirez, *El Derecho Procesal International en el Congreso Juridico de Montevideo* (Montevideo, 1892), 47 ff., 283); Congress of Montevideo, 1940 (cf. *Labores del Segundo Congreso Sudamericano de Derecho International Privado,* in *Derecho* (Medellin—Colombia, 1940), 245 ff.); rules of Lausanne of the International Institute of International Law in *Annuaire de l'Institut de droit international* (1947), 260. For the previous project by Arminjon see *Annuaire de l'Institut de droit international* (1947), 34, and Arminjon, *Les Conflits de Lois sur la Preuve en Droit prive, Institut de Droit International, XIIIeme Commission, Rapport Definitif* (Brussels, 1938).

legislative provisions, may be found in a comparison between Article 9 and Article 10 of the *Disposizioni Introduttive* of the Italian Civil Code of 1865. The two Articles say:—

Article 9: "The external forms of the transactions . . . will be governed by the law of the place where they are made. It is nevertheless in the power . . . of the contracting parties to observe the forms of their national law, if common to all of them . . . . The substance and the effects of the obligations will be governed by the law of the place where the acts were done, and, if the foreign contracting parties belong to the same nation, by their national law, exception always being made for the different intention of the parties."

Article 10: " . . . The means of proof of the obligations are determined by the law of the place where the contract has been made."

From a comparison of the two Articles it seems that this scheme may be drawn:

(a) Characterization of "substance":
Regles de rattachement:
I. Lex voluntatis.
II. Lex nationalitatis communis.
III. Lex loci.

(b) Characterization of "form":
Regles de rattachement:
I. Lex loci.
II. Lex nationalitatis communis.

(c) Characterization of "means of proof":
Regles de rattachement:
I. Lex loci.

This scheme clearly shows that the characterization of "means of proof" is in the provisions quoted distinct from any other[15] and that it has a particular law governing the elements it contains, a law

[15] The tendency to assimilate the characterization of "means of proof" to that of the "form" or "substance" of the transaction has caused sometimes a misunderstanding of the meaning of the above provisions. One of the most distinguished Italian authors, namely, Professor Anzilotti *(Codificazione de Diritto Internazionale Privato* (Florence, 1884), 78, n. 64), found an incongruity, if not a contradiction, in the provisions of Article 9 and of Article 10. Professor Anzilotti, in effect, was of the opinion that the legislator had considered matters of evidence as pertaining to the substance of the transaction. Therefore it should have been submitted to the law which governs the substance of the transaction and which, in accordance with the provisions of Article 9, will not necessarily coincide with the *lex loci.*

which does not always or necessarily coincide with that governing the elements of form or substance of the transaction.[16]

But this second tendency,[17] while in no way able to overcome the difficulties connected with the general reference to the *lex causae,* adds to that a rigidity which might cause the submission of the means of proof of a transaction to a law which shows no logical or practical relation to them.

If, for instance (considering the problem from the point of view of the Italian system of private international law), two Italians make in France, in Italian form, a contract to be executed in England and to be governed by English law, it is rather hard to understand

16 As other examples, among many, of this independent characterization we may quote Article 4 of the Hague Convention on the Conflict of Laws relating to Marriage; Article 2 of the Convention on Civil Procedure, adopted in Montevideo; Article 12 of the Brazilian Civil Code; Article 47 of the Brazilian Bills of Exchange Act, 1908; Article 399 of the Codigo Bustamante. The same kind of independent characterization is evident, it seems, in (a) the project of revision of the Belgian Civil Code (Article II, para. 3) which, for the proof of acts, admits all the means of proof authorised by the national law of all the parties concerned; (b) the solution proposed by Batiffol (*Les Conflits de Lois en Matiere de Contrats* (Paris, 1938), n. 445), according to whom the means of proof must be governed in principle by the *lex fori,* with the reservation that the parties may require the means of proof admitted by the law of the place where the contract was made; the author adds that in the case of means of proof not in writing, their value as evidence may be governed only by the *lex fori* (*ibid.,* n. 447). Both doctrines are cited in De Vos, *op. cit.,* I, 695.

17 The necessity of considering evidence as the content of an independent characterization has been, among Italian authors, specially maintained by Pau (*La Prova nel Diritto Internazionale Privato,* extract from the "Studi Economico-giuridici" of the University of Cagliari). Proof, according to Pau, must not be considered as an instrument for the judge to ascertain the facts: it is the degree of evidentness which the facts, taken into consideration by a legal system, possess: the degree of evidentness necessary in order that the guarantees of enforceability, which the system links with the facts, may be put into operation. In other words, proof is the required standard by which the facts may be recognised in order that they may produce juridical effects and, therefore, proof, as well as the form of the acts, transcends the limits of procedure; it constitutes no mere condition for the declaration of rights through the court, but a necessary element for the production of the juridical effects on which the decision is given. Proof, in its proper meaning, even when it is based on the simple fact of direct ascertainment by the judge, is always an element which contributes to the production of the juridical effects, which will be recognised in the process. It must not then be in any case confused with the formal mechanics through which the judge ascertains that such an element exists. Accepting these premises and using arguments based mainly on analogy and general priciples of the Italian system of international law, Pau is of the opinion that evidence should be governed

why, so far as means of proof are concerned, French law should be applied to such a contract, when it has no connection either with the form, governed by Italian law, or with the substance, governed by English law.

In any case the introduction of a different characterization, instead of reducing the doubts connected with the distinction between matters of substance and matters of procedure, would simply increase them by introducing, in addition to the difficulty of distinction between matters of evidence and substance, the difficulty of distinction between matters of evidence and procedure.

IV.

Thus we have examined the different views which have developed, especially in the continental systems, about evidence in private international law. Though theoretically the two systems are opposed, nevertheless, from a practical point of view, the gulf between the continental systems which refer matters of evidence to the *lex causae* and the Anglo-American system which refers them to the *lex fori* is not really as wide as might at first be believed.

In the end, many matters of evidence are also classified by Anglo-American authors and courts as matters of substance. This may easily be seen in the provisions governing the burden of proof, to give only a few illustrations.

In the first place, rules about the burden of proof might impose on the judge certain standards of evaluation of the evidence supplied by the parties[18] or forbid him to look for evidence not supplied by

by: (1) the law of the place where the facts which must be proved occurred; (2) the law which governs the substance of the transaction; (3) the law of the common nationality of the parties, when it coincides with that of their domicile (or the laws of the different nationalities when these laws have the same content); (4) the law of the place where the means of proof exist. Preference must be given to the law which makes proof easier.

A similar solution advanced by Perassi in Lausanne (regulation of the substance of the transaction by the law of the place where the facts which must be proved occurred) was rejected, especially by Arminjon, on the ground that it gives too wide a scope to the discretion of the judge and, to the plaintiff, an unjustifiable advantage (see *Annuaire de l'Institut de droit international* (1947), 202 ff.). But *contra*, see the observations of Pau (77 ff.) which seem quite acceptable.

18 Note, for instance, section 34 of the Matrimonial Causes and Personal Status Code, No. 73 of 1948 (Western Australia): "It shall be sufficient for the plaintiff to establish the grounds according to the reasonable probabilities of the case and in accordance with the normal standards of proof required in an action at law." Of similar nature are the well known presumptions, *in dubio pro reo, in dubio pro matrimonio*, etc.

them, in accordance with the maxim, *actore non probante reus absolvitur.*[19]

All these are rules which direct the court in its procedural aspect and, as such, can only have a procedural nature. But there is another large body of rules, which has the specific function of distributing between the parties the risk of failure to prove. The reciprocal position of the parties comes to the forefront; as one of the best known continental jurists has expressed it, "the uncertainty of a fact damages the party who has an interest in its affirmation: the uncertainty of a fact constituting the right damages the party who claims the right, while the uncertainty of a fact impeding or extinguishing the right damages the party by whom the defence has been raised."[20] In this case the rules about the burden of proof deal with substantive elements of the right and have to be regarded as matters of substance.[21]

The same might be said about those presumptions which merely present, in most cases, a different aspect of the rules as to burden of proof; many of the *praesumptiones juris tantum* belong in effect to this class.[22] Outside this group there remain at one end the *praesump-*

19 This is the burden of proof which Phipson calls adducing evidence (*op. cit.*, 24 ff.). While the burden of proof in the sense of establishing a case remains unchanged throughout the case (see Phipson, *op. cit.*, 25), the burden of adducing evidence may shift constantly (*ibid.*). This is because the first is an element dealing with the substantive rights (and, as such, they can also be varied by agreement of the parties): the second, on the contrary, is a matter of convincing the judge throughout the trial and changes therefore in accordance with the degree of certainty or otherwise in the judge's mind. On the substantive character of rules about the burden of proof, see also Kuhn, (*op. cit.*, 96); *Codigo Bustamante*, Article 398. Cf. also in various senses Ailes, *Substance and Procedure in the Conflict of Laws*, [1941] Mich. L. Rev. 392; Morgan, *Choice of Law Governing Proof*, (1944-5) 58 Harv. L. Rev. 153 ff. and *The Law of Evidence*, (1945-6) 59 Harv. L. Rev. 481, at 505.

20 Carnelutti, *Istituzioni del Nuovo Processo Civile Italiano* (Rome, 1942), 216.

21 Asser et Rivier (*op. cit.*, 167, n. 68); Frankenstein, *Internationales Privatrecht* (Berlin, 1926-35), Vol. I, 361; Rolin, *Principes de droit international prive belge* (Paris, 1897), 81.

22 In *The Ship "Fortunato Figari" v. S.S. "Coogee"*, (1904) 29 V.L.R. 874, 26 A.L.T. 22, 10 Argus L.R. 134, the Victorian Vice-Admiralty Court held that section 419 (4) of the Merchant Shipping Act 1894 (57 & 58 Vict., c. 60) which provides that a ship infringing collision regulations is deemed to be at fault, was to be considered as affecting the substance and not to be a rule of evidence and practice and so part of the *lex fori*. Concerning the *praesumptiones juris* as a matter of substance see Rolin, *Principes de droit international prive belge* (Paris, 1897), Vol. III, Nos. 1036 and 1038; Weiss, *Manuel de droit international prive* (Paris, 1925), 652 ff.; Laurent, *Droit civil international*, Vol. VIII, No. 48; De Vos,

tiones hominis, the procedural character of which has usually been accepted,[23] together with the *praesumptiones juris* which constitute a rule about the burden of proof of the first type considered, and, at the other end, the *praesumptiones juris et de jure,* which possess an undoubtedly substantive nature.[24] In this last case the juridical effects are not derived really from the fact which should be proved, but from the fact taken as the basis of the presumption.[25]

There are, moreover, many provisions that only in name may be regarded as matters of evidence as, for instance, many of the so-called presumptions of death.[26] The same might be said of many

Les Problemes des Conflits de Lois (Brussels, 1946), I, 698; Chiovenda, *Saggi di Diritto Processuale Civile* (Rome, 1930), Vol. I, 241 ff. For the solution of applying to the presumptions the law of the place where the fact happened which gives rise to them, see *Codigo Bustamante,* Article 404. For a statement rejecting the view which regards the presumptions as a different aspect of the burden of proof see Pau (*op. cit.,* 37 ff.).

23 Though they are not to be confused, as they are by some authors, with mere rules of logic—as, for instance, when they are admitted with some qualifications, as in the French and the Italian Codes, which state that they must be weighty, precise, and consistent. See Cansacchi, *Sulla Legge Regolatrice delle Presunzioni* in Giurisprudenza Comparata di Diritto Internazionale Privato (Rome, 1938), Vol. III, 212 ff.

24 See Halsbury's Laws of England (2nd ed. 1934), Vol. 13, 543 ff.; Phipson, *op. cit.,* 300 ff.; Goodrich, *Conflict of Laws* (St. Paul, Minnesota, 1927), 255 ff.; MacRae, Canadian Encyclopedic Digest (Ontario), 415, 760, 773; Falconbridge, (1935) 13 Can. Bar Rev. 317, who quotes, as an instance, the presumption of valid celebration of marriage when the parties live together and are generally considered as husband and wife. That, according to Falconbridge, "would be equivalent to making cohabitation and reputation of marriage sufficient formalities of celebration" (at 318). This may be agreed when the presumption is not rebuttable by demonstrating the parties' different intention.

25 For the more arguable substantive character of confession and oath see: Meili, *Das Internationale Civilprozessrecht auf Grund der Theorie, Gesetzebung und Praxis* (Zurich, 1905), 392 ff.; Weiss, *op. cit.,* 653; Arminjon, *op. cit.,* Nos. 429 ff.; Bartin, *Principes de droit international prive* (Paris, 1930-35), Vol. I, sec. 178, 450; Lerebours-Pigeonniere, *Precis de droit international prive* (Paris, 1932), No. 318A, No. 370; *Codigo Bustamante,* Article 105. For the substantive character of estoppel in English law see Phipson, *op. cit.,* 306. For the substantive character of the rules which prohibit or allow the modification of a written contract by parol, see *Pitcairn v. Phillip Hiss Co.,* (1903) 125 F. 110, 113; Lorenzen, *Cases* (1924), 179 n.; *Baxter National Bank v. Talbot,* (1891) 154 Mass. 213, cited in Kuhn, *op. cit.,* 88.

26 The presumptions of death have a definitely substantive character in the legislation of many continental countries. Similar to these is the provision of section 16 (2) of the Matrimonial Causes and Personal Status Code of Western Australia, which provides that the Court may make, on reasonable grounds, an order for the presumption of death and dissolution of marriage. For the substantive character of the general presumption of death after seven years of absence see Cook, *The Logical and Legal Bases*

of the presumptions of paternity, legitimacy, etc.[27]

V.

The application of the rules of evidence of the *lex fori* is sometimes rendered impractical for other reasons.

Some means of proof are actually often contemplated only for transactions which develop in a particular juridical system, or are limited in their application for other legal or practical reasons. Beyond these limits the presuppositions necessary to render the means of proof in question valid as such may be absent.

If, for example, by the law of a country marriage by cohabitation and repute is contemplated, when, as an American jurist puts it, "no peculiar ceremonies are requisite by the common law to the valid celebration of a marriage, the consent of the parties is all which is required",[28] it is evident that, in the absence of any form of publicity, all means of proof must be admitted, including presumptions. But it is clear too that such means of proof may be applied only to marriages celebrated in that particular form and not to foreign marriages, when the different form of celebration, by its very nature, conflicts with the admission of such kinds of presumptions.

To apply in these cases the means of proof required by the law of the country where the marriage is to be proved would mean, sometimes, reaching the absurd conclusion of treating as a valid marriage what, by the law of the country where the marriage took

of the Conflict of Laws (Harvard, 1942), 177 ff.; *contra* Hutley, *Recognition of Foreign Declarations of Death*, (1948-9) 22 Aust. L. J. 89. For the substantive character of the presumptions of simultaneous death (German law) and of death in order of seniority (English law), see *In re Cohn*, [1945] Ch. 5. For approval of this decision see Morris, (1945) 61 Law Q. Rev. 340; Falconbridge, *Essays on the Conflict of Laws* (Toronto, 1947), 265 ff.

27 Take as an example one of these provisions—Article 314 of the Swiss Civil Code states: "Paternity is presumed, when it is proved that between the three hundredth and the one hundred and eightieth day before the date of birth the defendant has cohabited with the child's mother. This presumption ceases to apply if established facts admit serious doubts about the paternity of the defendant."

In this case the facts from which the status arises consist of the birth within the given period together with the cohabitation of the parents. The last paragraph does not transform the said presumption into a *praesumptio juris tantum*, but only provides the facts which can be set against the facts which constitute the status and, as such, have to be established by evidence.

For provisions of a similar nature see Articles 232 and 235 of the Italian Civil Code and section 1717 of the German Civil Code.

28 Kent, *Commentaries on American Law* (Washington, 1889), Vol. II, 87.

place—which law, therefore, must govern the requisites of form— is nothing but mere concubinage.

On the other hand, when the law of a country requires, in order to prove a marriage, the production of the originals or copies of documents prepared in the course of a special religious or civil ceremony[29] it would become impossible, in that country, to give any evidence of a marriage celebrated in another, where those particular forms of public ceremony are unknown.

These arguments have given support to the continental doctrine which maintains the necessity of referring to the *lex causae* where matters of evidence are concerned, but we think that the application of a foreign law is, in these cases, based on quite different grounds.

Actually some means of proof must be deemed limited to a particular class of facts; in the case of facts which are outside the class under consideration the court could not do otherwise than go back to general principles in matters of evidence and, particularly, to its discretionary powers.[30] The view that in these cases the courts should give special consideration to the means of proof required by a foreign system would not be based on an application of the *lex*

29 Thus, for instance, in the Italian Civil Code, Article 130: "Nobody can claim the title of husband or wife and the consequences of marriage unless the record of celebration extracted from the Civil Registrar's Books is produced." (For the case of impossibility of production, by destruction etc., of the Registrar's Books, see Articles 132, 452). For a slightly different provision because of the greater weight given to general reputation (*possesso di stato, possession d'etat*) in the matter of affiliation, see Article 236.

30 Discretionary powers have often been used implicitly by the continental courts. In some instances when the production of foreign documents has turned out to be impossible, French courts have applied, by way of analogy, Article 46 of the French Code, which sets out the provisions concerning the loss or destruction of the Registrar's Books (cf. Regulation of 28 June 1937, reported in Clunet (1937), 87, and in *Giurisprudenza Completa di Diritto Internazionale Privato* (1942), Vol. VIII, No. 124, with note by Makaroff and cases there cited; judgment, Tribunal de la Seine, 18 February 1932, rep. Clunet (1932), 444 and in *Giurisprudenza Completa di Diritto Internazionale Privato* (1937), Vol. II, No. 25, with notes by Stefani and Andrioli).

In these cases, which both concerned Russian documents, the courts applied in fact neither Russian law as the *lex causae* nor French law as the *lex fori;* they made use of their discretionary power in the matter of evidence, being governed by the same motives which have guided the French legislators in making provisions about the loss or destruction of the French civil registers. Actual analogy between two different systems of law must be considered impossible. See also judgment quoted in Belgique Judiciaire (1938) with note by Dekkers, and in *Giurisprudenza Completa di Diritto Internazionale Privato,* Vol. III, 30, with notes by Houtte and Cansacchi.

causae, but on the ground that those are the means of proof which can provide the greatest certainty on the facts in issue.[31] The Court, for instance, which should determine the nationality of a person, would evidently rely upon those means of proof provided by the *lex fori* only for the determination of the nationality of its own country (special documents, naturalization certificates, etc.); but, if a foreign nationality were concerned, it would rather use, in what is really the absence of a rule, its discretionary power in the admission and evaluation of evidence, and, if the legislation of the foreign country whose nationality is claimed should require as proof particular documents or certificates, the court might demand the production of such documents, not by way of an application of the *lex causae,* but as the best means by which it might come to a conclusion.[32]

31 For the admission in evidence of foreign registers, if kept by public authority and recognised by the local tribunals, see *Lyell v. Kennedy,* (1889) 14 App. Cas. 437, cited in Phipson, *op. cit.,* 165. For the admission of authenticated copies of the French registers of marriage, see *Biddulph v. Lord Camoys* (1846), cited by Keating J. in *Abbott v. Abbott and Godoy,* (1860) 29 L.J.P. & M. 57, 164 E.R. 1513, in which the Court admitted an extract from a register of marriage kept by a curate-rector in Chile; see also Foote, *Private International Law* (5th ed., London, 1925), 571. For various decisions about foreign documents se cases quoted in The English and Empire Digest (London, 1925), Vol. 22, 3443 ff.

Also when statutory provisions regulate this matter they do not assume, usually, the aspect of rules of private international law, but of procedural rules directly governing the facts under consideration. See, for example in English law, Evidence (Colonial Statutes) Act, 1907 (7 Ed. VII, c. 16); Evidence (Foreign, Dominion and Colonial Documents) Act, 1933 (23 Geo. V, c. 4).

32 Article 17 of the projected Italian Code of 1942 provided that the means of proving the nationality of a person must be determined by the law of the State to which he is claimed to belong.

This Article, which was afterwards omitted in the final codification, was justified by Ago on the ground that "if you observe in this matter the provisions of the *lex fori,* proof of nationality might be rendered impossible in practice: thus, if the production of documents is requested which the authorities of the State to which the person is supposed to belong are not in a position to supply. And on the other hand a case might occur when, by accepting the means of proof supplied by the *lex fori,* it would be possible to reach the inadmissible result of attributing to a person the nationality of a country which does not recognise it" (*op. cit.,* 344; on the same lines Niboyet, *op. cit.,* 99 ff.). But it might be noted as against this argument, that the admission of or insistence on modes of proof contemplated by a foreign legal system is here determined not by way of exception to the application of the *lex fori,* but only by the fact that the rules as to proof of nationality must be considered as limited to cases concerning nationals of the country.

Outside these cases the court must make use of its discretionary power; the provision of Article 17 was really limiting unnecessarily the discretion

The preceding observations may be extended to the rules of evidence which apply to the books of corporations, companies and bankers,[33] minute books, etc.,[34] as well as to duplicates of cables, postal receipts, etc.

To accept these means of proof as admitted by the foreign system, and with the value they have therein, would not mean accepting the application of the *lex loci*[35] but would allow the court to use its discretionary power of choice, which will find the best guide in the provisions of the foreign legislation; these are in fact logically connected with all the other substantive norms, establishing the authenticity and governing the preparation of the said documents, and must be considered as a necessary condition of their value as evidence.

VI.

To sum up the points so far made, we may say that both the Anglo-American and the continental systems have to face the problem which arises in those matters of evidence where substantial and procedural qualities are closely connected.

To avoid the difficulty, continental doctrine has included all matters of evidence, more or less *en bloc,* under the characterization of substance. But, in this way, it has created difficulties which mirror

of the court, which may be more suitable than rigid statutory provisions for dealing with the wide variety of possible cases in this field.

33 In *Bank of Australasia v. Pollard* (1882) 8 V.L.R., L. 66, 3 A.L.T. 103, the Full Court of the Victorian Supreme Court held that the Bankers' Books Evidence Act, 1878, did not apply to books of a bank which are out of the jurisdiction of the Court, the application and validity of the means of proof in question being dependent on the presence of the books within the jurisdiction.

34 From this point of view the decision in *Brown v. Thornton,* (1837) 6 Ad. & E. 185, 112 E.R. 70, seems to be based on too rigid an interpretation of the English law. As reported by Cheshire, *Private International Law* (2nd ed.), 644, an action was brought in England to recover freight due under a charter-party that had been made in Batavia. It was found that charter-parties were made in Batavia by the instrument being written in the book of a notary, and then signed by the parties. Each party received a copy signed and sealed by the notary and counter-signed by the principal officer of the Government of Java. A charter-party was sufficiently proved in a Javanese Court by production of the notary's books, but, since such books were not allowed to be removed from Java, Courts in other parts of the Dutch dominions admitted the copies in evidence.

In this case to require that the charter-party be produced in accordance with English law was clearly to ask an impossible thing and proved to be in conflict with the provisions of the Dutch law.

35 The *lex loci,* of course, of the preparation of the documents and not, as suggested by some authors, the *lex loci* of the contract to be proved.

those which must be faced by the Anglo-American systems. While in the latter the questions arise particularly with regard to those matters of evidence which show the closest connection with substantive rights, the former is on the other hand especially embarrassed by those matters of evidence more strictly connected with procedure.

In order to refer these elements to the most appropriate procedural law, continental authors have often had recourse to different arguments, which reveal the attempt to escape the consequences which the acceptance of the established premises entails. To quote one example, in order to have the matter of the capacity of witnesses regulated by the *lex fori,* continental authors have been compelled either (1) to regard it as pertaining to the formalities of adducing evidence[36] or (2) to have recourse to the concept of public policy; it has been held, in fact, that the rules which establish the capacity or incapacity of witnesses are not intended to satisfy private interests, but are based on the ground that the age of a person, his mental condition, and his previous life are such as to invalidate a deposition he might make, and that all these are elements strictly connected with public policy.[37]

VII.

On the other hand the Anglo-American system has met strong criticism from authors in the field of international law. It has been noted that "the English classification of procedure is much too wide",[38] and it has been said that the characterization existing in the English system causes as a result, in particular cases, "the stulti-

[36] Cf. Masse, *op. cit.*, Vol. II, 772; Cass. Firenze 1873 (Legge VIII, 748); Pau, *op. cit.*, 44, 48.

[37] Asser et Rivier, *op. cit.*, 170; Despagnet, *Precis de droit international prive* (Paris, 1909), 376; Surville et Arthuys, *Cours elementaire de droit international prive* (Paris, 1925), 518; Pau, *op. cit.*, 44.

Contra Weiss, *Traite theorique et pratique de droit international prive* (Paris, 1898), Vol. V, 488; Foeliz et Demangeant, *Droit international prive* (Paris, 1866), Vol. I, 458.

Beauchet extends the argument to the whole question of evidence by witnesses, *Du Conflit des Lois Francaises et Etrangeres en Matiere de Preuve Testimoniale,* in Clunet (1891), 369 ff., and in Journal du droit international prive (1892), 362. For the application of the *lex substantiae,* according to general principles, see Diena, *op. cit.*, 402, and *Codigo Bustamante,* Article 404; for the application of the *lex loci,* see rule of the International Institute of International Law, session at Zurich, 1887.

[38] Foster, *Some Defects in the English Rules of International Law,* in (1935) 16 B.Y.I.L. 84, at 101; also Beckett, *op. cit.*, 71; Lorenzen, *op. cit.*, 339; Dicey, *Conflict of Laws* (3rd ed., 1922), 762.

fication of one of the main principles upon which the science of Private International Law rests"[39] and a solution similar to that of continental systems has been advocated.[40]

A particular thesis maintained by Cook is that the word "procedure" is to be taken with a different meaning in the various fields in which it occurs. The characterization of procedure and substance in the field of private international law would not be exactly the same as in the other fields of law, "as the words might have different meanings when employed in the different rules."[41]

It does not seem that this thesis might be maintained *de jure condito* as Cook suggests, but even accepting it on the ground *de jure condendo,* it is rather difficult to admit that a different meaning given to the same word in the different norms of a system (till now considered as an unfortunate occurrence, to be avoided as far as possible) might lead to a better solution of the problem.

Cook's thesis closely approaches that of Rabel, who thinks that characterization must be based on analytical jurisprudence and comparative law.[42] It is on these grounds that Rabel includes in the same classification of substance the provisions of Article 1341 of the French Civil Code and of section 4 of the English Statute of Frauds.[43]

The general criticisms raised against the thesis are well known, and we think it is useless to repeat them here, pointing out only that they may be found to coincide, on practical grounds, with those directed against Cook's doctrine.

39 Cheshire, *op. cit.*, 635 ff.

40 Lorenzen, *op. cit.*, 345.

41 Cook, *op. cit.*, 154 ff. For the same view as Cook's see Falconbridge, *op. cit.*, 258; Cheshire, *op. cit.*, 632 ff.

42 Rabel, *Le probleme de la Qualification,* in (1933) Revue de droit international prive, No. 1, 1 ff.; in similar vein see Beckett, *op. cit.*, 46 ff.

43 This view is not we think immune from criticism. Rabel puts forward the view that the French and the English systems characterize differently two rules of the same juridical nature. Actually the two rules are quite different in nature (at least as far as Rabel interprets them), the one relating to form and the other to evidence, and they would be classified accordingly as rules of substance or of procedure in both systems of law. Discussion of the true nature of the English Statute of Frauds and of the French doctrine would proceed on the same lines.

Similarly, with regard to the comparison between the Statute of Limitations, "proceeding from the point of view of the unsuitability of superannuated claims", and a rule *Verjaerung,* "which deals with the extinction of rights through conclusive disuse", see Mendelssohn Bartholdy, *op. cit.*, 31.

VIII.

The proposals made before aim really at overcoming only hypothetical difficulties, which arise we think not so much from defects of the private international law rules themselves, as from doubts about characterization, which result from either an incorrect interpretation of the rules or from an ambiguity of internal legislation. They would for the most part disappear if the interpretation were more careful and the statutory provisions more clearly formulated so as to leave no room for doubts in one direction or another.

Also, if evidence should be included in the characterization of procedure this would not imply in any way, as we have made clear before, the necessity of submitting to the *lex fori* all matters of evidence, many of which by a careful classification must be regarded as concerning substance.[44] It seems rather unlikely that after doing this, there would still remain matters to be classified as procedural but to which nevertheless the application of a foreign law would appear more suitable.

Such cases, if any, would have to be subjected to the most careful investigation so as not to introduce, with the application of a foreign law, principles inconsistent with the general legislative policy.[45] Instead of eliminating or, at least, diminishing the present difficulties, this might perhaps increase them, through the more frequent application of the principle of public policy. It seems then doubtful whether it should ever be considered advisable to submit those matters to the provisions of a foreign law.

IX.

But, were this the case and if both these conditions should coexist:—(a) the existence of a matter which might be considered a matter of evidence and, therefore, pertaining to procedure, and (b)

[44] *Cf.*, for instance, the *Relazione* of the Commission for the Italian Civil Code of 12 December 1938, n. 31, which suggests that evidence may be related, according to the different circumstances, to procedure, to the form of the acts, or to the substance of a transaction.

[45] If we take for instance the English provision which does not allow any action to be brought in respect of a wager or bet, it is difficult to decide whether allowing actions regarding foreign wagers to be brought to court would not offend against the intentions of the legislator to deny any recognition to such contracts wherever made, leaving them outside the rights protected by organized society. On the other hand, to regard capacity of witnesses as a matter of substance might perhaps be a breach of the principles of credibility, which are at the basis of each national system of the law of evidence.

the opportunity of submitting it to the provisions of a foreign law, the result of having the matters under discussion governed by the law suggested by logical or political reasons will not satisfactorily be reached by extending the existing characterizations, which, as such, are connected with all the other rules of the internal system. Also the creation of new characterizations, if not carefully conducted, would mean the introduction of illogicality and contradiction in the system itself and the attempt to overcome the existing difficulties would possibly cause worse ones and would bring with it a tangle of problems.

To attain our end we must then proceed by way of the other peculiar element of private international law, viz., the element of connection with a particular law. Both the Anglo-American and continental systems have accepted, with the dogmatic assurance of utterly obvious things, the principle that all procedural matters can be submitted only to the *lex fori*. As Cheshire says, "no other principle would be practicable";[46] "the general statement", says Goodrich, "is not disputed".[47] But these reasons actually apply only to a particular set of procedural rules. There are some matters to be considered as certainly pertaining to procedure against which the normal arguments have no validity.

Apart from the field of evidence, it is difficult to see any impossibility of applying foreign rules to matters such as that of limitation of actions, procedural capacity and liability, etc. If so, there should be no reason why particular matters, pertaining to the field of procedure, should not be submitted to a foreign law. A rule that might achieve the desired end and which, we think, would be, in its formulation, acceptable to both the English and the continental systems, might read as follows:—"The *lex fori* will not be applied to those elements of procedure which, not being in conflict with the principles on which the national jurisdictional organization is based, specially affect the substantive rights of the parties."[48]

[46] *Op. cit.*, 632.

[47] *Conflict of Laws* (2nd ed., 1938), 187.

[48] This comes very near to the solution suggested by Cheshire, who maintains that "a rule which, if applied, would prevent the enforcement of a right validly acquired under the proper law of the transaction, ought not to be treated as procedural merely on the ground that, strictly speaking, it may be said to affect the remedy; but any rule affecting the remedy which does not prevent the enforcement of such a right, though it may hinder its enforcement, may properly be treated as procedural."

To the criticisms advanced against this suggestion by Mendelssohn

In this way a definite group of procedural matters gathered, so to speak, in a sub-characterization of "elements of procedure affecting the substance", will be withdrawn from regulation by the *lex fori*.

It will then be the duty of the interpreter of the law to choose the matter of substance, and the corresponding competent law with which the single aspect of procedure shows the closest connection, leaving to the judge a certain power of discretion, which will be more suitable than too rigid a rule for the boundless variety of cases to be found in a branch of the law which has to deal with the many diversities of all the legal systems of the world.

V. BELLINI*

Bartholdy, *op. cit.*, 34, about the technical difficulty of ascertaining the conditions required by the last sentence, we may add the following:—

(a) The suggestion does not make it clear whether it modifies the characterization of procedure or applies the *lex causae* to a particular group of matters which, nevertheless, remain procedural in nature (see the words "may . . . . be treated as procedural").

(b) The reference to a "right validly acquired" would be unacceptable to some continental systems, which do not follow the theory of acquired rights (for example, Italian law).

(c) There are rules of procedure which "prevent the enforcement of a right validly acquired" and which, nevertheless, must be treated as procedural. This might often happen when particular machinery is provided to enforce rights which are unknown to the foreign law. The enforcement of the foreign right might be rendered impossible for lack of the necessary machinery, and at the same time, it would not be possible to treat this as a matter of substance. To quote some examples:— In Italian law there is no institution of divorce. Though the law which governs the substantive rights of the marriage is that of the nationality of the parties, Italian courts have sometimes considered it impossible to grant a divorce on the ground that the necessary machinery was not provided by Italian law. By other courts, when recourse has not been had to the impossibility of granting a divorce on the ground of public policy, the difficulty has been overcome by applying the procedural rules formulated for judicial separation.

Again, many of the substantive rights recognised by the foreign law would be not enforceable in England for the lack of the proper procedural machinery; for instance, the declaration of invalidity of a bill of exchange, after it has been lost, removed or destroyed (*ammortamento cambiario*).

In these cases it would be nevertheless desirable that the courts use every means to make it possible to enforce, within the limits of the existing machinery, the provisions of the competent foreign law.

* *Doctor in Law (Rome); Doctor Juris Canonici; Reader in International Law, University of Rome, 1942-51; Vice-Consul for Italy in Western Australia, 1951—.*