KURT LIPSTEIN

Collection of Essays

Edited by
PETER FEUERSTEIN and
HEINZ-PETER MANSEL

Mohr Siebeck

Kurt Lipstein

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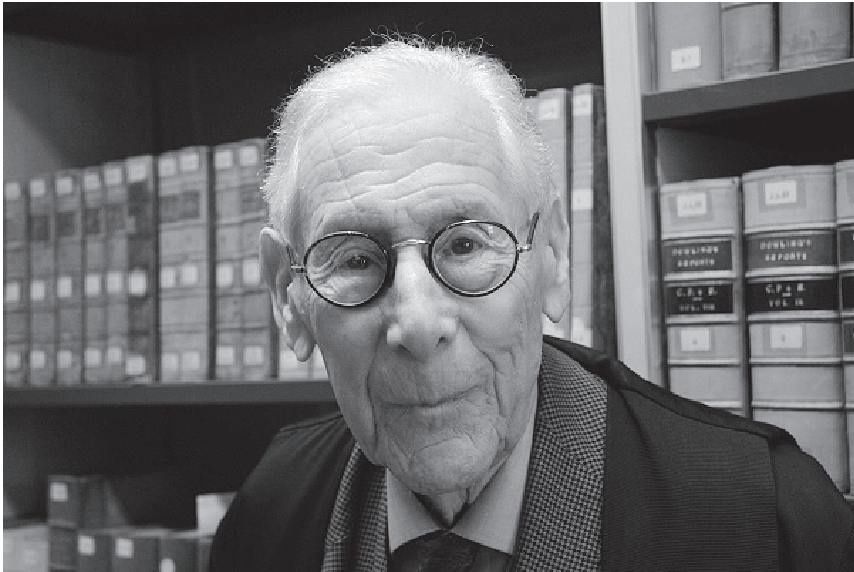

Kurt Lipstein, Squire Law Library, Cambridge, 2006

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Kurt Lipstein

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Edited by

Peter Feuerstein
Heinz-Peter Mansel

Mohr Siebeck

Peter Feuerstein († 2013) was an International Legal Consultant (USA), Rechtsanwalt (Germany), and student of Kurt Lipstein.

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Vorwort

Kurt Lipstein hat durch seine wunderbare Persönlichkeit, sein Lehren und seine Schriften gewirkt. Hier wird eine Auswahl seiner Veröffentlichungen vorgelegt. Die Herausgeber hoffen, durch diesen Band den Zugang seinem Werk und damit zu dem bleibenden wissenschaftlichen Vermächtnis von Kurt Lipstein zu erleichtern.

Peter Feuerstein (1946–2013) nahm meine Würdigung Kurt Lipsteins, die in *Rabels Zeitschrift* veröffentlicht worden war, zum Anlass, an mich mit dem Plan der Herausgabe dieses Werkes heranzutreten. Ich habe das Unternehmen gerne aufgenommen, stehen mir doch die Erinnerungen an eine letzte Begegnung mit Kurt Lipstein in seinem blühenden Garten in Cambridge noch immer klar vor Augen.

Peter Feuerstein hatte bei Kurt Lipstein in Cambridge während eines Forschungsaufenthalts (1972–1974) als Fellow des Claire Colleges im Rahmen seiner Promotion an der Philipps-Universität Marburg studiert; auch danach riss der Kontakt zu seinem verehrten akademischen Lehrer nicht ab. Ihm ist für die Festschrift für Kurt Lipstein aus Anlass seines 70. Geburtstages (Multum non multa, 1980) zu danken, die er zusammen mit Clive Parry herausgab. Ohne ihn wäre auch dieser Band nicht erschienen. Peter Feuerstein lebte seit 1998 als International Legal Consultant in den USA. Bis zu seinem Tode begleitete er die Herausgabe der Gesammelten Schriften, half bei Aufbringung von Druckbeihilfen und Abdruckgenehmigungen.

Die Herausgeber danken der *Universität Würzburg*, der *Bayer Stiftung für Deutsches und Internationales Arbeits- und Wirtschaftsrecht*, Leverkusen, dem *William Senior Fonds*, Cambridge, dem *Max-Planck-Institut für ausländisches und internationales Privatrecht* in Hamburg und der *Gesellschaft für Auslandsrecht e. V.* in Köln für die Aufbringung von Druckbeihilfen, ohne die der Band nicht hätte veröffentlicht werden können.

Sie danken ferner den Verlagen, Institutionen und Rechteinhabern, die mit der Erteilung von Abdruckgenehmigung zu diesem Band beigetragen haben, insbesondere dem *Cambridge Law Journal*, der Haager *Académie de droit international*, *Springer Science+Business Media B.V.* und *Oxford University Press* sowie Herrn Colin Turpin, der die Kosten für einen der Beiträge übernommen hat.

Der herzliche Dank der Herausgeber geht an Herrn Wiss. Mit. Tobias Lutzi (LL.M., Maître en droit), der mit größter Zuverlässigkeit und Sorgfalt die Drucklegung dieses Bandes redaktionell betreute. Dem Verlag *Mohr Siebeck* und insbesondere Herrn Dr. Gillig sind die Herausgeber für die Aufnahme der Gesammelten Schriften in das Verlagsprogramm und die angenehme Zusammenarbeit zu Dank verpflichtet.

Köln, im Frühjahr 2014 Heinz-Peter Mansel

Preface

Kurt Lipstein was a highly influential scholar, whose wonderful personality, teaching, and writing had lasting impact. This is a selection of his publications. The editors hope that it will provide an opportunity for readers to access his oeuvre and gain insight into his academic legacy.

It was Peter Feuerstein (1946–2013) who contacted me, following the publication of my remembrance of Kurt Lipstein in *Rabels Zeitschrift*, to propose that we edit the present collection. I agreed to undertake this project without hesitation, still remembering clearly my last meeting with Kurt Lipstein in his blooming Cambridge garden.

Peter Feuerstein was a student of Kurt Lipstein during his stay in Cambridge as a visiting researcher and fellow of Claire College. Even after his postgraduate studies, which he concluded with a PhD from the Philipps University of Marburg, Peter Feuerstein kept in contact with his admired academic teacher. He deserves credit for the Festschrift for Kurt Lipstein (Multum non multa, 1980), which he edited together with Clive Parry on the occasion of Kurt Lipstein's 70th birthday. If it were not for him, this volume too would not have been published. Since 1998, Peter Feuerstein lived and worked as an international legal consultant in the United States. Until his death, he participated actively in the work on this collection and helped to organise the necessary grants and printing permissions.

The editors would like to thank the *University of Würzburg*, the *Bayer Stiftung für deutsches und internationals Arbeits- und Wirtschaftsrecht*, Leverkusen, the *William Senior Fund*, Cambridge, the *Max Planck Institute for comparative and international Private Law*, Hamburg, and the *Gesellschaft für Auslandsrecht*, Cologne, for the award of the grants that made it possible to publish this volume.

The editors would further like to thank all of the publishers, institutions, and rights holders that contributed to this collection by allowing the reproduction of Kurt Lipstein's essays. In particular, we thank the *Cambridge Law Journal*, the *Hague Academy of International Law*, *Springer Science+-Business Media B.V.*, *Oxford University Press*, and Mr Colin Turpin, Cambridge, who generously underwrote the fees associated with one of the essays.

Finally, the editors wish to express their sincere gratitude to Mr Tobias Lutzi (LL.M., Maître en droit), research assistant in Cologne, who attended to the printing of this volume's publication with the utmost reliability and diligence. We would also like to thank the publishing house *Mohr Siebeck* and in particular Dr Franz-Peter Gillig for including the present volume in their publishing programme and for the pleasant collaboration on this project.

Cologne, spring 2014 Heinz-Peter Mansel

Acknowledgments

The publishers would like to thank all publishing houses, institutions, and right holders that contributed to this collection by allowing the reproduction of Kurt Lipstein's essays. In particular, we thank the Cambridge Law Journal, the Hague Academy of International Law, Springer Science+Business Media B.V., Oxford University Press, and Mr Colin Turpin, who generously paid the fees for one essay.

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Kurt Lipstein
(1909–2006)*

Kurt Lipstein was born in Frankfurt am Main, Germany, on 19th March 1909. He died aged 97 on 2nd December 2006, in Cambridge, England. This year marks the 100th anniversary of his birth and provides an occasion to remember Kurt Lipstein, the legal scholar, the man and his work.[*]

In 1934, at the age of 24, Lipstein left Germany to escape persecution, finding his new home in Cambridge. His academic career evolved from this point on and by the end of his life Lipstein came to be regarded in Cambridge as "one of the greatest academic lawyers of our time."[1] Kurt Lipstein's influence extends well beyond the boundaries of England. He has made lasting

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[HEINZ-PETER MANSEL, RabelsZ 73 (2009), 441–454 translated to English by Dr. iur. Maya Mandery, LL.M., LL.B. (Hons), University of Auckland]

[*] The following will be noted in abbreviated form: *Christian v. Bar,* Kurt Lipstein, The Scholar and the Man, in: Jurists Uprooted, German-speaking Emigre Lawyers in Twentieth-century Britain, in *Jack Beatson/Reinhard Zimmermann* (eds.) (2006) 749–760; *Christopher Forsyth,* Kurt Lipstein (*1909): *ibidem* 463–481; *Kurt Lipstein,* Acta et Agenda: Cambrige L.J. 36 (1977) 47–61; *idem.,* Cambridge 1933–2002, in: Jurists Uprooted (above) 761– 770.

Further accounts can be found in *Lipstein ,* Cambridge 1933–2002; *idem.,* Acta et Agenda 47–61; *Lesley Dingle/Daniel Bates,* Conversations with Kurt Lipstein, Emeritus Professor of Comparative Law, Some reminiscences over seventy years of the Squire Law Library and the Faculty of Law, University of Cambridge: Int. J. Leg. Inform. 35 (Spring 2007) 93–133, also available at: www.squire.law.cam.ac.uk/eminent_scholars. This website of the Eminent Scholar Archive of the Squire Law Library of the University of Cambridge also makes the following available: audio files of the mentioned interview, (an incomplete and at times incorrect) bibliography, video file of Kurt Lipstein's last lecture on English Legal Methods (held on 17 July 2006), and additional further information and photocopies on Lipstein. See also, *v. Bar* 749–760; *Peter Feuerstein/Clive Parry,* Foreword by the editors, in: Multum non multa, FS Lipstein (1980) S. VII–X; *Reinhard Zimmermann,* Happy Birthday, Kurt Lipstein!: IPRax 1999, 296–297; *Bob Hepple,* Kurt Lipstein-Teacher, Colleague and Friend: The Claire Association Annual 2006/2007, 18–23; *idem.,* Obituary: Kurt Lipstein, Refugee from the Nazis and pioneer of comparative law: The Guardian from 29.1.2007, p. 33; *Andrew v. Hirsch,* Obituary: Kurt Lipstein: Wolfson College Magazine 31 (2006/2007) 156– 157.

[1] *Gordon Jonson,* From the President: Wolfson College Magazine 31 (2006/2007) 1–3 (3).

contributions within the area of private international law, in particular, within the English conflict of laws. He established the study of European Law as a discipline in England and kept close ties with German law and jurisprudence.

I. Frankfurt – Berlin

His father was born in Königsberg, East Prussia, and was a well-known successful senior physician in Frankfurt am Main. His mother was born into the long-established banking family Sulzbach that had family ties with Max Warburg's family.[2] The Gebrüder Sulzbach[3] private bank was one of the founders of Deutsche Bank AG. Kurt Lipstein learnt the English language from very early on as his grandmother had been raised in England. Together with Sir Otto Kahn-Freund (born 1900), he attended the revered Goethe-Gymnasium, which had been established as a reformed grammar school in his home town. In 1927, he commenced his study of law spending his first semester at the University of Grenoble. That same year, he transferred to the Friedrich Wilhelm University in Berlin.

He attended lectures held by Theodor Kipp, lectures on French Law by Martin Wolff who had immigrated to Oxford in 1938, and attended Roman Law seminars held by Ernst Rabels who had fled to Ann Arbor in the US in 1939. Later on, in his first valedictory lecture, Kurt Lipstein spoke of the profound influence his three Berlin lecturers had on his academic thinking.[4]

In 1932, Lipstein passed his first state examination in law and began his practical legal training as *Referendar* at the district Court of Appeal of Frankfurt. The statute of 7th April 1933, cynically entitled "Gesetz zur Wiederherstellung des Berufsbeamtentums"[5] (Law for the Restoration of the Professional Civil Service), effectively brought his career to an end. He was prevented from entering the courts and was forced to submit an application for leave.[6] He realised that he was no longer safe in Germany.

English relatives provided him with contact to Patrick Duff, at the time a Fellow, and later Professor of Civil Law in Cambridge. Thereupon, Kurt Lipstein travelled to England and on Martin Wolff's recommendation met

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[2] Max M. Warburg (1867–1946).

[3] On the history of the bank, see *Hans-Dieter Kirchholtes*, Jüdische Privatbanken in Frankfurt am Main (1989) 29 et seq.

[4] *Lipstein,* Acta et Agenda 47.

[5] RGBI. 1933 I 175.

[6] On this, see *Lipstein,* Cambridge 1933–2002, 761; *v. Bar 752.*

with his brother-in-law H.F. Jolowicz in London. He later travelled on to Cambridge. Writing on his visit to Trinity College many decades later, Kurt Lipstein describes: "On a summer evening with the evening sun striking the court, the impression was overwhelming, and my mind was made up: it was to be Cambridge."[7]

II. Cambridge and the World

In 1934, Kurt Lipstein immigrated to England. Up until 1936, he had travelled back to Germany six times, trips which were to still cause him nightmares decades later.[8] The last message he was to receive from his parents came from the concentration camp Theresienstadt.[9]

Lipstein was one of the first doctoral students of the then newly established PhD degree. He obtained a place at Trinity College. Among his colleagues were Rene David and Glanville Williams with whom he was to forge a life-long friendship. His dissertation on Roman Law, supervised by Duff and Jolowicz, was completed in 1936. He obtained a work permit with the help of the influential Harold Cooke Gutteridge,[10] whom Lipstein regarded as his "friend and father". Gutteridge who later held the first chair of Comparative Law at the University of Cambridge appointed Lipstein as his personal assistant from 1937 to 1941.

Following the outbreak of World War II, Lipstein volunteered for British Military Service, but was never required to serve. In May 1940, he was interned as an enemy alien together with several other immigrants to Cambridge, many of whom were later to become part of England's academic elite.[11] At the end of October 1940,[12] he was released from the camp and subsequently employed as Faculty Secretary to the Board of Law.[13]

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[7] *Lipstein,* Cambridge 1933–2002, 761.

[8] *Lipstein,* Cambridge 1933–2002, 764.

[9] *Hepple,* Orbituary (above n. 1) 33.

[10] See *Kurt Lipstein,* Harold Cooke Gutteridge 1876–1963: RabelsZ 28 (1964) 201–207.

[11] Generally on the contribution of German refugees in England, see *Kurt Lipstein*, The history of the contribution to law by German-speaking Jewish refugees in the United Kingdom, in: Second Chance, Two Centuries of German-speaking jews in the United Kingdom, in: W. E. Mosse et al. (eds.) (1991) 221–227; also, Jurists Uprooted; *Gunther Kuhne*, Entwurzelte Juristen: JZ 2006, 233– 241. A general overview of German lawyers persecuted by the NS-regime and their contribution abroad can be found in *idem.*, Die Erforschung der Juristen-Emigration 1933–1945 und der Beitrag der deutschen Emigranten zur Entwicklung des Rechtswesens in Israel, in: Justo iure, Festgabe Otto Sandrock (1995) 385–400 (385–388).

[12] *Lipstein,* Cambridge 1933–2002, 766: „On the day when the battle of Britain was won."

[13] *Feuerstein/Parry* (above n. 1) S. IX.

His university appointments were not as rapid as the spread of his scholarly influence in Cambridge and beyond. He was appointed university lecturer in 1946, and, later in 1962, he was appointed Reader in Conflict of Laws. It was not until 1972 that he received the Professorship in Comparative Law, formerly held by Harold Gutteridge. At the age of 68, the University of Cambridge awarded him his LL.D. This was in 1977, the year of his formal retirement, but by no means meant an end to his teaching and supervising of students.

He was given membership of Clare College in 1940 and was elected Fellow in 1956. Later he also became a Member of Trinity College and in 1998, was made Honorary Fellow of Wolfson College. His legal training, activities and accolades were: 1938 his enrolment as student of the Middle Temple, 1950 call to the Bar, and 1966 Honorary Master of the Bench of the Middle Temple. In 1998 he was made an Honorary Queen's Council.

The provision of legal services and advice was not the main area of Kurt Lipstein's work. But even within this field of work he left his mark. Perhaps the most significant trial he was involved in was the famous Nottebohm Case, Liechtenstein v Guatemala[14] heard before the International Court of Justice in The Hague. He became one of Liechtenstein's lawyers (alongside Erwin H. Loewenfeld, Georges Sauser-Halland, James E.S. Fawcett), after inheriting the case from Hersch Lauterpacht who had been unable to continue following his appointment as judge at the International Court of Justice. The case was concerned with the question of diplomatic protection of a German born but naturalized citizen of Liechtenstein, against Guatemala and raised fundamental issues of Public International Law. It was later to impact on issues of private international law, despite the decision itself not involving any conflict of laws issues.[15]

Kurt Lipstein's sphere of academic influence steadily spread well beyond England. He was made Director of Research at the International Association of Legal Science from 1954 to 1959 and worked on the reception of western law in Turkey and India.[16] He was Visiting Professor at the University of

[14] [1955] ICJ Reports 4; on this, see *Kurt Lipstein/Erwin H. Loewenfeld,* Liechtenstein gegen Guatemala: Der Nottebohm-Fall, in: Gedächtnisschrift Ludwig Marxer (1963) 275–325; *Lipstein,* Acta et Agenda 55 et seq.

[15] On this see, e.g. *Heinz-Peter Mansel*, Personalstatut, Staatsangehörigkeit und Effektivität (1988) 148–149; *Ralf Michaels*, Public and Private International Law, German Views on Global Issues: J. Priv. Int. L. 4 (2008) 121–138 (125).

[16] *Kurt Lipstein*, The reception of western law in Turkey: Annales Fac. Dr. Istanbul 1956, 11–27, 225–238; *idem.*, The reception of western law in Turkey: Social Science Bulletin 1957, 70–95; *idem.*, The reception of western law in countries of a different economic and social background with special regard to problems arising out of industrialisation: Annales Fac. Dr. lstanbul 1961, 3–13 19 et seq.; *idem.*, The reception of western law in countries with a different social and economic background: India: Rev. Inst. Der. Comp. 1957/1958, 8–11, 69–81; 213–255; *idem.*, The reception of western law in countries with a different social and economic background: India: Indian Yb. Int. L. 6 (1957) 277–293.

Pennsylvania and twice at Northwestern University (Chicago) in 1962, 1966 and 1968. He was Professeur Associé in Paris at the Sorbonne and lectured English Contract Law in 1977. Lipstein was for many decades reporter on English conflict of laws in 'Clunet'.[17]

In 1972, he was invited to lecture[18] at The Hague Academy of International Law. In 1993, he was elected to the world-renowned *Institut de Droit International*,[19] established in 1873. He was one of only 130 members accorded with this honour. His success as rapporteur of the *Institut* will be discussed further below. In an interview given in 2005, he lists the three highlights of his academic career to be: his appointment to Cambridge Faculty, receiving the title of Queen's Council (1998), and becoming a member of the *Institut* de Droit International.[20]

Lipstein also participated in the legislative process with great enthusiasm: "Nothing gives more satisfaction than the knowledge that at the end of one's work the legal system has been added to for the common good."[21] He succeeded Harold Gutteridge in 1952, becoming Member of the United Nations, where he was involved with the draft of the New York Convention on Maintenance Obligations of 20th June 1956.[22] Later, he also participated as Member of the Committee appointed by the Lord Chancellor and the Secretary for Scotland to advise on the conclusion of treaties prepared by The Hague Conference of Private International Law and in the negotiation of several Hague Conventions for the British Government. He was involved in the implementation of Conventions into English laws, specifically The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions,[23] and the 1973 Convention concerning the International Administration of the Estates of Deceased Persons[24]. He paid

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[17] *Kurt Lipstein*, Chronique de jurisprudence britannique: Clunet 115 (1988) 803–845, 1051–1099.

[18] *Kurt Lipstein,* The general principles of private international law: Rec. des Cours 135 (1972-l) 97–230 (cited: General principles); further published in: Principles of the Conflict of Laws, National and International (1981) XII and 144 S.

[19] On the Institut and Session, in which Kurt Lipstein presented his draft resolution, see *Karl Doehring,* Tagung des Institut de Droit international in Berlin vom 17. bis 25.8.1999: NJW 1999, 3249–3250; *Erik Jayme,* Tagung des lnstitut de Droit international in Berlin: IPRax 2000, 61–62 (cited: Tagung). On the Institute generally, see *Fritz Munch,* Das lnstitut de Droit international: Arch. VolkR 28 (1990) 76–105.

[20] See *Dingle/Bates* (above n. 1) 93– 133.

[21] *Lipstein,* Acta et Agenda 54.

[22] *Kurt Lipstein,* A draft convention on the recovery abroad of claims for maintenance: Int. Comp. L.Q. 3 (1954) 125–134.

[23] Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions of 15 Nov. 1965; on this see *Kurt Lipstein,* The Tenth Session of the Hague Conference: Cambridge L.J. 23 (1965) 224–230; *idem.,* Adoption in private international law: Int.Comp.L.Q.12 (1963) 835–849.

[24] Hague Convention concerning the International Administration of the Estates of

particular attention to the Hague Conventions.[25] Later, he examined and guided the developments in both private international law and the law of procedure.[26] He frequently called for efforts to introduce supranational rules of law, either through the unification of laws or through the development of general principles of law. He sought to free the conflict of laws from its national constraints as much as possible, referring to the difficulties of a uniform application of laws on a supranational level. Consequently, Lipstein initiated the establishment of private law specialised chambers within the European Court of Justice.[27]

It was primarily the last third of his life during which he received the bulk of both his academic and other public acknowledgments. In addition to the above mentioned distinctions, Kurt Lipstein received the research award from the Alexander von Humboldt Foundation and in 1995 an honorary doctorate from the Law Faculty of the University of Würzburg.

Kurt Lipstein was deeply rooted in Cambridge. It was here that he married Gwyneth Herford[28] in 1944, leading a fulfilled married life until her death in 1998. They had two daughters, Eve and Diana, and six grandchildren. Their house, which he had moved into in 1947/1948 near the University, was surrounded by and hidden in greenery. Those that visited him there following the death of his wife would nevertheless notice the strong presence she still had in his life.

Kurt Lipstein was a person with lasting relationships. He clearly had a very strong affiliation with the University of Cambridge, evidenced in an interview that he gave in 2005.[29] A reception was held by the Law Faculty on the 20th November 2006, celebrating the 70th anniversary of his PhD in Cambridge. His Memorial Service was held shortly thereafter.

Deceased Persons of 2. Oct. 1973; on this see *Kurt Lipstein,* Das Haager Abkommen über die internationale Abwicklung von Nachlassen: RabelsZ 38 (1975) 29– 55.

[25] For a specific overview, see *inter alia Kurt Lipstein,* The Hague Convention on private international law, public law and public policy: Int. Comp. L.Q. 8 (1959) 506–522.

[26] On international contract law, see references given below under n. 61; and further, e.g. *Kurt Lipstein,* Chapter 39: The EEC Convention on the jurisdiction and the enforcement of civil and commercial matters of 27 September 1968, in: The Cambridge Lectures 1981, in *N. E. Eastham/B. Krivy* (eds.) (1981) 412–431.

[27] See in particular, the case study in *Kurt Lipstein,* Enforcement of judgments under the jurisdiction and judgments convention: safeguards: Int. Comp. L.Q. 36 (1987) 873–878 (878).

[28] On her life, see the brief description given by *v. Bar* 754. Gwyneth Lipstein was on the board of Cambridge council from 1967 to 1990, as evidenced by other documents.

[29] *Dingle/Bates* (above n. 1) 93–133.

III. Academic Achievements

Kurt Lipstein's scholary estate was made public with the generous donation of academic papers, including letters and manuscripts to Clare College by his heirs. These were then passed on to the Eminent Scholars Archive of the Squire Law Library for curation. It was the Lipstein Estate that gave the impulse to the creation of the Eminent Scholars Archive. The core collection of more than 2000 items occupies the ground floor of the JANUS-Archive established in 2007. The publicly available database has recorded the collection, which includes additional material such as picture, audio and video files.[30] The critical assessment of the whole of Kurt Lipstein's estate was a particularly worthwhile task.

Kurt Lipstein's academic achievements have been presented and analysed many times.[31] His bibliography,[32] not including the numerous and comprehensive book reviews and case comments, comprises well over one hundred autonomous and joint publications, published in several western European languages. The thematic spectrum of his work is impressive, ranging from substantive, comparative and private international law, to European law and public international law. His most important publications, particularly those in private international law, deserve special mention.

The above mentioned unpublished thesis[33] on the *beneficium cedendarum actionum* has been described by Christopher Forsyth, based on the text of an elegy by Thomas Grey, as a "flower born to blush unseen". Namely, that modern standard works would benefit from taking into consideration the work of Kurt Lipstein.[34] Although he lectured in Roman Law for many decades, it was not his main field of publication.

Even before the United Kingdom joined the European Economic Community in 1973, he had an interest in European Law. Following the accession, he published his detailed study on the law of European Community, the first of its kind written in English.[35] It was written from the point of view of a civil lawyer. It was Kurt Lipstein's specific aim to present not only the EC Treaty as primary law, but also to assess the influence of secondary law and the case law of the European Court of Justice on the national laws of the

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[30] On this see above n. 1.

[31] See Kurt Lipstein's own report on his retirement: *Lipstein,* Acta et Agenda 47–61, covering the period until 1976; see further *v.* Bar 749–760; *Forsyth* 463–481.

[32] Partial bibliographies can be found in: Multum non multa, FS Lipstein (1980) 379–382 (up until the beginning of 1981), as well as (beyond 1981) on the internet, above n. 1.

[33] *Kurt Lipstein,* Critical Studies upon the Beneficium cedendar um actionum and vendito nominis (unpublished Ph.D. thesis, University of Cambridge) (1936) 188 pages.

[34] *Forsyth* 467.

[35] *Kurt Lipstein* , The Law of the European Economic Community (1974); see e.g. the reviews by *Eric Stein,* C.M.L. Rev. 11 (1974) 445–447.

Member States. The interpretation of the specific Treaty provisions is supplemented by the systematic presentation of the corresponding secondary sources of law. With this major work, he was able to establish the study of European Law as a scholarly discipline in England. He later published further works on European law[36] but the focus of his work was private international law: "The conflicts of law, however, attracted me more than any other topic".[37]

Lipstein's first substantial article within the field of private international law was published together with Harold Gutteridge on unjustifiable enrichment in English law.[38] The conclusions of their study were subsequently integrated into the relevant section in *Dicey/Morris*, The Conflict of Laws.[39] This continued to be a main source of reference in English law, until the enactment of the legislative provision in Art. 10 of the Rome II Regulation.[40] Kurt Lipstein was co-author of this major work from the 6th to the 8th edition, published respectively in 1948, 1958 and 1967.[41] The paper also had influence within German conflict of laws[42] and is to this day still referenced in argument.[43] When comparing the 6th edition to the previous edition, it appears that several substantive amendments were made that are attributable to Kurt Lipstein. This is also clearly evidenced in his paper on "Conflict of Laws 1921–1971, the way ahead".[44] The study is in many respects a comprehensive draft of the Hague Lectures which will be discussed further below. The development of the English conflict of laws is masterfully presented and analysed. He draws attention to[45] the omission of the theory of acquired rights, upon which Dicey had justified the application of foreign law, which from the 6th edition onwards (for which Lipstein was

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[36] *Kurt Lipstein,* Some practical comparative law, The interpretation of multi-lingual treaties with special regard to the EEC-Treaties: Tul. L. Rev. 48 (1974) 907–915; *idem.,* The legal structure of Association Agreements with the EEC: Brit. Yb. Int. L. 49 (1974/75) 201–226; *idem.,* Conflicts of law in matters of social security under the EEC Treaty, in: European Law and the Individual, *F. G. Jacobs* (ed.) (1976) 55–77; *idem.*, Un juriste anglais dans la Communauté européenne: Rev. int. dr. comp. 30 (1978) 493–504.

[37] *Lipstein,* Acta et Agenda 48.

[38] *Kurt Lipstein/Harold Cooke Gutteridge,* Conflicts of law in matters of unjustifiable enrichment: Cambridge L.J. 7 (1941) 80–93.

[39] See also *Lipstein,* Acta et Agenda 48; and further *Forsyth* 468.

[40] EG Regulation No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, ABl. EU 2007 L 199/40.

[41] The current version is the 14th edition from 2006.

[42] See *Konrad Zweigert,* Bereicherungsansprüche im internationalen Privatrecht: Süddeutsche Juristenzeitung 2 (1947) 247–253; specifically *v. Bar* 755.

[43] See *Geoffrey* C. *Cheshire/Peter North/James J. Fawcett,* Private International Law[14] (2008) 829.

[44] *Kurt Lipstein,* Conflict of laws 1921–71, The way ahead: Cambridge L.J. 31 (1972) 67–120.

[45] *Lipstein,* Conflict of laws 1921–71 (above) 67 et seq.; see also *idem.,* Acta et Agenda 54.

also responsible) was no longer considered to be a general principle within the conflict of laws. He emphasises the circular nature of the arguments and restrictions of the theory.[46]

Kurt Lipstein published extensively within the conflict of laws. His research ranged from adoption in private international law,[47] issues concerning intellectual property and procedural law,[48] European Community law,[49] to the law concerning international insolvency.[50] But it was the general theory and basic rules and principles within the conflict of laws that fascinated him. This was the area within which Lipstein consistently produced groundbreaking research. The relationship between private international law and public international law, as well as private and public law served as a distinct area of research on which he was able to continuously throw new light through his comparative assessments.[51] A particular interest of Lipstein's was to follow the development of the conflict of laws for and through international (arbitration) tribunals. Given that they do not possess a *lex fori*, international tribunals must either ascertain that a certain system of municipal law applies with the help of its own international rules of the conflict of laws, or develop jurisdiction-selecting rules on a comparative basis if the basic legal order does not identify such.

He discovered, described and analysed this development several times,

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[46] See the detailed examination in *Lipstein,* Principles of the Conflict of Laws (above n. 19) 23 et seq.

[47] *Kurt Lipstein,* Adoption in private international law: Int. Comp. L.Q. 12 (1963) 835–849.

[48] *Kurt Lipstein,* Intellectual property: jurisdiction or choice of laws: Cambridge L.J. 61 (2002) 295–300; *idem.,* Intellectual property, Parallel choice of law rules: Cambridge L.J. 64 (2005) 593–613; see Forsyth 478.

[49] *Kurt Lipstein,* The law relating to the movement of companies in the European Community, in: FS Erik Jayme (2004) 527–531.

[50] *Kurt Lipstein,* Jurisdiction in bankruptcy: Mod. L. Rev. 12 (1949) 454–476; *idem.,* Jurisdiction to wind-up foreign companies: Cambridge L. J. 11 (1952) 198–208; *idem.,* Early treaties for the recognition and enforcement of foreign bankruptcies, in: Cross Border Insolvency, Comparative Dimensions?, in: Comparative Law XII Chap. 14, in *E. E. Fletcher (ed.)* (1990) 223–236; *idem.,* Bankruptcy and the Hague Conventions, in: FS Hans Hanisch (1994) 149–152.

[51] See in particular *Kurt Lipstein,* General principles (above n. 19) 167 et seq.; and *idem.,* Decisions of English courts during 1948–1949 involving questions of public or private international law: Brit. Yb. Int. L. 26 (1948/49) 469–493; *idem.,* Decisions of English courts during 1949–1950 involving questions of public or private international law: Brit. Yb. Int. L. 27 (1949/50) 466–482; *idem.,* Characterization, in: Int. Enc. Comp. L. III: Private International Law (1999) Chap.5, 65–67. See *idem.,* Conflict of public laws, Visions and realities, in: FS Zajtay (1982) 357–378; *idem.,* Öffentliches Recht und internationales Privatrecht, in: Internationales Privatrecht, internationales Wirtschaftsrecht, in *W. Holl/U. Klinke* (ed.) (1985) 39–54; *idem.,* Conflict of laws and public law, in: United Kingdom law in the 1980s, in *E. K. Banakas* (ed.) (1990) 38–58.

first in his essays completed in 1941 and 1943, then in his Hague lectures of 1972,[52] and finally in his paper of 2001.[53]

A seminal work of Lipstein's, which was based on his many earlier works[54] and was to become an important point of reference, is his lecture[55] at the Hague Academy of International Law in 1972. The lecture was later developed, updated and published in 1981.[56] In particular, the extension of the application of the Hague Convention was recognised and considered. The development of European contract law in the Rome Convention on the law applicable to contractual obligations[57] was not fully considered in the updated version of the Hague lecture. In contrast to earlier published versions he further refined the explanations on the significance of public policy in public international law and the limitation provisions of substantive law. He tackled issues such as the application of methodologically biased connections and overriding mandatory rules (from the *lex fori* or the law of a third state) through the application of the general jurisdiction-selection method in order to implement public policy interests. He re-examined these issues time and time again from differing perspectives.[58]

Kurt Lipstein's renowned Hague lecture[59] presents a concise yet comprehensive philosophical and historical perspective of the development of private international law and its defining principles. His work was largely carried out on a comparative basis. He examined the modern American revolutionary theories that sought to replace the outdated choice-of-law-selection system through value judgment. Lipstein's conclusions on this are conservative, mirroring his careful consideration of the need for the translation of his results into practice. The law must be coherent in practice. This is evidenced by foreseeability and predictability of results and certainty of the law.

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[52] *Kurt Lipstein,* Conflict of laws before international tribunals I, in: Transactions of the Grotius Society 27 (1941) 142–181 and II: *ibidem*. 29 (1943) 51–83; *idem.,* General principles (above n. 19) 173 et seq.

[53] *Kurt Lipstein,* Conflict of laws before international tribunals sixty years later, in: Aufbruch nach Europa, 75 Jahre Max-Planck-Institut für Privatrecht (2001) 713–723.

[54] It has already been noted that Lipstein's major study Conflict of laws 1921–71, The way ahead (above n. 45) provides a comprehensive draft of his Hague lectures of 1972.

[55] *Lipstein,* General principles (above n. 18) 97–230; on this see also *idem.,* Acta et Agenda 52 et seq.

[56] *Lipstein,* Principles of the Conflict of Laws (above n. 18).

[57] Rome Convention on the law applicable to contractual obligations of 19 June 1980, consolidated version, ABI. EG C 27/34.

[58] Individual studies are e.g. *Kurt Lipstein,* Les normes fixant leur propre domaine d'application; les expériences anglaises et américaines, in: Droit international privé, Travaux du comité français de droit international privé (1977/1979) 187–201 (Centre National de la Recherche Scientifique); *idem.,* Inherent limitations in statutes and the conflict of laws: Int. Comp. L. Q. (1977) 884–902 (see in particular 898 et seq.).

[59] See the comprehensive review in *Forsyth* 470 et seq.

From very early on, Lipstein was not only concerned with European law, but also with the question of whether and how private international law and more specifically international contract law should be unified within the European Community.[60] Again, his forward thinking and practice oriented views become apparent.

It was a particularly auspicious choice when the editors of the *International Encyclopedia of Comparative Law*, appointed Kurt Lipstein as chief editor of the third volume on Private International Law. Once again he adopted a comparativist approach to private international law. Lipstein's work never ignored the link to positive law, nor did it simply provide a mere restatement and discussion of it. His views were in depth and focused on the subject specific field of international conflict of laws.

As editor of the private international law volumes, Lipstein was responsible for their publication and continued with this task until his death. With his meticulous scholarly style, linguistic elegance and extensive knowledge he was able to improve the substantive content of numerous contributions from around the world. He published three of his own, central sections, namely: interpersonal conflict of laws,[61] trusts,[62] and characterization.[63] In the first and particularly in the last contribution, Lipstein was able to build on the fundamental principles he had established in his Hague lectures. Once again, characteristic of these contributions is Lipstein's unique comparativist approach. He reaches the conclusion that characterization is not based on facts, but rather on the underlying legal relationship and that its function and purpose, not its technical connotation, is the object of the inquiry.

Another theoretical problem to which Lipstein has turned his attention on several occasions, is the relationship of foreign characterization and *renvoi*. In his most recent contribution on the issue,[64] he reaches uniquely reasoned and sophisticated conclusions. Lipstein was also drawn to the specific

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[60] *Kurt Lipstein,* Comments on Art. 1 to 21 of the Draft Convention, in: European Private International Law of Obligations, in *Ole Lando/Bernd v. Hoffmann/Kurt Siehr* (eds.)(1978) 155–164; *idem.,* Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations, in: Harmonisation of Private International Law by the E.E.C., in *Kurt Lipstein* (ed.) (1978) 1–14; *idem.,* Characteristic performance, A new concept in the conflict of laws in matters of contract for the EEC: Northwestern J. Int. L. Bus. 3 (1981) 402–414.

[61] *Kurt Lipstein/I. Szászy,* Interpersonal conflict of laws, in: Int. Enc. Comp.L. III: Private International Law (1985) Chap. 10,3 – 35.

[62] *Kurt Lipstein,* Trusts, in: Int. Enc. Comp. L. III: Private International Law (1994) Chap. 23,3 – 40.

[63] *Lipstein,* Characterization (above n. 52) 3–67.

[64] *Kurt Lipstein,* Unusual bedfellows – renvoi and foreign characterization joined together, Private law in the international arena, Liber amicorum Kurt Siehr (2000) 405–412; see above *idem.,* Two basic problems of private international law revisited: King's College L.J. 10 (1999) 167–176.

issue of the *renvoi* problem and presented his examinations from invariably differing perspectives on numerous occasions. As part of his work at the *Institut de Droit International*, Lipstein was able to focus on the issue extensively. Only a few years following his election to the *Institut*, Lipstein was given the honourable appointment of rapporteur to the 4th Commission. He prepared a resolution[65] on the *renvoi* issue[66], the formulation of which is based on an examination by Wilhelm Wengler.[67] But Lipstein's approach is considerably different to that of Wengler. Lipstein pragmatically refrains from a theoretical overhaul of the *renvoi* problem, instead focusing on the prevalence of *renvoi* in the conflict of law rules in national systems. The quintessence of the resolution is that *renvoi* generally is applicable, and only where there are alternative connections, or where there is a free choice of law, should *renvoi* be excluded. This is in accordance with German private international law, which in Art 4 II, Art 35 I 1 EGBGB treats a choice of law as being a choice of the applicable substantive provisions of law; and, where alternative connections exist, excludes *renvoi*,[68] according to Art 4 I 1 EGBGB on the basis that it is incompatible with the meaning of the referral. The Articles of the Resolution are not presented in the form of binding rules, but instead as recommendations. This approach and the omission of further legal aspects related to the recognition of foreign private international law enabled Kurt Lipstein's largely unchanged draft to be adopted as the resolution. What was not accepted was his recommendation to reject "hidden" *renvoi*.[69] Nevertheless, the adoption of the resolution by the Institute must be considered a great personal triumph of the then 90 year old Kurt Lipstein. He was able to achieve that which had failed on two previous attempts. On those two occasions, in the years between 1896–1900 and 1957–1965, the Commission attempted to reach a majority on the issue of a resolution on the

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[65] *Kurt Lipstein,* Taking Foreign Private International Law to Account, Session de Berlin, 1999: Ann. Inst. Dr. int. 68 (1999–11) 89–153; Resolution also given in: IPRax 2000, 51–52; on the resolution, see *Jayme*, Tagung (above n. 20) 61–62.

[66] The preparatory works including the responses by the Commission Members are published in: The taking into consideration of foreign private international law, Travaux préparatoires, 4th Commission, Session de Berlin, 1999 – Première partie: Travaux préparatoires: Ann. Inst. Dr. int. 68 (1999-I) 13–56; on this see *Erik Jayme,* Völkerrecht und Internationales Privatrecht: Interdependenz und Interaktion: IPRax 1998, 139 et seq. (citation: Völkerrecht).

[67] *Wilhelm Wengler,* Die Beachtlichkeit des fremden Kollisionsrechts, Eine Bestandsaufnahme und Besinnung zum Renvoi-Problem: Internationales Recht und Diplomatie 1956, 56–74; referenced in *Jayme,* Völkerrecht (above) 140.

[68] *Heinz Georg Bamberger/Herbert Roth (-Stephan Lorenz),* Kommentar zum BGB[11] (2008) Art. 4 EGBGB marg. no. 8 with further references.

[69] See *Lipstein,* in: The taking into consideration of foreign private international law (above n. 67) 46 et seq.; cf. *Jayme*, Tagung (above n. 20) 62. On hidden renvoi, see critically Münchener Kommentar zum BGB *(-Hans-Jürgen Sonnenberger)* (2006) Art. 4 EGBGB marg. no. 42 et seq. with further references.

issue of *renvoi.*[70] It was Kurt Lipstein's profound comparativist knowledge, his common sense, negotiation skills and his personality, which all contributed to the success of his resolution.

V. Kurt Lipstein, the Teacher

Much can be learnt about Lipstein as a teacher by reading the many comments and condolences dedicated to Kurt Lipstein on the Squire Law Library website. He is honoured and remembered with great fondness by different generations of former students. Kurt Lipstein was a true gentleman who treated everyone that he met with the same respect. To teach was for him to illustrate rather than instruct. Those who spoke with him are just as unlikely to forget his friendly interest and patience, composure and modesty, generosity and warmth, charm and humour, as his intellectual brilliance, the clarity of his reasoning, and wealth of knowledge. His ability to share his love and passion for the law with others earned him the status of a much admired and successful teacher.

From the beginning of his time in Cambridge Kurt Lipstein was a teacher. He began in 1936 with supervisions and continued with these well beyond his retirement. The Lord Justice of Appeal Michael Kerr (1921–2001) expressed his gratitude for his supervisor Kurt Lipstein.[71] He held his last supervisory session just two weeks before his death. He held lectures and seminars on a wide range of subjects from Roman Law – at the beginning of his academic career and to which he later returned to lecture –, European Law, Comparative Law, Private International Law and Public International Law, to Contract, Torts and English Legal Methods. The website of the Eminant Scholar Archive of the Squire Law Library has posted a video of Kurt Lipstein's last lecture in Legal Methods, held on the 17th July 2006.[72]

In addition to lecturing and supervision, Kurt Lipstein also taught in the Squire Law Library, which was only four years older than him, and over the many years worked in all three of the Squire Law Library's homes. For 72 years Kurt Lipstein faithfully followed, influenced and was devoted to the development of this Library. He often vividly described[73] how he helped new (and old) users of the Library to find their way around. Many discussions on substantive issues of law would transpire, from which users would

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[70] See in-depth assessment in *Forsyth* 476 et seq.; *Jayme,* Tagung (above n. 20) 62.

[71] *Michael Kerr,* As far as I remember (2002) Chap. 30. On the internation of both Michael Kerr and Kurt Lipstein see also *Lipstein,* Cambridge 1933–2002, 765.

[72] At www.squire.law.cam.ac.uk/eminent_scholars.

[73] For specific memories see *Hepple,* Kurt Lipstein (above n. 1) 19, *v. Bar* 749 et seq, and *Zimmermann* (above n. 1) 296–297.

gain inspiration and ideas that were gratefully remembered decades later. This gratitude is documented in the introductory footnotes and forewords of numerous publications. The "Times"[74] obituary notes amongst his pupils in Cambridge six Lords Of Appeal in Ordinary, more Lords Justices of Appeal and "seemingly innumerable High Court Judges". He taught a countless number of non-English lawyers at the very successful courses at the International Summer School in English Legal Methods in Cambridge of which he was a co-founder.[75] It is they who carry on the memory of Kurt Lipstein, a remarkable man, a teacher and his work.

[74] The Times from 18 Jan. 2007.

[75] For an account of a seminar by Kurt Lipstein in the Summer School 1999, see *Thomas Hirschmann:* JuS 1999, Issue 11 (cover pages).

The Proper Law of the Contract*

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More than any other branch of the law, the science of Conflict of Laws lends itself to a fruitful study from a comparative point of view.[1] For though its character is that of municipal law, it tends to find the most practical solutions in cases where a clash of two different systems of law seems unavoidable. Rigid national principles are scarce and the science seems altogether unorthodox. Within existing systems of Conflict of Laws, it is the principle of the law governing contracts which is open to the greatest number of diverse

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[Editorial note: essay by *Kurt Lipstein*, *Jean S. Brunschig*, *Fredrick Jerie*, and *Karl M. Rodman*; first published in St John's Law Review 12 (1938), 242–246.]

* This article concerns itself with a comparative study of some aspects of the Continental and Anglo-American Systems.

Note: The authors wish to express their sincere gratitude to Professor H. C. Gutteridge, LL.M., K.C., Fellow of Trinity Hall of the University of Cambridge, under whose guidance this material was gathered during a seminar on the subject Lent Term 1938 at the University of Cambridge.

[1] See Kuhn, Comparative Commentaries on Private International Law; 4 Ficker, Rechtsvergleichendes Handwoerterbuch (1933) 371–390.

It is impossible to enter into the question of the relation between international law and conflict of laws. Reference may be made to the discussion by Arminjon (1928) (I) Rec. des cours 433–509; (1929) Revue de droit international et de legislation comparee 680–98 and a forthcoming article by Dr. Lipstein containing a full bibliography. We regard the attempt to find the basis of a system of conflict of laws in the conception of sovereignty as unfortunate; for either it means nothing more than that every state may introduce such rules of conflict of laws as it thinks fit. Or it may mean that every system of laws has to respect the sovereignty of other systems. Though this may be adequate (but not theoretically sound) in situations wholly connected with one territory, it fails to fulfill its task in cases connected with several systems of law. For what is the meaning of »respecting sovereignty«? Does it mean the universal recognition of the *lex patriae* (so Zitelmann, Frankenstein, Pillet) the *lex domicilii* (so v. Bar), or the *lex loci contractus*?

No answer can be given here; but it may be pointed out that it ends in a dispute upon questions of *a priori*.

solutions. This, because of the fact that contracts, more than any other legal institution, are less static than dynamic. Moreover, they are created by the free will of the parties. Thus, we believe, that a study of the solutions used in a number of European countries might be of use to the legal profession of the United States even though practice and doctrine are far more established there than in Europe.

Conflict of Laws or Private International Law, as it is more commonly called in Europe, has played the part of Cinderella in the codifications of most European systems, and | within the few systems that have attempted a codification of it, the rules governing contracts have often been consciously omitted. Thus we find detailed rules only in the Austrian aGBB[2] and the parts of Czechoslovakia and Yugoslavia which formerly belonged to the old Austrian Empire, in addition to Italy[3] and Poland.[4] In France, Germany and Switzerland the matter has been left to the courts as in the case of England and the United States. But as the role of precedent in Europe is a different one from that in the Common Law of England, case law has not been quite successful in introducing undisputed rules. For precedents are not binding upon any but the highest courts and even these are empowered to overrule their own precedents under certain conditions. This power is, of course, also exercised by Anglo-American courts but so rarely as not to seriously shake the ruling power of case precedents. In practice, however, European case law does establish a certain continuity, if only for the reason that inferior courts are reluctant to contradict cases decided by the supreme courts for fear of being overruled and thus to hamper the chances of promotion of the judges concerned.[5] On the whole we may therefore say that a certain practice has been established, but exceptions exist and there is always a certain chance of being able to criticize, attack and finally bring about a change in this sphere of no man's land.

Writers have been only too willing to accept this task, and during the past forty years an immense literature has sprung up. Of recent text-book writers who have not limited themselves to a descriptive discussion we have to mention Arminjon, Niboyet, Frankenstein, Nolde, Sauser-Hall, Jeanprêtre and Haudek[6] who have brought into bold relief the | problem as it exists on

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[2] 4, 34–37.

[3] Art. 9, § 2. disp. rel. c.c.; art. 58, c. comm. (1933).

[4] Arts. 7–10, Statute of 2.8.1926.

[5] The career of judges, on the continent of Europe, is distinct from that of other professional lawyers. After having completed their course of education, they have to decide whether they intend to go to the Bar or to the Bench, where they start as Assistant Judges, both in Regional and County Courts.

[6] 2 Arminjon, Precis de droit international prive (2d ed. 1934) 231 sq.; Niboyet, Manuel de droit international prive (2d ed. 1928) 789 sq. no. 681; (1927) (I) Rec. des cours 1–12; 2 Frankenstein, Internationales Privatrecht (1929) 123 sq. no.; Jeanpetre, Les conflits de lois

the Continent. In England the influence of Story, the great American jurist, has, during the last century, largely been replaced by the work of the late Professor Dicey, but of late the writings and teachings of Professor H. C. Gutteridge and Dr. G. C. Cheshire[7] have been well received by scholars and practitioners alike. American legal thought on the subject, initiated by Judge Story, is now best represented by the work of Professors Beale, Lorenzen and Cook.[8] Before expressing the views and tendencies outlined by these writers, it seems advisable to touch on the position of the law as it stands today.

The French Code Civile does not contain any pertinent provisions but the courts have taken a steady course and a well established »jurisprudence« (case law)[9] enables us to draw definite conclusions.[10] The governing principle is that of autonomy of will, *i.e.,* of free choice of law by the parties.[11] However, it happens, and not only occasionally, that the parties have omitted to express their intention. It is then that canons of interpretation come into play. First, the judge is called upon to investigate whether a tacit reference to any system of law places that contract under the rules of that system.[12] Failing this, he has to apply certain tests, whether|as canons of interpretation or as objective tests cannot be stated with any certainty.[13] These tests are as follows: (1) If both parties are of the same nationality then the *lex patria* or the law of their nationality governs. If the parties are domiciled in any other country than that of their nationality then the law of their domicile gov-

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en matiere d'obligations contractuelles selon la jurisprudence et la doctrine aux Estats-Unis (1936); Haudek, Die Bedeutung des Parteiwillens im Internationalen Privatrecht (1931); Sauser-Hall, Zeitschrift fuer Schweizerisches (1925) 271a–320a; Nolde, *Annuarie de l'Institut de Droit International* (1925) (32) 50–145, 501–508; (1927 (I) *id.* at 937–954; (II) *id.* at 194–225, 336.

[7] Professor H. C. Gutteridge (1936) Cambridge L. J. 19; Dr. G. C. Cheshire, Private International Law (2d ed. 1938) 241 *et seq*.

[8] Beale, A Treatise of the Conflict of Laws (1936); Beale, Cases on Conflict of Laws (1909); Lorenzen, Cases on Conflict of Laws; Lorenzen, A Comparative Study of the Law of Bills and Notes (1919).

[9] Precedent, in continental Europe, as we have stated above, does not carry the same weight as in Anglo-American law. Binding upon the supreme courts, but subject to overruling by a special form of judgment by the full court, it is only of persuasive authority with regard to inferior courts. The latter are not bound by their own previous decisions.

[10] This would not appear so from the attitude taken by text-book writers who attempt to introduce their own solution into the existing law.

[11] Cass. req. 28.12 (1936); (1937) Rev. crit. 684, with note by Battifol; Cass. civ. 31.5 (1932); (1934) Rev. crit. 909, with note by Niboyet; Cass. civ. 12.5 (1930); (1931) Clunet 164; *cf.* (1930) Clunet 417. See also Cass. civ. 5.12 (1910); Sirey (1911) 1, 129, with note by Lyon-Caen; (1911) Rev. Darras 395; Cass. req. 19.5 (1884); Sirey (1885) 1, 113, with note by Lacointa; *cf.* Haudek, *op. cit. supra* note 6, at 59.

[12] Battifol (1935) Rev. crit. 629; Cour d'Appel of Colmar (1934) Clunet 976; Lyon-Caeon, Sirey (1911) 1, 130; Cass. req. 10, 12 (1907); Sirey (1910) 1, 132.

[13] See Niboyet (1936) Rev. crit. 464.

erns.[14] (2) If the parties are of different nationalities then the *lex loci contractus* or the law of the place of contracting governs.[15] (3) If the place of contracting is difficult to ascertain then the law of the place of performance will be applied.[16] (4) Finally, the court will apply that system which would uphold or look with the greatest favor on the contract.[17]

Arminjon suggests a slight change in this order reversing the position of tests numbers two and three. Moreover, he suggests that in the case of test number three the *lex patria* of the debtor should supercede the *lex solutionis,* the law of the place of performance, provided it is a unilateral contract.[18] These contentions, however, have not found much favor in the decided cases.

| In Switzerland the law governing the essential validity of contracts has been summed up in the following words by the Tribunal Federal, the highest court of that country, in a recent case:

»Following a long line of decisions of the Tribunal Federal concerning the essential validity of contracts, we hold that that system of law is applicable which the parties intended submission to when the contract was concluded or lacking an express declaration, that system of law which they would have intended to apply if they had considered this question at all. The system of this presumed intention is the system of that country with which the contract in question has the closest local connection.«[19]

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[14] *Cf.* Lyon-Caen, note to Sirey (1911) 1, 129, and to (1900) 1, 161, quoting many older cases. See Cass. req. 19.5 (1894); Sirey (1885) 1, 113; Cour d'Appel, Douai 2.11 (1933); Sirey (1934) 2, 109 (2).

[15] Cour d'Appel, Colmar, 162 (1937); (1937) Rev. crit. 687, with note by Battifol; cf. note to Sirey (1913) 4. See Cass. req. 28.12 (1936); (1937) Rev. crit. 684; Cass. civ. 15.5 (1935); (1936) Rev. crit. 464; Battifol (1937) Rev. crit. (1937) 434; Cass. civ. 31.5 (1931); (1934) Rev. crit. 911; Sirey (1933) 1, 17, with note by Niboyet; Cass. civ. 15.12 (1910); Sirey (1911) 1, 129; (1911) Rev. Darras 395; Cass. civ. 6.2 (1900); Sirey (1900) 1, 161; Cour d'Appel, Paris, 25.6 (1931); (1932) Clunet 933 (5); Cour d'Appel, Colmar, 11.3 (1933); (1934) Rev. crit. 138; Cour d'Appel, Douai, 2.11 (1933); Sirey (1934) 2, 109 (regarding it as the presumed intention of the parties, contrary to the well established doctrine of the Cour de Cassation). See also Colmar 17.2 (1937); Battifol (1934) Rev. crit. 639/40.

[16] Decisions favouring the *lex loci solutionis* are gaining ground. Cour d'Appel, Paris, 26.3 (1936); (1936) Rev. crit. 487; Battifol (1937) Rev. crit. 435; Cass. civ. 31.5 (1932); (1934) Rev. crit. 909; Cour d'Appel, Paris, 28.2 (1935); (1935) Rev. crit. 748, with note; Cour d'Appel, Metz, 12.4 (1934); (1935) Clunet 988 (the court purports to interpret the intention of the parties); Cour d'Appel, Colmar (Belfort) 2.5 (1933); (1934) Clunet 424; (1934) Rev. crit. 163; Battifol (1935) Rev. crit. 631. But. cf. Colmar, 30.1 and 13.3 (1933); (1934) Clunet 951; Battifol, *op. supra* note 12, at 630 (where the court was unable to locate the place of execution of the contract).

[17] Weiss, Manuel de droit international prive (9th ed. 1925) 571 sq.; 2 Arminjon, *op. cit: supra* note 6, at 248 sq. No cases can be quoted in favour of this proposition.

[18] 2 Arminjon, *op. cit. supra* note 6, at 250.

[19] Arret du Tribunal Federal, Receuil officiel (A. T. F.) 40-II–391 and 63-II–307. But free choice of law exists only at the time the contract is concluded. It does not go so far as to allow the parties to state, during the litigation, that they intended to apply Swiss law when

The Swiss courts then, we can say, attempt to find the proper law of the contract – that law which is most closely connected with the contract. It is interesting to note that this has usually been held to be the law of the place of performance of the contract.[20] In cases where the places of performance are situated in more than one country, and one of the places happens to be Swiss, then Swiss law will be applied.[21] In the case of a unilateral contract the law governing will be held to be the law of the debtor's domicile. In the same manner when a Swiss firm enters into a type of contract known as a »massenvertraege« or a »contrad' adhesion« [editorial note: contrat d'adhésion] – a standard contract by one debtor with a large number of creditors in various countries, the law of the debtor's domicile is applied, *i.e.,* the Swiss law.[22] In the event the court is unable to find | the »proper law of the contract«, then it will apply the *lex fori* or the law of the forum.[23]

Contracts concluded in Czechoslovakia between nationals and foreigners are governed by Czech law even if the contract is to be performed in a foreign country or the debtor is a foreigner.[24] The same system of law, *i.e.,* the *lex loci contractus,* is applied even though the contract is between foreigners, if the contract has been concluded in Czechoslovakia. However, foreigners have the option of stipulating, in their contract, that another system of law is to apply and this choice is binding on the Czech courts. They are limited in their choice to a system of law which has some connection with the contract.[25] Although on the Continent it is the general rule that the law of a man's nationality follows him wherever he goes, Czech law permits its citizens autonomy of will in making contracts outside of Czechoslovakia. This permission extends not only to a Czech and a foreigner but to two Czechs contracting in a foreign land. However, if the contract is to be performed in Czechoslovakia then Czech law will be applied.[26] Where two foreigners conclude a contract in a foreign land to be performed in Czechoslovakia they are permitted a free choice of the law governing that agreement. These rules apply to Austria as well.[27]

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the circumstances of the case point to a different system. The declaration by the parties during the case to apply a certain system of law not specified in the contract can serve only as an indication to the judge of what they intended when entering into the contract. But this presumption or guide is in no way binding upon the judge. A. T. F. 63-II–44; A. T. F. 62-II–125; A. T. F. 60-II–300.

[20] A. T. F. 63-II–308.

[21] A. T. F. 57-II–72.

[22] A. T. F. 44-II–432.

[23] A. T. F. 44-II–492.

[24] Obcansky Zakonnik (Czech Code) § 36.

[25] *Ibid.*

[26] *Supra* note 24, § 4.

[27] *Supra* note 24, § 35. Unilateral contracts concluded by foreigners, being the debtors, are governed by Czech law or by the law of the nationality of the foreigners, depending upon which law is more favorable to the contract.

According to Italian law, contracts are governed by the *lex loci contractus* but if the parties are of the same nationality then by their *lex patria*. But it is always open to the parties to prove a different choice of law.[28]

The Polish Statute of 1926 provides an infinite variety of rules. The parties are free to choose for their contract one of the following systems: the *lex patria,* the *lex domicilii,* the *lex loci contractus,* the *lex loci solutionis,* or the *lex res sitae*.[29] Lacking a choice by the parties, the following system | is applicable: in contracts referring to stock exchange and other markets, the law governing the market concerned; as to land, the *lex res sitae;* for retail commerce, the law of the residence of the vendor; all insurance contracts, the law governing the insurance company; professional contracts, the law where the profession is exercised; labor contracts generally, the law of the place where the labor was done.[30] In all other contracts not mentioned above: if the parties are domiciled in the same country, the law of the domicile; if not domiciled in the same country, then the law of the debtor's domicile in the case of unilateral contracts; in the case of bilateral contracts, or if the domicile of the debtor is unknown, the *lex loci contractus*. For the purpose of this statute the *lex loci contractus* is the law of that place where the offeror receives the acceptance.[31]

More general rules, in this respect, are applied in Germany. In the first instance, the principle of free choice of law by the parties is recognized.[32] However, this does not mean that the parties may choose any law they may desire. A decision of the Reichsgericht, the highest court of the country, handed down in 1895, before the introduction of the new code of 1900, but which is still regarded as authority today, held that a marriage brokerage contract between two domiciled Saxons, executed and performed in Saxony, could not be submitted by the parties to the law of Prussia.[33] It is therefore suggested that the parties may choose the system of law they desire only so far as their contract has a certain connection with the system chosen.

In case the court is unable to find an expressed intention in the contract it

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[28] Art. 9, § 2, disp. prel. c.c.; Art. 58, c. comm. Udina, 6 Repertoire de droit international 510–12.

[29] Art. 7, Statute of 2.8 (1926); cf. Makarov. in Leske-Loewenfeld: 8 Die Rechtsverfolgung im Internationalen Verkehr (1929) 145 sq. no.

[30] *Id.* art. 8.

[31] *Id.* art. 9.

[32] *E.g.,* Gz. 145, 121 (1934); IPR. Rspr. (1934) n. 29; I. W. 3121 (1935) 33; Bull. Inst. Jur. Int. 71, no. 8792; (1935) Rev. crit. 447, with note by Mezger surveying the cases; RGZ. IPR. Rspr. (1934) n. 19; RGZ. 142, 417, 23; (1933) n. 21; (1931) nn. 30–32; (1930) nn. 30–31, 40, 48; (1929) nn. 31, 36, 43. It must suffice to refer to these cases and to Lewald, Das Deutsche Internationale Privatrecht nos. 260–268, 10; Repertoire de droit international 71, n. 5; 73, n.–12; Haudek, *op. cit. supra* note 6, with numerous quotations at 47, n. 2.

[33] RGZ. 44, 300; Lewald, *op. cit. supra,* at 212, n. 269; 10 Rep. 79, n. 39.

has to look for a tacit one. Lacking this, | the court is entitled to find the intention of the parties from the circumstances of the case and what system of law the parties would have chosen if they had ever considered the matter.[34] In addition the court may, in the last instance, apply the test of the *lex loci solutionis* – the law of the place of performance.[35] It is difficult to say when and how the courts apply one or the other of these tests, as it is nearly always possible to construe a fictitious intention and find that intention to be the *lex loci solutionis*.[36] It may be stated with some confidence that they are applied vicariously and that the *lex loci solutionis* is used as the last resort.

It is universally agreed that the English rule with respect to the essential validity of a contract calls for the application of the proper law of the contract. This, according to Professor Dicey's Rule 155, is the rule that governs, and he states it to be: »The proper law [of the contract] is the law by which the parties to a contract intend the contract to be governed, or the law or laws to which the parties intended to submit themselves.«

The English courts have paid, and still continue to pay, great deference to the authority of Dicey, but no case has yet arisen wherein there was an express intention that a specific system of law should apply, with the possible exception of the case of the *Torni,*[37] but this is a doubtful case at best. Inevitably the courts are forced to deduce a presumed intention. This, of course, is really an objective test. Cheshire and Westlake[38] both contend that the courts adopt the objective test in every instance and therefore reject Dicey's theory of the proper law.[39]

In attempting to find this proper law of the contract the courts have availed themselves of a number of rebuttable presumptions. The first of these presumptions is the *lex loci contractus* or the law of the place where the contract was | made. This is always indulged in when the contract is to be performed where it was made or where no place of performance is specified.[40] If, on the other hand, the agreement between the parties is to be performed at a place other than that of the making, the presumption is that the law of the place of performance was intended by the parties.[41] Thirdly,

[34] See *supra* note 32; RGZ. IPR. Rspr. (1930) nn. 32–33, 34; RGZ. 126, 196 (1929) n. 45. Lewald, *op. cit. supra* note 32, at 212, n. 269; 221, n. 276; 10 Rep. 74–75, nn. 14–17 and the cases quoted there.

[35] See *supra* note 32; RGZ. IPR. Rspr. (1932) n. 27; (1930) nn. 30, 31; (1929) nn. 33, 37, 38, 47, 48, 49; Lewald, *op. cit. supra* note 32, at 224, n. 281, with references.

[36] See Lewald, *loc. cit. supra* note 32.

[37] The Torni (1932) Probate 27 at 78.

[38] Cheshire, Private International Law, 249 *et seq.;* Westlake, Private International Law (7th ed. Bentwich) 299 *et seq.*

[39] Dicey, Conflict of Laws (5th ed. Keith) Rule 155 at 647 *et seq.* and 958 *et seq.*

[40] P. & O. v. Shand (1865) 3 Moo P. C. (N. s.) 272.

[41] Chatonay v. Brazilian Submarine Telegraph Co. (1891) 1 Q. B. 79; Benain v. Debono (1924) A. C. 514.

and this is a very rare case, where, in the case of maritime contracts, specific reference is made by the parties to the law of the flag of the ship as the governing rule, a court will adopt that law as conforming with the intent of the contracting parties.[42]

Although throughout the numerous jurisdictions that comprise the United States, support can be found for almost every doctrine concerning the law governing the essential validity of contracts, it seems to be widely held, if in fact it is not the majority rule, as stated by Corpus Juris: »A contract is governed as to its intrinsic validity and effect by the law with reference to which the parties intended, or fairly may have presumed to have intended, to contract, the real place of the contract being a matter of mutual intention except in exceptional circumstances evincing a purpose in making the contract to commit a fraud on the law.«[43] »The intention of the parties may be either expressed or implied from their acts and conduct at the time of making the contract.«[44] However, express provisions as to the law they desire to govern their contract must be made in good faith by the parties or the court will not give effect to them.[45]

When construing this intent, the American courts have usually presumed, when no further statement was made, that the law of the place of contracting was intended by the parties because of the fact that they made their contract in that place, or, as it has been put, the contract is governed by the *lex loci contractus* unless a contrary intent appears to have been in the minds of the parties.

| However, where the contract is made in one country or place, to be performed, wholly or in part, in another place, the proper law, particularly as to performance, may be presumed to be the law of the place of performance.[46]

Neither of these main presumptions is, as to the leading rules, conclusive as to the intention of the parties but they are important indicia of that fact.[47] Professor Beale does not see the intention of the parties as the basis of the law which ought govern contracts. His interpretation of the American cases does not place the intention of the parties as the leading rule. Considerable may be said for that opinion as it is often very difficult to find out,

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[42] Lloyd v. Gilbert (1865) L. R. 1 Q. B. 115.

[43] 13 C. J. 277, § 19 *et seq.*

[44] Bertonneau v. Southern Pacific Co., 17 Cal. App. 439, 120 Pac. 53 (1911).

[45] 2 Beale, *op. cit. supra* note 8, § 332.23 *et seq.*

[46] Northwestern Mutual Life Ins. Co. v. McCune, 223 U. S. 234, 32 Sup. Ct. 220 (1911); Am. Spirits Mfg. Co. v. Albany, 164 Ill. 186, 45 N. E. 442 (1896); Hall v. Cordell, 142 U. S. 116, 12 Sup. Ct. 154 (1891); Doughery v. Equitable Life Ins. Co., 266 N. Y. 171, 193 N. E. 897 (1891); Old Dominion Copper Mining Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193 (1909).

[47] Mayer v. Rochw., 15 A. 235.

from the mere reading of a case, whether the judge applied the *lex loci contractus* as a rigid rule, or found that rule to have been intended by the parties.[48] It is sufficient to say, however, that rigid rules are applied in some of the states of the Union and the question of whether the rule which seeks to find the intention of the parties or one which lays down an unalterable legal principle is the leading rule is merely an academic quibble. A discussion of the relative merits of the two opposing camps is, however, imperative, and is dealt with in detail below.

Capacity

In French law, capacity to enter into contractual relations is governed by the *lex patria,* or the law of the nationality of the contracting parties, according to the statutory provisions of Article 3, Section 3 of the Code Civile. To this is added the reservation that a foreigner dealing with French citizens in France cannot avail himself of his incapacity if he acted fraudulently and the Frenchman acted in good faith and with due caution.[49]

| Likewise in Swiss Law, the question of contractual capacity is governed by the *lex patria.* But foreigners, capable according to Swiss Law, cannot claim exemption afforded them by their national law.[50] This is also the rule according to the law of Germany.[51]

In accord with the general rule of the Continent as exampled above, the law of Czechoslovakia applies the *lex patria* concerning the question of capacity of foreigners to contract in Czechoslovakia.[52]

Capacity, in Italy, is also governed by the *lex patria* with the reservation that the law of the place of making the contract shall govern commercial contracts.[53] In Poland the *lex patria* is always applied.[54]

The Anglo-American common law here makes a rather sharp break with the Continental tendency and refuses to recognize the doctrine of a personal law following a man wherever he may go. In England, Dicey supported the

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[48] 2 Beale, *op. cit. supra* note 8, § 332.53 *et seq.*

[49] de Lizardi v. Chaise, Cass. req. 16.1 (1861); Sirey (1861) 1, 305, with note by Massé; Lyon, 30.4 (1907); (1908) Clunet 146; (1908) Rev. Darras 630; Cassin (1930) (IV) Rec. des cours 794, n. 94; Niboyet, *op. cit. supra* note 6, at 712, n. 600.

[50] Code civil suisse, Title Final, art. 59; 12 a 14.

[51] *Id.* art. 7, § 3 EGBGB; Lewald, *op. cit. supra* note 32, at 58, nn. 73–77, with cases.

[52] *Id.* § 36. Where foreigners are incapable according to the law of their nationality although this fact was not known to the other party, the contract cannot be enforced but the innocent party has a claim for damages.

[53] Idina, 6 Rep. de droit international 510, n. 127, quoting App. Milan 1.7 (1914); (1914) Rivista di diritto internazionale 610.

[54] Art. 1, Statute of 2.8 (1926).

view that the law of the domicile of the parties should govern, but made vital exceptions to that rule, particularly in the case of mercantile contracts. In the case of these latter contracts, all agree that the *lex loci contractus* must apply although Dr. Cheshire would apply the proper law of the contract to this phase of its validity as well.[55]

There is little doubt that in the United States the capacity of the parties to make a contract is, as a general rule, to be determined by the law of the place where the contract is entered into.[56] However, the law of the place of making the contract will not be given effect, as regards capacity, if it is contrary to the public policy of the forum.[57]

| Form

In French law formalities are governed by the law of the place where the transaction takes place.[58] This is also the rule in Swiss law.[59]

But in Germany, Poland and Czechoslovakia the law governing form is the proper law of the contract. Both countries, however, will recognize the formal validity of the contract if the *lex loci contractus* has been complied with.[60] In Italy the rule prevailing is the *locus regit actum* – the place where the act occurred – but if the parties are of the same nationality it is sufficient that the *lex patria* of the parties has been complied with.[61]

Dr. Cheshire, in his recent work, appeals for the proper law of the contract as governing with respect to form, but he has no authority for that proposition.[62] It is usually held to be the English rule that the *locus regit actum* governs, although no cases seem to exist on the question of the law governing the formal validity of a contract, outside of marriage and revenue cases.

The American rule follows the general trend as stated above.[63] However, as respects formalities in the nature of the Common Law Statute of Frauds, Professor Williston suggests that such requirements be considered a matter of validity instead of a requirement of procedure or evidence, since the parties to a contract normally observe the formalities required to make it en-

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[55] Cheshire, *op. cit. supra* note 38, at 205 *et seq.*

[56] Mathews v. Murchison, 17 Fed. 760 (Cir. Ct. N. C. 1883); Union Nat. Bank v. Chapman, 169 N. Y. 538. 162 N. E. 672 (1902).

[57] Geneva First Nat. Bank v. Shan, 90 Tenn. 237, 59 L. R. A. 498.

[58] Cass. req. 19.5 (1884); Sirey (1885) 1, 113, with note (4) by Lacointa, quoting many cases.

[59] A. T. F. 46-II–490.

[60] Art. 11, EGBGB; art. 5, Statute of 2.8 (1926).

[61] Art. 9 (1) disp. prel. c.c.

[62] Cheshire, *op. cit. supra* note 7, at 243.

[63] Roubicek v. Haddad, 5 L. A. 938.