Because a corporation has a legal personality, the tendency has been to analogize the law on foreign corporations and the conflict of laws part of family law.¹ It is tempting to apply the idea of “personal law” to an organization that has a “personality”, and to introduce concepts of “nationality” and “domicile”. Nationality and domicile are indeed attributed to corporations, though in a different sense from the way in which the terms are used in respect to human beings. But the idea of corporate personality can be carried too far, and there are different views as to its meaning.² “The danger attendant on all doctrines which are founded on presumptions, implications or fictions originally thought to be equitable is that they are apt to be extended by a process of logical development which loses sight of their origin and carries them far beyond the reach of any such justification as they may have originally possessed.”³ Those who favour the “realist” theory, think of a group of people as an “organism”, for certain purposes, having, as it were, a group mind and organs.⁴ As in other departments of private international law, a difficulty in regard to the recognition of corporations is to keep in touch with the commercial realities, and to avoid being carried away by maxims that have acquired the ring of truth by repetition.

The issues which are likely to arise in a conflicts problem on foreign corporations are: (i) Does the forum agree that the foreign

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¹ F. Cr. Baxter, of Osgoode Hall Law School, Toronto.
² Foley, (1929), 42 Harv. L. Rev. 516. Gierke in his Political Theory of the Middle Ages (1900), developed the theory of real corporate personality. See also Loussouarn, Les conflits de lois en matière de sociétés (1949), p. 18 et seq.; Muñoz, Comentarios a los Codigos Civiles de España e HispanoAmerica (1953), pp. 93-100.
court had jurisdiction to do whatever it did?; (ii) What system (or systems) of law should the forum apply to the problem?; (iii) Does the forum consider that a solution which would otherwise follow from its conflicts rules and the applicable law, should not be accepted (in whole or in part) by reason of public policy? Questions (ii) and (iii) are of great importance in regard to the recognition of changes in corporations or their dissolution, public policy arising, for example, in acquisitions of property without compensation, or in legislation transferring corporations to the state.

Recent decisions of the House of Lords concerning an amalgamation of Greek banks, bring out some of the difficulties inherent in this subject. Both the National Bank of Greece and Athens v. Metliss and Adams v. National Bank of Greece (formerly known as the National Bank of Greece and Athens) were concerned with amalgamations under state legislation. In the Metliss case, the National Mortgage Bank of Greece issued bonds which were guaranteed by the National Bank of Greece, both banks being incorporated under Greek law. In 1941, due to the German and Italian occupation of Greece, payments under the bonds ceased, and in 1949 a Greek statute was enacted suspending the service on Greek bonds payable in foreign countries (which included the bonds in question). This moratorium was continued by further Greek statutes until 1955 and it was still in operation, when Metliss, one of the bondholders, issued a writ. In 1953, a decree was promulgated under Greek Law No. 2292, amalgamating the National Bank of Greece and the Bank of Athens under the name of the National Bank of Greece and Athens. The decree provided that the National Bank of Greece and the Bank of Athens should cease to exist “and the entire property of each of them in its whole [assets and liabilities] on the day of publication is considered as being automatically contributed to the new limited liability banking company by shares, constituted by virtue of these presents, which is substituted ipso jure and without any other formality, in all


This law only applied to Greek banking sociétés anonymes and an amalgamation of the Popular Bank S.A. (a Greek bank) and the Ionian Bank Ltd. (a British bank) was held to be invalid: Council of State Decision No. 722/1954 (1954), 21 Journal of Greek Jurists 865. I am indebted to the Hellenic Institute of International and Foreign law, for this and other information.
rights and obligations of the said amalgamated banks as their universal successor."

Metlis sued neither the original debtor nor the original guarantor, but the National Bank of Greece and Athens. The House of Lords decided that the action must succeed. The main issues were (1) whether the plaintiff (without a plea of novation or statutory assignment) could recover from a person who was not a party to the contract and (2) whether, in any event, the claim would be barred by the Greek moratorium legislation.

The first point was a novel one in English law. It was held by the trial judge, and conceded in the House of Lords, that English law was the proper law of the contract.

The status of the appellant company was “recognized by the courts of” England because it was “incorporated by the law of its domicile.” The position taken by the appellants was that, although they would have been liable on the bonds by Greek law, if sued there, (subject to the effect of the moratorium) they were not liable on the bonds in England—notwithstanding that they had assumed control of assets in England. It was held that the new bank was liable for the obligations of the old bank, despite the lack of a contract between the respondent and the new bank. If the obligation sought to be enforced against the new bank did not arise from a contract, from what did it arise? The approach of Viscount Simonds was to ask what was included in the status of the new bank. “If a corporation exists for no other purpose than to assume the assets, liabilities and powers of another company, what sense is there in our recognizing its existence if we do not also recognize the purposes of its existence and give effect to them accordingly. If, for reasons of comity, we recognize the new company as a juristic entity, neither the Greek Government, the creator, nor the new company, its creature, can complain that we too clothe it with all the attributes with which it has been invested. Thus and thus alone, as it appears, justice will be done.”

Lord Tucker was of the opinion that the identity of the old bank had become merged in the amalgamation, and so, notionally at least, the old bank with its rights and obligations still lived in the new bank. “Why an English court should be compelled to recognize that part of the decree which has extinguished the old bank but refuse to give effect to matters which are of the essence of the process of amalgamation I find it difficult to understand.”

An amalgamation of two companies may be said to involve both

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8 Supra, footnote 5, at p. 512.
9 Ibid., at pp. 521-522 per Viscount Simonds.
10 Ibid., at p. 522.
11 Ibid., at p. 525.
12 Ibid., at p. 529.
an element of notional continuity of existence, after the merger, in order that justice may be done to those to whom the original companies were obligated, and an element of discontinuity in that a new legal personality has been created and the former legal personalities have been dissolved. This duality has been considered in various jurisdictions.\textsuperscript{13}

Lord Keith of Avonholm stressed the element of continuity and likened the appellant to a universal successor of the former banks, saying that the universal successor "is no more to be regarded as a new party introduced into a contract than is an executor or administrator of a dead man’s estate in English law". "The extinction of a corporation under statute or decree and the passing of all its rights and liabilities to a successor exhibits, in my view, all the features of a universal succession. It may not generally be so regarded, but the consequences appear to me to be in many respects indistinguishable."\textsuperscript{14} Where the sense of the amalgamation is to produce something which can fairly be described as a universal succession, the essential element is the continuity of rights and obligations. The dissolution procedures are the funeral rites of the old companies. In the present case, Greek law specified that the new bank was the universal successor. The reasoning would, therefore, appear to be (i) that the proper law of the contract on the bonds was English law; (ii) that the debtor under this contract was a legal personality created under Greek law to which certain things had happened under that law involving amalgamation and the vesting by universal succession in the new bank of the rights and obligations of the original debtor; (iii) that English law would recognize the status of the original debtor and the changes therein, and as part of the process of recognition, would look to Greek law for the scope, incidents and content of the status of the new

\textsuperscript{13} Cf., for example: "On explique parfois ces solutions en disant que la fusion n’est pas une dissolution mais une transformation de la société absorbée. Cette thèse est inexacte. À la différence de la simple transformation, la fusion suppose dissolution de la société absorbée, ou des sociétés combinées et création d’un être moral différent.” Hamel and Lagarde, Droit commercial (1954), Vol. 1, s. 766. The winding up of an old company in an amalgamation “n’est determiné, comme à dissolution, à liquidation et partilha do patrimônio social... A sociedade, no caso de fusão — cessa a sua existência como organização independente, mas — essa existência continua embora num condicionalismo diverso”. Coelho, Lições de Direito Comercial (1952), Vol. 2, s. 62.

bank in relation to the obligations of the old bank. This would imply that, subject to any operation of public policy, the English courts would recognize and accept whatever transformations Greek law might produce on the rights, powers and obligations which form the content of the status of the bank.

On the question of the moratorium by Greek law, it was held that whatever effect the moratorium might have had on a claim in a Greek court, it could not have extra-territorial effect nor bar a claim in an English court. Even if the old bank had been sued in England, the moratorium would have had no effect. The nature of the obligation should be determined by the proper law of the contract, not the law governing the status of the debtor.16

Basically, the Metliss case involves the analysis of a contractual obligation, subject to English law. But no doubt there were assets available in England, otherwise the respondent would not have troubled to sue in England as he did.16 It has been said that there is "every reason, if the authorities permit it, for giving effect to the simple rule that generally property in England is subject to English law and to none other".17 It was stated in the same case that there "is little doubt that it is the lex situs which as a general rule governs the transfer of movables when effected contractually. The maxim mobilia sequuntur personam is the exception rather than the rule, and is probably to be confined to certain classes of general assignments such as marriage settlements and devolutions on death and bankruptcy".18 If the Metliss situation had been approached from the starting point of ownership of property in England and not from that of enforcing the bond, that is, from the standpoint of rights in rem in such property, and not rights in personam under the contract, then it would seem that the basic law applicable would again be English law (as the lex situs). The property question to be determined under this law would have been — under what conditions or whether at all, could the new bank have laid claim to the property in England? The machinery of transmission was Greek, namely the amalgamating statute. Can property in England be effectively transferred inter vivos by a Greek statute? The trans-
ferring legislation is not part of the *lex situs*. Can it therefore, be argued that the transfer is ineffective? If the National Bank of Greece and Athens became the owner of any property in England, that would be as a result of its status by amalgamation recognized by English law. The transfer of title must be brought within the *lex situs*, otherwise it will be open to doubt whether it is of any effect.

Might English law have recognized that the identity of the old bank had been transformed by merger with another bank, without loss of continuity, and without real termination of personality? If so, the *lex situs* could then recognize a continuity between the old bank and the new amalgamated bank. The *lex situs* would only refer to the foreign law for verification of the juridical “fact” of underlying continuity of ownership through the amalgamation process. Clearly, on such a view, the title and incidents of ownership (such as claims of creditors) of the old bank and of the new amalgamated bank, must be the same. Although the governing law was English law, it is clear that some reference must be made to Greek law, if only to find out what has happened to the old bank, and what relationship the new bank bears to it. The crucial question would seem to be, how extensive should be that reference. Should it be merely an enquiry as to the continued existence or not of the debtor or property owner? Could the personality of the old bank be traced into the amalgamation? Lord Keith of Avonholm considered that the new bank had “the status and the liabilities of a universal successor”. In such a transfer, the property passes to the successor subject to the claims of creditors against that property in the hands of predecessors. Greek law should only determine the correct relationship between the old and the new banks, and on the *lex situs* (as the proper law of the transfer) and not on Greek law should depend the incidents of the transfer and whether the assets continued to be available to a creditor. The creditor “will not have lost in a universal succession, the security of the debtor’s assets which will have passed to the successor and be available for the creditor, whereas in a novation no transfer of assets need take place at all”. If it is considered that there is no

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20 The position by Greek conflicts rules would seem to be that in matters relating to the existence of the new or the absorbing company the amalgamation is governed by the law of the seat of this company. (See footnote 7, supra. The applicable conflicts rules are those of the forum.)

21 *Supra*, footnote 5, at p. 531.
continuity of personality, then the introduction of the new bank as a new debtor under the old contract or as a new owner of assets in England, must be derived from the status of the new bank. This status was created by Greek law, and so the reference must be to that law to determine if the new bank can be introduced as a new debtor or a new property owner. The practical importance of what might be termed the “continuous” and the “discontinuous” approaches to foreign merger problems seems to be that with the “continuous” approach the proper law of the contract or transfer does not abrogate in favour of the law of the place of amalgamation, except to establish the “fact” of continuity. In the “discontinuous” theory, creditors must, in general, spell out from the law of the place of amalgamation whether the new corporation is liable for the old debts.

This difference in approach did not affect the result of the Metliss case, but it had a bearing on a later decision involving the same amalgamation. The Metliss proceedings were raised in December 1955, and four days after the trial judgment was given in that case, the Greek law was altered by Legislative Decree No. 3504. This decree provided that the new bank was the universal successor of the old banks “with the exception of the obligations of these companies as principal debtors, guarantors or for any other cause deriving from bonds, securities in general or contracts or any other cause and relating to loans in gold or foreign currency by bonds or otherwise payable to the bearer issued by the limited liability companies, juridical persons of public law, municipalities and communes, etc.”. This alteration was made retrospective and the new corporation was declared to be governed as from its creation by Greek Law No. 2292 of 1953 as amended by Decree No. 3504. In July, 1956 certain bondholders presented coupons for payment covering arrears of interest, and payment was refused by both the National Mortgage Bank of Greece and by the National Bank of Greece and Athens. The case of Adams and others v. National Bank of Greece and Athens was then commenced. The trial judge, Diplock J., decided in favour of the bondholders on the ground that Decree No. 3504 represented an interference with vested rights. In Lynch v. The Provisional Government of Paraguay, X died domiciled in Paraguay leaving personal property in Eng-

22 Viscount Simonds said that: “The new company is a new juristic entity which was not a party to any contract with the respondent...” Ibid., at p. 524.
23 See supra, footnote 6.
24 (1871), L.R. 2 P. & D. 268. See discussion of this case by Grodecki (1961), 24 Mod. L. Rev. 711.
land. After his death, but before probate of his will, a decree was passed in Paraguay to the effect that all the property of the deceased, wheresoever situate, belonged to the nation of Paraguay. It was argued that this decree, by the law of Paraguay, was retrospective to the date of death. Lord Penzance asked if English law, in a succession question, adopts "the law of the domicile as it stands at the time of the death, or does it undertake to adopt and give effect to all retrospective changes that the legislative authority of the foreign country may make in that law? No authority has been cited for this latter proposition and in principle it appears both inconvenient and unjust". The trial judge said in relation to this principle, that although Lord Penzance, when dealing with a grant of probate "appears to have based it as much on convenience as anything else, I think that probably the true basis is that which I have expressed above, namely, that a law which regulates the rights of persons who are already successors is not a law of succession, and the English courts recognize as affecting movable property locally situate in England only the law of succession of the country of domicile of the deceased".

Diplock J. considered Decree No. 3504 to be not a law relating to succession or status, but in substance a law which attempted to discharge liabilities and to alter vested, contractual rights. To succeed, the defendants would have to show that their liability, which existed immediately prior to the passing of Decree No. 3504, had been discharged. If this Decree "is a law which in substance merely discharges [as from the date of its enactment] the liability of (inter alia) the defendants from liabilities which include (inter alia) liabilities under the contract of guarantee contained in the bonds whose proper law is English, it is in my view beyond question that an English court will not treat it as effective to do so, so far as the liabilities under a contract whose proper law is English law are concerned".

If the Greek legislation had not taken the course which it did, but there had simply been passed in Greece in 1952 "a law saying that the National Bank of Greece S.A. had not the capacity to pay the interest on this issue of bonds, or any particular class of bonds which it had already issued, or that it was ultra vires for them to do so, would the English court have given effect to such a law? The answer is, I think, plainly no. The reason being that such a law is not in substance a law relating to capacity or 'status';

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26 Ibid., at p. 271.
it is a law discharging a liability”. Such a law would have been of a confiscatory character, rendering nugatory a vested right to the payment of interest, and so would not have been recognized in England. The law governing the discharge of the liability to pay interest would be English law. The Greek law would be without extra-territorial effect and would not be the kind of foreign law which English law would be prepared to recognize, since if recognized, the effect would be to destroy vested property rights without compensation. Is there an element of public policy in this, at least implicitly, on the basis that the applicable content of the proper law may include not merely statutes and decisions of that law, but also by recognition, laws or decisions from systems other than the proper law? Suppose, for example, that a Greek law had been passed, not discharging the interest liability, but providing for an additional bonus to all English bondholders, would the Greek bank have been able to argue successfully in England that such legislation was not part of the proper law and could not, therefore, create an alteration of a contract governed by that law? Is recognition confined to status, capacity and the like? In any event, there is still involved a question of classification of a particular law as pertaining either to status or to the discharge of a liability. If a law provides for the amalgamation of X and Y to form Z, Z to take over the assets of X and Y but to have no responsibility for certain liabilities of X and Y, can it be said that this legislation is not concerned with status? This law creates a change of status of a kind which, if recognized by the proper law of the contract, would produce a discharge of liabilities already existing under that contract. There is a problem of characterization (qualification), and the law in question is associated both with changes in status (amalgamation) and with a variation of property rights—and not exclusively with either. This is a different kind of question from that concerning the moratorium in the Metliss case, since the moratorium question clearly applied to the suspension of liabilities and not to status. In the Adams case, the trial judge resolved the characterization problem by holding that the Greek law was not in substance a law relating to status, but was a law relating to the

28 Supra, footnote 26, at p. 77. In general, of course, the law governing the obligations of a corporation may not be the same as the law governing its status. This principle is not confined to the common-law systems. For example, Niboyet states that: “Les responsabilités et obligations légales sont indépendantes de toute question de capacité . . . . La loi applicable sera celle qui s’applique à chaque obligation légale elle-même, sans avoir à tenir compte de la loi organique de la personne morale.” Traité de droit international privé français (1948), Vol. V, s. 1567.
discharge of liabilities. The Greek statute passed in 1952 merely discharging the interest obligations in the bonds, was, he thought, a law relating to discharge of liabilities. There is another question which arises in this connection. Let there be a change of status A in country R, which produces a discharge of a liability which had existed in the law of R in accordance with the status which preceded the change A. Let A be effected either by a statute or by a decision of a court in R. The status prior to the change A had been recognized in country S, and the liability in question had then been regarded as valid by the law of S. Should the change A also be recognized in country S? A somewhat analogous situation has arisen in relation to the recognition of foreign nullity decrees. For example, a foreign nullity decree may be recognized in England (subject to jurisdictional requirements) and may be regarded as a judgment in rem on the matrimonial status of the parties. But the parties will have had the status of married or unmarried persons vis-à-vis English law prior to the foreign decree, depending upon whether their marriage was valid or not by that law. The foreign judgment may have the effect of rendering invalid a marriage formerly regarded as valid by English law and so of destroying the right to alimony, or perhaps rights under a separation contract. However, in matrimonial law, it does not seem to be an objection to the recognition of a foreign decree, that it may destroy a pre-existing entitlement to alimony founded on the validity of the marriage by English law.

The decision of the trial judge was reversed in the Court of Appeal, who said that Decree No. 3504 had the effect of re-defining and varying the status and the attributes applied by Greek law to the appellant bank. It was incorrect to regard the Decree as merely a law discharging contractual rights. It was a law which did certain things to status, and which had a resultant impact on the legal position of the bondholders. One result of the Decree was to render non-existent (by dissolution) the personality of the original debtor. Greek law had power to do this, and such a change of status ought to be recognized by English law. There was no necessity for Greek law to provide a new debtor or guarantor, available to the bondholders. It was necessary to consider the nature of the bondholders' claims. "The claims are not claims in contract against

29 See supra, footnote 1, at p. 331.
the appellant bank. Until Greek law was altered, the position was, as Lord Keith pointed out in his speech in the Metliss case, that the appellant bank represented and stood in the shoes of the contractual guarantor, the National Bank of Greece. They have not done so since the passing of Decree 3504. To establish a claim against the National Bank of Greece and Athens, that bank had to be linked by a chain of responsibility to the original contractual arrangements. Such a link could not be forged without resort to the Greek law concerning the amalgamation. Decree No. 3504 did not provide the necessary link, since it connected the old bank with a new bank which was declared not to have responsibility for the obligations in question. The link could only be provided by Law No. 2292, which was no longer a part of Greek law. The case of the bondholder; therefore, depended on a partially repealed Greek statute. "It seems to us that those who need recourse to Greek law must take it as they find it. If they assert that Greek law can endow, they must recognize that Greek law can disendow. If they aver that Greek law can create, they must accept that Greek law can change. If they need to have the foundation of Greek law upon which to build a claim, they can hardly say that Greek law as it used to be suits them far better than Greek law as it is." The Court of Appeal did not regard Decree No. 3504 as confiscatory or discriminatory in its scope or as of the nature of a foreign penal or revenue law, or as a law such that English public policy would require that it be not recognized.

The position by Greek law after Decree No. 3504 was, substantially, that the assets of the old bank were transferred to the new bank, but not the liabilities. Counsel in the Court of Appeal was asked if a bondholder after the Decree "could opt to wind up the old company in England or was he obliged to pursue any remedy he might have against the new company?" The reply was that he was obliged to sue the new company because all the assets were transferred to it. There could be no winding up of the old company under section 400 of the Companies Act, 1948, since (a) the court would not exercise its discretion, and (b) there would be

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32 Ibid.
33 Ibid., at pp. 81-82. Abrahams, Les sociétés en droit international privé (1957), pp. 130-134 discusses the situation where a foreign company is recognized and then there is a retroactive change of law in the foreign country, dissolving or fundamentally altering the personality of the corporation. He discusses the opinions of Bartin, Roubier and Niboyet, and himself expresses the view that retroactive changes of law should be recognized, but "ces lois rétroactives peuvent aboutir à des effets uniques que le juge étranger peut avoir hésité à appliquer intégralement". Unjust solutions may be avoided by the corrective operation of public policy.
no assets for the liquidator to get in. What would have been the situation if the transfer of the assets to the new bank had not been recognized in England and the English creditors had been entitled to look to the old bank for payment? On the dissolution of the old bank, the English creditors could have applied for a winding-up order under sections 339 and 400 of the Companies Act, 1948. The original guarantor bank, the National Bank of Greece, had little or nothing by way of English assets to be available in an English liquidation. But the other bank in the amalgamation, the Bank of Athens, did have assets in England. Thus, if the situation had been simply a dissolution of the two banks and nothing more, or if the transfer of assets had not been recognized in England, the English creditors of the Bank of Athens could have claimed against substantial assets in a winding-up, but not so the English creditors of the National Bank of Greece. If, however, the assets were regarded as transferred to the new company, and available to creditors of both the old banks, the creditors of the National Bank of Greece would gain by virtue of the change. If Decree No. 3504 were applied in England, the English bondholders would have no claim on the assets there, which would thus increase the availability of assets to creditors whose obligations were not of the type which did not transfer in the amalgamation. Under a simple winding-up of both old companies in England, the creditors of each would be able to claim against the respective English assets. In a transfer of all assets and liabilities to a new company, the creditors of the old bank which had the smaller amount of assets in England would reap an advantage. Under an application of Decree No. 3504, the creditors with non-transferable claims would have no claim and any other creditors of either bank would gain, but not necessarily all to the same extent. The main issues are what law or laws should govern the distribution of certain assets in England, and the extent to which English law should be displaced by Greek law in the determination of these matters.

The decision of the Court of Appeal in the Adams case was reversed by the House of Lords. The approach of the House of Lords was that Law No. 2292 created a transfer of assets and obligations to the new company. This gave the bondholders vested rights to claim against the assets, such rights being recognized by English law. But English law could not recognize an attempt to

34 Ibid., at p. 74. 35 See supra, footnote 16. 36 The English courts might nonetheless have been able to produce a fair result between the two groups of creditors. See [1957] 2 Q.B. 33, at pp. 44-45.
alter that situation retrospectively and so would not recognize Decree No. 3504. Lord Reid said that: "It is well settled that English law cannot give effect to a foreign law which discharges an English liability to pay money in England and the appellants’ contracts were English contracts under which they were to be paid in England." Decree No. 3504 was in substance and effect a law which sought to discharge English liabilities.

The difference between the House of Lords and the Court of Appeal depends largely on which vantage point (in time) is chosen for consideration of the problem. Some Greek law had to be brought into the matter to connect the new bank legally with the plaintiff. The Court of Appeal looked at Greek law at the time of the action, and as at that time, this consisted of Law No. 2292 as amended by Decree No. 3504. The unamended Law No. 2292 was not then part of the law of Greece, and — looking backwards — it had never been part of the law of Greece, by the retroactive effect of Decree No. 3504. The House of Lords took a historical approach and examined the law as it had been prior to Decree No. 3504. This law had been recognized in England. The amending Decree was not recognized in England. Hence there had been imported into England from Greece by a process of recognition, a law which, by Greek law at the date of the action, was not and had never been the law of that country. The principle applied by the House of Lords was an adaptation of Lynch v. Provisional Government of Paraguay,37 that the English courts will only recognize the laws of succession in force in the country of the deceased’s domicile at the time of his death. The Lynch decision was based on justice and convenience, or in other words public policy, and so this too, presumably, formed the basis of the decision of the House of Lords in the Adams case. Lord Denning saw no advantage in trying to place Decree No. 3504 in a particular category, such as, a law relating to succession, or a law relating to status. He preferred to

37 See supra, footnote 24. A similar attitude appears to be adopted in French law. Lagarde, Recherches sur l'ordre public en droit international privé (1959), p. 33 states that: "Les successions sont normalement soumises à la loi en vigueur au jour où elles sont ouvertes, de sorte qu'une nouvelle loi s'appliquera non seulement à la succession des individus nés après sa promulgation, tandis que les successions ouvertes ayant la loi nouvelle, mais non encore liquidées resteront soumises à la loi ancienne." Cf. the discussion in Batifol, op. cit., footnote 18, s. 320, on the different considerations which apply as between a change in the law of country A as regarded internally, and the same change as regarded in country B from the point of view of recognition. Country A is concerned with the proper coherence of its various laws, but country B is not similarly concerned in regard to the laws of A. See also Lerebours-Pigeonnier (Loussouarn), Droit international privé (7th ed., 1959), ss. 391-393.
regard it simply as a law defining the attributes of amalgamation.

A distinction is frequently made in European theories, between conflicts in space and conflicts in time. A conflict purely in space is between the law of country X and the law of country Y. An example of a conflict purely in time, would be whether a law of X is retroactive in X, that is whether the new law or the old law of X should apply to a certain situation. The Adams case is an example of successive laws in time which produce a conflict in space (whatever they may produce in time, in the internal law of Greece).

Public policy was brought into play to protect what the English court regarded as acquired rights of the English bondholders. The theory of acquired rights seems to have been initiated by the Dutch school of the seventeenth century, and it includes the idea of “importing” into the law of country A by recognition, rights created by some event in country B. This does not involve an application of the law of B within the jurisdiction of A. “It is however the general law of all civilized peoples that, in adjusting the rights of suitors, courts will impute to them rights and duties similar to those which arose in the place where the relevant transactions occurred.” It has been said that: “Le respect des droits acquis s'impose donc en droit international comme corollaire du respect des souverainetés étrangères. Il ne s'impose pas moins au nom de la sécurité des particuliers. Il ne faut pas compromettre la situation des titulaires de droits en remettant sur le tapis des questions déjà liquidées. S'il en était autrement, la société deviendrait un nid à chicane. Et personne ne voudrait plus acquérir un droit, de crainte qu'une vieille contestation, déterrée dans un lieu quelconque où ce droit a voyagé, ne le remette en question, parce que cette contestation serait désormais soumise à des règles bouleversant la solution précédemment appliquée.” Criticisms have been levelled at the theory of acquired rights. In France, Arminjon has opposed the theory on the ground that it is both vague and unnecessary.


39 Savatier, Droit international privé (2nd ed., 1953), s. 304.

40 See, for example, Cook, op. cit., footnote 38.

41 Précis de droit international privé commercial (1948), s. 306. See also discussion in Francescakis, La théorie du renvoi (1958), s. 203.
Choice of law depends on the conflict rules of the forum.\(^{42}\) Suppose that in an issue before the forum X, the conflict rules require that the law of Y should apply, what is meant by the law of Y? The normal answer would be—the current law of Y. However, the courts of X may refuse to apply the law of Y, for example, because its application would produce a solution offensive to principles of morality or justice in X. What is then the applicable law? The usual answer in this case is—the current law of the forum.\(^{43}\) The standard method of solution, then, is to make a choice among current applicable law in the forum and in foreign jurisdictions. There are, indeed, certain situations where current law is not applied. For example, the validity of a marriage is governed by the *lex loci celebrationis* as it was at the time of the ceremony.\(^{44}\) Similarly, questions of succession may be referred to the law at the time of the testator’s death. The position is that the internal law does not apply its current law, but the law as it was when a certain event occurred. The conflicts rules of the forum X as to choice of law, resolve conflicts “in space”, and make a selection between the internal laws of A, B, C, as governing a particular issue. Let the law of A be chosen by this process. There may still be a conflict as to whether the current or the antecedent law of A should be applied and (in general) this question falls to be resolved by the law of A. If public policy rejects the answer provided by the law of A, then we should expect, from general principles, that no part of the law of A will then be applied, but instead that the issue will be determined by the law of the forum. The resolution of a conflict “in time” in the law of A may depend on the content of the law of that jurisdiction and in particular on whether the most recent law is interpreted as retroactive by the law of A. It was clearly so interpreted by the local law in the *Adams* case and in the *Lynch* case. That being so, if the ordinary operation of public policy in conflicts questions had been followed, the foreign law would have been ignored altogether in both cases and English law applied instead. But this was not what happened. In the *Lynch* case, Lord Penzance said: “The general proposition that the succession to personal property in England of a person dying domiciled abroad is governed exclusively by the law of the actual domicile of the deceased was not denied; but it was affirmed by the plaintiff that this proposition had relation only to the law of

\(^{42}\) For a discussion of principles, see Castel, (1961), 21 R. du B. 181.

\(^{43}\) The operation of public policy is discussed in *op. cit.*, footnote 1, at p. 307 et seq.

the domicile as it existed at the time of the death of the individual in question, and that no changes made in that law after the date of the death can by the law of this country be recognized as affecting the distribution of personal property in England. This contention appears to me well founded. It was also stated in Re Aganoor's Trusts that English law adopts the law of the domicile as it stood at the time of the testator's death. Thus, it would seem that in certain cases the English courts are prepared not merely to make a choice of which legal system will govern, but also, with the aid of public policy, to determine (within the chosen system) whether the current law will govern, or the law as it was at some prior time. English law is prepared, therefore, to resolve both (a) a conflict "in space" between the laws of A, B, C, and also (b) having chosen the law of A, to resolve a conflict "in time" between \( L_1 \) and \( L_2 \) (two internal laws of A) and to resolve the latter conflict differently from the way in which the law of A would resolve it.

An objection to this attitude by the English courts, is that the court is applying law which, at the time of the proceedings, is not the law of any country. A foreign legal expert giving an opinion at the proceedings would have to say that it was not now and (because of the retroactive legislation) it never had been the law of his country. The conventional application of public policy is that either the foreign law or the lex fori is applied. Questions as between present and past law, are decided, internally, by the foreign law or by the lex fori, whichever has been applied. By what is here described as the "conventional" method, the protection or not of "vested rights" becomes a matter of internal policy, and they are not protected on an "international" basis by the use of supplementary principles.

If the facts of the Adams case had been different, and if the original Greek statute had combined the results of Law No. 2292 and Decree No. 3504, so that the amalgamation took place from the

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46 (1895), 65 L.J. Ch. 521.

47 Cf. the decision of the Tribunal de commerce of Brussels of 24th March 1951, where the court allowed the liquidation of a company according to a former (repealed) Hungarian law, on which Abrahams, op cit., footnote 33, comments (p. 130): "En acceptant la survie d'une loi étrangère abrogée, le Tribunal a imposé sa propre conception de détermination de la loi applicable. Il a appliqué, certes, une loi autre que la loi belge; mais il n'a pas donné compétence à la loi actuelle du pays auquel se rattache la société."

beginning on the basis that assets, but not obligations, transmitted to the new company, what might then have been the outcome of the case? 49 It would no longer have been possible to rely on the earlier Greek statute and to reject the later statute. Public policy could only have operated in one of two ways—(i) to have refused the whole of Greek law and to have applied English law; (ii) to have made a partial application of Greek law (and a partial application of English law). By the first alternative, Greek law would have been ignored entirely and so the original bank would have been regarded as still existing (since nothing happened to it by English law). Since there were few, if any, assets in England there would only be a small recovery in this way, and such operation of public policy would, no doubt, produce in the event, substantially the same result as a combined application of Law No. 2292 and Decree No. 3504, namely, that the English bondholders would get nothing or approximately nothing. In a situation like that in the Adams case, the effect would then be that a country could discriminate against bondholders in another country by passing an amalgamation statute without transfer of obligations, and the public policy of the other country would be more or less ineffective to prevent the discrimination. 50 Another difficulty in regard to (i) is that by it, the law of one country ignores an alteration of status which is valid by the law of another country, although what is offensive to public policy is not the change of status as such, but the incidents of the change of status. The recognition of a status without the necessary acceptance of the incidents attached to that status by the law of the place where it was acquired, is found in other fields of law. For example, the recognition by country M of a divorce obtained in the courts of country N, does not normally include acceptance and adoption in M of provisions as to maintenance, custody of children, and the like, contained in the divorce judgment in N. 51 Possibility (ii)—that there should be a partial application of Greek law—raises the question, what part of Greek law, and the further question whether Greek law in a partial or incomplete state (such as adoption of Law No. 2292 and refusal of Decree No. 3504) really represents a reference to Greek law at all, in the sense

49 The interest payments which were sued upon in the Adams case were presented for payment subsequently to the passing of Decree 3504, so that when the amounts became due, Law 2292 and Decree 3504 were both in operation. See [1960] 1 Q.B. 64, at pp. 78-79, 85.

50 If both new banks were substantially without assets in the forum, not much could be done anyway.

51 Unless, for example, there may be machinery in M for the enforcement of a judgment in personam for a sum of money.
normally contemplated. There would appear, *prima facie*, to be logical difficulties attached to both method (i) and method (ii) although the result in the *Adams* case was no doubt fair, in the circumstances. If a reference is made to a system of law other than that of the forum, it is very important that the questions put to the foreign law should be correctly formulated. For example, the foreign law might be asked to determine whether X company, which was not the original guarantor of a debt, was now liable under the guarantee. On the other hand, it might be asked merely about the "status" of the original guarantor company, and whether it could be said that its existence as a legal person had, in substance, been continued into the amalgamation. Before discussing these matters further, other aspects of the status of foreign corporations will be considered.

After the revolution in Russia, there was wholesale nationalization of companies, some of which had foreign branches and assets. Litigation followed in various jurisdictions on the distribution of the assets. In *A.M. Luther v. James Sagor & Co.*, the plaintiffs' timber mills in Russia were seized by the Soviet government without compensation. Later, agents of the U.S.S.R. sold to the defendants some of the timber which had been seized. It was argued that the English court was not bound to accept as valid all the acts of a foreign government which had been recognized by Britain. The Soviet confiscation was "not an act to command respect by any innate justice or morality. It is contrary to English political principles and ought to be disregarded". This argument failed. There are few occasions when English law, for reasons of public policy, will not enforce a right duly acquired under the laws of a foreign country, and the fact that the property had been taken by the state without compensation did not of itself make the acquisition contrary to public policy. Scrutton L.J. said: "Individuals must contribute to the welfare of the state, and at present British

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citizens who may contribute to the state more than half their income in income tax and super tax, and a large proportion of their capital in death duties, can hardly declare a foreign state immoral which considers (though we may think wrongly) that to vest individual property in the state as representing all the citizens is the best form of proprietary right. The question before the court concerned title to goods, which title was valid by the lex situs of the timber (prior to its export to England) and by the law of the place where the plaintiff company had been incorporated and had carried on business. Thus, Soviet law applied to the transfer of title from the plaintiffs to the state. If the situs of the goods is not within the jurisdiction of the state which had made the law affecting the title, that law will not govern the situation (except by extra-territorial recognition, if such exists). In a case in France, certain ships of the Russian merchant fleet had belonged to a private company before the nationalization decree in 1918. These ships came to Marseille and were claimed successfully by the company. The judgment of the Cour de cassation was: "At tendu que si, en principe, les tribunaux d'un Etat, lorsqu'ils sont appelés à apprécier une situation juridique née sous l'empire d'une législation étrangère, doivent le faire en appliquant la loi étrangère, cette règle ne les oblige que dans la mesure où l'application de la loi étrangère ou le respect des droits acquis en vertu de cette loi ne porte pas atteinte à des dispositions de leur loi nationale considérées comme essentielles pour l'ordre public." Article 545 of the French Civil Code prohibits the taking of property without compensation and the ships were in a French port at the time of the action. In Banco de Viscaya v. Don Alfonso de Bourbon of Austria, the defendant's property had been declared confiscated by a decree of the Spanish Government. A dispute arose as to some property of the defendant, deposited with the Westminster Bank in London to the order of the plaintiffs, who were a Spanish bank. It was held

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56 Bank voor Handel en Scheepvaart v. Slatford, see supra, footnote 17. As to similar decisions in Sweden, reference German anti-Jewish legislation, see Castberg, op. cit., footnote 52. See also Seidl-Hohenveldt, (1952), 1 Am. J. of Comp. L. 122. In Anglo-Iranian Oil Co. Ltd. v. Jaffrate, (1953) 1 W.L.R. 246, at pp. 253, 259, it was considered that the rule that a court should not enquire into the validity of foreign legislation on property within its territory, applies only to the property of nationals of the foreign government.
57 Req., 5 March 1928, Lagarde, op. cit., footnote 37, pp. 27 and 52.
that the confiscatory decree did not have effect in England and that the defendant's title was still good in that jurisdiction. The decision was based on a principle that the penal laws of foreign countries will not be enforced. "The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority." The judge did not determine the applicable law with reference to title. The securities consisted of £8,200, four per cent Victory bonds and 4,000 shares in Trinidad Central Oilfields Ltd. It was arguable that the lex situs was English law (or at least that it was not Spanish law), and that title to the securities could only be lost by an effective transfer of the title under the applicable law.

In such cases the problem is one of title, the competing parties are (a) the title-holder before the confiscatory decree in country X, and (b) whoever claims title by the decree. The first question is: what is the applicable law by the conflict rules of the forum for the transfer of property of the relevant type? If the law of X applies, the decree will be effective, unless the forum refuses to apply the law of X for reasons of public policy. If that happens, the governing law will be the law of the forum. If the law of country Y pertains (where Y may be the forum) the next question is: what is the content of the law of Y on this point? The decree in X will not operate directly in Y (where X and Y are sovereign states). It can only have effect in Y if the law of this country is prepared to import it by a process of recognition. Should Y ever recognize the statute law of country X and the consequences of that law? If not, a change of status by a statutory divorce would not be recognized. Is there any reason in principle why, in regard to recognition, a distinction should be made between a foreign statute and the decision of a foreign court? If Y recognizes the consequences of a statute of X it does so by virtue of the policy of its own law, for the statutes of X do not run in Y. The typical situation is where, by an event in country U such as a statute or a court decision, a legal attribute A is transformed into B, where B may be another legal attribute or zero, and the question is: what attitude does country V take to the transformation A → B? There is no reason, prima facie, why V should "bend" any of its laws into conformity or even substantial conformity with those of another state. It may, 

61 As to the situs of shares, see *Falconbridge, op. cit.*, footnote 18.
however, be thought desirable in \( V \), as a matter of policy, to regard the particular attribute \( A \) as subject there also to the transformation \( A \rightarrow B \). The idea of recognizing a particular transformation \( A \rightarrow B \) can be extended to classes of transformations, for instance, \( C \rightarrow C_1 \), where \( C \equiv C (A_1, A_2, A_3, \ldots) \), and \( C' \equiv C (B_1, B_2, B_3, \ldots) \). Policy attitudes become extended by recognition of transformation classes and may emerge finally as principles of law, part of the conflict rules of a state. The rules of recognition may be regarded as crystallized public policy. The conflicts rules of a country should designate the law of a uniquely determinable country as the law governing title.

The analysis of a recognition problem should therefore be, in general terms: (i) to determine the applicable law; (ii) to ascertain from that law whether any relevant transformation has taken place; (iii) if one has, to recognize—not the foreign law which produced the transformation—but the effect of the transformation, so as to determine, for example, the juridical "fact" whether \( R \) is a titleholder, whether \( S \) (a corporation) still exists, whether \( T \) is married, and so on. It is convenient that a piece of property should have the same owner in different jurisdictions; that a company should exist or not exist uniformly in different countries; that a person should be married or not universally. But there is no obvious reason why recognition should go beyond the extra-territorial acceptance of these "facts", or "transformations". In the *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, a Russian bank had a branch in England. By direction of the head office, the English branch deposed with a London bank certain bonds to be held on account of a French bank as security for a credit by that French bank for the benefit of the Russian bank. After the Soviet nationalization, the branch manager paid a sum to the French bank to clear the amount due and to obtain release of the bonds. The French bank refused to release the bonds on the ground that the branch manager's authority to receive them had been determined by the Soviet decrees. The Soviet government was recognized by the British government. The House of Lords were not satisfied on the expert evidence that the decrees passed by the Soviet government were effective (by Soviet law) to dissolve the company. If the Soviet government had effectively dissolved the bank by the law of the U.S.S.R. that result would have been recognized in England.

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By English law, the courts have jurisdiction to wind up foreign corporations either registered in England or having a place of business in England, but not registered in Scotland or Northern Ireland. The corporation has a ghost existence under the statute for the purpose of winding up. The position at common law, if the foreign company is regarded as effectively dissolved by the law of its incorporation, is that the company is then a non-existent person and cannot sue in England. This was decided in the *Russian and English Bank v. Baring Brothers and Company*, where Eve J. followed the statement by Scrutton L.J. in *Banque Internationale de Commerce de Petrograd v. Goukassov* that: “In the case of artificial persons, the existence of such a person depends on the law of the country under whose law it is incorporated, recognized in other countries by international comity, though its incorporation is not in accordance with their law. If the artificial person is destroyed in its country of origin, the country whose law creates it as a person, it appears to me it is destroyed everywhere as a person.” Similarly assets cannot vest in a non-existent person, and the prevailing view seems to be that assets in England of a dissolved foreign corporation belong to the Crown as *bona vacantia*. There is indeed a dictum of Lord Finlay in *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* which appears to suggest that a branch which has been carrying on business for some time, may continue to function for the purpose of getting in the assets and discharging existing liabilities. Though this view has not found favour in later cases and does not seem to be supported by authority, it has a kind of parallel in the situation where a partnership is dissolved by the death of a partner, and the

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63 The Companies Act 1948, 11 & 12 Geo. 6, c. 38. See M. Mann *op. cit.*, footnote 52, for a very interesting discussion of the position in English law of the dissolved foreign corporation. There is provision in Canada for winding up a corporation having an office in or carrying on business within Canada. See the Bankruptcy Act, R.S.C., 1952, c. 14, s. 2 (c), (f), (i), (j), (m), and the Winding-up Act, R.S.C., 1952, c. 296, s. 6.


65 [1923] 2 K.B. 682, at p. 691. See also *supra*, footnote 62.

66 See Mann, (1955), 18 Mod. L. Rev. 8, at pp. 11-12; *Swineburne-Hanham v. Howard*, [1933] 1 Ch. 29; *In re Sir Thomas Spencer Wells*, [1933] 1 Ch. 29.

67 See *supra*, footnote 62, at p. 141.

68 See *Russian and English Bank v. Baring Brothers and Company*, *supra*, footnote 64, at p. 440 et seq.
authority of the surviving partners continues so far as necessary
to wind up the partnership affairs. A winding-up order may
be granted if there are assets in England, even though the foreign
corporation does not have a place of business in England. In *Re Tovarishestvo Manufactur Liudvig-Rabenek* [71], some directors of a
Russian company came to England and transacted business from
a hotel there. There were assets outstanding in England after the
Russian decree dissolving the company, and it was held sufficient
to warrant a finding that the company was carrying on business
in England. A similar question arose in *Banque des Marchands de
Moscou v. Kindersley.* [72] It was held that there was some evidence
to show that the foreign corporation had been carrying on business
in England within the meaning of the statute. In addition, the
court expressed the view that: "By reason of the total extinction in
Russia of the bank and the absence of any machinery under
Russian law for the due distribution of the assets among the
persons regarded as properly having claims upon them, there
would be, unless the machinery of winding up under the Companies
Act is available, no means of any kind existing for the administra-
tion of the English assets. The existence of assets here, the presence
here of persons claiming as creditors of the bank or said to be
indebted to them, seem to constitute at least the indicia of a business
in some sense formerly conducted here. Where, therefore, the
circumstances exist which, upon the general principle above re-
ferred to, would make the case appropriate for the exercise by our
court of its winding-up jurisdiction, it would appear that the ques-
tion whether the foreign corporation carried on business in this
country would generally be academic, unless it is also necessary
to show that that business was carried on directly and from some
established or specified place or places in this country." [73] It is,
of course, only property in England that can be dealt with under
the English winding-up legislation and this may involve considera-
tion of the locus of a chose in action. [74] If a debt owed by the foreign
corporation is governed by the foreign law, a foreign decree of
nationalization extinguishing the debt will be recognized as effecti-
ave by the forum. [76] Prior to the making of any winding-up order,

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71 [1944] 1 Ch. 404.
72 [1951] 1 Ch. 112.
73 Ibid., at p. 126. The final point in the quotation was decided in the
Rabenek case, supra, footnote 71.
74 *Re Banque des Marchands de Moscou (No. 2)*, [1954] 1 W.L.R. 1108.
76 *Re Banque des Marchands de Moscou v. The Liquidator*, [1952] 1 All
E.R. 1269.
the position of assets depends upon the common law, which means that they are *bona vacantia* until the company is revivified by statute for the purposes of the liquidation.\(^{76}\) This implies that the effect of the statute is to provide a fictional re-creation of the non-existent corporation as a means of distributing assets within the forum, and that the fiction does not operate retrospectively.\(^{77}\)

According to *Naylor v. Brown*,\(^{78}\) the creditors of a dissolved corporation can follow against the members, assets which the latter have distributed among themselves, on the basis that such assets remain in equity assets of the corporation available to the creditors. In *Macon v. Le Croy* it was said that as the company in question was a foreign corporation, "the courts of this state have no authority to dissolve and wind up its business. The rights of courts of equity in this state are limited to taking charge of the property within the jurisdiction of the court and enforcing the rights of creditors here".\(^{79}\) It is obviously just and sensible in any legal system, whether the result is achieved by equity or by statute, that machinery should be available to enable a fair distribution to be made of the assets of a dissolved foreign corporation. The common law position in England, that the assets became *bona vacantia*, was unjust. A corporation cannot make a will, and the law of intestate succession is designed for physical persons. The corporation is dissolved and ceases to exist, thus, it cannot sue or be sued, nor can it appoint an agent, and so on. Thus it is an heirless deceased, and its property is *bona vacantia*. On this reasoning, the fiction of corporate personality, invented by lawyers to enable the company to operate smoothly vis-à-vis third parties, could deprive physical persons of property in which, in commonsense, they have an interest. But the legal personality is an "as if" created for simplicity and efficiency. A fiction can be useful, but it can become unfair if we carry the make-believe too far.\(^{80}\) What is really involved in a corporation is a group of persons engaging in a certain kind of enterprise. If the corporation is dissolved, then we can no longer use the fiction of a single, theoretical "focus" for the group, but must return to the prior realities. The creditors should have first claim on the assets, followed by the various classes of shareholders.

\(^{76}\) *Ibid.*, at p. 1277.

\(^{77}\) But see criticism by M. Mann, (1952), 15 Mod. L. Rev. 481 et seq.

\(^{78}\) (1673), Finch 83. The case concerned a livery company—the Woodmongers Company. See also Williston on Contracts (Rev. ed., 1938), Vol. 6, s. 1960.


\(^{80}\) *Cf.* Foley, *op. cit.*, footnote 2.
The Russo-Asiatic Bank had a branch in Paris and this branch brought proceedings in Belgium against the National City Bank of New York in relation to funds in the hands of the National Bank of Belgium. The Belgian courts considered that they should not recognize the existence of an irregular "société de fait" by French law and as far as Belgium was concerned the Russian company no longer existed. According to Niboyet, by the concept of "société de fait", a company "quoique nulle, qui a néanmoins fonctionné, possède une personnalité de fait qui produit des conséquences assez importantes au sujet de sa liquidation". Such a company, he argues, having been created by the law, even if for a limited purpose, should receive international recognition if the creating law was that of the "siège social", that is, the governing law by French conflicts rules. He also says of the Russian companies: "Considérer hors de Russie, qu'une société russe existait encore, c'était tout simplement tomber dans l'artificiel." The question of the existence or not of a company is really distinct from that of the distribution of the assets of a dissolved corporation. In the latter case, the abstract personality created by the law, has been destroyed, and we are left with a problem involving a collection of assets and a number of claimants—creditors and shareholders. The applicable law in this case, need not be the same as that of the country of incorporation or the "siège social" of the dissolved company. "Selon certaines législations comme la nôtre, la personnalité morale se prolonge durant la période de liquidation des sociétés. Cette personnalité ne peut subsister que dans la mesure où la loi étrangère la conserve. Si elle la supprime dès la dissolution de la société et avant tout partage ou liquidation, on retombe dans un régime de pure indivision soumis aux règles du partage, c'est-à-dire à chaque lex rei sitae des biens, combinée avec le pacte social, en tant qu'il est compatible avec elle." In certain of the French cases, there was no branch in France, but only assets and so there was no basis for the theory of "société de fait". The solution was to apply French law to the distribution of assets, on the basis that the old Russian law no longer applied and that the Soviet law was rejected on grounds of public policy, leaving the distribution of assets to be governed by the lex fori. On the general attitude of the French courts to the Russian nationalization, it has been said that: "Les tribunaux français, à la différence de ceux de plusieurs pays étrangers, notamment des Etats-Unis, de Belgique, de Roumanie,

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82 Loussouarn, op. cit., footnote 2, p. 144 et seq.
estimèrent ne pouvoir refuser leurs effets à ces décrets de nationalisation au nom de l'ordre public en tant du moins qu'ils mettaient fin à l'existence de la personne morale. Mais les tribunaux ayant refusé d'admettre l'expropriation des actionnaires sans indemnité, décidèrent qu'il fallait procéder à la liquidation des biens situés en France sur requête des créanciers ou des actionnaires, et nonobstant la résistance des administrateurs intéressés à la survie de l'affaire."

In another Belgian decision, concerning the Azoff Tanneries Company, the Tribunal de Liège took a rather different view from that taken by the Brussels court in the case of the Russo-Asiatic Bank, and accepted the idea of a "société de fait" to be wound up in accordance with Belgian law. A similar decision was made by the Brussels Court of Appeal in 1947. In 1951, the Tribunal de Commerce of Brussels decided a case concerning a Hungarian company named "Textor", which had been nationalized. The former management of the company, established themselves out of Hungary and relying on the former Hungarian law, brought a summons as "collège de liquidateurs" against a debtor of the company. The court considered that the company was validly dissolved in Hungary but that the nationalization law had no extra-territorial effect. The company, however, could be considered outside Hungary as still subsisting for the purposes of liquidation, the law governing that liquidation being the former Hungarian law. This case, therefore, applied a law which was neither the lex fori nor Hungarian law at the time of the decision.

Questions on the nationalization of Russian companies did not come before the courts in Greece. The Greek courts have no jurisdiction to institute a winding-up in respect of assets in Greece of a dissolved foreign company. Greek law is concerned merely with the recognition of foreign companies and with the question of permitting them to function within Greece. The Greek Civil Code provides for the operation of public policy, and the Greek constitution recognizes the compulsory expropriation of property.

There has been an attempt to build up in relation to corporations, a theory analogous to that of the personal law of an in-

83 Batiffol, op. cit., footnote 37, s. 202; Perroud, op. cit., footnote 52.
85 25th June, J.T., 1948, 104; Abrahams, op. cit., ibid., p. 127.
87 See supra, footnote 47 for a criticism of this decision in relation to the Adams case.
88 See supra, footnote 7.
89 Art. 33.
90 Art. 17.
There are two types of problem in connection with this, (i) how to determine the personal law (ii) to what range of matters does the personal law of a company apply? The theory of the personal law of physical persons is based on the idea of a connection between that person and one system of law, the connection being nationality or domicile. The idea of nationality (with respect to physical persons) involves certain features, such as allegiance, which are hardly compatible with imaginary persons, without straining the concept. Domicile (at least in the sense of main residence) offers a more reasonable possibility, although the determination of the domicile may be difficult, especially in the case of large companies operating in different countries simultaneously.

There is a further problem. The birth of a human being is a physical fact, but the coming into being of a corporation may be valid or invalid by a system of law. If the creation of the company is invalid by the law of X, can it have a domicile or a nationality by that law, since these characteristics belong to existing entities? Let the legal problem arise in X as to whether or not corporation A has been validly created in the eyes of the forum. Is it logical to apply the law of the domicile, for example, to such a problem, when the very question is whether the company exists and so whether qua company, it resides anywhere? A similar question may be asked in regard to the validity of the dissolution of a company. An example of this kind of difficulty occurred in the case of the Russo-Asiatic Bank, to which reference has already been made. The company had lost its legal status by having been dissolved in Russia according to Soviet law. The Belgian court determined whether or not the company still existed by referring that question to a system of law other than the lex fori. But the ultimate decision was that the company did not exist and, therefore, had no domicile at the time that the matter came before the court in Belgium. What then—from the point of view of strict logic—was the justification for referring the matter to Soviet law?

We must see the abstract personality for what it is—a legal fiction. Suppose that certain physical persons X₁, X₂ . . . Xₙ wish to associate for the purpose of trade. It is convenient that the set...
of X’s should be regarded in law, for various purposes, as possessing the group characteristic of being able to function (in law) like a single unit for various purposes. The law adds a new legal characteristic to those already possessed by the n individuals. This characteristic is a “group” characteristic, given to the set \( (X_1, X_2, \ldots X_n) \) by the law of state A. The recognition of corporate personality amounts to whether in the eyes of state B, the set of n persons has or has not a “group” characteristic. It would seem reasonable to refer this question to the law of A (as the \( \text{lex loci actus} \)), without becoming involved in esoteric discussions about whether a non-existent legal person can have a personal law if the rule is that the personal law is the law of the domicile.

The common-law systems tend to favour the law of incorporation as the main governing law for corporations, while the civil-law systems usually prefer the law of the place of the company’s main centre of operations (the “siège social”). Both views seem to be of fairly ancient origin. Rabel says of the anglo-saxon principle that: “The particular historic or rational causes for this rule are not known, although it originated upon the current background of pedantic axioms now antiquated.” By the common-law theory, a corporation cannot change its domicile by transferring the centre of its operations to another country—at least not without being dissolved and reincorporating. The common-law domicile of a corporation is comparable, therefore, with the English

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94 For a comparative discussion of the different points of view, see Rabel, op. cit., footnote 52, p. 3 et seq. Some civil-law systems also make use of the place of incorporation (ibid., p. 22). There is a different point of view in certain Latin-American countries (ibid., p. 24). The recent Greek Civil Code, art. 10 employs the “siège social”, and so did the former Polish Code of Private Inter-Provincial Law, art. 3 (3). See also Nadelmann, (1948), 61 Harv. L. Rev. 804; Weidenbaum, (1938), 36 Mich. L. Rev. 881; White, (1939), 3 Mod. L. Rev. 54; Vaughan Williams and Chrussachi (1933), 49 L.Q. Rev. 334, at p. 346. The “commercial domicile” is a different concept and is concerned with the test of whether a person is an enemy alien or a neutral. See also Halsbury, (3rd ed., 1954), Vol. 7, p. 25; Lewis, (1923-24), 5 B.Y.I.L. 60; Farnsworth, The Residence and Domicile of Corporations (1939), Ch. 3, pp. 69 and 125. The Bustamente Code provides that matters concerning the constitution and manner of functioning of commercial companies and the responsibility of their organs, is submitted to the law governing the “contrato social” (Art. 249). Certain other matters, such as the issue of shares and debentures, and the responsibility of agencies and branches to third parties, are governed by the \( \text{lex loci} \) (Art. 250). The Brazilian \( \text{Let de introdução ao Código Civil} \) provides that group organisations such as companies are governed by the law of the country in which they are constituted. However, they cannot have subsidiaries, agencies or establishments in Brazil until the constitution of these has been approved by the Brazilian government and they are subject to Brazilian law. See Espinola, Do Direito Internacional Privado Brasileiro (1943), Vol. III, p. 1430; Carvalho de Mendonça, Tratado de Direito Comercial Brasileiro (1958), Vol. 3, s. 625.

law domicile of origin of a physical person, whereas the "siège social" is more like the domicile of a physical person in those countries where it is equated to main residence.6 The common-law principle enables a company to have as its governing law, a system other than that of the country which is its main centre of activity. It may, therefore, avoid the application of the law of its "siège social" where the provisions of that law are inconvenient. Perhaps this approaches the French doctrine of "fraude à la loi",97 and the continental lawyer, for this reason may tend to feel some hesitation about such a choice of law principle. On the other hand, a reference to the law of the country of incorporation has an element of certainty about it, in that there is seldom doubt as to which is the country concerned.

Niboyet considers that the law of the place of creation of a company determines such things as capacity and ultra vires—the initial rights and the legal character.98 But in general, the company is governed by the law of the country of its "siège social", or principle seat of operations. The "siège social" will be the domicile and "statut juridique" of the corporation.99 However, it does not follow that this law will apply to obligations between the company and third parties. "Les responsabilités et obligations légales sont indépendantes de toute question de capacité... La loi applicable sera celle qui s'applique à chaque obligation légale elle-même, sans avoir à tenir compte de la loi organique de la personne morale."100 Arminjon supports the idea of a lex societatis to cover the "constitution, la dissolution, la liquidation de la société, sa capacité, c'est-à-dire les pouvoirs de ses représentants, les droits réciproques des associés, leurs obligations à l'égard des tiers...".101 He takes "siège social" in the sense of "siège administratif".102 According to Batiuol:103 "Le siège social est là où se trouvent la direction supérieure et le contrôle de la société... et non celui où elle a seulement son exploitation et une direction de caractère secondaire... C'est la force du système du siège social

96 See Gasque v. Commissioners of Inland Revenue, [1940] 2 K.B. 80, at p. 84. See also Baron Fredericq, Traité de droit commercial belge (1950), Vol. 5, 774, on the subject of nationality and "siège social".
97 See Baxter, op. cit., footnote 1, at p. 310, for a discussion of "fraude à la loi".
99 Ibid., s. 1546. "Le domicile est donc la source de vie comme de mort de la société." s. 1547 (2).
100 Ibid., s. 1567.
101 Op. cit., footnote 41, s. 27.
102 Ibid., s. 44.
103 Op. cit., footnote 18, s. 194. See also Pillet, Des personnes morales en droit international privé (1914), p. 128 et seq. and Abrahams, op. cit., footnote 33, Part 3, Ch. 2 (B).
qu’il y a normalement un lieu unique où doivent se prendre les décisions finales et ce sont précisément ces décisions qui intéressent le droit international privé pour caractériser l’activité sociale quant au pays auquel elle se rattachée.”

As mentioned, the “siège social” may not be so easy to determine in practice as the place of incorporation. “La notion de siège social réel n’est pas rigoureusement attachée à une concentration de tous les éléments de direction. L’un ou l’autre peut-être détaché du siège social statuaire, soit temporairement, soit habituellement sans que celui-ci devienne fictif, pourvu que les organes de direction du siège social demeurent les organes principaux et que les éléments détachés ne constituent que des éléments secondaires. Lorsque les organes principaux siègent dans des pays différents, la tâche des tribunaux est plus délicate. La jurisprudence fait en général prévaloir le lieu de réunion du conseil d’administration sur celui de l’assemblée générale.”

As to the domain of the law of the “siège social”, it has been said that this law, “qualifiée loi nationale régit tout à la fois le contrat de société, les statuts, la constitution de la personne morale, sa publicité, sa capacité, les pouvoirs de ses organes, les causes de nullité, de dissolution, liquidation, l’exercice des actions sociales et des actions individuelles des associés. Son empire est donc extrêmement vaste.”

It would seem that the main argument in favour of the “siège social” as a basis for a lex societatis, as compared with the place of incorporation, is that there is more likely to be a real connection between the company and the former basis than the latter. Under the common-law rule, a company may have as its lex societatis, the law of a country in which its business activity is nominal or even non-existent. On the other hand, the “siège social” may also produce certain unrealities if applied exclusively as the lex societatis. There is a strong argument that matters relating to the incorporation itself, the validity of the documents and procedure, and so on, the dissolution of the corporation, and perhaps amalgamation and fusion, should be governed by the law of the place of incorporation. If a company is incorporated in state R and establishes its seat of management in state S, is it not reasonable that, for example, a question as to whether the incorporation was valid should be determined by the law of R rather than the law of S. It would seem, therefore, that the law of incorporation must be applied to some questions at least. Also, it is possible to

104 Lerebours-Pigeonnier (Loussouarn), op. cit., footnote 37, s. 255.
105 Ibid., s. 256. See also, for a general discussion of the nationality of corporations, Kronstein, (1952), 52 Col. L. Rev. 983.
overstress the question of finding a connection between the company and the country of the applicable law. Are the dangers really significant nowadays, from a practical point of view, of a company incorporating in a country with which it has no commercial connection, to have the benefit of more advantageous law governing conflict questions? In the taxation of a company, or in the control of a company, such as by the criminal law or general commercial law, there is no difficulty in making the relevant legislation, codes, or the like, refer to all business operations within the state. Also, a transaction between the company and a third party should logically be referred to the law governing the type of transaction in question. If, then, we exclude (i) taxing and control laws, (ii) questions as to whether the company has or has not validly received the characteristic of being a juristic person, or whether it has had that characteristic validly removed or altered (such as by amalgamation), and (iii) third party transactions, is there any real necessity for the introduction of the concept of "siège social"? Commercial corporations have many other things to consider besides the rules of conflict of laws, and there are many factors more important than these rules in the choice of a country of incorporation.

The virtue of the country of incorporation as the lex societatis is its practical simplicity. If the "siège social" is used, then two laws will be required, the law of incorporation for matters such as the validity of the incorporation, and the "siège social" for certain other matters. It is suggested that the "siège social" theory has no practical advantages over the place of incorporation.

There are well-known situations in both the civil law and the common law, where a contract becomes frustrated or impossible of performance without the fault of any of the parties. Most systems of law, nowadays, have machinery intended to provide fair adjustments between the parties when there is supervening impossibility of performance. These principles may be regarded as a form of unjust enrichment ("enrichissement sans cause"), and in broad terms, they represent situations where a person is required to make restitution in respect of what the law considers to have been an unfair benefit obtained by him at the expense of another. One of these situations may be where a contract has been frustrated, and one of the parties may be left with property in his hands, which

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Baxter, (1954), 32 Can. Bar Rev. 873. As to frustration of contract under the Greek Civil Code, see Zepos, (1948), 11 Mod. L. Rev. 36; Greek Civil Code, art. 388.
it would be unfair in the circumstances to allow him to retain.\textsuperscript{107} Unjust enrichment has been frequently criticized on the ground of its uncertainty, but whatever one thinks of this, there is no doubt that the idea of unjust enrichment as a principle of fairness and justice lies at the back of a good deal of our legal thinking. Neither frustration of contract nor unjust enrichment seems to have been invoked directly in the leading cases on foreign dissolutions and amalgamations of corporations, but there has undoubtedly been a feeling that contracts, property rights, and so on, should not be affected by these events—"frustrating" (in a broad sense) what had been originally intended, so as to leave certain persons unfairly with the property of others. Our feelings of fairness are against unearned, uncontracted for, and unintentional transfers of property and rights. Also, our sense of justice should probe behind the concept of corporate personality. It should be unwilling to play a logic-game with this concept, and should insist on linking rights and obligations with the real persons who comprise the group.

The main elements in a recognition-problem in conflicts of laws, are choice of law and public policy. Public policy, as here considered, gives a discretion to avoid a conflicts rule leading to a foreign solution. Usually the choice of law will be the same whether the party concerned is a corporation or a physical person—for example, it may be the proper law of the contract, or the law governing the transmission of title to the property. But the range for choice of law is widened in certain cases, where it is important to determine the existence, form or consequences of abstract personality. In other words, there may be added to the usual choice of law range, a further choice—a \textit{lex societatis}. The law on the recognition of foreign corporations has been confused by too much enthusiasm for the \textit{lex societatis}, by a tendency to exploit this idea beyond its practical uses. A system of private international law based on the theory that the legal rights of a person, physical or abstract, shall be determined by one system of law, to which that person is subject—the personal law—is, in that extended form, an idealistic dream, which has brought confusion and complexity to the problems of recognition.

The effect of corporate personality is to add a group characteristic to the characteristics already possessed by those who comprise the group. We may have to determine whether this characteristic

\textsuperscript{107} Cf. (1944), 92 U. of Pa. L. Rev. 451, discussing \textit{David v. Veitscher Magnesitwerke Actien Gesellschaft}, supra, footnote 27, a case of pension rights being cancelled by a German anti-semitic decree.
exists, what form it takes, and the extent of the powers connected with it. The concept of *lex societatis* has practical value in determining the differences between a set of persons *with* group unity, and the same set *without* it. To apply the *lex societatis* to matters outside this area, is to confuse the problem by introducing an additional, unnecessary choice of law.

We must know how to determine the *lex societatis* and what kind of information to seek from it. In regard to the first, for reasons already specified, the law of the place of incorporation is preferred. This may be regarded as an application of *lex loci actus* rather than of a *lex personalis*. Reference to the *lex societatis* should be made in a conservative manner—only to provide information about the group characteristic as such. In cases such as those discussed earlier in this article, how much should be referred to the *lex societatis*? The problems were primarily in the field of contracts and property, and if nothing more were involved, the applicable law might be, for example, the *lex loci contractus* or the *lex situs*. But there are subsidiary questions, such as: did a group characteristic which existed at time $T_1$ still exist at time $T_2$? A subsidiary choice-of-law rule is necessary to answer this question. The chosen law will give information on juridical acts connected with the group characteristic, including the validity of these acts. For such informations the forum should apply to the law of the place of incorporation, and the answer may be that the group characteristic has been destroyed; or that group characteristics $A$ and $B$ have been fused into a group characteristic $C$. Have $A$ and $B$ been destroyed and is $C$ a new "creation", or is $C$ a true fusion of $A$ and $B$, in which $A$ and $B$ still exist, though they perhaps have changed somewhat in the process? In a merger or amalgamation there is continuity in the sense that any element remains a group element. Let the groups be $A \equiv A (X_1, X_2, X_3 \ldots X_n)$ and $B \equiv B(Y_1, Y_2, Y_3, \ldots Y_m)$, where the $X$'s and $Y$'s indicate the individual persons involved in the group operations. If the amalgamated group is $C \equiv C(X_1, X_2, \ldots, Y_1, Y_2, \ldots)$, then $X_1$, for example, remains involved with a group, although not always the same group. An amalgamation, therefore, may be considered to be an operation whereby an element is transformed from being an element in one group to being an element in another. It is more realistic to describe it this way than as the "deaths" of $A$ and $B$, and the "birth" of a new "person" $C$. In the re-grouping description, we are concerned with the commercial facts, but in the "birth" description, we over-emphasize the fictional machinery.
Using the foregoing considerations, we can now formulate suggestions for a simplification of the law in this field, and for an efficient and fair system. Suppose that we are concerned with the determination of rights under a contract. Let the forum be R and the proper law of the contract S. One of the parties is a corporation A, which appears to have fused with corporation B to form corporation C. A and B were incorporated in jurisdiction T. The amalgamation took place there. The objective is to find the attitude taken by the law of R. The law of R will apply its conflicts rules. Let it be assumed that by these, a problem in contracts is referred to the proper law—in this case the law of S, on the basis that R will recognize and accept solutions by S, provided they do not offend the public policy of R. If they do so offend, R will apply its own law. In most cases, these choice-of-law rules will be sufficient to give a reasonable disposition of the conflicts-of-laws part of the problem. But in the present case they will not be sufficient. We have information that some sort of fusion has taken place in T, which concerns the group structure A. Should the law of R regard this as a legally valid event? Since the fusion will have been made in conformity with special law and procedure in T, it is not sensible to refer the question of validity to the law of S. We must make an exception to the conflicts rule of R, that a contracts problem is referred to the proper law of the contract. The validity and the meaning of the terminology of such events as the creation, the fusion, the amalgamation, and the dissolution of a group, are referred to the law of the place where the event happened, and not to the proper law of the contract (where that is different). The reason for this is practical common sense. So the law of R should select the law of T to determine if the amalgamation was valid. We do not ask the law of T to determine more than this. There is no reason why S should yield to T except to answer questions outside the scope of S. It follows that the legal consequences of an event like an amalgamation, as opposed merely to validity or to the meaning of the terminology, should be referred (in the present example) to the law of S, that is, the principal law applying to the problem. If, therefore, T passes legislation affecting the consequences of amalgamation—as distinct from the validity of the amalgamation, that legislation will not effect the resolution of the problem by a court in R, since R will apply the law of S to determine “consequences”. This was the problem in the second of the Greek bank cases. It is submitted that this case did not require the operation of public policy, theories of vested rights,
or the like. The correct solution could have been reached by applying the foregoing choice of law principles. English law was the applicable law governing the bond transactions. Greek law should have been referred to only to determine if there had been a valid amalgamation. The forum ought to have recognized the determination of Greek law on this point. Having done this, the problem should then have been referred back to English law to work out the consequences of the amalgamation. Decree No. 3504 did not affect the "fact" of amalgamation (which had already been established by Law No. 2292), it only altered the consequences of the amalgamation. But the consequences of the amalgamation should have been determined by the law governing the bond transactions, amalgamation being a type of change well known to English law and commercial practice. It was within the capabilities of English law to answer a question on "consequences", and there was no need to refer to Greek law on this point. The English court should have determined from Greek law that an amalgamation existed, but should have derived the consequences of that amalgamation from English law, not from Greek law. The law governing the bonds should have been displaced, by the lex societatis, only in respect of issues upon which the law of the bonds could not reasonably provide an answer.

Many of the logical obscurities of the Russian and similar cases were caused by pressing the fiction of corporate personality beyond the region of its practical usefulness. Where a group characteristic is dissolved, there should be adequate machinery for the distribution of the relevant property in a fair manner, among creditors and members of the group. It is letting the legal imagination run astray to discuss such a problem in terms of whether the corporate person is "alive" or "dead" and if "dead" whether rules exist for the distribution of the property of the "deceased" or whether a "dead" or "non-existent" corporate person can sue in the courts, and so on. By thinking, this way, lawyers become slaves of their own dreams. The law of all countries should provide for the distribution of assets to creditors and to members of a group, when the group characteristic disappears, whatever legal form the group may take and whether it is a domestic group or a foreign group.