

THE WILL IN PRIVATE INTERNATIONAL LAW OF JAPAN

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I. *Introductory*

The "Hōrei" or "Law concerning the Application of Laws in General," which is the private international law code of Japan, was promulgated on 21 June, 1898 as Law No. 10 and took effect on 16 July of the same year. With the exception of a few minor subsequent changes, it has continued down to the present day in its original form. This law was early translated into English by Dr. Lönholm¹ and into German by Dr. Niemeyer,² while it was given a brief introduction in French by Dr. Yamada³ and presented in book form in English by de Becker.⁴ In addition, there has recently appeared an English translation by the Attorney General's Office.⁵

This law, like the "German Private International Law in the Introductory Law to the Civil Code", was based on the Gebhard Draft and served as a model for the "Law concerning the Application of Laws in General" of China. As providing material for the study of comparative law, it has frequently been cited and criticized by European scholars, although not all of their observations seem to be justified. This paper aims at a brief introduction of the subject of wills and hopes to provide material

¹ L. Lönholm, *The Civil Code of Japan* (1989), pp. 306—313.

² Th. Niemeyer, "Das internationale Privatrecht in Japanischen Civilgesetzbuch," *Niemeyer's Zeitschrift für internationales Recht*, XI (1902), pp. 197—204; Makarov, *Die Quellen des internationalen Privatrechts* (1929), pp. 83—87.

³ S. Yamada, "Le droit international privé au Japon," *Journal du droit international*, XX VIII, 1901, pp. 632—643; "Droit international privé du Japon," *Repertoire de droit international*, VI, 1930, pp. 533—546.

⁴ J. E. de Becker, *International Private Law of Japan* (1919).

⁵ The Attorney General's Office, *The Civil Code of Japan* (1951), Appendixes pp. 1—6.

for critical analysis.⁶

In substantive law a will often calls to mind a legacy ; and not only are will and legacy frequently confused, but it has become customary to treat of wills in conjunction with inheritance. A legacy, however, is an act whereby property is given under a will without compensation and is not to be confused with a will, which is merely an expression of intention. Acts which may be done by will are classified below :

Acts coming under Law of Inheritance

Removal and its revocation of heir presumptive (Art. 893, Art. 894 Par. 2).

Designation of method of distribution of inheritance, delegation of such designation, and restriction of distribution (Art. 908).

Modification of responsibility for legal guaranty incident to distribution of inheritance (Art. 914).

Legacy (Art. 964 ; see German Civil Code, Art. 2147).

Appointment of executor and delegation of such appointment (Art. 1006 ; see German Civil Code, Art. 2197 and Art. 2198).

Limitation of legacy deduction (Art. 1034).

Acts coming under Family Law

⁶ Art. 26 of the "Hörei," which provides for testaments, has been rendered by the four translations following. Translation by Lönholm is as follows :

"The existence and the effect of a will are governed by the law of the nationality to which the maker of the will belongs at the time of its making.

The revocation of a will is governed by the law of the nationality of the maker at the time of revocation.

Notwithstanding the provisions of the preceding two paragraphs, the law of the place where the act is done may be followed as to the forms of a will." (p. 312).

Translation by Niemeyer is as follows :

"Das Bestehen und die Wirkung einer letztwilligen Verfügung bestimmt sich nach dem Heimatrecht des Erblassers zur Zeit der Errichtung.

Der Widerruf einer letztwilligen Verfügung richtet sich nach dem Heimatrecht des Widerrufenden zur Zeit des Widerrufs.

Unbeschadet der Bestimmungen der beiden vorhergehenden Absätze kann auf die Form der Verfügung das Recht des Ortes angewendet werden, wo die Willenserklärung abgegeben wird." (Niemeyer's *Zeitschrift*, p. 202 ; Makarov, p. 86).

Walker's translation is as follows :

"Der Bestand und die Wirkung eines letzten Willens bestimmen sich nach dem Gesetze des Landes, welches zur Zeit der Errichtung das Heimatland des Erblassers war.

Der Widerruf eines letzten Willens bestimmt sich nach dem Gesetze des Landes, welches zur Zeit des Widerrufs das Heimatland des Erblassers war.

Die Bestimmungen der vorgehenden zwei Absätze hindern nicht, dass in bezug auf die Form des letzten Willens dem Gesetze des Ortes der Handlung nachgegangen wird." (Walker, *Internationales Privatrecht*, 4th ed. p. 827, note 7).

Translation by the Attorney General's Office is as follows :

"As regards the formation and effect of a will, the law of the home country at the time of its formation governs.

The revocation of a will is governed by the existing law of the home country of the testator. The provisions of the preceding two paragraphs do not prevent the law of the place of the act being followed as regards the form of a will." (Appendixes p. 5).

Recognition of a child (Art. 781 Par. 2; see Swiss Civil Code, Art. 303 Par. 2).

Appointment of guardian (Art. 839; see German Civil Code, Art. 1777 Par. 3).

Appointment of guardian supervisor (Art. 848).

Besides the acts enumerated above, endowment (Art. 41 Par. 2; see Swiss Civil Code, Art. 81 Par. 1; German Civil Code, Art. 83) and trust (Law of Trusts, Art. 2 and Art. 49) may also be executed by will.

Wills should therefore be considered not only in relation to inheritance but from a more extensive standpoint. It is to be noted, moreover, that a will represents a particular type of expression of intention and is not in itself a juristic act. Much of the confusion found in the treatment of wills seems to be attributable to overlooking this essential difference.

The problem of expression of intention (that is, the problem peculiar to wills) and the problem of juristic acts based on wills (that is, the problem of juristic acts having as an essential element the intention expressed in a will) constitute two entirely different problems. The treatment of these problems in the substantive law seems to be reflected in a general way in the treatment within the conflict of laws. It will be convenient here to limit this study to Japanese law and to proceed from an investigation of the treatment of the problem in the substantive law to an investigation of the treatment under the conflict of laws.

We will first consider the Japanese Civil Code with regard to the expression of intention in wills. First, the *formation* of a will. Regardless of the contents of the will, the capacity to execute a will is possessed by any person attaining the full age of fifteen years whether that person be a minor, interdict, or quasi-incompetent, provided however that such person is capable of an intelligent exertion of will (Art. 961 and Art. 962). Expressions of will attended by coercion or fraud are regulated by a uniform provision (Art. 96). The forms of will uniformly recognized in usual cases are holographic documents, notarial documents and secret documents (Art. 967—Art. 973) with special forms being uniformly provided in special cases (Art. 976—Art. 982). The intention expressed in a will is interpreted as being established at the time of execution of the will. Next comes the problem of the *effect* of a will. Without regard again for the contents of the will, a will comes into force with the death of the testator (Art. 985), and its adequacy to be a juristic act is established with the extinction of the right to revoke (see Art. 1022). In the substantive law, therefore, the formation and effect of an expression of intention in a will (that is, the will viewed as an expression of intention) are both treated in a uniform manner without regard being had to the specific contents of the will.

On the other hand, the treatment of juristic acts having as an essential

element the intention expressed in a will shows great variations depending on the content of the will and is far from being uniform. Recognition of a child by will becomes established as a juristic act through formal notification by the executor after the death of the testator, at which time the parent-child relation intended by the testator takes effect retroactive to the time of birth of the child (Art. 781, Art. 784 and Family Registration Law, Art. 64)⁷. Adoption by will becomes established as a juristic act when, after the death of the testator, assent is given by the child to be adopted or by some person authorized to do so in its stead and formal notification of adoption is made by the executor, at which time the parent-child relation in adoption takes effect retroactive to the time of death of the testator (Old Civil Code, Art. 848 and Old Family Registration Law, Art. 91). A trust by will becomes established as a juristic act when, after the death of the testator, the person appointed as trustee makes known to the executor his intention to accept same, at which time the trust takes effect retroactive to the time of death of the testator (Law of Trusts, Art. 2 and Art. 49; Civil code, Art. 985). The removal of an heir presumptive by will takes effect with the operation of a judgment for removal rendered on a petition for removal submitted by the executor, the effect being retroactive to the time of death of the testator (Art. 893 and Art. 985; Family Registration Law, Art. 97). Legacies (Art. 964), designation by will of portions to be inherited (Art. 902), and appointment of guardian by will (Art. 839) are already established as juristic acts at the time of making the will and take effect with the death of the testator (Art. 985). With regard, therefore, to juristic acts having as an essential element the intention expressed in a will (that is, a will viewed as a juristic act), the conditions and inception of their existence differ with variations in content. The content and time of taking force of the effect show similar variations, with no indications at all of any uniformity.

Turning now to the provisions relating to the conflict of laws, we see that with regard to expression of intention in a will there is only one article to be found, namely Art. 26 of the afore-mentioned "Hōrei." Par. 1 provides that "the formation and the effect of a will are governed by the law of the home country of the testator at the time of its formation," thus laying down a uniform rule and paying no heed to the content of the will. Par. 2 uniformly provides that regardless of the content of the will to be revoked, "the revocation of a will is governed by the law of the home

⁷ Tamakichi Nakajima, *Commentary on the Civil Code*, Vol. 4, *Family Law* (in Japanese, 1937) p. 513. But the prevailing doctrine has it that a recognition of a child takes effect simultaneously with the decease of the testator without necessitating formal notification. See Shigeto Hozumi, *Family Law* (in Japanese 1933), p. 457 and Zennosuke Nakagawa, *Outline of the Civil Code (Family Law, Law of Inheritance)* (in Japanese 1950), pp. 97—98.

country of the testator at the time of revocation." Par. 3 provides for the form as follows: "The provisions of the preceding two paragraphs do not prevent the law of the place of the act being followed as to the form of a will."

For those juristic acts mentioned above, however, which are recognized as capable of being based on a will, we find that several articles have been provided and that the treatment differs according to the content of the juristic act. As to recognition of a child, Art. 18 of the "Hōrei" provides that the requisites of such act shall be governed for each party by the law of the home country of that party and that the effect shall be governed by the law of the home country of the party making recognition. As to adoption, Art. 19 of the "Hōrei" provides that the requisites of such act shall be governed for each party by the law of the home country of that party and that the effect shall be governed by the law of the home country of the adoptive parent. As to juristic acts relating to guardianship, Art. 23 of the "Hōrei" provides that in all cases the law of the home country of the ward shall be followed. As to juristic acts relating to the law of inheritance, Art. 25 of the "Hōrei" provides that in all cases the law of the home country of the deceased shall be followed. Juristic acts coming under the law of property have been specially provided for in Art. 7 and Art. 10 of the "Hōrei." As to the form of the juristic act, Art. 8 of the "Hōrei" provides as follows: "The form of a juristic act shall be governed by the law which determines the effect of such act" (Par. 1). Notwithstanding the above paragraph, a form in accordance with the law of the place of the act shall be valid,....." (Par. 2).

The brief examination above of juristic acts capable of being done through a will has made clear that a will does not necessarily concern itself exclusively with acts relating to status. A will, however, may be considered as an act relating to status in view of the fact that (1) the law of wills was based on a desire to respect the intentions of the testator and came into existence as a law relating to status, (2) a will often touches upon facts relating to status, and (3) many statutes have relaxed the capacity of the testator to a level below that of juristic acts relating to property.⁸

II. *Testamentary Capacity*

By testamentary capacity is meant the legal capacity to make a valid will. The laws of many countries make a distinction between this capacity and the capacity to undertake acts relating to property and lay it down that

⁸ Zennosuke Nakagawa, *Outline of the Law of Status* (in Japanese 1930), p. 274.

if there exists the capacity to exert the will intelligently, all persons attaining a certain age are qualified to make a valid will (Austrian Civil Code, Art. 569—14 years of age; German Civil Code, Art. 2229 and the French Civil Code, Art. 904—16 years of age; Swiss Civil Code, Art. 467—18 years of age). The Japanese Civil Code provides in Art. 961 and Art. 962 that all persons attaining the age of fifteen years, regardless of whether that person is a minor, interdict, or a quasi-incompetent and irrespective of the content of the will, may execute a valid will.

There is no direct reference in the "Hōrei" to this testamentary capacity. However, as we have termed a will an act relating to status, it would be proper to interpret the testamentary capacity also as a capacity to perform an act relating to status. Therefore, just as the capacity to perform acts relating to status, such as the capacity to marry, to recognize a child, and to adopt are included as an essential element of the requisites for the existence of such acts (for example, the "Hōrei" Art. 13 Par. 1, Art. 18 Par. 1 and Art. 19 Par. 1), it is proper to view the testamentary capacity as included in the requisites for the formation of a will. The testamentary capacity, therefore, is to be interpreted as coming under the "formation of a will" as provided in Art. 26 Par. 1 of the "Hōrei" and as being governed by the law of the home country of the testator at the time of making the will. Accordingly, in cases where there is a change in nationality following the formation of a will, a will executed by a person possessing testamentary capacity under the law of the old home country is not affected by the law of the new home country declaring such person not to possess testamentary capacity. Again, a will executed by a person not possessing testamentary capacity under the law of the old home country is not affected by the law of the new home country declaring such person to possess testamentary capacity.⁹

⁹ J. E. de Becker, *International Private Law of Japan*, p. 147; Iwataro Kubo, "The will in Private International Law" (in Japanese, 1937), *The Journal of International Law and Diplomacy* Vol. 36, Nos. 2, 4 and 6; Reprint pp. 13—20; *Outline of Private International Law* (in Japanese, 1946), p. 270; Masao Sanekata, *Outline of Private International Law* (in Japanese, 1942), pp. 386—388; Hidebumi Egawa, *Private International Law* (in Japanese, 1950), pp. 321—322; Taro Kawakami, *Lectures on Private International Law* (in Japanese, 1952), p. 167. Art. 26 Par. 1 of the "Hōrei" and Art. 21 Par. 1 of China's "Law concerning the Application of Laws in General" are generally similar, but it is doubtful whether Art. 24 Par. 3 of "The Introductory Law to the Civil Code of Germany" should be submitted to a similar interpretation. See Raape, *Staudingers Kommentar zum Bürgerlichen Gesetzbuch und dem Einführungsgesetz, VI. Band, Einführungsgesetz 2 Teil* Art. 7—31, pp. 641, 666; Frankenstein, *Internationales Privatrecht*, IV, p. 425. The laws of the following countries adhering to the principle of law of domicile are similar to one another: Argentine Civil Code, Art. 3646, Paraguay Civil Code, Art. 3611, and the Swiss Statute relating to Civil Rights of Persons Domiciled and Sojourning, Art. 7 Par. 4. Further see Cheshire, *Private International Law*, 3rd ed., p. 681; Wolff, *Private International Law*, 2nd ed., p. 582.

On the other hand, the "Hōrei" provides that the capacity to perform a juristic act relating to property, regardless of whether that act pertains to a real right or a right in personam, is to be viewed as an legal independent relation set off from the other elements comprising a juristic act and is to be governed by the law of the home country of the respective parties at the time of the act ("Hōrei," Art. 3 Par. 1; see German Introductory Law to the Civil Code, Art. 7 Par. 1; Polland's Private International Law, Art. 1 Par. 1). The capacity to perform a juristic act relating to status, however, is governed by the proper law for fixing the requisites of an execution of an act relating to status, which proper law is to be determined on the basis of the content of the respective acts. For example, capacity to recognize a child is governed by the law of the home country of the person making recognition at the time of recognition or, in the case of recognition by will, at the time of death (Art. 18 Par. 1 of the "Hōrei"); capacity to adopt is governed by the law of the home country of the adoptive parent at the time of adoption or, in the case of adoption by will at the time of death (Art. 19 Par. 1 of the "Hōrei"); and capacity to execute juristic acts relating to inheritance is governed by the law of the home country of the testator, that is the person being inherited from, at the time of his decease (Art. 25 of the "Hōrei"). When a juristic act is made through a will, therefore, the result is that two different laws are applied in respect of capacity. Supposing now that a sixteen-year old German domiciled in Japan makes a will adopting a Japanese and after making such will acquires Japanese citizenship and dies sometime before 1948 as a minor under 20 years of age, his capacity to make a will will be regulated by Art. 2229 of the German Civil Code and the will therefore be valid (the "Hōrei" Art. 26 Par. 1); but the capacity to adopt will be governed by Japanese civil law (old Civil Code Art. 837) in accordance with the provisions of Art. 19 Par. 1 of the "Hōrei," as a result of which the formal notification of adoption will not be accepted as the same article provides that a minor does not possess the capacity to adopt. Even in the event that the formal notification is accepted by mistake, it will be voidable (old Japanese Civil Code, Art. 849, Art. 852 and Art. 853). The most complicated case is that of a legacy, which constitutes a unilateral act. In a legacy, too, the capacity to make a will is governed by the law of the home country of the testator at the time of making the will (the "Hōrei," Art. 26 Par. 1), while the capacity to perform an act coming under the law of inheritance is governed by the law of the home country of the testator at the time of decease (the "Hōrei," Art. 25). Thus, if a fifteen-year old Japanese provides for a legacy in a will and then dies after acquiring Swiss citizenship, the will itself will have been validly executed even if the testator be under eighteen years of age as this point will be governed by Japanese civil law

(Art. 961), but there remains the problem of whether or not as a legacy it will be considered as a juristic act executed by one having capacity thereunto. If Art. 467 of the Swiss Civil Code be interpreted as regulating only the capacity to dispose of property affecting the inheritance, it must be considered as specifying the capacity to perform acts relating to inheritance; and the afore-mentioned act will then be deemed an act performed without the capacity to do so and will have to be governed by Art. 469, Art. 519 and Art. 521 of the Swiss Civil Code (the "Hōrei," Art. 25).¹⁰

III. *Marred Will*

When a will is made under mistake, fraud, or coercion, there arises the problem of the effect upon the will itself. On this point Art. 6 Par. 2 of the German-Austrian Inheritance Treaty specifies that the law of the home country of the testator at the time of making the will shall govern. Art. 24 Par. 3 of the German Introductory Law to the Civil Code has also been given this interpretation.¹¹

The problem of a marred will is but the problem of the execution of a valid expression of will, that is, a will which is not marred by any defects. The fact that Art. 95 and Art. 96 of Japan's Civil Code, which relate to expression of will in general, provide uniformly for marred will in connection with the problem of valid execution indicates that the problem of marred will belongs to the problem of execution of a valid expression of will. Therefore, in private international law, too, it should be interpreted as being comprised under Art. 26 Par. 1 of the "Hōrei" which provides uniformly for the formation of wills in general, and consequently as being governed by the law of the home country of the testator at the time of

¹⁰ The great difference found among scholars upon the question of whether to take the time of formation of the will or the time of death as the decisive time point would seem to be attributable to the fact that the problem of the will as an expression of intention and the problem of the will as a juristic act have not been clearly distinguished.

¹¹ Zitelmann, *Internationales Privatrecht*, II, pp. 171—, 971 note; Raape, *Kommentar*, p. 670, *Internationales Privatrecht*, 3rd ed., p. 270. There are, of course, those who hold to the proper law as regards inheritance, that is, to the law of the home country of the testator at the time of his decease. Kahn, *Abhandlungen zum internationalen Privatrecht*, II, p. 208; Lewald, *Das deutsche internationale Privatrecht*, p. 318. This latter theory, it seems, does not make a clear distinction between the problem of the expression of intention by the will and the problem of the juristic act made through the will.

making the will.¹²

IV. *Effect of a Will*

The next problem to be considered in conjunction with the problem of testamentary capacity and marred will is the effect of a will. This problem of the effect of a will is to be interpreted as the effect of the intention expressed in a will in the same sense that testamentary capacity and marred will were considered above as being capacity and marred will with reference to a will as an expression of intention, that is, to the intention expressed in a will. This effect of the intention expressed in a will is the effect which is recognized uniformly for all wills regardless of their respective contents and signifies the problem of the binding force of a will and its adequacy to be a juristic act and the starting point of its existence. This effect which a will as an expression of intention uniformly possesses without regard to the content of the will must also be given uniform treatment without regard for the content of the will in the sphere of private international law. Art. 26 Par. 1 of the "Hōrei" declares in general terms that "the formation and effect of a will shall be governed by the law of the home country of the testator at the time of its formation"; this effect, therefore, may be interpreted as signifying the effect of a will viewed as an expression of intention. Accordingly, the effect of a will is governed by the law of the home country of the testator at the time of making the will and is not in any way affected by the testator's change of nationality subsequent to the formation of a will.¹³

In contrast to this, the effect of a juristic act supported by an expression of intention in a will, that is, the effect of a will viewed as a juristic

¹² Kubo, *aforementioned paper*, p. 21. *Outline*, p. 271; Sanekata, p. 390; Egawa, p. 167. For example, if a Japanese acquires Swiss citizenship after making a will under coercion and dies as a Swiss citizen after three years have elapsed since removing himself from the influence of the coercion, the will according to Swiss civil law would be deemed as expressing a marred will (Art. 519 Par. 1 Sub-par. 1), which marred will, however, would be validated by the passing of at least one year after removal of oneself from such influence, thus making the will valid (Art. 469 Par. 2). In this case, however, the Japanese civil law would be the proper law, and the heir accordingly would be in a position to annul the will (Art. 96, Art. 120, Art. 126).

¹³ Kubo, *aforementioned Paper*, pp. 41—50, *Outline*, pp. 271, 272; Sanekata, pp. 389—391; Egawa, pp. 321, 322; Kawakami, pp. 164, 165, 170. J. E. de Becker also takes the same view but adds that recognition must be withheld if it is prejudicial to public order or to good morals notwithstanding as validity under the law of the home country of the testator at the time of making the will. As far as the meaning of the words is concerned, this interpretation is natural and justified, but it seems to be grounded on a confusion of the effect of the intention expressed in a will and the effect of the juristic act executed through a will (pp. 147, 148).

act shows numerous variations depending on the specific content of the will. For example, the effect of a recognition of a child by will is the establishment of a parent-child relation between the parent and the child born out of wedlock; the effect of an adoption by will is the establishment of a parent-child relation between the adoptive parent and the adopted child; and the effect of a legacy or the removal of an heir by will is the transfer of property by will without compensation therefor or the disqualification of the heir. It is specified that the effect of such recognition of a child shall be governed by the law of the home country of the person recognizing (the "Hōrei," Art. 18 Par. 2), that the effect of an adoption shall be governed by the law of the home country of the adoptive parent (the "Hōrei," Art. 19 Par. 2), and that the effect of a legacy or the removal of an heir shall be governed by the law of the home country of the deceased (the "Hōrei," Art. 25). Not only is there no positive ground for distinguishing between such acts executed through a will and the same acts done *inter vivos*, but such discrimination leads to very illogical results. It therefore seems that juristic acts executed through a will should as juristic acts (legal requisites) be governed by the proper law determined by the specific content of the act in question in the same way as the general case.

Consequently, a will as an expression of intention would be governed by the law of the home country of the testator at the time of making the will as determined by Art. 26 Par. 1 of the "Hōrei", while a will as a juristic act would be governed by the proper law as determined by the specific content of the will. If therefore a foreigner makes a will recognizing a Japanese child born out of wedlock and dies after subsequently acquiring Japanese citizenship, the formation and the effect of the will as an expression of intention will be governed by the law of his home country at the time of making the will, that is, by a foreign law (the "Hōrei," Art. 26 Par. 1). If the will is valid according to such law, the will as a juristic act, that is, the juristic act executed through the will will be regulated by Art. 18 of the "Hōrei." The effect of the recognition of a child will therefore be governed by the proper law determined by Art. 18 Par. 2 of the "Hōrei," or in this case the Japanese law, and the parent-child relation will operate from the time of death of the testator (Civil Code, Art. 784). If a foreigner makes a will providing for the removal of an heir and dies after subsequently becoming a naturalized Japanese citizen, the will as an expression of intention will be determined by the law of the home country of the testator at the time of making the will and therefore by a foreign law (the "Hōrei," Art. 26 Par. 1). If the will is valid according to such law, the will as a juristic act for the removal of an heir (that is, the removal of an heir by will) will be regulated by Art. 25 providing for determining the proper law peculiar to a will of such content, and consequently will be governed by

the Japanese law in this case. The effect of disqualification of the heir will therefore act retroactively to the time of death of the testator (Civil Code, Art. 893 and Art. 985; Family Court Law, Art. 9 Par. 1 Item 9, Art. 17, Art. 21 and Art. 23).¹⁴

V. *Form of a Will*

Art. 8 of the "Hōrei" provides that "the form of a juristic act shall be governed by the law which determines the effect of such act" (Par. 1) and that "notwithstanding the above paragraph, a form in accordance with the law of the place of the act shall be valid....." (Par. 2). On the other hand, Art. 26 of the "Hōrei" provides that "the formation and effect of a will shall be governed by the law of the home country of the testator at the time of making the will" (Par. 1) (Par. 2 omitted) and that "the preceding two paragraphs do not prevent the law of the place of the act being followed as regards the form of a will" (Par. 3).

The next problem is: Do "the form of a juristic act" of Art. 8 and "the form of a will" of Art. 26 both refer to the same form and do "the effect of an act" of Art. 8 and "the effect of a will" of Art. 26 both refer to the same effect?

It is evident from the literal meaning that "the form of a juristic act" of Art. 8 refers to the form of a juristic act as one of the class of legal requisites, but there exists some doubt as to whether "the form of a will" of Art. 26 refers to the form of a juristic act executed through a will or whether it should be literally interpreted as referring to the form of the expression of intention, a legal fact. If the former, Art. 26 Par. 3 represents a repetition of Art. 8 Par. 2 and is an obvious and superfluous provision.¹⁵ However, Art. 26 Par. 1 is, as frequently noted, concerned

¹⁴ Art. 3645 of the Argentine Civil Code provides that "the law of domicile of the testator at the time of making a will shall govern as to the capacity or incapacity to make a will" and Art. 3646 continues "the contents of a will and its validity or invalidity shall be governed by the law of domicile of the testator at the time of death." If we look upon the former as specifying the proper law as regards expression of intention by will and the latter as specifying the proper law for juristic acts relating to inheritance, the principal class of juristic act executed through a will, we see that although there exists a difference in that one accepts as personal law the law of the home country and the other the law of domicile, both the Argentine law and the Japanese "Hōrei" treat the subject in the same way.

¹⁵ The fact that China's Law concerning the Application of Laws in General has Art. 21 Par. 1 and Par. 2 corresponding word for word with Art. 26 Par. 1 and Par. 2 of the "Hōrei" and yet has not provided for a paragraph corresponding with our Par. 3 is indicative of the view presented here. It also seems that Germany's Law concerning the Application of the Civil Code, Art. 24 last end of Par. 3 indicates support of this position. Similarly, the theories listed under Note 16.

with the legal fact, the expression of intention; and it would therefore be logical to infer that "the form of a will" of Par. 3 following signifies the form of the expression of intention by will, which interpretation would also furnish ground for the existence of this paragraph.

It is evident from the literal meaning that "the effect of an act" of Art. 8 refers to the effect of a juristic act as one of the class of legal requisites, but there is some doubt as to whether "the effect of a will" of Art. 26 refers to the effect of the juristic act executed through a will or whether it should be literally interpreted as referring to the effect of a legal fact, the expression of intention by will. One theory supports the former position and maintains that even the form of a will should be regulated by Art. 8 Par. 1 of the "Hōrei" and consequently should be governed in the first instance by the law which determines the effect of a will, the law of the home country of the testator at the time of making the will; and in the second instance by the law of the place of the act as provided in Art. 8 Par. 2. According to this theory, therefore, Art. 26 Par. 3 of the "Hōrei" is merely a precautionary provision to insure against any possibility of misunderstanding.¹⁶ However, as has been frequently pointed out, Art. 26 Par. 1 provides for the expression of intention, a legal fact; and therefore Art. 8 of the "Hōrei" providing for juristic acts should be interpreted as having no connection with the former article. It is clear from a study of the provisions of the civil law (see Art. 960—Art. 984) that the form of an expression of intention by will is included along with testamentary capacity and marred will in the problem of the existence of an expression of intention and therefore should be governed by the law of the home country of the testator at the time of making the will as coming under the provisions of "the formation of a will" in Art. 26 Par. 1 of the "Hōrei". However, a faithful application of this principle would always require the form of a will governed absolutely by the law of the home country of the testator and in practice might result in cases where it would not be possible to make a will in a foreign country. Art. 26 Par. 3 should therefore be interpreted as an attempt to meet such contingencies and as recognizing an exception (supplementary provision) to the effect that the form of a will as an expression of intention may also be governed by the law of the place of the act. Par. 3 is therefore fully justified in the sense that it provides for application of the principle "Locus regit actum" to the form of the expression of intention of a will, and is by no means a super-

¹⁶ Saburo Yamada, *Private International Law* (in Japanese, 1934), pp. 684, 685. Hisao Kawabe, *Private International Law* (in Japanese, 1939), pp. 437, 438. Also J. E. de Becker, p. 148. Theories prior to Kubo, *aforementioned paper*.

fluous precautionary provision.¹⁷

The problem next arises of the mutual relations between the proper law for the form of a will as an expression of intention and the proper law for the form of a will as a juristic act. Considering first a case where the expression of intention of a will forms part of a contract, for example, the case of adoption by will, let us suppose that a foreigner A of A nationality executes a holographic will in accordance with the form prescribed by the law of his country (or the law of the place of making the will) and provides therein for the adoption of a Japanese B. Upon the death of A after becoming a naturalized Japanese citizen, his executor obtains the assent of the Japanese B to the adoption and submits before 1948 a formal notification of the adoption in the form prescribed by the Japanese Family Registration Law (form of juristic act) together with an exemplified copy of the will. Under these conditions, the form of the will would be valid even if it did not comply with the form prescribed by Japanese law as it has complied with the form prescribed by the law of A country, the law of the home country of the testator at the time of making the will or the law of the place of the act (the "Hōrei," Art. 26 Par. 1 or Par. 3). It would also comply with the form prescribed for an agreement of adoption by Japanese law, the proper law (or the law of the place of the act) as regards the effect of this mutual assent called adoption by will (old Civil Code, Art. 848 and old Family Registration Law, Art. 91); the form of this juristic act of adoption would, therefore, also be valid (the "Hōrei," Art. 8 Par. 1 or Par. 2). The same principle applies to cases where the expression of intention of a will represents a unilateral act but still needs some specified requisite or requisites, as in cases of recognition of a child by will. The difficulty lies in those cases where the expression of intention of a will constitutes a unilateral act which does not need any other requisite. Such a case is provided where the expression of an intention by will to leave a legacy becomes of itself a unilateral act of leaving a legacy. In a case where the form of a will leaving a legacy is in accordance with that prescribed by the law of A country, the law of the home country of the testator at the time of making the will, but at variance with that prescribed by the law of country B, the home country at the time of death; there is the problem of whether or not such legacy is valid. Let us consider a case where a Japanese leaves a legacy by holographic will as recognized by Japanese law and subsequently acquires Swiss citizenship and dies as a Swiss citizen. What if there is no indication of the place where the will was made and that as a result the will does not comply with the form prescribed by Swiss

¹⁷ Kubo, *aforementioned paper*, pp. 62—68, *Outline*, pp. 273, 274; Sanekata, pp. 393, 394; Egawa, pp. 322, 323; Kawakami, p. 167.

civil law (Art. 505)? In the first place, this will is valid under the civil law of Japan (Art. 968), that is, the law of the home country of the testator at time of making the will; allowing, therefore, for the fact that the will does not comply with the form prescribed by the Swiss civil law, the law of the home country at the time of death, the form of the expression of intention of the will is still valid (the "Hōrei," Art. 26 Par. 1). Next, there is the problem whether the form of this legacy could be declared invalid on the ground that it does not comply with the form prescribed by the Swiss civil law, the law of the home country at the time of death. The solution of this problem, however, will depend on whether the provision of the Swiss Civil Code regulating the form (Art. 505) refers to the form of the will as an expression of intention or to the form of the will as a juristic act, that is, to the form of a legacy. If we assume that the provision of the Swiss Civil Code applies to the form of the expression of intention of the will and not to the form of the juristic act, in this case the legacy, then the legacy will not be bound by any form and will in this respect, too, be valid. If, on the contrary we assume that the provision governs the form of juristic acts, then the legacy will become one lacking the legally prescribed form (the "Hōrei," Art. 8 Par. 1).¹⁸ Supposing that a Chilean woman made in Chile a holographic will providing for a legacy and then died after subsequently marrying a German and acquiring German citizenship, the will as an expression of intention would not comply with the form prescribed by Chilean law, which does not recognize holographic wills. The will, therefore, would be void for lack of form (the "Hōrei," Art. 26 Par. 1 and Par. 3); and the problem would not arise of whether or not as a juristic act it had complied with the form prescribed by German law, the proper law as regards wills, in this case legacies (the "Hōrei," Art. 8 Par. 1).¹⁹

VI. Conclusion

This paper has made clear in the first place that among those wills vaguely referred to by that name there are two different classes, wills as an expression of intention (that is, the expression of intention itself of a will) and the will as a juristic act (that is, a juristic act supported by an expression of intention of a will); and furthermore that theoretically they must be clearly distinguished and treated accordingly in view of the great

¹⁸ Kubo, *aforementioned paper*, pp. 68—72

¹⁹ Raape, *Kommentar*, p. 668.

difference in their respective characteristics. Next, legislation in the field of Japanese private international law has made a clear distinction between the two types of wills and in this respect is theoretically a superb piece of legislation. It is to be regretted however that this distinction has not been adequately recognized.²⁰ Art. 26 of our "Hōrei" has regard to a will as an expression of intention, that is, to the expression of intention of a will. Par. 1 specifies the proper law for the formation and effect of a will and provides that testamentary capacity, marred will, and form of the will, (these are problems connected with the formation of a will,) and the binding force of the expression of intention of a will, adequacy to be a juristic act, and the commencement of such adequacy, (these are problems connected with the effect of a will,) shall be governed by the law of the home country of the testator at the time of making the will. Par. 2 designates the proper law for the revocation by will of a will as an expression of intention and provides that this shall be governed by the law of the home country of the testator at the time of revocation. Explanation of this point has been omitted. The form of a will as an expression of intention and the form of a will revoking another will are in the first instance governed by the law of the home country of the testator at the time of making the will or the revoking will in accordance with the provisions of Par. 1 and Par. 2. Par. 3, as a supplementary provision, expressly provides that compliance with the form prescribed by the law of place of performance of the expression of intention will also make for validity.

With regard to juristic acts supported by an expression of intention in a will, we find general provisions based on the specific content of the will such as Art. 18 (recognition of a child), Art. 19 (adoption), Art. 23 (appointment of guardian), and Art. 25 (juristic acts coming under the law of inheritance); besides these we find Art. 7 (acts based on a right in personam) and Art. 10 (acts based on real rights). Each of these provisions designates the proper law for the respective juristic acts and makes it clear that as juristic acts, there will be no differentiation of treatment made, even when the expression of intention forming a part of these juristic acts is made through a will. It has also been made clear that Art. 8 of the "Hōrei" prescribes the general form for juristic acts. Some tentative views have been advanced with reference to the mutual relations existing between the proper law of a will as an expression of intention and the proper law of a will as a juristic act (that is, a juristic act made through a will).

Lastly, mention should be made of the fact that since a will deals primarily with matters coming under the law of inheritance, treatment of it in the past has generally tied it in too closely with the subject of inheritance. What is called for is a study of wills from a broader standpoint.

²⁰ Raape, *Kommentar*, p. 673; Frankenstein, IV, p. 497.