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Conflict of Laws and the Administration of Decedents' Real Estate

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CONFLICT OF LAWS AND THE ADMINISTRATION OF DECEDENTS' REAL ESTATE

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The subject matter of this article will be treated under three heads dealing with, A, the power of executors and administrators to sell real estate; B, inheritance taxes; and C, the law and the courts which determine, one, the validity of wills and two, who succeeds by operation of law. The core of the problem lies in the validity of wills and intestate succession to real estate.

A. *Which Executor or Administrator or Which Court Has Power to Sell Real Estate?*

Two questions involving the power of executors or administrators have been considered by the courts. First, which executor, administrator or court has power to sell the real estate in order to pay creditors when there is insufficient personal property for that purpose — will executors or administrators appointed by a court of the domicil of the deceased, or in some other state than that in which the land lies, have this power, or may it be exercised only by the executor, administrator or court of the state in which the land is situated? The cases hold that only the court of the state in which the land is situated or its executor or administrator has this power.[1] The second question is: When the will gives the executor a power of sale, is this power to be exercised by the executor appointed at the domicil or some other state than that in which the land lies, or is it to be exercised by the executor appointed by the state in which the land is situated? Most of the cases hold that the power of sale may be exercised only by the executor appointed in the state where the land is situated.[2] Several *contra* cases proceed on the ground that the executor has the power by the will and does not

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1. Key v. Harlan, 52 Ga. 476 (1874); Hofferd v. Coyle, 212 Ind. 520, 8 N.E.2d 827 (1937); Bowdoin v. Holland, 64 Mass. 17 (1852); Borden v. Borden, 5 Mass. 67 (1809); Sheldon v. Rice's Estate, 30 Mich. 296 (1874); Heard v. Drennen, 93 Miss. 236, 46 So. 243 (1908); Cabanne v. Skinker, 56 Mo. 357 (1874); Tillson v. Holloway, 90 Neb. 481, 134 N.W. 232 (1912); Parsons v. Lyman, 20 N.Y. 103 (1859); Nowler v. Coit, 1 Ohio 520 (1824). See also Pott v. Pennington, 16 Minn. 509 (1871). *Contra:* Murphy v. Mackey, 135 Md. 611, 109 Atl. 326 (1920).

2. Apperson, Ex'r v. Bolton, 29 Ark. 418 (1874); West v. Fitz, 109 Ill. 425 (1884); Lucas v. Tucker, 17 Ind. 41 (1861); Sims, Ex'r v. Hodges, 65 Miss. 211 (1887); Wells Fargo & Co. v. Walsh, 87 Wis. 67, 57 N.W. 969 (1894); Hayes v. Lieulokken, 48 Wis. 509, 4 N.W. 584 (1880).

need to be appointed by the court.[3] In these cases, although the conveyance was by the executor named in the will who had been appointed in a state other than the situs of the land, the will was recorded (regarded as equivalent to probate) in the state where the land was situated. The court said that the executor had the power by the will without appointment. This reasoning assumes that the court must appoint the executor named by the testator. This assumption, however, is invalid.[4] Creditors where the land is situated should be given an opportunity to file claims. Whether or not there are such creditors cannot be known until an executor or administrator is appointed and the opportunity afforded. In these *contra* cases heirs not provided for in the will were claiming title. The court held that the heirs' title was cut off by the probate at the situs without appointment of an executor there. In *Babcock v. Collins*[5] the court said there were no creditors. Doubtless they were entitled to presume this because nineteen years had elapsed since the testator's death. In *Calloway v. Cooley*[6] the legatees who received the proceeds of the sale by the domiciliary executor were also the heirs seeking to get the land from the purchaser. If they had succeeded in this, they would have had both the purchaser's money and the land. It is clear from these cases that the court is not going to enforce the technical right of the executor appointed at the situs of the land unless creditors or heirs will be injured by its failure to do so, that the claims of heirs are cut off by probate without appointment of an executor and that the absence of creditors may be inferred from lapse of time without application for the appointment of an administrator.

B. *To Which States Must an Inheritance Tax Be Paid?*

If real estate situated in one state is owned by a person domiciled in another, which state may exact an inheritance tax? The cases hold that the tax may be exacted by the state in which the real estate is situated[7] and not by the state in which deceased was domiciled.[8]

3. Babcock v. Collins, 60 Minn. 73, 61 N.W. 1020 (1895); Crusoe v. Butler, 36 Miss. 150 (1858). See also Doe v. McFarland, 9 Cranch 151, 3 L. Ed. 687 (U.S. 1815); Bromley v. Miller, 2 Thomp. & C. 575 (N.Y. Surr. 1874).
4. ATKINSON, WILLS 567 (1937).
5. 60 Minn. 73, 61 N.W. 1020 (1895).
6. 50 Kan. 743, 32 Pac. 372 (1893).
7. *In re* De Stuers' Estate, 199 Misc. 777, 99 N.Y.S.2d 739 (Surr. Ct. 1950); Chatfield v. Berchtoldt, 7 Ch. App. 192 (1872).
8. Connell v. Crosby, 210 Ill. 380, 71 N.E. 350 (1904); Succession of Westfeldt, 122 La. 836, 48 So. 281 (1909); *In re* Rust's Estate, 213 Mich. 138, 182 N.W. 82 (1921); *In re* Swift's Estate, 137 N.Y. 77, 32 N.E. 1096 (1893); *In re* Robinson's Estate, 285 Pa. 308, 132 Atl. 127 (1926).

C. Which Law Determines the Validity of a Will, Who Takes by Intestate Succession and Which Court Has Power to Decide This?

It is impossible to determine the choice of law and jurisdiction of court questions separately. The choice of law problem is inextricably interwoven with the jurisdiction of courts in the matter of succession to real estate upon death of the owner. It will be found that only a court of the state whose law determines the validity of a will has jurisdiction to decide that question in a way which will directly affect the title to land.[9] These actions are local and not transitory. In this they are like the action of ejectment to try title to land[10] where the order of the court, if the plaintiff is successful, directs the sheriff to put the plaintiff into possession[11] — an order which only an officer of the state where the land is situated can carry out since the officers of other states would have no authority there. Unless a probate is local in the state of the situs and in rem and, therefore, as to property within the territory, binding upon the whole world regardless of the service of process within the territory upon interested parties, a record of it will not be a muniment of title which a purchaser will be obliged to accept in the vendor's chain of title.[12]

While we know that a court of a state other than that in which the land lies may, in an in personam proceeding, determine the rights as between the parties to land in another state,[13] this judgment, being in personam, has no direct effect upon title to the land[14] until sued upon and reduced to judgment in the state in which the land is located.[15] Such in personam judgments are no guarantee that there may not be others than those who are parties whose title may prove to be superior to that of the successful party. This is why a probate proceeding in a state other than that in which the land is situated may be a valid in personam judgment as to the parties served with process within the territory or who appeared, and yet not be a good muniment of title which a contract purchaser must accept,[16] even if it is recorded in the state where the land is situated[17] unless such record itself becomes a probate by lapse of time without contest, thus providing the

9. See notes 23-28, 31 and 94 *infra.*
10. Gorham v. Jones & Johnson, 30 Tenn. 353 (1850). In Ellenwood v. Marietta Chair Co., 158 U.S. 105, 107, 15 Sup. Ct. 771, 39 L. Ed. 913 (1895), Justice Gray said, "an action for trespass upon land, like an action to recover the title or the possession of the land itself, is a local action, and can only be brought within the State in which the land lies."
11. SHIPMAN, COMMON LAW PLEADING §§ 64-65, n.5, 11 (3d ed. 1923).
12. See notes 26-28 *infra.*
13. See cases cited notes 14, 15 *infra.*
14. Fall v. Eastin, 215 U.S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65 (1909); Bullock v. Bullock, 52 N.J. Eq. 561, 30 Atl. 676 (1894).
15. Redwood Investment Co. v. Exley, 64 Cal. App. 455, 221 Pac. 973 (1923); Matson v. Matson, 186 Iowa 607, 173 N.W. 127 (1919).
16. See note 26 *infra.*
17. See notes 71, 72 *infra. Contra:* see note 70 *infra.*

local in rem probate. But such a probate proceeding in a state other than that in which the land is situated cannot be a binding in personam judgment unless the issues there were the same as at the situs. And they would not be the same if the law of the situs controls unless the law of the two states was the same or the court there applied the law of the situs — circumstances which are seldom shown.[18]

If the law of the domicil of the deceased controls and the real estate everywhere could be considered *a universitas* having a situs at the domicil of the deceased, then a probate there could be considered a binding *in rem* judgment on all the real estate regardless of its actual situs.[19] Any supposed desirability or convenience in the administration of estates arising from this would certainly be counterbalanced by the inconvenience in searching title and the impossibility of determining the validity of title if such foreign judgments are considered as directly affecting the title to land. If it be argued that the state in which the land is situated can require the foreign judgment to be recorded and that bona fide purchasers before such recording would not be affected by the judgment, such an argument would concede that the law of the actual situs controlled at least to this extent and would be inconsistent with the domicil theory. If the actual situs theory is valid for this part, it is valid for the whole. The domicil theory would make difficult, even impossible, the tracing of title to land.

1. *Validity of Wills*

The great weight of authority applies the law of the state in which the land is situated.[20] This is true in cases uncomplicated by prior probate in another state or country.[21] In one of these the Orphans' Court at the situs of the land refused to admit the will to probate until it had been admitted at the domicil. The Supreme Court of Alabama reversed, holding that probate at the domicil would not show that the will was valid as to real estate in Alabama.[22] Prior probate or denial of probate at the domicil has been held to have no effect upon the issue of probate or validity of the will at the situs of the land.[23] The reasons

18. See notes 33-40 *infra.*

19. See Crippen v. Dexter, 79 Mass. 330 (1859) and cases cited notes 41-45 *infra.*

20. Notes 21, 23 and 26 *infra.* This is in accord with the rule that the validity of inter vivos transactions attempting to transfer title to land is determined by the law of the situs of the land. Clark v. Graham, 6 Wheat. 577, 15 L. Ed. 335 (U.S. 1821); United States v. Crosby, 7 Cranch 115, 3 L. Ed. 287 (U.S. 1812).

21. Kingsbury v. Burnside, 58 Ill. 310 (1871); Calloway v. Doe, 1 Blackf. 372 (Ind. 1825); *In re* Gaines' Will, 84 Hun 520, 32 N.Y. Supp. 398 (Sup. Ct.), *aff'd*, 154 N.Y. 747, 49 N.E. 1097 (1895); Flannery's Will, 24 Pa. 502 (1855); *In re* Brandow's Estate, 59 S.D. 364, 240 N.W. 323 (1932); Pepin v. Bruyere, [1900] 2 Ch. 504; Duncan v. Lawson, 41 Ch. D. 394 (1889); Macdonald v. Macdonald, 14 Eq. 60 (1872); Coppin v. Coppin, 2 P. Wms. 291, 24 Eng. Rep. 735 (Ch. 1725).

22. Varner, Ex'r v. Bevil, 17 Ala. 286 (1850).

23. Clarke v. Clarke, 178 U.S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028 (1900); Blount v. Walker, 134 U.S. 607, 10 Sup. Ct. 606, 33 L. Ed. 1036 (1890) (power

given are that the law of the situs controls,[24] that probate is a proceeding in rem and that the court at the domicil did not have jurisdiction of the res.[25] A probate other than at the situs of the land is not admissible in evidence to show title in an action to try title.[26] In re *Eklund's Estate*[27] is a case illustrating the in rem character of probate and the fact that it is binding on the whole world as to real estate in the state whose court rendered the judgment. Probate in Minnesota, where the real estate was situated, was held binding on heirs in Sweden who had no actual knowledge of the death of testator or of the probate proceeding. In line with the actual situs of the land or in rem

to appoint by will); Frederick v. Wilbourne, 198 Ala. 137, 73 So. 442 (1916); Jaques v. Horton, 76 Ala. 238 (1884); Schweitzer v. Bean, 154 Ark. 228, 242 S.W. 63 (1922); Selle v. Rapp, 143 Ark. 192, 220 S.W. 662 (1920); Sayre v. Sage, 47 Colo. 559, 108 Pac. 160 (1910); Frazier v. Boggs, 37 Fla. 307, 20 So. 245 (1896); Crolly v. Clark & Alsop, 20 Fla. 849 (1884); Sternberg v. St. Louis Union Trust Co., 394 Ill. 452, 68 N.E.2d 892, 169 A.L.R. 545 (1946) (revocation by subsequent marriage); Pratt v. Hawley, 297 Ill. 244, 130 N.E. 793 (1921); Evansville Ice & Cold-Storage Co. v. Winsor, 148 Ind. 682, 48 N.E. 592 (1897); Thompson v. Parnell, 81 Kan. 119, 105 Pac. 502 (1909); Northcutt v. Patterson, 233 Ky. 23, 24 S.W.2d 902 (1930); Swift v. Wiley, 40 Ky. 115 (1840); Sneed v. Ewing, 28 Ky. 460 (1831); Atkinson v. Rogers, 14 La. Ann. 633 (1859); Woodville v. Pizzati, 119 Miss. 442, 81 So. 127 (1919); Dobschutz v. Dobschutz, 279 Mo. 120, 213 S.W. 843 (1919); Hines v. Hines, 243 Mo. 480, 147 S.W. 774 (1912); Keith v. Johnson, 97 Mo. 223, 10 S.W. 597 (1889); Applegate v. Smith, 31 Mo. 166 (1860); Allaire v. Allaire, 37 N.J.L. 312 (1875); Knox, Ex'r v. Jones, 47 N.Y. 389 (1872); White v. Howard, 46 N.Y. 144 (1871); Ex'rs of Wilson and Abraham v. Tappan, 6 Ohio 172 (1833); *In re* Pepper's Estate, 148 Pa. 5, 23 Atl. 1039 (1892); Bowen v. Johnson, 5 R.I. 112 (1858); Cornell v. Burr, 32 S.D. 1, 141 N.W. 1081 (1913); Kirkland v. Calhoun, 147 Tenn. 388, 248 S.W. 302 (1923); Owen v. Younger, 242 S.W.2d 895 (Tex. Civ. App. 1951); Holman v. Hopkins, 27 Tex. 38 (1863); Rice v. Jones, 4 Call's Rep. 89 (Va. 1786); Walton v. Hall's Estate, 66 Vt. 455, 29 Atl. 803 (1894). See also Paschall v. Ackhn, 27 Tex. 174 (1863). Curiously, the court here totaled assets everywhere and held if devise of Texas lands to charities exceeded one-fourth of this it should be cut down. For a *contra* case on this method, see Jarel v. Moon's Succession, 190 So. 867 (La. 1939) (involving forced heirs).

24. Most of the cases note 23 *supra.*

25. Sneed v. Ewing, 28 Ky. 460 (1831); Woodville v. Pizzati, 119 Miss. 442, 81 So. 127 (1919); Rice v. Jones, 4 Call's Rep. 89 (Va. 1786). An added reason in three cases was that the probate at the domicile was in common form and therefore not a final judgment until lapse of the statutory period for contest. See Selle v. Rapp, 143 Ark. 192, 220 S.W. 662 (1920); Pratt v. Hawley, 297 Ill. 244, 130 N.E. 793 (1921); Sneed v. Ewing, 28 Ky. 460 (1831).

26. Robertson v. Pickrell, 109 U.S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049 (1883); Darby's Lessee v. Mayer, 10 Wheat. 465, 6 L. Ed. 367 (U.S. 1825); M'Cormick v. Sullivant, 10 Wheat. 192, 6 L. Ed. 300 (U.S. 1825); Kerr v. The Devisees of A. Moon, 9 Wheat. 565, 6 L. Ed. 161 (U.S. 1824); Ferriday v. Grosvenor, 86 Conn. 698, 86 Atl. 569 (1913); Pennel's Lessee v. Weyant, 2 Harr. 501 (Del. 1839); Chidsey v. Brookes, 130 Ga. 218, 60 S.E. 529 (1908), *overruling* Doe v. Roe, 31 Ga. 593 (1860); The Chicago Terminal Co. v. Winslow, 216 Ill. 166, 74 N.E. 815 (1905); Henderson v. Belden, 78 Kan. 121, 95 Pac. 1055 (1908); Carmichal v. Elmendorf, 7 Ky. 484 (1817); Budd v. Brooke, 3 Gill & J. 198, 232 (Md. 1845); Ward v. Hearne, 44 N.C. 184 (1852); Lockwood v. Lockwood, 51 Hun 337, 3 N.Y.Supp. 887 (Sup. Ct. 1889); Ives v. Allyn, 12 Vt. 589 (1840); Thrasher v. Ballard, 33 W. Va. 285, 10 S.E. 411 (1889) (power to appoint by will). Cases in Tennessee may be distinguished because they go on the ground that the devisee of real estate is in by the will and no probate at the situs in Tennessee is necessary. However, the will must be valid by Tennessee law. Bleirdorn v. Pilot Mountain C. & M. Co., 89 Tenn. 166, 15 S.W. 737 (1890); Smith v. Neilson, 81 Tenn. 461 (1884); Donegan v. Taylor, 25 Tenn. 500 (1846).

27. 174 Minn. 28, 218 N.W. 235 (1928).

theory, the United States Supreme Court and the better considered state cases hold that a court in the state in which the land is situated need not give faith and credit to a probate or judgment passing upon the validity of the will rendered elsewhere.[28] *Contra* cases in Missouri[29] are due to a failure to distinguish in rem from in personam judgments and not to application of the domicil or *universitas* theory. They are inconsistent with other Missouri decisions, two of which were decided later.[30]

A final judgment of validity or invalidity of the will by a court at the situs of the land is res judicata on the question as to land within the jurisdiction of the court.[31] The question cannot be raised again collaterally, that is, in subsequent actions to try the title to that land.[32] A question arises whether a final judgment of validity or invalidity of the will, rendered by a court of a state other than that in which the land is situated, may be a valid in personam judgment res judicata as against parties who were personally subject to the jurisdiction of that court. Two of the cases indicate that this depends upon whether the law in the jurisdiction where the judgment was rendered was the same as the law at the situs.[33] In both cases the judgment was held not res judicata. In *Trotter v. Van Pelt*[34] the law applied by the court at the domicil was the law of the domicil which was different from the law of the situs and so the issues in the two cases were not the same. In *Allaire v. Allaire*[35] the court assumed that the law was different,

28. Clarke v. Clarke, 178 U.S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028 (1900); Robertson v. Pickrell, 109 U.S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049 (1883); Schweitzer v. Bean, 154 Ark. 228, 242 S.W. 63 (1922); Selle v. Rapp, 143 Ark. 192, 220 S.W. 662 (1920); Pritchard v. Henderson, 2 Penne. 553, 47 Atl. 376 (Del. 1900); Trotter v. Van Pelt, 144 Fla. 517, 198 So. 215 (1940); Woodville v. Pizzati, 119 Miss. 442, 81 So. 127 (1919); Crusoe v. Butler, 36 Miss. 150 (1858); Hines v. Hines, 243 Mo. 480, 147 S.W. 774 (1912); Bowen v. Johnson, 5 R.I. 112 (1858); Kirkland v. Calhoun, 147 Tenn. 388, 248 S.W. 302 (1922); Williams v. Saunders, 45 Tenn. 60 (1867).

29. Drake v. Curtis, 88 Mo. 644 (1886); Bradstreet v. Kinsella, 76 Mo. 63 (1882); Lewis v. St. Louis, 69 Mo. 595 (1879).

30. Dobschutz v. Dobschutz, 279 Mo. 120, 213 S.W. 843 (1919); Hines v. Hines, 243 Mo. 480, 147 S.W. 774 (1912); Applegate v. Smith, 31 Mo. 166 (1860).

31. Tompkins v. Tompkins, 1 Story 547 (Mass. 1841); *In re* Gaines' Will, 84 Hun 520, 32 N.Y. Supp. 398 (Sup. Ct. 1895), *aff'd mem.*, 154 N.Y. 747, 49 N.E. 1097 (1897).

32. Leatherwood v. Sullivan, 81 Ala. 458, 1 So. 718 (1887); Goodman v. Winter, 64 Ala. 410 (1879); Stull v. Veatch, 236 Ill. 207, 86 N.E. 227 (1908); Stanley v. Morse, 26 Iowa 454 (1868); Houser v. Paducah Lands Co., 157 Ky. 252, 162 S.W. 1113 (1914); Whalen v. Nisbet, 95 Ky. 464, 26 S.W. 188 (1894); Parker v. Parker, 65 Mass. 519 (1853); The Inhabitants of Dublin v. Chadbourn, 16 Mass. 433 (1820); Stevens v. Oliver, 200 Mo. 492, 98 S.W. 492 (1906); Roberts v. Flanagan, 21 Neb. 503, 32 N.W. 563 (1887); Caulfield v. Sullivan, 85 N.Y. 153 (1881); Lovett's Ex'rs v. Mathews, 24 Pa. 330 (1855); Townsend v. Estate of Downer, 32 Vt. 183 (1859). *Contra*: Cobb v. Willret, 313 Ill. 92, 144 N.E. 834 (1924); Lindsley v. O'Reilly, 50 N.J.L. 636, 15 Atl. 379 (1888); Cornelison v. Browning, 49 Ky. 425 (1850).

33. Trotter v. Van Pelt, 144 Fla. 517, 198 So. 215 (1940); Allaire v. Allaire, 37 N.J.L. 312 (1875).

34. 144 Fla. 517, 198 So. 215 (1940).

35. 37 N.J.L. 312 (1875).

saying that the issue in each case was whether the will was valid by the law of the state whose court was considering the matter.[36] The other cases holding that the foreign judgment is not res judicata give either no reason or reasons which are unsound.[37] Two cases hold that the foreign judgment is res judicata.[38] In one of these, the parties were cited but it does not appear that they were personally served within the territory of the first court or entered an appearance.[39] In the other, it is not stated where the land was situated.[40] If jurisdiction was obtained over the parties, it would seem that the foreign judgment should be res judicata as to them and their privies where the law applied and, therefore, the issues are shown to be the same as at the situs of the land.

A minority of cases apply the law of the domicil of the deceased to determine the validity of a will of real property.[41] Courts following this view have given significance to the words primary and ancillary probate, holding that there can be no probate at the situs until the will had been probated at the domicil of deceased,[42] and that probate by a court other than at the domicil of deceased was by a court without jurisdiction[43] even if that probate was at the situs of the land.[44] In *Murphy v. Mackey*[45] probate at the domicil in New York, after a contest, was held to entitle executors appointed there to collect rents of real estate in Maryland. Several cases proceed upon the theory that

36. This ignores the possibility that the court at the domicil might have applied the law of the situs or that the law of the two jurisdictions may have been the same.

37. Frederick v. Wilbourne, 198 Ala. 137, 73 So. 442 (1916); Pritchard v. Henderson, 2 Penne. 553, 47 Atl. 376 (Del. 1900); McCartney v. Osborn, 118 Ill. 403, 9 N.E. 210 (1886); Gilmore v. Gilmore, 144 Miss. 424, 110 So. 111 (1926); Woodville v. Pizzati, 119 Miss. 442, 81 So. 127 (1919). In Pritchard v. Henderson, *supra*, the reason given was that the foreign court did not have jurisdiction. True, it may not have had jurisdiction of the land for an in rem judgment but this has no bearing on whether there was a binding in personam judgment based on jurisdiction in personam. In Frederick v. Wilbourne, *supra*, the court said the appearance in the first action could have only been for the purpose of determining the validity of the will as to land in that jurisdiction.

38. Quinton v. Kendall, 122 Kan. 814, 253 Pac. 600 (1927); *In re* Barney's Will, 94 N.J. Eq. 392, 120 Atl. 513 (1923).

39. *In re* Barney's Will, *supra* note 38.

40. Quinton v. Kendall, *supra* note 38.

41. Burbank v. Ernst, 232 U.S. 162, 34 Sup. Ct. 299, 58 L. Ed. 551 (1914); Corrigan v. Jones, 14 Colo. 311, 23 Pac. 913 (1890); Irwin's Appeal, 33 Conn. 128 (1865); Newman v. Willetts, 52 Ill. 98 (1869); Sullivan v. Kenney, 148 Iowa 361, 126 N.W. 349 (1910); Bissell v. Bodcaw Lumber Co., 134 La. 839, 64 So. 792 (1914); Crippen v. Dexter, 79 Mass. 330 (1859); Scripps v. Durfee, 131 Mich. 265, 90 N.W. 1061 (1902); Seccomb v. Bovey, 135 Minn. 353, 160 N.W. 1018 (1917); Sturdivant v. Neill, 27 Miss. 157 (1854); Holland v. Jackson, 121 Tex. 1, 37 S.W.2d 726 (1931) .

42. Rackemann v. Taylor, 204 Mass. 394, 90 N.E. 552 (1910). For the opposite view, see cases cited note 23 *supra*, applying the majority view.

43. Patterson v. Dickinson, 193 Fed. 328 (9th Cir. 1912); McEwen v. McEwen, 50 N.D. 662, 197 N.W. 862 (1924); Seifert v. Seifert, 82 Okla. 230, 200 Pac. 243 (1921).

44. Patterson v. Dickinson, 193 Fed. 328 (9th Cir. 1912).

45. 135 Md. 611, 109 Atl. 326 (1920).

the will is the res and for this reason hold that probate at the purported domicil is conclusive.[46] One case suggests that the law of the country of which deceased was a citizen and the place where the will was made determines its validity.[47]

Many of the cases applying the domicil-*universitas* theory have been impliedly overruled by later, inconsistent decisions in the same state.[48] In only five states are there no decisions inconsistent with the single decision applying this doctrine.[49] The argument that the will is the res proves too much, for it would make a probate in a state which was neither the situs of the land nor the domicil of the deceased conclusive.

The doctrine of election has been applied to partially defeat the application of the law of the situs.[50] The idea seems to be that, if the will is invalid in the state or country in which real estate is situated, a court

46. Torrey v. Bruner, 60 Fla. 365, 53 So. 337 (1910); State *ex rel.* Ruef v. District Court, 34 Mont. 96, 85 Pac. 866 (1906).

47. Curling v. Thornton, 2 Adm. & Eccl. 6 (Prerog. Ct. 1823).

48. Sturdivant v. Neill, 27 Miss. 157 (1874), *overruled,* Woodville v. Pizzati, 119 Miss. 442, 81 So. 127 (1919); Irwin's Appeal, 33 Conn. 128 (1865), *overruled,* Ferriday v. Grosvenor, 86 Conn. 698, 86 Atl. 569 (1913); Newman v. Willetts, 52 Ill. 98 (1869), *overruled,* Kingbury v. Burnside, 58 Ill. 310 (1871), The Chicago Terminal Co. v. Winslow, 216 Ill. 166, 74 N.E. 815 (1905), Pratt v. Hawley, 297 Ill. 244, 130 N.E. 793 (1921); and Corrigan v. Jones, 14 Colo. 311, 23 Pac. 913 (1890), *overruled,* Sayre v. Sage, 47 Colo. 559, 108 Pac. 160 (1910). In Massachusetts, where the doctrine originated, Crippen v. Dexter, 79 Mass. 330 (1859), and Rackemann v. Taylor, 204 Mass. 394, 90 N.E. 552 (1910), are inconsistent with later cases involving personal property where effect was given to a prior probate at the situs away from the domicil. Morrison v. Hass, 229 Mass. 514, 118 N.E. 893 (1918); Wright v. Macomber, 239 Mass. 98, 131 N.E. 480 (1921). In Louisiana, Bissell v. Bodcaw Lumber Co., 134 La. 839, 64 So. 792 (1914), is inconsistent with the earlier case of Atkinson v. Rogers, 14 La. Ann. 633 (1859). In Texas, Holland v. Jackson, 121 Tex. 1, 37 S.W.2d 726 (1931), is inconsistent with the earlier supreme court case of Holman v. Hopkins, 27 Tex. 38 (1863), and with a later decision of the commission of appeals, De Tray v. Hardgrove, 52 S.W.2d 239 (1932), and with two later court of civil appeals decisions, Singleton v. St. Louis Union Trust Co., 191 S.W.2d 143 (1945), and Owen v. Younger, 242 S.W.2d 895 (Tex. Civ. App. 1951). In Burbank v. Ernst, 232 U.S. 162, 163, 34 Sup. Ct. 299, 58 L. Ed. 551 (1914), Justice Holmes said, "Of course the jurisdiction of the Texas court depended upon the domicile of Burbank. . . ." Holmes' opinion does not mention the character of the property. However, an examination of the opinion of the Supreme Court of Louisiana in Succession of Burbank, 129 La. 528, 56 So. 430 (1911), shows that real estate in Louisiana was involved and that counsel on both sides agreed that jurisdiction depended on domicil. The Louisiana court found that the domicil was in Louisiana and not in Texas where there had been a prior probate. Since the situs of the land was in Louisiana, the situs theory would have produced the same result. Of course, Justice Holmes' dictum is contrary to earlier Supreme Court decisions cited in notes 23 and 26 *supra.* In Maryland, Murphy v. Mackey, 235 Md. 611, 109 Atl. 326 (1920), is inconsistent with the earlier case of Budd v. Brooke, 3 Gill & J. 198, 232 (Md. 1845).

49. Iowa: Sullivan v. Kenney, 118 Iowa 361, 126 N.W. 349 (1910); Michigan: Scripps v. Durfee, 131 Mich. 265, 90 N.W. 1061 (1902); Minnesota: Seccomb v. Bovey, 135 Minn. 353, 160 N.W. 1018 (1917); North Dakota: McEwen v. McEwen, 50 N.D. 662, 197 N.W. 862 (1924); Oklahoma: Seifert v. Seifert, 82 Okla. 230, 200 Pac. 243 (1921).

50. *In re* Estate of Washburn, 32 Minn. 336, 20 N.W. 324 (1884); Van Dyke's Appeal, 60 Pa. St. 481 (1869); Orrell v. Orrell, 6 Ch. App. 302 (1871). See also Bolling v. Bolling, 88 Va. 524, 14 S.E. 67 (1891). *Contra*: Maxwell v. Maxwell, 2 De Gex McN. & G. 705, 42 Eng. Rep. 1048 (Ch. 1852); Brown v. Gregson, [1920] A.C. 860.

in a state or country where the will is valid will endeavor to compensate for this and carry out the testator's intention by making adjustments of the bequests or devises of property which it controls. It can do this by compelling the heirs who take by intestate succession to elect to give up the valid bequests or legacies or so much thereof as is needed to bring the aggregate of what they receive down to the value that the testator intended to give, or to convey the real estate received by intestate succession or its value to the intended devisee as a condition of receiving the valid bequest or devise. This equitable relief against mistake of law cannot be approved. The whole idea of the Wills Act is that the testator's intention is not to be carried out unless he complies with its formalities. To the extent that the will is invalid, the testator's intention should not be carried out.[51] In *Maxwell v. Maxwell*,[52] the first case on this issue, the court said this[53] and refused to put the heir to an election. The House of Lords reached the same result in *Brown v. Gregson*.[54] Apart from the conflict of laws the early law was that "if a will, purporting to devise real estate, but ineffectually, because not attested according to the Statute of Frauds, gives a legacy to the heir at law he cannot be put to his election."[55] If there is an express condition in the will that the legatee or devisee give up a valid claim to property in another state and the will is valid in both states, the legatee or devisee is put to an election.[56]

There are dicta that the interpretation or construction of a will is governed by the law of the domicil.[57] There are also dicta that interpretation or construction is governed by the law of the situs.[58] The domicil dicta are found in two classes of cases: (1) those in which there is no difference in the law of the two states and therefore no conflict of laws question;[59] and (2) those in which the question is not what

51. We cannot assume that the law of intestate succession is unfair or inappropriate.

52. 2 De Gex McN. & G. 705, 42 Eng. Rep. 1048 (Ch. 1852). Cited as *contra* in note 50 *supra*.

53. "[W]e are, as it seems to me, bound to hold that the will before us does not exhibit an intention to give or to affect any property that the will was not adapted to pass." *Id.* at 713-14.

54. [1920] A.C. 860. Cited as *contra* in note 50 *supra*.

55. Van Dyke's Appeal, 60 Pa. St. 481, 488 (1869). In Hearle v. Greenbank, 3 Atk. 695, 715, 26 Eng. Rep. 1200 (Ch. 1749), Lord Chancellor Hardwicke said, "It is like the case where a man executes a will in the presence of two witnesses only, and devises his real estate from his heir at law, and the personal estate to the heir at law; this is a good will as to personal estate, yet for want of being executed according to the statute of frauds and perjuries, is bad as to the real estate; and I should in that case be of the opinion, that the devisee of the real estate could not compel the heir at law to make good the devise of the real estate, before he could intitle him to his personal legacy, because here is no will of real estate for want of proper forms and ceremonies required by the statute."

56. Caulfield v. Sullivan, 85 N.Y. 153 (1881).

57. See notes 59, 60 *infra*.

58. See notes 67, 68 *infra*.

59. Dannelli v. Dannelli, 67 Ky. 51 (1868); Ford v. Ford, 80 Mich. 42, 44 N.W. 1057 (1890); Ford v. Ford, 70 Wis. 19, 33 N.W. 188 (1887); Studd v. Cook,

the testator's intention in fact was but what the court should assume it to be when the testator's intention cannot be ascertained.[60] This is a question of policy or law, that is, what the presumption is as a matter of law.[61] The applicable law should be the law of the situs.

The prevalence of these domicil dicta is due to Story[62] who relied upon *Trotter v. Trotter*[63] and Burge's *Commentaries on Colonial and Foreign Law.* In *Trotter v. Trotter* the Scotch Court of Sessions professed to be construing the will by the law of the domicil, India, but it does not appear that the result would be any different by the law of Scotland, the situs of the real estate. Furthermore, it was dealing with a presumption of law in a situation where the testator's intention is not clear rather than with a question of actual intention. Story quotes from Burge that if a testator died domiciled in *A* leaving real estate in *A, B* and *C* to his "heirs," it would be presumed that he was acquainted with the sense attached to the word "heirs" by the law of his domicil, and not that he intended the real estate in three jurisdictions to pass to different persons because "heirs" meant different people in the law of the three jurisdictions. This reasoning cannot survive analysis. In the first place, laymen are seldom acquainted with the law either of their domicil or elsewhere, so that no such presumption is justified. In the second place, if they are thoroughly familiar with the law of their domicil, including its conflict of laws rules, they will know

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8 App. Cas. 577 (1883); Trotter v. Trotter, 4 Bligh N.S. 502, 5 Eng. Rep. 179 (Sc. Sess. Cas. 1828). In Dannelli v. Dannelli, *supra,* the domicil of the testator and apparently the real estate were both in Kentucky. The question was whether the devisee born illegitimate was legitimated and this depended on the law of Lombardy or Switzerland, neither of which was clearly shown. The court erroneously treated the problem as one of interpreting the word "heirs." In Studd v. Cook, *supra,* the testator domiciled in England devised real estate including real estate in Scotland to the use of his elder son Edward Fairfax Studd and after his death to the use of the first and every other son of the said Edward Fairfax Studd, successively, according to their respective seniorities in tail male with remainder, and so forth. By Scotch law this would give a fee to Edward Fairfax Studd unless an intention clearly appeared to give him a life estate only. It was decided that from words used throughout the will such an intention did appear. There was no difference in the law of the two countries on this. However, it was stated that the incidents and consequences of this gift must be determined by the Scotch law, and that therefore an estate tail being something different in Scotch law than in English law, and the life tenant having different rights to lease beyond his life in Scotch law than in English law these rights would be determined by the Scotch law. See, *In re* Miller, [1914] 1 Ch. 511. In Ford v. Ford, the Wisconsin case *supra,* the testator's domicil was in Wisconsin and the court professed to be affecting Wisconsin real estate only. Michigan, where the other *Ford* case was decided, subsequently adopted the minority domicil theory as to the law applicable to wills of real estate. See note 49 *supra.*

60. Guerard v. Guerard, 73 Ga. 506 (1884); Keith v. Eaton, 58 Kan. 732, 51 Pac. 271 (1897); Staigg v. Atkinson, 144 Mass. 564, 12 N.E. 354 (1887); Bolling v. Bolling, 88 Va. 524, 14 S.E. 67 (1891).

61. Heilman calls this construction as distinguished from interpretation. Heilman, *Interpretation and Construction of Wills of Immovables in Conflict of Laws Cases Involving "Election,"* 25 ILL. L. REV. 778 (1931).

62. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 479h (6th ed. 1865).

63. 4 Bligh N.S. 502, 5 Eng. Rep. 179 (Sc. Sess. Cas. 1828).

that the will is governed by the law of the situs of the real estate and the presumption would be that they used the term in the sense of the law which controlled.[64] In reality we cannot know what the testator meant by this term, and the question becomes one of policy or law which, by the great weight of authority, must be determined by applying the law of the situs.[65] These domicil dicta also leave open the question of domicil when? In *Staigg v. Atkinson*[66] the interpretation was by the law of the domicil of the testator at the time he made the will (the law of the situs of the real estate was the same) and not by the law of the testator's domicil at the time of his death.

The situs dicta are also found in two classes of cases: (1) those in which there was no difference in the law of the two states and therefore no conflict of laws question;[67] (2) those in which the question was not what the testator's intention was in fact but what the court should assume it to be when the intention cannot be ascertained.[68]

The question of the law applicable to wills of real estate is complicated by statutes at the situs. There are four types of statutes: First, those providing that a record of probate in a foreign court may be used directly as evidence in actions to try title without local recording or probate.[69] These are undesirable because they ignore the possibility of difference in the law of the two jurisdictions and the in rem character of foreign probate. Second, those providing for recording, either with the registrar of deeds or in a probate court, of a copy of the will together with an authenticated record of the foreign probate — they usually provide that the record shall have the same force and effect as if the will were probated in the state. The ambiguity of these statutes has resulted in two inconsistent lines of decisions interpreting them. One line holds that the statute validates a will so recorded, although it was not otherwise valid by the law of the situs.[70] The other

64. Hening, *Is the Construction of Wills Devising Real Estate Governed by the Rules of Construction of the Domicil of the Testator or by the Rules of the Situs of the Property?* 50 AM. L. REG. 623, 732 (1902).

65. See notes 20-26 *supra*.

66. 144 Mass. 564, 12 N.E. 354 (1887).

67. Peet v. Peet, 229 Ill. 341, 82 N.E. 376 (1907); McCartney v. Osborn, 118 Ill. 403, 9 N.E. 210 (1886); *In re* Osborn's Estate, 151 Misc. 52, 270 N.Y. Supp. 616 (Surr. Ct. 1934).

68. Jennings v. Jennings, 21 Ohio St. 56 (1871); *In re* Miller, [1914] 1 Ch. 511.

69. Scott v. Herrell, 27 App. D.C. 395 (1906). See also Chattanooga Iron & Coal Corp. v. Shaw, 157 Ga. 869, 122 S.E. 597 (1924).

70. Amrine v. Hamer, 240 Ill. 572, 88 N.E. 1036 (1909); Green v. Alden, 92 Me. 177, 42 Atl. 358 (1898); Lyon v. Ogden, 85 Me. 374, 27 Atl. 258 (1893); Kennard v. Kennard, 63 N.H. 303 (1885); Poole v. Jackson, 66 Tex. 380, 1 S.W. 75 (1886); *In re* Gailey's Will, 169 Wis. 444, 171 N.W. 945 (1919); *In re* Gertsen's Will, 127 Wis. 602, 106 N.W. 1096 (1906). One court refused to apply such a statute. Jones v. Robinson, 17 Ohio St. 171 (1867). In Markwell v. Thorn, 28 Wis. 548 (1871), the purchaser from the devisee objected that the title resulting from recording of the foreign probate at the situs was not clear without administration since creditors of the testator might proceed against the property. The court held the title marketable, brushing aside this argument.

In several cases, recording of foreign probate has been limited to probate

line of cases annuls the recording[71] or holds it invalid[72] if the will was not valid by the law of the situs. This type of statute seems to be based on the idea that a single probate affects land wherever situated so that all that is needed is a record of it at the situs. As shown above,[73] this is not true. The third type consists of those statutes which provide for probate of a photostatic copy of the will where the original has been probated elsewhere and cannot be removed or can be removed only temporarily.[74] Obviously, this type of statute is desirable since, if there is real estate in several states, there must be a probate in each of those states. Fourth are those providing that a will shall be valid if executed in accordance with the law of this state, of the place of execution or of the law of the testator's domicil at the time of its execution.[75] This is a desirable remedial statute. The law of the situs pro-

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at the domicil of the testator. Bate v. Incisa di Camerana, 59 Miss. 513 (1882); *In re* Mauldin's Estate, 69 Mont. 132, 220 Pac. 1102 (1923); Manuel v. Manuel, 13 Ohio St. 458 (1862). *Contra*: Jacobs v. Willis' Heirs, 147 Tenn. 539, 249 S.W. 815 (1923). In the three majority cases this resulted in no effect being given to the foreign probate which was not at the domicil. However, this assumes a potency in probate at the domicil which does not exist.

71. Meese v. Keefe, 10 Ohio 362 (1841).

72. Collum v. Price, 185 Ala. 556, 64 So. 88 (1913); Crossett Lumber Co. v. Files, 104 Ark. 600, 149 S.W. 908 (1912); Knight v. Wheedon, 104 Ga. 309, 30 S.E. 794 (1898); Williams v. Jones, 77 Ky. 418 (1878); Cornelison v. Browning, 49 Ky. 425 (1850); White v. Greenway, 303 Mo. 691, 263 S.W. 104 (1924); Nelson v. Potter, 50 N.J.L. 324, 15 Atl. 375 (1888). See also Dickey v. Vann, 81 Ala. 425, 8 So. 195 (1886); Harrison v. Weatherly, 180 Ill. 418, 54 N.E. 237 (1899); Bailey v. Bailey, 8 Ohio 239 (1837). In Dibble v. Winter, 247 Ill. 243, 93 N.E. 145 (1910), the court treated the record as a probate in common form subject to contest within one year as in the case of probate. Bailey v. Bailey, 8 Ohio 239 (1837), and Shephard v. Carriel, 19 Ill. 312 (1857), hold that the validity of the recording cannot be raised collaterally in actions to try title.

73. See notes 23-30 *supra*.

74. For example, N.J. STAT. ANN. §§ 3:2-46, 3:2-47 (1939). This statute is limited to the wills of resident decedents. It is not perceived why it should be so limited. See also ORE. COMP. LAWS ANN. § 19-202 (1940); Barnes v. Brownlee, 97 Kan. 517, 155 Pac. 962 (1916) (authenticated copy of judgment proving will); Pratt v. Hargraves, 77 Miss. 892, 28 So. 722 (1900) (notarial act).

75. MODEL EXECUTION OF WILLS ACT § 7, 9 U.L.A. (1951); Moore v. Executive Committee, 171 La. 191, 129 So. 920 (1930); Shimshak v. Cox, 166 La. 102, 116 So. 714 (1928); Jones v. Hunter, 17 La. 130, 6 Rob. 235 (1843); Lyon v. Ogden, 85 Me. 374, 27 Atl. 258 (1893).

The UNIFORM WILLS ACT, FOREIGN PROBATE § 3, 9 U.L.A. (1942), adopted in 1915 and withdrawn from the active list of Uniform Acts in 1943 contained features of § 7 of the Model Execution of Wills Act, but provided for effect to be given to the foreign probate upon proof of such probate if these features existed. In this respect it belongs in the second class of statutes. See notes 70-73 *supra*. Idaho has this type of statute. IDAHO CODE ANN. tit. 15, §§ 15-220 to 15-222 (1949). In Sternberg v. St. Louis Union Trust Co., 394 Ill. 452, 68 N.E.2d 892, 169 A.L.R. 545 (1946), the Supreme Court of Illinois interpreted the Uniform Wills Act, Foreign Probated. Although the will was made and probated at the domicil of deceased in Missouri, the Illinois court held that the law of the situs of the real estate, Illinois law, determined whether marriage after the execution of the will revoked it. This suggests that the Model Execution of Wills Act applies only to matters of "manner" of execution and not to other matters affecting the validity of wills such as revocation by a subsequent marriage. What is a matter of manner of execution might be a nice question. Is a statute prohibiting gifts of more than a certain proportion of deceased's property to charities a matter of "manner" of execution? Possibly § 7 of the Model Execution of Wills Act refers only to the formalities required in ex-

vides that the will shall be valid if valid by the law of any one of three places. This gives no effect to foreign in rem proceedings.

If the will is probated at the domicil of the testator and not offered for probate or record at the situs of the land until years later, will the devisee prevail over heirs who have been in possession or bona fide purchasers from them? Several decisions favor the devisee[76] but most favor the bona fide purchasers from the heirs.[77]

2. *Succession on Death by Operation of Law*

The applicable law to determine who takes real estate by intestate succession is the law of its situs.[78] This has never been questioned, but difficult problems arise in applying the rule.

In some situations in the administration of decedents' estates real estate is treated as personal property. Nevertheless, in these situations, the courts apply the law of descent of the situs of the real estate and not the law of the domicil.[79]

Another problem of application occurs in connection with the inheritance of real estate when children are illegitimate or when it is claimed that children have been legitimated or adopted. The problem can best be illustrated by two well-considered decisions which produce results which are inconsistent but sound. They are *Birtwhistle v. Vardill*[80] and *Ross v. Ross*.[81] In *Birtwhistle v. Vardill* a child was born in Scotland to unmarried parents, physically present in Scotland and

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ecuting a will such as witnesses, and so forth. Would it refer to questions of capacity to make a will?

76. Belt v. Adams, 125 Miss. 387, 87 So. 666 (1921); Carpenter v. Denoon, 29 Ohio St. 379 (1876) (statute providing that heirs should not be defeated by a will probated more than two years after death of the testator was enacted too late to apply in this case); Bryan v. Nash, 110 Va. 329, 66 S.E. 69 (1909). In the first and last cases the defendants were purchasers at judicial sales in partition and foreclosure suits at the situs instituted by them but the courts thought that the suits were fraudulent.

77. Catholic University of America v. Boyd, 227 Ill. 281, 81 N.E. 363 (1907); Foster v. Jordan, 130 Ky. 445, 113 S.W. 490 (1908) (ten-year statute of limitations); Van Syckel v. Beam, 110 Mo. 89, 19 S.W. 946 (1892); Slayton v. Singleton, 72 Tex. 209, 9 S.W. 876 (1888); Simpson v. Cornish, 196 Wis. 125, 218 N.W. 193 (1928). In the last case the purchasers bought from the heirs after administration and a judicial finding that deceased died intestate.

78. Harrison v. Moncravie, 264 Fed. 776 (8th Cir. 1920); *In re* Hill's Estate, 176 Cal. 232, 168 Pac. 20 (1917); Wunderle v. Wunderle, 144 Ill. 40, 33 N.E. 195 (1893); Montgomery v. Montgomery, 101 Tex. 118, 105 S.W. 38 (1907). See also Coppin v. Coppin, 2 P. Wms. 291, 24 Eng. Rep. 735 (Ch. 1725). In Harrison v. Moncravie, *supra*, both the law of Oklahoma, where the land was situated, and the law of Kansas, where both the deceased and his wife were domiciled and where she murdered him, prohibited one from inheriting from a person whose life they had taken. The court nevertheless held that the wife could inherit, on the ground that the bar of the Oklahoma statute applied only if she were convicted in Oklahoma and here she was convicted in Kansas. This narrow interpretation of the law of the situs is indefensible.

79. Clarke v. Clarke, 178 U.S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028 (1900) (equitable conversion); *In re* Berchtold, [1923] 1 Ch. 192 (1922) (equitable conversion); Duncan v. Lawson, 41 Ch. D. 394 (1889) (leasehold interests).

80. 7 Cl. & Fin. 895, 7 Eng. Rep. 1308 (H.L. 1840).

81. 129 Mass. 243 (1880).

domiciled there. Subsequently, the father married the mother in Scotland. By Scotch law this legitimated the child, that is, it created the parent-child relationship including the right to inherit real estate in Scotland. The father died intestate owning real estate in England. The House of Lords held that although a parent-child relationship was created in Scotland which was entitled to recognition and existed everywhere, the child could not inherit because by the English statute of descent only children born after the marriage of their parents could inherit real estate in England. This was the Statute of Merton, adopted for England by the Lords at a time when the ecclesiastical courts were recognizing subsequent marriage as legitimating the child, and when the House of Lords included members from the King's French provinces which had the civil law rules by which children were legitimated by subsequent marriage of the parents. Thus, although the child was legitimate, the law of descent at the situs of the land prevented it from inheriting.

In *Ross v. Ross* a child was adopted in Pennsylvania while all parties were in Pennsylvania and domiciled there. By the law of Pennsylvania this created the relation of parent and child and also entitled the child of the adoptive parents to inherit as if the relation were a natural one. Subsequently, the adoptive father died domiciled and owning real estate in Massachusetts. The Massachusetts statute of descent provided that the real estate of a person dying intestate should descend in equal shares to his "children." It did not distinguish between children of his blood or by adoption. Another Massachusetts statute provided that children might be adopted and that after adoption the child and adoptive parents had the same right of inheritance as if the relation were natural. The question was whether the child could inherit the real estate. The court held that the relation of parent and child was created by Pennsylvania law and continued when the parties removed to Massachusetts so that the child was legally the child of the deceased and entitled to inherit under the statute of descent which provided for inheritance by "children." It was argued that only children adopted in Massachusetts could inherit, but this was rejected.

Thus it appears that the results depend upon analysis of the statutes involved and their classification into those dealing with status, that is, the personal legal relationship between the parties, and those dealing with descent, that is, with the transfer of title to real estate on death of the owner. The applicable law for the former is the law to which the parties were subject at the time of the conduct or proceeding alleged to have effected a legitimation or adoption.[82] The applicable law

82. Eddie v. Eddie, 8 N.D. 376, 79 N.W. 856 (1899); see also notes 85, 87 and 88 *infra*. In *In re* Bruington's Estate, 160 Misc. 34, 289 N.Y. Supp. 725 (Surr.

for the latter is the law of the situs of the real estate.[83] Both may be involved. A single statute may cover both status and descent. If such a statute exists in both the state to whose law the parties were subject at the time of the legitimation or adoption and the state in which the real estate is situated, the status of the parties is determined by the former and their right to inherit the real estate by the latter.[84] Three steps are involved in the analysis of any fact situation: (1) Was the parent-child relationship created by the law to which the parties were subject at the time of the conduct or proceedings alleged to have constituted a legitimation or adoption? (2) Would this relationship entitle the claimant to inherit by the law of the situs of the real estate? (3) In the case of illegitimates, if a legal relationship was not created by the law to which the parties were subject at the significant time, does the law of the situs enable illegitimates to inherit from the father if recognized by him in some way specified by the statute? If the legal relationship created elsewhere will not entitle the claimant to inherit by the law of the situs, he will fail.[85] Some courts have reached this result by very narrow interpretation of the law of the situs. They hold that, although by their own law legitimated or adopted children could inherit, their law of descent was that only those legitimated or adopted in the state or by identical procedure could inherit.[86] If the legal relationship created elsewhere will entitle the claimant to inherit by the law of the situs, he will succeed[87] although he could not inherit by the

Ct. 1936) the New York court refused to recognize a New Jersey law legitimating the children although all parties were subject to that law, on the ground that it was contrary to the public policy of New York. This is unsound. *Cf.* Royal v. Cudahy Packing Co., 195 Iowa 759, 190 N.W. 427 (1922); Lee v. Attorney General, 1 D.L.R. 1166 (1924). Of course a situation can arise where the parent and child are subject to different laws at the time of the conduct alleged to have constituted a legitimation or adoption. In that event the applicable law is the law to which the party alleged to be under a duty was subject, usually the parent. Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915 (1892) (adoption); Irving v. Ford, 183 Mass. 448, 67 N.E. 366 (1903) (legitimation); *cf.* Commonwealth v. Acker, 197 Mass. 91, 83 N.E. 312 (1908).

83. See notes 85, 87 and 88 *infra. Contra: In re* Sunderland, 60 Iowa 732, 13 N.W. 655 (1882).

84. Keegan v. Geraghty, 101 Ill. 26 (1881); *In re* Riemann's Estate, 124 Kan. 539, 262 Pac. 16 (1927); Calhoun v. Bryant, 28 S.D. 266, 133 N.W. 266 (1911).

85. Williams v. Kimball, 35 Fla. 49, 16 So. 783 (1895) (legitimation); Keegan v. Geraghty, 101 Ill. 26 (1881) (child legally adopted in Wisconsin could not inherit real estate in Illinois from collateral relatives of adoptive parents because that was the law of descent of Illinois for all adopted children); Smith v. Derr's Adm'r, 34 Pa. 126 (1859) (legitimation); Birtwhistle v. Vardill, 7 Cl. & Fin. 895, 7 Eng. Rep. 1308 (H.L. 1840).

86. Hood v. McGehee, 237 U.S. 611, 35 Sup. Ct. 718, 59 L. Ed. 1144 (1915); Brown v. Finley, 157 Ala. 424, 47 So. 577 (1908); Fisher v. Browning, 107 Miss. 729, 66 So. 132 (1914); Frey v. Nielson, 99 N.J. Eq. 135, 132 Atl. 765 (1926). *Contra:* Gray v. Holmes, 57 Kan. 217, 45 Pac. 596 (1896); Ross v. Ross, 129 Mass. 243 (1880).

87. Adoption: McNamara v. McNamara, 303 Ill. 191, 135 N.E. 410 (1922); Glos v. Sankey, 148 Ill. 536, 36 N.E. 628 (1893); Gray v. Holmes, 57 Kan. 217, 45 Pac. 596 (1896); Ross v. Ross, 129 Mass. 243 (1880); Finley v. Brown, 122 Tenn. 316, 123 S.W. 359 (1909); Melvin v. Martin, 18 R.I. 650, 30 Atl. 467 (1894). Legitimation: Dayton v. Adkisson, 45 N.J. Eq. 603, 17 Atl. 964 (1889) (statute at the situs is not set out); Miller v. Miller, 91 N.Y. 315 (1883).

law which created the legal relationship.[88] The law of the situs is applied to determine the right of illegitimates to inherit land.[89] Under statutes enabling illegitimates to inherit it usually does not matter that the required marriage[90] or act of recognition[91] occurred in another state or before the statute became law.[92]

A widow's dower rights in real estate or statutory share in lieu thereof is determined by the law of the situs of the real estate.[93] A judgment elsewhere is not entitled to faith and credit and can have no effect at the situs of the land in determining the widow's interest.[94] Whether the rights of a spouse in real estate are community rights or common law rights is determined by the law of its situs and not by the law of their domicil.[95]

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88. *In re* Riemann's Estate, 124 Kan. 539, 262 Pac. 16 (1927); Calhoun v. Bryant, 28 S.D. 266, 133 N.W. 266 (1911). Both are adoption cases.

89. Pfeifer v. Wright, 41 F.2d 464 (10th Cir. 1930); Shaver v. Nash, 181 Ark. 1112, 29 S.W.2d 298 (1930); Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915 (1892); Stoltz v. Doering, 112 Ill. 234 (1885); Harvey v. Ball, 32 Ind. 98 (1869); Sneed v. Ewing, 28 Ky. 460 (1831); see cases cited in notes 90-92 *infra*. See also Barnum v. Barnum, 42 Md. 251 (1875).

90. Hall v. Gabbert, 213 Ill. 208, 72 N.E. 806 (1904); Leonard v. Braswell, 99 Ky. 528, 36 S.W. 684 (1896); *In re* Oliver's Estate, 184 Pa. 306, 39 Atl. 72 (1898).

91. Van Horn v. Van Horn, 107 Iowa 247, 77 N.W. 846 (1899).

92. Alston v. Alston, 114 Iowa 29, 86 N.W. 55 (1901); Moen v. Moen, 16 S.D. 210, 92 N.W. 13 (1902).

93. Gaskins v. Gaskins, 311 Ky. 59, 223 S.W.2d 374 (1949); Jarel v. Moon's Succession, 190 So. 867 (La. App. 1939); Hite v. Hite, 301 Mass. 294, 17 N.E.2d 176 (1938); Jones v. Gerock, 59 N.C. (6 Jones Eq.) 190 (1861); Jennings v. Jennings, 21 Ohio St. 56 (1871); Singleton v. St. Louis Union Trust Co., 191 S.W.2d 143 (Tex. Civ. App. 1945).

94. Gaskins v. Gaskins, 311 Ky. 59, 223 S.W.2d 374 (1949).

95. Gratton v. Weber, 47 Fed. 852 (C.C.D. Wash. 1891); Smith v. Gloyd, 182 La. 770, 162 So. 617 (1935).

It should be noted that this article deals with the effect of death of the owner of land in transferring title to land. If the land is not owned by the deceased his death will not have the effect of transferring title. So, although the deceased is the record owner of real property, it may turn out that in fact he does not own it or is only a co-owner. Thus property belonging to others may be traced into the real estate resulting in the court treating the deceased as a trustee of the land for those whose property was used in purchasing it. In that event the real estate or a portion of it would not pass to the heirs or devisees of the deceased record owner. Parrott v. Nimo, 28 Ark. 351 (1873); Gidney v. Moore, 86 N.C. 485 (1882); Mendenhall v. Walters, 53 Okla. 598, 157 Pac. 732 (1916). So in the case of personal property which inter vivos became community property by the law of a state to which it was subject at the time of acquisition and was later invested in real estate in a common law state in the name of one of the spouses. The law of the situs of the real estate controls but that law includes the tracing or source doctrine by which it can be shown that a half interest belonged to the other spouse which half interest would not be affected by death of the one having record title. Edwards v. Edwards, 108 Okla. 14, 233 Pac. 477 (1924). So also in the case of property which inter vivos became separate property of one of the spouses by the law which governed at the time of acquisition and which was invested in real estate in a community property state. While the law of the situs of the real estate controls, the tracing or source doctrine of that law will result in the real estate being treated as the separate property of the spouse whose funds went into its purchase. *In re* Thornton's Estate, 1 Cal.2d 1, 33 P.2d 1 (1934); Douglas v. Douglas, 22 Idaho 336, 125 Pac. 796 (1912); Brookman v. Durkee, 46 Wash. 578, 90 Pac. 914 (1907).