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An Inquiry Into the Utility of "Domicile" as a Concept in Conflicts Analysis

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AN INQUIRY INTO THE UTILITY OF "DOMICILE" AS A CONCEPT IN CONFLICTS ANALYSIS

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No attempt is made here to conduct an exhaustive case study of any one particular area in which the concept of "domicile" is used as a tool for analysis in the conflict of laws. A number of thorough and useful studies have been made in narrow areas[1] and are cited at appropriate places in the body of this article. Instead, this article will review the use of "domicile" in analyzing certain typical conflicts problems, particularly its use as the contact or pointing word in choice of law rules concerning the testate and intestate distribution of movables, and, as is newly the fashion, its use when determining the capacity of a wife to sue her husband in tort. "Domicile" as a basis for judicial jurisdiction will also be dealt with briefly. But, except for divorce jurisdiction, jurisdiction to deal with status will be skirted since such problems are enormously complex and require separate treatment. The purpose of this wide-ranging overview is to appraise the utility of the concept of "domicile" as a tool for conflicts analysis. Several well-known cases have been selected for examination. A review of those cases and the analytical problems they present should allow some conclusions to be drawn regarding whether domicile is a useful concept which assists proper analysis or is an albatross around our necks that we would be better to be quit of.

I. Intestate Succession to Movables

In other areas of choice of law, the second *Restatement of Conflict of Laws* has departed dramatically from the rules of the first *Restatement.* This is true, for example, in the substitution of "the state with which the contract has its most significant relationship"[2] for "the place of contracting"[3] and in the substitution of "the

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1. See particularly Stimson, *Conflict of Laws and the Administration of Decedents' Personal Property,* 46 VA. L. REV. 1345 (1960); Yiannopoulos, *Wills of Movables in American International Conflicts Law—A Critique of the Domiciliary "Rule,"* 46 CALIF. L. REV. 185 (1958) (survey of all cases to date of article involving international contacts).

2. RESTATEMENT (SECOND), CONFLICT OF LAWS § 332 (Tent. Draft No. 6, 1960).

3. RESTATEMENT, CONFLICT OF LAWS § 332 (1934).

state which has the most significant relationship with the occurrence and with the parties"[4] for "law of the place of wrong."[5] These changes are already having salutary effects upon our courts.[6]

Insofar as intestate succession to movables is concerned, however, the new *Restatement* is content to parrot the "law of the state of his domicil"[7] language of the first *Restatement*, but with a new renvoi twist. The new black-letter rule reads as follows:

> "(1) Questions of intestate succession to interests in chattels or in rights embodied in a document are determined by the law of the state where the decedent was domiciled at the time of his death, unless the law of the state in which the chattel or document is situated is to the contrary."
>
> "(2) Questions of intestate succession to rights not embodied in a document are determined by the law of the state where the decedent was domiciled at the time of his death."[8]

In the case of chattels and rights embodied in a document, reference to the whole law of the situs is explained by the fact that the situs has control over such movables,[9] the undoubted power to administer such assets in the event of intestacy,[10] and probably the power to apply its own law on distribution should it wish to do so.[11] This accords with the common explanation of the supposed[12] standard choice of law reference to the law of the domicile at death for intestate distribution of personalty as a preliminary reference to the whole law of the situs and then a referral by its choice of law rule to the law of the domicile at death.[13] Moreover, in the new

4. RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 8, 1963).

5. RESTATEMENT, CONFLICT OF LAWS § 379 (1934).

6. For cases abandoning the "place of wrong" rule under the influence of the second *Restatement*, see, *e.g.*, Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964).

7. RESTATEMENT, CONFLICT OF LAWS § 303 (1934).

8. RESTATEMENT (SECOND), CONFLICT OF LAWS § 303 (Tent. Draft No. 5, 1959).

9. *Id.* § 303, comment *b*.

10. See Iowa v. Slimmer, 248 U.S. 115 (1918); Newcomb v. Newcomb, 108 Ky. 582, 57 S.W. 2 (1900) (power to probate will at situs); Stimson, *supra* note 1, at 1352.

11. See Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 22 (1891) (dictum); MISS. CODE ANN. § 467 (1942) (personal property situated in Mississippi to be distributed according to Mississippi law); Stimson, *supra* note 1, at 1380.

12. Some commentators have found substantial evidence that the situs law is being applied. See, *e.g.*, Stimson, *supra* note 1, at 1345, 1380.

13. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 208 (1940); STUMBERG, CONFLICT OF LAWS 374 (3d ed. 1963); Briggs, *"Renvoi" in the Succession to Tangibles—A False Issue Based on Faulty Analysis*, 64 YALE L.J. 195, 197 (1954); Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1194 (1938).

Some support for this view is claimed from the fact that escheat is to the situs. See Matter of Menschefrend's Estate, 283 App. Div. 463, 128 N.Y.S.2d 738 (1954), *aff'd mem.*, 8 N.Y.2d 1092, 208 N.Y.S.2d 453, 170 N.E.2d 902, *remittitur amended*, 8 N.Y.2d 1156,

Restatement version, the reference to the law of the domicile, either directly or by way of the whole law of the situs, is again to the whole law of the domicile including its conflicts rules.[14] This is to insure that all courts referring to the law of the domicile will in fact distribute the property as the courts of the domicile would under identical facts.[15]

In this age of non-music and non-books, it is probably fitting that we should have such a non-rule. A purported choice of law rule which refers to the whole law of the indicated jurisdiction is not a choice of law rule at all. It gives no real guidance as to which domestic law of all those which might be applied is in fact the most appropriate. It gives no guidance to the courts of the jurisdiction to whose whole law other courts are directed[16]—no guidance, that is, to the most probable forum. There is a distinction between what a forum has the power to do and what it ought to do,[17] and the purpose of choice of law rules is to tell it what it ought to do in selecting applicable law.

On the whole, however, the expectation of the second *Restatement*, as of the first, seems to be that the internal law of the domicile at death will ultimately be applied to intestate distribution and that this is proper.[18] Except for the insertion of the renvoi concept and the rather sensible recognition of the fact that the meaning of "domicile" must vary with the context[19] (about which more will

209 N.Y.S.2d 836, 171 N.E.2d 909, *cert. denied sub nom.* Brown v. Lefkowitz, 365 U.S. 842 (1960); *In re* Barnett's Trusts, [1902] 1 Ch. 847; RESTATEMENT (SECOND), CONFLICT OF LAWS § 309 (Tent. Draft No. 5, 1959). There is, however, some authority to the contrary. See Estate of Nolan, 135 Cal. App. 2d 16, 286 P.2d 899 (Dist. Ct. App. 1955) (bank accounts); California v. Tax Comm'n, 55 Wash. 2d 155, 346 P.2d 1006 (1959) (stock in local corporation, certificates at domicile); *In re* Lyons' Estate, 175 Wash. 115, 26 P.2d 615 (1933) (bank account). There is even some authority that escheat will not be to the situs if the law of the domicile treats the domiciliary government as an heir for purposes of escheat. See *In re* Estate of Utassi, 29 Misc. 2d 387, 217 N.Y.S.2d 389 (Surr. Ct. 1961), *aff'd mem.*, 20 App. Div. 2d 232, 246 N.Y.S.2d 478 (1964); *Re* Maldonado, [1953] 2 All E.R. 1579 (Ct. App.). For criticism of this latter trend, see Ehrenzweig, *Characterization in the Conflict of Laws—An Unwelcome Addition to American Doctrine*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAWS 395, 403 (1961).

14. RESTATEMENT (SECOND), CONFLICT OF LAWS § 303, comment *c* (Tent. Draft No. 5, 1959).

15. *Ibid.*

16. See COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 264 (1942).

17. But see Baker, *In the Administration of Intangibles—Missouri's Section 466.010 in Perspective*, 19 Mo. L. REV. 1, 15 (1954): "Not always have courts clearly distinguished between the propriety of administering at the situs, and the propriety of applying in that administration the succession law of the domicile."

18. RESTATEMENT (SECOND), CONFLICT OF LAWS § 303, comment *c* (Tent. Draft No. 5, 1959).

19. *Id.* § 11, comment *d* (Tent. Draft No. 2, 1954).

be said later),[20] the approach of the new *Restatement* to the problem is basically the same as that of the old. It might be well therefore to scrutinize the "law of the domicile" choice of law rule for intestate succession and to begin by reviewing some of the classic cases applying that rule.

A. *In re Estate of Jones*[21]

1. *Facts*

Evan Jones, a native of Wales, had come to America in 1883 because of bastardy proceedings instituted against him by the mother of his illegitimate daughter. He became a naturalized citizen and married here, but his wife predeceased him. Being thrifty and hard-working, he had accumulated a considerable amount of property in Iowa, where he had settled. In 1915, having decided to return to his native Wales to live out the rest of his days, he sold his realty, purchased a draft for about two thousand dollars, left the rest of his cash on deposit in an Iowa bank with a note and mortgage for collection, sailed on the *Lusitania*, and was drowned when that ship was sunk by a German submarine.

The contestants for the intestate property in Iowa were, on one side, Evan's brothers and sisters and, on the other, his illegitimate daughter. Under Iowa law, because her paternity had been sufficiently proved and recognized during Evan's lifetime,[22] the daughter would inherit all assets administered in Iowa.[23] Under British law, however, it was conceded that the intestate distribution would be entirely to the decedent's brothers and sisters. It was therefore crucial to decide whether Iowa law or British law controlled the intestate distribution.

2. *Decision*

The court took as its guide the choice of law rule that the law of the decedent's domicile at death governed the intestate distribution of his movables. The only issue, then, was whether Evan Jones was domiciled in Iowa or in the British Isles at the time of his death. The argument for domicile in Great Britain was based on the English doctrine of reverter of the domicile of origin as soon

20. See text accompanying notes 85-96 *infra*.
21. 192 Iowa 78, 182 N.W. 227 (1921).
22. IOWA CODE ANN. § 3385 (1897).
23. IOWA CODE ANN. §§ 3362, 3378 (1897).

as the domicile of choice is abandoned:[24] Evan had acquired a domicile of choice in Iowa, but as soon as he left Iowa intending to return to his domicile of origin, Wales, his domicile of origin was renewed. This argument was rejected by the court which viewed it as based on feelings of patriotism and ties to the mother country that might exist when a British subject went to some distant part of the Commonwealth to make his fortune, always regarding himself as an Englishman. The court thought such notions inapplicable to a naturalized American citizen. Once this doctrine was rejected, it was clear that Evan was technically domiciled at death in Iowa. He had acquired a domicile of choice in Iowa and would retain it until he was physically present in another jurisdiction concurrent with a present intention to make the other jurisdiction his home. Therefore, he died domiciled in Iowa, Iowa law controlled intestate distribution of his property, and all intestate property went to the daughter.

3. *Analysis*

In testing the soundness of a decision such as this, it is often helpful to put oneself in the position of an advocate for the losing side and thus to see what reasonable arguments could be advanced for an opposite result. First, the Iowa court misinterpreted the English rule on revival of the domicile of origin, since the rule was applicable not only when a domicile of choice was abandoned to return to the domicile of origin but also whenever a domicile of choice was abandoned until a new domicile of choice was established.[25] Further, the rule was not based solely on notions of patriotism and ties to mother England. The domicile of origin reverted because of its special nature; one acquired his domicile of origin by operation of law as the domicile of his parents at his birth. When, therefore, a person had left his domicile of choice intending never to return and it seemed unrealistic to say that he retained a domicile there, the domicile of origin which he had originally acquired by operation of law would renew, again by operation of law, until it was once more sensible to speak of a domicile of choice elsewhere.[26] It seems very unlikely, however, that a

24. See Udny v. Udny, L.R. 1 H.L. 441 (1869). For a report on a proposal to abandon the rule in England, see Graveson, *Reform of the Law of Domicile*, 70 L.Q. REV. 492, 496, 498-99 (1954).

25. Udny v. Udny, *supra* note 24, at 448, 454, 460-61.

26. *Id.* at 452, 458-60.

correct understanding of the English rule on revival of domicile of origin would have changed the result.

Playing the domicile game with the court, one is tempted to expose the fallacy latent in the statement that "all will agree that the decedent did not have a domicile on the *Lusitania*."[27] For the purpose of the choice of law rule in issue, it was necessary only to decide whether Evan had died domiciled somewhere in the British Isles since Wales has no intestacy law of its own. He could have died domiciled in Great Britain without having died domiciled in Wales.[28] As soon as he set foot anyplace on British territory, he would be physically present in the jurisdiction whose law was in issue with a present intention to make his home somewhere within that territory. The *Lusitania* was a ship of the Cunard Line flying the British flag, and in the event of a tort on the high seas, the old, standard choice of law rule would have chosen the law of the flag to govern.[29] Since the *Lusitania* was a little piece of Britain and Evan Jones was therefore on British territory with domiciliary intent before he died, he died domiciled in Great Britain, and its law, not Iowa law, should have been applied.

Thus to play the domicile game exposes its inherent silliness. Why should the result turn on whether Evan managed to set foot on British territory again before his death or whether he retained a technical domicile in Iowa? What reasons can be advanced for having domicile at death govern the intestate distribution of movables and are these reasons applicable in the context of this case? Let us turn to these questions, which seem to go to the heart of the matter.

The reason most often advanced in support of the rule that the law of the domicile at death governs distribution of movables on intestacy (frequently the only reason advanced) is that it insures uniformity of distribution.[30] It is desirable, in order that confusion and conflict may be avoided, that the same law govern distribution of movable property everywhere; but this argument does not support any particular conflicts rule. Uniform interpretation and application of any choice of law rule will produce the desired result.

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27. 192 Iowa 78, 83, 182 N.W. 227, 229 (1921).

28. RESTATEMENT (SECOND), CONFLICT OF LAWS § 11, comment *e* (Tent. Draft No. 2, 1954).

29. RESTATEMENT, CONFLICT OF LAWS § 406 (1934).

30. RESTATEMENT (SECOND), CONFLICT OF LAWS § 303, comment *c* (Tent. Draft No. 5, 1959); STUMBERG, *op. cit. supra* note 13, at 374; Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679, 687 (1963).

Another reason frequently given for the domiciliary rule in intestacy and stated by the court in the principal case[31] is that the decedent is presumably more familiar with the law of his domicile than that of any other jurisdiction and, having left no will, wishes his property to pass in accordance with that domiciliary law. This seems unrealistic in the extreme. One may speculate with amusement over what responses the inquiring reporter would have if he asked people whether they knew the intestacy laws of their home state and wished those laws to govern distribution of their property. But, even conceding the possible validity of this as a general proposition, was it proper to presume that Evan Jones wished his bastard daughter to inherit all of his property? He seems to have made a life-long project of avoiding any responsibility for her support, and the court itself admitted that, so far as Evan's intentions were concerned, there was no basis for choosing Iowa or British law.[32]

A reason for applying the domiciliary rule in intestacy cases that is far more satisfactory than either of those usually given would seem to be that the technical domicile at death is likely, in the great majority of cases, to be in fact the jurisdiction which has the sole or at least the predominant interest in the application of its intestacy laws to the property of the decedent. Whatever be the policies underlying a state's intestacy statute directing which of the surviving kin shall take and in what portions, the chances are that the technical domicile at death will have a real and legitimate interest in wanting its own policies in these matters enforced. The natural objects of the decedent's bounty, or a good portion of them, are likely to be residents of the place of his domicile at death. If hard feelings are caused by a distribution improper in the eyes of the domicile, it is the domestic peace and tranquility of the domicile which will suffer. If those dependent upon the decedent are not given a share the domicile state considers just and proper and become objects of public charity, the government and citizens of that state will pay the bill.

If this is the reason which might most reasonably be advanced for the rule selecting the law of the domicile at death to govern intestate distribution of movables, is it applicable on the facts of *In re Estate of Jones*? A little searching of the record will reveal that all of the contestants, the illegitimate daughter and the brothers and sisters of the decedent, were residents of the British Isles at the time of his death and, with the exception of one sister who had

31. 192 Iowa at 95, 182 N.W. at 234.
32. *Ibid.*

sojourned briefly in the United States, had been life-long residents of Great Britain.[33] Iowa had no interest in preferring the bastard daughter over the brothers and sisters when British law would not have done so.

B. *White v. Tennant*[34]

1. *Facts*

The same basic objection can be made to the result in *White v. Tennant.* Michael White, at least until less than a month before his death, had been a life-long domiciliary of West Virginia, where his wife and brothers and sisters were also domiciled. Michael owned a farm in West Virginia on which he was living with his wife. He sold the farm and reached an agreement with his mother and brothers and sisters to occupy a forty-acre tract and a house on that tract. The tract was situated in Pennsylvania, just across the state line from West Virginia. This forty-acre tract was part of a larger 240-acre farm, the main part of which, including the mansion-house, was in West Virginia. On the morning of April 2, 1885, Michael and his wife left the West Virginia farm and house which he had sold and started for the house on the family farm in Pennsylvania "with the declared intent and purpose of making the Pennsylvania house his home that evening."[35] Michael and his wife arrived at the Pennsylvania house about sundown. The previous tenants had left several days before and the house was damp and uncomfortable. Michael's wife complained of feeling ill. Under the circumstances, Michael accepted the invitation of his brothers and sisters to spend the night in the mansion-house in West Virginia. He paused long enough to place in the Pennsylvania house the household goods he had carried with him and to turn loose his livestock. As it happened, Michael never did return to the Pennsylvania house to live. His wife, it was soon learned, had typhoid fever, and he stayed at the mansion-house to care for her. For about two weeks he went daily to the Pennsylvania tract to care for his stock, then suffered an attack

33. The residences of the contestants are indicated in the record in the following places and are Wales unless otherwise designated. Illegitimate daughter—Margaret, appellant's abstract of record, p. 2. Brothers and sisters—William, appellees' amendment to abstract, p. 128; Rees (London), appellant's abstract of record, p. 11; Thomas, same abstract, p. 114; Sarah Williams (had lived in United States but returned to Wales), same abstract, pp. 114-15; Mary, appellees' amendment to abstract, p. 131; John, same abstract, p. 129; Elizabeth Davies, same abstract, p. 130.

34. 31 W. Va. 790, 8 S.E. 596 (1888).

35. *Id.* at 794, 8 S.E. at 598.

of typhoid fever himself, and, a short time later, died intestate in the West Virginia mansion-house.

2. *Decision*

A good deal depended upon whether West Virginia law or Pennsylvania law was applied to the intestate distribution of Michael's personal property. Under West Virginia law everything would go to his widow.[36] The Pennsylvania statute gave half to the widow and half to the brothers and sisters.[37] Using the domicile at death rule, the West Virginia court ordered distribution under the Pennsylvania intestacy statute. It reasoned that Michael had been physically present at his house in Pennsylvania with a concurrent present intent to make it his home. Though he was present for only a short time, even momentary physical presence[38] if coupled with the requisite domiciliary intention[39] would be sufficient. Therefore, he had acquired a domicile of choice in Pennsylvania.

3. *Analysis*

Again, if one wishes to play the domiciliary game with the court and to argue for application of West Virginia law, it would first be necessary to point out the fallacy in one of the arguments the court used to establish the existence of a domicile of choice in Pennsylvania. The court reasoned[40] that Michael had to have a domicile somewhere at all times. He did not have one in the house he had sold and vacated, and he did not have one in the mansion-house in West Virginia because he did not think of it as a home. Therefore, he must have been domiciled in the Pennsylvania house. There is, of course, another possibility. He could have died domiciled in the State of West Virginia, though not in any house in that state.[41] This is what would necessarily have been the result had he suffered a fatal heart attack on the trip to Pennsylvania before crossing the state line but after leaving his West Virginia

36. W. VA. CODE ch. 78, § 9 (1899).
37. Pa. P.L. 315, § 1 (1833).
38. RESTATEMENT (SECOND), CONFLICT OF LAWS § 15(3) (Tent. Draft No. 2, 1954).
39. *Id.* § 18: "To acquire a domicile of choice in a place, a person must intend, for the time at least, to make that place his home." This is a modern updating of the "indefinite time" test traditionally used by American courts and used in the principal case.
40. 31 W. Va. at 797, 8 S.E. at 599-600.
41. See note 28 *supra*.

house and, let us assume, after it had been occupied by the new tenants. Having pointed this out, the argument in support of the widow should concentrate on the mental element part of the physical-presence-plus-domiciliary-intention combination needed to acquire a domicile of choice. The argument would be that before he had reached Pennsylvania on April 2, in view of his wife's complaints of illness, he had already decided to stay in West Virginia at the mansion-house that night and thus his domiciliary intention was but a future intention and not the required present intention. To be sure, the court specifically found that his intention to remain was a present one upon his arrival,[42] but this finding may have been changed by cogent evidence to the contrary.

Is all this, however, not beside the point? It is a common ploy for Conflicts teachers when discussing this case in class to ask whether the result would have been the same if the ultimate issue had been whether West Virginia or Pennsylvania could levy a large inheritance tax on, let us imagine, several million dollars of intangible personalty in Michael's estate.[43] The purpose of such a question may be to prepare the class for the startling revelation that "domicile" may mean different things in different contexts. Perhaps, however, there is another reason why the result might be different. Such an issue would focus the West Virginia court's attention on a matter which it did not seem to note in *White v. Tennant*—West Virginia's substantial interest in the outcome of the litigation. In the principal case, since all the contestants had been long-time West Virginia residents, one can ask what legitimate interest Pennsylvania had in controlling the intestate distribution as between the siblings and widow of Michael White. In view of the possible policies underlying an intestate distribution statute, perhaps Pennsylvania had no interest. Michael certainly was not more familiar with the Pennsylvania law on the subject than he was with West Virginia law. West Virginia had the predominant, perhaps exclusive, interest in preventing discord among the contestants and treating them according to its own notions of fairness and their needs. Although there is no indication of where the widow settled after the death of her husband, presumably it was in West Virginia; but it would be foolish to let much

42. 31 W. Va. at 796, 8 S.E. at 599.

43. *Cf.* Reese, *Does Domicil Bear a Single Meaning?*, 55 COLUM. L. REV. 589, 593 (1955) (puts hypothetical similar to *White v. Tennant* with inheritance tax issue and suggests courts would fail to find requisite domiciliary intention toward new state).

turn upon that. We would not want the widow to be able to select the law to govern distribution by selecting her house.[44]

C. *A More Useful Tool for Rational Analysis*

In order to point up the relative interests of West Virginia and Pennsylvania in the *White* case and to argue in terms of the policies underlying the statutes on intestate distribution, one might approach the problem as one of statutory construction. The statutes speak of "decedents," "intestates," "widows" and "kindred," but what decedents, what intestates, what widows and next of kin? If, as one might expect, the statutes of the two states are innocent of any answers to these questions in the interstate context of a conflicts problem, an answer must be supplied by statutory construction. The basic technique of such construction is to inquire into the purposes of the statutes to determine which of several possible constructions would advance these purposes and which would not. Unfortunately for such an approach, the Pennsylvania legislature had succumbed to the domicile dogma and a section of its code read, "Nothing in this act contained, relative to a distribution of personal estate among kindred, shall be construed to extend to the personal estate of an intestate, whose domicile, at the time of his death, was out of this commonwealth."[45] There was, however, no such embarrassment to rational analysis in the West Virginia code for the West Virginia forum. A code section such as this serves to buttress the argument against attempts to deal with conflict problems by statute—at least in the present state of our maturity respecting choice of law analysis. If not based upon an analysis of the policies underlying the statute and their relevance to extrastate contacts, such enactments are likely to generate spurious conflicts, resulting in the application of the law of a state having no legitimate interest in the matter and defeating the relevant interest of another state. If such enactments are based on the analysis of policies and seek to advance the interest of the enacting state whenever its policies are relevant, they will stifle any attempts at rational solutions to true conflicts.

In view of the possible policies underlying a statutory scheme

44. *But cf.* Gore v. Northeast Airlines, 222 F. Supp. 50 (S.D.N.Y. 1963) (widow's move from New York after husband's death makes New York law inapplicable).

45. Pa. P.L. 315, § 20 (1833).

of intestate distribution, if we must have a choice of law rule in this area as a shorthand for proper analysis, we would do well to fashion a judge-made rule which by its very terms takes specific account of those policies. Instead of talking in terms of technical domicile at death, it would be preferable to speak of "the state with the paramount interest in the distribution of the intestate movables." This may be, perhaps usually will be, the technical domicile at death. But, when it is not, we should have the tools at hand to recognize this.

II. Validity of a Will Disposing of Movables

The second *Restatement* adopts the same formula for determining the validity of a will of movables as it does for intestate succession, with the same double renvoi footwork:

> "(1) The validity and effect of a will in so far as it affects interests in chattels or in rights embodied in a document are determined by the law of the state where the testator was domiciled at the time of his death, unless the law of the state in which a chattel or document is situated is to the contrary. (2) The validity and effect of a will in so far as it affects rights not embodied in a document are determined by the law of the state where the testator was domiciled at the time of his death."[46]

Thus is approved for continued use the supposed[47] standard choice of law rule looking to the domicile of the testator at death. Again, we might begin by reviewing a classic case.

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46. Restatement (Second), Conflict of Laws § 306 (Tent. Draft No. 5, 1959).

47. There is some doubt about the universality of the rule. Alternative references are sometimes made, frequently to the situs law, in order to uphold the will. See *In re* Chappell's Estate, 124 Wash, 128, 213 Pac. 684 (1923) (situs law applied to uphold testamentary trust as against accumulations rule of domicile); Ill. Rev. Stat. ch. 3, § 89b (1961) (nonresident testator may provide in will for application of Illinois law as to personalty having situs in Illinois); N.Y. Deced. Est. Law § 47 (same); Yiannopoulos, *supra* note 1, at 206: *"Whenever the will does not violate superior policies of the forum* essential validity is governed by the law upholding the will. . . ." (International conflicts cases); Note, *The Testator's Intention as a Factor in Determining the Place of Probate of His Estate*, 33 Ind. L.J. 591, 599, 608 (1958); *cf.* Lanius v. Fletcher, 100 Tex. 550, 101 S.W. 1076 (1907) (situs law applied to prevent dissolution of trust by beneficiary under law of domicile).

In regard to formal validity, many states have statutes alternatively referring to the law of the place of execution or the law of domicile at time of execution. See Model Execution of Wills Act, superseding Uniform Wills Act, Foreign Executed, 9A U.L.A. 341, § 7; Restatament (Second), Conflict of Laws § 306, comment *f* (Tent. Draft No. 5, 1959); Rees, *American Wills Statutes*, 46 Va. L. Rev. 856, 905-06 (1960) (listing thirty-two states with statutes making some alternative reference for formal validity).

A. *An Illustrative Case—In re Annesley*[48]

1. *Facts*

Mrs. Annesley died in France in 1924, having lived there since moving from England in 1866. She left two wills, a holographic will in French and a will in English form. There was also a codicil to the latter. In these wills, Mrs. Annesley purported to dispose of all of her personal property in France and in England. This was permissible under English law, but, if French law were applicable, she could dispose by will of only one-third of her personal property, and the rest would go to her two surviving daughters. In a contest over distribution of the personal property in England (consisting chiefly of two bank accounts) the daughters, who had received less than two-thirds of the property disposed of by the wills, contended that French law was applicable; the other legatees argued for English law.

2. *Decision*

The court, applying the domicile-at-death choice of law rule, began by deciding that Mrs. Annesley had acquired a domicile of choice in France, even though she had not taken the steps prescribed for obtaining a formal French domicile[49] by Article 13 of the French Civil Code and had declared in her English-form will and a codicil to it that it was not her intention to abandon her English domicile of origin. For purposes of the English choice of law rule, "domicile" would be defined by English standards.[50] Immediately, however, the English court ran into another difficulty. The English choice of law rule would refer to French law in this case, but what French law—French domestic internal law only or the whole law of France including its conflicts rules? This was important because, in the case of a foreigner not legally domiciled in France according to the French Code, the French choice of law rule would select the law of that person's nationality—here, British law. Speaking for the majority of the court, Judge Russell applied the whole law of France, although he himself would have preferred the other alternative.[51]

48. [1926] Ch. 692.

49. But see DELAUME, AMERICAN-FRENCH PRIVATE INTERNATIONAL LAW 74-75 (2d ed. 1961) ("an alien residing in France with the appropriate intent could acquire a *de facto* domicile in France, a notion substantially equivalent to the general concept of domicile").

50. [1926] Ch. at 705.

51. *Id.* at 708-09.

The method chosen for applying the whole law of France was for the English court to decide the case just as a French court would have. After hearing expert testimony on this subject, the court decided that a French court would refer to English law, including the English choice of law rule pointing back to France, would accept this reference back (renvoi), and would apply French internal law to determine the validity of the testamentary disposition.[52] Thus Mrs. Annesley's wills were invalid insofar as they undertook to dispose of more than one-third of her personalty, and the legacies of the personalty in England under the will in English form could not be paid in full.

3. *Analysis*

This is all wonderfully complex and interesting. The only difficulty is that it makes no sense whatever and the result is wrong.[53] The intent of the testatrix was known; it was, as expressed in her wills, to leave the bulk of her estate to persons and institutions other than her two daughters. England had no policy against giving effect to this intention, and English law permitted testamentary disposition of an entire estate. Did France have any *logically applicable* policy against giving effect to this intent? There was such a French policy in regard to persons "domiciled" in France in the French sense. But is not the French choice of law rule an indication that the French policy, as interpreted by the French courts, is inapplicable to this very testatrix? Why should an English court enforce a French limitation on the intent of the testatrix when the French courts themselves would not have enforced it but for the English reference to French law?[54] It is gauche to be more Roman

52. *Cf. In re* Schneider's Estate, 198 Misc. 1017, 96 N.Y.S.2d 652, *adhered to*, 100 N.Y.S.2d 371 (Surr. Ct. 1950) (applying whole law of situs to determine validity of devise of realty); *In re* Zietz's Estate, 198 Misc. 77, 96 N.Y.S.2d 442 (Surr. Ct. 1950) (situs accepts reference by law of domicile to law of nationality); Simmons v. Simmons, 17 N.S.W. St. 419 (1917) (reference to whole law of domicile in intestacy with opposite view of that taken in principal case as to French rule on renvoi). For the very questionable use of the renvoi device to resolve a question of will construction, see *In re* Duke of Wellington, [1947] Ch. 506. This case is aptly criticized in Mann, *Succession to Immovables Abroad*, 11 MODERN L. REV. 232 (1948). For a case rejecting reference to the whole foreign law but reaching a result which should have been reached by construction alone, see Matter of Tallmadge, 109 Misc. 696, 181 N.Y.S. 336 (Surr. Ct. 1919).

53. For a case fortuitously reaching the right result by the same device because the Italian conflicts rule referred back to only the internal law of the "nationality," which the court took to mean the last but no longer continuing American domicile, see Taormina v. Taormina Corp., 35 Del. Ch. 17, 109 A.2d 400 (1954).

54. Counsel for the parties entitled to a trust legacy made a similar argument in the principal case. "The origin of the rule that the law of the domicil governs the succession to movables is based on convenience and international courtesy. The rule is satisfied as soon as it is found that the law of the domicil rejects the propositus,

than the Romans, but to be more French than the French is downright sinful.

The reason the English court fell into error was that, in adopting the renvoi device and placing itself in the position of a French court, it assumed that achieving uniformity of decision and thus insulating the result from change by the selection of a forum was the sole goal of choice of law rules. This is a goal, but only a secondary or subsidiary one. The primary goal is to apply the law which best takes into account the interests of the contact states and the intentions of the parties. As a first step in conflicts analysis, the court should determine whether there is any real conflict represented by the differing domestic laws—whether the contact states have *applicable* policies pointing to different results. If there is such a real conflict, the court should attempt to provide a rational solution, perhaps by looking to shared policies and general, shared trends in the underlying substantive area. It is only when this primary analysis is exhausted without success by a non-neutral forum[55]—when there is a real conflict which does not lend itself to rational solution or when neither state has an interest in having its law applied but one or the other must be applied[56]—that the sole focus is properly on insulating the result from the selection of the forum. When this is the proper focus, the "sitting-and-judging" formula with the forum court placing itself in the position of the foreign court and deciding the case exactly as the foreign court would have is the place to begin. This technique will not work if the foreign court would also employ it, since an endless circle of references will result unless there is some natural terminus on which both jurisdictions can agree, such as "the more probable forum."[57] It also will not work if there is more than one foreign contact state and the courts in those states would reach results diverse from one another and diverse from the forum. Only at this point—when rational solution of the conflict in terms of substantive policies and procedural

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and then both on grounds of convenience and courtesy an English court will apply English law." [1926] Ch. at 700.

55. If the forum has no applicable policy of its own and justice to the parties does not permit dismissal under a doctrine of forum non conveniens, the neutral forum should probably mirror a result that would be reached in common by all interested states. See Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 969 (1952).

56. See Weintraub, *A Method for Solving Conflict Problems*, 21 U. PITT. L. REV. 573, 589 (1960). *But see* Currie, *Survival of Actions—Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 228-29 (1958).

57. *Cf.* Freund, *Characterization With Respect to Contracts in the Conflict of Laws*, in THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS 158, 161 (1951).

attempts to insulate the result from the selection of the forum have both failed—has the time come to apply the rationally applicable law most convenient for and most in consonance with the domestic policies of the forum. Except in the case of a neutral forum without sufficient contacts with the parties or with the transaction to keep application of its law within the bounds of reason,[58] this will be the forum law.

B. *A More Useful Approach*

A conflicts case involving the essential validity of a will presents a problem too complex to be solved by any rigid, territorially oriented choice of law rule in the standard mold. This is true whether we use "domicile" or "situs" or any other jurisdiction-selector as the contact word. The number of different rules under which a will might be declared invalid is very great, and the policies which underlie these rules are quite diverse. In such a situation, when one state having a contact with the parties or the property would invalidate a will and another with such a contact would uphold it, the way to begin is by focusing on the domestic laws in apparent conflict and on the policies underlying those laws.[59] In light of those policies and those contacts, does only one of the states have a rational interest in having its policies and its law applied? If so, there is no true conflict and the law of that state should be applied. If, on the other hand, several states have legitimate concerns for having their diverse rules on validity applied, a real conflict is present and a rational solution for it should be sought. Perhaps the general direction for resolution of a true conflict concerning the essential validity of a will should be toward validation.[60] It is likely, at least as between states of the United States, that the difference in the laws will be one of detail rather than basic policy; for example, one state may have a "two lives" perpetuities rule and another a "lives in being" rule. The states will share a general policy of upholding the intention of the testator, an invalidating rule being an exception carved out of this general policy.[61] If, however, the difference in laws is basic and

58. See Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449, 450-68, 490 (1959).

59. See STUMBERG, *op. cit. supra* note 13, at 377: "The problem is primarily one of ascertaining the policy or purpose behind a particular prohibition and then giving it effect."

60. *Cf.* Yiannopoulos, *Wills of Movables in American International Conflicts Law —A Critique of the Domiciliary "Rule,"* 46 CALIF. L. REV. 185, 206, 262 (1958).

61. *Cf.* Weintraub, *The Contracts Proposals of the Second Restatement of Conflict*

the equities for validation are weak, perhaps both states would agree that invalidation is the proper resolution of the conflict.

A further illustration may be helpful. Let us suppose a case in which a testator, who was a long-term resident of state *X*, as were all the natural objects of his bounty, dies in *X* bequeathing personalty located in state *Y* to a *Y* charity, which conducts its activities only in *Y*. If all contacts had been in *Y* the will would have failed, at least in part, because the will was executed closer to the time of death than is permitted by *Y* law for bequests to charities. If all contacts had been in *X*, the bequest would have failed because it gave the charity property in a greater amount than charities are permitted to take under *X* law.

On the surface, there appears to be no real conflict, except perhaps as to the degree of invalidity, and it appears that the bequest should fail. But appearances may be deceiving. Let us assume,[62] for the purposes of illustrative analysis, that the only policy underlying the *Y* time limit on bequests to charities is the protection of the decedent and next of kin from death-bed decisions prompted by solicitations or late-coming religious fervor. Let us similarly suppose that the only purpose of the *X* statute is to prevent local charities from becoming too powerful and to protect the local economy by limiting the amount of property that can be taken out of commercial use.[63] If so, then on these facts *X* has no interest in applying its invalidating rule and neither has *Y*. Both *X* and *Y* have a general policy of giving effect to the intention of the testator, and this general policy should be effectuated in the posited case no matter which state is the forum.

III. Capacity of a Wife To Sue Her Husband for Negligence

A. *Illustrative Cases*

1. *Haumschild v. Continental Cas. Co.*[64]

This case produced the rule that a wife's capacity to sue her husband for negligence is determined by the law of the marital domi-

of Laws—A Critique, 46 Iowa L. Rev. 713, 714-16 (1961) (resolution of true conflict concerning validity of contract).

62. A limit on the amount charities can take will, to some extent, protect heirs, and protection of heirs will, to some extent, limit the amount taken by charities.

63. For an early non-conflicts case pointing out the differences in types and policies of such statutes, see Trustees of Amherst College v. Ritch, 151 N.Y. 282, 45 N.E. 876 (1897). For a masterly treatment of the problem, see Hancock, *In the Parish of St. Mary le Bow, in the Ward of Cheap*, 16 Stan. L. Rev. 561 (1964).

64. 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

cile. While a husband and wife, domiciled in Wisconsin, were driving in California, the wife was injured by the husband's negligence. Under Wisconsin law, but not under California law at that time, a wife could sue her husband for such negligent injury. Overruling a long line of Wisconsin cases[65] and abandoning the "place of wrong" rule in this context, the Wisconsin court permitted the wife to sue her husband and his liability insurer. The reason given was that this was a problem of family law and not tort law and therefore was governed by the law of the marital domicile rather than that of the place of wrong.

This kind of label-switching, not based on analysis of the policies underlying the apparently conflicting state law, is arbitrary and unconvincing. Furthermore, devoid as it is of proper analysis of substantive policies, it runs the risk of creating as many spurious conflicts as did the rule it replaced. In *Haumschild* the result, fortuitously, happened to be correct. It was correct because Wisconsin had an obvious interest in permitting the wife to recover and California's rule preventing suit applied only to California husbands and wives. The reason for the California rule was that, since California is a community property state, the defendant husband would share in the fruits of his wrongdoing if the wife recovered. The disability of California wives to sue their husbands for negligence was terminated as soon as the community property law was amended so that the husband would not share in the recovery.[66]

2. *Haynie v. Hanson*[67]

In another Wisconsin case applying the domicile rule, however, a spurious conflict was generated and the result was wrong. In *Haynie* an Illinois husband and wife were driving in Wisconsin when the wife, Mrs. Haynie, was injured in a collision with an automobile driven by Mr. Hanson. The wife sued Mr. Hanson and his liability insurer in Wisconsin. At all relevant times, Mr. Hanson was a citizen of Wisconsin and his liability insurer was a Wisconsin company.[68] The defendants attempted to implead the Illinois hus-

65. *E.g.*, Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931).

66. Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70 (1962). For a case reaching the *Haumschild* result, but on the basis of policies underlying the competing rules, see Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963). In California, a wife's cause of action even before *Klein* was not community property if it arose in California between spouses domiciled in noncommunity property states. Bruton v. Villoria, 138 Cal. App. 2d 642, 292 P.2d 638 (1956).

67. 16 Wis. 2d 299, 114 N.W.2d 443 (1962).

68. Brief for Appellant, p. 11.

band's liability insurer on the ground that the husband's negligence made him liable for contribution. The cross-complaint was dismissed on the ground that under Illinois law a wife could not sue her husband for negligence and, applying the *Haumschild* marital domicile choice of law rule, there was no underlying liability on which to base contribution. This is wrong. Wisconsin had an interest in permitting the Wisconsin defendants to obtain contribution and had no policy against wives suing husbands. The policies possibly underlying the Illinois incapacity rule—prevention of marital discord and fear of collusive suits—were not rationally applicable when the wife was suing not her husband, but third parties, in a Wisconsin forum.[69]

B. *The Harm of the Domicile Concept in this Context*

Aside from generating false conflicts in the contribution situation, the domicile-centered rule for determining the wife's capacity to sue may disguise a real conflict and prevent its rational solution. Even if a suit against the husband is forbidden by the law of the domicile, another state may have a very significant interest in permitting recovery. This would be true, for example, if the accident happened in a state which permitted such suits, the wife was seriously injured and under intensive treatment there, there were unpaid medical creditors, and the wife was a public charge. Under such circumstances, if suit is brought at the place of injury and the main concern of the domicile is the prevention of collusive suits, perhaps the conflict should be resolved in favor of permitting recovery.

Thus, once again, a domicile-centered choice of law rule generates false problems and interferes with the rational solution of true problems.[70]

IV. A Constitutional Basis for Judicial Jurisdiction

Domicile within a state is a recognized constitutional basis for in personam jurisdiction,[71] provided notice and opportunity to be heard that are reasonable under the circumstances are given.[72] But

69. *Cf.* LaChance v. Service Trucking Co., 215 F. Supp. 162 (D. Md. 1963) (permits joinder of husband on analysis similar to that above; but query whether the place of impact had interest in permitting contribution except as place where defendant company transacted some business).

70. For a fuller discussion, see Weintraub, *A Method for Solving Conflict Problems —Torts*, 48 Cornell L.Q. 215, 216-20 (1963).

71. Milliken v. Meyer, 311 U.S. 457 (1940).

72. McDonald v. Mabee, 243 U.S. 90 (1917).

is mere technical domicile within a state always sufficient for this purpose?

A. *Illustrative Cases*

1. *Alvord & Alvord v. Patenotre*[73]

In this case substituted service based on the defendant's domicile within the state was made five days after the defendant had left the state intending to establish a domicile of choice in Switzerland. At the time of service, defendant had not yet arrived in Switzerland; so, lacking the necessary physical presence, he had not yet established his domicile there. This being so, under the technical concept of domicile, he retained his former domicile in New York, and a motion to vacate the order for substituted service was denied.

The core concept in satisfying the due process demands for judicial jurisdiction is one of reasonableness. In the great majority of cases, domicile within a state is likely to provide a constitutional basis for in personam jurisdiction because it is reasonable to require domiciliaries who are temporarily absent from the state to appear and defend under penalty of having their rights adjudicated by default. In the *Patenotre* case, the passage of only five days and the fact that during that time the defendant would not likely be subject to suit anywhere else may have made the result reasonable. But suppose we extend the period of defendant's sojourn to his new domicile to a year or more, during which time he was undecided where to make his new home. All his property has been removed from his former home state and he has severed all other connections with it. Assuming no other basis for personal jurisdiction over the defendant, is his technical domicile there enough to answer due process objections to an attempt to assert such jurisdiction over him? One would hope not.[74]

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73. 196 Misc. 524, 92 N.Y.S.2d 514 (1949).

74. *But see* RESTATEMENT (SECOND), CONFLICT OF LAWS, Explanatory note § 79, at 70 (Tent. Draft No. 3, 1956): "The position is taken in this Section that domicil in a state provides a sufficient basis of judicial jurisdiction even though the individual's contacts with the state are slight and his domicil there of a technical nature. This is because (1) everyone should be subject to suit in at least one state without actually being present there at the time of service and (2) a person will normally be more closely connected with the state of his domicil than with any other." As support for this statement there is cited the following passage from McDonald v. Mabee, 243 U.S. 90, 92 (1917): "When the former suit was begun, Mabee, although technically domiciled in Texas, had left the state, intending to establish his home elsewhere. Perhaps in view of his technical position *and the actual presence of his family in the state*, a summons left at his last and usual place of abode would have been enough." (Emphasis added.) If this passage supports anything, it would seem to support a position contrary to that taken by the second *Restatement*.

2. *Lea v. Lea*[75]

This case presents another example of how losing sight of the core concept of reasonableness and focusing on technical domicile may hinder rational analysis in matters of judicial jurisdiction. A woman domiciled in New Jersey was attempting to enforce an alimony award which had been included in a divorce decree obtained against her former husband in New York. The former husband, also presently domiciled in New Jersey, contended that the alimony award was void because the New York court did not have in personam jurisdiction over him. The New York court had based its jurisdiction on the husband's domicile in New York, although in fact, at the time of the wife's divorce in New York, the husband was living in Louisiana with another woman. He had been living and working in Louisiana for several years and had clearly established a domicile of choice there when he moved into that state with his wife and son. He had, however, sent his wife and son from Louisiana to New York to be with his mother who was dying. The husband came to New York for his mother's funeral but returned to Louisiana, leaving his wife and child in New York. Suspicious of her husband's continued insistence that she stay in New York, the wife went to Louisiana, learned that her husband had secured a purported divorce in Arkansas, and then returned to New York to file suit for divorce. The Supreme Court of New Jersey upheld the New York alimony decree based on the husband's domicile in New York, saying: "Even conceding that the appellant has never been in the State of New York, except to pass through, since 1942, he was under a paramount duty to supply a home for his wife and child and such a home was established at his direction, insecure as it was, in New York. We, therefore, conclude that the family domicile and the domicile of the appellant was in the State of New York. . . ."[76]

New York probably had a constitutional basis for personal jurisdiction over the absent husband, since he had sent his wife and child into the state and they were there with a right to his support. He caused these consequences in New York and should be subject to the jurisdiction of a New York court in an action growing out

75. 18 N.J. 1, 112 A.2d 540 (1955).

76. *Id.* at 11, 112 A.2d at 545. *Cf.* Bangs v. Inhabitants of Brewster, 111 Mass. 382 (1873) (domicile of choice established by wife's presence while husband at sea). *But cf.* McIntosh v. Maricopa County, 73 Ariz. 366, 241 P.2d 801 (1952) (wife's presence while husband in armed forces did not establish husband's domicile of choice).

of them.[77] Having a constitutional basis for jurisdiction, absent any outrageous surprise to the husband, the New York courts were probably free to stretch their domiciliary service statute to cover the situation as other courts have stretched "doing business" statutes.[78] But we should not be so caught up in this play acting that we believe for a moment that the husband was "domiciled" in New York and that this was the basis for jurisdiction.

To test this proposition, suppose one of the husband's Louisiana creditors had moved to New York and then discovered that he had forgotten to collect a sum the husband owed him. Having learned of the wife's action in New York and the finding of domicile by the New York court, the creditor sues the husband in New York using the provision for substituted service on domiciliaries. It is submitted that there is no constitutional basis for in personam jurisdiction over the husband in the creditor's suit.[79]

B. *A Substitute for Domicile as a Basis for Judicial Jurisdiction*

Just as technical domicile alone should not suffice as a constitutional basis for personal jurisdiction when measured against the core concept of reasonableness, it would seem that in view of this same reasonableness standard, technical domicile, despite United States Supreme Court dicta to the contrary,[80] should not be a constitutional prerequisite for divorce jurisdiction.[81] What is necessary for divorce jurisdiction is some contact between the forum and the marriage to give that forum a reasonable interest in affecting the marital status. The servicemen's divorce statutes and the opinions upholding their validity seem proper by such a test.[82] The serviceman's substantial period of residence in the state while stationed

77. See RESTATEMENT (SECOND), CONFLICT OF LAWS § 84 (Tent. Draft No. 3, 1956).

78. See Roy v. North Am. Alliance, Inc., 205 A.2d 844 (N.H. 1964); Note, *Recent Interpretations of "Doing Business" Statutes*, 44 IOWA L. REV. 345 (1959).

79. *Cf.* COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 199 (1942) (although the court in Winans v. Winans, 205 Mass. 388, 91 N.E. 394 (1910), found husband domiciled in Massachusetts for purpose of wife's divorce jurisdiction, Cook does not think there would be a similar finding for personal jurisdiction in a cause of action not related to the marriage).

80. See, *e.g.*, Williams v. North Carolina, 325 U.S. 226, 229 (1945): "Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil."

81. See Note, *Domicile as a Constitutional Requirement for Divorce Jurisdiction*, 44 IOWA L. REV. 765 (1959).

82. See, *e.g.*, Lauterbach v. Lauterbach, 392 P.2d 24 (Alaska 1964); Craig v. Craig, 143 Kan. 624, 56 P.2d 464 (1936); Wood v. Wood, 159 Tex. 350, 320 S.W.2d 807 (1959).

there, which the statutes require,[83] seems to afford the state where he is serving a legitimate interest in affecting his marital status although, because of his obligation to obey orders and the nomadic nature of service life, he could not ordinarily have the state of mind required to establish a technical domicile of choice in that state.[84]

V. The Suggestion That We Should Retain "Domicile" as a Tool for Conflicts Analysis but Recognize That its Meaning Changes with the Context

In the famous debate during the proceedings of the American Law Institute concerning the adoption of the provisions of the first *Restatement of the Conflict of Laws* on domicile, Professor Walter Wheeler Cook advanced the following proposition concerning the meaning of that term: "There is no doubt that what you might call the core of the concept is the same in all these situations; but as you get out towards what I like to call the twilight zone of the subject, I don't believe the scope remains exactly the same for all pur-

83. An exception is the Alabama statute which requires no period of residence. Ala. Code tit. 7, § 96(1) (1958): "Any person in any branch or service of the government of the United States of America, including those in the military, air and naval service, and the husband or wife of any such person, if he or she be living within the borders of the State of Alabama shall be deemed to be a resident of the State of Alabama for the purpose of maintaining any suit or action at law or in equity in the courts of this State." Furthermore, the Alabama divorce statute requires a period of residence (one year) only if the divorce is ex parte and only if the defendant is not a resident. Ala. Code tit. 34, § 29 (1958). The validity of the Alabama servicemen's residence statute would, therefore, seem highly doubtful in divorce cases. It was, however, upheld in a case in which the plaintiff serviceman had actually lived in Alabama for almost two years. Conrad v. Conrad, 275 Ala. 202, 153 So. 2d 635 (1963).

84. See, *e.g.*, Hammerstein v. Hammerstein, 269 S.W.2d 591 (Tex. Civ. App. 1954). *But see* Slade v. Slade, 122 N.W.2d 160 (N.D. 1963); Sasse v. Sasse, 41 Wash. 2d 363, 249 P.2d 380 (1952).

The second *Restatement* draws a distinction between soldiers who must live on post and those who may live off post. Restatement (Second), Conflict of Laws § 21, comment *d* (Tent. Draft No. 2, 1954): "A soldier or sailor, if he is ordered to a station to which he must go and live in quarters assigned to him, cannot acquire a domicil there though he lives in the assigned quarters with his family . . . . On the other hand, if he is allowed to live with his family where he pleases provided it is near enough to his post to enable him to perform his duty, he retains some power of choice over the place of his abode and can acquire a domicil." Query whether an irrebuttable presumption that a serviceman living on post cannot acquire a domicile of choice in the state is a sufficiently reasonable classification to withstand attack under the equal protection clause of the fourteenth amendment. *Cf.* Carrington v. Rash, 85 Sup. Ct. 775 (1965) (Texas constitutional provision preventing servicemen from acquiring a voting residence in Texas a violation of equal protection); Newman v. Graham, 82 Idaho 90, 349 P.2d 716 (1960) (Idaho Board of Education regulation preventing nonresident students from acquiring resident status for purposes of tuition is arbitrary and unreasonable).

poses."[85] This was too much for Professor Beale, the Reporter, and his vested rights allies to swallow, since it would upset the symmetry of the tight little syllogisms that they were fashioning and that imprisoned conflicts analysis for the better part of three decades. At least for now, however, the verdict of history has gone to Professor Cook, for the second *Restatement* adopts substantially his position.[86]

It, of course, cannot be otherwise. The domiciliary concept is used for too many diverse purposes; the finding of domicile is too dependent upon subjective inferences drawn from the facts, even undisputed facts,[87] for the meaning of that concept not to vary with its context.[88] For this same reason, the proposition that the meaning of "domicile" shifts with the circumstances would be difficult or impossible to prove by case analysis. Articulating the same technical definition of "domicile," courts can shift its meaning subtly by shifting the emphasis to one or another element of the definition or by drawing different reasonable inferences from essentially the same fact pattern.[89]

The point, however, is that the common-sense recognition that the meaning of "domicile" must shift with the use to which it is put, is not enough to preserve it as a viable and useful tool for conflicts analysis, especially as a contact word in choice of law rules. It is true that an able and enlightened court, utilizing the flexibility inherent in the term, can reach proper results in individual cases. This is not impossible, but neither is it very easy or likely. It is like retaining "place of wrong" as the basic choice of law rule for torts and attempting to achieve just and rational results by varying

85. 3 PROCEEDINGS OF THE AMERICAN LAW INSTITUTE 227 (1925).

86. RESTATEMENT (SECOND), CONFLICT OF LAWS § 11, comment *d* (Tent. Draft No. 2, 1954).

87. The classic example is the *Dorrance* litigation in which, from essentially undisputed facts, Mr. Dorrance was found domiciled in both New Jersey and Pennsylvania at death and double inheritance taxes were levied. *In re* Dorrance, 115 N.J. Eq. 268, 170 Atl. 601 (Prerogative Ct. 1934), *aff'd mem.*, 13 N.J. Misc. 168, 176 Atl. 902 (Sup. Ct. 1935), *aff'd mem.*, 116 N.J.L. 362, 184 Atl. 743, *cert. denied*, 298 U.S. 678 (1936); Dorrance's Estate, 309 Pa. 151, 163 Atl. 303, *cert. denied*, 288 U.S. 617 (1932).

88. See STUMBERG, CONFLICT OF LAWS 48 (3d ed. 1963); Reese, *supra* note 43, at 592; Yiannopoulos, *supra* note 60, at 259 n.378. For a classic judicial statement of the opposing viewpoint, see Williamson v. Osenton, 232 U.S. 619, 625 (1914) (Holmes, J.): "The very meaning of domicil is the technically preeminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined . . . . In its nature it is one, and if in any case two are recognized for different purposes it is a doubtful anomaly."

89. *Cf.* RESTATEMENT (SECOND), CONFLICT OF LAWS § 21, comment *d* (Tent. Draft No. 2, 1954).

the meaning of "place of wrong"[90] or by characterization legerdemain.[91]

One of the crowning glories of the new *Restatement* is that it has abandoned the "place of wrong" rule for torts.[92] There is no justification for retaining any rigid, territorially-oriented choice of law rule which utilizes contact words pointing to a place rather than focusing attention on the reasonable interests of contact states.[93] If the result in *In re Estate of Jones*[94] is wrong, the error does not lie in fixing Evan Jones' technical domicile at death in Iowa. It is wrong because Great Britain had an interest in controlling the distribution of Evan's intestate personalty as between his illegitimate daughter and his brothers and sisters; Iowa did not. If the result in *White v. Tennant*[95] is wrong, it is wrong because it fails to advance West Virginia's legitimate interests in having its own law applied, not because Michael White was domiciled at death in West Virginia. So, too, if the holding in *In re Annesley*[96] is incorrect, it is because it employs the French rule frustrating the intention of the testatrix when the French rule is not relevant.

If it is desirable in these cases to manipulate the meaning of "domicile" so that Evan Jones will be domiciled at death in Great Britain, or Michael White in West Virginia, or Mrs. Annesley in England, it is because of reasons revealed by an analysis of the policies underlying the apparently conflicting domestic rules con-

90. Cases involving harm to the incidents of marriage have sometimes applied the law of the marital domicile rather than the law of the place where the defendant acts. Albert v. McGrath, 278 F.2d 16 (D.C. Cir. 1960) (alienation of affections); Orr v. Sasseman, 239 F.2d 182 (5th Cir. 1956) (alienation of affections); Gordon v. Parker, 83 F. Supp. 40 (D. Mass), *aff'd*, 178 F.2d 888 (1st Cir. 1949) (alienation of affections). For cases rejecting the argument that the harm occurred at the marital domicile, see Sestito v. Knop, 297 F.2d 33 (7th Cir. 1961) (loss of consortium); Jordan v. States Marine Corp., 257 F.2d 232 (9th Cir. 1958) (loss of consortium); McVickers v. Chesapeake & O. Ry., 194 F. Supp. 848 (E.D. Mich. 1961) (loss of consortium). *But cf.* Lister v. McAnulty, [1944] Can. Sup. Ct. 317, [1944] 3 D.L.R. 673 (law of marital domicile applied to prevent husband's recovery for loss of consortium).

91. See, *e.g.*, Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961) ("procedural"); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959) ("family law"); Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953) ("administration of estates," "procedural").

92. RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 8, 1963).

93. As an indication that allowing the meaning of domicile to vary with context will not produce satisfactory results, Professor Cook, one of the champions of the flexible meaning view, cites with approval for its awareness of the problem *In re Jones' Estate* (see text accompanying notes 21-33 *supra*). COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 196 n.3 (1942).

94. See text accompanying notes 21-33 *supra*.

95. See text accompanying notes 34-45 *supra*.

96. See text accompanying notes 48-54 *supra*.

cerning intestate succession or validity of wills. Without such an analysis, manipulation of the meaning of "domicile" is unreasoned and blind and, therefore, unwise. With such an analysis, molding "domicile" to fit our needs is unnecessary. It is unnecessary because, having made the analysis, we can base the result directly upon the relevance or irrelevance of the domestic policies in issue and need not, therefore should not, speak of "domicile" at all. The time has come to bury the albatross.