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

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In this article the author urges abandonment of one of the most firmly established choice-of-law rules—the rule which looks to the law of the situs to determine conflict of laws problems concerning interests in realty. He reviews the reasons commonly given for the situs rule—the need to expedite land transactions, the exclusive jurisdiction of situs courts over the subject matter, and the interest of the situs in controlling realty. He finds each of these reasons lacking in cogency and states that non-situs decrees affecting the interests in land of persons before the court should be entitled, under the full faith and credit clause, to the same recognition at the situs as other judgments. The author then analyzes the typical situations in which the law of the situs is applied. He finds that most of the results reached are irrational and unjust, and urges extension into the real property area of the type of functional or "state-interest" analysis now rapidly gaining favor in resolving tort and contract conflicts problems.

> It follows that the right to redemption as of course under a foreclosure sale is a rule of property in the State of Iowa. It has no extra-territorial force, but dies at the State boundary, as the trees about Troy, under the mandate of the gods, grew no higher than the walls.[1]

Thus, in his typically colorful fashion, Judge Henry Lamm epitomizes the almost mystical acceptance of the law of the situs of real estate as the proper law to be applied in deciding all matters concerning realty. Joseph Story's statement concerning real property, that "the general principle of the common law is, that the laws of the place, where such property is situate, exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities, which should accompany them,"[2] is as true today as it was over a century ago. The Second Re-

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1 Hughes v. Winkleman, 243 Mo. 81, 91, 147 S.W. 994, 996 (1912).

2 Story, Conflict of Laws § 424, at 708 (3d ed. 1846). For a more recent statement of the same conclusion, with approval, see Goodrich, "Two States and Real Estate," 89 U. Pa. L. Rev. 417, 418 (1941). Baxter, "Conflicts of Law and Property," 10 McGill L.J. 1, 34-35 (1964), gives reluctant approval to the situs rule because its wide use leads to uniformity and predictability. Carnahan, "Tangible Property and the Conflict of Laws," 2 U. Chi. L. Rev. 345, 347 (1935) is so enamored of the situs rule as to urge its extension to questions

statement of Conflict of Laws, which has made dramatic departures from the rigid rules of the First Restatement in articulating choice-of-law rules for torts[3] and contracts,[4] without exception refers every question concerning "immovables,"[5] whether arising from inter vivos transactions or on testate or intestate succession, to the whole law[6] of the situs of the realty, including the conflicts rules of the situs. This reference to the whole law of the situs is not itself a choice-of-law rule, for it provides no guidance to a court at the situs, the most probable forum.[7] Despite this circumlocution, however, the Second Restatement is clearly urging that the domestic law of the situs is properly applicable to the full gamut of choice-of-law problems concerning realty.[8]

As indicated in the reference to the Second Restatement, this most monolithic of all choice-of-law rules is further buttressed by the very conflicts jargon used in this area. Instead of "realty" and "personalty" we speak of "immovables" and "movables." The term "immovables"[9] is likely to encompass matters such as leaseholds[10] which would be classified as "personalty" for domestic purposes, and "it is a firmly established principle that questions involving interests in immovables are governed by the law of the situs."[11]

This article will review and appraise the cogency of the reasons commonly given for favoring the law of the situs as a determinant of interests in realty. Then it will scrutinize the results actually obtained by applica-

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of succession of personal property. But cf. Note, 38 Colum. L. Rev. 1049, 1050 (1938) (noting "substantial deflections" from the situs rule in cases concerning covenants not running with the land, contracts to convey, and mortgages, but concluding "there is no denying the fact that the situs rule is dominant").

3 Restatement (Second), Conflict of Laws § 379 (Tent. Draft No. 8, 1963) ("the state which has the most significant relationship with the occurrence and with the parties").

4 Restatement (Second), Conflict of Laws § 332 (Tent. Draft No. 6, 1960) ("the State with which the contract has its most significant relationship").

5 Restatement (Second), Conflict of Laws ch. 7, Topic 2 (Tent. Draft No. 5, 1959).

6 Id. at 13.

7 See Susi v. Belle Acton Stables, Inc., 360 F.2d 704, 710 (2d Cir. 1966). (Friendly, J.) (in case of chattels, referral to whole law of situs "gives us a method of approach but little more"); Cook, The Logical and Legal Bases of the Conflict of Laws 264 (1942); Weintraub, "An Inquiry into the Utility of 'Domicile' as a Concept in Conflicts Analysis," 63 Mich. L. Rev. 961, 963 (1965).

The provisions of the Second Restatement of Conflict of Laws in Tentative Draft No. 5, regarding "movables" are being reconsidered. Letter of the Reporter, Professor Willis L. M. Reese, March 8, 1966.

8 Restatement (Second), Conflict of Laws ch. 7, Topic 2, at 12-14 (Tent. Draft No. 5, 1959).

9 Id. at 12: "The term 'immovables,' as used in the Restatement of this Subject, refers to land and to things that are so attached, or otherwise related, to the land as legally to be regarded a part of it."

10 Duncan v. Lawson, 41 Ch. D. 394 (1889); Restatement (Second), Conflict of Laws § 208, illustration 2 (Tent. Draft No. 5, 1959). But see id., comment b: "Some states of the United States, however, use the terms real and personal property exclusively in both local law and Conflict of Laws."

11 Restatement (Second), Conflict of Laws ch. 7, Topic 2, at 12 (Tent. Draft No. 5, 1959).

tion of the situs rule to a number of classic choice-of-law problems to determine whether they are rational and just adjudications. If the reasons for the rule are shallow and the results obtained from applying it are outrageous, an effort will be made to suggest a method of abating the nuisance that the monolith has become.

I

An Appraisal of the Reasons for the "Situs" Rule

Two reasons are most frequently advanced for a choice-of-law rule ineluctably pointing to the law of the situs to govern all questions that may arise concerning realty. The first of these reasons has to do with modern recording systems and the necessity of keeping title search simple and feasible by allowing the searcher to apply the law of the situs to all legal problems that his search may uncover. Many of the factors which might lead one to urge application of law other than that of the situs—such as, for example, that the parties to a recorded transaction have a settled residence elsewhere—will not be revealed of record. Even if such matters were revealed, it would substantially complicate the title search and enormously increase its cost to require the searcher to ferret out the foreign law, gain an understanding of its nuances, and apply it to the problem at hand. In short, the recording system would be thrown into chaos and transactions in realty would become impossibly expensive, risky, and impractical if any law but that of the situs were to govern.[12]

This is indeed an imposing reason for adherence to the situs rule when there is present on the scene a bona fide purchaser who has relied upon record title and situs law. Such matters, however, have absolutely no relevance to the original parties to the transaction for which we are seeking the governing law. But it is here, between the original parties, that almost all the conflicts problems in the cases and the literature arise and here that the situs rule has been dominant. The fundamental distinction that would eliminate the cogency of the expediency reason for the situs rule is the distinction between immediate and subsequent parties to the transaction for which a choice-of-law question arises.[13] It is this

[12] Sinclair v. Sinclair, 99 N.H. 316, 318, 109 A.2d 851, 852 (1954); Restatement (Second), Conflict of Laws ch. 7, Topic 2, at 13 (Tent. Draft No. 5, 1959); Cook, supra note 7, at 262; Goodrich, supra note 2, at 419; Note, 111 U. Pa. L. Rev. 482, 486, 490 (1963).

[13] See Matter of Courtney, Mont. & C. 239, 252 (Ch. 1840) (law of England, residence of creditor and debtor, not the law of the situs, Scotland, determines whether creditor acquired a lien on Scottish land superior to succession rights of debtor): "The transaction is in no respect impeached, and there is no competition with any person having obtained a title under the law of Scotland."; cf. Lorenzen, "Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land," 34 Yale L.J. 591, 611 (1925), (drawing distinction between immediate and remote parties for requirement of full faith and credit to non-situs land decree).

distinction that this article uniformly draws. If it should be decided to apply some law other than that of the situs to such a transaction between the original parties, the victor, in order to preserve his victory against subsequent bona fide purchasers, would have to enter of record the evidence of the adjudication of his rights.[14]

The second reason for applying the law of the situs is well stated by the Second Restatement:

> [L]and and things attached to the land are within the exclusive control of the state in which they are situated, and the officials of that state are the only ones who can lawfully deal with them physically. Since interests in immovables cannot be affected without the consent of the state of the situs, it is natural that the latter's law should be applied by the courts of other states.[15]

Even if it were true that only a court at the situs of realty has constitutional jurisdiction over the subject matter in litigation affecting interests of persons in that realty, this would not logically compel application of the law of the situs. For example, if the situs courts believed that a more rational result would be reached in such a case by applying the law of some other state, they would be free to apply that other law.[16] Of course, if the situs had exclusive jurisdiction of the subject matter, the Restatement's reference to the whole law of the situs would be a constitutionally-compelled truism. But much more than this, such a state of things would seriously weaken any campaign to change from the situs rule. If nothing else, the simple convenience and economy in judicial administration flowing from the only competent forum's applying its own law would raise a presumption in favor of situs law that only the most compelling circumstances should rebut. It is necessary then, before focusing directly on the choice-of-law problem, to scrutinize the alleged constitutional reasons why, as between states of the United States, only

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[14] See Matson v. Matson, 186 Iowa 607, 622-23, 173 N.W. 127, 132 (1919) (dictum); B. Currie, "Full Faith and Credit to Foreign Land Decrees," 21 U. Chi. L. Rev. 620, 639 (1954); Hopkins, "The Extraterritorial Effect of Probate Decrees," 53 Yale L.J. 221, 254 (1944).

In Hughes v. Winkleman, 243 Mo. 81, 147 S.W. 994 (1912), the court refused to enforce an Iowa right of redemption against a Missouri citizen to whom the Iowa creditor had negotiated a note and mortgage on Missouri real estate, the court noting that there was no showing that the Missouri holder knew that the mortgagor was an Iowa citizen or that a right of redemption existed under Iowa law. In Jennings v. Jennings, 21 Ohio St. 56, 62-63 (1871), one R. P. Ranney, attorney for the plaintiff, in arguing brilliantly but unsuccessfully that the law of the domicile of all parties, not the situs, should govern the question whether provisions in the husband's will for the widow are in lieu of dower, contended: "the legislature has intended in this as in many other directions, to allow the citizens of such States to dispose of property held here in accordance with their own laws, simply requiring them to place the evidence of their title upon our public records . . . ."

[15] Restatement (Second), Conflict of Laws ch. 7, Topic 2, at 12-13 (Tent. Draft No. 5, 1959).

[16] See Hancock, "Equitable Conversion and the Land Taboo in Conflict of Laws," 17 Stan. L. Rev. 1095, 1096 n.4 (1965).

situs courts have jurisdiction over the subject matter in adjudications affecting interests in real property and why in personam jurisdiction over all persons whose interests are to be affected is not sufficient. The United States Supreme Court opinions most often cited for such a proposition provide a place to begin.

A. *Jurisdiction of the Non-Situs Court: Early Supreme Court Decisions*

One of the earliest cases discussing the jurisdiction of a non-situs court to issue a decree affecting interests in land, *Massie v. Watts*,[17] supported such jurisdiction, at least under certain circumstances. Watts, a citizen of Virginia, sued Massie, a citizen of Kentucky in a federal court in Kentucky to compel Massie to convey to Watts land in Ohio to which Massie held legal title. Watts claimed that Massie had acquired legal title with notice of Watts' equitable title. In affirming a decree that Watts should recover the land from the defendant, Chief Justice Marshall said:

> Was this cause, therefore, to be considered as involving a naked question of title . . . the jurisdiction of the Circuit Court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction.[18]

In *Watts v. Waddle*,[19] a sequel to *Massie v. Watts*, the Court affirmed a refusal to decree specific performance on behalf of Watts as vendor under a contract for sale of the same land. The refusal was based on clouds on Watts' title unrelated to his decree against Massie. One such blot consisted of the fact that Watts was being sued in Kentucky by one Banks who claimed an interest in the Ohio land. Watts tried to dissipate this cloud by arguing that "the court of Kentucky has not jurisdiction of the subject-matter, so as to transfer the title to land in Ohio."[20] The Court replied that "The General Court of Kentucky have jurisdiction of the controversy; and as process was served on the defendant Watts, their powers are ample to enforce their decree, in personam, or to direct the execution of a deed, should the land be decreed, by a commissioner, as the statute of Kentucky authorizes."[21]

There was dictum to the same effect in *Cheever v. Wilson*,[22] a case

[17] 10 U.S. (6 Cranch) 148 (1810).
[18] Id. at 158.
[19] 31 U.S. (6 Pet.) 389 (1832).
[20] Id. at 397.
[21] Ibid.
[22] 76 U.S. (9 Wall.) 108 (1869).

involving the impact of an Indiana divorce decree on District of Columbia realty: "The decree rendered in Indiana, so far as it related to the real property in question, could have no extraterritorial effect; but, if valid, it bound personally those who were parties in the case, and could have been enforced in the *situs rei*, by the proper proceedings conducted there for that purpose."[23]

Thus far then, the Supreme Court cases seemed to support a proposition quite the opposite of that stated above—that is, that a non-situs court does have the power to affect interests in realty as between parties over whom it has in personam jurisdiction. *Robertson v. Pickrell*,[24] holding that a District of Columbia court at the situs of realty need not give full faith and credit to a Virginia proceeding which validated a will devising the realty, permitted attack on the will by persons who (as the Court was careful to point out[25]) were not parties to the Virginia proceeding.

Carpenter v. Strange[26] began the movement away from this early line of cases. The plaintiff sued her sister, the executrix of her father's estate. Suit was brought in New York, the common domicile of the sisters and of the father at death. The plaintiff sought to recover a sum which the father had held for her benefit as trustee, but for which he had never accounted to her. The father had made a devise to the plaintiff on condition that she renounce this claim against his estate, and he had conveyed land in Tennessee to the executrix without consideration. The New York court held that the plaintiff had not accepted the provision in her father's will, that she was entitled to recover the full amount she claimed from her father's estate, and that the deed of the Tennessee land to the executrix was null and void insofar as it purported to affect the assets against which the plaintiff might press her claim. Then, in a Tennessee equity proceeding in which the plaintiff and her executrix-sister again were parties, the Supreme Court of Tennessee made just the opposite ruling on every point. It held that the plaintiff had elected to take the devise, that therefore she could no longer press her claim, and that a New York court was without power to declare a deed of Tennessee land null and void. On writ of error, the Supreme Court of the United States held that the Tennessee court had improperly denied full faith and credit to the New York decree insofar as the New York decree determined that plaintiff had not elected to take her father's devise and was not barred from pressing her claim. But then, emphasizing the form of the New York decree, the Court upheld Tennessee's refusal to recognize that

[23] Id. at 121.
[24] 109 U.S. 608 (1883).
[25] Id. at 609, 613.
[26] 141 U.S. 87 (1891).

portion of the sister-state decree which declared the deed of Tennessee land void:

> By its terms no provision whatever was made for its enforcement against Mrs. Strange [the executrix] in respect of the real estate. No conveyance was directed, nor was there any attempt in any way to exert control over her in view of the conclusion that the court announced. Direct action upon the real estate was certainly not within the power of the court, and as it did not order Mrs. Strange to take any action with reference to it, and she took none, the courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee, exclusively subject to its laws and the jurisdiction of its courts.[27]

There then followed the two cases upon which the doctrine that the non-situs court lacks jurisdiction over the subject matter is primarily based, *Clarke v. Clarke*[28] and *Fall v. Eastin*.[29]

B. *Jurisdiction of the Non-Situs Court: The Clarke and Fall Decisions*

In the *Clarke* case, Mrs. Clarke had died domiciled in South Carolina survived by two minor daughters and her husband. Her daughters and husband were also South Carolina citizens. Mrs. Clarke's will left all of her estate, real and personal, wherever situated, in three equal shares to her husband and two daughters. When one of the daughters died shortly after Mrs. Clarke, Mr. Clarke, as executor and testamentary trustee, brought an action in South Carolina to construe his wife's will, the surviving daughter being represented by a guardian ad litem. The South Carolina Supreme Court affirmed the finding of the lower court that Mrs. Clarke intended that her realty, including that situated in other states, should be sold and the proceeds distributed as personalty—the will thus working an equitable conversion of the realty everywhere into personalty.[30] In so holding, the court specifically adverted to the choice-of-law issue, concluding that the equitable conversion made South Carolina law applicable to all questions of testate succession of the realty situated in Connecticut, New York, and Kansas, and, more important, made South Carolina law applicable to the intestate succession of the father and surviving daughter to the deceased daughter's share in the mother's estate.[31] Under South Carolina law, the father and surviving daughter divided equally the share that the deceased daughter would have taken in the mother's estate.

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27 Id. at 106. For similar emphasis on the failure of the non-situs court to shape its decree in the form of an order to convey see Fire Ass'n v. Patton, 15 N.M. 304, 107 Pac. 679 (1910); Rozan v. Rozan, 129 N.W.2d 694 (N.D. 1964).

28 178 U.S. 186 (1900).

29 215 U.S. 1 (1909).

30 Clarke v. Clarke, 46 S.C. 230, 24 S.E. 202 (1896).

31 Id. at 233-38, 24 S.E. at 203-05.

Mr. Clarke then brought suit in Connecticut as administrator of his deceased daughter's estate and asked directions for distribution. The Connecticut Probate Court decreed that the surviving daughter should take the entire share that the deceased daughter would have taken in the mother's estate. Mr. Clarke appealed in his own name, claiming that the Connecticut court was bound by the prior South Carolina determination between the same parties. The Connecticut Supreme Court of Errors, however, affirmed the Connecticut probate decree.[32] The Supreme Court of Errors indicated that the South Carolina courts did not have subject-matter jurisdiction to control intestate succession to Connecticut land, citing *Carpenter v. Strange*.[33] It avoided meeting the issue of full faith and credit head-on, however, by reading the South Carolina opinion as purporting to affect only realty in South Carolina,[34] an interpretation which is extremely doubtful in light of the express reference by the South Carolina court to the Connecticut realty and the choice of law for intestacy. Further, the Connecticut court pointed out the parties were not the same because the husband had not appeared in his individual capacity in South Carolina and therefore would not have been bound if the South Carolina decision had gone against him, citing no South Carolina decisions to support such a statement. The Connecticut court therefore felt it:

> [U]nnecessary to inquire whether, if he had been a party individually to the South Carolina suit, and the principal administrator of the estate of Julia Clarke [the deceased daughter] had also been brought in, the court would have had jurisdiction to make a final and conclusive determination as to the effect of the will upon lands in other States and their descent upon the decease of those in whose favor the testatrix disposed of them.[35]

Upon writ of error, however, the United States Supreme Court went directly to the jurisdictional issue in meeting Mr. Clarke's full-faith-and-credit objections to the Connecticut judgment. The doctrine was "firmly established that the law of a State in which land is situated controls and governs its transmission by will or its passage in case of intestacy."[36] Mr. Clarke's argument was "but to contend that what cannot be done directly can be accomplished by indirection."[37] The guardian ad litem appointed for the surviving daughter in South Carolina did not have "authority to act for her *quo ad* her interest in real estate beyond the jurisdiction of the South Carolina court, and which was situated in Connecticut." And finally, "the decree of the South Carolina court, in the

32 Clarke's Appeal, 70 Conn. 195, 39 Atl. 155 (1898).
33 Id. at 210, 39 Atl. at 159.
34 Id. at 212, 39 Atl. at 160.
35 Id. at 212-13, 39 Atl. at 160.
36 Clarke v. Clarke, 178 U.S. 186, 190 (1900).
37 Id. at 191-92.

particular under consideration, was not entitled to be followed by the courts of Connecticut, by reason of a want of jurisdiction in the court of South Carolina over the particular subject-matter which was sought to be concluded in Connecticut by such decree."[38]

In *Fall v. Eastin*, Mrs. Fall had obtained a divorce from her husband in a contested proceeding in Washington, where both spouses were then domiciled. As part of its decree, the Washington court set apart for Mrs. Fall, as her separate property, land in Nebraska owned jointly by the couple. It ordered the husband to convey his interest in the Nebraska land to his wife and, when he failed to do so, appointed a commissioner who did execute such a deed. Four months before the Washington decree, Mr. Fall mortgaged the Nebraska land to his brother and, after the decree, deeded the land to his sister. Mrs. Fall brought suit in Nebraska to quiet title to the land in herself, contending that the mortgage and deed were attempts to defraud her of the interest in the land that she had acquired under the Washington decree. Although Mr. Fall was served by publication,[39] he was not served personally and did not appear. The Nebraska Supreme Court first affirmed a judgment in favor of Mrs. Fall, quieting her title in the land,[40] but then, after a decisive change in membership of the court, reversed on rehearing.[41] It was held that the Washington court was without jurisdiction to affect the title to Nebraska land: "To say that the decree binds the conscience of the party, so that persons to whom he may convey the land thereafter take no title, is the same as saying that the decree affects the title . . . ."[42] On writ of error, the United States Supreme Court affirmed. Mr. Justice McKenna sounded somewhat reluctant: "however plausibly the contrary view may be sustained, we think that the doctrine that the court, not having jurisdiction of the *res*, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree, is firmly established."[43]

It is possible to attempt to explain away *Fall v. Eastin* on the ground that the wife mistook her remedy.[44] Instead of suing the husband's grantees directly, she should first have sued upon the Washington decree in Nebraska asking a Nebraska court to establish and enforce it as a decree from a Nebraska court, much as is the practice with sister-state money judgments. Indeed, Mr. Justice McKenna remarked that "Plain-

[38] Id. at 195.
[39] Fall v. Fall, 75 Neb. 120, 123, 113 N.W. 175, 176 (1907).
[40] Fall v. Fall, 75 Neb. 104, 106 N.W. 412 (1905).
[41] Fall v. Fall, supra note 39, at 120, 113 N.W. at 175.
[42] Id. at 132, 113 N.W. at 180.
[43] Fall v. Eastin, 215 U.S. 1, 11 (1909).
[44] See, e.g., Restatement (Second), Conflict of Laws § 434b, Reporter's Note at 55 (Tent. Draft No. 10, 1964); Goodrich, supra note 2, at 428 n. 50.

tiff seems to contend for a greater efficacy for a decree in equity affecting real property than is given to a judgment at law for the recovery of money simply."[45] The Nebraska court made a similar point in expressing concern over a hypothetical bona fide purchaser, who might be misled by the record title in Nebraska if a Washington court "can so adjudicate the rights of parties to land in this state that a title apparently clear upon the official records could be made null and void by its action . . . ."[46] If this is all that was bothering the Nebraska court, requiring Mrs. Fall to go through what Nebraska considered the proper procedural steps would seem, within broad reasonable bounds, consistent with the mandate of full faith and credit. In all candor, however, it seems probable that neither the Nebraska nor the United States Supreme Court opinion would have been affected no matter how punctilious Mrs. Fall's procedural etiquette had been.

Since *Fall v. Eastin*, the Supreme Court has done nothing to dispel the notion that only the situs has subject-matter jurisdiction to affect title to its land. As recently as 1963, in holding that full faith and credit must be given to the jurisdictional finding that the land is within the adjudicating state, Mr. Justice Stewart stated that the first forum, Nebraska, "had jurisdiction over the subject matter of the controversy only if the land in question was in Nebraska."[47] This same notion is reflected in many decisions of situs courts refusing to recognize sister-state adjudications purporting to affect the interests in realty of parties before the non-situs court.[48] However, it remains to be seen whether such a doctrine can withstand analysis under proper constitutional standards.

C. *Full Faith and Credit for Non-Situs Decrees: Proper Constitutional Standards*

One ground upon which it might be contended that the situs state need not give full faith and credit to the judgment of a sister state affecting interests to realty at the situs is that this would deprive the situs of con-

45 Fall v. Eastin, supra note 43, at 12.
46 Fall v. Fall, supra note 41, at 133, 113 N.W. at 180.
47 Durfee v. Duke, 375 U.S. 106, 108 (1963).
48 Courtney v. Henry, 114 Ill. App. 635 (1904); Bullock v. Bullock, 52 N.J. Eq. 561, 30 Atl. 676 (Ct. of Err. & App. 1894); Higginbotham v. Higginbotham, 84 N.J. Super. 232, 201 A.2d 581 (Ch. Div. 1964), rev'd, 35 U.S.L. Week 2095 (Super. Ct. App. Div. July 20, 1966); Fire Ass'n v. Patton, 15 N.M. 304, 107 Pac. 679 (1910); McRary v. McRary, 228 N.C. 714, 47 S.E.2d 27 (1948); Rozan v. Rozan, 129 N.W.2d 694 (N.D. 1964); Sharp v. Sharp, 65 Okla. 76, 166 Pac. 175 (1916); Williams v. Williams, 83 Ore. 59, 162 Pac. 834 (1917) (but reaching the same conclusion as the non-situs court). Cf. In re Goar's Estate, 252 Iowa 108, 106 N.W.2d 93 (1960) (refusal to determine whether Texas land was part of estate of Iowa testator on ground that only Texas courts have such power). Ironically, the next year the Texas Supreme Court recognized an Oklahoma divorce decree ordering the husband to convey Texas land to the wife, McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722 (1961).

trol over its realty and would conflict with the strong and legitimate interests of the situs. The answer to such a contention must begin with recognition that the mandate of full faith and credit, even as to judgments, is not absolute; it requires weighing the interests of the situs in refusing to recognize the decree of a sister state affecting the title to situs land against the very strong national interest in according full faith and credit to judgments.[49] The situs, moreover, does not have the last word as to the balance to be struck. The standard is a federal one.[50]

We may dismiss at once the argnment that by refusing to recognize the sister-state decree as between the original parties and their privies, the situs is simply protecting hypothetical bona fide purchasers who might rely on a record title which does not note the sister-state decree. When bona fide purchasers exist, the situs is free to protect them on the same basis as it would in wholly domestic transactions which are improperly recorded. It may not, however, create imaginary bogies to mask what is simply hostility to a sister-state decree.[51] The situs may, under a proper full faith and credit standard, refuse to recognize a sister-state judgment affecting the interests of persons in realty (and this is the only sense in which a court ever adjudicates title[52]) only when recognizing a particular interest as validly created will conflict with its own interests as situs and when this conflict with its interests is so gross as to outweigh the need for full faith and credit. Although full discussion of this point must await analysis of the choice-of-law issues below, almost never will the situs qua situs have any legitimate interest in having its own law applied to the matter in hand. When the situs qua situs does have such an interest, it will typically be when the foreign decree affecting the interest of persons in the land will also affect the nature or the use of the land in ways not permitted by the law of the situs. Even in such very rare instances, it will be at least debatable whether this conflict with the interest of the situs is sufficient to outweigh the very great national need for full faith and credit to judgments. It is utterly inconsistent with any rational view of full faith and credit, however, to raise an irrebuttable presumption,

[49] For statements of this full faith and credit standard, see Hughes v. Fetter, 341 U.S. 609, 612 (1951); Milwaukee County v. M. E. White Co., 296 U.S. 268, 276-77 (1935); Restatement (Second), Conflict of Laws § 434c (Tent. Draft No. 10, 1964); Reese, "Full Faith and Credit to Foreign Equity Decrees," 42 Iowa L. Rev. 183, 187 (1957); Weintraub, "Due Process and Full Faith and Credit Limitations on a State's Choice of Law," 44 Iowa L. Rev. 449, 477 (1959).

[50] See Currie, supra note 14, at 623.

[51] Cf. Hughes v. Fetter, 341 U.S. 609 (1951) (forum may not be closed to wrongful death action under statute of sister state if only basis for refusal of forum is hostility to the statute).

[52] See Restatement (Second), Conflict of Laws ch. 4, introductory note at 40 (Tent. Draft No. 3, 1956): "Every valid exercise of judicial jurisdiction, as here defined, affects the interests of persons."

as now is done, that the interest of the situs advanced by refusing recognition will always outweigh the national need for full faith and credit.

It might be argued that non-situs land decrees are not entitled to full faith and credit because of their special nature. Equity decrees act upon the conscience of the defendant, and of old the only enforcement of such decrees was by coercion upon his person.[53] But to argue today "that a foreign decree ordering the conveyance of land creates no obligation but merely a duty owed by the defendant to the court" is to assume "that equity has made no progress since the time of Coke."[54] Since *Sistare v. Sistare*,[55] moreover, it has been clear that at least equity decrees in the form of past due unmodifiable alimony installments are entitled to full faith and credit.

Indeed, in one respect it is circular to talk in terms of full faith and credit not being owed to non-situs decrees affecting interests in land because the decreeing court lacks subject-matter jurisdiction. If full faith and credit were required, the non-situs court would have subject-matter jurisdiction. This point is well illustrated in one of the fountainheads of the doctrine of such lack of jurisdiction, Joseph Story's treatise on Conflict of Laws.[56] In section 543, widely cited by situs courts denying recognition to non-situs decrees,[57] he does state:

> [A]lthough the person may be within the territorial jurisdiction; yet it is by no means true, that, in virtue thereof, every sort of suit may there be maintainable against him. A suit cannot, for instance, be maintainable against him, so as absolutely to bind his property situate elsewhere; and, *a fortiori*, not so as absolutely to bind his rights and titles to immovable property situate elsewhere.

Little noticed, however, is Story's statement in section 551 having important implications for courts bound by the mandate of full faith and credit:

> In respect to immovable property every attempt of any foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly nugatory, and its decree must be forever incapable of execution *in rem*. We have seen, indeed, that by the Roman law a suit might in many cases be brought, either where the property was situate, or where the party had his domicil. This might well be done within any of the vast domains, over which the Roman empire extended; for the judgments of its tribunals

[53] See Penn v. Lord Baltimore, 1 Ves. Sen. 444, 27 Eng. Rep. 1132 (Ch. 1750); J.R. v. M.P., Y.B. 37 Hen. VI, f. 13, pl. 3 (Common Pleas, 1459); Cook, "The Powers of Courts of Equity," 15 Colum. L. Rev. 37, 48 (1915).

[54] Barbour, "The Extra-Territorial Effect of the Equitable Decree," 17 Mich. L. Rev. 527, 528 (1919).

[55] 218 U.S. 1 (1910).

[56] Story, Conflict of Laws (3d ed. 1846).

[57] See, e.g., Courtney v. Henry, 114 Ill. App. 635, 639 (1904). Cf. Page v. McKee, 66 Ky. (3 Bush) 135, 138-40 (1867) (but the situs court will enforce equities growing out of invalid decree).

> would be every where respected and obeyed. But among the independent nations of modern times there would be insuperable difficulties in such a course.

In order to break the circle of such reasoning, it would be necessary to establish that permitting a non-situs court to affect the interests of persons before it in realty is so unfair, so inappropriate, so outrageous, as to deprive the party adversely affected of due process of law. One difficulty with such a proposition is that it proves far too much. If this were so, the decree of the non-situs court affecting interests in realty would be void, and recognition of it not only would not be required under the full-faith-and-credit clause, but would also be forbidden as a violation of due process.[58] Yet many courts at the situs of real estate have given effect in various forms to non-situs land decrees. Some have held the losing party estopped to relitigate facts found as the basis for the non-situs decrees;[59] some have recognized the interests declared by the non-situs court out of comity;[60] and some have even thought the non-situs decree entitled to full faith and credit.[61]

It is indeed ironic that Nebraska, the state whose refusal to recognize a non-situs decree led to the decision in *Fall v. Eastin,* falls into this last category. *Weesner v. Weesner*[62] again involved a non-situs divorce decree purporting to alter the interests of husband and wife in Nebraska land they had previously owned jointly, transferring the husband's interest to the wife as part of an alimony award. This time, however, the Nebraska Supreme Court said:

> [W]here all necessary parties are before a competent court in the land situs state, such an order will be given force and effect under the full faith and credit clause . . . and [the] same may in a proper case be pleaded as a defense, or as a cause of action to enforce the obligation of the order, if the

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58 But cf. Roller v. Murray, 234 U.S. 738 (1914) (no substantial federal questions raised if forum erred by giving conclusive effect to sister-state judgment). Professor Currie points out, however, that Roller v. Murray was decided before the Supreme Court had jurisdiction to review state decisions in favor of rights asserted under the Constitution. Currie, supra note 14, at 648 n.102.

59 Norton v. House of Mercy, 101 Fed. 382 (5th Cir. 1900); Dunlap v. Byers, 110 Mich. 109, 67 N.W. 1067 (1896); Lyle Cashion Co. v. McKendrick, 227 Miss. 894, 87 So. 2d 289 (1956); Bailey v. Tully, 242 Wis. 226, 7 N.W.2d 837 (1943). Cf. Redwood Inv. Co. v. Exley, 64 Cal. App. 455, 459, 221 Pac. 973, 975 (Dist. Ct. App. 1923) (decree is "record evidence of the equities therein determined"); Page v. McKee, 66 Ky. (3 Bush) 135, 140 (1867) (decree invalid to affect interest in land, but situs court will "enforce the equities growing out of it").

60 Phelps v. Williams, 192 A.2d 805 (D.C. Ct. App. 1963); McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722 (1961).

61 Barber v. Barber, 51 Cal. 2d 244, 247, 331 P.2d 628, 630-31 (1958) (dictum); Meents v. Comstock, 230 Iowa 63, 296 N.W. 721 (1941); Weesner v. Weesner, 168 Neb. 346, 95 N.W.2d 682 (1959); Burnley v. Stevenson, 24 Ohio St. 474 (1873); Mallette v. Scheerer, 164 Wis. 415, 160 N.W. 182 (1916).

62 168 Neb. 346, 95 N.W.2d 682 (1959).

> related public policy of the situs state is in substantial accord with that of the other state.[63]

As this quote indicates, one ground on which the Nebraska court attempted to distinguish its former decision in *Fall v. Fall* was that at the time of *Fall* a Nebraska court did not have the power to award real estate to the wife as alimony. Because this was no longer so, no substantial interest of Nebraska was now violated in recognizing the sister-state decree making such an award. This distinction is unconvincing because Nebraska's purposes in formerly denying the divorced wife alimony rights in the husband's Nebraska realty seem so unrelated to spouses domiciled elsewhere[64] that it is difficult to articulate an interest of Nebraska *qua situs* which would be sufficiently undermined to outweigh the federal need for recognition of the sister-state decree. The further distinction by the *Weesner* court that in *Fall* the husband had not been subject to the in personam jurisdiction of the Nebraska court[65] is untenable because the situs of real estate as such, upon giving reasonable notice and opportunity to be heard, has judicial jurisdiction to affect the interests of all persons in the world in land at the situs.[66] Another distinction between *Weesner* and *Fall* is that in *Weesner* the wife's quiet-title action was directly against the husband whereas in *Fall* it was against his grantees. It is difficult to see how this difference could be of constitutional diguity unless one is prepared to argue that the wife's action in *Wessner* was in effect one to reduce the sister-state decree to judgment in Nebraska, as is done with money judgments preparatory to local execution, and that this detail of procedural etiquette had been omitted in *Fall*.

As a further indication that the non-situs court is not so outrageously inappropriate a forum as to raise due process impediments to the enforcement of its decree, situs states have consistently given effect to a deed actually executed by a party under the compulsion of such a decree.[67] In *Fall* itself the Nebraska court said:

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[63] Weesner v. Weesner, 168 Neb. 346, 357, 95 N.W.2d 682, 689-90 (1959).

[64] See B. Currie, "Full Faith and Credit to Foreign Land Decrees," 21 U. Chi. L. Rev. 620, 637 (1954).

[65] Weesner v. Weesner, supra note 63, at 356-57, 95 N.W.2d at 689.

[66] See Avery v. Bender, 124 Vt. 309, 204 A.2d 314 (1964); Restatement (Second), Conflict of Laws § 101 (Tent. Draft No. 4, 1957).

[67] See Gilliland v. Inabnit, 92 Iowa 46, 60 N.W. 211 (1894); Steele v. Bryant, 132 Ky. 569, 116 S.W. 755 (1909); Bullock v. Bullock, 52 N.J. Eq. 561, 569, 30 Atl. 676, 677 (Ct. Err. & App. 1894) (dictum); Sharp v. Sharp, 65 Okla. 76, 78, 166 Pac. 175, 177 (1916) (dictum); Barbour, supra note 54, at 549; Lorenzen, "Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land," 34 Yale L.J. 591, 608-09 (1925). For the proposition that the situs would be free to refuse recognition of such a deed, see Irving Trust Co. v. Maryland Cas. Co., 83 F.2d 168, 172 (2d Cir.) (dictum, L. Hand, J.), cert. denied, 299 U.S. 571 (1936); Note, "Validity of Deed Given under Compulsion of 'Foreign' Court," 12 Mont. L. Rev. 59, 71 (1951).

> [I]f Fall had obeyed the order of the Washington court and made a deed of conveyance to his wife of the Nebraska land, even under the threat of contempt proceedings, or after duress by imprisonment, the title thereby conveyed to Mrs. Fall would have been of equal weight and dignity with that which he himself possessed at the time of the execution of the deed.[68]

It is difficult to see how such circumstances could remove legitimate due process objections based on the inappropriateness of the forum.

A similar notion of the inappropriateness of the non-situs forum for adjudication of title is at least partially responsible for the "local action" doctrine—that actions for trespass to land are "local" and triable only at the situs of the land.[69] Several jurisdictions, however, have abandoned the local action rule either by judicial decision[70] or statute[71] and, it is submitted, without running afoul of the due process clause.

Moreover, it is simply not true that the non-situs forum is always an extremely inappropriate forum to adjudicate the interests in realty of persons before it. In cases such as *Fall* and *Weesner*, when the forum is granting a divorce and dividing the property of the warring spouses, it is highly desirable that such division be made with a view of the full picture and include property of the couple wherever situated. In fact, if a non-situs forum in a particular case proves to be an inconvenient place to litigate title to land, because a view of the land is desirable or because witnesses available at the situs are necessary, the doctrine of forum non conveniens is available to prevent a miscarriage of justice; in extreme cases this doctrine might receive due process sanction. But none of the cases cited in this article presents such a problem.

It is at this point that the interrelationship between the problems of judicial jurisdiction and choice of law for adjudicating interests in realty becomes apparent. If the situs court is the only court competent to hear such matters, this will support the argument that it is most expedient to apply situs law—the law of the forum. Conversely, if the non-situs court must or should apply the law of the situs, then this will buttress a contention that the non-situs court is an incompetent forum. Therefore, this article now turns to the choice-of-law problem itself.

Non-situs decrees affecting the interests in land of persons before the court should be entitled to the same recognition at the situs under full

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[68] Fall v. Fall, 75 Neb. 120, 128, 113 N.W. 175, 178 (1907), aff'd sub nom. Fall v. Eastin, 215 U.S. 1 (1909).

[69] Livingston v. Jefferson, 15 Fed. Cas. 660 (No. 8411) (C.C.D. Va. 1811); see Ehrenzweig, Conflict of Laws § 39 (1962).

[70] Reasor-Hill Corp. v. Harrison, 220 Ark. 521, 249 S.W.2d 994 (1952); Little v. Chicago, St. P., M. & O. Ry., 65 Minn. 48, 67 N.W. 846 (1896). See also Ingram v. Great Lakes Pipe Line Co., 153 S.W.2d 547 (Mo. App. 1941) (Missouri venue statute construed as ending local action rule).

[71] N.Y. Real Prop. Actions Law § 121.

faith and credit as other judgments. Rarely, if ever, will the situs have so great an interest in denying full recognition to non-situs decrees that it should be permitted to disregard them. The following sections will attempt to demonstrate that the reason why it is especially important that this result, long advocated,[72] now be realized, is to permit the functional re-analysis of choice-of-law problems, having such salutary effects in other areas, to enter the mists of the real property realm. Once false dogmas about jurisdiction of the subject matter are consigned to the bonfire, it becomes apparent that proper solution of the choice-of-law problem will rarely, if ever, result in the application of the law of the situs qua situs.[73]

II

An Appraisal of the Results of the "Situs" Rule

The primary focus of choice-of-law analysis for problems concerning real property should be on the purposes underlying putatively conflicting domestic rules of property law. Although two states have domestic rules pointing to different results if applied to interests in realty, analysis of the purposes underlying those domestic rules may reveal that the conflict is apparent rather than real. The purposes underlying one domestic rule may not be advanced by applying that rule to the transaction in issue; the policies of the other domestic rule, on the other hand, may be fully applicable. When this occurs, a rational and just result can be achieved only by applying the domestic rule whose purposes are relevant to the transaction in issue and rejecting the domestic rule whose policies would not be meaningfully advanced by application. This is true without regard to which rule is that of the forum or that of the situs of the realty. When, on the other hand, each of two or more states' domestic property rules pointing to different results has an underlying policy which would be meaningfully advanced by application to the case at bar, there is a real, not apparent, conflict-of-laws problem. A rational solution will turn primarily on interests and policies which the two jurisdictions have in common and on clearly discernible trends and developments in the substantive area involved.

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72 See Barbour, supra note 54, at 532-33; B. Currie, "Full Faith and Credit, Chiefly to Judgments: A Role for Congress," in 1964 Supreme Court Review 89, 108 (1964); Currie, supra note 64, at 623-66; Hancock, "Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: The Supreme Court and the Land Taboo," 18 Stan. L. Rev. 1299, 1321 (1966); Hancock, "In the Parish of St. Mary le Bow, in the Ward of Cheap," 16 Stan. L. Rev. 561, 571 n.33 (1964); Lorenzen, supra note 67, at 597, 607; Reese, supra note 49, at 201; B. Schwartz, "Fall v. Eastin Revisited: Extraterritorial Effect of Foreign Land Decrees," 54 Dick. L. Rev. 293, 299 (1950).

73 Cf. Von Mehren & Trautman, The Law of Multistate Problems 197 (1965).

The remainder of this article is devoted to applying these concepts to the most frequently recurring choice-of-law problems involving interests in land. One of the three reasons advanced by the Second Restatement for applying the law of the situs to choice-of-law problems concerning land is that "immovables are of greatest concern to the state in which they are situated . . . ."[74] It is the central thesis of this portion of the article that if this statement means that the situs qua situs will in most cases have the predominant interest in regulating and affecting the interests of persons in realty, the assertion is completely false.

A. *Choice-of-Law Problems Concerning Land in Decedents' Estates*

1. *Intestate Distribution*

The classic choice-of-law problem involving the intestate distribution of realty runs as follows: The real estate is situated in state *X*. It is owned in fee simple by Mr. Smith. Mr. Smith has a settled residence in state *Y*, as do his wife and three minor children. Mr. Smith dies intestate. Under the intestacy statute of state *X*, the widow would take a one-third interest in the real estate and the other two-thirds would be divided equally among the children. Under *Y* intestacy law, however, the widow would take a one-half interest in the realty and the other one-half would go to the children. Should *X* or *Y* law be applied to the intestate distribution of the *X* realty?

Y, the settled residence of all the claimants, has as much interest in determining the proportions in which the claimants shall take as it would if the land in question were in that state. *Y* has indicated who shall take on intestacy and in what shares in accordance with its own notions of what would be fair in light of the claimants' needs and legitimate expectations. If a *Y* resident does not receive a share that *Y* thinks sufficient and as a consequence becomes a public charge, it is *Y* and *Y*'s citizens who will pay the bill. If the distribution does not comport with *Y*'s ideas of fairness and the *Y* claimants quarrel, it is *Y*'s peace that is disturbed.

Does *X*, the situs, have any interest in controlling the intestate distribution in this case? No. It can be of no legitimate concern to *X* in what shares the *Y* widow and children take. The conflict is a false one, only *Y* law being rationally applicable.[75] Yet the situs dogma has here uniformly resulted in the wrong answer to a false problem.[76]

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[74] Restatement (Second), Conflict of Laws ch. 7, Topic 2, at 13 (Tent. Draft No. 5, 1959).

[75] See Baxter, "Choice of Law in the Federal System," 16 Stan. L. Rev. 1, 16 (1963); Hancock, "Equitable Conversion and the Land Taboo in Conflict of Laws," 17 Stan. L. Rev. 1095, 1115 (1965).

[76] See, e.g., Sinclair v. Sinclair, 99 N.H. 316, 109 A.2d 851 (1954); Matter of Estate of Sendonas, 62 Wash. 2d 129, 381 P.2d 752 (1963). Cf. McCollum v. Smith, 19 Tenn. 342

If the intestacy laws of *X* and *Y* speak of "wife" and "childreu" but do not specify what wives and children, whether only wives and children with settled residences there or all the wives and children in the world, the above approach might be taken as an exercise in statutory construction.[77] "Wife" and "children" have, in this territorial context, more than one reasonable meaning and that meaning should be adopted which best advances the purposes of the statute. It is true, however, that the situs dogma has been frozen into a number of intestacy statutes.[78] Such statutes would have to be amended before a rational result could be reached.

The situs which has no interest in the fractions in which the interests in realty are divided among non-residents also has no interest in deciding whether one or another non-resident shall take. In this latter situation, applying the situs law is likely to be even more inimical to the interest of the home state of the claimants in treating them according to its own notions of fairness. But the situs rule resulted in English law being applied in *In re Berchtold*[79] to give the Hungarian widow the entire interest in the English realty rather than giving all to the Hungarian sister subject to a usufruct for life in the widow, as would have been the result under Hungarian law.

Can the situs ever have a legitimate interest qua situs in controlling the intestate distribution of interests in realty? Not today as between states of the United States. Their laws on intestacy are too similar in both letter and purpose, differing on details which are no concern to a state which has no contact except as situs. It is theoretically possible, however, for the intestacy law of the situs to differ from that of another jurisdiction in a manner which may affect the use of the land as land and therefore affect the economy and vital interests of the situs. For example, the situs might have a rule designed to prevent the land from being broken up into parcels too small to be utilized economically. Its intestacy law might, instead of dividing the interests in the land among relatives of the same degree in equal shares, select some one or a few persons to take all—as, for example, the English rule of primogeniture

(1838) (same result classifying slaves as immovables). See also Restatement (Second), Conflict of Laws § 245 (Tent. Draft No. 5, 1959).

[77] Cf. Williamson's Adm'rs v. Smart, 1 N.C. 355, 362 (1801). In applying the law of the state where the master died domiciled to the question of intestate distribution of slaves, the court dismissed the argument that the law of the state where the slaves were located was to be applied, the situs state's rules causing slaves to descend like realty to heirs-at-law: "there can be no reason wherefore that State [situs] should be concerned about the manner in which strangers hold that sort of property, which they may freely carry away with them. All that, as a State, they can be interested in ascertaining is, whether the party asserting a claim has really a right, according to the laws of his own country . . . ."

[78] Ill. Ann. Stat. ch. 3, § 11 (Smith-Hurd 1961); N.Y. Deced. Est. Law § 47.

[79] [1923] 1 Ch. 192.

gave all to the oldest son.[80] Such concentration of the interests in realty might also increase the likelihood that the land will eventually escheat to the situs. The point is, however, that the situs as such has no interest in intestate distribution unless that distribution will in some way be reasonably likely to affect the use of the land and the economy of the situs, or to increase the likelihood of escheat.

The Connecticut Supreme Court of Errors in *Clarke's Appeal* indicated that it had an interest as situs in controlling the intestate distribution of Connecticut realty between the South Carolina father and daughter:

> Succession to the real estate of a deceased person is regulated at the will of the sovereign within whose territory it is embraced. It has always been regarded as a matter of grave political consequence. . . . Ownership of land controls its occupancy, and largely influences the character of the population. It determines the source to which governments ordinarily look for their surest, if not their principal, means of financial support. It had, in former times, in England and in all her American colonies, an intimate relation to the right of suffrage, and in this State is still a qualification for it under at least one of our municipal charters.[81]

None of this justifies the decision in the context of that case. Connecticut's ability to collect land taxes does not turn on which non-resident takes and, even if the "right of suffrage" can constitutionally turn on land ownership,[82] it is irrelevant when apportioning interests in the land among non-residents who do not in any event vote at the situs.

A somewhat analogous problem occurs when an inter vivos trust is treated as part of the gross estate for federal estate tax purposes, and the situs of the trust property and the settled residence of the settlor-decedent differ on whether the beneficiaries of the trust and the distributees of the estate should share the tax burdens. Although it does not deal with a trust corpus consisting of realty, the Seventh Circuit case of *Doetsch v. Doetsch*,[83] in choosing the law of the decedent's domicile, articulates a reason for its selection of that law which is relevant to our purposes:

> Finally, referring to the law of decedent's domicile results in observing that state's policy with respect to protecting the widow and family. . . . Protection of the widow and family is a matter in which the domiciliary state has a dominant interest, and without reference by the situs state to the state of decedent's domicile, this policy can not be fulfilled.[84]

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80 See In re Cutcliffe's Will Trusts, [1940] Ch. 565.

81 Clarke's Appeal, 70 Conn. 195, 210-11, 39 Atl. 155, 159 (1898), aff'd sub nom. Clarke v. Clarke, 178 U.S. 186 (1900).

82 But cf. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966) (holding Virginia's poll tax unconstitutional as inconsistent with the equal protection clause) ("a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard").

83 312 F.2d 323 (7th Cir. 1963).

84 Id. at 328. Accord, In re Royse's Estate, 118 N.Y.S.2d 421 (Surr. Ct. New York

The attempt has been made at times, in intestacy and in other situations requiring a choice of law to determine interests in realty, to avoid the situs rule and inject a rule looking to the law of the decedent's domicile at death by use of the fiction of equitable conversion.[85] This doctrine, which is rooted in the notion that the law will regard as done what ought to have been done, may be applicable to a question of intestate succession if the intestate decedent's interest in the realty stems from an inter vivos or testamentary document that has directed the sale of the realty and its conversion into personalty. Even though the sale has not yet taken place at the death of the intestate, by "regarding as done what ought to have been done" the court may view the realty as equitably converted into personalty. This, in turn, would invoke another classic but quite different choice-of-law rule: the law of the decedent's domicile at death determines the intestate distribution of his personal property.[86] Such an argument was offered but rejected in *In re Berchtold*: "But this equitable doctrine of conversion only arises and comes into play where the question for consideration arises as between real estate and personal estate. It has no relation to the question whether property is movable or immovable."[87]

Is a reversal of this attitude concerning equitable conversion the answer to the problem? No. It is an advocate's trick which should be remembered and stored away for possible use in undermining the situs monolith when all else fails. It is true that on the average, over a great number of cases, more just and rational decisions will be reached by accepting this argument of equitable conversion than by rejecting it. This is because the domicile of the decedent at death will usually have the predominant interest, often the sole interest, in regulating the intestate distribution of his property. But this would leave untouched the greater number of cases in which, because of the absence of any direction or discretion to sell, the equitable conversion game cannot be played. Moreover, the substitution of one rigid, territorially-oriented choice-of-law rule, "domicile at death," for another, is not why we storm the Bastille. "Domicile" itself is a useless concept for choice-of-law purposes. Because it is used

County 1952); First Nat'l Bank v. Wells, 267 N.C. 276 (1966), 148 S.E.2d 119. See also Scoles, "Apportionment of Federal Estate Taxes and Conflict of Laws," 55 Colum. L. Rev. 261, 295 (1955). Contra, Beatty v. Cake, 236 Ore. 498, 387 P.2d 355 (1963) (corpus was realty, but court assumed that most of the beneficiaries were residents of the situs).

85 See Hancock, "In the Parish of St. Mary le Bow, in the Ward of Cheap," supra note 72, at 574.

86 See Restatement (Second), Conflict of Laws § 303 (Tent. Draft No. 5, 1959).

87 [1923] 1 Ch. 192, 206. Accord, Re Burke, 22 Sask. 142, [1928] 1 D.L.R. 318 (Sask. K.B. 1927). But see Re Hole, 56 Man. 295, 312-13 [1948] 4 D.L.R. 419, 433 (Man. K.B.), disapproving Re Burke for its rejection of equitable conversion and holding rights of vendor in contract for sale of Saskatchewan land escheated to vendor's domicile, Manitoba.

on so many different occasions—choice of law for intestate distribution of personalty, validity of a will of personalty, judicial jurisdiction, estate tax on intangibles in the estate—the slightest insight into the legal process will reveal that the meaning of "domicile" must shift with these very different contexts.[88] In order to choose rationally among different possible meanings, we must advert to the purposes we seek to serve by our choice. If this is done, "domicile," when determined, is the label for the result, not the reason.[89] Finally, even if we were so naive as to believe that domicile had a single, unitary meaning which, once determined, could be plugged in as needed to any legal problem requiring it for solution, we would find many instances in which the domicile at death did not have the predominant interest in the distribution of the intestate property.[90] *Matter of Wright's Estate*[91] probably reached the right result by applying the law of the situs of realty to intestate succession, rather than the law of the intestate's domicile at death. The contest was between an illegitimate child of the decedent and an illegitimate child of his sister. The decedent had died domiciled in New York. However, both bastards had been born in the Virgin Islands, the situs of the brother's realty, and had resided there all their lives.

Although adoption of the fiction of equitable conversion is, therefore, not the answer to our problem, it should be recognized that actual or imminent sale of the realty may terminate whatever interests the situs qua situs does have in intestate distribution. For example, the case of *In re Cutcliffe's Will Trusts*[92] involved the distribution on the intestacy of an Ontario resident of his interests under a trust of property situated in England. The intestate had seven children. Under the then English rule of primogeniture only his oldest son would take, but under Ontario law his seven children would take equal shares. If, as was true at the time the English trust was created by his aunt, the corpus had consisted solely of realty, England as situs might claim some interest in having its rule of primogeniture applied to avoid fractionizing the interests in English realty into uneconomically small units. In fact, however, at the time that the case was heard part of the realty had been sold and the proceeds used to buy stocks. Only the distribution of the stocks was in issue. Even if England had an interest as situs in the application of

88 See Restatement (Second), Conflict of Laws § 11, comment d (Tent. Draft No. 2, 1954); 3 ALI Proceedings 227 (1925) (Cook's Statement); Weintraub, "An Inquiry into the Utility of 'Domicile' as a Concept in Conflicts Analysis," 63 Mich. L. Rev. 961, 983-84 (1965).

89 Weintraub, id. at 984-86.

90 Id. at 964-72 (personalty, discussing In re Estate of Jones, 192 Iowa 78, 182 N.W. 227 (1921) and White v. Tennant, 31 W. Va. 790, 8 S.E. 596 (1888)).

91 207 F. Supp. 912 (Dist. V.I. 1962).

92 [1940] 1 Ch. 565.

its rule of primogeniture to land, it had no such interest where only stock was involved. The English statute which the court relied on, providing that such proceeds of the sale of land "shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone,"[93] was not dispositive of the problem. The territorial scope of this very statute was in issue. Did "persons" mean all persons in the world?

Although actual sale of the realty may terminate an interest of the situs in affecting its distribution, some care will have to be taken that the discretion to sell or hold is not exercised by parties in interest to affect that very distribution.[94] Such a danger exists only when such discretion exists. When a decision to sell or hold can be made, however, *Norris v. Loyd*[95] is the kind of horrible example that should be avoided. That case involved a contest between an illegitimate child of the testator on one side, and the testator's widow and twelve legitimate children on the other. Under the law of California, the domicile at death of the testator, the bastard would take an intestate share in the estate as a pretermitted heir, as he was not mentioned in the will. Under the law of Iowa, the situs of the land and domicile of the bastard, he would take nothing. The will directed the executors to sell the Iowa land and divide the proceeds among the legitimate children. In order to avoid the change into personalty and the possible shift from the law of the situs by use of the equitable conversion fiction, the legitimate children and the widow (who had elected to take a share against the will) agreed to take and hold the land as land and so notified the executors who consented. This plan succeeded, the Iowa court stating: "It is well settled by authority that, though a will work an equitable conversion of land, the beneficiaries of the devise may, at any time before actual conversion, work a reconversion into land, by so electing and agreeing among themselves."[96]

Such manipulation of the decision to sell or hold the land cannot occur if the choice of law should in no way be affected by the change in ownership of the realty. This is so if, as is typically the case in intestacy, the situs as such has no interest in having its law applied even if the interests

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[93] Settled Land Act, 1882, 45 & 46 Vict., c. 38, § 22(5).

[94] Cf. Matter of Schneider's Estate, 198 Misc. 1017, 1021, 96 N.Y.S.2d 652, 657, adhered to on reargument, 198 Misc. 1030, 100 N.Y.S.2d 371 (Surr. Ct. New York County 1950) (fortuitous conversion of land should not affect its disposition).

[95] 183 Iowa 1056, 168 N.W. 557 (1918).

[96] Id. at 1061, 168 N.W. at 558.

of the claimants remain interests in realty. This is also true in the remaining cases on intestacy in which, although the situs has an interest as situs in having its intestacy law applied because the difference in methods of distribution may hypothetically affect the use of land, its interest as situs should yield to the competing interest of another jurisdiction in which all the claimants have settled residences. The situs' interest should so yield because the method of intestate distribution is not in fact likely to affect land use.[97] On the other hand, the settled residence of the claimants will in every case have valid interests to promote: concern for the welfare of the claimants and of the society of which they are a part. This concern is a purpose shared by both situs and claimants' residence, but in this context only the concern of the residence is relevant.

2. *Validity of a Will of Realty*

It is well established that the law of the situs of realty determines the validity of a will disposing of interests in the realty.[98] Here, especially, the situs rule is unsatisfactory. There are many quite different domestic rules affecting the validity of wills. The policies underlying these laws are as various as the rules. To attempt to deal with all problems concerning the validity of a will of land with a single choice-of-law rule is to ignore the underlying diversity of rules and policies and to make just and rational results extremely improbable.[99] This is illustrated in the following discussion of some of the rules concerning the validity of wills which most often present choice-of-law problems.

a. *Mortmain.* The bizarre results obtained from uniformly applying the situs law to determine the applicability of a mortmain statute to a devise of realty are epitomized in *Toledo Soc'y for Crippled Children v. Hickok*.[100] Mr. Hickok died domiciled in Ohio survived by a wife and two children, also Ohio domiciliaries.[101] In a will which he executed within one year of his death he established a trust, the income to be paid to his widow and two adult children for twenty years and then the corpus to be divided among twenty charities. An Ohio statute, however, invalidated any devise to charity by a testator with surviving children if the

97 Cf. Von Mehren & Trautman, supra note 73, at 406:
In former days, of course, the concern of the situs was considerably greater. For example, the rule of primogeniture, with its function of precluding the splitting up of land into small estates, represented a significant concern of the situs. However, few rules representing comparable concerns of the situs can be found today.

98 See Restatement (Second), Conflict of Laws § 249 (Tent. Draft No. 5, 1959). For a statute to this effect, see N.Y. Deced. Est. Law § 47.

99 See Hancock, "In the Parish of St. Mary le Bow, in the Ward of Cheap," supra note 72, at 566.

100 152 Tex. 578, 261 S.W.2d 692 (1953), cert. denied, 347 U.S. 936 (1954).

101 Reply Brief for Appellees, pp. 80-81, Toledo Soc'y for Crippled Children v. Hickok, 252 S.W.2d 739 (Tex. Civ. App. 1952).

will was not executed at least one year prior to death. The charities sought to establish their rights under the will to certain Texas land and mineral interests. Some of the land and mineral interests were owned by Mr. Hickok individually at his death, but the most valuable interests were owned by a partnership of which he was a member. Before his death, Mr. Hickok had contracted with his partner to form a corporation and to convey the partnership assets to the corporation in exchange for stock. His will incorporated this contract by reference and directed compliance with it; by the time of trial his executors had carried out Mr. Hickok's instructions and all of his interest in the partnership had been conveyed to the corporation in exchange for stock.[102] As to the land and mineral interests that Mr. Hickok owned individually at his death, the trustees of the testamentary trust were given the power, but not directed, to sell any assets and reinvest the proceeds.

Under Texas law, the devise to the charities would be valid. In order to avoid the situs rule, Mr. Hickok's widow and two children argued that both the discretion to sell the land owned individually by Hickok and the actual exchange of his partnership interests for corporate stock resulted in an equitable conversion of the interests in Texas realty into interests in personalty, so that the law of the domicile at death would determine the validity of the will. The wife and children had complete success with this argument in the Court of Civil Appeals.[103] The Texas Supreme Court, however, rejected the equitable conversion argument, applied Texas law as the law of the situs, and, with respect to the Texas land and mineral interests, held valid the testamentary gift over to the charities. It concluded:

> If this view should impress some as legalistic . . . it is hardly more of a "technical" approach than that of regarding "as done" that which was *not* done, in order to deprive the petitioners of the last remnant of benefits the testator obviously intended them to have, and, in effect, to enforce here a legislative policy of Ohio, which is contrary to the policy of our own Legislature.[104]

What policy of the Texas legislature? Not one of the twenty charities was a Texas charity. Eighteen of them were Ohio corporations and two had headquarters in Michigan.[105] There was no indication that any of the charities conducted any activities in Texas. Texas could not possibly

[102] Toledo Soc'y for Crippled Children v. Hickok, 252 S.W.2d 739, 740 (Tex. Civ. App. 1952).

[103] Id. at 743.

[104] Toledo Soc'y for Crippled Children v. Hickok, supra note 100, at 593, 261 S.W.2d at 702.

[105] Appendix to Application for Writ of Error, pp. 40-41, Toledo Soc'y for Crippled Children v. Hickok, supra note 100.

have had any interest in validating the devise for the benefit of the charities when to do so would undermine the highly relevant purposes of Ohio to protect the Ohio wife and children and "to prevent undue influence enhanced by the apprehension of approaching death."[106]

Sometimes the law of the situs will provide the wrong answer to a false conflict in such a manner that charities will be deprived of benefits that they should have received. *Lowe v. Plainfield Trust Co.*[107] provides an example of this. The testator died domiciled in New Jersey and owning realty in New York. His will left the realty to one New Jersey and two New York charities. He was survived by a wife and two children. A New York statute prohibited any person having a spouse or child from devising more than one-half of his estate to a charity. The will gave the executor a power to sell the New York realty and, pursuant to that power, the executor had entered into a written contract providing for the sale of all except one parcel of the realty. Rejecting the contention of the charities that this resulted in the conversion of the realty into personalty, thus avoiding the situs choice-of-law rule, the court held that New York law controlled as to the interests in the New York realty and its proceeds, and that the son and daughter (the wife now also having died) were entitled to one half of the New York realty unless they had waived their rights under an alleged settlement agreement.

The New York statute involved in *Lowe* seems to be directed at protecting the natural objects of the testator's bounty from having the bulk of the estate diverted from them to charities. New York, however, had no interest in providing this protection for citizens of New Jersey if their

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106 Kirkbride v. Hickok, 155 Ohio St. 293, 302, 98 N.E.2d 815, 820 (1951). The Ohio Supreme Court held that the corpus would pass as intestate property at the end of the twenty year period, but left undisturbed the Ohio Court of Appeals reservation that whether this was true as to the Texas realty was up to the Texas courts. See Respondents' Supplemental Argument in Supreme Court of Texas, p. 5 quoting from the opinion of the Court of Appeals of Lucas County, Ohio: "The opinion of this court as to the equitable conversion, however, cannot be a controlling judgment. The courts of Texas will determine the effect of the will as it relates to real estate located in that state."

See Hancock, "In the Parish of St. Mary le Bow, in the Ward of Cheap," supra note 72, at 573 characterizing the Hickok result as "officious intermeddling." For similar "intermeddling" see N.Y. Deced. Est. Law § 47 which contains the following provision concerning testamentary dispositions of personalty situated in New York:

> Whenever a decedent, being a citizen of the United States or a citizen or a subject of a foreign country, wherever resident, shall have declared in his will and testament that he elects that such testamentary dispositions shall be construed and regulated by the laws of this state, the *validity* and effect of such dispositions shall be determined by such laws. [Emphasis added.]

The Uniform Probate of Foreign Wills Act § 4, 9B U.L.A. 388, would not deter a Hickok result:

> Final rejection of the will from probate or establishment in the jurisdiction where the testator died domiciled is conclusive in this state except where the will has been rejected solely for a cause which is not ground for rejection of a will of a testator who died domiciled in this state, in which case the will nevertheless may be admitted to probate under Section 5. Id. at 394.

107 216 App. Div. 72, 215 N.Y. Supp. 50 (1st Dep't 1926).

own state did not think such protection necessary. It might be argued that New York had an interest in controlling the soliciting activities of New York charities and that this statute was designed, in part, to mitigate the harm of overzealous fund-raising. This is possible, but it does not seem nearly so likely a purpose of the New York statute in *Lowe* as it might have been of the Ohio statute in *Hickok*, the latter being aimed at deterring deathbed solicitations and at protection of the family from the testator's late-coming religious fervor. Moreover, the *Lowe* decision affected the New Jersey charity as well, and New York could have no interest in policing that charity's solicitations of New Jersey citizens in New Jersey.

Mortmain statutes of the type involved in *Hickok* and *Lowe* are primarily designed to protect the family from undue depletions of the estate by devises to charity. It is the settled residence of the testator and his family which is primarily concerned with the application of such a statute. Another state, in which the charity is incorporated or conducts a substantial amount of its activities, may be interested in application of such a statute if, as in *Hickok*, it seems reasonable to view the statute also as controlling the soliciting activities of the charity. The situs does not have a legitimate countervailing interest in validating the will unless the charity conducts a substantial amount of its activities at the situs.

Another type of mortmain statute, representing the original meaning of the term, limits the total value of property that a charity may hold.[108] Both the situs qua situs and a state in which the charity conducts substantial activities are interested in enforcing such a statute. The situs may wish to keep realty in the stream of commerce. The scene of the charity's activities may wish to protect itself from what it considers excessive economic and political power of charities. The settled residence of the testator and his family has little interest in application of this type of statute. *Norton v. House of Mercy*[109] reached a result similar to that which would have been achieved by analysis of the purposes of this latter type of statute. The permissive law of the situs was avoided by classifying the question as one of the capacity of the charity to take. The issue of capacity to take was resolved by the law under which the charity was organized, New York, rather than that of the situs of the realty, Texas.

b. *Perpetuities.* The situs qua situs has an interest in having its own rules on perpetuities and accumulations applied. Such restrictions on the

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[108] For an early 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).

[109] 101 Fed. 382 (5th Cir. 1900).

use of situs land may adversely affect the economy of the situs by removing land from the stream of commerce.[110]

This legitimate interest of the situs qua situs is terminated if the land, whether because of directions or discretion under the will or otherwise, is sold and thus freed from what the situs considers undesirable provisions as to alienation or accumulation. The effect of sale in eliminating the interest of the situs, basic to any functional analysis of the problems in this area, has been recognized by a number of courts for at least the better part of a century.[111]

A true conflict occurs when the testator makes provisions in his will concerning land which violate the perpetuities rules of the situs but not of the state where the testator and the beneficiaries under the will have settled residences. The situs is interested in freeing its land from such fetters. The state where the claimants are resident has an interest in giving effect to the desires of the testator and having the claimants conform to his estate plan. This true conflict, at least as between states of the United States, should be resolved in favor of the validity of the will. The differences between the perpetuities rules of the various states are differences in detail rather than of basic policy.[112] The usual variations are the common law rule of lives in being plus twenty-one years,[113] a lives-in-being rule, or a two-lives rule. In view of the shared interest in giving

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110 See Cook, The Logical and Legal Bases of the Conflict of Laws 290 (1942); Restatement (Second), Conflict of Laws ch. 7, Topic 4, Title B, at 88 (Tent. Draft No. 13, 1965); Baxter, supra note 75, at 16-17; Re, "The Testamentary Disposition of Land in the Conflict of Laws," 27 St. John's L. Rev. 36, 54 (1952). Cf. Wilson v. Smith, 373 S.W.2d 514 (Tex Civ. App. 1963), writ refused n.r.e., cert. denied sub. nom. Burrows v. Carr, 379 U.S. 973 (1965) (trust of Texas land and personal property invalid in providing proceeds to be used to operate chiropractic hospitals which are prohibited in Texas, even though the hospitals were to be operated in California where they were legal).

111 See Ford v. Ford, 80 Mich. 42, 55-56, 44 N.W. 1057, 1061 (1890):

> The object of our statute was to prevent the lands within this State from being taken out of the channels of trade and the accumulation of large landed estates to be held in perpetuity, or for a long series of years. The only act which the executor is required to perform in Michigan is to make the sale; the proceeds to be taken to Missouri, and there invested. Our statute is in no sense violated by the direction in the will that the estate, after conversion here, is to be invested in Missouri lands, and there held for any number of lives.

Cf. Equitable Trust Co. v. Ward, 29 Del. Ch. 206, 48 A.2d 519 (Ch. 1946) (rents from situs land transmitted to another state for accumulation); Hope v. Brewer, 136 N.Y. 126, 32 N.E. 558 (1892) (vagueness rules of situs not violated when situs land to be sold and proceeds administered in Scotland); Despard v. Churchill, 53 N.Y. 192 (1873) (fact that New York leaseholds soon to terminate makes New York perpetuities policy inapplicable). But see Penfield v. Tower, 1 N.D. 216, 46 N.W. 413 (1890) (trustee's discretion to sell does not make situs' perpetuities policy inapplicable).

112 See Von Mehren & Trautman, supra note 73, at 200. Cf. Shannon v. Irving Trust Co., 275 N.Y. 95, 103-04, 9 N.E.2d 792, 794 (1937) (accumulations of proceeds from personalty: "our policy in that connection is substantially the same as that of New Jersey"); Cross v. United States Trust Co. of N.Y., 131 N.Y. 330, 30 N.E. 125 (1892) (personalty).

113 Atkinson v. Kettler, 372 S.W.2d 704 (Tex. Civ. App. 1963), modified, 383 S.W.2d 557 (Tex. 1964) (common law rule applicable in Texas described as twenty-one years after some life in being at the time of the creation of the interest, plus a period of gestation).

effect to the intention of the testator and the largely-shared policies on perpetuities, the situs may defer to the more liberal perpetuities rule of the testator's residence without vitally affecting its own land policy.[114]

c. *Formalities of Execution and Revocation.* One of the most objectionable applications of the situs rule is to invalidate, because of lack of requisite formalities, a will that satisfies the formalities indicated by the law of the testator's settled residence where it was executed. In reaching such a result, the situs not only upsets the expectations of the testator and the policy of a sister state in giving effect to those expectations, but also advances no conceivable interest that it, qua situs, can have. This is clearly true when the situs invalidates the will because of some variance on a matter of detail from the situs' statute of wills. For example, the will may have had two witnesses as required at the testator's residence but lacked the three witnesses required by the situs.[115] But invalidation under situs law is still undesirable even when the will violates in some very substantial way the formalities requirements of the situs. For example, the will is a nuncupative or holographic will valid at the residence of the testator but not permitted by the situs.[116] The situs' rejection of nuncupative and holographic wills, designed to assure appropriate deliberation on the part of the testator and to prevent mistake and fraud, is understandable for the protection of citizens of the situs, but is misplaced paternalism when directed at citizens of other states which strike a balance in such cases in favor of the intention of the decedent, even though that intention is somewhat informally expressed.[117] This is true whether the testamentary act in question is the only will, a will revoking a prior will,[118] or an act intended simply to revoke an existing will.[119]

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114 Cf. Matter of Bauer, 14 N.Y.2d 272, 278, 200 N.E.2d 207, 210-11, 251 N.Y.S.2d 23, 26-27 (dissent, Fuld, J.) (urging more flexible choice-of-law approach to perpetuities problem concerning personalty).

115 See Melon v. Entidad Provincia Religiosa De Padres Mercedarios De Castilla, 189 F.2d 163 (1st Cir. 1951) (nuncupative will denied effect because it had only the four witnesses required by the testatrix's domicile, not the five required by the situs).

116 For cases applying the situs law under such circumstances, see Trotter v. Van Pelt, 144 Fla. 517, 198 So. 215 (1940); Matter of McDougal's Will, 49 N.J. Super. 485, 140 A.2d 249 (Probate Div. 1958), aff'd, 55 N.J. Super. 36, 149 A.2d 801 (Super. Ct., App. Div.) aff'd, 29 N.J. 586, 151 A.2d 540 (1959).

117 See Hancock, supra note 75, at 1099-1100, rejecting the argument that the situs, as forum, has an interest in preventing fraud in its courts; the reliability of such informal wills may turn on whether they are sanctioned and customary in the community with which the testator is most closely related.

118 See cases cited note 116 supra.

119 See In re Barrie's Estate, 240 Iowa 431, 35 N.W.2d 658 (1949) (revocation by writing "void" invalid under situs law though valid under law of domicile, rejecting equitable conversion argument). Cf. In re Barrie's Estate, 331 Ill. App. 443, 73 N.E.2d 654 (1947) (holding revocation of same will valid under Illinois law, but permitting withdrawal from Illinois probate files so that it may be probated at the Iowa situs); Succession of Martin, 147 So. 2d 53 (La. Ct. App. 1962), cert. denied (result correct), 243 La. 1003, 149 So. 2d 763 (1963)

Suppose the situation is reversed, and the law of the situs would validate the will but the law of the testator's residence would not. Is application of the situs law justified? Perhaps validation under situs law is proper if the situs law differs from that of the settled residence on what might fairly be described as a matter of detail—number of witnesses, necessity for attestation clause, whether witnesses must sign in the presence of one another, and so forth. Here the situs and the residence share the basic policy of giving effect with appropriate safegnards to the intention of the testator and are, in essence, agreed on what those safeguards should be. This would seem to justify an alternative-reference rule validating the will under such circumstances if valid under either the law of the place of residence or of the situs.[120] If, however, the difference between situs and decedent's residence is more basic, the situs accepting holographic or nuncupative wills and the residence completely rejecting them, then validation under situs law is far more questionable.[121] It would seem, agaiin, to be an unwise interference in matters with which the situs qua situs has no interest.

3. *Rights to Take Against the Will*

The situs qua situs has no interest whatever in applying its own rules in determining whether a surviving spouse may elect against the will, the share in realty to which the survivor is entitled upon such election, and whether provisions in the will for the spouse, in the absence of specific testamentary indication one way or the other, are in lieu of or in addition to dower. The settled residence of the spouses has the sole interest in applying such rules to these matters as it deems fair and reasonable. Yet the situs dogma has consistently resulted in displacing the residence's rules on such matters with the rules of the situs.[122] If

(renunciation of will by testator's widow, though in proper form under law of domicile of testator and widow, invalid under law of situs).

See also Owen v. Younger, 242 S.W.2d 895 (Tex. Civ. App. 1951) (Texas situs rejects rule of domicile that subsequent marriage revokes the will, but beneficiaries were Texas citizens). But see Gailey v. Brown, 169 Wis. 444, 171 N.W. 945 (1919) (applying law of domicile, contra law of situs, that subsequent marriage revoked the will, but result based on construction of situs statute admitting to probate at the situs wills of situs land probated elsewhere).

120 The typical alternative reference statute, refers to either the law of the forum, the place of execution or the law of the domicile at time of execution. See Model Execution of Wills Act § 7, 9A U.L.A. 341 susperseding Uniform Wills Act, Foreign Executed; Rees, "American Wills Statutes," 46 Va. L. Rev. 856, 905-06 (1960) (listing thirty-two states with statutes making some alternative references for formal validity). The result advocated would not be achieved under Uniform Probate of Foreign Wills Act § 1, 9B U.L.A. 391, which accepts at the situs wills probated at the domicile, but not vice versa.

121 For application of situs law under such circumstances see McCaughna v. Bilhorn, 10 Cal. App. 2d 674, 52 P.2d 1025 (Dist. Ct. App. 1935); In re Briggs' Estate, 148 W. Va. 294, 134 S.E.2d 737 (1964) (but holding instrument did not qualify even under more liberal law of situs).

122 See Colvin v. Hutchison, 338 Mo. 576, 92 S.W.2d 667 (1936) (whether in absence of express preference wife, on electing against the will, to be given dower or alternative fee

objection is made that creditors, in extending credit, may have relied upon the law of the situs and its less liberal provisions for the widow,[123] the answer is to protect them under situs law, but only when they actually exist and when their right to payment in full would be threatened by applying the law of the settled residence. This is consistent with the distinction which is the basis for all of the choice-of-law discussion in this article—that between original parties and remote parties to the land transaction.

Applying the law of the situs to determine the rights of the widow as against other claimants to the testator's bounty is bad enough when it provides the wrong answer to a false conflict over interests in situs land. It becomes doubly pernicious when the threat of application of situs law hangs as blackmail over the widow's head, preventing her from freely exercising her rights to non-situs property under non-situs law. This is very likely to happen. The widow's election against the will, when made at the settled residence of the testator and the natural objects of his bounty, is binding against the widow at the situs of the land.[124] *Singleton v. St. Louis Union Trust Co.*[125] illustrates what the result is when a large portion of the estate consists of interests in situs land. In *Singleton*, the testator died resident in Missouri owning as his separate property valuable real estate in a community-property state, Texas. Not satisfied with the provisions made for her in the will, the widow elected against the will in Missouri and filed this declaration in Texas. The latter was probably a tactical error, but it made no difference as she would have been bound at the situs by her election at home in any event. Under Missouri law, on her rejection of the will, the wife was entitled to a one-third life dower interest in her husband's realty or, in lieu of dower, a fee in a share equal to the share of a child of the deceased husband. In Texas the widow lost all her rights under the will to the Texas realty and, because in Texas a wife has no rights in the separate property of

interest); Jennings v. Jennings, 21 Ohio St. 56 (1871) (whether to presume provision in will is in lieu of dower, despite argument by widow's counsel, one R. P. Ranney, that the Ohio statutes "have no application to wills made and proved in other States, or to the rights of widows resident there." Id. at 60); Ing v. Cannon, 398 S.W.2d 789 (Tex. Civ. App. 1965), writ ref'd n.r.e. (interest in land acquired during coverture; effect of electing to take under husband's will); Singleton v. St. Louis Union Trust Co., 191 S.W.2d 143 (Tex. Civ. App. 1945), writ ref'd n.r.e. (effect of electing against the will); Restatement (Second), Conflict of Laws §§ 248 (interest of surviving spouse), 253 (widow's election) Tent. Draft No. 5, 1959. Cf. Matter of Schneider's Estate, 198 Misc. 1017, 96 N.Y.S.2d 652, adhered to on reargument, 198 Misc. 1030, 100 N.Y.S.2d 371 (Surr. Ct. New York County 1950) (avoidance of situs law of "legitime" by renvoi device); Matter of Stackman's Estate, 388 P.2d 305 (Okla. 1963) (widow's allowance during administration, but court stresses that widow is a resident of the situs).

123 See Ester & Scoles, "Estate Planning and Conflict of Laws," 24 Ohio St. L.J. 270, 280 (1963).

124 Colvin v. Hutchison, supra note 122.

125 191 S.W.2d 143 (Tex. Civ. App. 1945).

her husband, a gift over after the widow's life to the children was accelerated and she took nothing. It is evident that in such a situation the widow cannot exercise her rights under the law of the home state to property there without weighing against her gains under that law losses to be suffered under the law of the situs.

Ing v. Cannon[126] demonstrates the appalling mess that results from applying the law of the situs qua situs to the rights of the widow. The husband and wife were domiciled in Oklahoma at all relevant times. The husband owned Oklahoma land before marriage which he traded after marriage for Texas land, taking title in his own name. The court, however, stated that under Texas law all land acquired in the state during coverture is presumed to be community property unless the conveyance otherwise indicates.[127] At this point, then, the wife owned one-half of the Texas realty. The husband died leaving his wife a life interest in his realty wherever situated, remainder to his son. When the wife died intestate, her mother and then her mother's heirs claimed the wife's one-half interest in Texas realty. The court held, however, that having accepted the benefits of her husband's will, which purported to dispose of the wife's interest in the Texas realty, and having taken other rights under the will which she would not otherwise have, the wife and her successors in interest were estopped to question the husband's disposition of the wife's property. Thus by giving the wife an interest she probably never knew she had and having her make an election she never knew she made, the court circumnavigates Robin's barn and arrives at the result that could have been reached directly by applying Oklahoma law to determine the wife's interests in the Texas realty.

A far more tragic example of applying situs law to determine the widow's protection against disinheritance is the following. A husband and wife live all their lives in *X*, a common-law state. The husband prospers and accumulates considerable wealth in *X*, including realty in *X*. Under *X* law, the husband has sole title to the realty and the wife is protected against disinheritance by her inchoate dower rights. In their later years, husband and wife decide to sell out their interests in *X* property and spend the few good years ahead in the sunnier climate of *Y*, a community-property state. The husband invests most of the proceeds of the sale of *X* property in reliable income-producing securities and with the remainder buys a modest home in *Y*. On the husband's death it is discovered that in his will he has left everything to that young lady in the well-filled

126 398 S.W.2d 789 (Tex. Civ. App. 1965).

127 Id. at 790-91. But see McDowell v. Harris, 107 S.W.2d 647 (Tex. Civ. App. 1937), writ dismissed, (realty in Texas acquired with separate funds by husband domiciled in Illinois is separate property of the husband).

bathing suit. The wife takes nothing and has no right to elect against the will. No longer being a resident of *X* and the husband no longer owning realty in *X*, she has lost the protection of *X* law. Under *Y* law, all of the husband's property is his "separate" property, having been bought with the proceeds of the sale of his *X* property which was surely not "community" property. If it were community property, the wife would be entitled to one-half of it. Thus the wife falls between the protection that both *X* and *Y* have provided for their wives.[128] California has now corrected this aberration by a statute treating the wife for purposes of inheritance as if husband and wife were residents of California at all relevant times.[129] This seems the sensible way to protect the wife and give effect to the now predominant interest of the new home in her welfare.[130] It is a result which, barring insurmountable local statutory or constitutional obstacles in the form of definitions of "separate" and "community" property, should be reached in *Y* without need for a statute. If there are such obstacles, they should be removed at once. Here, in light of *Y*'s interests other than as situs, it is not the application of situs law which is undesirable, but the application of a weird amalgam of situs and non-situs law.

4. *Construction of the Will*

In administering the estate, issues often arise which the testator could have controlled with a proper manifestation of his intention but on which his intention is either non-existent, or, if he had an intention, it is unknown and unknowable. Such questions have included, to give a few examples, whether a bastard of the testator's son qualifies as an "heir of the body"

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128 See Estate of O'Connor, 218 Cal. 518, 23 P.2d 1031 (1933) (personalty). For a similar mixture of common law and community property law burdening the husband's creditor with the worst features of each and reaching a result untenable under either law, see Escrow Serv. Co. v. Cressler, 59 Wash. 2d 38, 365 P.2d 760 (1961).

129 Cal. Prob. Code § 201.5. An earlier version reclassifying the property as "community" for all purposes was declared unconstitutional. In re Thornton's Estate, 1 Cal. 2d 1, 33 P.2d 1 (1934) (personalty). A similar fate was met by the provision which attempted to give the wife the power to dispose by will of one-half of the property if she pre-deceased her husband. Paley v. Bank of America, 159 Cal. App. 2d 500, 324 P.2d 35 (Dist. Ct. App. 1958). But see Addison v. Addison, 62 Cal. 2d 558, 565-66, 43 Cal. Rptr. 97, 101, 399 P.2d 897, 901 (1965) which held constitutional Cal. Civ. Code § 140.5 providing that property acquired by California spouse while domiciled in a common-law state shall be treated as "quasi-community property" for purposes of distribution in matrimonial actions, and stated in regard to Thornton, "the correctness of the rule of Thornton is open to challenge." For discussions of the problem see Abel, Barry, Halsted & Marsh, "Rights of a Surviving Spouse in Property Acquired by a Decedent While Domiciled Outside California," 47 Calif. L. Rev. 211 (1959); De Funiak, "Conflict of Laws in the Community Property Field," 7 Ariz. L. Rev. 50 (1965); Schreter, " 'Quasi-Community Property' in the Conflict of Laws," 50 Calif. L. Rev. 206 (1962); Comment, "Marital Property and the Conflict of Laws: The Constitutionality of the 'Quasi-Community Property' Legislation," Calif. L. Rev. 252 (1966); Note, 5 Natural Resources J. 373 (1965).

130 But cf. Marsh, Marital Property in Conflict of Laws 229 (1952) (suggesting reference to wife's rights under law of former domicile).

of the son after written recognition,[131] or as "lawful issue" of the son when legitimized by the son's subsequent marriage of the mother;[132] whether a bastard[133] or legitimate child[134] of the testator, not mentioned in the will, should take as a pretermitted heir; whether, if devisees predecease the testator, the heirs of such devisees are to take under an anti-lapse statute;[135] whether a devise of mortgaged realty is intended to pass the property clear of the mortgage.[136]

A glance at the cases cited to illustrate these problems will indicate that this is one area in which a sizeable crack has appeared in the monolith of the situs rule. As the new Restatement puts it:

> Authority is nearly equally divided as to whether in situations where there is no satisfactory evidence of the testator's intentions, the meaning of the words in question should be determined according to usage in the state where the testator was domiciled at the time the will was executed, or according to usage prevailing at the situs of the land.[137]

The reasons advanced for the rule pointing to the domicile of the testator on questions of construction of the will are that the domicile's rule will be most likely to coincide with the actual intention of the testator[138] and that, in a case in which the testator has made the same cryptic provision concerning land situated in several states with differing domestic rules of construction, applying the law of the testator's domicile will avoid the absurdity of construing his will differently at each situs.[139]

Neither of these reasons is a convincing argument for looking to the law of the testator's domicile on such matters. It is highly unrealistic in a genuine construction problem, when the testator's intention is either non-existent or unknown and unknowable, to assume that he formulated any intention in terms of his domicile's rule of construction—a rule of which he is probably unaware. It is true that applying the law of the testator's domicile will avoid differing constructions of the will when the land is situated in several states. This, however, is only an argument for some non-situs choice-of-law rule, not necessarily a rule pointing to the testator's domicile.

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131 Keith v. Eaton, 58 Kan. 732, 51 Pac. 271 (1897) (law of testator's domicile).

132 Olmsted v. Olmsted, 216 U.S. 386 (1910) (law of testator's domicile and situs but not son's domicile).

133 Norris v. Loyd, 183 Iowa 1056, 168 N.W. 557 (1918) (situs law).

134 Peet v. Peet, 229 Ill. 341, 82 N.E. 376 (1907) (situs law).

135 Duckwall v. Lease, 106 Ind. App. 664, 20 N.E.2d 204 (1939) (law of testatrix's domicile applied after court accepted "equitable conversion" argument); Zombro v. Moffett, 329 Mo. 137, 44 S.W.2d 149 (1931) (law of testator's domicile).

136 Higinbotham v. Manchester, 113 Conn. 62, 154 Atl. 242 (1931) (law of testator's domicile).

137 Restatement (Second), Conflict of Laws § 251, comment b (Tent. Draft No. 5, 1959).

138 See Higinbotham v. Manchester, supra note 136; Keith v. Eaton, 58 Kan. 732, 51 Pac. 271 (1897).

139 Restatement (Second), Conflict of Laws § 251, comment b (Tent. Draft No. 5, 1959).

Which choice-of-law rule should be adopted for construction of a will disposing of interests in real property—the law of the situs or the law of the testator's domicile at the time of execution of the will? Neither. The law that should be applied is the law of the state predominantly concerned with the matters with which the issue of construction deals. This may be the testator's domicile at the time he executed the will, or at the time of his death, even though it is not concerned qua testator's domicile; it may be the situs, though not qua situs; or it may be none of these. If all of the claimants under the will have settled residences in a single state, it will be that state.

In *Keith v. Eaton*,[140] the testator died domiciled in Missouri and owning land in Kansas, Missouri, Illinois, and Colorado. His will left a life estate in all his land to his son Lanson with remainder to the "heirs of his [Lanson's] body." Lanson resided in Kansas from the death of the testator until his own death. He was survived by his wife, a son, two grandchildren, and the plaintiff, his bastard. The bastard sued for partition between himself and the other lineal descendants of Lanson of the land in Kansas devised by the testator to the heirs of Lanson's body. The illegitimate son would have prevailed under Kansas law, but not under Missouri law. The court applied Missouri law, the law of the testator's domicile, and held against the bastard. The court explained its choice on the ground that the testator presumably used the words "heirs of his body" in the sense given to them by the laws of his own domicile, not of the situs; he was presumably more familiar with the law of his own domicile. One difficulty with this was that the illegitimate son was born four years after execution of the will and months after the death of the testator. The court candidly admitted: "Of the possibility of his [plaintiff's] birth we cannot presume the testator had knowledge, neither can we conceive that the testator understood as a fact that the will made provision for the illegitimate offspring of his son."[141] Under the circumstances, then, it would have made far more sense to apply Kansas law under which the illegitimate son, having been recognized in writing by his father, would have participated in the estate. Kansas is where Lanson resided at all relevant times and presumably was where the other claimants had settled residences. As the home of the claimants, not as situs of the land, it had the predominant interest in determining the rights in land, wherever situated, as among Lanson's illegitimate and legitimate lineal descendants.

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140 Supra note 138.

141 Id. at 740, 51 Pac. at 274.

B. *Choice-of-Law Problems Concerning Land in Inter Vivos Transactions*

Another major crack in the situs monolith appears when we focus on inter vivos transactions affecting interests in realty. This crack is in the form of the contract-conveyance distinction which pervades cases dealing with such inter vivos transactions.[142] Courts have drawn distinctions between the contract to convey and the conveyance itself,[143] between a promissory note and the mortgage securing the note,[144] and between covenants personal to the parties and those running with the land.[145] The effect of such distinctions has often been to treat the second item in each set as a "land" problem to which the law of the situs is applicable and the first item as a "contract" problem to be resolved by a choice-of-law rule appropriate to contracts—typically, in the old cases, the law of the place of making of the contract.

One result of this contract-conveyance dichotomy is to give added flexibility to choice of law in dealing with inter vivos land transactions, just as flexibility is added to problems of decedents' estates by the equitable conversion fiction. Is this added flexibility sufficient to produce just and rational results in choice of law for inter vivos land transactions? The answer lies in a functional analysis of the usual circumstances in which such choice-of-law problems have arisen.

1. *Capacity*

One of the most frequent problems involving capacity to affect interests in realty has concerned the capacity of the wife to contract with her

142 See Note, 38 Colum. L. Rev. 1049, 1050 (1938). Most commentators adverting to the distinction have not had a good word to say for it. See, e.g., Goodrich, "Two States and Real Estate," 89 U. Pa. L. Rev. 417, 422 (1941) ("civilization would not crumble if the distinction disappeared and both the contractual and the conveyancing sides of the transfer of land were referred to the law of the place where the land is"); Stumberg, Conflict of Laws 344 (3d ed. 1963) ("difficulties encountered in attempting to draw a clear line of demarcation between matters of title and contract"); Note, 111 U. Pa. L. Rev. 482 (1963) ("the fact that many land transactions can fit comfortably into either characterization demonstrates the inadequacy of the contract-conveyance dichotomy as the sole choice-of-law rule").

143 Liljedahl v. Glassgow, 190 Iowa 827, 180 N.W. 870 (1921); Polson v. Stewart, 167 Mass. 211, 45 N.E. 737 (1897) (Holmes, J.); Mallory Associates, Inc. v. Barving Realty Co., 300 N.Y. 297, 90 N.E.2d 468 (1949).

The contract-conveyance distinction is constitutionally permissible in that the situs may cancel a deed given elsewhere to a foreign corporation not qualified to own land under situs law, Munday v. Wisconsin Trust Co., 252 U.S. 499 (1920), and the place of contracting may give damages for forfeiture of a contract to convey if forfeiture is improper under its own law although proper under the law of the situs. Selover, Bates & Co. v. Walsh, 226 U.S. 112 (1912). But the distinction is not compelled, for the situs may apply its own law to determine the proper procedure to cancel a contract to convey land made elsewhere, Kryger v. Wilson, 242 U.S. 171 (1916).

Cf. Irving Trust Co. v. Maryland Cas. Co., 83 F.2d 168 (2d Cir.), cert. denied, 299 U.S. 571 (1936) (although the validity of a conveyance is determined by the law of the situs, place where conveyance made may declare it tortious and order specific reparation).

144 Thomson v. Kyle, 39 Fla. 582, 23 So. 12 (1897); Burr v. Beckler, 264 Ill. 230, 106 N.E. 206 (1914).

145 Beauchamp v. Bertig, 90 Ark. 351, 119 S.W. 75 (1909).

husband or as surety for her husband. If the wife and husband have settled residences in state *X* under whose law the wife has such capacity, and the land is in state *Y* where wives may not so contract, the decision should be in favor of the wife's capacity. This is so whether the transaction is classified as a contract or a conveyance. The purpose behind the situs statute—to protect wives from their own folly and the impositions of impecunious husbands—is not relevant for wives whose home states do not think such protection necessary.[146]

Sometimes, as in *Polson v. Stewart*,[147] the situs court has reached this rational result by use of the contract-conveyance distinction. *Polson* enforced a contract between husband and wife made in their marital domicile which would have been invalid in Massachusetts, the situs. Thus the contract-conveyance dichotomy may, as was the case with the equitable conversion fiction, be more likely than the situs rule to produce proper results. This is because the place of contracting is likely to coincide with the settled residence of the wife, and the settled residence of the wife is likely to have the predominant interest in her capacity to contract. But since this distinction between contract and conveyance is unrelated to the purposes of the particular domestic rule denying the wife capacity, there is no assurance that it will lead to a correct decision. In *Burr v. Beckler*,[148] for example, application of the law of the place of contracting resulted in invalidating a wife's note and the trust deed securing it, though the instruments were valid at her marital domicile which was also the situs of the land. The place where she executed the note while sojourning denied wives capacity to so contract. The decision may be explainable in terms of the strong sympathies for the wife created by her husband's fraudulent conduct, but relief, if needed, should have come from the law of the forum-domicile-situs.

On the other hand, if wife, husband, and husband's creditor have settled residences in *X*, another state cannot have any legitimate interest, as situs of the land on which the wife issues a mortgage to secure her husband's debt, in validating the mortgage in the face of an invalidating rule of the common residence, unless it seems likely that the creditor has relied on situs law in extending credit. In a case in which the husband, wife, and creditor had a common non-situs residence, the Florida court

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146 See Restatement (Second), Conflict of Laws § 216, comment a, § 225, Reporter's Note (Tent. Draft No. 5, 1959); Note, 111 U. Pa. L. Rev. 482, 486 (1963). But see Story, Conflict of Laws 720 (3d ed. 1846) (situs should invalidate even though wife has capacity at her domicile); Swank v. Hufnagle, 111 Ind. 453, 12 N.E. 303 (1887) (situs law invalidates wife's mortgage executed in Ohio where wife apparently domiciled).

147 167 Mass. 211, 45 N.E. 737 (1897).

148 264 Ill. 230, 106 N.E. 206 (1914).

in *Thomson v. Kyle*[149] was misled by the contract-conveyance distinction into validating the wife's mortgage, although stating that her note, made and payable at her domicile, was probably void. The New Hampshire court in *Proctor v. Frost*[150] came much closer to the mark without drawing a contract-conveyance distinction, for it started at the heart of the problem—the purpose of the situs statute denying a wife capacity to mortgage her land to secure her husband's debt. The court validated the mortgage saying: "The primary purpose of the statute . . . was not to regulate the transfer of New Hampshire real estate, but to protect married women in New Hampshire . . ."[151] Except for its implications that the court was stressing that the contract was executed in Massachusetts rather than that the wife had a settled residence there, the opinion would have scored a bull's-eye.

A true conflict concerning the capacity of a married woman to affect her interests in realty occurs when her residence has an interest in protecting her under its invalidating rule and the situs has an interest in holding her to her promise in order to protect the expectations of a creditor resident at the situs. Assuming that the creditor's expectations are justifiable, that he has not, for example, jerry-built the situs contact with the wife's transaction in a deliberate attempt to evade the law of the wife's home where the creditor is doing business, this conflict should probably be resolved in favor of validating the wife's contract or conveyance. Both the wife's residence and the situs-creditor's residence share an interest in making commercial transactions convenient and reliable and enforcing agreements deliberately entered into. The unmistakable march of the law in this area is to increase the contractual competence of married women. This trend the two states share, although one has not advanced as far along this road as the other.

Problems sometimes occur concerning the capacity of minors to affect their interests in realty. The false conflicts here are the same as those discussed just above in the context of the wife—the minor's domicile and settled residence grants capacity,[152] or it denies capacity and no other jurisdiction has any legitimate interest in validating what the minor has done. The true conflict between protective minor's residence and enforcing creditor's residence may, however, call for a different response than when dealing with the wife. There is, in the minor's situation, no

149 39 Fla. 582, 23 So. 12 (1897).
150 89 N.H. 304, 197 Atl. 813 (1938).
151 Id. at 307, 197 Atl. at 815.
152 Cf. Sun Oil Co. v. Guidry, 99 So. 2d 424 (La. Ct. App. 1957) (for purpose of terminating tolling of situs statute of limitations for minority, situs recognizes domiciliary decree emancipating the minor). But see Beauchamp v. Bertig, 90 Ark. 351, 119 S.W. 75 (1909) (situs invalidates conveyance despite judgment of residence removing disabilities of nonage).

similar manifested trend toward increasing contractual capacity which minor's and creditor's residence will share. If the minor's home wishes to insist on its protection when it is the forum, one could not blame it, and the creditor's residence, if forum, might be expected to follow suit.[153]

2. *Formal and Substantial Validity*

Again, as in the case of wills, rules invalidating inter vivos transactions purporting to affect interests in land come in many different forms, and the policies underlying such rules are quite diverse. In such circumstances, rational results must begin with an inquiry into the purposes of the particular rule which is alleged to invalidate the transaction and into whether these purposes would be advanced in the case at hand in view of contacts between the state having the rule, the parties, and the transaction.[154]

There is no better example of the fruits of blind adherence to a situs formula in determining validity than *Smith v. Ingram*.[155] A wife, whose marital domicile was in South Carolina, joined with her husband in deeding North Carolina land to a purchaser for value. The wife was not given privy examination regarding her willingness to make the conveyance, as was required by the situs, North Carolina, but not by her home, South Carolina. Under North Carolina law, absence of such examination made a wife's deed void. Seventeen years later, after a town had been built on the land conveyed, the wife sued to recover the land. She prevailed under situs law, and the defendants, subsequent bona fide purchasers, did not even receive a refund of their purchase money. One may marvel at the force of the situs rule which could cause Judge Douglas to say: "I concur in the opinion of the Court with reluctance, on account of the great and unmerited hardship it inflicts upon so many individuals; but I am forced to concur because, in my opinion, it is the law."[156] It was the law of the situs, but if its purpose was to protect North Carolina wives from the importunities of their husbands, it had no relevance to South Carolina wives if that state did not deem such protection necessary.[157]

Better results were reached in *Mallory Associates, Inc. v. Barving Realty Co.*[158] One New York company leased a hotel in Virginia from another New York company. The lease provided that a $65,000 tenant

153 Cf. Note, 38 Colum. L. Rev. 1049, 1055.
154 See Cook, supra note 110, at 274.
155 130 N.C. 100, 40 S.E. 984 (1902), rehearing denied, 132 N.C. 959, 44 S.E. 643 (1903) (leaving open question whether equitable remedy for improvements is available to purchasers).
156 Id. at 108, 40 S.E. at 986.
157 See Cook, supra note 110, at 272.
158 300 N.Y. 297, 90 N.E.2d 468 (1949).

deposit might be spent by the landlord to purchase the premises. A New York statute invalidated any clause purporting to waive the landlord's duty to hold such deposits in trust for the tenant. A majority of the court thought the statute covered a use of the money to purchase the premises. Having so decided, it applied the New York statute even though the realty leased was in Virginia, saying: "The need for protection is obviously no less, but rather more, when the land to which the lease relates is situated outside of this State."[159]

There is a real conflict concerning substantial or formal validity when one state has a genuine interest in protecting some of the parties with its invalidating rule and another state has a genuine interest in validating to protect the expectations of other parties. Again, as in the case of the wife's capacity, resolution should probably be in favor of validity. This probability increases when the difference in domestic laws is one of detail[160] and decreases when there are more fundamental policy differences between the two jurisdictions. Again, the more justifiable are the expectations which the parties have formulated in terms of the validating law, the more justifiable is the validation.[161]

3. *Construction*

As was the case with testamentary dispositions, the situs rule is less than universally established on matters of construction of inter vivos transfers of interests in land.[162] In a way, this is ironic, for it is in relation to questions of the construction of inter vivos transfers that the situs rule has very special strengths—and very special weaknesses.

The special weakness of the situs rule in this area stems from the fact that it is not supported now by considerations of expediency and ease

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159 Id. at 302, 90 N.E.2d at 471.

160 See Rees, supra note 120, at 906 n.829 (list of statutes providing alternative choice-of-law references for deed formalities).

161 See Liljedahl v. Glassgow, 190 Iowa 827, 180 N.W. 870 (1921) (whether deed with grantee's name blank binds grantee to mortgage assumption clause determined not by law of situs but by law of state where two of three grantees and lender resided and where lending contract executed and to be performed).

162 See Restatement (Second), Conflict of Laws § 214 comment d (Tent. Draft No. 5, 1959):

> Authority is nearly equally divided as to whether, in situations where the actual intentions of the conveyor are unascertainable, the meaning of words used in an instrument of conveyance by way of inter vivos gift of an interest in land should be determined according to usage at the situs or at the domicil of the conveyor at the time of the conveyance . . . .
>
> When the conveyance is based on consideration, as in the case of a sale or lease, the intentions of both the conveyor and the conveyee are important. Here the situs courts will frequently feel that there can be no justification for seeking the meaning of words used in the instrument of conveyance in the usage of the conveyor's domicil unless the evidence indicates that this was the meaning actually intended by both parties, or unless the conveyee was also domiciled in that state at the time, or unless the word has the same meaning in the domicile of both the conveyor and the conveyee.

of title search, even as to remote parties, for "although a title searcher can rely on a statute which determines legal effect regardless of the intention of the parties, he cannot so rely on a rule of construction which can be overcome by evidence of a contrary intent."[163]

But the situs rule has special appeal in dealing with the construction of inter vivos transactions affecting the interests of persons in realty. There is less likelihood than there was in the case of testamentary dispositions that some one state will stand out as the state predominantly concerned with the results of the construction. If there is, its law should be applied. If there is no such state, however, by definition in problems of "construction," no state is sufficiently opposed to the construction that would result under the law of another state to invalidate such a result if it were clearly manifested as the intention of the parties. Again by definition, the intention of the parties is nonexistent or unknown and unknowable. The primary goals of choice-of-law, to advance the legitimate interests of contact states and to give effect to the justifiable expectations of the parties, recede into the background. There remains, however, another purpose of conflicts analysis—uniformity of result. If this is left as the sole consideration, the situs of land emerges as the natural source of the domestic rule to insulate the result from the selection of the forum. The situs is certain, easily identified, and the most probable forum.[164]

4. *Servitudes*

If the parcels of land are in different states, one state imposing a servitude on one parcel with the other parcel dominant and the other state imposing no such servitude, it is not possible to seek a mechanical solution in terms of the law of the situs. Which situs? Nor will rational solutions likely result from mechanical insistence on always looking to the law of the situs of the servient estate, or to the law of the situs of the dominant estate. Again, focusing on the actual domestic rules in putative conflict and on their underlying policies is the key.

Such analysis may reveal that the conflict is only apparent. For example, A owns land in state X where he is resident and B owns adjoining land in state Y, where he is resident. A dams a stream which runs onto his land from B's land, causing a flood on B's land. Under X law, A's land would have a servitude of drainage and A would be liable in damages for harm he caused to upper riparian owners by interfering with the natural drainage. Under Y law, however, there is no such servitude and

163 Note, 111 U. Pa. L. Rev. 482, 495 (1963).

164 For discussion of the "more probable forum" concept see Freund, "Characterization with Respect to Contracts in the Conflict of Laws," in The Conflict of Laws and International Contracts 158, 161 (1951).

if everything had occurred in *Y*, *A* would have no liability. There is no real conflict. *X* has no interest in imposing a servitude on *A*'s land when the state where the owner of the alleged dominant estate is resident and the injured land is situated has no rule conferring such a benefit on lands there.[165]

If, in the above hypothetical case, the laws of *X* and *Y* are reversed, a true conflict appears. *X* has an interest in permitting *A* to use his land to the limit permitted by *X* law, and *Y* wishes to protect *B* and *Y* land. If one state's rule is not clearly anachronistic and if the servitude does not stem from any transaction between the parties, there seems to be little opportunity for reaching a rational solution to this true conflict on the basis of shared policies, trends in the substantive area, or the legitimate expectations of the parties. Nor is the situs a natural focus for achieving the one remaining goal of conflicts analysis, insulation of the result from the selection of the forum. Again, which situs? Perhaps then, the sitting-and-judging rule will prove useful in this context.[166] The forum, *X* or *Y*, if it decides that achieving uniformity of result is more important to it than insistence on application of its domestic rule, should put itself in the position of the other state's courts and decide the case just as it finds that they would have decided it. This will not work if the other state would be so uncooperative as to use this same rule, for then the references back and forth would be circular and infinite. If so, then no goal of the conflict of laws can be achieved and the time has come for the forum to apply the law most convenient for it to apply and most in consonance with its domestic policies—its own.

5. *Rights of Secured Creditors*

Choice-of-law problems have frequently arisen concerning the rights of creditors who hold obligations secured by mortgages or other liens on land. Such questions have included, for example, whether the creditor may obtain a deficiency judgment after foreclosure,[167] whether he must first foreclose his lien and not sue directly on the secured obligation,[168] and whether the debtor has a right to redeem after foreclosure.[169]

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165 But cf. Caldwell v. Gore, 175 La. 501, 143 So. 387 (1932) which reached the opposite result while differing from the hypothetical only in that both owners were residents of the state where the alleged servient estate was located. The court, however, did note that it was likely that there was no practical difference between the law of the two states, there being liability in each though by different routes.

166 Cf. Matter of Schneider's Estate, 198 Misc. 1017, 1020, 96 N.Y.S.2d 652, 656, adhered to on reargument, 198 Misc. 1030, 100 N.Y.S.2d 371 (Surr. Ct. New York County 1950); Griswold "Renvoi Revisited," 51 Harv. L. Rev. 1165 (1938).

167 Provident Savings Bank & Trust Co. v. Steinmetz, 270 N.Y. 129, 200 N.E. 669 (1936) (situs law).

168 Maxwell v. Ricks, 294 Fed. 255 (9th Cir. 1923) (applying forum law on theory that action was "transitory").

169 Hughes v. Winkleman, 243 Mo. 81, 147 S.W. 994 (1912) (situs law).

If the law of the situs gives the creditor greater rights in regard to his security than does the law of some other state having a contact with the parties and with the transaction, such as the debtor's settled residence, there is good reason to apply that law when the creditor is likely to have relied on it in extending credit. Reliance on the law of the situs is especially likely when the creditor is a remote holder, having taken by mesne assignments from the original creditor.[170]

If the situation is reversed, however, the situs giving the creditor fewer rights in regard to the security than does a state with which the parties and the transaction have all other contacts, there seems to be no purpose now in making available to the debtor a rule which is designed primarily for the protection of situs citizens and which may upset the expectations of the creditor.

CONCLUSION

There is no constitutional basis for reserving to the situs of realty exclusive judicial jurisdiction to affect the interests of persons in property. The situs will rarely, if ever, have such an interest qua situs in refusing to recognize a non-situs land decree that the situs' interest should be permitted to override the great national interest in recognition of sister-state judgments. Once false constitutional dogmas concerning jurisdiction of the subject matter are swept aside, a functional analysis reveals that the situs qua situs, with rare exceptions, has an interest in applying its own law to affect the interests of persons in property only when choice of law will affect the use of the land. Even when land use is affected, as between states of the United States, the situs rule should probably yield to the conflicting rule of another state which has a genuine interest in validating a transaction that the situs would invalidate.

The cloak of the situs myth has too long robbed those Trojan trees of light and stunted their growth. Let us hope that their day in the sun has come.

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170 Ibid.