THE TESTATOR'S INTENTION AS A FACTOR IN DETERMINING THE PLACE OF PROBATE OF HIS ESTATE

The ever increasing mobility of our population and the growing practice of residing for several months each year in two or more states have heightened the interest in the conflict of law rules with respect to the administration of estates. Concomitantly, questions have been raised concerning the possibility of a testator's influencing the choice of law by which the construction, validity, and effect of his testament will be determined. The extent to which this possibility exists depends on a number of factors: the classification of the property as realty or personalty, statutes concerning the administration of estates, the conflict of law rules of the forum, the testator's awareness of the problem, and the application of the full faith and credit clause of the Federal Constitution[1] to probate proceedings.

In order to understand choice of law rules and the effect of judgments in relation to probate problems, it is necessary to determine the nature of probate proceedings. It is generally held that the entire administration of an estate from the filing of the petition for probate to the discharge of the last personal representative is one proceeding, and that such proceeding is in rem.[2] The character of in rem actions is explained in the recent case of *Hanson v. Denckla*:[3]

"Founded on physical power, . . . the in rem jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister States. The basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State. . . . Since a state is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction."[4] This character of probate proceedings permeates the entire subject of such actions. Since the rules concerning the administration of estates are stated with reference to the classification of the property involved, realty and personalty will be examined separately.

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1. U.S. CONST. art. IV, § 1.
2. IND. ANN. STAT. § 7-102 (Burns 1953). See MODEL PROBATE CODE § 62; Simes, *The Administration of a Decedent's Estate as a Proceeding in Rem*, 43 MICH. L. REV. 675 (1945).
3. 78 Sup. Ct. 1228 (1958).
4. *Id.* at 1236.

I. *Realty*

The general common law rule in determining the validity, effect, and construction of wills disposing of realty is that the law of the situs controls.[5] In *Evansville Ice and Cold Storage Co.* v. *Winsor*,[6] the testatrix owned real property in Indiana but died domiciled in New York. Her will, which named her husband sole beneficiary and failed to mention her daughter born the day after its execution, was initially probated in New York, the husband taking sole interest in the realty thereunder. A copy of the will and probate was then filed in Indiana. This cause several years later was an attack by the daughter, contending that her birth revoked her mother's will. It was held that the daughter failed to bring her action within the time allowed for the contest of a will. The court, before reaching this result, declared that it is settled law that title to and disposition of real property, whether by deed or will, must be governed exclusively—as to the forms to be observed in the execution of the will and as to the capacity or incapacity of a person to make a will—by the law of the jurisdiction where it is situated.[7] It was further noted that revocation of such a will is governed by the law of the situs, and that probate of a will in one state gives no title to land in another state.[8] The court also indicated that the contest of a foreign will at the situs has no effect in the jurisdiction where it was initially probated, the decree being limited to the realty situated there.[9]

A corollary to the rule that the situs law controls as to dispositions of realty is that an original probate may be had at the situs. In *McPherson*

5. Sternberg v. St. Louis Union Trust Co., 394 Ill. 452, 68 N.E.2d 892 (1946); ATKINSON, WILLS 487 (2d ed. 1953); Scoles, *Conflict of Laws in Estate Planning*, 9 U. FLA. L. REV. 416 (1956).

6. 148 Ind. 682, 48 N.E. 592 (1897).

7. Perhaps the court seized this opportunity to dispel any doubts as to the possible existence of a contrary rule in Harris v. Harris, 61 Ind. 117 (1878), where it was intimated that the full faith and credit clause of the Federal Constitution required recognition of domiciliary decrees as to all property. The court in the *Evansville Ice* case expressly overruled the *Harris* case to the extent that it was inconsistent with their opinion.

8. The scope of the rule that the law of the situs of land is controlling is quite extensive. An administrator must conform to the laws of the state where the land is situated. Lucas v. Tucker, 17 Ind. 41 (1861). Where an estate consists of both realty and personalty, the domicile may control the personalty, but the situs must control the realty. *In re* Fabbri's Will, 3 Misc. 2d 184, 146 N.Y.S.2d 276 (Surr. Ct. 1955); Smith v. Smith, 174 Ill. 52, 50 N.E. 1083 (1898). The validity of a power of appointment is determined by the situs of the realty. Amerige v. Attorney General, 324 Mass. 648, 88 N.E.2d 126 (1949).

9. The dictum of this case has been followed in numerous instances. See Hofferd v. Coyle, 212 Ind. 520, 8 N.E.2d 827 (1937); Duckwall v. Lease, 106 Ind. App. 664, 20 N.E.2d 204 (1939). The Indiana rule has now apparently been changed by statute. See IND. ANN. STAT. §§ 6-505, 7-125-28 (Burns 1953).

v. McKay,[10] the testator, having written wills in 1936 and 1939, died domiciled in Louisiana, but owned realty in Arkansas. The 1936 will was originally probated in Arkansas. The 1939 will was probated in Louisiana and a copy thereof was filed in Arkansas for an ancillary probate proceeding. The Arkansas court held that its law controls the disposition of land in Arkansas, that the 1936 will could be originally probated there without first having been probated at the domiciliary state, and that the 1939 will did not revoke the earlier will since it did not satisfy Arkansas revocation formalities.[11]

A non-situs forum's decrees affecting land are ordinarily given no extraterritorial effect by the situs forum. For example, in *Smith* v. *Smith*,[12] the testator died domiciled in California leaving land in Illinois. The California court granted his widow a family allowance; Illinois had no provision for such a right. The widow sought to enforce her decree in Illinois from the proceeds of the sale of the Illinois land. The Illinois court disallowed the claim, holding that the sale had not converted the realty into personalty, and that its law is to control the disposition of realty. Thus the California decree was localized. In *Evansville Ice and Cold Storage Co.* v. *Winsor*,[13] the court, sitting at the situs of the land, also localized its decree when it declared that the contest of the will would affect only the realty situated there and was not intended to have effect at the domiciliary state where the will was earlier probated.[14]

The problem of localization of a decree affecting realty versus extraterritorial recognition of it is fundamentally one of determining whether the full faith and credit clause of the Federal Constitution is applicable. It can readily be seen that a person who has received a favorable decree at the domiciliary forum will attempt to invoke the full faith and credit clause in the event of subsequent attack in the situs forum. This attempt, however, is futile in most, if not all, jurisdictions. The orthodox approach to cases involving real property begins with the premise that full faith and credit attaches only to decrees which are within the jurisdiction of the court rendering them. Since state courts have no power over property beyond their borders, they have no jurisdiction to render a

10. 207 Ark. 546, 181 S.W.2d 685 (1944).

11. See also *In re* Master's Will, 136 N.Y.S.2d 907 (Surr. Ct. 1954); *In re* De Buck's Estate, 125 N.J.Eq. 80, 4 A.2d 309 (1939); Hofferd v. Coyle, 212 Ind. 520, 8 N.E.2d 827 (1937). The UNIFORM PROBATE OF FOREIGN WILLS ACT § 5, makes the original probate of a foreign will discretionary, regardless of the classification of the property.

12. 174 Ill. 52, 50 N.E. 1083 (1898).

13. 148 Ind. 682, 48 N.E. 592 (1897).

14. See note 9 *supra* and accompanying text. See also Hofferd v. Coyle, 212 Ind. 520, 8 N.E.2d 827 (1937).

decree concerning title to foreign land. Such was the approach of the Supreme Court in *Fall* v. *Eastin*,[15] where the plaintiff brought a quiet title action in Nebraska, relying for her title on a Washington commissioner's deed which was the result of a divorce action in the latter state. The defendants contended that the Washington court had no power to affect title to Nebraska land, even though the defendant in the Washington action was personally within the jurisdiction of that court. It was held that the Washington court, not having jurisdiction of the res, the Nebraska land, could not affect title to the land by its decree, nor by a deed made by a master in accordance with that decree. The court further held that the full faith and credit provision of the Federal Constitution does not extend the jurisdiction of the courts of one state to property in another, but only makes the judgment rendered conclusive on the merits of the claim or subject-matter of the suit, *i.e.*, that the defendant was to convey the realty to the plaintiff.[16]

This is not to say that such decrees are never given some extraterritorial recognition.[17] Local statutes often validate foreign wills and probates thereof if they conform to the requirements either of the place of execution or of the testator's domicile.[18] The UNIFORM PROBATE OF FOREIGN WILLS ACT declares that a domiciliary probate will be accepted in the situs state as to both real and personal property.[19] The doctrine of equitable conversion affords some opportunity for controlling the choice of law as to realty.[20] Where realty has been sold or is to be sold, the non-situs forum could consider the proceeds as personalty and apply its law.[21] The doctrine of renvoi affords still another possibility for a

15. 215 U.S. 1 (1909).

16. See also Selle v. Rapp, 143 Ark. 192, 220 S.W. 662 (1920); Chidsey v. Brookes, 130 Ga. 218, 60 S.E. 529 (1908). It has also been said that proceedings to probate a will do not come within the full faith and credit clause. Trotter v. Van Pelt, 144 Fla. 517, 198 So. 215 (1940).

17. Granting extraterritorial effect does not necessarily abrogate the rule that the situs controls the disposition of realty. It merely indicates that the situs has adopted a rule which allows extraterritoriality where it would not otherwise exist as a matter of right.

18. *E.g.*, State *ex rel.* Ruef v. District Court, 34 Mont. 96, 85 Pac. 866 (1906); IND. ANN. STAT. §§ 6-505, 7-125-28 (Burns 1953). See also Roach v. Jurchak, 182 Md. 646, 35 A.2d 817 (1944); Lucas v. Tucker, 17 Ind. 41 (1861) (dicta).

19. UNIFORM PROBATE OF FOREIGN WILLS ACT § 1, Epperson v. Buck Inv. Co., 176 Tenn. 358, 141 S.W.2d 887 (1940).

20. Scoles, *Conflict of Laws in Estate Planning*, 9 U. FLA. L. REV. 419 (1956).

21. Although this is a distinct possibility, courts seem reluctant to employ it. In Duckwall v. Lease, 106 Ind. App. 664, 20 N.E.2d 204 (1948) it was held that for purposes of conversion of realty into personalty, it is proper for the state where the land is located to determine initially if there has been such a conversion. It has been held that a discretionary power to sell realty granted to a trustee does not effect an equitable conversion, and that proceeds of the sale are deemed to be real property, the disposition of which is governed by the situs. *In re* Healy's Will, 125 N.Y.S.2d 486 (Surr. Ct. 1953). See also *In re* Schneider's Estate, 198 Misc. 1017, 96 N.Y.S.2d 652 (Surr. Ct.

non-situs forum to control the disposition of realty.[22]

The principles of res judicata and collateral estoppel may sometimes be invoked to secure extraterritorial effect of a non-situs forum's decrees, although the cases stand in confusion and contradiction. Where reliance is placed on the fact that the first forum had personal jurisdiction over the same parties that are before the second forum, it would appear that the doctrine of res judicata or collateral estoppel could be invoked against the person who attacks the first decree in the second forum.[23] For example, an election to take against the will made in one state has been enforced in the second state as an application of res judicata;[24] a second forum has held parties estopped from raising identical questions as to the property included in the will and the cause of death;[25] it has also been held that a party who consents to an entry of judgment and accepts benefits thereunder cannot be heard in a second forum to object to the first court's power to render such judgment.[26] Montana has indicated that the first probate proceeding binds a second forum by res judicata because it is a proceeding in rem and determines the status of the subject matter, namely, the validity of the will.[27]

1950). In Ford v. Ford, 72 Wis. 621, 40 N.W. 502 (1888), Wisconsin disclaimed jurisdiction to determine whether personalty could be converted into realty in Missouri, holding that only Missouri could decide that question. See also Trotter v. Van Pelt, 144 Fla. 517, 198 So. 215 (1940); Appeal of Clarke, 70 Conn. 195, 39 Atl. 155 (1898), *aff'd sub nom.* Clarke v. Clarke, 178 U.S. 186 (1900).

22. If the situs applies its conflict of laws rule which refers to another jurisdiction's conflict of laws rule, which latter jurisdiction then accepts the reference to its local law, that local law may determine the validity and effect of a will or decree differently than would have been the case under the "pure" local law of the situs. But it can be seen that the situs law in fact controls; it merely adopts a rule which takes into consideration the laws of other jurisdictions connected with the case. See Scoles, *Conflict of Laws in Estate Planning,* 9 U. FLA. L. REV. 416 (1956). The New York courts have adopted this concept. It was first denounced as unsound logically, and as a chaotic influence, and was declared inconsistent with conflict of laws rules. *In re* Tallmadge, 109 Misc. 696, 181 N.Y. Supp. 336 (Surr. Ct. 1919). But in *In re* Schneider's Estate, 198 Misc. 1017, 96 N.Y.S.2d 652 (Surr. Ct. 1950), it was accepted. It was there held that ordinarily the law of the situs must be referred to in the distribution of real property. But Switzerland, the situs, in such a situation would resort to the internal law of New York. Therefore, New York, the domicile, was controlling.

23. See note 31 *infra* and accompanying text.

24. *In re* Washburn, 32 Minn. 336, 20 N.W. 324 (1884).

25. Dalrymple v. Gamble, 68 Md. 523, 13 Atl. 156 (1888).

26. Loewenthal v. Mandell, 125 Fla. 685, 170 So. 169 (1936); Hopper v. Nicholas, 106 Ohio St. 292, 140 N.E. 186 (1922).

27. State *ex rel* Ruef v. District Court, 34 Mont. 96, 85 Pac. 866 (1906). ". . . [T]he judgment of the California court, admitting the will to probate there, fixed the status of the instrument as a will and became at once conclusive upon all the world of all the facts necessary to the establishment of a will, among which are that, at the time the will was executed, the testator was of sound and disposing mind and was not acting under fraud, menace, or undue influence." *Id.* at 102, 85 Pac. at 868. That this doctrine would conflict with the situs rule and therefore not be widely followed is readily apparent. Sime in *The Administration of a Decedents' Estate as a Proceeding in Rem,* 43 MICH. L. REV. 675, 698 (1945), recognizes this possibility, declaring that the opposite

Other courts fail to invoke res judicata or collateral estoppel by emphasizing the in rem character of probate proceedings. They overlook or deny the significance of personal jurisdiction over the parties in the first forum. Since a probate proceeding is in rem, these courts hold that each state's determination in such a proceeding is valid only as it pertains to property within the first state's boundaries.[28] This approach denies the application of res judicata because property in the second state could not have been disposed of in the first court and thus a new question exists in the second forum.[29] Under present concepts of in rem proceedings,[30] there appears to be no method under the full faith and credit clause to compel the second forum to employ the rule that recognizes the first forum's decree as decisive because of its personal jurisdiction over the parties.

Although the above discussion is cast in the language most often employed by the courts, the analysis presented is somewhat oversimplified. Professor Currie[31] has very ably illustrated a more refined approach, based on an analysis of *Fall* v. *Eastin.*[32] Although the decision is correct, speculation arises as to what would have been the rule had the plaintiff sought a more appropriate remedy. Currie argues that the plaintiff should have brought an action in Nebraska to convert her Washington decree into a Nebraska decree on the basis of res judicata. That is, since Washington, having personal jurisdiction over the plaintiff and de-

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holding is actual law. He contends that such a use of status is a distortion of that concept, relying on the RESTATEMENT, CONFLICTS § 119 (1934): ". . . [S]tatus means a legal personal relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned." Simes admits that the object of a single administration is a worthy one, but says it should be brought about by legislative or constitutional amendment, and not by confusing the law of res judicata in the above manner. *But cf.*, Hopkins, *The Extraterritorial Effect of Probate Decrees,* 53 YALE L. J. 221, 251 (1943). Hopkins, pleading for a single, unified administration at the domicile, relies heavily on the status and res judicata concepts for fulfillment of this objective. See also Carey, *Jurisdiction Over Decedents' Estates,* 24 ILL. L. REV. 44, 170 (1929). Trotter v. Van Pelt, 144 Fla. 517, 198 So. 215 (1940), holds contra to the above language. The Florida court held the status argument invalid, since otherwise the doctrine—which is absolute—that the law of the situs controls would be ineffectual. It held that the status did not follow the will out of Virginia, but was local there.

28. Hanson v. Denckla, 78 Sup. Ct. 1228 (1958); Matter of Gaines, 84 Hun. (N.Y.) 520, 32 N.Y.Supp. 398 (Sup. Ct. 1895); Walton v. Hall's Estate, 66 Vt. 455, 29 Atl. 803 (1894).

29. Trotter v. Van Pelt, 144 Fla. 517, 198 So. 215 (1940); Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936); Smith v. Smith, 174 Ill. 52, 50 N.E. 1083 (1898). See Clarke v. Clarke, 178 U.S. 186 (1900).

30. Hanson v. Denckla, 78 Sup. Ct. 1228 (1958) (dictum on this point since it was held that no personal jurisdiction was obtained over an indispensable party to the state proceeding.)

31. Currie, *Full Faith and Credit to Foreign Land Decrees,* 21 U. CHI. L. REV. 620 (1954).

32. 215 U.S. 1 (1909). See note 15 *supra* and accompanying text.

fendant, decreed that the defendant was to convey land to the plaintiff, that decree is res judicata on the merits in Nebraska, and Nebraska should render judgment for the plaintiff, using the Washington decree as a basis for so doing. As Currie's argument demonstrates, there are no valid reasons why situs states could not and should not apply the doctrine of res judicata in such cases, thus in effect granting extraterritorial recognition to decrees affecting land.

However, since courts and litigants often overlook this refinement and the law of the situs is nearly always controlling, the testator has little opportunity for expressing an intent as to what law shall control the disposition of his realty.

II. *Personalty.*

The general rule respecting dispositions of personalty is expressed in the maxim mobilia sequuntur personam, *i.e.,* the law of the domicile of the testator at death controls the validity and effect of such disposition.[33] The extent of this maxim is quite as great as that of the situs rule concerning realty. The Indiana Supreme Court has said that for wills disposing of personalty the law of the place where the testator is domiciled at death governs as to the capacity of the testator, as to the forms to be observed in the execution and revocation of the will, and as to its validity in every respect.[34] *McCraw* v. *Simpson*[35] presented the question of having an original probate at the situs of personalty. The testator described the situs, Arkansas, as his domicile. However, the Arkansas court found the actual domicile to be Oklahoma, wherein the testator maintained a farm home, and refused an original probate of the will, holding that only the domicile could exercise that function.[36] Some states, notably Kansas and Florida, have attempted to enforce the maxim mobilia sequuntur personam by codifying it in a statutory mandate.[37]

Several reasons are advanced in support of this rule. It is generally agreed that a decedent's estate should be considered a unit to facilitate administration and that the domicile should be the jurisdictional focal point of this unitary estate.[38] The domicile is selected because the testator

33. ATKINSON, WILLS 487 (2d ed. 1953).

34. Evansville Ice and Cold Storage Co. v. Winsor, 148 Ind. 682, 48 N.E. 592 (1897). This rule has been changed by statute. See IND. ANN. STAT. §§ 6-505, 7-125-28 (Burns 1953).

35. 203 Ark. 763, 158 S.W.2d 655 (1942).

36. See also Riggs v. Rankin's Ex'r, 268 Ky. 390, 105 S.W.2d 167 (1937). The UNIFORM PROBATE OF FOREIGN WILLS ACT § 5, makes an original probate at the situs discretionary.

37. KAN. GEN. STAT. ANN. § 59-303 (Supp. 1955); FLA. STAT. §§ 732.26 (1), .36, .47 (1955).

38. See Scoles, *Conflict of Laws and Elections in Administration of Decedents' Estates,* 30 IND. L. J. 293, 309 (1955).

usually expects the administration of his estate to be there. Also, an original probate wherever assets exist is not thought proper because the opportunity for heirs and kin to file caveats would be narrowed, since a caveat in the domicile has no effect in the foreign jurisdiction.[39] Thus the maxim mobilia sequuntur personam is primarily adopted for the convenience of the family, and on the presumed intent of the testator that the domicile control the validity and effect of his will.

In addition, various legal concepts aid in establishing the domicile as the principal place of administration and hence as the controlling law with respect to personalty. The courts' utilization of the jurisidction concept has led to acceptance of some of the same arguments for granting extraterritorial recognition to domiciliary probate decrees that are rejected when the property is classified as realty.[40] Thus while it was held that a state would have no jurisdiction to render a decree affecting *realty* outside its boundaries, it has been held that, because of the maxim mobilia sequuntur personam, it would have jurisdiction over *personalty* not located in the state.[41] The position that a probate proceeding is a determination of a status of testacy gains some acceptance. Where either of these views is adopted, the courts can find that full faith and credit must be given to the first forum's decree.[42] Res judicata and collateral estoppel will also effect extraterritorial recognition of those cases in which the parties have litigated the same question in the domiciliary forum.[43] Even when a jurisdiction does not recognize such a decree as controlling through full faith and credit or res judicata, it may still, in deference to the domicile, decline original jurisdiction of the matter.[44]

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39. *In re* Chadwick's Will, 80 N.J. Eq. 471, 85 Atl. 266 (1912).

40. For a criticism of the use of the jurisdictional approach see Hopkins, *The Extraterritorial Effect of Probate Decrees,* 53 YALE L. J. 221 (1944).

41. See Reed v. Bishop, 51 Ind. App. 187, 97 N.E. 1023 (1912), Evansville Ice and Cold Storage Co. v. Winsor, 148 Ind. 682, 48 N.E. 592 (1897) (dicta); Harris v. Harris, 61 Ind. 117 (1878) (dicta).

42. See notes 27 and 41 *supra* and accompanying text. Professor Carey in his article declares that many states hold that a probate adjudication at the decendent's domicile, as to personalty, is entitled to extraterritorial recognition under the full faith and credit clause. Carey, *Jurisdiction Over Decedents' Estates,* 24 ILL. L. REV. 44, 67 (1929). In a later sentence he qualifies this by saying that there is also a substantial amount of good authority for the proposition that even here no recognition of the domiciliary decree is required, which accords with the theory that the adjudication affects only property within its jurisdiction. See also ATKINSON, WILLS 488 (2d ed. 1953).

43. See *In re* Moran, 180 Misc. 469, 39 N.Y.S.2d 929 (Surr. Ct. 1943); Loewenthal v. Mandell, 125 Fla. 685, 170 So. 169 (1936). See notes 25-27 *supra* and accompanying text. *But cf.,* notes 28-29 *supra* and accompanying text.

44. *In re* Lamborn's Estate, 168 Misc. 504, 6 N.Y.S.2d 192 (Surr. Ct. 1938). See *In re* Chadwick's Will, 80 N.J. Eq. 471, 85 Atl. 266 (1906). See notes 85-88 *infra* and accompanying text.

However there are also exceptions to the rule that the domicile controls as to personalty, exceptions which—in contrast to the infrequent acceptance of such exceptions with respect to realty—are rather widely recognized. For example, the validity of a testamentary trust of personal property ordinarily is determined by the law of the testator's domicile at the time of his death; but where such trusts were to be held and administered in a foreign state and were valid there, they have been upheld in the foreign state even though they would have been invalid at the domicile.[45]

Not only are there exceptions such as this to the maxim mobilia sequuntur personam but there is also a directly contrary rule supported by substantial authority. This rule is that the situs of the personalty controls the disposition thereof, not the testator's domicile. An example of a preference for the situs rule, and the reasons therefore, is furnished by *Pullman's Palace Car Co.* v. *Pennsylvania.*[46] To say that situs rather than domiciliary law controls is to imply that an original probate proceeding may be had at the situs. Many courts therefore hold that the original probate of a will may be had in any jurisdiction where the decedent at death owned property having a situs, and that such probate is in no way dependent upon a domiciliary probate.[47] This is an application of the principle that every state has plenary power with respect to the administration and disposition of estates of deceased persons as to all

45. Amerige v. Attorney General, 324 Mass. 648, 88 N.E.2d 126 (1949); *In re* Hohn's Estate, 180 Misc. 384, 40 N.Y.S.2d 237 (Surr. Ct. 1943).

46. 141 U.S. 18 (1891). "The old rule, expressed in the maxim mobilia sequuntur personam, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could easily be carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the lex situs—the law of the place where the property is kept and used. . . . A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there." *Id.* at 22. Although this was a personal property tax case, this attitude prevails in other areas as well. See Iowa v. Slimmer, 248 U.S. 115 (1918). See also the language in a recent Supreme Court case: "For the purpose of jurisdiction in rem the maxim that personalty has its situs at the domicile of its owner is a fiction of limited utility. . . . The maxim is no less suspect when the domicile is that of a decedent." Hanson v. Denckla, 78 Sup. Ct. 1228, 1237 (1958). For an extended discussion of the rule that the maxim mobilia sequuntur personam is not required to be followed see Higgins v. Eaton, 202 F.2d 75 (2d Cir. 1913); *In re* James' Estate, 167 Misc. 142, 3 N.Y.S.2d 679 (Surr. Ct. 1938).

47. Carey, *Jurisdiction Over Decedents' Estates,* 24 ILL. L. REV. 44, 170 (1929). An application of this rule is that the situs has the power either to distribute property located there according to the terms of the will, or to direct that it be transmitted to the personal representative of the decedent at his domicile. Iowa v. Slimmer, 248 U.S. 115 (1918).

property of such persons found within its jurisdiction.[48]

Once it is established that the situs forum need not defer probate until the domicile has acted, the opportunity for conflict among states arises, and with it, the opportunity for a testator to attempt to control the law applicable to the administration of his estate. If the testator wishes a law other than his domicile to control the validity and effect of his will, he must place his assets in a jurisdiction which recognizes the situs rule and then clearly indicate that he intends that state's law, and not the law of his domicile, to apply.[49] The extent to which this intent will be effectuated will depend on the situs forum's attitude to the maxim mobilia sequuntur personam, its principles of comity, and its statutory rules relating to the administration of estates.

The orthodox rule for non-conflict of laws problems relating to a testator's intent is that it will be carefully followed except when it contravenes a positive rule of law.[50] Florida and Kansas have enacted statutes which for purposes of choice of law purport to prohibit a domiciliary of their state from selecting another state as the place for the administration of his estate.[51] However, most states have no such statutory rules for choice of law, thus leaving the question for judicial determination. In resolving this question courts will rely on implications from related probate administration statutes and from common law rules.

The rule which permits a testator's intention to influence the selection of controlling law for the administration of his personal property is that the law of his domicile controls, unless it is manifest that the testator intended otherwise. This rule was suggested by Mr. Justice Story in *Harrison* v. *Nixon*.[52] The testator in the *Harrison* case died

48. *In re* Holden's Estate, 110 Vt. 60, 1 A.2d 721 (1938). See also Nashville Trust Co. v. Cleage, 246 Ala. 513, 21 So.2d 441 (1945); *In re* Howard's Estate, 108 Utah 294, 159 P.2d 586 (1945); Woodfin v. Union Planters National Bank and Trust Co., 174 Tenn. 367, 125 S.W.2d 487 (1939). The mere presence of this plenary power, however, does not necessarily lead to a universal exercise of it. *In re* Holden's Estate, *supra* (by principles of comity, the situs will not act if the domiciliary state has begun a proceeding). *But cf., In re* James' Estate, 167 Misc. 142, 3 N.Y.S.2d 679 (Surr. Ct. 1938) (New York even admits to probate wills denied probate in the domiciliary state, provided the will fulfills the formal requirements of New York).

49. Scoles, *Conflict of Laws in Estate Planning*, 9 U. FLA. L. REV. 425, 426 (1956).

50. See, *e.g., In re* Loew's Estate, 155 Kan. 679, 127 P.2d 512 (1942) (rule against appointing a foreign corporation as trustee). Many cases involve restraints on alienation or a violation of the rule in *Shelley's* Case. See, *e.g.*, Fowler v. Duhme, 143 Ind. 248, 42 N.E. 623 (1896).

51. KAN. GEN. STAT. ANN. § 59-303 (Supp. 1955); FLA. STAT. §§ 732.26(1), .36, .47 (1955). That these statutes will be unenforcible in situs states as to property in those states seems clear. See note 82 *infra* and accompanying text.

52. 34 U.S. (9 Pet.) 483 (1835). For modern statements of the rule see *In re* Fabbri's Will, 3 Misc. 2d 184, 146 N.Y.S.2d 276 (Surr. Ct. 1955); *In re* Feuermann's Will, 47 N.Y.S.2d 738 (Surr. Ct. 1944); Will of Risher, 227 Wis. 104, 277 N.W. 160 (1938).

in England, but the parties failed to plead or prove where he was domiciled. The Supreme Court remanded the case to the Pennsylvania court with directions to determine the testator's domicile and his intention as to whose laws were to be applied to his estate.

Drafting a clause expressly stating that a jurisdiction other than the domicile is to control is the clearest manifestation of such an intent. In at least one case the testator's express intent was effectuated even when the purpose of the clause was clearly to deprive his son of what, under domiciliary law, would have been a statutory share.[53] Not all commentators agree that the testator's intent should be effectuated when to do so would affect such basic rights as the receipt of statutory shares or the exercise of a widow's right of election.[54] It is feared that a testator could place his assets in a state that does not recognize such a right of election and thus exclude his wife completely from his estate.[55] However, it has been suggested that the concept of fraud on the law might be used to void any such transfers.[56] The problem of affecting substantial rights is alleviated by the fact that those jurisdictions which recognize the intent or situs rule usually state that original probate therein is discretionary. The courts could and sometimes have denied probate in such situations.[57]

As *Lanius* v. *Fletcher*[58] demonstrates, the intention that a law other than the domicile's control the validity and effect of the testator's disposition of personalty may be implied. In the *Lanius* case the testatrix died domiciled in Illinois. Her will established a trust for her daughter which could be terminated under Illinois law but not under Texas law. The greater part of the estate was in Texas, as was the trustee, who had for some time acted in that capacity for the testatrix. The daughter brought this action in Texas to terminate the trust. The court, in refusing to so hold, relied on a judicially implied intent to have Texas law control. The court presumed that the testatrix was familiar with the law of her

53. *In re* Cook's Estate, 204 Misc. 704, 123 N.Y.S.2d 568 (Surr. Ct. 1953). See also National Shawmut Bank v. Cummings, 325 Mass. 457, 91 N.E.2d 337 (1950); *In re* Smith's Estate, 182 Misc. 711, 48 N.Y.S.2d 631 (Surr. Ct. 1944). This rule will be particularly advantageous to American nationals who remain outside the country for some time and who wish their American property to be administered according to American law. See, *e.g.*, *In re* Tabbagh's Estate, 167 Misc. 156, 3 N.Y.S.2d 542 (Surr. Ct. 1938). Cf. Matter of Adriance, 158 Misc. 857, 286 N.Y. Supp. 936 (Surr. Ct. 1936).

54. See Note, 24 CAN. B. REV. 528 (1946).

55. Scoles, *Conflict of Laws and Elections in Administration of Decedents' Estates*, 30 IND. L. J. 293, 307 (1955).

56. *Ibid.* See Note, 42 COL. L. REV. 1015 (1942).

57. *In re* Spencer's Estate, 169 Misc. 421, 7 N.Y.S.2d 891 (Surr. Ct. 1938); *In re* Lamborn's Estate, 168 Misc. 504, 6 N.Y.S.2d 192 (Surr. Ct. 1938). The Illinois statute is written in terms allowing probate of a nonresident's will only at the discretion of the court. ILL. REV. STAT. c. 3, § 207 (1955), § 241(b) (Supp. 1957).

58. 100 Tex. 550, 101 S.W. 1076 (1907).

domicile and found it unlikely for her to write a provision invalid under it. The court said that it was more reasonable to find that she selected the law of another jurisdiction as controlling, which finding was further supported by the fact that she sent her will to her trustee in Texas to be probated there.[59]

Courts have not restricted their findings of implied intent to cases involving trusts. An implied intent has also been found in those cases in which the issue is one of establishing the validity and effect of a will and in determining the law controlling the administration of the estate. In *Woodfin* v. *Union Planters National Bank and Trust Co.*,[60] the testator died a resident of Arkansas, leaving two wills. The first, written in 1933, disposed of all his property; the second, executed in 1937, was limited to his bank account in Tennessee and contained no revocation clause. The first will was probated in Arkansas. This case was an action seeking original probate of the second will in Tennessee. Tennessee granted the original probate finding that the testator clearly manifested an intention to have a local administration to dispose of his local property, although he had no specific clause in his will to that affect.[61]

The force of the above decisions as precedents is weakened by the fact that in each case it was the situs forum that effectuated the intent. Thus it is difficult to determine if the intent was actually the crucial factor, since it is equally plausible to conclude that the courts were merely applying the situs rule.

However, there are situations in which the intent of the testator is inarguably crucial. New York, for example, normally applies the law of the testator's domicile to personalty situated in New York.[62] However, if a testator has expressed an intention that the laws of New York

59. See also *In re* Chappel's Estate, 124 Wash. 128, 213 Pac. 684 (1923). This case also involved a clause invalid at the domicile but valid at the situs. The situs once again applied its law on the basis of an implied intent of the testator. See also Application of New York Trust Co., 195 Misc. 598, 87 N.Y.S.2d 787 (Sup. Ct. 1949); Wilmington Trust Co. v. Wilmington Trust Co., 26 Del. Ch. 397, 24 A.2d 309 (Sup. Ct. 1942).

60. 174 Tenn. 367, 125 S.W.2d 487 (1939).

61. In finding an implied intent the court will examine all surrounding factors. See *In re* Stebbin-Vallois' Estate, 99 N.Y.S.2d 402 (Surr. Ct. 1950); *In re* Ryan's Estate, 178 Misc. 1007, 36 N.Y.S.2d 1008 (Surr. Ct. 1942); *In re* James' Estate, 167 Misc. 142, 3 N.Y.S.2d 679 (Surr. Ct. 1938). Surrounding facts and language of the testator sufficient to imply an intent for invocation of foreign law will vary with relation to several factors. Where basic rights—rights of election, statutory shares ,etc.—are involved, it may take more explicit language to invoke foreign law than where more minor changes are involved. See *In re* Sahadi's Estate, 125 N.Y.S.2d 204 (Surr. Ct. 1953); Matter of Kadjar, 200 Misc. 268, 102 N.Y.S.2d 113 (Surr. Ct. 1950).

62. *In re* Fabbri's Will, 3 Misc. 2d 184, 146 N.Y.S.2d 276 (Surr. Ct. 1955); *In re* Gravenhorst's Will, 204 Misc. 377, 121 N.Y.S.2d 197 (Surr. Ct. 1953); Application of New York Trust Co., 195 Misc. 598, 87 N.Y.S.2d 787 (Sup. Ct. 1949); *In re* Feuermann's Will, 47 N.Y.S.2d 738 (Surr. Ct. 1944) (dicta).

control the disposition of such property, the New York courts will apply their own law.[63] This rule has been codified in a statutory mandate purporting to be declaratory of the common law.[64] There are also instances in which a domiciliary state has applied the laws of the situs of personalty when an intention to that effect has been found. Thus in *Will of Risher*,[65] the testator died domiciled in Wisconsin, and his will was later probated there. The question before the court concerned the validity of a testamentary trust of personal property with its situs in Pennsylvania. The Wisconsin court found that the testator intended the trust to be governed by the laws of Pennsylvania and applied that law. The same rule has been followed in New York in cases dealing with the validity and construction of wills, *i.e.*, where the testator selects another state as the controlling law for disposition of his personalty, the domicile has applied that law even to assets situated in New York.[66]

As the foregoing cases illustrate circumstances may make it possible for one to select the state in which his estate will be probated, at least insofar as his estate consists of personalty and assets are present in the state selected. In order to ensure that the testator's intent will be given consideration in a possible contest between the state selected by the testator and the state of his domicile careful consideration needs to be directed to several factors.

The testator should recognize that not all states follow the intent or situs rules; in those states the law of the domicile, and not the state selected, may control the administration of his estate. Thus if the domiciliary state is the one in which the first application for probate is made, that state may be the controlling one through statute,[67] through res judicata,[68] through full faith and credit,[69] or through principles of

63. *In re* Cook's Estate, 204 Misc. 704, 123 N.Y.S.2d 197 (Surr. Ct. 1953); *In re* Ryan's Estate, 178 Misc. 1007, 36 N.Y.S.2d 1008 (Surr. Ct. 1942); *In re* James' Estate, 3 N.Y.S.2d 679 (Surr. Ct. 1938).

64. N.Y. DECED. EST. LAW § 47 (whenever a decedent, wherever resident, shall have declared in his will that he elects that such will shall be construed and regulated by the laws of New York, the validity and effect of such dispositions shall be determined by such laws), *In re* Cook's Estate, 204 Misc. 704, 123 N.Y.S.2d 197 (Surr. Ct. 1953). See also ILL. REV. STAT. c. 3, § 241 (b) (Supp. 1957).

65. 227 Wis. 104, 277 N.W. 160 (1938).

66. *In re* Healy's Will, 125 N.Y.S.2d 486 (Surr. Ct. 1953); Matter of Adriance, 158 Misc. 857, 286 N.Y. Supp. 936 (Surr. Ct. 1936) (semble).

67. UNIFORM PROBATE OF FOREIGN WILLS ACT § 1.

68. See note 27 *supra* and accompanying text.

69. Two leading cases often cited in support of this rule are Evansville Ice and Cold Storage Co. v. Winsor, 148 Ind. 682, 48 N.E. 592 (1897), and Harris v. Harris, 61 Ind. 117 (1878). In the *Harris* case the court interpreted a statute allowing contest of wills as relating solely to domestic wills and not extending to the foreign wills already probated elsewhere. The court went on to say that if the statute had allowed contest of a foreign probate it would have violated the full faith and credit clause. The *Evansville*

comity.[70] Familiarity with the policy of the state selected is therefore a necessary prerequisite to any such selection.

However, arguments against a second forum's granting extra-territorial recognition to the domiciliary decree are accepted by many jurisdictions; for this reason the testator's intent may be considered in those states even though the domicile has previously entertained probate of the will. The failure of most courts to accept the status concept, *i.e.*, that the first forum decides whether the decedent died testate or intestate, together with the in rem character of probate proceedings effectively bar the application of res judicata and full faith and credit principles since the res is within the second state's territory, and thus a new question is before that court.[71] Another method of withholding recognition of a domiciliary decree is to deny that that jurisdiction was the domicile. Although this attack would not often be utilized in cases involving the testator's selection of his place of probate, cases in which this approach has been employed help to illustrate the Supreme Court's interpretation of the full faith and credit clause. In *Baker* v. *Baker, Eccles and Co.*,[72] a finding by the Tennessee court that the testator was domiciled therein was subsequently attacked in Kentucky. The Kentucky court found the domicile to be Kentucky and not Tennessee. The Supreme Court held that the full faith and credit clause does not preclude a second state from inquiring into the jurisdiction of the first state, and that the finding of domicile is a jurisdictional fact, which, therefore, can be relitigated in a subsequent forum.[73]

An attack on the domicile's jurisdiction that would more often be invoked in cases involving the issue of giving effect to a testator's intent is to concede that the testator's domicile was in the first state, but to attack the first forum's jurisdiction over assets existing outside its ter-

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case added more dicta to that of *Harris*. The court decided only that the plaintiff had not brought her action within the time allowed by statute. However, the court declared that it "overruled" *Harris* insofar as it related to real property, but "upheld the rule" that that full faith and credit requires recognition of a domiciliary decree to the extent that it pertains to personalty.

70. See, *e.g.*, Morrison v. Haas, 229 Mass. 514, 118 N.E. 893 (1918) (New York probated a will affecting property in both New York and Massachusetts. Massachusetts assumed New York had jurisdiction, stating that, as a matter of comity, it must recognize the judgment of the New York court as conclusive). See note 85 *infra* and accompanying text.

71. Trotter v. Van Pelt, 144 Fla. 517, 198 So. 215 (1940). See note 28 *supra* and accompanying text.

72. 242 U.S. 394 (1916).

73. See also Tilt v. Kelsey, 207 U.S. 43 (1907); Overby v. Gordon, 177 U.S. 214 (1899); Thormann v. Frame, 176 U.S. 350 (1899). A court cannot by a mere finding of fact—of domicile—extend its jurisdiction, thereby defeating jurisdiction in the second forum. *In re* Eisenberg's Estate, 177 Misc. 655, 31 N.Y.S.2d 380 (Surr. Ct. 1941); Loewenthal v. Mandell, 125 Fla. 685, 170 So. 169 (1936).

ritorial boundaries, relying on the situs rule.[74] Although the rule that a state can not exercise jurisdiction over assets not within the state is most often invoked where the property involved is realty,[75] it is also applied by some courts where the subject of the will is personalty.[76] The rule is applied in two situations: where the situs is granting original probate of the estate,[77] and where the situs is denying effect to an original probate at the domicile.[78] This rule also prevents the application or res judicata, since it can be said that no question as to property in the second forum was before the first forum.[79]

As *Nelson* v. *Miller*,[80] indicates, where each of two states insists that it has jurisdiction over an estate, neither state as a matter of right or power can control the other; the end result is that each governs only those assets within its jurisdiction. In the *Nelson* case the testator died in California. Florida admitted his will to probate, appointing the appellant executor. Shortly thereafter California admitted the will to probate, appointing the appellees executors. The appellees then filed a petition in Florida for revocation of that probate and for a finding of domicile in California. The Florida court not only found that Florida was the domicile and denied the appellees' petition, but also ordered the appellees to turn over to the Florida executor certain assets situated in California. The appellees failed to comply with this order. The appellant then brought this action in the federal district court seeking the application of full faith and credit to the Florida decree, an order remitting California assets to Florida, and a declaration that the California probate proceedings were null and void. The federal district court disclaimed jurisdiction, holding that each state had possession, and the right to possession, only of such part of the decedent's property as was situated within its boundaries. The court of appeals affirmed the district court, holding that the full faith and credit clause presupposes that a judgment is within the subject matter jurisdiction of the court pronouncing it and that

74. This attitude stems from the classification of probate proceedings as in rem. It is generally held that the estate is the res and that in rem jurisdiction is limited to property having its situs within the state. See Riley v. New York Trust Co., 315 U.S. 343 (1941); Baker v. Baker, Eccles and Co., 242 U.S. 392 (1916); Olney v. Angell, 5 Rh. I. 198 (1858). See notes 3, 28, and 47 *supra* and accompanying text.

75. See, *e.g.*, McPherson v. McKay, 207 Ark. 546, 181 S.W.2d 685 (1944); Selle v. Rapp, 143 Ark. 192, 220 S.W. 662 (1920).

76. See Hanson v. Denckla, 78 Sup. Ct. 1228 (1958).

77. See note 48 *supra* and accompanying text.

78. Schweitzer v. Bean, 154 Ark. 228, 242 S.W. 63 (1922). That the Supreme Court would affirm such a rule would seem to be settled by the doctrines of Hanson v. Denckla, 78 Sup. Ct. 1228 (1958); Riley v. New York Trust Co., 315 U.S. 343 (1941); and Baker v. Baker, Eccles and Co., 242 U.S. 394 (1916).

79. See note 28 *supra* and accompanying text.

80. 201 F.2d 277 (9th Cir. 1952).

inquiry on the point is always in order. The court stated that there is no authority for the claim that the property of a decedent in one state can be required by any court to be administered by a court of another state, or that the federal court can interfere in a conflict resulting from the irreconcilable findings of two jurisdictions. "Having no jurisdiction over property outside its borders, its orders as to such property imposed no duty upon another state to recognize them on the doctrine of full faith and credit."[81]

The testator's intent as to choice of law, then, can furnish the situs state strong support for applying its own law, which can not be frustrated by a contrary domiciliary decree. The situs state's decree is, however, not granted extraterritorial recognition, so assets remaining outside the state selected may be controlled by the domiciliary state. Although it is sometimes intimated by the domicile that an original proceeding at this situs is void,[82] the foregoing analysis indicates that the correct rule is merely that the decree is not entitled to extraterritorial effect.[83]

It is also necessary to consider the factors influencing the situs to grant initial probate of an estate. Some jurisdictions disregard principles of comity and grant original probate of a non-resident's will even though the domicile has probated an earlier will of the decedent. Such courts rely on the theory that the existence of assets within the state is the fact which gives jurisdiction and that each state has plenary power with respect to the administration and disposition of the estates of deceased persons as to all property of such persons within its jurisdiction.[84]

Not all states have chosen to exercise their plenary power in this regard. Many decline or modify their jurisdiction in deference to a domiciliary administration. Some states decline jurisdiction even though

81. *Id.* at 280. See also *In re* Harriman's Estate, 124 Misc. 320, 208 N. Y. Supp. 672 (Surr. Ct. 1924) (where rights are prejudiced or a question is raised then the New York court enforces its exclusive power over the testator's estate and inquires into the validity of a will in an original proceeding there); Appeal of Clarke, 70 Conn. 195, 39 Atl. 155 (1898), *aff'd sub nom.* Clarke v. Clarke, 178 U.S. 186 (1900) (what courts cannot enforce, they cannot decree).

82. Riggs v. Rankin's Ex'r., 268 Ky. 390, 105 S.W.2d 167 (1937).

83. See Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936). Where New York first probated a Florida domiciliary's will, Florida held that the New York probate did not establish its validity in Florida and that the time for determining election to take against the will was the time of the Florida probate, not that of New York. See also *In re* Clarke's Estate, 148 Cal. 108, 82 Pac. 760 (1905) . . . "[T]his exercise of original jurisdiction over estates of non-residents affects, and can affect, only property within that state. . . . [S]tates . . . are jealous in the extreme of any invasion of, or attempt to invade, their original jurisdiction in such matters." *Id.* at 112, 82 Pac. at 761. *Cf.*, Walton v. Hall's Estate, 66 Vt. 455, 29 Atl. 803 (1894).

84. E.g., Woodfin v. Union Planters National Bank and Trust Co., 174 Tenn. 367, 125 S.W.2d 487 (1939). See also *In re* James' Estate, 167 Misc. 142, 3 N.Y.S.2d 679 (Surr. Ct. 1938); Higgins v. Eaton, 202 F.2d 75 (2d Cir. 1913).

the domicile has not yet acted.[85] Other courts emphasize that they will grant original probate of a non-resident's will only at their discretion.[86] In the exercise of discretion, the courts look to the presence of legatees in the state, to the will itself, to the relative rights of the parties, and to any special circumstances.[87] *In re Joyce's Estate*[88] presents another variation of the comity principle. Wisconsin entertained original probate of the estate as that of a non-resident. The will was later submitted for probate in Texas. Texas found the domicile to be therein and granted an original probate of the will. The Wisconsin court then declared that the Wisconsin executor could act only in an ancillary capacity; that he should make an accounting of the administration to date, and, to prevent action inconsistent with that at the domiciliary state, that he could no longer exercise power directly over the personalty.

The existence of the sharp conflict between the maxims mobilia sequuntur personam and lex situs and the fact that states may and do adopt either of the rules has quite naturally influenced courts to apply principles of comity to lessen the conflict without at the same time abandoning their plenary power over the administration of estates within their jurisdiction. In *Cornell* v. *Delehanty*,[89] a non-resident sought a writ of mandamus in New York, the situs, requiring the surrogate either to entertain original probate of a non-resident's will, or to issue a formal order stating his reasons for not acting. Although the deceased was domiciled in Pennsylvania, and all beneficiaries were non-residents, some personalty was located in New York. No prior attempt had been made to probate the will at the domicile. The court refused to grant the writ, emphasizing the resentment of probate courts of sister states against an invasion of their right to administer the estates of their residents, and the need to halt the enactment by all states of such discriminatory and retaliatory laws as have already been enacted by a few states as a result of the assumption of such jurisdiction by courts of non-resident states. Judicial awareness of the conflicts can thus go far in eliminating petty bickering among states, while at the same time leaving the door open for what it considers legitimate use of its courts by non-resident testators.

III. *Conclusion.*

From the above discussion it can be seen that a testator's intention may have a limited effect in influencing the choice of law applicable to

85. McCraw v. Simpson, 203 Ark. 763, 158 S.W.2d 655 (1942).
86. *In re* Lamborn's Estate, 168 Misc. 504, 6 N.Y.S.2d 192 (Surr. Ct. 1938); *In re* Holden's Estate, 110 Vt. 60, 1 A.2d 721 (1938) (dicta).
87. *In re* Lamborn's Estate, 168 Misc. 504, 6 N.Y.S.2d 192 (Surr. Ct. 1938).
88. 238 Wis. 370, 298 N.W. 579 (1941).
89. 173 Misc. 483, 18 N.Y.S.2d 153 (Sup. Ct. 1940).

the administration of his estate. The possibility for a testator to choose the law which will govern his dispositions of realty is almost non-existent, because situs states are greatly concerned with regulating the title to and dispositions of realty. Therefore the situs will nearly always apply its law to questions concerning real property therein, except in those situations in which res judicata or equitable conversion is applicable or where local statutes provide that another law is to be considered.

The opportunity for a testator to influence the choice of law governing his dispositions of personalty is somewhat greater, since the choice of law rules for personal property are more flexible. Thus, although it is often stated that the maxim mobilia sequuntur personam is the general rule, situs states often apply their own rules to determine the validity and effect of wills disposing of personal property. The conflict between these two rules provides an opportunity for the testator to influence the choice of law determination. For intention to become an operative factor, the state selected must have personal property therein and must be one which follows the intent or situs rule if effect is to be given the intent in the state selected.[90] But even though the state selected may not effectuate the intent, another state would not thereby be precluded from honoring the intent as to assets in the latter state.[91]

It is arguable that the testator's intent should be a more influential factor in choice of law problems than it currently is. Nevertheless, the interest of situs states in realty, including such problems as recording and the marketability of titles, would seem to preclude giving effect to a testator's intention that another state's law apply to his disposition. This would not, however, necessarily rule out acceptance of the principles of res judicata. No such compelling local interest appears at the domicile when the subject of the will is personalty. The nexus of assets therein and intention of the testator that the law of a certain state is to control, would seem to give that state a greater interest in the probate than is furnished by death in a particular state—one's domicile. The concept of domicile appears to be less important than it might once have been, due largely to the increase in the mobility of our population. Legal rules based on such a concept accordingly become suspect. Thus while many states currently grant extraterritorial recognition to domiciliary decrees, it might be more appropriate to grant such recognition to the decrees of the state selected by the testator.

90. The inclusion of a specific intent clause may well be the factor which persuades an otherwise indecisive state to apply its law, rather than the domicile's.

91. Thus in Will of Risher, 227 Wis. 104, 277 N.W. 160 (1938), the Wisconsin court, the domicile, could apply Pennsylvania law, the law selected by the testator, even though a Pennsylvania court might not have applied its own law under the same circumstances.