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CONFLICT OF LAWS AND ELECTIONS IN ADMINISTRATION OF DECEDENTS' ESTATES

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The problem of election arises whenever a person has a choice of inconsistent interests in the same subject matter, and in the administration of decedents' estates it usually concerns whether or not a widow can claim dower and also take the provisions for her in the will. At early common law the presumption was that she could.[1] The growth of this presumption had its roots in England during a period in which land could not be willed;[2] an heir at that time took personalty by will and land by descent so no inconsistency was perceived in receiving benefits by both.[3] The states of the United States have, with three exceptions, reversed the common law by a statutory presumption that a devise or bequest in a will is deemed in lieu of dower, or statutory rights; and the widow must elect to take dower or be bound by the will.[4] Vermont retains the common law presumption so that the widow may take both dower and the benefits under the will unless the testator clearly indicates in his will that the gift is in lieu of dower.[5] To a lesser extent Georgia has the same rule.

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1. II AMERICAN LAW OF PROPERTY §§ 7.1, 7.34 (1952); DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 95 (1945); DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 1 (1943).

2. I AMERICAN LAW OF PROPERTY 724 (1952); 2 SCRIBNER, DOWER 444 (2d ed. 1883).

3. CHESHIRE, PRIVATE INTERNATIONAL LAW 743 (3d ed. 1947); DICEY, CONFLICT OF LAWS 552, 834 (6th ed. 1949); GOODRICH, CONFLICT OF LAWS 522 (3d ed. 1949); GRAVESON, CONFLICT OF LAWS 337 (1952). See *In re* Olgilvie, 87 L.J. Ch. 363, [1918] 1 Ch. 492.

4. I AMERICAN LAW OF PROPERTY § 5.41 (1952); ATKINSON, THE LAW OF WILLS § 33 (2d ed. 1953). See, *e.g.*, COLO. REV. STAT. ANN. 152-5-5 (1953); FLA. STAT. § 731.35 (1953); IND. ANN. STAT. § 6-301 (Burns Repl. 1953); MASS. GEN. LAWS c. 191, § 15 (1932); MICH. COMP. LAWS § 702.69 (1948); N. Y. DEC. EST. LAW § 18; VA. CODE § 64-31 (1950).

5. VT. REV. STAT. § 3031 (1947); Phillips v. Northfield Trust Co., 107 Vt. 243, 179 Atl. 154 (1935); *In re* O'Rourke's Estate, 106 Vt. 327, 175 Atl. 24 (1934). In the *Phillips* case, the court stated: "The common-law rule is that in the absence of an express or implied intention on the part of the testator that his widow should elect between her lawful rights in his property and the provisions made for her in his will, she shall take both. So far as her homestead and dower rights are concerned, it has been the established rule of this jurisdiction that she takes both unless it clearly appears that such was not the inten-

Georgia's statute provides that, while a devise is deemed in lieu of dower, a bequest is not.[6] The third variation of consequence occurs in Utah, where testamentary provisions for the widow are deemed in lieu of her statutory share, but, unless the widow elects to take under the will, she receives her statutory share.[7] If a decedent domiciled elsewhere dies owning land in one of these three states, there is the possibility that his widow may take under the will at the domicile and never be put to an election in Vermont or Georgia, while her failure to act at the domicile may constitute an election to statutory share in Utah. Such a frustration of the testamentary scheme could result from a blind application of the rule that the law of the situs governs all questions of disposition of land; the widow, moreover, would receive more than the statutory amount given her by any of the states. Fortunately, the possibility of opposing presumptions has been removed by legislative action in most states and may soon disappear in even these last three states.[8]

Even without the presence of inconsistent statutory presumptions other conflict of laws problems exist in relation to these elections. It is often necessary, for example, to decide whether the will puts a particular claimant to an election. In such a case, it may be necessary to decide whether the law of the forum, of the domicile, or of the situs shall determine the effective construction of a will allegedly barring the claimant from a statutory interest in addition to whatever is received under the will.[9] Likewise, it may be necessary to choose between the law of the testator's domicile at death, or that of his domicile at the time he executed the will, or even that law which he stated to be applicable to his will.[10]

Should it be assumed that an election must be made, it remains to be decided whether the claimant has already elected or still has the opportunity to do so. In this situation the court may be required to decide if acts in another state amount to an election, there or at the forum, and the

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tion of the testator. . . . If the will leaves the matter in doubt, the widow is given the benefit of that doubt and she takes both." *Id.* at 247, 179 Atl. at 156.

6. GA. CODE ANN. § 31-103 (1933).

7. UTAH CODE ANN. § 74-4-4 (1953).

8. Several states have recently adopted statutory changes according with the majority view. See, *e.g.*, KAN. GEN. STAT. § 59-2233 (1949), as amended, KAN. GEN. STAT. § 59-2233 (Supp. 1951); R.I. GEN. LAWS 566, § 21 (1938), as amended, R. I. Acts and Resolves, Jan. Sess., 1942, c. 1119, p. 7.

9. See Heilman, *Interpretation and Construction of Wills of Immovables in Conflict of Laws Cases Involving "Election,"* 25 ILL. L. REV. 778 (1930); RESTATEMENT, CONFLICT OF LAWS § 253 (1934).

10. See Staigg v. Atkinson, 144 Mass. 564, 12 N.E. 354 (1887); STUMBERB, CONFLICT OF LAWS 424 (2d ed. 1951).

effect.[11] In addition to these problems of election, the variation in the laws of different states may cause a will to be valid in one state and invalid in another.[12] In case of partial invalidity a beneficiary may have to elect between his interests under the will and under the statute, as the consequence of the merely fortuitous location of the testator's assets.

The share of a forced heir, such as the widow, is usually determined, as to existence and extent, by the law of the decedent's domicile in the case of movables and that of the situs in the case of immovables.[13] If the same dual governing law obtained in cases involving elections, anomalous results would often occur. To avoid this possibility there has been considerable emphasis on the deceased's domiciliary law for both movables and immovables, and this recognition of the need for a single reference has resulted because of the policies having force in this particular area. Estate election problems require the court to strike a balance between the need for adhering to the testator's scheme of distribution while giving the surviving spouse, or some other beneficiary, the desired and legally assured protection. The function of the court is to see that this accommodation is made with justice and fairness to all the beneficiaries of the estate. This balance between opposing local law policies is achieved by providing that the beneficiary's claims must not be inconsistent, and this consistency is required in regard to all parts of the estate wherever located. This is an application of the policy favoring uniformity in administration of parts of the whole estate. Some alteration of the testator's plan becomes necessary whenever an interest is taken against the will. The application of the doctrine of election in conflict of laws cases should keep the distortion of the testamentary scheme to the minimum permitted by the law of the state having the dominant interest in the family. Election should not be thought of as having an automatic, slot machine effect which depends on the beneficiary's act, but, rather, the purposes behind the possibly applicable doctrine should be explored thoroughly to determine the extent of its actual application. It should be possible for the beneficiary to alter her position or election if later facts show the initial choice was a poor one, because the surviving spouse, or children, has the favored position in the law and because conflict of laws policies are probably satisfied if consistency is achieved by the final result. In cases in which variant standards are available under different possibly applicable

11. Security Trust Co. v. Hanby, 32 Del. Ch. 70, 79 A.2d 807 (1951); see also 1 WOERNER, THE AMERICAN LAW OF ADMINISTRATION 396-398 (3d ed. 1923); GOODRICH, CONFLICT OF LAWS 521 (3d ed. 1949).

12. McGehee v. McGehee, 189 N.C. 558, 127 S.E. 684 (1925); Van Dyke's Appeal, 60 Pa. 481 (1869).

13. GOODRICH, CONFLICT OF LAWS 501 *et seq.* (3d ed. 1949); RESTATEMENT, CONFLICT OF LAWS §§ 248, 301 (1934); STUMBERG, CONFLICT OF LAWS 409 *et seq.* (2d ed. 1951).

laws, the law of the decedent's domicile normally should be the guide in view of the connection and enduring relationship between the family and the state.

A. Effect of Election Made in Domiciliary Administration

As to immovables in ancillary administration

The most important area of controversy concerning elections made in administration of decedents' estates is that in which the widow either takes under the will or renounces at the domicile, and the effect of this action is raised in ancillary administration of immovables located in another state. The situation in which the claimant takes under the will at the domicile and then attempts to claim dower or statutory share in ancillary administration will be considered first. In *Brooks v. Carson*[14] the Kansas court held that the effect of acts at the domicile in Massachusetts, such as not filing an express election and taking benefits under the will, controlled any possible election at the situs of land. Since the widow could not claim against the will in Massachusetts, she could not do so in Kansas. An analogous case arose in Louisiana, where children are forced heirs.[15] After receiving $1,000 as legatee in a domiciliary probate in Iowa, the deceased's daughter claimed that she was entitled to a forced share under the law of Louisiana, where the deceased had left an immovable asset valued at $500. She asserted the share was one-third the value of the estate located everywhere or, in the alternative, one-third of the value of the Louisiana land. The court held that she had renounced the Louisiana succession by her acceptance of the benefits of the will in Iowa. In each of these cases the courts of the situs governed the ancillary election by the domiciliary result.

A case illustrating the dangers of ignoring a foreign election is the Missouri case of *Lee's Summit Bldg. and Loan Ass'n v. Cross*.[16] In this case the owner died domiciled in California, where her husband probated her will and took the benefits which it provided for him. The testatrix had devised Missouri land to her daughter, then seven years old. The husband, however, filed an election against the will in Missouri and claimed one-half the land under the Missouri statute. No one objected, and he later conveyed to the loan association. Thirteen years later, in a partition suit against the daughter, the loan association was held to have received no title from the husband because he had not effectively re-

14. 166 Kan. 194, 200 P.2d 280 (1948); see also Martin v. Battey, 87 Kan. 582, 125 Pac. 88 (1912).
15. Jarel v. Moon's Succession, 190 So. 867 (La. App. 1939).
16. 345 Mo. 501, 134 S.W.2d 19 (1939).

nounced the will.[17] The potential hardship to third parties when matters of forced share are not conclusively settled during administration, which this case indicates, and the practical problems of checking title to real estate, would make a court's application of the law of the situs seem reasonable in analogous cases involving elections and third parties. The purchaser of the realty would be protected and the child left to a suit against the father's estate for his fraud.

While the purchasing public should be protected by their reliance upon the law of the situs, no need exists, in litigation actually occurring during administration of the estate, for looking only to the law of the situs, as a Nebraska case well illustrates.[18] There the spouses while domiciled in California had released their claims to each other's property in return for cross life estates in certain pieces of realty. After the death of the husband in California, the widow, then incompetent, elected by her guardian to take dower in her husband's Nebraska lands. The Nebraska court denied the claim and held the widow bound by the California contract. While the case does not directly involve an election in administration, it is closely analogous, and the court, citing *Polson v. Stewart,*[19] indicated the limitations upon application of the situs rule: "The principle that the *lex rei sitae,* as such, governs as to real property is also subject to an exception as to obligations which, although in relation to real property, do not directly affect the title to or interest in the property itself."[20]

From the cases it is clear that in nearly every instance accepting benefits under the will at the domicile constitutes an election which precludes a claim of a forced share against the will at the situs. When the case arises among the parties to an estate, this conclusion seems clearly correct, at least in the absence of fraud or concealment of assets; considerable hardship may occur, however, when third parties relying upon the record at the situs purchase the land from the surviving spouse. In such a case bona fide purchasers should be protected unless the local record is sufficient to warn them.

Renunciation of the will in domiciliary administration has been held in most cases to preclude the claimant from taking under the will at a

17. The court found reason for holding that no local renunciation had been made as required under the Missouri statutes. Thus, they avoided an actual decision on the effect of the California election. The daughter was required to account for improvements made with the association's funds but even this partial remedy would not exist in many transfers. *Ibid.*

18. Jorgensen v. Crandell, 134 Neb. 33, 277 N.W. 785 (1938).

19. 167 Mass. 211, 45 N.E. 737 (1897). In this case the court sustained a contract regarding Massachusetts land between non-residents that would have been unenforceable between residents.

20. Jorgensen v. Crandall, 134 Neb. 33, 39, 277 N.W. 785, 789 (1938).

foreign situs. Confusion has arisen because of the specific requirements of many state statutes that renunciation of the will and election to take the statutory share must be filed in a particular manner and by a particular time.[21] These same statutes usually provide that, in the absence of a formal renunciation and election, the surviving spouse is entitled only to the share provided for her in the will. The important case of *Colvin v. Hutchison*[22] concerns a situation arising under such a statute. The widow filed a renunciation at the domicile in Illinois and elected to take her dower and legal share under Illinois law. The will was also probated in Missouri, where the decedent left real property, but the widow did nothing there to indicate an election, though the Missouri statutes enabled her to renounce her husband's will and take either dower or a child's part. A short time later the widow died, and her heirs claimed a child's part, which was one-half of the Missouri realty, against the devisee of the will of the deceased husband. The court held that the Illinois renunciation was effective in Missouri since they found no requirement in the Missouri statute for filing a renunciation. In this regard they stated:

> But when she renounces the will, in the state of her residence, where its validity is established by probate, she renounces it *in toto,* everywhere and cannot take testamentary benefits under it anywhere. At least, in the absence of a statute with specific requirements, no filing of the renunciation elsewhere is necessary. Likewise if she accepts it, in the state of her residence and its probate, she is bound by it everywhere and cannot renounce it in some other state. This view is supported by well-considered authority, and gives effect both to the principle that title to real estate is governed by the laws of the state where it is located and to the principles upon which the doctrine of election is based.[23]

Even if it were assumed that the foreign renunciation was effective in Missouri, the court was still faced with the question of which of the two interests available under the statute, dower or child's share, the widow would receive without an express election between them. They concluded that, as to this point, an affirmative election was required by the statutes of Missouri, in absence of which she would receive dower, that is, a life estate in one-third of the land. This interest expired at her

21. See, *e.g.,* statutes cited note 4 *supra.*

22. 338 Mo. 576, 92 S.W.2d 667 (1936). See also Huston v. Colonial Trust Co., 266 S.W.2d 231 (Tex. Civ. App. 1954).

23. Colvin v. Hutchison, 338 Mo. 576, 92 S.W.2d 667, 670 (1936).

death so the husband's devisee prevailed over the widow's heirs.[24]

The Missouri court's concern for the need of an affirmative election at the situs between the interests given by the situs statute suggests a problem peculiar to the renunciation cases: Can a foreign election satisfy both the requirements of renunciation and election? In brief, this requires that both a negative effect, estoppel, and an affirmative effect, election, be given the foreign action. In the cases involving acceptance, only estoppel to a claim against the will is necessary since the will provides the exact distributive share. Most courts that have considered it, indicate that this is not an insuperable problem. The solution has been to find renunciation or election by implication from unequivocal declarations or acts in another state showing such intent. A holding that an election in Peunsylvania to take against the will constituted an implied election in Delaware is found in *Security Trust Co. v. Hanby.*[25] The Delaware statute is not one which requires specific acts, but the court's reasoning was not limited to cases under such statutes. The Pennsylvania election was held to be binding on the widow because of equitable principles forbidding one to take under and against the same instrument at the same time. The statutes of several states, however, require specific affirmative acts; the North Carolina statute, for example, requires dissent from the will to be filed with the probating court within six months after probate and provides that it will have the effect of an election to take a forced share.[26] In *Coble v. Coble* the North Carolina court held that an election made at the domicile in South Carolina was effective as to land at the forum even though the North Carolina statute was not satisfied by a local filing.[27]

In some cases the courts do not concern themselves with any distinction between election and renunciation but consider them co-existing. In *Russell v. Shapleigh,*[28] for example, a Massachusetts decedent left property in both New Hampshire and Massachusetts; the Massachusetts court assumed that the widow took a statutory share in New Hampshire after renunciation and election to do so in Massachusetts. The court said: ". . . we think that a widow's election to take her statutory rights in lieu of provisions for her in her husband's will operates in all jurisdictions in which he left property; that a man can leave but one will, although he

24. Clearly the interest which will be taken in land is governed by the situs as in the *Colvin* case. See to same effect: *In re* Estate of Randolph, 175 Kan. 685, 266 P.2d 315 (1954); Singleton v. St. Louis Union Trust Co., 191 S.W.2d 143 (Tev. Civ. App. 1946); Bankers Trust Co. v. Greims, 115 N.J. Eq. 102, 169 Atl. 655, *aff'd,* 117 N.J. Eq. 397, 176 Atl. 112 (1934).

25. 32 Del. Ch. 70, 79 A.2d 807 (1951).

26. N.C. GEN. STAT. §§ 30-1, 30-2 (1943).

27. 227 N.C. 547, 42 S.E.2d 898 (1947).

28. 275 Mass. 15, 175 N.E. 100 (1931). See also Bankers Trust Co. v. Greims, 115 N.J. Eq. 102, 169 Atl. 655, *aff'd,* 117 N.J. Eq. 397, 176 Atl. 112 (1934).

may leave several testamentary writings; and that the widow's renunciation cannot be partial."[29]

Not all cases have reached a result which recognizes the estate as a single unit. The Tennessee court in *McGinnis v. Chambers*,[30] under a statute similar to those of North Carolina and New Hampshire, concluded that the law of the situs governs land and that a renunciation and election filed in Oklahoma, the decedent's domicile, did not satisfy the requirements of their own statute providing for renunciation and election of a statutory share. Accordingly, the time for election in Tennessee having expired, the widow could not claim dower but was bound by the will. The confusion made possible by such a determination is illustrated by the Maryland case of *Bish v. Bish*,[31] in which the widow had renounced and elected against the will in the Pennsylvania domiciliary administration. The period in which an election could be made in Pennsylvania was longer than that permitted in Maryland, where the deceased left real property, and where the widow asserted a claim after the time had expired. The court reasoned that satisfaction of the Maryland statute was a positive requirement, that the renunciation in Pennsylvania had not come within Maryland's statutory period, and that therefore the renunciation was ineffective. Even though the will had no residuary clause and did not mention the Maryland realty, the court concluded that she was to have a life estate in the Maryland farm because she was to have a life estate in other assets. This conclusion apparently bothered the court because the widow would take against the will in one state and under it in another. To correct this the court limited the total interest to be received by the wife in both states to the value of the life estate as originally provided in the will. This awkward conclusion which required a retaliatory decree by a court in ancillary administration could have been avoided by giving effect to the Pennsylvania election as an election by implication in Maryland.[32]

A lower court decision in Pennsylvania illustrates the possible results which blind adherence to the situs rule can produce;[33] the widow elected against the estate in Pennsylvania, the domicile, but did nothing in Florida, New Jersey, or Maine, where the decedent owned real estate, which was sold so that the proceeds could be transmitted to Pennsylvania.

29. Russell v. Shapleigh, 275 Mass. 15, 20, 175 N.E. 100, 101 (1931).

30. 156 Tenn. 404, 1 S.W.2d 1015, 82 A.L.R. 1492, noted at 1509 (1928). See also Rannels v. Rowe, 166 F. 425 (8th Cir. 1908); Apperson v. Bolton, 29 Ark. 418 (1874).

31. 181 Md. 621, 31 A.2d 348 (1943).

32. The court rather obviously, though not expressly, preferred to give effect to the testator's intention rather than permit the widow to exercise her statutory privilege and was willing to adopt the confusing course indicated to accomplish that end.

33. Eckel's Estate, 37 Pa. D. & C. 383, 56 Montg. 120, 88 Pitts. L.J. 321 (1940).

The court held that the election was effective only as to assets in Pennsylvania, and the proceeds of the foreign land passed by the will under which the wife took a life estate. While the court was probably correct in its assumption that the proceeds came from the situs states "impressed with the law of those jurisdictions governing its distribution,"[34] the anomaly remains; the same court was distributing assets to one taking both under and against the will.[35] This might have been avoided had the court not failed to consider that the other states might not apply their local law provisions but rather, under their conflict of laws rules, might give effect to the election made at the state of the domicile.[36]

Considering the cases in which the claimant, at the domicile, has either taken under the will or renounced, the binding strength of the equitable doctrine of election is apparent. While the cases are not unanimous, it appears that in most instances the election at the domicile has been conclusive upon the same person in ancillary administration. This is the desirable result and protects the interests of all parties concerned while preventing conflicting results because of fortuitous location of assets. The cases seem to establish, without much question, that the negative aspects of the foreign election will be effective in nearly every instance on an equitable estoppel concept. The primary question of difficulty has been whether or not a person, barred from taking under the will, can receive a benefit under a local statute with which he has not complied. In view of the policy in favor of speedily settling estates, it seems reasonable that the claimant be subject to some time limitations;[37] also there is need for fairly prompt action in order to avoid complicating the procedure for allowing creditors' claims since forced shares often have priority. On the other hand, there is no other compulsion for action before distribution, so one might expect liberal extension of periods in which an election might be made, and it seems desirable to extend the

34. *Id.* at 387, 56 Montg. at 126, 88 Pitts. L.J. at 325.

35. The fact that the estate was insolvent may explain in part the reason why no attempt was made toward adjustment. Too, the court may have assumed that the widow's rights under the will were prior to creditors as she had given value in loss of dower. *Cf.* Muse v. Muse, 186 Va. 914, 45 S.E.2d 158 (1947); Moody and Moody, In Re: *The Preferred Legatee,* 25 BAR BULL. 163 (Boston 1954).

36. *Cf.* Griley v. Griley, 43 So.2d 350 (Fla. 1949); Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936); Bankers Trust Co. v. Greims, 115 N.J. Eq. 102, 169 Atl. 655, *aff'd,* 117 N.J. Eq. 397, 176 Atl. 112 (1934).

37. The courts have often applied local statutes governing the time in which an election can be made to permit the surviving spouse to claim a share in the estate. In so doing they have usually concluded that the time is measured from the time of local probate of the will. Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936); *In re* Tamburri's Will, 100 N.Y.S.2d 647 (1950). *Cf. In re* Will of Witt, 120 Kan. 200, 243 Pac. 296 (1926); Scripps v. Durfee, 131 Mich. 265, 90 N.W. 1061 (1902). See also 1 WOERNER, *op. cit. supra* note 11, at 408.

theory of election by implication to further the policies favoring unitary treatment of estates. Third parties and creditors may be protected in their reliance on local records as an exception to such a rule. In this way protection of the regularity of local titles is provided when it is the dominant policy, and the important policies of the testator's intention and family protection can be accommodated fairly in the internal estate controversies.

The purpose of family allowances practically removes it from the area of the interstate election problems. Allowances are primarily to provide support pending administration and, as such, are normally not considered to be inconsistent with taking benefits under either the will or statute.[38] Since there is ordinarily no requirement or reason to elect between allowance privileges and the will, the petition for such an allowance and its receipt at the domicile usually will have no effect in a conflicts case. An example is an Indiana case where the court held that the widow's petition and receipt of an allowance at the domicile in California would not bar her from claiming her distributive share under the will in Indiana ancillary administration.[39] In some states it is possible for the testator to put the recipient of a statutory allowance to an election,[40] but an express provision is necessary to do so. In those states a reference to the domicile of the deceased for the determination of the election question would be expected and desirable since it would satisfy the policies favoring unitary treatment of the estate and protection of the family in accordance with the law of the state having the dominant interest.

Like family allowances, there are few conflict of laws problems concerning elections to take homestead. These problems are particularly local since the existence of homestead rights depend upon domicile at the situs of the real property in question. Also, many states exclude the homestead from the testamentary scheme in much the same manner as family allowances. There are some states, however, that have made homestead a substantial part of their scheme of testate and intestate distribution, and a few of these have provided that a claimant cannot

38. *In re* Stachnick's Estate, 376 Pa. 592, 103 A.2d 765 (1954); *In re* O'Donnell's Estate, 71 S.D. 339, 24 N.W.2d 326 (1946); *In re* Wahl's Estate, 236 Mo. App. 345, 158 S.W.2d 743 (1942); Industrial Trust Co. v. Dean, 68 R.I. 43, 26 A.2d 482 (1942); Andros v. Flournoy, 22 N.M. 582, 166 Pac. 1173 (1917); DEL. CODE ANN. tit. 12, § 2307 (1953). See 1 WOERNER, *op. cit. supra* note 11, at 248.

39. Dick v. Glenn, 218 Ind. 282, 31 N.E.2d 1009, 32 N.E.2d 698 (1941).

40. GA. CODE ANN. § 113-1007 (1933); ILL. SMITH HURD ANN. STAT. c. 3, § 334 (Supp. 1954); KAN. GEN. STAT. §§ 59-403, 59-404 (1949); KY. REV. STAT. § 391.030 (1953); MASS. GEN. LAWS c. 193, § 13 (1932); ME. REV. STAT. c. 156, §§ 14, 16 (1954); MICH. COMP. LAWS § 702.68 (Supp. 1952); N.H. REV. LAWS c. 359, § 1 (1942). See also In the Matter of the Estate of Wenzel, 161 Kan. 545, 170 P.2d 618 (1946); Porter v. Axline, 154 Kan. 87, 114 P.2d 849 (1941); *In re* Estate of David, 227 Iowa 352, 288 N.W. 418 (1939); Sturtevant v. Wentworth, 226 Mass. 459, 115 N.E. 927 (1917).

take under both the will and homestead statute.[41] More often it is provided that the claimant cannot take both dower and homestead.[42] This means that the substantive effect and scope of the statute at the domicile and in states of ancillary administration, when they are alleged to be applicable, should be investigated very carefully. Particular attention should be paid as to whether or not any election is required under the statute and, if so, whether it is intended to be an election between testamentary and statutory rights or between two statutory rights. In an Iowa case the decedent, who was domiciled in California, disinherited his widow in his will.[43] The widow chose to take homestead by California law and later claimed her statutory share in Iowa land of the decedent. The devisees resisted on the basis of the Iowa homestead statute which provides that any person electing "homestead" waives a right to a statutory share. The court quite properly held the widow was not barred from claiming her statutory share, for the election referred to in the statute was between two statutory rights in Iowa land, and the election in California to take homestead would, therefore, not bar her in Iowa. It should be noted, however, that, in a case in which Iowa was the domicile, an election to take homestead would amount to an election against the will under this statute since it is a substitute for dower or statutory share. In such a case, the election to take homestead in Iowa should be treated as binding in another state to bar a claimant from taking under the will but not under the statute.

The cases involving partial invalidity may concern any devisee or legatee but often involve the surviving spouse or other person entitled to a nonbarrable interest. Because of this and the analogous nature of the authorities, these cases are included in this discussion. Partial invalidity may be described as partial intestacy by reason of the will's being valid in one state but not in another, or because of inconsistent clauses, or invalid clauses. In such a case the beneficiary is usually required to elect between the interest received under the will and that taken under the statute. The leading case in the United States is *Van Dyke's Appeal*,[44] in which the deceased, domiciled in Pennsylvania, where his will was valid, left real property in New Jersey, where the will was invalid. The court held that those persons who took the New Jersey land by intestate succession must, by reason of the doctrine of election, compensate the disappointed "devisees" if they were to claim personalty as legatees in Pennsylvania. In a

41. See 1 WOERNER, *op. cit. supra* note 11, at 308, 404.
42. *Ibid.*
43. Ehler v. Ehler, 214 Iowa 789, 243 N.W. 591 (1932).
44. 60 Pa. 481 (1869).

later case involving similar facts, the Pennsylvania court in reaching the same result stated:

> The orphans' court correctly held that the appellant could not be permitted to affirm the validity of the will in Pennsylvania and take under it, and at the same time deny its validity in Washington, to prevent other devisees from taking under it, so as to draw to himself as heir at law what the testator did not intend he should have, but had distinctly given to others. If he will insist on the unjust advantage which the requirement of three subscribing witnesses under the laws of Maryland gives him, to defeat the will as to the Washington property he should be required to make compensation to the disappointed devisees.[45]

While these Pennsylvania cases do not involve the effect in ancillary proceedings of election at the domicile, they are important background for any discussion of the partial invalidity cases. A case which illustrates the strength of the doctrine when election is made at the domicile is *Mechling v. McAllister*.[46] The widow, in this case, filed an election to take under the will in Iowa, the domicile. There was a lapse of one-half the residue, and the widow then claimed her share under the will plus a share as intestate successor in Minnesota land. The court held the widow was barred by her Iowa election from taking any share under the laws of intestacy.[47]

Probably the best known conflicts cases in this area are the *McGehee* cases.[48] The decedent whose estate was involved died domiciled in South Carolina, where he left considerable personalty but no real property; he also left real and personal property in North Carolina, Virginia, and Maryland. His will, executed while visiting a lawyer relative in North Carolina, was valid in North Carolina, Maryland, and Virginia but invalid at the decedent's domicile in South Carolina because three witnesses were required there. The will provided $20,000 cash and a $7,500 insurance policy for the widow "in lieu of her dower rights." The estate was first administered as an intestate estate in South Carolina, where the

45. Cummings's Estate, 153 Pa. 397, 399, 25 Atl. 1125, 1126 (1893). The court's reference to Maryland law was occasioned by the fact that the land was located in a portion of Washington, D. C. in which Maryland law continued to be applicable in this regard.

46. 135 Minn. 357, 160 N.W. 1016 (1917). *Cf.* Compton v. Akers, 96 Kan. 229, 150 Pac. 219 (1915); 1 WOERNER, *op. cit. supra* note 11, at 400.

47. The result in this case is questionable because of the uncertainty as to whether it is a case of election between inconsistent rights. While the testator may have intended that his wife receive only one-half if the son were alive, he may well have had a different intent after the son's death, or at least, the statute of descent and distribution might properly represent his presumed intention.

48. McGehee v. McGehee, 189 N.C. 558, 127 S.E. 684 (1925); McGehee v. McGehee, 152 Md. 661, 136 Atl. 905 (1927).

widow received $36,000 as her intestate share. Next the will was probated in North Carolina, where the widow claimed her bequest in the will from the proceeds of the North Carolina land. Other legatees objected, but in vain because the North Carolina court held that there had been no previous election and that the widow was entitled to receive the bequest from the North Carolina land. The court took the view that, since the will was invalid in South Carolina, the widow had taken neither under the will nor against it so no election could have occurred. "The plaintiff," the court reasoned, "had no alternative as to the personal property. She could not take her distributive share of it under the will, when the will failed to dispose of any of the personal property. She could only claim it under the law, or decline to take it. And upon her refusal to accept her distributive share of the personal property, what would become of it? There is no will by which it may be given to others."[49]

The court considered that no compensation was due the disappointed legatees since the doctrine of compensation depended upon an election which did not exist. In reaching its results the North Carolina court relied on early English cases in which the will was effective to pass personalty but not realty. The argument by counsel that the results were extremely harsh was met by the answer that the old English cases were so well established as to amount to a rule of property. It seems doubtful that anyone would intentionally leave a will valid in some states but not at his domicile in reliance on such an anomalous "rule of property." In refusing to treat the estate as a unit, the court said that, "[i]t cannot be known judicially that the result we have reached is at variance with the intention of the testator, for to hold otherwise would be to give effect to that which the South Carolina law says is void. It is not the testator's will, but the requirements of the law of a sister State, at which the defendants complain. Just here, we are unable to help them."[50]

The proceeds of the North Carolina land were applied to the widow's bequest, but, since the proceeds were less than the bequest, the widow next filed suit in Maryland to obtain the "balance" of her bequest by probate of the will there. Denying her claim, the Maryland court held that the doctrine of election did apply because the will was valid in Maryland and because it clearly indicated the testator's intention. Since the widow had already received over twice that intended for her by the testator, she could not take more. This view seems preferable to the conceptual approach of the North Carolina opinion. By forcing the widow to elect, the North Carolina court could have treated the estate as a whole rather

49. McGehee v. McGehee, 189 N.C. 558, 561, 127 S.E. 684, 685 (1925).
50. *Id.* at 565, 127 S.E. at 687.

than give the widow, because of the chance location of assets, more than she would have received by the law of any state. Perhaps it could be argued that the problem of protecting against excessive shares being taken is that of the domicile. If there has been no distribution at the domicile, this is perhaps possible; however, once the matter has passed beyond the power of the courts of the domicile, other states only are in a position to see that the distortion of the testamentary scheme is kept at a minimum. The ancillary court, in addition, has no real difficulty in determining the testator's intention since the will is valid in their courts. For these reasons it would seem that the Maryland court's decision is more just and more nearly in accord with the reasonable expectations of all parties to the estate.

As to movables in ancillary administration

There are few cases in which difficult conflicts problems of election are involved in regard to movables in ancillary administration, for when the matter has arisen, the courts have, with but few exceptions, applied the law of the domicile.[51] Certainly even more reason exists for referring all of these problems to the domicile than in the case of realty, since policies referring to the situs of movables are of slight strength.

Two cases inconsistent with the nearly universal rule should be mentioned. The first, *Bolton v. Barnett*,[52] occurred in Mississippi, where a statute provides that the law of Mississippi shall govern distribution of personalty, as well as of realty, located in that state.[53] The Mississippi court indicated that local law would be used to determine matters of election at least where original probate of the will was had in Mississippi. The second inconsistency arose in a New York case, *Smith's Estate*.[54] The deceased had died domiciled in Spain but with his will providing that New York law should govern. In ancillary administration the widow elected against the will and asserted a claim based in the alternative upon New York or Spanish law. The court allowed the widow to elect to take under the New York law, even though the assets were movables and her husband was a non-resident, on the theory that inclusion in the will of the provision for application of New York law included a New York widow's

51. *In re* Weiss' Will, 64 N.Y.S.2d 331 (1946); Singleton v. St. Louis Union Trust Co., 191 S.W.2d 143 (Tev. Civ. App. 1945); Hewitt v. Cox, 55 Ark. 225, 17 S.W. 873 (1891); Gibson v. Dowell, 42 Ark. 164 (1883); Mitchell v. Word, 64 Ga. 208 (1879); Jones v. Gerock, 59 N.C. 190 (1861).

52. 131 Miss. 802, 95 So. 721 (1923). *Cf.* Doran v. Beale, 106 Miss. 305, 63 So. 647 (1913); Slaughter v. Garland, 40 Miss. 172 (1866).

53. MISS. CODE ANN. § 467 (1942). A similar provision in Illinois has recently been changed to accord with practice elsewhere. ILL. SMITH HURD ANN. STAT. c. 3, § 162 (Supp. 1954).

54. *In re* Smith's Estate, 48 N.Y.S.2d 631 (1944). *Cf.* Sahadi's Estate, 125 N.Y.S.2d 204 (1953).

right to elect against the will.[55] It seems odd that the will should govern the forced share the widow may take by renouncing it. If this were carried to its logical extreme a testator could elect the law of a state giving no right to elect and leave substantial personalty there to avoid the widow's share allowed by the domicile. The policies behind the statutory forced share give the domicile a dominant interest, and it seems somewhat of a bootstrap doctrine to permit the testator to determine by his will the law governing his widow's right to renounce.[56] On the other hand, however, the policies preferring the widow might permit a widow's claim under the law chosen by her husband if it is more favorable for her to do so since his personal representative could scarcely claim that only those parts of the chosen law favorable to the husband were to be considered applicable.[57]

The cases involving the election problem in relation to family allowances or homestead do not raise problems different from those above concerning immovables. Likewise the problem of partial invalidity has not arisen except as previously noted in the cases concerning land.[58] The solution of potential problems in these areas presumably would be consistent with the previous discussion, permitting the election at the domicile to control, particularly in view of the usual reference to the domicile for solution of problems involving succession of movables.

B. Effect of Election Made in Ancillary Administration

As to movables and immovables at the domicile

Movables and immovables located at the domicile are normally governed by the same local law and so the effect of elections as to both types of assets can be treated together. The practical control exercised by the domiciliary forum when the election is first made in ancillary administration is substantially stronger in most cases than that of the ancillary forum when election is first made at the domicile. This is because most decedents leave sufficient property at their domiciles for the domiciliary courts effectively to control foreign elections. Also personal property is ordinarily transmitted to the domicile for distribution,

55. No similar interstate case has come to the writer's attention. See *In re* Allen, 114 L.J. Ch. 298, 173 L.T. 198; [1945] 2 All E.R. 264. *Cf.* Kollar v. Noble, 184 Ark. 297, 42 S.W.2d 408 (1931). Morris, *Conflict of Laws—Community Property—Doctrine of Election,* 24 Can. B. Rev. 528 (1946).

56. *Cf.* Bolling v. Bolling, 88 Va. 524, 14 S.E. 67 (1891).

57. *But cf.* Sahadi's Estate, 125 N.Y.S.2d 204 (1953). Perhaps the solution would be to apply the law indicated by the testator except where an intention to unreasonably exclude the widow seems apparent. *Cf.* Note, *Fraud on the Law—The Doctrine of Evasion,* 42 Col. L. Rev. 1015 (1942).

58. See pp. 303-306 *supra.*

and the domiciliary administration usually is not closed nor is distribution made, until after the ancillary administrations have been completed. While it could be urged that person should be bound by his first election even though made in ancillary administration, no case has been found where the domiciliary state has raised a complete estoppel solely on this ground. The courts of the domicile, as well as those sitting in ancillary administration, have considered the domicile election as the binding one.[59] This result means that an inconsistent position may be taken at the domicile after an election in ancillary administration. However, a previous election cannot of course be ignored by the domiciliary court, and the solution has been found in the doctrine of equitable contribution. Illustrative of this are the *Murphy* and *Griley* cases decided in Florida,[60] in each of which a domiciliary died in Florida leaving property elsewhere. In each case the widow participated in the foreign ancillary administration receiving assets of considerable value under the will. Each widow also subsequently chose to renounce the will and claimed dower in Florida. The Florida court, on both occasions, concluded that the domiciliary election governed notwithstanding the prior ancillary election. The widows, however, were required to account for benefits received elsewhere so that they could be set off against a statutory share. If more than the statutory share had already been received, no more would be paid but if not, the difference would be made up. This result was reached in the leading case of *Van Dyke's Appeal,*[61] and the method is particularly convenient for the domicile state which is the principal place of administration and usually the last to distribute.[62]

It may be suggested that this procedure of controlling foreign disposition by modifying the domiciliary distribution is improper. Certainly, it must be recognized that property actually distributed in foreign administrations cannot be taken away. Nevertheless, most cases would recognize the propriety of the domicile controlling distribution of movable assets wherever located. Particularly as to personal property it seems proper to permit the domicile to treat the estate as a unit which is subject

59. *In re* Lawrence's Estate, 93 Vt. 424, 108 Atl. 387 (1919); Gibson v. Gibson, 292 F. 657 (D.C. Cir. 1923); Russell v. Shapleigh, 275 Mass. 15, 175 N.E. 100 (1931); Cummings's Estate, 153 Pa. 397, 25 Atl. 1125 (1893); Van Dyke's Appeal, 60 Pa. 481 (1869).

60. Griley v. Griley, 43 So.2d 350 (Fla. 1949); Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936).

61. 60 Pa. 481 (1869).

62. When administration is closed at the domicile before the ancillary administration is closed it would seem reasonable for the ancillary administration to salvage the testator's plan as against the scheme of distribution at the testator's domicile. See McGehee v. McGehee, 152 Md. 661, 136 Atl. 905 (1927). *Cf.* Pearce v. Pearce, 281 Ill. 194, 118 N.E. 84 (1917).

to their laws, and probably even to the extent of using retaliatory decrees if necessary.[63] But even as to foreign real property there seems reason to permit the domicile to adjust its own distribution to compensate for an inconsistent election in another state. This is because there is effective evidence of what the testator intended in a will valid by at least some law, usually that of the domicile. Further, the domicile is not substituting its law for that of the foreign situs but is in effect merely preventing the claimant from taking inconsistent positions which would thwart the purpose of the laws of both states. The procedure followed in the *Murphy, Griley,* and *Van Dyke* cases[64] seems consistent with the general trend of giving less effect to the doctrine of arbitrary election whenever it causes forfeiture; for example, many states permit revocation of an election under local dower statutes when no harm results to others.[65] The technique of treating an ancillary election only as a set-off against the claim at the domicile recognizes that the estate is a unit even though its assets are located in several states. There probably are situations in which the location of the domicile may be uncertain, the existence of assets doubtful, or in which even fraudulent concealment of assets by the decedent may not be discovered until some acts constituting an election have been done in a state of ancillary administration. There seems little reason why the spouse should not be permitted to change her position if no one is harmed as a consequence. To permit such a reversal will recognize the local law policies protecting the widow and members of the family and at the same time will protect third persons. It can be argued that the same reasoning would allow the widow to change her mind after a final election at the domicile and take differently in the ancillary administration. When the domicile has lost its control by distribution, it seems that the ancillary administration could assume control if its assets are sufficient; it seems clear, however, that this converse situation should not be permitted in absence of fraud or other unusual circumstances. There should be one standard against which to measure finally the act of election and the receipt of benefits in the estate, and states should not permit "competitive" administrations but should give effect to policies recognizing the state with the dominant interests.[66] In view of the present relative importance of personal property and the "family" nature of these estate

63. Griley v. Griley, 43 So.2d 350 (Fla. 1949); Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936); *In re* Lawrence's Estate, 93 Vt. 424, 108 Atl. 387 (1919); Cummings's Estate, 153 Pa. 397, 25 Atl. 1125 (1893); Van Dyke's Appeal, 60 Pa. 481 (1869). See also Caruso v. Caruso, 106 N.J. Eq. 130, 148 Atl. 882 (1930).

64. See p. 308 *supra.*

65. Note, *Dower: Estoppel by Widow's Election Under Will,* 3 U. OF FLA. L. REV. 214 (1950).

66. See Caruso v. Caruso, 106 N.J. Eq. 130, 148 Atl. 882 (1930).

problems, the domicile seems to be the focal point; accordingly, it seems reasonable to govern elections in administration of decedents' estates by the law of the domicile and to control dispositions elsewhere by the elections made at the domicile as long as no third parties are injured.

As to movables and immovables in a second ancillary administration

Very few opinions actually involving this point have been handed down. The cases in point have involved a prior claim under the will where a disclaimer has been precluded in the second ancillary administration.[67] In cases of inconsistent elections at the domicile and in first ancillary administration, the court in the second ancillary administration would probably abide by the domicile election or, at least, would refuse recovery of more than would be allowed under the larger of the two interests. Probably a second ancillary administration would not ignore either prior administration but would require accounting and set-off of both as in the Maryland case involving the McGehee estate.[68]

C. Conclusions

In all of the conflict of laws problems concerning elections in decedents' estates discussed there appears a need for a single standard against which to measure benefits and elections. It should be recognized that local law provisions for protection of persons interested in estates are drawn with an eye to a single system of law. The policies underlying the protective provisions should not be destroyed or unduly enlarged because the property may be found in different places. So far as possible, protection should be given, and according to a single standard. In a society in which personal property constitutes the bulk of wealth, the domicile has the greatest claim as this single reference. Similarly, policies concerning the protection of the family and its interests seem to center at the domicile. While regularity of title to real property is important so far as third parties are concerned, there seems little reason why the courts of the situs should not defer to the domicile in litigation within the estate; such an approach would give appropriate effect to local policies while recognizing that each state is an integral part of the interstate and international system upon which all are in part dependent.

67. McGehee v. McGehee, 152 Md. 661, 136 Atl. 905 (1927), discussed at pp. 304-306 *supra;* Pearce v. Pearce, 281 Ill. 194, 118 N.E. 84 (1917).

68. See discussion pp. 304-306 *supra.*