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# THE TESTAMENTARY DISPOSITION OF LAND IN THE CONFLICT OF LAWS \*

EDWARD D. RE †

## I

### THE LEX SITUS IN ANGLO-AMERICAN LAW

MORE than a century ago, an outstanding American jurist and law professor, Joseph Story, in what has become a classic work on the *Conflict of Laws*, wrote the following concerning the testamentary disposition of land:

“... [T]he doctrine is clearly established at the common law, that the law of the place, where the property is locally situate, is to govern as to the capacity or incapacity of the testator, the extent of his power to dispose of the property, and the forms and solemnities to give the will or testament its due attestation and effect.”<sup>1</sup> In a footnote, adequately documenting the statement in the text, Mr. Justice Story quoted at length from Burge’s *Commentaries on Colonial and Foreign Laws*.<sup>2</sup>

On this point Mr. Burge wrote with particular certainty.

The power of making the alienation by testament is no less *qualitas rebus impressa*, than that of making the alienation by contract. When therefore the question arises, whether the immovable property may be disposed of by testament, recourse must be had to the *lex loci rei sitae*. That law must also decide, whether the full and unlimited power of disposition is enjoyed, or whether it is given under restriction. By the jurisprudence of England and the United States, a will devising lands in England or the States, if the solemnities prescribed

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\* This article is the substance of a talk given by the author at the 1952 Annual Breakfast of the Section of International and Comparative Law of the American Bar Association in San Francisco, California.

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<sup>1</sup> STORY, *CONFLICT OF LAWS* 786 (3d ed. 1846).

<sup>2</sup> BURGE, *COMMENTARIES ON COLONIAL AND FOREIGN LAWS GENERALLY AND IN CONFLICT WITH EACH OTHER* (1838).

by the Statute of Frauds have not been observed, would be ineffectual to pass those lands.<sup>3</sup>

The same confidence in the certainty of the state of the law is manifested in Wharton's *Conflict of Laws* wherein the author states: "So far as concerns England and the United States, real estate, to adopt our distinctive phraseology, in all jurisdictions, and by an uninterrupted current of authority, is held to be subject to the *lex rei sitae*. To cite cases to this point would be superfluous."<sup>4</sup> Although many cases on this question are in fact cited and discussed in the succeeding pages of the treatise, their comparison with cases decided by the civil law courts, makes it perfectly clear that the *lex loci rei sitae* enjoys a much greater applicability in the Anglo-American system. Professor Lorenzen has expressed this thought by stating that "as regards real estate Anglo-American courts have gone far in applying the law of the situs."<sup>5</sup>

There can be no doubt that both American<sup>6</sup> and English<sup>7</sup> authors on the conflict of laws consider it to be unquestionably established that the governing law concerning all dispositions of realty is the *lex loci rei sitae*. Not only does the *lex situs* govern the legal effect of a purported conveyance of realty, but it also determines all matters of succession, both testate and intestate.<sup>8</sup>

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<sup>3</sup> 4 BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS 217 (1838).

<sup>4</sup> 1 WHARTON, CONFLICT OF LAWS 607-608 (3d ed. 1905).

<sup>5</sup> Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L. J. 736, 737 (1924).

<sup>6</sup> 2 BEALE, CONFLICT OF LAWS 938-939 (1935). "It will be at once seen that immovables, being unable to be taken away from the state in which they are, must always in the last analysis be governed by the laws of that state. Those laws alone can apply to the land since any contrary provision would be given no effect by the courts and the executive officers of the state of situs. It therefore follows that every question arising with regard to land is to be governed by the law of the situs." GOODRICH, CONFLICT OF LAWS 453 (3d ed. 1949). "The general rule is that the validity and effect of a transaction by which an interest in land is created or transferred is governed by the law of the situs of the land." MINOR, CONFLICT OF LAWS 32 (1901).

<sup>7</sup> CHESHIRE, PRIVATE INTERNATIONAL LAW 721 *et seq.* (3d ed. 1949); WESTLAKE, PRIVATE INTERNATIONAL LAW 10, 220 *et seq.* (5th ed. 1912).

<sup>8</sup> Hood v. McGebee, 237 U. S. 611 (1915); Sullivan v. Kidd, 254 U. S. 433 (1921).

## II

## SOME REASONS FOR SUPREMACY OF LEX SITUS

Even a cursory evaluation of some of the reasons underlying the applicability of the *lex loci rei sitae* to transfers of realty will indicate that the rule is both expedient and necessary. It is neither accident nor coincidence that favors the *lex situs*, but rather, as has been stated, "[s]itus must, from the very nature of property be the arbiter."<sup>9</sup> Whether land be viewed as an actor or an immovable *res*, title to the land is conferred by and subject to the law of the sovereignty where it is located. It is obvious that by its presence in a given state only that state is capable of exercising a possessory title over the land. Just as someone in possession can be ousted only by the authority of the law of that jurisdiction, no claimant can be placed into possession except by resorting to the governmental authorities of that same jurisdiction. This concept of power or "force of territorialism"<sup>10</sup> stems inescapably from the concept of territorial sovereignty.<sup>11</sup>

This control of a state over realty located within its jurisdiction is most usually spoken of in terms of public policy. It is stated that "each state has its fundamental policy as to the tenure of land,"<sup>12</sup> and hence it would not tolerate any other state determining any matter affecting title to its land. Whether the rationalization be in terms of "sovereignty" or "public policy"<sup>13</sup> it can be added that since, under our system of jurisprudence, a court can transfer title only by an *in rem* proceeding, such a proceeding can only be instituted in a court of the situs.

Wharton summarily disposes of the applicability of the law of the owner's domicile and the *lex loci contractus* (or

<sup>9</sup> 1 WHARTON, CONFLICT OF LAWS 638 (3d ed. 1905).

<sup>10</sup> See Rabel, *Situs Problems in Enemy Property Measures*, 11 LAW & CONTEMP. PROB. 118, 120 (1945).

<sup>11</sup> See *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (U. S. 1812).

<sup>12</sup> 1 WHARTON, CONFLICT OF LAWS 636 (3d ed. 1905).

<sup>13</sup> See Goodrich, *Public Policy in the Law of Conflicts*, 36 W. VA. L. Q. 156 (1930); Huserl, *Public Policy and Ordre Public*, 25 VA. L. REV. 37 (1938); Note, *The Public Policy Concept in the Conflict of Laws*, 33 COL. L. REV. 508 (1933).

the law of the place where the will is executed in the case of a testamentary disposition) as follows:

If the *lex rei sitae* be abandoned, there is no other law that can be invoked. The law of the owner's domicile cannot, because, first, the question generally is, who the owner is, which must be discovered before the law of his domicile is applied; and secondly, where there are two or more owners with different domicils, we must resort to an arbiter outside of the domicile of either to determine which domicile is to prevail. The *lex loci contractus* cannot avail; for, when a thing is contended for by parties claiming under hostile contracts executed in different countries, here, also, an umpire is required; and to assume that the *lex loci contractus* of either contract is to prevail is to assume the very point in dispute.<sup>14</sup>

### III

#### SPECIFIC APPLICATION OF LEX SITUS RULE

Notwithstanding the dogmatic assertions found both in treatises and in the cases regarding the applicability of the *lex situs* to matters affecting realty, the number of cases where a different rule was urged is amazingly large.<sup>15</sup> As one might expect, the alternative choice of law rule that was urged, in wills devising land, involved either the law of the domicile of the testator or the law of the place of execution of the will. The *lex situs*, however, was uniformly held to prevail. For example, the *lex situs* was held to determine:

- (a) the formal requirements of the will;<sup>16</sup>
- (b) the number of witnesses required;<sup>17</sup>
- (c) the necessity for filing or recordation;<sup>18</sup>
- (d) the capacity of the testator to make the will;<sup>19</sup>

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<sup>14</sup> 1 WHARTON, CONFLICT OF LAWS 638 (3d ed. 1905).

<sup>15</sup> See cases cited in 1 WHARTON, CONFLICT OF LAWS 611 *et seq.* (3d ed. 1905). See Note, 48 L. R. A. 133 *et seq.* (1913); 11 AM. JUR. 479 *et seq.* (1937).

<sup>16</sup> Robertson v. Pickrell, 109 U. S. 608 (1883).

<sup>17</sup> White v. Greenway, 303 Mo. 691, 263 S. W. 104 (1924).

<sup>18</sup> Keith v. Johnson, 97 Mo. 223, 10 S. W. 597 (1889); Kerr v. Moon, 9 Wheat. 565 (U. S. 1824).

<sup>19</sup> Peck v. Cary, 27 N. Y. 9 (1863); Woodville v. Pizzati, 119 Miss. 442, 81 So. 127 (1919); Dickey v. Vann, 81 Ala. 425, 8 So. 195 (1886). See Note, 2 L. R. A. (N. S.) 415 (1906).

- (e) the capacity of the devisee to take under the will; <sup>20</sup>
- (f) the legal power of the testator to devise as against an unborn child; <sup>21</sup>
- (g) the power of a widow or other person to contest the will; <sup>22</sup>
- (h) the revocation of the will by the birth of a child; <sup>23</sup>
- (i) the revocation of the will by the marriage of the testator; <sup>24</sup>
- (j) the nature of the estate created; <sup>25</sup>
- (k) the application of the rule in Shelley's case; <sup>26</sup>
- (l) whether a remainder interest created was vested or contingent; <sup>27</sup>
- (m) whether a sale of land devised operates as an ademption; <sup>28</sup> and
- (n) whether land devised is to be treated as equitably converted into personalty. <sup>29</sup>

#### IV

#### CONFLICT OF AUTHORITY CONCERNING INTERPRETATION OF WILL

Many other instances could be found indicating that the law of the situs governs matters affecting the disposition of land by will. In fact, cases can be found holding that the law of the situs will also govern in the interpretation of the

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<sup>20</sup> *United States v. Fox*, 94 U. S. 315 (1876); STORY, *CONFLICT OF LAWS* 719 (3d ed. 1846). "Thus, if the laws of a country exclude aliens from holding lands, either by succession or by purchase, or by devise, such a title becomes wholly inoperative as to them, whatever may be the law of the place of their domicile."

<sup>21</sup> *Ensley v. Hodgson*, 212 Ala. 526, 103 So. 465 (1925).

<sup>22</sup> *Robertson v. Robertson*, 144 Ark. 556, 223 S. W. 32 (1920).

<sup>23</sup> *Bloomer v. Bloomer*, 2 Bradf. 339 (N. Y. 1853).

<sup>24</sup> *Cornell v. Burr*, 32 S. D. 1, 141 N. W. 1081 (1913).

<sup>25</sup> *DeVaughn v. Hutchinson*, 165 U. S. 566 (1897); *Thompson v. Penn*, 149 Ky. 158, 148 S. W. 33 (1912).

<sup>26</sup> *DeVaughn v. Hutchinson*, *supra* note 25.

<sup>27</sup> *Williamson v. Youngs*, 200 Iowa 672, 203 N. W. 28 (1925).

<sup>28</sup> *Phillips v. Phillips*, 213 Ala. 27, 104 So. 234 (1925).

<sup>29</sup> *Ford v. Ford*, 72 Wis. 621, 40 N. W. 502 (1888); *Clarke v. Clarke*, 178 U. S. 186 (1900); *In re Trustee Act*, 22 Sask. L. R. 142 (Canada 1927).

words used in the will.<sup>30</sup> This phase of the problem has been exhaustively treated by Mr. Crawford D. Hening who has concluded that:

Public convenience requires that, in the case of rules of construction as in the case of rules of property, the rules of the situs should govern. To secure the expeditious and safe transfer of titles to real estate, it is far preferable that the law of the situs should be indiscriminately applied to all wills of real estate, whatever be the domicile of the testator, than that several wills, all containing the same language and all devising real estate in the same jurisdiction or even devising the same real estate at different dates, should be differently construed by the court of the situs, according as the domiciles of the testators established different rules of construction.<sup>31</sup>

Relying at least partially on the conclusions of the author just quoted, Judge Goodrich writes that "[t]here are good reasons for referring this matter to the law of the situs of the land."<sup>32</sup> No unanimity of opinion, however, can be found on this matter either in England or in the United States.<sup>33</sup> Both the cases and the authors on the conflict of laws are divided.<sup>34</sup> Story urges that the law of the domicile of the testator should govern.<sup>35</sup> Professor Minor suggested that "the weight of reason and authority is in favor of the rule that the interpretation of a devise is to be governed by the law or usage with which the testator is supposed to be most familiar namely that of his domicile; and hence when he uses words he must be presumed to have intended that they should be used in the sense given them in his domicile, unless the contrary appears."<sup>36</sup> He further observed that the situs rule "could not be applied" if the testator possessed lands in sev-

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<sup>30</sup> *McCartney v. Osborn*, 118 Ill. 403, 9 N. E. 210 (1886). See 6 HALSBURY, LAWS OF ENGLAND 242 (2d ed. 1932).

<sup>31</sup> Hening, *Is the Construction of Wills Devising Real Estate Governed by the Rules of Construction of the Domicil of the Testator or by the Rules of the Situs of the Property?*, 41 AM. L. REG. (N. S.) 623, 718 (1902). See also Note, 2 L. R. A. (N. S.) 408, 443 (1906).

<sup>32</sup> GOODRICH, CONFLICT OF LAWS 509 (3d ed. 1949).

<sup>33</sup> See CHESHIRE, PRIVATE INTERNATIONAL LAW 735 (3d ed. 1949).

<sup>34</sup> See cases discussed in Hening, *supra* note 31. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 419 (2d ed. 1951). "Construction of wills of realty should be matter for the law of the situs . . ."

<sup>35</sup> STORY, CONFLICT OF LAWS 798-811 (3d ed. 1846).

<sup>36</sup> MINOR, CONFLICT OF LAWS 341 (1901).

eral states which gave a different interpretation of the words used, and disposed of them by the same language, since "it could not be supposed that the testator would intend the same clause to have different meanings with respect to different tracts of land."<sup>37</sup>

Nevertheless, even the situation referred to by Professor Minor has not deterred the courts from applying the *lex loci* rule. In *McCartney v. Osburn*,<sup>38</sup> which involved a devise of lands situated in Pennsylvania and Illinois, the Supreme Court of Illinois made the following significant statements:

While it was entirely competent for the Pennsylvania courts to construe the will and determine the rights of the parties to the property there, yet they could make no order, decree, or ruling with respect to the legal effect of the will that would deprive this court of the right to construe that instrument for itself, so far as it relates to lands in this state. Where a testator, by a single will, devises lands lying in two or more states, the courts of such states will, respectively, construe it, as to the lands situated in them respectively, in the same manner as if they had been devised by separate wills.<sup>39</sup>

It is true that in the decided cases where the question presented dealt with the interpretation of a testamentary disposition of realty the courts have not agreed, and cases can be found "supporting either view."<sup>40</sup> It is also probably true that this conflict of judicial opinion can even be found within the same jurisdiction.<sup>41</sup> As far as the present New York view is concerned it seems accurate to state that the New York Court of Appeals will favor the application of the *lex situs* rule. In 1911, in deciding *Monypeny v. Monypeny*,<sup>42</sup> wherein a testator domiciled in Ohio, devised lands located in Ohio and New York, the New York court stated that "[t]here can be no question that, though the will was made

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<sup>37</sup> *Ibid.*

<sup>38</sup> 118 Ill. 403, 9 N. E. 210 (1886).

<sup>39</sup> *Id.*, 9 N. E. at 212.

<sup>40</sup> GOODRICH, *CONFLICT OF LAWS* 511 (3d ed. 1949). See also STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 419-426 (2d ed. 1951).

<sup>41</sup> *Monypeny v. Monypeny*, 202 N. Y. 90, 95 N. E. 1 (1911); *Matter of Osborn*, 151 Misc. 52, 270 N. Y. Supp. 616 (Surr. Ct. 1934); *cf.* *N. Y. Life Ins. Co. v. Viele*, 161 N. Y. 11, 55 N. E. 311 (1899); *Caulfield v. Sullivan*, 85 N. Y. 153 (1881).

<sup>42</sup> 202 N. Y. 90, 95 N. E. 1 (1911).



in Ohio, its interpretation and effect, so far as it relates to the real property within this state, is to be determined by the courts of this state and that their decision is conclusive.”<sup>43</sup> If any doubt exists as to the view of the New York Court of Appeals on this question, a reading of *Matter of Good*<sup>44</sup> decided on April 23, 1952, will convince the skeptic. Judge Conway, writing for a unanimous court, stated that “[t]he common-law rule, as to which there appears to have been no exceptions, was that the validity of a devise of real property [situate in New York], and all questions relating to the title to the property, were to be determined by the laws and courts of New York regardless of the domicile of the testator.”<sup>45</sup> Immediately thereafter the judge wrote: “Subsequently we codified the law in what is now section 47 of the Decedent Estate Law.”<sup>46</sup> The citation of authorities<sup>47</sup> in the decision will leave no doubt that the court considered the *lex situs* to be the governing law concerning all questions involving realty within the state. Since the devise in *Matter of Good* pertained to land in several states the court agreed with and quoted from the Illinois case of *McCartney v. Osburn*<sup>48</sup> the statement to the effect that where a testator devises by a single will lands located in several states the courts of each state have the right to construe the will for themselves as if the lands were disposed of by separate wills.

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<sup>43</sup> *Id.* at 92, 95 N. E. at 1.

<sup>44</sup> 304 N. Y. 110, 106 N. E. 2d 36 (1952).

<sup>45</sup> *Id.* at 114, 106 N. E. 2d at 38 (emphasis added). The court cited *White v. Howard*, 46 N. Y. 159 (1871), and *Peck v. Cary*, 27 N. Y. 9, 11 (1863).

<sup>46</sup> *Matter of Good*, *supra* note 44 at 114, 106 N. E. 2d at 38.

<sup>47</sup> The court cited cases in support of the statement that “[t]he general rule throughout the country was the same as our [the New York] common-law rule.” The court quoted from *Clarke v. Clarke*, 178 U. S. 186, 191 (1900), which in turn quoted from *DeVaughn v. Hutchinson*, 165 U. S. 566, 570 (1897): “It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances.” *Matter of Good*, 304 N. Y. 110, 115, 106 N. E. 2d 36, 39 (1952).

<sup>48</sup> See note 38 *supra*.

## V

RULES OF THE RESTATEMENT OF THE CONFLICT  
OF LAWS

Concerning matters relative to the validity and effect of a devise found in a will the Restatement adopts the *lex loci rei sitae* rule. Section 249 of the Restatement states the general rule: "The validity and effect of a will of an interest in land are determined by the law of the state where the land is."<sup>49</sup> This rule is in harmony with the Restatement position that makes the law of the situs the governing law in matters affecting realty.<sup>50</sup> For example, the *lex situs* governs the conveyance of realty,<sup>51</sup> capacity to convey,<sup>52</sup> formalities of conveyance,<sup>53</sup> validity of conveyance,<sup>54</sup> capacity of grantee to take,<sup>55</sup> effect of the conveyance,<sup>56</sup> nature of the interest created,<sup>57</sup> validity and effect of a mortgage,<sup>58</sup> method and effect of foreclosure of a mortgage,<sup>59</sup> creation and effect of a lien,<sup>60</sup> or charge,<sup>61</sup> whether a person has an equitable interest,<sup>62</sup> validity of a trust,<sup>63</sup> and matters of devolution upon the death of the owner.<sup>64</sup>

Concerning matters of interpretation and construction Section 251 of the Restatement establishes rules that parallel the rules applicable to the interpretation of a conveyance of realty.<sup>65</sup> If the meaning of the language of the will is clear, the effect of such language in creating an interest in

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<sup>49</sup> RESTATEMENT, CONFLICT OF LAWS § 249 (1934). See also § 8(1), comment *a*.

<sup>50</sup> *Id.* §§ 208-254.

<sup>51</sup> *Id.* § 215.

<sup>52</sup> *Id.* § 216.

<sup>53</sup> *Id.* § 217.

<sup>54</sup> *Id.* § 218.

<sup>55</sup> *Id.* § 219.

<sup>56</sup> *Id.* § 220.

<sup>57</sup> *Id.* § 221.

<sup>58</sup> *Id.* § 225.

<sup>59</sup> *Id.* § 227.

<sup>60</sup> *Id.* § 230.

<sup>61</sup> *Id.* § 231.

<sup>62</sup> *Id.* § 239.

<sup>63</sup> *Id.* § 241.

<sup>64</sup> *Id.* § 245.

<sup>65</sup> *Id.* § 214.

land is to be determined by the law of the situs. In the absence of any expression of intent on the part of the testator, the will is to be construed according to the presumptions of intent which prevail by the law of the situs. If the intent of the testator, however, is not clear, in that he has expressed his intent in language which is ambiguous under the *lex situs*, the Restatement adopts the *lex domicile* rule. It states: "The meaning of words used in a devise of an interest in land . . . is, in the absence of controlling circumstances to the contrary, determined in accordance with usage at the domicile of the testator at the time when the will was made."<sup>66</sup> This rule, however, establishes no more than a presumption, and would not apply if there exist "controlling circumstances to the contrary."<sup>67</sup> In no event could an interpretation prevail which would lead to a result contrary to the law of the situs.<sup>68</sup>

## VI

### STATUTORY MODIFICATIONS

Since some of the preceding common law rules may have been seriously affected by statutory provisions, no definite pronouncement can be made concerning the law of any jurisdiction without a careful examination of the applicable statutes of that jurisdiction. In New York, for example, although the *lex situs* rule has been codified by a statute that declares that the ". . . validity and effect of a testamentary disposition of real property, situated within the state . . . are regulated by the laws of the state, without regard to the residence of the decedent,"<sup>69</sup> the common law concerning foreign wills is radically changed. Concerning wills executed outside of the state the statute provides that: "A will executed without this state in the mode prescribed by law, either of the place where executed or of the testator's

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<sup>66</sup> *Id.* § 251(3).

<sup>67</sup> See 2 BEALE, *CONFLICT OF LAWS* 973 (1935).

<sup>68</sup> *Larned v. Larned*, 98 Kan. 328, 158 Pac. 3 (1916).

<sup>69</sup> N. Y. DEC. EST. LAW § 47; see also *Matter of Good*, 304 N. Y. 110, 106 N. E. 2d 36 (1952).

domicile, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state, provided, such will is in writing and subscribed by the testator."<sup>70</sup> Therefore, if a will is in writing and subscribed by the testator, it will be deemed valid and effective in New York, if it is valid either by the law where executed or by the law of the testator's domicile. Another section expressly provides that a will of real property executed without the testator's domicile may be admitted to probate in New York provided it is in writing and subscribed by the testator.<sup>71</sup> These various sections, of course, are not inconsistent. Whereas Sections 22-a and 23 permit wills to be admitted to probate if executed in accordance either with the law of the testator's domicile or of the place where executed, Section 47 declares that the *lex situs* shall be the governing law after the will has been admitted to probate.

## VII

### SPANISH SACRAMENTAL WILL

As recently as May 1951, the United States Court of Appeals for the First Circuit decided an interesting case which again brought into the foreground some of the problems discussed herein. The case, entitled *Melon v. Entidad Provincia Religiosa De Padres Mercedarios De Castilla*,<sup>72</sup> involved the validity and effect of a sacramental will executed in Spain and which purported to devise land located in Puerto Rico. A sacramental will, in essence, is a religious oral will, and although the privilege of making such a will was originally conferred by Pedro II in the year 1283 upon the citizens of Barcelona, the validity of such a nuncupative will has continued to be recognized by the Supreme Court of Spain.<sup>73</sup>

On July 7, 1937, Pantaleona Melon Saenz, being in extremis, declared in the presence of four witnesses that it was

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<sup>70</sup> N. Y. DEC. EST. LAW § 22-a; *cf.* MODEL EXECUTION OF WILLS ACT § 7 (1940).

<sup>71</sup> N. Y. DEC. EST. LAW § 23.

<sup>72</sup> 189 F. 2d 163 (1951).

<sup>73</sup> *Id.* at 164, n. 1.

her will that her niece (one of the plaintiffs) should be her only and universal heir. Pantaleona died two days later and the will was duly proven as a sacramental will. It was reduced to writing and protocolized before a notary. Plaintiffs, basing their claim of title to the Puerto Rican land in question on the sacramental will, proven and protocolized, brought an action to set aside the deeds pursuant to which the defendants hold the land.

The District Court held that the sacramental will was ineffective to pass title to the plaintiffs to the Puerto Rican realty. On appeal the question was thus squarely presented whether the law of Puerto Rico would recognize as effective to pass title to Puerto Rican realty, a foreign will the formalities and proof of which did not comply with Puerto Rican law. Although valid by the law of the place where executed, it was clear that the will would not qualify as a valid Puerto Rican nuncupative will since such a will would require five witnesses,<sup>74</sup> while in the will of Pantaleona only four witnesses were present and only two testified. Although Section 10 of the Civil Code of Puerto Rico provided that real property is subject to the laws of the country in which it is situated, plaintiffs relied upon Section 11 which reads: "The forms and solemnities of contracts, wills and other public instruments are governed by the laws of the country in which they are executed." The court held that the reconciliation of conflicting provisions of the Code was a matter to be determined by the Supreme Court of Puerto Rico, and that that court has held that ". . . under the Civil Code of Puerto Rico, which in this respect departs from the Spanish Civil Code, the rule of *lex rei sitae* has been adopted to determine not only the validity and effect of the provisions of wills purporting to dispose of real estate in Puerto Rico but also the formalities required in the execution of such wills and the capacity of parties to make them."<sup>75</sup> The court stated: "The American rule of *lex rei sitae* as it applies to the ques-

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<sup>74</sup> CIVIL CODE OF PUERTO RICO § 650 (1930). See *Melon v. Entidad Provincia Religiosa De Padres Mercedarios De Castilla*, 189 F. 2d 163, 164, n. 2 (1951).

<sup>75</sup> *Supra* note 74, at 166.

tion with which we are here confronted is stated in Section 249 of the Restatement of the Law of Conflicts of Laws . . ." <sup>76</sup> and under the rule the validity of the will of Pantaleona, in so far as it purported to pass an interest in the Puerto Rican realty, was to be determined by the law of Puerto Rico. Since there was no compliance with the Puerto Rican Code concerning nuncupative wills, the Spanish sacramental will was ineffective to pass title to the plaintiffs as to the Puerto Rican land.

### VIII

#### IN RE SCHNEIDER'S ESTATE — THE REVIVAL OF RENVOI

Thus far no reference has been made to *In re Schneider's Estate*,<sup>77</sup> a case recently decided by the Surrogate's Court of New York County, since the discussion was intended to demonstrate the remarkable degree of unanimity that exists in cases involving a devise of realty. The discussion has also indicated that even in the realm of the *interpretation* of such a devise, where a conflict of authority has existed, the highest court of New York State has declared that all questions arising from the devise are to be resolved by the *lex loci rei sitae*.<sup>78</sup> Although the 1952 Court of Appeals decision made no reference to *In re Schneider's Estate* decided by the Surrogate in 1950, this latter decision, nevertheless, warrants serious examination.

In *In re Schneider's Estate*, the deceased, a naturalized American citizen of Swiss descent, died domiciled in New York County, leaving as an asset of his estate real property located in Switzerland. By the terms of the will the testator attempted to dispose of his property, including the Swiss realty, in a manner contrary to the law of Switzerland. This resulted from the fact that the law of Switzerland confers upon one's legitimate heirs a *legitime*, being an indefeasible right to a specified portion of a decedent's property. Since the *legitime* entitles the heir to a substantial part of the

<sup>76</sup> *Ibid.*

<sup>77</sup> 198 Misc. 1017, 96 N. Y. S. 2d 652 (Surr. Ct.), *aff'd upon reargument*, 198 Misc. 1017, 1030, 100 N. Y. S. 2d 371 (Surr. Ct. 1950).

<sup>78</sup> See note 45 *supra*.

estate and since it cannot be divested by testamentary act,<sup>79</sup> the disposition in the *Schneider* case seemed clearly illegal under the Swiss law although it would have been valid under New York law. Inasmuch as the administratrix had liquidated the foreign realty and had transmitted the proceeds to New York, the court considered the fund as a substituted *res* and proceeded to ascertain the validity of the original devise.

The opinion commenced in an entirely conventional manner by stating: "Actions concerning realty are properly litigable only before the courts of the situs."<sup>80</sup> In order to direct the distribution of the fund (representing the Swiss land), the court stated that ". . . reference must be made to the law of the situs, as the question of whether the fund shall be distributed to the devisee of the realty under the terms of the will is dependent upon the validity of the original devise thereof . . . which must be determined under the law of the situs of the land itself."<sup>81</sup> Up to this point the reader would still believe that the devise was illegal under "Swiss law," but the court made the following inquiry:

. . . [T]he court is confronted at the outset with a preliminary question as to the meaning of the term "law of the situs"—whether it means only the internal or municipal law of the country in which the property is situated or whether it also includes the conflict of laws rules to which the courts of that jurisdiction would resort in making the same determination. If the latter is the proper construction to be placed upon that term, then this court must, in effect, place itself in the position of the foreign court and decide the matter as would that court in an identical case.<sup>82</sup>

After having put the reader on notice by this inquiry which injected the doctrine of *renvoi* into the case, the court stated that ". . . the rights which were created in that land are those which existed under *the whole law* of the situs and as would be enforced by those courts which normally would

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<sup>79</sup> NUSSBAUM, AMERICAN-SWISS PRIVATE INTERNATIONAL LAW 23 (1951).

<sup>80</sup> *In re Schneider's Estate*, 198 Misc. 1017, 1019, 96 N. Y. S. 2d 652, 655 (1950).

<sup>81</sup> *Id.* at 1017, 1020, 96 N. Y. S. 2d at 656. For the latter proposition the court cited *Monypeny v. Monypeny*, 202 N. Y. 90, 95 N. E. 1 (1911), and *Matter of Del Drago's Estate*, 287 N. Y. 61, 38 N. E. 2d 131 (1941), *rev'd on other grounds*, 317 U. S. 95 (1942).

<sup>82</sup> *In re Schneider's Estate*, *supra* note 80 at 1020, 96 N. Y. S. 2d at 656.

possess exclusive judicial jurisdiction.”<sup>83</sup> The Surrogate, after stating that the precise question presented (*viz.*, whether the law of the situs implies a reference to the entire law of the situs including its conflict of laws rule) was one of first impression in the State of New York, held that “. . . a reference to the law of the situs necessarily entails a reference to the whole law of that country, including its conflict of laws rules.”<sup>84</sup> The Surrogate categorically rejected the statement found in the New York case of *Matter of Tallmadge*<sup>85</sup> that “*renvoi* is no part of the New York law”<sup>86</sup> and stated that the law of New York is “in agreement with the principle stated in . . . the Restatement . . .”<sup>87</sup> of the Conflict of Laws. Although the Restatement otherwise rejects *renvoi*,<sup>88</sup> the doctrine is accepted in matters affecting title to land and questions concerning the validity of a decree of divorce.<sup>89</sup>

Since it was clear that the Court would apply the whole law of Switzerland, its attention was called to the Swiss-American treaty of 1850<sup>90</sup> which specifically provided in Article VI that: “Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property is situated.” This treaty provision did not disturb the court nor did it call for a different solution than the one the court proposed to apply. The court said that it “. . . merely directs, as does the common law of this State, that initially a reference must be made to the law of the situs. But the conflict of laws rules and the rules concerning the rights and privileges of foreign nationals and domiciliaries are as much a part of the

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<sup>83</sup> *Id.* at 1021, 96 N. Y. S. 2d at 656 (emphasis added). The theory of *renvoi* accepted by the Surrogate is generally referred to as the “substitution” theory. See Note, *Renvoi Revived*, 31 B. U. L. REV. 69, 75 (1951).

<sup>84</sup> *In re Schneider's Estate*, *supra* note 80 at 1022, 96 N. Y. S. 2d at 657.

<sup>85</sup> 109 Misc. 696, 181 N. Y. Supp. 336 (Surr. Ct. 1919).

<sup>86</sup> *Id.* at 711, 181 N. Y. Supp. at 345 (emphasis added).

<sup>87</sup> *In re Schneider's Estate*, *supra* note 80 at 1023, 96 N. Y. S. 2d at 659. RESTATEMENT, CONFLICT OF LAWS § 8(1) (1934).

<sup>88</sup> RESTATEMENT, CONFLICT OF LAWS § 7 (1934).

<sup>89</sup> *Id.* § 8.

<sup>90</sup> 11 STAT. 587 (1850).



'laws' of the situs as are its internal laws. . . ." <sup>91</sup> The court, therefore, from an examination of the authorities and materials submitted by the expert witnesses formed its conclusion <sup>92</sup> that under the facts of the case "the Swiss law would refer a matter such as this to the New York internal law, under which law the will is a valid disposition of the testator's property." <sup>93</sup> The court, therefore, held the devise to be valid and ordered that the proceeds from the sale of Swiss realty be distributed to the devisee notwithstanding the invalidity of such a devise under Swiss internal law.

## IX

### MEANING OF "LEX" RE-EXAMINED

Without prolonging the discussion unduly, it is clear that by the stratagem of *renvoi* in the *Schneider* case the Surrogate applied New York law to a devise of Swiss realty. Actually there is a serious question as to whether the court properly construed the Swiss law since the result has been severely criticized by authorities on Swiss law both here and abroad. <sup>94</sup> What is significant is the court's revival of the *renvoi* doctrine <sup>95</sup> and its specific application in a New York decision. Although much has been written about the doctrine <sup>96</sup> it has been generally understood that *renvoi* is

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<sup>91</sup> *In re Schneider's Estate*, *supra* note 80 at 1025, 96 N. Y. S. 2d at 660.

<sup>92</sup> See N. Y. CIV. PRAC. ACT § 344-a pursuant to which a trial or appellate court, in its discretion, may take judicial notice of foreign law.

<sup>93</sup> *In re Schneider's Estate*, *supra* note 80 at 1026, 96 N. Y. S. 2d at 661.

<sup>94</sup> See NUSSBAUM, AMERICAN-SWISS PRIVATE INTERNATIONAL LAW 21 *et seq.* (1951). Prof. Nussbaum, discussing the power to acquire and dispose of property, stated that "[t]he situation . . . has recently and unexpectedly become even more complex and confused by a juridically elaborate decision of a New York Surrogate's Court." *Id.* at 121. For discussions in foreign legal periodicals see footnote 76 in Prof. Nussbaum's *American-Swiss Private International Law*. In footnote 77 he states: "In the present case, *renvoi* was not pleaded by the parties. The court was apparently misled by an excess of theoretical study."

<sup>95</sup> See Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938); Cowan, *Renvoi Does Not Involve a Logical Fallacy*, 87 U. OF PA. L. REV. 34 (1938); Griswold, *A Reply to Mr. Cowan's Views on Renvoi*, 87 U. OF PA. L. REV. 257 (1939).

<sup>96</sup> Cormack, *Renvoi, Characterization, Localization and Preliminary Questions in the Conflict of Laws*, 14 SO. CAL. L. REV. 221 (1941); Falconbridge, *Renvoi, Characterization and Acquired Rights*, 17 CAN. B. REV. 369 (1939);

not a part of the American law of Conflict of Laws.<sup>97</sup> This view of the state of the law seemed to be well supported by judicial decisions.<sup>98</sup> The *Schneider* case, however, is a warning beacon indicating that the *renvoi* doctrine is not dead.<sup>99</sup>

It would seem unduly facile to urge that most of the discussion by the Surrogate concerning the law that would govern a devise of foreign realty was dicta since in fact the court was not dealing with foreign realty but with a fund having a New York situs. Whether or not one would agree with the conclusion of Mr. Sommerich that the decision was "thoroughly practical and eminently sound,"<sup>100</sup> there can be no question that the decision warrants serious consideration.<sup>101</sup> It is clear that the decision has stirred up "the hornets' nest of *renvoi*."<sup>102</sup> Again ancient discussions will become current. If the reference is to the whole law of the foreign country, and the conflict of laws rule of that country makes reference to the "law" of another country, is this latter reference to the "whole" law or only to its internal law? Obviously if we are to avoid the "*circulus inextricabilis*" referred to in *Matter of Tallmadge*<sup>103</sup> one of the references

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Lorenzen, *The Renvoi Doctrine and the Conflict of Laws—Meaning of the "Law of a Country,"* 27 YALE L. J. 509 (1918); Lorenzen, *The Renvoi Theory and the Application of Foreign Law,* 10 COL. L. REV. 190 (1910); Schreiber, *The Doctrine of Renvoi,* 31 HARV. L. REV. 523 (1918).

<sup>97</sup> STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 11 n. 28 (2d ed. 1951).

<sup>98</sup> Although *Matter of Tallmadge*, 109 Misc. 696, 181 N. Y. Supp. 336 (Surr. Ct. 1919), was the opinion of a referee, it was approved by the Surrogate and involved a complete discussion of the problem and the authorities. See also *Apton v. Barclay's Bank, Ltd.*, 91 N. Y. S. 2d 589 (Sup. Ct. 1949), *rev'd on other grounds*, 276 App. Div. 910, 94 N. Y. S. 2d 1, *aff'd*, 301 N. Y. 601, 93 N. E. 2d 495 (1950); *Lann v. United Steel Works Corp.*, 166 Misc. 465, 1 N. Y. S. 2d 951 (Sup. Ct. 1938); *Gray v. Gray*, 87 N. H. 82, 174 Atl. 508 (1934).

<sup>99</sup> In this connection, see *Mason v. Rose*, 176 F. 2d 486 (2d Cir. 1949) (where the court made a reference to the *whole law* of England), and *In re Zietz' Estate*, 198 Misc. 77, 96 N. Y. S. 2d 442 (Surr. Ct. 1950) (where Surrogate Frankenthaler, who decided the *Schneider* case, referred to the *whole law* of Austria).

<sup>100</sup> Sommerich, 126 N. Y. L. J. 1304, col. 2 (Nov. 20, 1951).

<sup>101</sup> See 26 N. Y. U. L. REV. 201 (1951); 50 COL. L. REV. 862 (1950); 64 HARV. L. REV. 166 (1950).

<sup>102</sup> In *Mason v. Rose*, 176 F. 2d 486 (2d Cir. 1949), Judge Frank, who concurred in the decision of the case, strongly regretted that the decision rested on the *renvoi* doctrine. He wrote: "In the present case, where we all agree on the result . . . I think we should be wary of unnecessarily stirring up the hornets' nest of *renvoi* along the way." *Id.* at 491 (emphasis added).

<sup>103</sup> 109 Misc. 696, 712, 181 N. Y. Supp. 336, 346 (Surr. Ct. 1919).

must be to the *internal* law of some jurisdiction. In the *Schneider* case the merry-go-round of references came to a halt at an early stage in the chain of references since the court concluded that the Swiss court would refer the matter to the *New York internal law*. If this doctrine is to be implemented in the future, it is fair to guess that this is the manner in which it will be done.

## X

### CONCLUSION

As is indicated by the foregoing discussion the doctrine of *renvoi* is perhaps the sole serious factor that injects a real element of uncertainty in future cases dealing with a devise of foreign realty. The *lex loci rei sitae* rule, as explained previously, enjoys a long history of application and the approval of countless authorities. It is not likely that it will be easily displaced by a new or different interpretation of the word *lex*—as to whether it refers solely to the internal law of another jurisdiction or also to its conflict rules. The conventional rule and the manner of its application can be observed in the *Melon* case.<sup>104</sup> The *Schneider* case indicates what is a possible result if the forum chooses to implement the doctrine of *renvoi*.

It does not seem likely that courts will readily relinquish the existing clarity and harmony of decisions in favor of the promised uniformity<sup>105</sup> that theoretically would result from the application of *renvoi*. Nevertheless, any sound prediction as to the result in a given case must now seriously consider the threshold question whether the forum will apply *renvoi*. It is hoped that the highest court of the state will soon have the opportunity to pass authoritatively upon this question and put at rest the many doubts that have been recently revived.

Apart from the application of *renvoi*, from an examination of the cases and the commentaries, it becomes evident

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<sup>104</sup> See note 72 *supra*.

<sup>105</sup> See Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1190 (1938).

that in matters affecting the disposition of local realty, a deviation from the *lex situs* rule requires a local statute which expressly changes the existing rule. As in the case of other statutes clearly in derogation of the existing common law such statutes are likely to be strictly construed. In no event would a transfer be tolerated which would be void or against the land policy of the situs. It is perhaps accurate to say that, only with the most minor qualifications, Mr. Hening correctly summarized this entire body of law as follows: "To secure the expeditious and safe transfer of titles to real estate it is far preferable that the law of the situs should be indiscriminately applied to all wills of real estate."<sup>108</sup>

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<sup>108</sup> See note 31 *supra*.