

THE  
AMERICAN LAW REGISTER.

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MARCH 1886.

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TESTAMENTARY PROVISIONS AS AFFECTED BY THE  
RULES OF PRIVATE INTERNATIONAL LAW.

Plaisante justice qu'une rivière ou un montagne borne.—PASCAL.

SECT. I. INTRODUCTORY.

MUNICIPAL laws cannot *proprioire vigore* have any extra-territorial bearing or effect. This limitation of their scope leaves two classes of cases unprovided for : First, cases arising between states having no common superior ; secondly, cases where the subjects of one state have rights or obligations which are questioned or impaired in another. The first class of cases is settled by the Public International Law, a set of rules emanating from common agreement in practice, or the original compacts of states. And to determine before the courts of what state a case of the second class is to be heard, and by the law of what state determined, is the special province of International Private Law. This system consists of rules of interstate comity, affecting to regulate the rights and acts of persons as depending on a diversity of laws and jurisdictions. It acknowledges the binding force of municipal laws, and its problem is to ascertain the principles on which such laws, as such, are binding between members of different states ; and to determine which municipal law is, by those principles, to be applied in a particular case : Westlake, Priv. Int. Law, ch. 11. If a decedent, domiciled in one state, has left a will disposing of personalty at home, and realty situate in a foreign or sister state, questions may arise as to his capacity, the solemnities of the execution of the will, or the validity of its dispositions ; and when such questions do arise

a problem of practical difficulty is presented: where and how are they to be determined? When, therefore, a set of facts has to be regulated in accordance with law, two questions of capital importance are at once presented for solution: First, what state has jurisdiction to apply the law? And, secondly, what law will it apply? The former of these questions is said to relate to the proper *forum*; the latter to the appropriate *lex*: Holland, Jurisprudence 305. We will now consider these in order.

## SECT. II. THE PROPER FORUM.

### A. CASES RELATING TO PERSONALTY.

As a general rule, the court of the domicile is the proper forum in which to raise questions in wills of personalty, even though the property be situate in another state: *Gilman v. Gilman*, 52 Me. 165. The court of the domicile, it is said, is the *forum concursus* to which the legatees under a will of a testator or the persons entitled to the distribution of an estate of an intestate are bound to resort: *Enohin v. Wylie*, 10 H. L. Cas. 1. The apparent violation of sovereignty implied in the action of one state assuming to regulate the disposition of property in another, is eliminated by the fiction *mobilis sequuntur personam*; by which, though the movables are in point of fact within the territory of a different state, yet in contemplation of law they are considered as having followed him to the place of his last domicile. The general rule is, however, subject to the limitation that, for certain purposes, the *forum rei sitæ* may also take cognisance of the will; as, for example, to construe the will for the direction of ancillary administrators: *Parsons v. Lyman*, 20 N. Y. 103; or to try the validity of foreign bequests, where the title to the bequeathed property is claimed by a citizen of a foreign state: *Burbank v. Payne*, 17 La. Ann. 15. Upon the death of a person leaving property in two or more states or countries, his property in each is considered a separate succession for the purposes of administration, the payment of debts, and the decision of claims of parties asserting title to the property. So Lord KAMES: "In a legal view, a movable situated within a certain territory is subjected to the judge of that territory; and every action claiming the property or possession of it must be brought before that judge, as no other judge has authority over it." Kames, Principles of Equity, B. 3, c. 8, sect. 3. We have, therefore, the fiction that the domicile draws to it the personal estate wherever it

may chance to be; but the fiction yields whenever, for the purposes of justice, the actual *situs* of the property should be examined: *Green v. Van Buskirk*, 7 Wall. 139.

#### B. CASES RELATING TO REALTY.

The exclusive right of the sovereign to command within its own territory, and the intimate relation which feudalism established between the sovereignty of the territory and the lordships of the soil, furnish the basis for the exclusive claim of the courts of the *locus rei sitæ* to entertain suits respecting the realty. The rights of the ownership of land receive the protection of the state where the land lies, and of no other; and the protection of these rights draws with it the just claim to regulate them. Moreover, no state, by its laws, can affect to regulate the rights respecting immovables in another state, since it cannot enforce its own decree without a violation of the foreign territorial sovereignty. These two grounds concur to sustain in reason the claim of the courts of the *situs*.

An incidental effect of this rule is, that it becomes necessary for an executor of a decedent, who has left land in two or more states, to take out letters in each state. For by taking out letters in one state, he becomes an officer of its courts, and as such, cannot sue (*Morrell v. Dickey*, 1 Johns. Ch. 153; *Noonan v. Bradley*, 9 Wall. 394), or be sued (*Vaughan v. Northup*, 15 Pet. 2; *Caldwell v. Harding*, 5 Blatch. 50), in another state without becoming an officer of its courts also.

There is, however, an exception to the general rule that the *forum rei sitæ* possesses exclusive jurisdiction when the judgment of a foreign court would act *in personam*, as *e. g.*, in an action of specific performance against a foreign executor found within the jurisdiction. The process, in such case, would operate against him alone, and in no wise affect the foreign state: *Massie v. Watts*, 6 Cranch. 148.

### SECT. III. THE APPROPRIATE LEX.

#### A. CASES RELATING TO PERSONALTY.

1. *As to Testamentary Capacity.*—The modern Roman law and the common law, divergent as they often are in questions of the conflict of laws, agree in the rule that the law of the actual domicile of the testator at the time of his death, governs on the point of his legal capacity to make a will: Savigny Pr. Int. Law 137; *Schultz*

v. *Dambman*, 3 Bradf. 379; *Cath. Roberts's Will*, 8 Paige Ch. 525; Whart. Conf. of Laws, sect. 570. If, therefore, the age of capacity differs in two states, and an individual makes a will valid by the laws of one, and subsequently acquiring a domicile in the other, dies before reaching the testamentary age according to that law, he would die intestate. The rule that he must be of testamentary age by the law of the domicile at the time of his death is inflexible: the rule *locus regit actum* cannot modify it: Fœlix, Droit International Privé. So, also, if a married woman is incapacitated to make a will by the law of her domicile at the time of her death, it will avail nothing that she made a will in a former domicile where she had such capacity: Story Conf. of Laws, sect. 70. Likewise, in our practice the jurisdiction in which wills of movables are litigated on the issue of sanity, is that of the decedent's last domicile; and the question is, whether by the law of that domicile the testator had a disposing mind: Whart. Conf. of Laws, sect. 574. And when the courts of the *forum situs* claim to decide the question of domicile (usual practice), they do not depart from the principle, but show that they hold it inviolable.

The stringency of the common-law rule in this regard has been departed from in England (24 & 25 Vict. c. 107), and many of our states (*e. g.*, New York, Code Civ. Proc., sect. 2612), so that now no change of domicile, under the laws of such states, avoids or affects a will, valid by the law of the domicile at the time of its execution: Whart. Conf. of Laws, sect. 570.

2. *As to Forms and Solemnities of Execution.*—On the question what law shall determine the validity of the execution of a will, there is a conflict between the jurisprudence of the continent and the common law of England. The former allows an option of conformity to the *lex loci actus*, or the *lex domicilii*, on the ground, according to Savigny, that “the object of law is to favor and facilitate, not to thwart the act of the party:” XXXVIII., sect. 381. Early opinion on the continent, however, was in favor of the *lex domicilii* governing. Vattel lays down the rule that the validity of a testament, as to its form, can only be decided by the judge of the domicile, whose sentence ought to be everywhere acknowledged: Law of Nations, B. 2, sect. 85. The common law of England accords with the earlier continental view; and is rigorous in the requirement that the forms and solemnities required by the law of the domicile at the testator's death be complied with: *Stanley v.*

*Bernes*, 3 Hagg. 374; *Grattan v. Appleton*, 3 Story 755; *Whicker v. Hume*, 7 H. L. Cas. 124; *Croker v. Marquis of Hertford*, 4 Moore Priv. Council Rep. 339; 10 Id. 361. Accordingly a will made in one state in compliance with the formalities there required, by one who subsequently becomes domiciled and dies in another state, is not valid unless conformable to the formalities prescribed by the latter state: the reason being that the will is not a completed act until the testator dies, and as he does not die abroad no principle of comity enters into the case: *Moultrie v. Hunt*, 23 N. Y. 394. And a will invalid by the law of the last domicile will not pass personalty in a foreign country, although executed with all the formality required by the local laws: *Desesbats v. Berquier*, 1 Binn. (Penna.) 336.

The rule as to formal execution of wills has also been abrogated in England and many of our states (24 & 25 Vict., c. 107), and the option of the modern Roman law permitted: *Irwin's Appeal*, 33 Conn. 128; N. Y. Code Civ. Proc., sect. 2612.

3. *As to Validity of Dispositions.*—Although there be a difference in the law as between the place of the last domicile, and the place where the movables are situate, still, if there be no positive law prohibiting the disposition made, the law of the domicile always governs: *Garland v. Rowan*, 2 Sm. & M. 617; N. Y. Code Civ. Proc., sect. 2694. The reason of this, in the language of Chief Justice ABBOTT, “is not that the law of England gives way to the law of the foreign country; but that it is a part of the law of England that personal property should be disposed of according to *jus domicilii*.” *Birtwhistle v. Varçill*, 5 B. & C. 438. When, however, the law of the domicile comes in conflict with an express statute of another jurisdiction, it loses its binding force: *Harper v. Stanbrough*, 2 La. Ann. 377. It is a maxim that the law of comity cannot prevail in any case where it violates the law of our country, the law of nature, or the law of God: BEST, J., in *Forbes v. Cochran*, 2 B. & C. 448. For it is the attribute of every government, as a necessary result of its sovereignty, to establish such modifications of the right of property in things within its jurisdiction, as the public interest and the policy of its laws require. Indeed, an explicit interdiction is not necessary to prevent the operation of the rule of the *lex domicilii*. It has been held that the interdiction may result from general laws declaring public policy, as well as special laws covering the precise point: *Mahorner v. Hooe*, 9 Sm. & M. 247.

This condition of the law leads to the remark that testamentary bequests often have to comply with the laws of two states. For if a will, by the law of the domicile, have all the forms and requisites to pass title to personalty, the validity of particular bequests may still depend on conformity with the law of the domicile of the legatee: *Chamberlain v. Chamberlain*, 43 N. Y. 433. So it was expressly decided that a bequest by a citizen of this state to a charity to be administered in a sister state, although lawful by the law of the state, the domicile of the testator, was invalid for non-compliance with the laws of the state where the fund was to be administered: *Kerr v. Dougherty*, 79 N. Y. 327.

4. *As to Construction.*—Where a person has several residences and makes a will disposing of his personal estate, the law presumes that the will was made with reference to the law of his domicile: and wherever such will becomes the subject of legal inquiry, that is the law to be applied in its legal interpretation and construction: *Trotter v. Trotter*, 4 Bligh. (N. S.) 502; *Parsons v. Lyman*, 20 N. Y. 103; see Code Civ. Proc., sects. 2612, 2694. Where a testator domiciled in England made a will in Scotland, disposing of movables, Lord BROUGHAM said: “His written declarations must \* \* \* be taken with respect to the English law. I think it follows from hence, that these declarations of intention touching that property must be construed (by the Scotch court) as we should construe them here, by our principles of legal interpretation:” *Yates v. Thomson*, 3 Cl. & Fin. 544. So where movables are bequeathed to a testator’s “heir at law,” it is presumed the testator intended him who is heir by the law of domicile: *Harrison v. Nixon*, 9 Pet. 483. And where a lady domiciled in England, resided for a long period in Scotland, and there made a will bequeathing an absolute interest in her personal property, the legatee having died in her lifetime, it was held that the law of England governed the construction, and that by that law her representatives, and not those of the legatee, were entitled; though by the law of Scotland the interest does not lapse by the death of the legatee: *Anstruther v. Chalmers*, 2 Sim. 1. The same rule was subsequently followed in the House of Lords, in a case where a testator domiciled in Russia, made a will in the Russian language, disposing of certain personal property in England. The will was construed, in the latter country, in accordance with the law of Russia: *Enohin v. Wylie*, 10 H. L. Cas. 1.

## B. CASES RELATING TO REALTY.

It is the common and received opinion, with respect to immovables, that the law of the place where they are situate is to govern in their transfer and devolution. *Communis et recta sententia est, in rebus immobilibus, servandum esse jus loci in quo bona sunt sitæ*: Huberus, de Confl., Leg. I., liber 3, tit. 13. This principle is doubtless to be attributed to the feudal system, and is adhered to more rigidly in England and America than in continental Europe. It may be stated generally that the *lex situs* is to be applied to determine the character of the property: Fœlix, Droit Int. Privé, No. 60, n, the rights of which, the diverse kinds may be the subject, and the persons to be admitted to the enjoyment of these rights: *Newlands, v. Chalmers's Trustees*, 11 Sh. & Dunl., Ses. Cas. 65. And it must be further consulted respecting the modes which, with due regard to the public interest, this law has provided for the acquisition, protection and transmission of these rights: *Beatar v. Smith*, 3 Knapp 143. For convenience, the same classification may be made as in the rules relating to personalty.

1. *As to Testamentary Capacity*.—The real statute in regard to capacity to devise, is in the common law, applied with the utmost rigor. If a person is incapable by the *lex rei sitæ* of transferring his real estate, any will of it made by him will be invalid, though by the law of his domicile or by the law of the place where the act is done, no such incapacity exists: IV. Phil. Int. Law 448; N. Y. Civ. Proc., sects. 2612, 2694. This, however, is not the uniform opinion of the continental jurists. Those authorities are about equally divided between this principle and the rule that the law of the domicile should govern, with the great names of Grotius, of Savigny and of Fœlix, in favor of the latter view: Wharton Confl. Laws, sect 570, n. 3. But the first principle is acted upon with great unanimity in this country. See *Eyre v. Storer*, 37 N. H. 121.

2. *As to Forms and Solemnities of Execution*.—As the disposition of real property is exclusively subject to the law of the state where it is situate, it is the sole privilege of that law to prescribe the form of instrument by which the title may be transferred: *McCormick v. Sullivant*, 10 Wheat. 192; N. Y. Code Civ. Proc., sects. 2612, 2694. This branch of the general rule was laid down in an early case, where a will was made beyond sea, which did not conform to the formalities of the English law. The court said: "The

will, *as to the land*, must be void; and it makes no difference that the will was made beyond sea, the same being lands in England, which if they pass by will, must pass by such a will and so circumstanced and attested as the laws of England require:" *Coppin v. Coppin*, 2 P. Wms. 293; *Doe v. Pickett*, 51 Ala. 584. Following this principle, it has been held that where a local statute provided that no foreign will should affect real estate unless filed in the county where the land lay, the requirement of the statute must be strictly complied with, or the will would be inoperative as to such land: *Kerr v. Moon*, 9 Wheat. 565. It may therefore happen that a will would fail to pass really in a foreign jurisdiction, by reason of non-compliance with the formalities prescribed by the *lex rei sitæ*, and yet be valid to pass personalty there; compliance with the law of the domicile being sufficient for that purpose: *Potter v. Titcomb*, 22 Me. 303. And conversely, a will void for informality, by the law of the domicile, or where made, may yet be effectual to pass title to real property in another state, by reason of its due execution according to the solemnities there required; though it would be invalid as to personalty there also: *Holman v. Hopkins*, 27 Tex. 39.

A question as to leaseholds arises at this point. Are they to be governed by the law of the owner's last domicile, or the law of the place where the land lies? In the Roman law and systems derived from it, they are governed by the same law as the land, being included in the term immovables. And this is the rule in England; *Freke v. Lord Carbery*, L. R., 16 Eq. 466. In New York, however, a leasehold, for this purpose, as well as for others, is considered to be personal property, and is allowed to pass by a will not within the requirements of the Revised Statutes, provided it be valid by the law of the last domicile: *Despard v. Churchill*, 53 N. Y. 192; the rule would now be this way under sects. 2611, 2612, Code Civ. Proc.

3. *As to Validity of Dispositions*.—On this point there is no conflict. It is universally agreed that the *lex rei sitæ* is to prevail not only in the matter of the transfer of lands, but also as to the nature, extent and purpose of the dispositions: *White v. Howard*, 52 Barb. 306; s. c. 46 N. Y. Code Civ. Proc., sect. 2694. Accordingly, in a state where the birth of a posthumous child operates to nullify a will, a testator domiciled elsewhere cannot dispose of property to the disinheritance of a child born

after his death: *Eyre v. Stover*, 37 N. H. 114. Although properly executed by the law of the domicile, and effective to pass real estate there, the birth of a posthumous child would operate as an abatement of all devises of property situated in the foreign state: *Kingsbury v. Burnside*, 58 Ill. 337. So, also, where a foreign testator devises real estate, situate here, to certain charitable uses, it becomes incumbent on the courts of this state to determine, not only the validity of the dispositions, but also the capacity of the charitable bodies to take the property intended for them: *White v. Howard*, 52 Barb. 306. And where a legacy is left a wife in lieu of dower in foreign lands, and she refuses the legacy and claims her dower, the dower is to be admeasured according to the law of the state where the lands lie: *Bolton v. Sigler*, 29 Ark. 426. The question whether dower extends to all the lands of which the husband was at any time seised, or simply to those of which he died seised, is likewise determined by the same law: *Id.*

4. *As to the Construction.*—It has been said that the law of the last domicile is to furnish the rule of construction of wills, as well of realty as of personalty, unless it clearly appears from the terms of the will that the testator had in mind the law of the foreign jurisdiction: *Story Conf. Laws*, sect. 479 h. But notwithstanding the great authority of the writer who so states it, the rule as thus laid down is not borne out by the cases, and is undoubtedly opposed to the analogies of the law in this regard: *Whart. Conf. Laws*, sect. 597. As early as 1682, the courts of England refused to construe a will made in Dutch, and disposing of land in England, according to the law of Holland: *Bovey v. Smith*, 1 Vern. 85. The court said: “As to what was objected that in Dutch they never use the word ‘heir,’ that signifies nothing; for a will that concerns land in England must be so framed as by the law of this realm is required for the passing of estates, as hath been several times resolved in cases of Latin wills and the like”: *Id.* And the courts of this country are equally explicit: *Jennings v. Jennings*, 21 Ohio St. 56. Where the question was whether equitable conversion of lands here situate had taken place by the terms of a foreigner’s will, the judge said: “It is for the courts of New York, as to the real estate in New York, to construe the will,” and to construe it by our law: *White v. Howard*, 52 Barb. 306. Also where the question was whether after-acquired realty passed by a general devise of land “wherever situate,” it was held that the judge of the *situs* apply-