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?

(*Second Part.*)

II. Foreign Wills of Realty Construed by the Courts of the Situs.

In the preceding part of this article in the November number[1] an examination was made of the cases where courts of the domicil have construed a will devising foreign real estate, and the conclusion was reached that in no such case has a court of the domicil enforced its own rule of construction where a contrary rule of construction existed in the court of the situs.

We now pass to the inquiry, Have the courts of the situs enforced their own law, or that of the foreign domicil of the testator in construing foreign wills, devising realty within their jurisdiction?

Yates v. *Thompson*,[2] decided by the House of Lords in 1835, is repeatedly cited by text-writers in the present connection, and for this and other reasons about to appear, this case should here be examined, although it cannot properly be classified as one where the court of the *situs* construed a foreign will devising real estate. The testator domiciled in England bought the Island of Shuna in Scotland in 1815, paid part of the purchase money down, and deposited the balance in the Bank of Scotland to be paid when the title became clear. The testator made several wills in England. In one will, he declared that the deposits above named should be paid over by the trustees to his English executors and applied to discharge the debt. He subsequently executed a trust deed of Shuna, declaring that

[1] See American Law Register, November, 1902, p. 623.

[2] 3 Cl. and Fin. 544, 1835.

in a separate will respecting his English property he had directed his trustees to endorse the receipts for the said deposit to the Scotch trustees. He afterwards made a will disposing of all his personal property wherever situated to his nephew. The nephew obtained probate of the will and claimed thereunder the bank deposit.

"It is on all hands admitted," said Lord Brougham, L. C., "that the whole distribution of Mr. Yates's personal estate must be governed by the law of England." The Court of Sessions of Scotland had admitted in evidence a prior will of the testator, in order to ascertain his intention, and the question was whether the admission of this evidence was error. The House of Lords on appeal held that it was not error, that there was not "any inconsistency in applying the English rules of construction and the Scotch ones of evidence."

It will therefore be noted that this case related exclusively to personal property—money of the testator applied by him to the payment of a purchase of real estate. The case, however, contains the following important dictum of Lord Brougham:

"Where the question is what a person intended by an instrument relating to the conveyance of real estate situated in a foreign country, and where the *lex loci rei sitae* must govern, we decide upon his meaning by that law, and not by the law of the country where the deed was executed, because we consider him to have had that foreign law in his contemplation."

Turning to the first case in order of time, so far as I have found, where a court of the situs has been confronted with this question, we find that *Applegate* v. *Smith*,[3] decided by the Supreme Court of Missouri in 1880 is a direct authority against Mr. Thorndike's and Professor Minor's contention. The facts sufficiently appear in the following extract from the opinion: Scott, J.: "The only material point in this "case is whether the after-acquired lands passed by the "devise. The will was made in Kentucky and by the law "of that state there must be something in the will itself

[3] 31 Mo. 166, 1880.

"which showed that after-acquired lands were intended to be "passed by it in order that it may have that effect. A gen- "eral devise of all his property, or of all his estate or a gen- "eral disposition of his land, will not authorize such a deduc- "tion. But his intention to devise whatever interest he "may own in land at his death must be disclosed by the "language used, or by the actual import of the provisions "contained in the will. Story in his Conflict of Laws, "speaking of wills of immovable property or lands (Section "474) says, that 'the law of the place where the property is "locally situate is to govern as to the capacity 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.' According to this principle we are "to construe the will with an eye to the laws of Missouri, so "far as the land situated within her limits is concerned. We "consider that the case of *Liggat* v. *Hart*[4] settles the one "now under consideration."

Mr. Thorndike's answer to this case is that it was decided "by a misapplication of the rule that the validity and forms of transfers of real estate are governed by the *lex situs.*" But this reply is based on the assumption that only the capacity of the testator and the validity of his execution of his will is governed by the law of the situs. This assumption, I contend, is supported neither by reason nor authority. Professor Minor says of *Applegate* v. *Smith* that it is one of "a few cases (which) may be found holding that the interpretation of the devise must depend upon the *lex situs.*"[5]

In *Jennings* v. *Jennings,* decided by the Supreme Court of Ohio in 1871, the facts were as follows:

The testator died domiciled in West Virginia devising real estate situated in both West Virginia and Ohio. His will was admitted to probate in both states and contained a devise to his widow. By the law of West Virginia a devise to a widow, as at common law, was presumed to be in addition to her dower. By the statute law of Ohio such a

[4] 23 Mo. 127.

[5] The professor cites in this category also *Yates* v. *Thompson,* 3 Cl. and Fin. 544, 1835; *Jennings* v. *Jennings,* 21 Ohio St. 56, 1871.

devise was presumed to be in lieu of dower unless a contrary intention was shown in the will. It was held that the law of Ohio controlled the question of the widow's interest in lands in that state and that the widow under the law of Ohio could not waive the will and take a dower right as against the will without the devisee receiving in lieu of his devise the lands in fee simple devised to the widow and which she rejected. The Court said: "Now in the case of "a foreign will, devising lands situated in this state, is its "construction to be governed by the law of the testator's "domicile or by that of this state within which the lands "devised lie? Laws cannot *proprio virgore,* have any extra "territorial operation or effect. And in regard to wills of "real property, it is well settled by all the authorities, that "the construction, as well as the mode of execution and "validity of such wills must be governed exclusively by the "*lex rei sitae.*"

"No principles of comity require that in a will of real "property the construction and effect of plain and unambiguous terms shall be governed by the law of the domicile and "not by the law of the place where the property is situated. ". . . . Now if the foreign and the domestic will both "stand on the same footing are both to have the same legal "force and efficacy? They must both be subject to the "same general law of construction, unless the statute provides otherwise. To hold otherwise would be to give an "operation and effect to the one, which is denied to the other; "and to make the construction and effect of the testator's "will, in its operation upon titles to lands in this state, "depend upon the law of another sovereignty."

Of *Jennings* v. *Jennings,* Mr. Thorndike says that it is decided by a misapplication of the rule as to capacity and execution, and Professor Minor classifies this case as among the few improperly decided.

Studd v. *Cook,*[6] decided by the House of Lords in 1883, is next to be considered.

On first reading this case it looks like one in which the court of the situs (the Court of Sessions in Scotland) applied the *lex domicilii,* and not the *lex rei sitae*—known as

[6] H. of L. 57, Court of Sessions Cases, 1883.

the rule in Frog's case. Accordingly this case is cited in the note of Mr. Thorndike to Story[7] to support his view. On examination, however, it will be seen that the estate was held to be a life estate under the law of Scotland as that law was affected by an Act of Parliament,[8] and also by the proper meaning and application of the rule in Frog's case. In other words, there was a distinct recognition of the contrary doctrine to that of Story by the court of the *situs,* and by the House of Lords on appeal.

The testator domiciled in England devised English and Scotch estates. The question was whether a rule of interpretation known in Scotch law as the rule in Frog's case so governed, as to give the pursuer a fee or whether he took a life rent—and not whether the Scotch rule or the English rule of construction governed.

Lord Watson: "I venture to think that the real if not "the only question which the House has to consider in this "case is, to what extent and effect has the old rule of the "Scotch law been relaxed in the case of a foreign will by "these statutory provisions?

". . . . What I think the Legislature did intend, and "have provided is, that the intention of the testator shall be "gathered from the whole context of the will *interpreted by* "*the rules of English law.* In the second place, even if the "words on which the argument is founded fell to be con- "strued according to the law of Scotland, the rule established "in *Frog's Creditors* v. *His Children,* and the series of "decisions by which that case has been followed is not an "inflexible rule, but must yield to reasonable presumption "that the maker of the deed intended otherwise; and the will "of General Studd contains numerous provisions clearly "indicative of his intention that the appellant's interest "should be restricted to a liferent."

Lord Fitzgerald: "I take it then to be part of the *lex* "*rei sitae* that a gift or devise to a parent in liferent and "after his death to his unborn children in fee confers a fee "on the parent from a supposed necessity . . . The rule

[7] P. 651.

[8] Sec. 20, Titles to Land Consolidation (Scotland) Act; 31 and 32 Vict. c. 101, s. 20.

"however yields to the addition of restrictive words, and if "proper words be added restricting the parent to a liferent, "if he takes the fee it is only in a fiduciary character.

". . . . We have now before us the will of a domi- "ciled native of England expressed in the proper language "of the county where it was made, and we interpret it accord- "ing to the law of the testator's domicil: *but so far as it "deals with immovable property in Scotland its application "and the right of the parties claiming under it are to be "determined by the lex rei sitae.* Adopting, but not extend- "ing the rule in Frog's case . . . I concur in the opin- "ion expressed by your Lordships that the testator has ade- "quately and sufficiently, according to the law of Scotland "indicated his intention to restrict the pursuer to a liferent." This case is not mentioned by Professor Minor.

We will next examine two cases cited by Professor Minor in support of his contention that the construction of wills of realty should be in accordance with the *lex domicilii.* The first case gives a decision of the court of the domicil of the testator and the second a decision of the court of the *situs.* The two cases should be examined together. The cases are *Van Steenwyk* v. *Washburn,*[9] and *Washburn* v. *Van Steenwyk.*[10]

The testator, domiciled in Wisconsin, devised certain real estate in Wisconsin and Minnesota to his executors in trust for his wife, who for years had been insane and under guardianship. The executors brought a bill in Wisconsin against the guardian to compel an election. The Wisconsin Supreme Court held that the widow was put to her election, exercised the right of election for the widow, and accepted the provisions of the will. The Supreme Court of Wisconsin said:

"Of course the personal property will be governed by the "law of the domicil, so that the election which has been made "will dispose of all questions relating to the personal estate "and the real estate situated in this state. How this election "may or should affect the rights of the widow in real "property in other states is a point upon which we decline to

[9] 59 Wis. 483, February 6, 1884.
[10] 32 Minn. 336, July 21, 1884.

"express an opinion although the executors ask us to decide "the question here. But it seems to us that the decision of "that question may properly be left to the tribunals of the "state where such real estate is situated. . . . But "suffice it to say, we shall not attempt to define the rights "of Mrs. Washburn in real estate in other states."

Here the court of the domicil expressly disclaimed all attempt to ascertain or apply the law of the *situs* of the Minnesota lands.

In *Washburn* v. *Van Steenwyk*[11] the Supreme Court of Minnesota held that Mrs. Washburn under the law of that state was put to her election and that the election had been exercised by the Court of Wisconsin.

The Court said: "Although the testator at the time of "his death, had his domicil in the state of Wisconsin, where "the will was executed, and where the widow still is domi- "ciled, we refer to the law of our own state for the rule of "descent of lands situated here. It is an established prin- "ciple of the law that real estate is exclusively subject to the "laws of the government within whose territory it is situated.

". . . . It is true that the Supreme Court of Wis- "consin did not assume jurisdiction over lands of Minne- "sota. But it did rightfully exercise jurisdiction to do what "its ward, if sane, might have done; it elected, in her behalf, "to take the bounty which the testator offered. This choice "determines the whole subject. It commits her to an "acceptance of the will, and she cannot also take *against* the "will either in that state or in this."

Here the court of the *situs* applied its own law without even the slightest reference to the law of the domicil, but merely held that the *act* of election had occurred in the court of the domicil—not that the law of the domicil determined the construction of the will as to the duty of election or whether election had been exercised.

Instead of proving the proposition of Mr. Minor these two cases show that the precise contrary of his contention was regarded by the Supreme Court of Minnesota to be the correct rule for construing devises of real estate.

These two cases are not mentioned in Mr. Thorndike's

[11] 32 Minn. 336, 1884.

note; the edition annotated by him having been published in 1883.

In *McCartney* v. *Osborn*[12] the Supreme Court of Illinois passed on the present question and decided it adversely to the doctrine advanced by Story and followed by Mr. Thorndike and Professor Minor.

A testator domiciled in Pennsylvania devised lands lying in Pennsylvania and Illinois. The Supreme Court of Pennsylvania construed the will and held that the word "heirs" as used in the will constituted a devise *per stirpes*.[13] The will subsequently came before the Supreme Court of Illinois and that court refused to adopt the construction of the Supreme Court of Pennsylvania, and said:

"Where a testator by a single will, devises lands lying in "two or more states, the courts of such states will respec- "tively construe it as to the lands situated in them, respec- "tively, in the same manner as if they had been devised by "separate wills. . . . the Pennsylvania court would "have the power to pass upon the question of insanity, but "not upon the rights of the parties to lands lying in this "state. We are unable to concur in the view that the "decision of the Pennsylvania courts is conclusive upon this."

In *Hobson* v. *Hale*,[14] the New York Court of Appeals, in construing a Massachusetts will *specifically* devising New York real estate, which was valid under the Massachusetts law, but conflicted with the New York laws as to the suspension of the power of alienation, held that the laws of New York must govern.

In *Richardson* v. *De Giverville*,[15] a French marriage settlement contract made in France was construed according to the law of Missouri. The Court said:

"The common law [says Story] declares that the law of "the *situs* shall exclusively govern in regard to all rights, in- "terests and titles in and to immovable property. (Story on "Conflict of Laws, Sections 428-46.) It follows from what "has been said that, so far as concerns the real property

[12] 118 Ill. 403, 1886.
[13] See Osburn's Appeal, 104 Pa. St. 637, 1883.
[14] 95 N. Y. 588, 1884.
[15] 107 Mo. 422, 1891.

"situated in this state, and owned by Miss Kingsbury at the "date of the ante nuptial contract, we must take the contract "as it is expressed on its face, and construe and apply it "according to the laws of this state. As respects this prop- "erty we have nothing to do with the French law. As to this "real estate the parties are to be deemed as having con- "tracted in reference to the laws of this state."

In the second class of cases, therefore, no case can be found where a court of the *situs* has construed a devise in accordance with a rule of property or a rule of construction of the domicil when that rule conflicted with its own rule.

III. Have the Courts of a Third Sovereignty Enforced the Law of the Domicil or the Law of the Situs?

In *Staigg* v. *Atkinson*,[16] the court of a third state, *i. e.*, a court neither of the domicil nor of the *situs*, construed a will devising real estate. One Richard Staigg made a will in Rhode Island, bequeathing an annuity to his wife and also making her a specific devise of real estate in Rhode Island. The testator after making his will moved to Massachusetts and died there.

The suit in question was brought by his widow against the executor to recover her share of lands sold in Minnesota, which the widow had joined in conveying but without prejudice to her rights therein, and the question before the Massachusetts court was whether she was entitled to this share. It was contended for the executor that the same rule should govern as if the land lay in Massachusetts, viz: that the plaintiff was compelled to elect between her dower and the will. The law of Minnesota (*i. e.*, the law of the *situs*) did not put the widow to an election, neither did the law of Rhode Island, where the will was made. The Supreme Court of Massachusetts held that the removal of the testator from Rhode Island to Massachusetts did not affect the construction of the will. The court said: "We cannot admit "that a rule of construction, properly so called, not known "to the law of the party's domicil when he made his will,

[16] 144 Mass. 564, 1887.

"is necessary to be imported into it by reason of his dying "domiciled elsewhere. For purposes of construction, it is "always legitimate to consider the time when and the cir- "cumstances in which the will was made, and we think the "law under which it was made is one of those circumstances. ". . . The testator was at liberty to make his gift to his "wife in lieu of or in addition to dower, as he saw fit. Which "it should be, he had to consider, if he ever considered it, "when he drew his will. He drew his will under a system by "which the gift was in addition to dower unless he expressed "the contrary and he did not express the contrary. We are "at a loss to see why his words should be held to acquire a "new meaning upon his moving into a new state where testa- "mentary gifts are in lieu of dower unless shown to be in "addition to it." P. 569.

Plainly the court did not attempt to pass on the question whether the law of the *situs* (Minnesota) or the law of the prior domicil (Rhode Island) determined the question of election; because there was no conflict of laws between those two jurisdictions. In fact the court expressly said: "Neither "need we pass upon the plaintiff's argument that the general "law of Minnesota should be accepted here as determining "the construction of the will, so far as concerns the effect "of accepting its provisions upon the plaintiff's right to "Minnesota land."

There being, therefore, no conflict between the law of the first domicil (*i. e.*, where the will was made) and the law of the *situs*, the case establishes nothing relevant to the present inquiry and is clearly not an authority supporting Professor Minor's view although cited by him for that purpose.[17]

Upon a review of all the authorities above discussed I think we may fairly dissent from Professor Minor's assertion that the doctrine of Story is supported by "the weight of authority" in 1901. On the contrary, I submit that the preponderance is decidedly the other way.

Before examining the reasons which may be adduced in support of the two contentions, I desire to call attention to what may be called the historical aspect of the question.

[17] Minor's Conflict of Laws, p. 341.

It should not be understood from the discussion of *Trotter* v. *Trotter* in the first part of this article[18] that Story's doctrine, that interpretation is governed by the *lex domicilii,* originated in nothing but a misconception on his part in 1834 of the point actually decided in that case by the House of Lords in 1828. The fact is, Story's doctrine is the one previously advanced by Continental writers, although in no extract from those writers given by Story (who quotes freely from them[19]) does it appear that they expressly stated that the *lex domicilii* governed the interpretation of a foreign will devising real estate or a will devising foreign real estate. Undoubtedly, however, the general proposition of the civilians that in all wills the intention should be determined by the *lex domicilii* was fairly understood by Story to apply to wills of immovable property.[20] But before Story's day this doctrine of the Continental writers as to the supremacy of the *lex domicilii* in all questions concerning the capacity of the testator and of the validity of the execution of a will encountered antagonism in England and was there distinctly repudiated. Indeed we find Story himself recording the history of this conflict between the English common-law doctrine of the *lex situs* and the civil-law doctrine of the *lex domicilii.* "We next pass," says Story, "to the consideration "of wills made of immovable property. And here the doc-"trine 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, to the "extent of his power to dispose of the property and the forms "and solemnities to give the will or testament its due attesta-"tion and effect.

"The doctrine of foreign jurists does not, as we have seen, "entirely accord with that of the common law, but even "among them there is great weight of authority in favor of

[18] See *ante* A. L. R. for November, pp. 627-30.

[19] Story's Conflict of Laws, pp. 672-76.

[20] That such is the general view of civilian writers see "Traité du Droit International Privé ou Du Conflit des Lois de différentes Nations En Matiere de Droit Privé," par M. Foelix, Docteur en droit, Avocat à la Cour d'Appel de Paris, Deuxième Edition Corrigée et Augmentée, Paris, Videcoq Fils Ainé, Editeur, 1852. Pp. 161-63.

"the general principle."[21] The refusal of the English courts to adopt the doctrine of the civil law as to domicil in questions of real estate is also well illustrated by the language of Lord Chief Justice Abbott in 1826. "The rule as to law of "domicil has never been extended to real property; nor have "I found in the decisions of Westminster Hall, any doctrine "giving a countenance to the idea that it ought to be so ex- "tended. There being no authority for saying that the right "of inheritance follows the law of the domicil of the parties, "I think it must follow that of the country where the land "lies."[22]

It is remarkable that Story, after having previously recorded in these same Commentaries how the civil-law doctrine of the *lex domicilii* was rejected in England as a determinant of capacity and validity, should have adopted without the slightest hesitation the doctrine of the civilians as to interpretation. But Story evidently thought he saw in *Trotter* v. *Trotter* (erroneously as I think I have shown)[23] an English recognition of the views of Continental writers and without much deliberation as to whether their doctrine was consistent with the English rule as to the capacity of the testator and the validity of the will, or whether the doctrine of the civilians rested on any strong foundation of reasonableness and general expediency, Story endeavored to engraft that Continental notion upon the common law of the various states of the United States in 1834.

How doubtful Story was of the acceptance of his doctrine in England may be gathered from Section 479[24] of Chapter XI: "The same rule has been recognized in England (*i. e.*, "that wherever words of an ambiguous signification or differ- "ent significations in different countries are used in a will, "they are to be interpreted in the sense in which they are "used in the law of the testator's domicil), or rather it has "been generalized; for it has in effect been held that in the "construction of ambiguous instruments or contracts, the

[21] Story's Conflict of Laws, ss. 474-75.

[22] *Birtwhistle* v. *Vardill*, 5 B. & C. 438, 1826; but see S. C. 9 Bligh 32-88, 1834; 2 Cl. & Fin. 571, 1835.

[23] See Part I of this article in November issue, pp. 627-29.

[24] Story's Conflict of Laws, eighth edition, 1883.

"place of executing them, the domicil of the parties, *the place "appointed for their execution and other circumstances, are "to be taken into consideration."*

Aside from the authorities (which we have examined) the reasons urged by the supporters of the doctrine of the *lex domicilii* are the following:[25] If a testator, owning land in several countries disposes of all his lands wherever situate by a general devise, and applies the same language to all his real estate, the presumption is that he intended his words to have the same meaning in their application to the land in each country and therefore in order to accomplish this intention the will, it is said, must be construed according to the *lex domicilii.* Why we must conclude that the testator had in mind the law of the domicil in order to escape from the conclusion that he had more than one rule or law in contemplation is not clear. Why may we not with equal propriety say that he had in mind the law of the place where he made his will or the law of the country where he owned the most of his land? In answer to this criticism the civilians would immediately reply that there is a natural presumption that a testator has in mind the law of his domicil when he devises foreign real estate, and therefore wishes his will to be interpreted by that law.[26] To say, however, that there is any presumption that when

[25] Story adopts the reasoning of Mr. Burge, Story's Conflict of Laws, Sec. 479h; Mr. Thorndike likewise employs the same argument in his note to the Bigelow Edition of Story, Sec. 473a (p. 651). Professor Minor uses the argument styling it a *reductio ad absurdum.* Minor's Conflict of Laws, p. 341.

[26] "Le testateur est supposé avoir eu l'intention de se rapporter à ses "usages ordinaires ou habitudes et aux lois de son domicile, comme "étant celles qui lui sont connues et présentes à la memoire Cette "règle puisée dans la nature d' l'esprit humain est écrite dans les lois "romaines. . . . En cas de changement de domicile du testateur, la "validité intrinsèque du testament doit être appréciée d'après la loi du "domicile qu 'il avait au moment du décès. Avant la mort du testateur, "le testament ne confère pas un droit acquis à l'héritier ou au légataire; "c'est donc à ce moment seulement que la loi peut agir sur les dispositions "de dernière volonté, et exercer ses effets sur la substance de ces dis-"positions. Le testateur doit être regardé comme s'étant rapporté à la "loi de ce nouveau domicile, parce qu' on suppose qu 'il ne s'y est fixé "qu'après avoir pris connaissance des lois qui le régissent." Foelix, Traité du droit International privé, p. 161.

a man makes his will in Massachusetts and specifically devises land in Pennsylvania he intends the will to be construed by the law of Massachusetts and not of Pennsylvania is a point to which Mr. Thorndike will not go. That the law of Pennsylvania will govern in such a case is admitted by Mr. Thorndike and he accordingly would limit the *dictum* of Lord Brougham in *Yates* v. *Thompson*,[27] to cases of specific devise. But in the cases where a testator makes a general devise of his real estate and he owns land in several countries is there any natural and imperative presumption that he had in contemplation the laws of his domicil and not those of the *situs* of his property?

Suppose a testator owned merely a homestead in the state of his domicil and large estates in another state, are we to infer that he had in mind the law of his domicil rather than the law of the state where, for example, his timber or coal lands were situated? Or, suppose a testator has no land in the state or country where he is domiciled, but owns lands in two or more different states or countries, is it to be presumed that he intended that the law of the state or country where he had no real estate (of whose real estate laws he was therefore presumably ignorant) should govern the interpretation of his will by the courts of the states or countries where his land was situated? This final presumption of the civilians is, I submit, unwarranted, and it is on this final presumption that the doctrine of Story must stand, if at all.

But, it is asked, how can a testator express contrary intentions by the same language? I reply, how can a man who has made and executed a will devising lands in several states die testate in one state and intestate in another of those states? If he has not executed his will in conformity to the laws of those states where his real estate lies, a testator may be adjudged an intestate. So by not conforming to the rules of property or rules of construction of testamentary language he may fail to effectuate his intention in one state and accomplish his intention in another state.

[27] See *ante* p. 719. See Mr. Thorndike's note to Story, Sec. 473a, above quoted Part I of this article on p. 625.

The question by what law the testator intended his will should be construed is to my mind irrelevant. First, because if the rules of construction are different in different states or countries so that they amount to rules of property —or rules of interpretation which are peremptory—the testator has no more reason to expect those rules to be disregarded in the case of a non-resident than of a resident owner of real estate, and he should be held to have framed his will subject to those rules just as a testator is everywhere compelled, in this country at least, to execute his will in conformity to the law of the *situs*. Second, it cannot be said *à priori* that a testator intended the rule of the domicil to govern the interpretation of his will as to lands in another state where a different rule prevails, because if the testator is presumed to know the law of the domicil (and all civilians admit this knowledge) he must also have known that the law of the domicil had no control over, or any relation to, foreign real estate. Thus in *Staigg* v. *Atkinson,* if the widow of Mr. Staigg had sued in Massachusetts for her dower in Massachusetts lands, claiming at the same time under his will, is it likely that Judge Holmes would have held that Mr. Staigg, having made his will under Rhode Island law, by which devises were presumed to be in addition to and not (as in Massachusetts) in *lieu* of dower, intended that the Rhode Island law should control the Massachusetts real estate, or if it could fairly be said that he intended the law of Rhode Island to operate in Massachusetts would the Supreme Court of Massachusetts have been bound by such an intention? Where by reason of a statute or a judicially established rule of construction certain words in one state or country have acquired a settled meaning, they become in time rules of property. To say that a testator in a foreign state or country may disregard these rules on the ground that he is thinking only about the law of the place where he is making his will is as reasonable as to say that he may disregard the rules determining his own capacity and the formalities prescribed for the execution of the testament.

If the conflict is merely between rules of construction then it is submitted 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 domicil 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 foreign domicils of the testators established different rules of construction. A rule of private international law which would require the courts of the *situs* to determine the foreign rules of construction and laws of the foreign domicil of a testator is far less reasonable than a rule which requires foreign testators to express their testamentary intentions in conformity to the law of the *situs* of their property.

There is no hardship in requiring that a person who is fortunate enough to own lands in several countries or states should take notice of and be presumed to know the rules of construction and laws as to testaments adopted by that sovereignty on whose laws his own right of property depends and to whose laws alone he can look to, effectuate his intentions after his death.

It is a public hardship and inconvenience to say that all persons who attempt to ascertain the meaning of his will as to real estate in a certain state or country must at their peril take notice of the laws or rules of testamentary construction of the domicil of the testator (or shall we say where the will was made?)—rules perhaps entirely different from those which generally apply to other lands in the same sovereignty.

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