

## CHAPTER 69

# Effect of Wills

### I. CONSTRUCTION

#### 1. Concept of Construction

**I**N common law the terms construction and interpretation of ambiguous texts are often interchangeable, the first term including the latter.<sup>1</sup> More specifically, it has been thoughtfully suggested that interpretation should mean the ascertainment of the real intention of a declarant and construction the use of canons, maxims, or rules, established by law or judicial decisions, in order to clarify the effect of a declaration or to protect an act from invalidity.<sup>2</sup>

This differentiation corresponds to a German distinction: The rules of interpretation concern factual ascertainment of intention, including presumptions where an intention is deemed to exist and only its expression is ambiguous. The rules stating what should be the legal effect in the *absence* of a presumptive intention are called suppletive (in a narrow sense), complementary to the declaration. Much theoretical thought has been devoted to this undeniable difference.<sup>3</sup>

Nevertheless, earlier in this work it has been submitted that only one reliable conclusion can be drawn in conflicts

<sup>1</sup> Matter of Costello (1933) 147 Misc. 629, 265 N.Y.S. 905.

<sup>2</sup> HEILMANN, "Interpretation and Construction of Wills of Immovables in Conflict of Laws, involving Election," 25 Ill. L. Rev. (1931) 778; RHEINSTEIN, Cases and Other Materials on Succession (1947) 482 f.

<sup>3</sup> See DANZ, Die Auslegung der Rechtsgeschäfte, (ed. 3, 1911) and the commentaries to BGB. §§ 133, 157; ENNECCARUS-NIPPERDEY, 1 Bürg. R. §§ 192, 193.

law from any such distinction, namely the contrast between, on the one hand, the true, veritable, expressly or tacitly declared intention of the declarer, and, on the other, intention implied either in fact or in law.<sup>4</sup> The same approach is suitable to the construction of wills. This favorite subject of lengthy discussions forms an oversized body of rules in English law and an extremely intricate network of subtle considerations in American courts, and produces plain confusion in conflicts law.

The core of the matter involves the frequent legal rules created by judicial practice or enactments, which state presumptions for the content of ambiguous words in a will, such as "my children," "my issue," "heirs"; the codes prescribe whether this expression includes illegitimate or adopted offspring, and stepchildren. There are innumerable rules of this category. If a coheir or a legatee dies before the testator, the statutes either attribute this portion to the same class of beneficiaries or cancel it. Or a devise by a husband to his wife is deemed to be in lieu of dower, et cetera. Many so-called rules of construction had the important function of correcting antiquated law. For instance, the English Statute of Wills 1837 (s.24), often copied in American statutes, extended the effect of wills to after-acquired property by providing that the will is "to be construed as if it had been executed immediately before the death of the testator unless a contrary intention appears in the will."

These rules are called interpretative, because they yield to any sign of a contrary intention of the testator; or at least to rebuttal; but when nothing indicates the true intention, the same rule is suppletive. Treatment in conflicts law must be always the same. We may state that all legal

<sup>4</sup> Vol. II, p. 530.

rules subsidiary to an intention ascertained by facts are to be deemed complementary rather than merely "interpretative." Among other consequences of this proposition, we ought not to differentiate between presumed (as opposed to tacitly declared) intention and legal effects,<sup>5</sup> or expect a court of the situs to look to a stereotyped meaning of certain words of the legal language of the situs as long as the inquiry still turns upon the actual intention of the testator,<sup>6</sup>—and this, I dare say, even though the lawyer writing the will has chosen terms that he presumed to reproduce the testator's wish. And if we look to a foreign legal definition of a term used by will, we should not believe that we apply the foreign law.<sup>7</sup>

The purpose and nature of construction of wills have changed in history. The bulky English canons are partly due of course to the old endeavor to facilitate the task of juries. In recent times, their effect was often unhealthy, introducing an element of judicial discomfort, until finally some courageous decisions opened the gate to free interpretation. An English writer says of this body of law:

"Much of it has become unreasonably technical, but it is still applied, presumably in the interest of uniformity and certainty, though its effect is not infrequently to defeat what seems to the lay mind to have been the actual intention of the particular testator."<sup>8</sup>

How often was it held that "my money" in a testamentary gift always meant currency and never securities—this writer once experienced one of these decisions of the Court of Appeal which finally in 1948 Lord Atkin in the House

<sup>5</sup> STUMBERG, 419, 422, distinguishes intention, stated by operative facts and rules, from legal effects.

<sup>6</sup> Thus, apparently, ATKINSON in 3 Am. L. Prop. 749.

<sup>7</sup> Vol. II, p. 534.

<sup>8</sup> PARRY, Succession (ed. 3) 103 citing Lord Romer in *Perrin v. Morgan* [1943] A.C. 399, 420 ff.

of Lords called "absurd"; "the ghosts of dissatisfied testators" would from now on be considerably diminished. So, "money" has now "no fixed meaning";<sup>9</sup> it is a "cardinal rule" that the court "has to sit in the testator's armchair."<sup>10</sup>

The same current, fortunately, breaks through the overlapping lines of American decisions. What is now tantamount to an almost universal view was expressed by the Illinois Supreme Court in 1952, urging that the intention of the testator is to be ascertained from the entire will and a strict technical construction of certain language is not warranted.<sup>11</sup> The New York courts are indefatigable in asking for such free interpretation.<sup>12</sup>

Conflicts law should finally take note of this development and further it. There are many fixed interpretations that are not even meant to transcend the domestic sphere.

## 2. Universal Principle

(a) In the first place it would seem, in spite of all traditional canons and presumptions, that respect is paid everywhere to the intentions of the testator, as they appear in the light of the entire document and of all "external" circumstances. It is very important not to resort to any petrified presumption at this stage of judicial investigation. Where the true intention is ascertained, there remains merely one question. In the Romanistic tradition leading

<sup>9</sup> *Perrin v. Morgan* [1943] A.C. 399—H.L., 408 per Viscount Simon, Lord Chancellor, 414 f. per Lord Atkin.

<sup>10</sup> *Ibid.* 420 per Lord Russell of Killowen.

<sup>11</sup> *Kiesling v. White* (1952) 411 Ill. 493, 499.

<sup>12</sup> See the New York Digest index. The same careful search of the testator's intention appeared in an older case, *New York Life Ins. and Trust Co. v. Viele* (1899) 161 N.Y. 11, affirming 22 App. Div. 80, 47 N.Y.S. 841. The courts discuss what 4 *FRANKENSTEIN* 470 missed on the ground of an incomplete private report in 11 Z. int. R. 105; they used free individual interpretation of the words "lawful issue" in the will of an American lady living in Germany.

to this free interpretation as well as in the English courts,<sup>13</sup> interpretation is limited by the condition that the result is not inconsistent with the expression used: the court may not substitute a stipulation not expressed by the testator.<sup>14</sup> Only most recently has it been sometimes suggested that the court should exercise a bolder discretion: the power to correct the will by an equitable decision.<sup>15</sup> American courts very firmly put presumptions and precedents behind the interpretation of the will in the instant case; thus, in the primary objective of investigation, all courts concur.<sup>16</sup> Conflicts arise only where the search for the intention in fact ends without result.

An obvious application is made when common-law courts look to a foreign law for explanation of technical terms peculiar to this law.<sup>17</sup> This is done everywhere, and no true application of the foreign law is implied.

(b) From this it is a close step to a consideration of foreign law without applying it in any sense. The testator may expressly or tacitly have contemplated such consideration, which the forum observes for the limited purpose of

<sup>13</sup> See Mr. Justice Holmes in *Eaton v. Brown* (1904) 193 U.S. 411; "The English courts are especially and wisely careful not to substitute a lively imagination of what a testatrix would have said if her attention had been directed to a particular point for what she has said in fact."

Germany: A.G. München (Dec. 29, 1927) IPRspr. 1928 Nr. 58.

Switzerland: 64 BGE. II 186.

<sup>14</sup> *Matter of Watson* (1933) 262 N.Y. 284, 186 N.E. 787: the court has no power to change a clause.

<sup>15</sup> To this effect the tentative draft of a law on inheritance for Israel.

<sup>16</sup> United States: *Purl v. Purl* (1921) 108 Kansas 673, 197 Pac. 185; 4 PAGE 701.

E.g., Germany: RG. (March 13, 1924) Leipz. Z. 1924, 74; RAAPE 643; 4 FRANKENSTEIN 471.

<sup>17</sup> England: *In re Price* [1900] Ch. 442, 452; *Studd v. Cook* (1883) 8 App. Cas. 577, 590; *Re Miller* [1914] 1 Ch. 516; *Re Manners* [1923] 1 Ch. 220; *Dacey* (ed. 6) 183 at 833; *Chia Khwee Eng v. Chia Poh Choon* [1923] A.C. 424; *Re Allen's Est.* [1945] 2 All E.R. 264.

construing his actual intention.<sup>18</sup> As if considering contracts, English courts speak outright of the "proper law" of a will,<sup>19</sup> and an intention expressly declared<sup>20</sup> or presumed.<sup>21</sup> The presumption refers to the law of the testator's domicile at the time of the execution.<sup>22</sup>

These are exaggerated formulas, usual when judicial presumptions are stiffening into legal rules. We have to replace the "presumptive" by a "tacitly expressed" intention and instead of inventing a "proper law" of the will give due regard to the law to which the testator seems to have looked, amid all circumstances of the case. In this manner, a sound and universally acceptable rule is in the making. When a Swedish woman died domiciled in Massachusetts, the Swedish Supreme Court assumed "without an express provision by the testatrix" that she left certain assets to her husband, which would have been his separate property by force of the Massachusetts law. As the Court said, not only the text but also all other circumstances, particularly the law of the country involved, are to be considered.<sup>23</sup>

From the form of a will, a reference to the content of a law may be drawn<sup>24</sup> or not drawn.<sup>25</sup>

*Exception.* In American practice, as the Restatement

<sup>18</sup> STORY § 479; DICEY (ed. 5) comment on rule 196; WESTLAKE (ed. 7) § 123 i.f.; SCHMITTHOFF (ed. 1) 234.

France: NIBOYET, 4 *Traité* § 1341; LERERBOURS-PIGEONNIÈRE (ed. 6) 371; BATTIFOL, *Traité* 672 § 668; but there is no judicial authority.

Germany: OLG. Karlsruhe (Nov. 17, 1898) 9 *Z. int. R.* 310.

<sup>19</sup> *Bradfort v. Young* (1885) 29 *Ch. D.* 617; *Trotter v. Trotter* (1828) 4 *Bli. (N.S.)* 502, 505.

<sup>20</sup> Solicitor General dictum in *Anstruther v. Chalmers* (1826) 2 *Sinn.* 1, 4.

<sup>21</sup> *Eve J. in re Cunnington* [1924] 1 *Ch.* 68, 72; Briton, domiciled in France, will made in England in English form: "the will ought prima facie to be construed according to French law."

<sup>22</sup> SCHMITTHOFF 234: particularly if it is identical with the last domicil.

<sup>23</sup> *H.D.* (Feb. 25, 1939) *N.J.A.* p. 101, 13 *Z. ausl. PR.* 844; on another point of the decision, MICHAELI 245.

<sup>24</sup> France: App. Paris (April 24, 1913) *Clunet* 1913, 1276.

<sup>25</sup> Germany: OLG. Karlsruhe (Nov. 17, 1898) 9 *Z. int. R.* 310.

§ 251 (1) clarifies the law, interpretation is not free where an interest in *land* is devised and certain words are used, having an "operative effect irrespective of the intent of the testator." This exception may be, apart from tradition, justified by the need for certainty in real property transactions. However, a doubt in the usefulness of such formalism is confirmed by its application. In the very example adduced by the Restatement, a devise of land in Y to "the children of A" is frustrated in the person of A's adopted son because "children" in Y means legitimate children by birth, although the adoption was made in X with full effect. The court thus would consider neither the intention of the testator nor the extraterritorial effect of the adoption nor the status of the child according to the law of its domicil. Certainty here conflicts with justice.

### 3. Conflict of Rules

Where the testator's factual intention is not discoverable and a set of legal rules must be applied in a subsidiary manner, no agreement has been reached on the choice of this law.

(a) An old and widespread opinion resorts to the law governing the succession.<sup>26</sup> The *lex situs*<sup>27</sup> for immovables, the law of the last domicil<sup>28</sup> or nationality<sup>29</sup> for movables,

<sup>26</sup> CHESHIRE (ed. 2) 533 (but see *infra* n. 32); DICEY (ed. 5) rule 196; STUMBERG (ed. 2) 423 n. 34; LEREBOURS-PIGEONNIÈRE (ed. 6) 421 § 377; but see STORY §§ 473, 479 a-f. 484.

<sup>27</sup> England: HALSBURY, Laws of England (ed. 2) 242.

United States: Jennings v. Jennings (1871) 21 Ohio St. 56; Staigg v. Atkinson (1887) 144 Mass. 564, 12 N.E. 354.

<sup>28</sup> England: Trotter v. Trotter (1828) 4 Bligh (N.S.) 502; but the exceptions for the law intended by the will are much emphasized, see *Re Allen's Est.*, *supra* n. 17.

United States: see cases in 4 PAGE 707 § 1639.

France: Trib. civ. Seine (Apr. 2, 1925) *Revue* 1926, 405 (currency of legacy); Cour Paris (May 29, 1948) J. C. P. 1950 II 5241, *Rev. crit.* 1950, 197, affirmed by Cass. civ. (Nov. 13, 1951) S. 1952.1.189, *Rev. crit.* 1952, 323.

<sup>29</sup> Germany: R.G., Leipz. Z. (1924) 741.

respectively, furnish the rule of interpretation or invalidate the clause or the will.

This approach is favored by eminent authors, some of whom would have this the exclusive method.<sup>30</sup> The reason most advanced is that it is the law "with which the ordinary person is most familiar."<sup>31</sup>

(b) Another part of the authorities, continuing the direction toward the proper law of succession, presume that the testator in an ambiguous clause may have had in mind the law of his domicile at the time of the execution.<sup>32</sup> This, of course, is a rebuttable presumption.<sup>33</sup>

This view, primarily intended only for personalty, easily extends to immovables, provided that *lex situs* "has the last word" for allowing the creation of rights.<sup>34</sup> Indeed, the Restatement calls for the law of the domicile at the time when the will was made, with respect to movables (§ 308) as well as to immovables except in the case of legally fixed words (§ 251). This is a considerable progress in approaching several successions, especially when a single will disposes of both real and personal property. However, such

<sup>30</sup> HENNING, 41 N.S. Am. L. Reg. 623, 718, approved by GOODRICH (ed. 3) 376.

<sup>31</sup> CHESHIRE (ed. 4) 563.

<sup>32</sup> England: WESTLAKE 155 § 123; DICEY (ed. 6) rule 183; CHESHIRE (ed. 4) 562, 565.

Canada: Ontario H. Ct.: *Re Bassette* [1942] O.W.N. 278, [1942] 3 D.L.R. 207, FALCONBRIDGE 464.

Quebec: 3 JOHNSON 64.

United States: *Staigg v. Atkinson* (1882) 13 R.I. 725; *in re Chappel's Estate* (1923) 124 Wash. 128, 213 Pac. 684, with rationale, citing *Story* in *Harrison v. Nixon*, 9 Pet. (32 U.S.) 483; *Palmer et al. v. Crews* (1948) 203 Miss. 806, 35 So. (2d) 430, 4 A.L.R. (2d) 483; "royalties" of oilwells in Louisiana and Mississippi did not include other oil interests, according to the law of the domicile in Texas.

France: Trib. Seine (March 9, 1895) *Clunet* 1895, 628; *cf.*, the authors cited *supra* n. 18; DELAUME, *Rev. crit.* 1950, 199.

<sup>33</sup> *In re Cunningham* [1924] 1 Ch. 68.

<sup>34</sup> England: *Nelson v. Bridport* (1846) 8 Beav. 547, 570 per Langdale, M.R.; Lord Nelson was not allowed by Sicilian law to acquire land devised to him under English law.



a role of the domiciliary law purely as a device of mind-reading is quite arbitrary.

(c) More isolated opinions point to the law giving validity to the will,<sup>35</sup> the domicil of the beneficiary,<sup>36</sup> or look for combinations.<sup>37</sup>

*Illustration.* A mortgaged land is devised to a legatee. Where there is no clue to the intention of the testator, is the legatee entitled to demand that the secured debt be paid out of the general personal property? This question has been much discussed in England because the law was changed; the claim formerly granted is now denied; the cases are therefore antiquated.<sup>38</sup> It has been concluded that the legatee has only the rights given him by the *lex situs*.<sup>39</sup> However, in another view, this question of construction must be answered according to the law of the domicil as of the time of execution, following the presumed intention of the testator.<sup>40</sup>

This example shows that no certain solution of the choice of law problem is feasible, if we work with so elusive a criterion as "presumptive" intention. Where no actual intention can be verified, the applicable law must be the law governing the succession, not because the testator is supposed to have had it in mind, but simply because it is in charge of the situation!

The advantage of a common criterion for a plurality of successions could be maintained, if the situs were to recognize, by renvoi, the prerogative of the domicil, in the line

<sup>35</sup> Cf., DICEY (ed. 6) 833.

<sup>36</sup> 4 PAGE 708 n. 5.

<sup>37</sup> E.g., WESTLAKE 155; CHESHIRE (ed. 4) 565; BRESLAUER, 27 Iowa L. Rev. at 429 ff.

<sup>38</sup> See in particular FALCONBRIDGE 451, 480; Locke King's Act 1854, amended 1867, 1877; Adm. of Est. Act 1925, sec. 35; Ontario: Wills Act R.S.O. 1937 c. 164, Rev. Stat. 1950, c. 426, sec. 37 (1).

<sup>39</sup> WESTLAKE § 118.

U.S.: Restatement § 490; STUMBERG (ed. 2) 425 ff.

<sup>40</sup> Maxwell v. Hyslop, L.R. 4 Eq. 407; Higinbotham v. Manchester (1931) 113 Conn. 62, 154 Atl. 242, 79 A.L.R. 85; 4 PAGE 732 § 1652.

of the improved doctrines of formal requirements and conclusive probate judgments.

However, the conclusive effect of judicial construction of a will is doubtful in this country.<sup>41</sup>

#### 4. Transposition

A will may be executed in the technique of one system and finally governed by a law of another system. The testator may have preferred his former habits to the usage of his domicile, he may after execution change his domicile or nationality determining the applicable law, or he may dispose of his several successions by one will. Here, more than an ordinary construction is needed: something like the transposition of a piece of music to a different key.

Through *renvoi* to the law of domicile and that of the *situs*, continental courts have had not seldom to adapt American wills with their particular technique into the structure of a civilian legislation.<sup>42</sup> A sole residuary legatee in American terminology is understood as universal legatee in France, and both are sole heirs in the German parlance. An executor may not be allowed all the powers attributed by the will. Future interests, if vested, must be assimilated to a German *Nacherbschaft* or *Nachvermächtnis* and if contingent, conceived as conditional legacies. Creation of a trust fund or a foundation—possible in some countries, while not in others—has to be converted into a type of the forum or considered void.

A good operation of this kind will save a maximum of the testator's intention. But regard to the exigencies of

<sup>41</sup> See Note, 63 Harv. L. Rev. (1950) 504 and *infra* Ch. 71.

<sup>42</sup> In the Institute of Berlin during my directorship, this was a frequent subject of advice to courts and tax authorities. See the article by RUDOLF MÜLLER, 7 Z. ausl. PR. (1933) 808, 816. See also on the subject LEWALD, Questions 115-118; M. WOLFF, D. IPR. (ed. 3) 87; 4 FRANKENSTEIN 471-474.

the governing system cannot always obviate the results that must be reached when the forum applies the foreign law.

## II. REVOCATION

A testator may, by his intentional act, rescind a will. The formal requisites vary: physical destruction of the document or of parts, repeal by a new will, tacit revocation by contrary dispositions, etc. Anglo-American law developed in addition an annulment *ipso facto*, by certain events,<sup>43</sup> also called revocation, although originally the will simply expired when the testator married and had a child, or a testatrix married, or had a child after the execution of the will. While the statutes formed variations of these causes and added divorce, in more recent times many provisions directly granting hereditary shares to posthumous and pretermitted issue have superseded the destruction of the will. Marriage of women has no effect any more, since they may have separate property and capacity to testate; and marriage of a bachelor usually breaks his will only under certain conditions; the legal presumption is rebuttable by such facts as express declaration to the contrary, settlement in favor of the widow, or other provisions for her benefit. Actually, the statutes making divorce a ground for "revocation by implication" are still the most practical of this decaying institution and in American courts the most rigorously applied in spite of counterevidence.<sup>44</sup>

Divorce and separation of spouses are causes of presump-

<sup>43</sup> England: GRAVESON (ed. 2) 250 ff.

United States: ELIZABETH DURFEE, "Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator," 40 Mich. L. Rev. (1940) 406; SIMES, Model Probate Code 83-84.

<sup>44</sup> ELIZABETH DURFEE *l.c.* at 412, 415 ff.

tive revocation in a part of the civil-law countries by rules of subsidiary function,<sup>45</sup> in others not.

*Formal validity* of a voluntary declaration of revocation is assimilated to execution of wills by a few of the American statutes that give liberal options of foreign forms or liberal statutory interpretation.<sup>46</sup> Usually,<sup>47</sup> however, and even in the Execution of Wills Act of 1940, revocation is forgotten. Hence, the law of succession, especially the law of the *situs* of land, applies rigorously.<sup>48</sup> When a domiciliary of Illinois made a will and revoked it by writing "void" over the dispositions, the Illinois court recognized the revocation, but the court of Iowa as situs of land, by five against four votes, refused probate, although Iowa does probate the wills executed at the domicil.<sup>49</sup> This decision, as the dissenting judges said, perpetuates "an anomalous and confusing legal situation."

In civil law, the references to foreign law—of the place of execution or the domicil as of the same time, or also the domicil at death—are usually broad enough to embrace revocation by a new will or other declaration.<sup>50</sup>

<sup>45</sup> Revocation by force of law is distinguished, e.g., in the case of pretermitted children, from revocation by act, e.g., in Venezuela, C.C. art. 951, 990.

<sup>46</sup> *Supra*, Ch. 67 I; Okla. St. Ann. 1938 tit. 84 §§ 71-73; Utah C. Ann. 1943, § 101.1-14; *Re Traversi* (1945) 64 N.Y.S. (2d) 453.

<sup>47</sup> ATKINSON, 3 Am. L. Prop. 750.

<sup>48</sup> Restatement §§ 250, 307; *In re Kimberly's Estate* (1913) 32 S.D. 1, 141 N.W. 1081.

<sup>49</sup> *In re Will of Barrie* (1946) 393 Ill. 111, 65 N.E. (2d) 433; *First Presbyterian Church of Sterling, Illinois v. Hodge* (1949) 240 Iowa 431, 35 N.W. (2d) 658, 9 A.L.R. (2d) 1399, annot. 1412. In *Matter of the Estate of Nora Gardner Lufkin* (1933) 32 Haw. 826, where a Californian holographic will was revoked in Hawaii by another holographic will, invalid under the Hawaii statutes, the court recognizes the first and rejects the second, leaving uncertain whether the law of the place of execution or the new domicil decides.

Canada: *Re Busslinger* (Alta. 1952) 6 W.W.R. (N.S.) 408 and cited precedents.

<sup>50</sup> Expressly e.g., China: P.I.L. art. 26 par. 2; Czechoslovakia: P.I.L. § 43.

For cancellation by force of law, and for all substantive requirements, in any case, the views are divided.

(a) *Law of Succession*: Whatever happens to a will after its execution may be considered under the law ultimately controlling the succession. American courts incline to this view; they submit revocation in any sense to the *lex situs*<sup>51</sup> or *lex domicilii* as of the time of death,<sup>52</sup> respectively. Events that have not effect *mortis causa* are unimportant.

The same approach is taken in Continental courts, where the last national law of the decedent governs.<sup>53</sup>

(b) *Effect Inter Vivos*. The English courts are of a contrary opinion, connected with their wrong characterization of a revocation of a will (at least of a British subject) by subsequent marriage as an incident of marriage.<sup>54</sup> Any revocation of a testamentary disposition of movables is held to be governed by the law of the domicil at the time of the revocation.<sup>55</sup> If it is valid at such time, there is no will left.<sup>56</sup>

The Court of Appeals in New York makes use of a statute allowing revocation by holographic will made in a state where it is effective; if the revocation is made by can-

<sup>51</sup> Restatement § 250; *In re Patterson's Est.* (1923) 64 Cal. App. 643; and see cases in Note 9 A.L.R. (2d) 1414.

*Sternberg v. St. Louis Union Trust Co.* (Mo. 1946) 66 F. Supp. 16; *Sternberg v. St. Louis Union Trust Comp.* (1946) 394 Ill. 452, 68 N.E. (2d) 892, 169 A.L.R. (1947) 545.

<sup>52</sup> Restatement § 307, GOODRICH (ed. 3) 519; WOLFF, P.I.L. § 569; *In re White's Will* (1920) 112 Misc. 433, 183 N.Y.S. 129; *In re Smith's Est.* (1940) 55 Wyo. 181, 47 Pac. (2d) 677; cases in 9 A.L.R. (2d) 1412, 1430.

<sup>53</sup> France: App. Bordeaux (Aug. 5, 1872) S.1872.2.269; App. Alger (Apr. 14, 1908) Clunet 1909, 489, Revue 1909, 232, (marriage of a German wife with an Italian, revocation); VALÉRY 1246; BATIFFOL, *Traité* 673 § 669. Germany: 2 BAR 239 tr. 832; 2 ZITELMANN 967; LEWALD 318 § 386.

Italy: FEDOZZI (ed. 2) 615.

<sup>54</sup> *In re Martin*, Loustalan v. Loustalan [1900] P. 211, Vol. 1 p. 375 and n. 181-183.

<sup>55</sup> CHESHIRE (ed. 4) 540, 542.

<sup>56</sup> DICEY (ed. 6) 835.

cellation valid under the law of the testator's domicile at the time, it is considered effective also in New York.<sup>57</sup>

*Illustrations.* (i) Revocation effective in state X where made, ineffective in state Y where the testator dies.

A testator domiciled in Washington, D. C., was divorced, which would cancel his will under the District law, but later moved to California and died there. The will was considered not revoked, following the view *supra* (a).<sup>58</sup> According to the English theory, the will would have remained revoked.<sup>59</sup>

(ii) Revocation ineffective in state X, effective in the last domicile Y.

A Dutch married woman married in the Netherlands where the will remained intact and died domiciled in England. The will was held effective in England; <sup>60</sup> in an analogous American case, the will was held revoked.<sup>61</sup>

(iii) A German woman, who became Italian by marriage, bequeathed her assets to her Italian husband. After annulment of the marriage, restoring her German nationality, the will was held void by a French court, under German inheritance law, BGB. § 2077.<sup>62</sup>

(iv) A case involving an implied revocation by executing a new will came recently for the first time to the French Court of Cassation. The court denied the intention of the testatrix, domiciled in France, to revoke her French will by executing a second Argentine testament, rejecting the application of the Roman and Argentine presumption that

<sup>57</sup> *Re Traversi's Est.* (1946) 189 Misc. 251, 64 N.Y.S. (2d) 453: dissenting opinion *in re Barrie's Est.* (1950) *supra* n. 49, 9 A.L.R. (2d) at 1414.

<sup>58</sup> *Re Patterson's Est.* (1924) 64 Cal. App. 643, 222 Pac. 374, 266 U.S. 594.

<sup>59</sup> DICEY, rule 185 Ill. 1.

<sup>60</sup> In the goods of Groos [1904] P. 269; see *In the goods of Reid* (1866) L.R. 1 P.&D. 74.

<sup>61</sup> *Matter of Coburn's Will* (1894) 9 Misc. 437, 30 N.Y.S. 383.

<sup>62</sup> *App. Alger* (Apr. 14, 1908) *Clunet* 1909, 489.

*testament posterius rumpit prius.*<sup>63</sup> The decision agrees with the principles.<sup>64</sup>

It might be asked at what time a will is deemed revoked if both laws annul it. Logically, in the American view the effect occurs at death and in the English at the time of the destructive event. The first approach makes it possible for the testator to confirm the will or at least re-execute it,<sup>65</sup> which is much more consonant with the modern transformation of revocation by law. Another connected problem arises when the law between the event and the death changes; the American decisions have taken a special attitude in such cases, more favorable to the time when the will was executed.<sup>66</sup> Still another phase of this question is illustrated by the following Canadian case.<sup>67</sup>

(v) A man domiciled in Quebec made a testament and afterward married a woman at whose desire they established their home from the start in Ottawa, Ontario, where he died. Under Quebec law his will in favor of his mother and sister was valid, although the widow received half of the community property. In Ontario the will was revoked by the marriage, and the widow and child inherited the entire assets. The Ontario Court, following the English approach, considered the will as definitively revoked at the time of the marriage. The Quebec court evidently would recognize the result, but only because the law of the last domicil governed.

There is no doubt that the law of the succession ought to determine these effects.

<sup>63</sup> Cass. civ. (Nov. 13, 1951) *supra* n. 28; *cf.*, Argentina C.C. art. 3827.

<sup>64</sup> *Contra* the annotation *ibid.*, with a criticism that may rather be addressed to the imperfection of present conflicts law. For a similar case, see *In re Estate of Wayland* (Prob. Div. 1951) [1951] 2 All E.R. 1041: testator executed an English and a Belgian will, the court searches for the intention, separates the wills, and concludes against revocation.

<sup>65</sup> WARREN, *Cases on Wills*, 315 n.

<sup>66</sup> Note, 34 *Harv. L. Rev.* (1921) 768.

<sup>67</sup> *Seifert v. Seifert* (Ont. 1914) 23 D.L.R. 440, 32 O.L.R. 433.

## III. ELECTION

A much developed doctrine of "election" in Anglo-American law deals with the cases where the beneficiary of a devise or bequest enjoys, as an effect of the same death, a benefit by the will or *ab intestato* or against the will or by marital property law. According to the facts and the legal situation, he may be entitled to both rights or have to choose between them.

The traditional cases of the doctrine are those where the testator gives property not belonging to himself but other property to the owner, and where his will fails but his intention is protected. If in the latter case the will is valid under one law and invalid by another, the purpose of the testator is carried out by putting the enriched beneficiary or intestate successor to election: he has to choose between his interests granted by the will and the benefit obtained against the will, releasing his right to the surplus to the disappointed person. The courts involved, according to the Restatement, have to co-operate.<sup>68</sup>

The present conflicts doctrine tends to state that election depends on the law governing the succession,<sup>69</sup> with respect to immovables<sup>70</sup> as well as to movables. However, American decisions are vastly divided.<sup>71</sup>

Occasionally, the erroneous idea of applying party autonomy has misled courts to invoke a law presumptively intended by the testator.<sup>72</sup> Doubts arose sometimes about the rights of a widow to dower, granted her in many jurisdictions (by

<sup>68</sup> Restatement § 252, apparently a uniform substantive rule.

<sup>69</sup> WESTLAKE 125; CHESHIRE (ed. 4) 566-570; DICEY (ed. 6) 834; BEALE § 253.1; GOODRICH (ed. 3) 121 § 170; STUMBERG (ed. 2) 424.

<sup>70</sup> England: *De Nicols v. Curlier* [1898] 1 Ch. 403, 413; [1900] A.C. 21-H. L.

United States: Restatement § 253, Notes, 22 A.L.R. 437; 79 A.L.R. 103, 105.

<sup>71</sup> Note, 105 A.L.R. 271, lists "seven views."

<sup>72</sup> Thus *Re Allen's Est.* (1945) *supra* n. 17; *contra* MORRIS, 34 Can. Bar Rev. 528; *id.* in DICEY (ed. 6) 834.



the old rule or by presumption) only when she did not take under the will of the husband; but in the general opinion, any question still of practical interest, about dower or the more recent legal shares substituted for dower, depends on the character of the right granted by the situs.<sup>73</sup>

The "singular tenderness" shown by English courts toward English heirs in adjudging benefits<sup>74</sup> has not been imitated in the United States.<sup>75</sup>

The interesting aspect of this situation is the relationship between the state laws confronting the beneficiary.

(a) In state X, a surviving spouse has an intestate portion if he does not take under the will. But there is land in Y and the testator was domiciled in Z, where no conditions attach to the taking of testamentary gifts, even though no respective intention of the testator is perceivable. The Canadian Supreme Court held that the surviving spouse may claim his testamentary rights in states Y and Z, under the legal requirements prevailing there, so as not to be bound by the provision in X.<sup>76</sup> The restriction on the will by a statute of election, thus, presupposes that the enacting state is that controlling the succession.

(b) If the testator owns land in several states, it would follow logically that election could be exercised in each state

<sup>73</sup> United States: In *Staigg v. Atkinson* (1887) 144 Mass. 564. Holmes, then judge of the Massachusetts court, did not specify whether he applied Minnesota law, not imposing election between dower and a legacy of personalty, *qua lex situs* or *lex domicilii* as of the time of the execution of the will. But see STUMBERG (ed. 2) 424 ff.; HEILMAN (*supra* n. 2) 797.

Canada: *Re Elder* [1936] 3 D.L.R. 422, 2 W.W.R. 70: the right to dower and election in lieu of will in Manitoba land was subject to election according to Manitoba Dower Act, C.A.M. 1924, c. 50, although the husband was domiciled in British Columbia.

<sup>74</sup> DICEY (ed. 5) 975; *Brown v. Gregson* [1920] A.C. 860- H.L. against *In re Ogilvie* [1918] 1 Ch. 482, 502, see MORRIS in DICEY (ed. 6) 558; *cf.*, CHESHIRE (ed. 4) 568; JARMAN, Wills 552.

<sup>75</sup> GOODRICH 521 § 170.

<sup>76</sup> *Pouliot v. Cloutier* [1944] 3 D.L.R. 737, S.C.R. 284.

without regard to the others.<sup>77</sup> This awkward result is usually corrected by the courts; they consider the choice first made in one state as binding under the theory of waiver or estoppel.<sup>78</sup> Where the estate contains movables and immovables, the same rule obtains.<sup>79</sup>

(c) A special case, however, exists if taking against the will at the domicile depends on election. It is controversial whether such taking has universal effect and operates even at the situs of immovables.<sup>80</sup> The affirmative answer means another slight progress towards unity of succession.

*Courts of civil-law countries* will recognize these rules of the common-law courts, if, according to their own choice of law, a common-law statute governs the succession. The construction of a will executed under American or English conceptions may be influenced thereby.

#### IV. POWERS OF APPOINTMENT

Another Anglo-American institution has some analogy to the Romanistic *substitutio pupillaris* and *quasi-pupillaris* with the difference that a Byzantine father wills in advance for his son, but the English son wills for his late father. In civil law this is a singular exception to the basic requirement for a will that it must be declared by the testator in person. At common law, the testator may empower a beneficiary to dispose of assets of the inheritance by deed or will.<sup>81</sup>

<sup>77</sup> Van Steenwyck v. Washburn (1883) 59 Wis. 483, 17 N.W. 289.

<sup>78</sup> England: Douglas-Menzies v. Umphalby [1908] A.C. 224.

United States: 4 PAGE 730.

<sup>79</sup> Van Steenwyck v. Washburn, *supra* n. 77; Lindsley v. Patterson (Md. Sup. Ct. 1915) 177 S.W. 826; see GOODRICH 521 § 170.

<sup>80</sup> Pro: Coble v. Coble (1947) 227 N.C. 547, 42 S.E. (2d) 892; Note, 105 A.L.R. (1936) 271; *contra*: Bish v. Bish (1943) 181 Md. 621, 31 Atl. (2d) 348; Seaton v. Seaton (1945) 184 Va. 180, 34 S.E. (2d) 236.

<sup>81</sup> JOHN MULFORD, "The Conflict of Laws and Powers of Appointment," 87 U. of Pa. L. Rev. (1939) 403; 4 PAGE § 1649; 2 BEALE §§ 284.1, 236.1; 150 A.L.R. 521; FALCONBRIDGE 455 ff.

With respect to immovables, *lex situs*, of course, decides the entire issue.<sup>82</sup> The optional contacts affording formal validity are specially determined in English law.<sup>83</sup>

Where immovables are in the inheritance, the dominating idea of this institution asserts itself. The assets come from the donor and are further transferred by his will and left by him, though through the medium of the donee. Hence, the law of the donor's last domicil governs not only the validity and construction of the original provision, but also the exercise of the power. American courts, hence, generally require that the power be exercised—where the donor has not specified the form of exercise—by a will complying with the formalities of the donor's domicil: so many witnesses as required there,<sup>84</sup> but not so many as obligatory at the donee's domicil,<sup>85</sup> etc. Yet a contrary intention of the donor, inferred from circumstances, has been given effect.<sup>86</sup> The capacity of the donee must only satisfy the law of the donor's domicil;<sup>87</sup> undue influence is determined likewise,<sup>88</sup> as also revocation.<sup>89</sup>

Next to the tax problems<sup>90</sup> that are in the foreground, the question whether the donee's forced heirs may claim rights is outstanding. Again, merely the persons entitled to a share in the donor's estate have rights.<sup>91</sup>

<sup>82</sup> 2 BEALE §§ 234.1, 236.1.

<sup>83</sup> See DICEY (ed. 6) 845 ff.

<sup>84</sup> As in England: *In re Scholefield* [1905] 2 Ch. 408.

<sup>85</sup> *Adger v. Kirk* (1921) 116 S. Car. 298, 108 S.E. 97.

<sup>86</sup> *Amerige v. Att. Gen.* (1949) 324 Mass. 648, 659, 88 N.E. (2d) 126, *supra* Ch. 66; but see *Survey 1950* at 53 on other decisions of the same court.

<sup>87</sup> *Matter of the Will of Stewart* (N.Y. 1845) 11 Paige 398.

<sup>88</sup> *In re Harriman's Est.* (N.Y. 1926) 217 App. Div. 733, 216 N.Y.S. 842.

<sup>89</sup> *Velasco v. Coney* [1934] P. 143; Note, 48 Harv. L. Rev. 1202, 1291; *MULFORD, supra* n. 81, at 421 n. 101 against the criticism 83 U. of Pa. L. Rev. (1934) 279.

<sup>90</sup> GRISWOLD, "Powers of Appointment and the Federal Estate Tax," 52 Harv. L. Rev. (1939) 929, 967.

<sup>91</sup> Restatement § 234.

In England, however, the distinction between general and special powers, familiar to this country in other respects, enters. If the original testator does not indicate the specific persons in favor of whom the power should be exercised ("special powers") but has left their designation to the donee, the donee is deemed to act on his own property so that his own domicil controls the exercise.<sup>92</sup> A will conforming to the Will's Act, 1837, is always in proper form to exercise a power given by an English testator if exercisable by will.<sup>93</sup>

These delicate rules, roughly sketched above, are decisive also in Continental courts, if they belong to the law governing the donee's succession.<sup>94</sup>

<sup>92</sup> As to capacity: *Puey v. Hardern* [1900] 2 Ch. 339; *Re Walker* [1908] 1 Ch. 560.

<sup>93</sup> DICEY (ed. 6) 851.

<sup>94</sup> 4 FRANKENSTEIN 493-496, SCHNITZER (ed. 3) 471.