

Computation of the Legitime When Estate of Deceased Consists of Assets in Several States

William F. Wilson Jr.

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country and should it be found that the revenue therefrom is not what it should be, it is hoped that the legislature will provide for proper enforcement of the tax rather than increase the rates or extend the tax to transfers of property which are not now subject to it.

SIDNEY A. CHAMPAGNE*

COMPUTATION OF THE LEGITIME WHEN ESTATE OF DECEASED CONSISTS OF ASSETS IN SEVERAL STATES

Limitations on freedom of testation are common in this country.¹ Provisions which reserve some portion of a decedent's estate to the surviving spouse are found in some form in all states, varying from the ancient institutions of dower and curtesy to the idea of "forced portion" as provided by the Louisiana Civil Code,² or "hell-fire" statutes limiting a testator's freedom to leave his estate to charity where he either is survived by close relatives or attempts to make the charitable gift during his last illness.³

Two main types of statutes which restrict freedom of testation must be distinguished at this point: First, those statutes which reserve an "indefeasible share" to "forced heirs,"⁴ exemplified by Article 1493 of the Louisiana Civil Code;⁵ second, those statutes which limit to a certain fraction of the estate the share disposable by the testator either generally or in favor of certain recipients, especially charities, but do not reserve any defeasible share to specific members of the testator's family.⁶ The California "hell-fire" statute is a good illustration of the second type.⁷ That statute provides, in effect, that a testator who leaves certain

* Graduate of February 1950; presently member, Baton Rouge Bar.

1. Kuhn, *Comparative Commentaries on Private International Law* (1937) 333; Rheinstein, *Cases on Decedent's Estates* (1 ed. 1947) 403; Breslaur, *Conflict of Laws in Restriction on Freedom of Testation* (1942) 27 *Iowa L. Rev.* 425, n. 3, 426 n. 4, 5, 6, 7, 8, 9, 10, 11.

2. Arts. 1493, 1494, La. Civil Code of 1870.

3. Cal. Prob. Code (Deering, 1937) § 41.

4. Rheinstein, *op. cit. supra* note 1, at 439: "In contrast to the laws of the Civil Law countries, the laws of the several states of the United States, with the sole exception of Louisiana, do not grant an undefeasible share to the descendants of a testator. However, American law has developed some devices by which some measure of protection against disinheritance is established for all, or for certain groups of, the descendants."

5. "Donations inter vivos or mortis causa can not exceed two-thirds of the property of the disposer, if he leaves, at his decease, a legitimate child, one-half, if he leaves two children; and one-third, if he leaves three or a greater number. . ."

6. Bordwell, *Statute Law of Wills* (1928) 14 *Iowa L. Rev.* 1, 172, 196-198.

7. See note 3, *supra*.

heirs cannot devise or bequeath more than one-third of his estate to *charity*. The statute does not provide, however, that these enumerated heirs will receive the other two-thirds of the estate. Thus, a testator could validly devise one-third of his estate to charity, and the remaining two-thirds to a stranger. The problem raised by these statutes is one of computation of the *disposable* fraction of the estate, and not the computation of the indefeasible share reserved to forced heirs. It must be remembered, however, that, in both types of restrictive statutes the fundamental purpose is to protect the family of the deceased against disinheritance.⁸

Upon the death of a person testate, there arises the problem of determining how these various statutes apply to an estate the assets of which are located in more than one state or country, and especially of how to compute the "indefeasible share" of a protected member of the family or the "disposable share" subject to the testator's free disposition.

Before dealing with this problem, certain preliminary observations should be made. With respect to statutes which restrict dispositions in favor of charitable associations or corporations in general, it is necessary that the purpose of the statute in question be inquired into.⁹ Was it intended to limit the capacity of the organizations enumerated in the statute *to take*, or was it intended to place a restriction on the capacity of the testator *to give*? Statutes of the former variety are referred to as *mortmain* acts.¹⁰ The history of the mortmain acts is interesting, but it must suffice to observe that they were originally "aimed at the prevention of the accumulation of too much wealth in the hands of an economically powerful and, therefore, politically dangerous organization. . ."¹¹ The Magna Charta of 1217 contained such a prohibition directed at the Church. In the United States today mortmain acts exist in various forms. In many cases gifts to corporations are prohibited unless exempted by the corporation charter or the statutory law of the state. In other states gifts to charitable organizations are dependent upon governmental authoriza-

8. See note 4, *supra*.

9. Bordwell, *supra* note 6, at 194.

10. Rheinstein, *op. cit. supra* note 1, at 400: "Early in the Middle Ages, the canonist lawyers of the Church had established the rule that church lands, being devoted to the service of the Lord, could never return to temporal ownership and were, therefore, to be inalienable. Under this doctrine, the Church's land holdings could increase but never diminish, and land that had once come to the Church had come to a 'dead hand' (*manus, mortua, mortmain*) and was perpetually withdrawn from the market."

11. *Ibid.*

tion.¹² In any case, however, the restriction is on the ability to *receive*.¹³ Statutes which limit the freedom of the testator to *give* must clearly be distinguished. Of course, in statutes which reserve an indefeasible fraction to certain heirs no difficulty arises, as the statute does not predicate the restriction upon the nature of the legatee or devisee, but upon the natural relationship of the heirs. The distinction must be kept in mind, however, in relation to certain "hell fire" statutes which restrict disposition to charitable, literary, scientific, religious, educational or missionary societies. These statutes also predicate upon the testator's having a husband, wife, parent, child or some other relation. It has been generally held that when the statute restricts disposition when the testator leaves certain family relations, the purpose of the statute is for the protection of these persons.¹⁴ Thus, such a statute restricts the freedom of the testator to *give* and is not a restriction upon the capacity of the organizations enumerated in the act to *receive*.

The principal problem under discussion is best presented by means of a concrete illustration. Assume the following facts:

T, a widower, dies testate as a domiciliary of State *Y*. His closest surviving relation is his daughter, *Mary*. In his will he has bequeathed all of his personal property to his daughter and devised all of his real property to a local charity.

T has left the following net assets:

Immovables situated in State *X* worth \$80,000
 Immovables situated in State *Y* worth \$60,000
 Immovables situated in State *Z* worth \$10,000
 Movables situated in State *X* worth \$40,000
 Movables situated in State *Y* worth \$20,000
 Value of total net estate—\$210,000

In State *X* there is a statute which provides as follows:

"Disposition by will and last testament cannot exceed one-half of the estate of the testator if he leaves at his decease a legitimate child or one-third if he leaves two or more legitimate children."

No such statute is in effect in States *Y* or *Z*.

12. *Ibid.*

13. For further literature on mortmain acts see Hazeltine, *Mortmain*, 11 *Enc. Soc. Sci.* 40.

14. *Chamberlain v. Chamberlain*, 43 N. Y. 424 (Ct. App. 1871).

Does the statute of *X* apply in the present case, and if so, how does it affect the distribution of *T*'s estate?

It is generally said that succession to immovables is determined by the law of the state of the *situs* and succession to movables by the law of the state of the decedent's domicile at the time of his death. Numerous cases enunciate this rule,¹⁵ and noted writers in the field of conflict of laws are generally in accord.¹⁶ The reason for applying the law of the *situs* (*lex rei sitae*) to problems of succession to immovables is basically the same one that calls for the application of the law of the *situs* to all problems concerning title to immovables. Such problems usually arise at the *situs*. If they are to be decided in some other forum, that court applies the *lex situs* to bring about uniformity of decision. In addition, it is a practical necessity for a title examiner, in determining the legal effects of a title deed or any other event that might possibly affect title, to have to look to one and only one law. Obviously this law has to be the one of the place where the land is and where the title deeds are recorded.¹⁷ For the purposes of this comment, the reason for this rule must be kept clearly in mind.

In answering the question of how statutes like that of State *X* affect the distribution of a testator's estate, courts of the *situs* of immovable assets have followed two or possibly three main courses.

First, the indefeasible or disposable share may be computed as a fraction of the assets subject to distribution under the *lex fori* (that is, the *lex situs*), without regard to how much a forced heir or charity may receive from other assets.¹⁸ Following this reasoning in applying the hypothetical statute of *X*, which reserves an indefeasible share to the forced heir, a court of *X*

15. Succession of Senac, 2 Rob. 258 (La. 1842); Succession of Robert, 2 Rob. 427 (La. 1842); Succession of Pachwood, 9 Rob. 438 (La. 1845); Hughes v. Hughes, 14 La. Ann. 85 (1859); Estate of Lewis, 32 La. Ann. 385 (1880); Succession of Bysdale, 121 La. 816, 46 So. 873 (1908); Succession of Herber, 128 La. 111, 54 So. 579 (1911); Succession of Harris, 179 La. 954, 155 So. 446 (1934); Larned v. Larned, 98 Kan. 328, 158 Pac. 3 (1916); Humphries v. Settlement, 91 S.C. 389, 74 S.E. 892 (1912). But see Estate of Lathrop, 165 Cal. 243, 131 Pac. 752 (1913) which held that both personal and real property in the state of California are governed by the laws of California, although domicile of testator at time of his death was New York.

16. Restatement, Conflict of Laws (1934) §§ 306.4 (p. 1036) 249.1 (p. 969); Cook, The Logical and Legal Bases of the Conflict of Laws (1942) 252; Dicey, Conflict of Laws (6 ed. 1949) 529, Rule 127; Goodrich, Conflict of Laws (3 ed. 1949) §§ 167, 168; 4 Page, Wills (3 ed. 1941) § 1643 (p. 713).

17. Cook, *op. cit.* supra note 16, at 427.

18. Breslaur, *op. cit.* supra note 1, at 429.

would make the following computation: The daughter Mary is entitled to one-half of the value of the immovable assets in X, regardless of the fact that she had been bequeathed personal property worth \$60,000 out of the estate elsewhere. The Louisiana case of *Estate of Lewis*¹⁹ has been cited as an example of this method of computation. In that case a Mississippi testatrix had favored one of her daughters as universal legatee. She left considerable immovable property in Louisiana. The other descendants (forced heirs) of the deceased brought an action in Louisiana seeking reduction to the extent of their forced portion. The supreme court said: "As regards her movable property, the effect of Mrs. Butler's donation is to be regulated by the laws of Mississippi; and to determine the reduction to which said donation is liable under the laws of Louisiana, an aggregate must be formed of *exclusively* the property and things or of the proceeds of the sale of the property and things which she owned *in this state* at the time of her death, and which—at that date and under our laws—were *immovable*. . . and—this aggregate formed—by deducting therefrom the portion reserved to the forced heirs of the deceased."²⁰ The Louisiana court clearly states that only the immovable property in Louisiana will form the aggregate upon which the forced portion is computed. However, at no point does the court conclude that the forced heir would be entitled to that fraction *irrespective* of what was received by him out of the total estate elsewhere. There was no necessity for such a conclusion in the *Lewis* case, as the forced heirs had in fact received nothing from the testatrix. Several other decisions have been cited corroborating the *Lewis* decision and the fact that consideration will not be given to what the heir receives outside

19. 32 La. Ann. 385 (1880).

20. 32 La. Ann. 385, 389 (1880). The court further noted the second paragraph of Art. 491, La. Civil Code of 1870. "Persons who reside out of the state, can not dispose of the property they possess here, in a manner different from that prescribed by its laws." The only exception to this rule is to be found in Art. 10, La. Civil Code of 1870, which states: "The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed.

"But the effect of acts passed in one country to have effect in another country, is regulated by the laws of the country where such acts are to have effect.

"The exception made in the second paragraph of this article does not hold, when a citizen of another State of the Union, or a citizen or subject of a foreign State or country, disposes by will or testament, or by any other act *causa mortis* made of this State, of his movable property situated in this State, if at the time of making said will or testament, or any other act *causa mortis*, and at the time of his death, he resides and is domiciliated out of this State."

of the state.²¹ In all these cases, however, the heir who was seeking the reserved share had received nothing from the estate. A more reasonable conclusion from the cases would be that the court of the situs *might* hold that the forced share is the prescribed fraction of the immovable assets at the situs irrespective of what the heir receives out of the total estate elsewhere. It is presumptuous to conclude that this rule is settled by the jurisprudence when the cases reviewed do not involve the factual situation of the heirs receiving such benefits elsewhere.²²

Under the reasoning just discussed the bequest of the personal property amounting to \$60,000 to the daughter, Mary, would be disregarded.

A second method of computing the indefeasible or disposable share has been argued. It has been said that this bequest ought to be considered in order to determine whether the daughter has received as much as the law of X wishes her to receive; that is, one-half of the estate. If, for the purposes of the law of State X, the "estate" is regarded to consist exclusively of the land located there and valued at \$80,000, by receiving a legacy of \$60,000 Mary has been given more than one-half of the "estate," and the entire devise of the X land to the charity would thus be upheld. An illustration of this method of computation is provided by the case of *Jarel v. Moon's Succession*.²³ The testatrix died as a domiciliary of Iowa, leaving a total estate of roughly \$9,000. She had bequeathed \$1,000 to her only daughter and appointed her niece as residuary legatee. The testatrix had owned real estate in Louisiana worth \$500. The daughter brought suit in Louisiana, asking to be awarded one-third of the *entire* estate of the deceased as her forced portion under the laws of Louisiana, and, in the alternative, to be awarded one-third of the immovable property situated in Louisiana. The court of appeal dismissed her first demand by stating ". . . the courts of this state will only attempt to regulate the effect of the will of Mrs. Moon insofar as it affects the immovable property within this state."²⁴ As to the alternative demand of the plaintiff to acquire one-third

21. Note (1940) 14 Tulane L. R. 313, 315, cites the following cases on this point. *Hughes v. Hughes*, 14 La. Ann. 85 (1859); *Banker's Trust Co. v. Greims*, 110 Conn. 36, 147 Atl. 290 (1929).

22. It must be remembered that what the forced heir receives outside Louisiana need not be a legacy. It could be an interest in the estate which the heir has received under similar protective statutes either in the domiciliary administration or other ancillary administrations.

23. 190 So. 867 (La. App. 1939).

24. *Id.* at 869.

of the immovable property in Louisiana, the court said: "As far as the property located in this state was concerned, the plaintiff was not aggrieved, as she received a far greater amount than the one-third reserved to her under the laws of this state."²⁵ The court reasoned that to include property outside the state in the computation of the estate would be creating a dilemma, as courts in all states where immovable property is situated would attempt to administer the entire estate of the deceased without regard to the domiciliary law.²⁶ In many cases such attempted administration would be fruitless for the simple reason that the value of the immovable property in the forum could be less than the portion reserved to the heir by the law of the forum. At the same time the court could not justifiably ignore the fact that the heir had received out of the total estate an amount greater than the value of his forced portion in the Louisiana immovables. The *Jarel* decision has been criticized as a departure from the jurisprudence of the Louisiana courts.²⁷ The opinion was advanced that either "all the property" of the deceased be considered in computing the forced portion, or "only the gifts and the estate in Louisiana" should be recognized.²⁸ It is submitted that none of the cases cited in criticism as the sound jurisprudence of Louisiana²⁹ dealt with the situation presented in the *Jarel* decision; that is, the receipt of gifts by the heir outside Louisiana. The *Jarel* decision is, therefore, not contradictory, but supplementary.

A third method of computing the portion reserved under the restrictive statute differs greatly from the previous two methods. The court of State *X* may consider the entire estate of *T*, wherever located, as comprising the "estate." There is no distinction made between immovable and movable assets in arriving at this aggregate. In taking cognizance of the property outside of State *X*, however, the court also considers gifts or benefits which the heir has received in other jurisdictions. The court of *X* will consider the estate of *T* as amounting to \$210,000. Applying the statute the court computes that Mary should receive the sum of \$105,000, that is, the one-half provided in the statute. Since Mary has already received \$60,000 in specific bequests, she will be awarded the sum of \$45,000 out of the immovable

25. *Ibid.*

26. *Ibid.*

27. Note (1940) 14 *Tulane L. Rev.* 313.

28. *Id.* at 315.

29. See Note 21, *supra*.

assets in X. The remainder of the assets in X (\$35,000) will be available for the devise to the charity. In the Texas case of *Paschal v. Acklin*³⁰ such computation was adopted by the court. The testator died as domiciliary of Tennessee, leaving immovable assets in Texas. A Texas statute provided that a testator could not dispose of more than three-fourths of his estate if he had children surviving him. The statute was similar to the hypothetical statute of State X in that the child was reserved an indefeasible share of the estate. The court was clear in pointing out that, if the children of the testator had received nothing from the total estate of the deceased elsewhere, the Texas statute would be applied and the children would be awarded out of the Texas assets, an amount equal to one-fourth of the *entire* estate of the deceased. The children of the deceased, however, had received legacies of property in other states, and the court found these legacies to be equivalent to one-fourth of the total estate. The court said, "The object of the law is to secure to children a just and reasonable portion of their parent's estate. If they received the portion to which the law declared they were entitled, it was immaterial where or in what way they received it."³¹ It is interesting to observe in the *Paschal* decision that the court attributed absolutely no importance to the fact that the testator had been domiciled in Tennessee rather than in Texas.

The jurisprudence of California supplies other excellent examples of computing a disposable portion on the basis of the entire estate of the deceased, although neither the domicile of the decedent nor the major part of the estate was in California.³² The California statute was not one which reserved an indefeasible portion to certain heirs, but it limited disposition to charitable organizations to one-third of the decedent's estate. Nevertheless, the cases point out the application of a restrictive statute by the court of the situs to the entire estate of the deceased. In *Estate of Dwyer*,³³ a Louisiana testatrix had left the bulk of her estate to a Louisiana charity. In an ancillary administration in California, where certain immovable assets were located, the heirs invoked the California statute which limited disposition of decedent's estates to one-third of the "estate"

30. 27 Tex. 173 (1863).

31. *Id.* at 196.

32. *Estate of Dwyer*, 159 Cal. 680, 115 Pac. 242 (1911); *Estate of Lathrop*, 165 Cal. 243, 131 Pac. 752 (1913); *Estate of Gracey*, 200 Cal. 482, 253 Pac. 921 (1927); *Estate of Layton*, 217 Cal. 451, 19 P.(2d) 793 (1933).

33. 159 Cal. 680, 115 Pac. 242 (1911).

when such disposition was made to charity (contingent also on the existence of certain "heirs at law"). The value of the immovable property in California was less than one-tenth of the entire estate. The court, however, in computing the one-third which was disposable, considered the *entire* estate of the testatrix. Speaking of the legislative intent in interpreting the statute, the court said, ". . . there is no reason why it should be held that the estate of the testator mentioned therein, of which a limited disposition to charity may be made, means the estate of the testator distributable alone in this state. On the contrary, as the legislative intent was only to prevent a disposition in excess of one-third of the estate of the testator where he left heirs at law."³⁴ The case was remanded to the lower court for purposes of actual computation based on the aggregate of the entire estate.

In the New York case of *Decker v. Vreeland*³⁵ a local statute was applied by the court of the situs of immovables to the will of a testator who had died as a domiciliary of New Jersey. The New York statute provided that a testator could not give more than one-half of his "estate" to charity when he was survived by a husband, wife, child or parent. It is similar to the California statute; it restricts the freedom of testation by establishing a disposable limit, but does not give an indefeasible share to the heirs. The will of the testator left practically the entire estate to charity. Only about one-third of the estate's assets were in New York. The New York court said, "There can be little doubt that in determining the testator's estate all his property, both real and personal, and wheresoever situated, must be taken into consideration."³⁶ It is submitted that courts which adopt this line of reasoning, when the intention of the statute is not explicit to that effect, are imputing a meaning to their statutes which is clearly not there. Simply because immovable assets are situated in the state, these courts have assumed the obligation of protecting the interests of the decedent's family by com-

34. 159 Cal. 680, 689, 115 Pac. 242, 245 (1911).

35. 220 N.Y. 326 (App. Div. 1917).

36. *Id.* at 335. The court then described the actual computation as follows: "Applying this rule to the case at bar we have the following (using round figures): The entire estate over debts of the testator, including the New York property is \$140,000; \$70,000 of it can go to charity. If the North New Jersey Baptist Association has received \$70,000 of the estate in New Jersey, it cannot have any part of the New York real estate, which will then go to the heirs of the testator. If the Association has received but \$50,000 it can share in the New York real estate to the extent of \$20,000 and no more." (*Id.* at 336.)

puting under the local law exactly how much of the *entire* estate is subject to disposition. This position rapidly reaches the ridiculous when the case of a man owning oil land in, for example, California, is considered. He has made this purchase merely for investment. He has never been to California. His entire family lives with him in Maine, where they have always lived. Upon his death the entire tenor of his will may be destroyed because the California court will assume the task of protecting the heirs of the deceased on the basis of the California law and will consider the entire estate of the deceased as a necessary basis for computing the degree of protection. Although the California court can make use of only the immovable property situated in California in effecting its computation, it is difficult to comprehend how the facts of such a case give the California court justification for assuming the task of protecting the Maine family by the laws of California. The only connection the state of California has with the problem of descent and distribution of the decedent's estate appears to be the fact that immovable property is situated in California. If the statute of California is to be applied at all, it should apply so as to compute the share subject to free disposition merely as a fraction of the value of the assets subject to the California law of descent, that is, the California immovables. To do otherwise is to project the effect of the law of the situs to the general problem of descent and distribution of the estate of a non-resident testator, thus ignoring the law of the decedent's domicile. It is difficult to imagine that any legislature might ever knowingly intend to bring about such a result.

Application by the court of the situs of the three approaches discussed above has given rise to related problems in the course of the *domiciliary* administration. In the English case of *In Re Ogilvie*,³⁷ the testatrix died while domiciled in England. She had made certain special bequests of personal property to some of her heirs, and had devised a large amount of real property situated in Paraguay to charity. The heirs obtained four-fifths of the Paraguayan property in a Paraguayan court by invoking the law of the *situs*, which provided that only one-fifth of the estate of a testator could be bequeathed or devised to charity. In administration proceedings in England those of the heirs who were named in the will claimed the full amount of their legacies. The Chancellor held that the claimants could not simultaneously claim under the will in England and against it in Paraguay, and

37. [1918] 1 Ch. Div. 492.

thus conditioned their claim to the legacies upon their paying over to the charitable legatees the value of the share in the Paraguayan lands obtained by them in the Paraguayan proceedings. Thus, the English court in the domiciliary administration nullified the effect of the application of the law of the situs by putting the English heirs to their election. A strikingly similar case arose in Vermont. In that case, *In Re Lawrence's Will*,³⁸ the decedent had been domiciled in Vermont. He had made legacies to certain of his heirs, and devised the remainder of his estate to charity. The heirs brought suit in California urging a California statute which limited disposition to charitable institutions to one-third of the estate of the testator. As there was immovable property in California, the heirs were successful in obtaining from the California assets two-thirds of the value of the entire estate of the testator. The California court had obviously followed the doctrine of *Estate of Dwyer*³⁹ in making this computation. Later, in the domiciliary administration in Vermont these same heirs claimed the amount of their legacies under the will. The Vermont court, citing *In Re Ogilvie*,⁴⁰ conditioned the upholding of these special legacies upon the legatees' paying the disappointed charity the exact sum which the California court had stricken from the devise. It is suggested that both of these cases present the same fundamental purpose—the application of the law of the decedent's last domicile by utilizing the doctrine of election to correct the erroneous application of the law of the situs. In the course of other domiciliary administrations several courts have expressed the view that statutes restricting testation should be applied only to domiciliaries of the state which has enacted that statute. In a Pennsylvania case, *Thompson v. Swoope*,⁴¹ a testator domiciled in Pennsylvania devised his entire estate to charity. One of these charitable organizations was chartered in New York. All of the estate of the deceased was located in Pennsylvania. The heir of the deceased sought to invoke a New York statute which prevented disposition of more than one-half of the estate. After pointing out that the New York statute was not a mortmain act, the Pennsylvania court further observed, "The statute was intended to regulate the testamentary power of their own citizens,

38. 93 Vt. 424, 108 Atl. 387 (1919).

39. 159 Cal. 680, 115 Pac. 242 (1911).

40. [1918] 1 Ch. Div. 492.

41. 24 Pa. 474 (1855).

not of ours.⁴² Under identical facts the Connecticut court in *Crum v. Bliss*⁴³ stated, “. . . it [the New York Statute] cannot affect testators who at the time of their death were domiciled in other states.”⁴⁴

The analysis of the cases discussed indicates the proper solution of our hypothetical case. In problems arising in ancillary administration or in other proceedings at the state of the situs, why apply the protective statute of the situs at all? As we have seen, the fundamental purpose of a statute limiting freedom of testation in the manner indicated is to protect the families of decedents dying domiciled within the state. Therefore, no state should apply any protective statute other than that of the state of the decedent's last domicile. Ordinarily the protective statutes of the state of the decedent's last domicile should be applied only in the domiciliary administration proceedings. To this general rule there is but one necessary exception: Security of land titles requires that every state where immovables are located disregard the provisions of the domiciliary law and apply its own provisions.⁴⁵ *But*, if the provisions of the protective statute in the state where the immovable assets are located do not give the forced heir a direct share in the estate or a direct interest in the land, but only give that heir a claim against the beneficiaries of the will, there is no question of title involved, and hence no necessity of invoking the exception to the general rule. It has been clearly held that when there is no question of title to land or part of the estate, the court will not hesitate to look to the law of the decedent's last domicile although the problem presented to the court is directly concerned with the immovable estate of the deceased.⁴⁶ Whether or not the restrictive statute which the court of the situs is called upon to interpret is one which affects title to the immovable assets, or one which merely was intended to give a claim against the beneficiaries of the will, is a problem of local law. A New York statute, for example, which is similar to the California “hell-fire” statute, has been interpreted as immediately vesting one-half of the estate in the protected heirs.⁴⁷ A similar statute of California might well be interpreted as giving a direct interest in the estate to the pro-

42. *Id.* at 475.

43. 47 Conn. 592 (1880).

44. *Id.* at 600.

45. Cook, *op. cit.* supra note 16, at 253.

46. *Higginbotham v. Manchester*, 113 Conn. 62, 154 Atl. 242, 79 A.L.R. 85 (1931).

47. *In re De Lamar's Estate*, 192 N.Y. Supp. 412 (Sup. Ct. 1922).

tected heirs. The Louisiana forced heirship provision is another example of testamentary restrictions which directly affect title to the immovable property in Louisiana.⁴⁸ In the case of common law dower and curtesy a direct interest in the land is created in favor of the surviving spouse.⁴⁹ All such restrictive statutes deal directly with questions of title to the immovable property in the state. It is necessary that they be applied to this property to preserve the security of land titles in the state. *In no case*, however, should the court of the situs consider any more than the immovable property in the state in computing the fraction which the statute reserves to the heirs. To do so would be to project the local law which is necessarily applied for the purpose of security of title to the entire problem of descent and distribution of the estate of a non-resident testator.

On the other hand, it is quite possible that the statute which restricts testation is designed merely to afford the pretermittal heir to a claim against the beneficiaries of the will. Such is the purpose of Section 2303 of the German Civil Code.⁵⁰ The English Family Provision Act of 1938 might also be interpreted as a statute which merely provides for a money payment from the estate for the benefit of certain neglected members of the testator's family.⁵¹ When such interpretation can be placed upon the statute, there is no question of title to immovable property involved, and, consequently, no necessity to apply the statute to immovable property of a testator who had died domiciled in another state. Thus, in our example case, if the court of State X were to interpret the X statute as providing for only a money claim against the beneficiaries and involving no questions of title, the court could justifiably refuse to apply the statute of X at all, and relegate the questions of succession under the will to the law of the decedent's last domicile, State Y.

It is suggested that when a court sitting at the situs of the immovable assets is confronted with a statute expressed in general terms which imposes restrictions on the capacity of a testa-

48. Arts. 1492, 1493, 940, 941, La. Civil Code of 1870.

49. Blackstone, Commentaries on the Laws of England (7 ed. 1775).

50. Art. 2303, B.G.B. "If a descendant of a testator is excluded from succession by disposition mortis causa, he may demand his compulsory portion from the heir. The compulsory portion is equal to one-half of the statutory portion (h).

"The same rights belong to the parents and spouse of the testator, if they have been excluded from succession by a disposition mortis causa (i)."

51. See Note (1940) 53 Harv. L. Rev. 465-472. This act is expressly limited to testators dying domiciled in England.

tor to dispose of his estate, it should ask itself whether the statute was intended to lay down a restriction affecting title to immovable property in the state or whether it was intended to lay down a policy for restricting freedom of testation of persons domiciled within the state. In the first case, where title is affected, the statute must apply to the immovable assets in the state no matter where the testator was domiciled; but in the second case, as no title to the assets within the state are affected by the statute, the statute should not apply to the estate of the deceased who has died domiciled in another state.⁵² Such an approach would relegate problems of the decedent's estate to the most appropriate law—the law of the decedent's last domicile, which can frequently undo any disposition made by any law of any state where immovables are located, by compelling the beneficiaries of these laws to pay back to the estate the value of the benefit received in the other state.

WILLIAM F. WILSON, JR.

52. Cf. Dicey, *Conflict of Laws* (6 ed. 1949) § 31.