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court may have adopted the minority rule for fear of setting a liberal precedent which might prohibit the construction of many needed public improvements and to avoid the problems encountered when California earlier adopted a liberal rule for compensation in the land right of way cases.[23] That situation resulted in an increasingly restrictive judicial attitude concerning the right to compensation.[24]

Colberg is significant in that it reflects the merging of the three rules into the minority rule. The court has recognized the need for a state to meet its responsibility of acting in the best interest of all its people. If these penumbral property rights are recognized, the cost of public improvements would become prohibitive and commerce would be considerably impeded.

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RIGHT OF ELECTION AGAINST A FOREIGN TESTATOR'S WILL

New York's Decedent Estate Law, section 47 ostensibly allows a testator's intention to control the law to be applied in governing the validity and effect of his will. The pertinent portion of section 47 provides:

> Whenever a decedent, being a citizen of the United States or a citizen or a subject of a foreign country, wherever resident, shall have declared in his will and testament that he elects that such testamentary dispositions shall be construed and regulated by the laws of this state, the validity and effect of such dispositions shall be determined by such laws.[1]

In re Estate of Clark[2] presents a novel conflict of laws question concerning the interpretation of section 47. The decedent, a Virginia domiciliary, died leaving an estate which consisted of real and personal property in Virginia and personal property in New York. In his last will and testament the decedent established a testamentary trust for the benefit of his widow. The trust satisfied the requirements of the New York right of election statute, and thus the widow was

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[23]Brown v. Board of Supervisors, 124 Cal. 274, 57 P. 82 (1899); Eachus v. Los Angeles Consol. Elec. Ry., 103 Cal. 614, 37 P. 750 (1894); Reardon v. San Francisco, 66 Cal. 492, 6 P. 317 (1885).

[24]See Note, 38 S. Cal. L. Rev. 689 (1965), discussing the development of California law on compensation for loss of right of access to land.

[1]Law of 1911, ch. 244 [1911] Laws of N.Y. (repealed 1967) [now N.Y. EST., POWERS & TRUSTS LAW § 3-5.1(h) (McKinney 1967)].

[2]21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993 (1968).

precluded from asserting an election against the will under New York law.[3] Under applicable Virginia law the surviving spouse had an absolute and unconditional right to renounce the will and assert a statutory share of the estate.[4] The Virginia election was made, and notice of it was timely filed. However, the testator's will provided that the will, the included testamentary dispositions, and the trusts shall be construed and regulated by the laws of the state of New York.[5] In light of this provision the New York executors challenged the widow's right to renounce the will and assert the statutory share allowed by the law of Virginia. The executors sought a determination under section 47 that the widow's right to elect be denied. The Surrogate Court of New York County, in a cursory disposal of the issue, held that, although the surviving spouse had under Virginia law the absolute right to renounce, the exercise of this right had been effectively barred by the decedent's expression that the laws of New York should apply.[6] The widow appealed, and the supreme court, in a divided opinion, held that since the surviving spouse's right of election is not a testamentary disposition, section 47 did not apply and Virginia law would govern the widow's right of election.[7] This decision was affirmed by the Court of Appeals of New York.[8]

The generally accepted conflict of laws doctrine is that the right of a surviving spouse to elect against a foreign testator's will bequeathing personality is governed by the law of his domicile at the date of his death.[9] This common law concept is a more specific appli-

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[3]Law of 1929, ch. 229, § 4 [1929] Laws of N.Y. (repealed 1967) [now N.Y. EST., POWERS & TRUSTS LAW § 5-1.1 (McKinney 1967)]. This section affords the testator the power to defeat the surviving spouse's right to elect against the will by the creation of a trust of a satisfactory size which provides the spouse with its net income.

[4]VA. CODE ANN. § 64-16 (1950) provides:

> If renunciation be made, or if no provision for the surviving husband or wife be made in the will of the decedent, the surviving consort shall, if the decedent left surviving any direct descendants or a legally adopted child, or descendants of any deceased adopted child, have one-third of the surplus of the decedent's personal estate mentioned in § 64-11; or if no direct descendants or adopted child of the testator, or descendants of a deceased adopted child, survive, the surviving consort shall have one-half of such surplus; otherwise the surviving consort shall have no more of the surplus than is given him or her by the will.

[5]*In re* Estate of Clark, 52 Misc. 2d 583, 276 N.Y.S.2d 507 (Sur. Ct. 1966).

[6]*Id.*

[7]*In re* Clark's Will, 28 App. Div. 2d 55, 281 N.Y.S.2d 180 (Sup. Ct. 1967).

[8]*In re* Estate of Clark, 21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993 (1968).

[9]RESTATEMENT OF CONFLICT OF LAWS § 301 (1934); 6 W. BOWE & D. PARKER, PAGE ON WILLS § 60.21, at 485 (1962). Concerning the right of election against a will devising realty, the determination is governed by the law of the situs of the

cation of the fundamental notion, long recognized by the New York Court,[10] that the right of intestate succession and testamentary transmission of personalty, in the absence of statute or contrary intent, is governed by the law of the decedent's domicile.[11]

In the resolution of conflict of laws problems a modern approach is to avoid the conventional doctrine in favor of the center of gravity or grouping of contacts theory.[12] The foundation for this approach is that the laws that should be controlling are those of the jurisdiction having the dominant interest in the outcome of a particular litigation. New York courts have been receptive to this approach.[13]

There is an argument that can be made for the application of New York law, even if the modern "gravity" or "contacts" theory is used; New York was the situs of the disputed property and New York has a policy of encouraging trust business in its jurisdiction. Carried to its logical extreme, the *Clark* decision is likely to have a detri-

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realty. RESTATEMENT OF CONFLICT OF LAWS § 253 (1934); 6 W. BOWIE & D. PARKER, PAGE ON WILLS § 60.21, at 482-83 (1962).

[10]*In re* Sahadi's Estate, 30 Misc. 2d 166, 125 N.Y.S.2d 204 (Sur. Ct. 1953); *In re* Weiss' Will, 64 N.Y.S.2d 331 (Sur. Ct. 1946); *In re* Adams' Estate, 182 Misc. 937, 45 N.Y.S.2d 494 (Sur. Ct. 1943), *aff'd mem.*, 267 App. Div. 985, 48 N.Y.S.2d 801 (Sup. Ct. 1944), *motion for leave to appeal denied*, 268 App. Div. 849, 50 N.Y.S.2d 673 (Sup. Ct. 1944), *cert. denied*, 324 U.S. 865 (1945); *In re* Slade's Estate, 154 Misc. 275, 276 N.Y.S. 956 (Sur. Ct. 1935); *In re* Thorold's Estate, 147 Misc. 899, 265 N.Y.S. 39 (Sur. Ct. 1933).

[11]*In re* Hollister, 18 N.Y.2d 281, 221 N.E.2d 376 (1966); Caulfield v. Sullivan, 84 N.Y. 153 (1881); Despard v. Churchill, 53 N.Y. 192 (1873); Parsons v. Lyman, 20 N.Y. 103 (1859); *In re* Barandon's Estate, 41 Misc. 380, 84 N.Y.S. 937 (Sur. Ct. 1903). "It is an established doctrine, not only of international law but of the municipal law of this country, that personal property has no locality. It is subject to the law which governs the person of the owner, as well in respect to the disposition of it by act *inter vivos*, as to its transmission by last will and testament, and by succession upon the owner dying intestate." Parsons v. Lyman, 20 N.Y. 103, 112 (1859). This concept of *mobilia personam sequuntur*—personal property follows the domicile of the person—is subject to the testator's contrary intent. *In re* Feuermann's Will, 47 N.Y.S.2d 738 (Sur. Ct. 1944). As concerns the validity and effect of the testamentary disposition of real property and the manner in which it descends, the governing law is that of the situs of the realty. *In re* Gallagher's Estate, 10 Misc. 2d 422, 169 N.Y.S.2d 271 (Sur. Ct. 1957), *aff'd*, 7 App. Div. 2d 1029, 184 N.Y.S.2d 782 (Sup. Ct. 1959); *In re* Master's Will, 136 N.Y.S.2d 907 (Sur. Ct. 1954).

[12]The center of gravity theory has been applied in several areas of law. Bowles v. Zimmer Mfg. Co., 277 F.2d 868 (7th Cir. 1960) (tortious occurrence arising from contract); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955) (intra-family immunity from tort); Aleckson v. Kennedy Motor Sales Co., 238 Minn. 210, 55 N.W.2d 696 (1952) (workmen's compensation).

[13]Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 473 (1963); Haag v. Barnes, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961) (contract); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (wrongful death action); Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99, 117 N.Y.S.2d 881 (1954) (contract).

mental effect on New York trust business by discouraging the creation of testamentary trusts to evade the restrictions imposed by other jurisdictions. However, *Clark* relied on "Virginia's overwhelming interest"[14] to help reach a decision. Indeed, the domicile's relationship with the result seems quite acute, for if the widow were cut off entirely from participation in the decedent's estate by his decision to subject his will to the law of a state having no election statute, the domicile would likely bear the expense of supporting a public charge.

Under either the traditional conflict of laws rule that the law of the decedent's domicile controls or the more recent center of gravity concept, it appears that the *Clark* decision, applying Virginia law, is proper. The vital question then presented is whether such a result is changed by section 47, in light of the testator's expression that New York law should govern the validity and effect of his will.

Although there are no cases involving the precise choice of laws problem confronted in *Clark*, a study of previous lower New York court decisions interpreting the pertinent statute reveals language indicating that a foreign testator may, by the use of section 47, avoid disadvantageous laws of his domicile. In *In re Tabbagh's Estate*[15] a surrogate court ruling recognized that a testator, who died domiciled in France, could establish a testamentary trust which, although prohibited by French law, would be valid in New York. *In re Smith's Estate*[16] involved the will of a testator domiciled in Spain at date of death. The will obviously attempted to avoid the widow's right to elect by submission of the will to the laws of New York. The attempt was, however, unsuccessful because the New York right of election statute[17] had become effective four months prior to the writing of the will, and the widow was held to have the right to elect under this statute. More in point is *In re Cook's Estate*,[18] in which the testator, domiciled in Cuba, attempted to avoid a restriction placed on his right to bequeath. Under Cuban law the status of a decedent's child was that of a forced heir entitled to *légitime* in two-thirds of the estate.[19]

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[14]*In re* Estate of Clark, 21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993 (1968).

[15]*In re* Tabbagh's Estate, 167 Misc. 156, 3 N.Y.S.2d 542 (Sur. Ct. 1938).

[16]*In re* Smith's Estate, 182 Misc. 711, 48 N.Y.S.2d 631 (Sur. Ct. 1944).

[17]Law of 1929, ch. 229, § 4 [1929] Laws of N.Y. (repealed 1967) [now N.Y. EST., POWERS & TRUSTS LAW. § 5-1.1 (McKinney 1967)].

[18]204 Misc. 704, 123 N.Y.S.2d 568 (Sur. Ct. 1953), *aff'd mem.*, 283 App. Div. 1047, 131 N.Y.S.2d 882 (Sup. Ct. 1954).

[19]Salatich v. Hellen, 4 F. Supp. 474 (S.D. Cal. 1933); Bauman v. Pennywell, 160 La. 555, 107 So. 425 (1926). A forced heir is one to whom the law reserves a particular portion in the decedent's estate. The forced heir cannot be deprived of this portion other than by his own consent. The particular portion reserved by law is called *légitime*.

The testator sought to ignore this limitation by expressing in his will that it be regulated by the laws of New York. The child's special guardian, in reliance on the domicile's restriction on the power to bequeath, challenged the testamentary disposition. In denying this challenge the lower court commented upon the availability of section 47 as a method to avoid the laws of the testator's domicile:

> In this proceeding the court is asked to say whether this provision affords residents of other jurisdictions a means of escaping onerous restrictions on the testamentary disposition of property imposed by the laws of their own domiciles. The answer is that the statute does exactly that when the estate left by the testator is subjected to control by the courts of this state as it was in this case ... by the direction as to the governing law.[20]

Although none of these lower court decisions were mentioned by the court of appeals, the result in *Clark* is clearly inconsistent with *In re Cook's Estate,* and that case should no longer be considered good law. The decision does not affect *In re Tabbagh's Estate* since the question there did not concern a widow's right of election, while *In re Smith's Estate* can be distinguished on the ground that the surviving spouse adopted the testator's election to have New York law apply.

The court in *Clark* placed primary emphasis on the finding that a widow's right of election is not a testamentary disposition.[21] Thus section 47, which is expressly applicable to testamentary dispositions, does not affect the right of a surviving spouse to assert a statutory election. In this reasoning the court appears correct. Precedent indicates that the nature of the right of election statutes is one of legislative restriction on the power of the testator to dispose of his assets.[22] This is aptly phrased in *In re Lavine's Will:*

> Section 18 [New York's election statute] of the Decedent Estate Law ... marked a somewhat radical departure from the previously existing latitude of authority for the personal direction of testamentary devolution by a decedent, and amounted

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[20]123 N.Y.S.2d at 570.

[21]21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993, 997 (1968).

[22]Mitchell v. Mitchell, 265 App. Div. 27, 37 N.Y.S.2d 612 (Sup. Ct. 1942), *aff'd mem.,* 290 N.Y. 779, 50 N.E.2d 106 (1943); *In re* Topazio's Estate, 175 Misc. 132, 22 N.Y.S.2d 847 (Sur. Ct. 1940). It is important to note that the right to make a will is purely statutory and subject to the complete control of the legislature. Able v. Bane, 123 Ind. App. 585, 110 N.E.2d 306 (1953); *In re* Erstein's Estate, 205 Misc. 924, 129 N.Y.S.2d 316 (Sur. Ct. 1954). Statutory restrictions upon the power or capacity of a testator to dispose of his property exist in other forms. For example, see S.C. CODE ANN. § 19-238 (1962) (restriction on legacy to bastards or to woman living in adultery); CAL. PROBATE CODE § 41 (West 1956) (restrictions on charitable bequest).

> in effect to a statutory limitation upon the power of an owner to direct the mode of distribution of his net estate. . . .[23]

The basic purpose behind the right of election statutes also indicates that the right to inherit despite the will is characteristically a limitation on the power to dispose of property. The scheme suggests a legislative decision that the testator should not be able to avoid his obligation to support his sponse by disinheritance;[24] protection of the surviving spouse by providing proper support was the end sought.[25] This being the ultimate aim of the statutes, they would be rendered meaningless if a testator were allowed to declare in his will that it be construed by the laws of a jurisdiction which had no election statute. Such a testamentary power has been subjected to at least one criticism:

> It seems odd that the will should govern the forced share the widow may take by renouncing it. If this were carried to its logical extreme a testator could elect the law of a state giving no right to elect and leave substantial personalty there to avoid the widow's share by the domicile. The policies behind the statutory forced share give the domicile a dominent interest, and it seems somewhat of a bootstrap doctrine to permit the testator to determine by his will the law governing his widow's right to renounce.[26]

The court in *Clark* strengthened its decision by an examination of recent changes, enacted after the testator's death, in New York's own election statute.[27] In 1965 the state legislature amended the section to prohibit a foreign testator's surviving spouse from exercising

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[23]167 Misc. 879, 4 N.Y.S.2d 923, 926 (Sur. Ct. 1938).

[24]*In re* Boesenberg's Estate, 179 Misc. 3, 37 N.Y.S.2d 194 (Sur. Ct. 1942), *rev'd on other grounds*, 265 App. Div. 484, 39 N.Y.S.2d 418 (Sup. Ct. 1943).

[25]*In re* Greenberg's Estate, 261 N.Y. 474, 185 N.E. 704 (1933); *In re* Jackson's Will, 177 Misc. 480, 31 N.Y.S.2d 54 (Sur. Ct. 1941), *aff'd*, 264 App. Div. 783, 34 N.Y.S.2d 1007 (Sup. Ct. 1942); *In re* Moore's Estate, 165 Misc. 683, 1 N.Y.S.2d 281 (Sur. Ct. 1937), *aff'd mem.*, 254 App. Div. 856, 6 N.Y.S.2d 369 (Sup. Ct. 1938), *motion for leave to appeal denied*, 255 App. Div. 774, 7 N.Y.S.2d 572 (Sup. Ct. 1938), *aff'd mem.*, 280 N.Y. 733, 21 N.E.2d 512 (1939). *In re Greenberg's Estate* offers a classic example of the protection offered the widow. There the testator died leaving a wife and five children. The will, which contained a $1 legacy for the widow, expressed the testator's disappointment in her failure to provide him with a "blissful and contented home." In holding that the excution of a codicil after the effective date of the election statute constituted a republication of the will so the widow would be able to assert a statutory share, the court said, "Here, however, the purpose of the Legislature was the protection of the widow." 261 N.Y. 474, 185 N.E. 704, 705 (1933).

[26]Scoles, *Conflict of Laws and Elections in Administration of Decedents' Estates*, 30 IND. L.J. 293, 307 (1955).

[27]Law of 1929, ch. 229, § 4 [1929] Laws of N.Y. (repealed 1967) [now N.Y. EST., POWERS & TRUSTS LAW § 5-1.1 (McKinney 1967)].

election rights offered by that section.[28] In 1966[29] and 1967[30] the prohibition was affirmed by the legislature. As indicated in *Clark*, the primary reason for these enactments was not to deprive the spouse of a New York election, but to insure that her right under the law of the testator's domicile would not be abrogated.[31] In 1967 section 5-1.1(d)(6) of the new Estates, Powers and Trusts Law was amended and presently provides:

> The right of election granted by this section is not available to the spouse of a decedent who was not domiciled in this state at the time of death, unless such decedent elects, under paragraph (h) of 3-5.1 [formerly Section 47], to have disposition of his property situated in this state governed by the laws of this state.[32]

This action by the legislature was interpreted by the court as a decision to make available to the spouse the right to elect under either the laws of New York or the laws of the domicile.[33] Thus, the widow of a foreign testator who wants his will to be regulated by the laws of New York is given a choice as to which law will apply concerning her right to take against the will. Although this most recent amendment could, within reason, be interpreted to limit the right of election exclusively to New York law, the more rational construction, consistent with the basic purpose of protecting the spouse, was wisely adopted.

The broader question presented in *Clark*, whether an established conflict of laws rule is changed by statute, although not one frequently encountered, will probably be litigated eventually in other jurisdictions. Indeed, the recent Virginia decision of *French v. Short*[34] presented a situation in which close scrutiny of the appropriate statutes could have resulted in an opposite outcome. In *French* the decedent died domiciled in Florida and by will attempted to dispose of real and personal property in Virginia. Because the will did not comply with the Florida statute of wills, it was not admitted to probate there, but the Florida court permitted the will to be presented to the appropriate Virginia court for probate. The lower Virginia court admitted the writing to probate as to all of the decedent's

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[28] *In re* Estate of Clark, 21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993, 1000 (1968).

[29] Law of 1966, ch. 517, § 6, [1966] Laws of N.Y. 1229.

[30] N.Y. EST., POWERS & TRUSTS LAW § 5-1.1 (McKinney 1967).

[31] 288 N.Y.S.2d at 1000.

[32] N.Y. EST., POWERS & TRUSTS LAW § 5-1.1(d)(6) (McKinney 1967), *as amended*, Law of 1967, ch. 686, §§ 38, 39 [1967] Laws of N.Y. 943 (emphasis omitted).

[33] 288 N.Y.S.2d at 1001.

[34] 207 Va. 548, 151 S.E.2d 354 (1966).