Volume 60
Issue 1 *Dickinson Law Review - Volume 60, 1955-1956*

10-1-1955

Conflict of Laws Problems Raised by "Modern Mortmain Acts"

G. Stanley Joslin

CONFLICT OF LAWS PROBLEMS RAISED BY "MODERN MORTMAIN ACTS"

By

G. STANLEY JOSLIN*

Legislative Basis For Conflicts

To many who have not been confronted with the spectre of George I and his Mortmain Act of 1736 (which required that all gifts and conveyances for charitable uses must be by deed executed before two witnesses, delivered twelve months before death, and enrolled within six months after its execution) there has been a languid and comfortable feeling that it has long since been dead with no children surviving. The disabusement[1] may be most painful and will certainly confront those who draft wills and probate estates of any substance. The Wisconsin lawyer perhaps may rest at ease since the repeal of the Wisconsin Act[2] only to be jolted when he attempts to probate his Wisconsin client's will in which real estate in New York has been devised to a Pennsylvania charity. The living children of this patriarch of Mortmain Acts are many and far the more dangerous because of their unpatterned, unpredictable location and by the modern tendency of our citizenry to have domiciliary fluidity. Twelve of the jurisdictions in the United States today have legislative restrictions or guided procedures for the effective testamentary gift to charities.[3] These are the Modern Mortmain Acts which trap the unwary and confound the astute. The well established paths of conflict are re-examined to their inception, followed, distinguished or disregarded with impunity as the full weight of a policy toward charities in one state meets the conflicting policy of another. Here then is an area of conflicts in which the area itself may be the basis for variance.

The Modern Mortmain Acts

An understanding of the conflicts that may arise necessitates a clear picture, not only of the existing legislation in the twelve jurisdictions mentioned, but the historical development and social background of the restriction on testamentary

* Professor of Law, Emory University.

1 Author's liberty with "disabuse."

2 Wisconsin for a two year period restricted gifts or devises of real estate to religious and charitable societies unless executed at least three months before death. Wis. Laws 1891, c. 359, p. 464; repealed, Wis. Laws 1893, c. 102, p. 111.

3 (1) California, CAL. PROB. CODE § 41 (1949).
(2) District of Columbia, D. C. CODE ANN. § 19-202 (1951).
(3) Florida, FLA. STAT. § 731.19 (Supp. 1953).
(4) Georgia, GA. CODE ANN. § 113-107 (Supp. 1951).
(5) Idaho, IDAHO CODE ANN. § 14-326 (1948).
(6) Iowa, IOWA CODE § 633.3 (1954).
(7) Maryland, CONST. OF MD. art. 38, ANN. CODE OF MD. (Cum. Supp. 1947).
(8) Mississippi, MISS. CODE ANN. § 671 (1942).
(9) Montana, MONT. REV. CODES ANN. § 91-142 (1947).
(10) New York, N. Y. DEC. EST. LAW, § 17.
(11) Ohio, BALDWIN'S OHIO REV. CODE ANN. 2107.06 (1953).
(12) Pennsylvania, PA. STAT. ANN tit. 10, § 17, tit. 20, § 195 (1950).

gifts to charities in that jurisdiction.[4] The problem is not confined to these twelve jurisdictions but is of general scope, for every probate lawyer will be confronted at some time with estates comprised of assets located in other jurisdictions, and testamentary provisions for charities therein. Although Texas has never had a restrictive act, its court was one of the most recent to struggle with this matter in the case of *Toledo Society For Crippled Children v. Hickok.*[5] The Texas court's decision must have given Ohio jurists a resounding surprise. It is possible that this conflicts problem may become more widespread as the tendency for older persons to move in their declining years to Florida or California,[6] where restrictions on testamentary gifts to charities are quite rigid, increases.

These legislative restrictions on testamentary gifts to charities (charities is used broadly to include religious objects) found in our twelve jurisdictions may be generally divided into three classes:

(1) Those jurisdictions restricting the testamentary gift to charities executed a certain period before death as in Florida, Ohio, Pennsylvania and the District of Columbia.[7]

(2) Those jurisdictions with restrictions on the percentage of the total estate which may be devised or bequeathed to charities as in Iowa and New York.[8]

(3) Those having a combination of the two, i. e., time before death restriction and percentage of estate restriction, as found in a greater number of the jurisdictions restricting the testamentary gift to charities. California, Georgia, Idaho, Mississippi, and Montana are jurisdictions with such combined restrictive legislation.[9]

For example, the Idaho Code provides that no estate, real or personal, shall be devised or bequeathed to any charity except by a will executed at least thirty days before death; however, no such devises or bequests shall collectively exceed one-third of the estate.[10] One of the twelve jurisdictions, Maryland, does not fall in any of the three general classes and must be considered separately. Although the last amendment to the Maryland Constitution[11] put an end to all restrictions on charitable gifts, on the constitutional level, the control of the problem was shifted to the legislature, where it may again reassert itself.

A glance at the above examples of restrictive legislation in the three general classes will immediately bring to mind not only many questions of interpretation and scope which must be answered but also the question as to who will answer them. Hypothetical and actual situations come to mind. Decease domicile, place

---

4 Joslin, *"Mortmain" in Canada and The United States,* 29 CAN. B. REV. 621 (1951).
5 152 Tex. 578, 261 S. W. 2d 692 (1953), *cert. denied,* 347 U. S. 936 (1954).
6 FLA. STAT. § 731.19 (Supp. 1953); CAL. PROB. CODE § 41 (1949).
7 FLA. STAT. § 731.19 (Supp. 1953); BALDWIN'S OHIO REV. CODE ANN. 2107.06 (1953); PA. STAT. ANN. tit. 20, § 195, tit. 10, § 17 (1950); D. C. CODE ANN. § 19-202 (1951).
8 IOWA CODE § 633.3 (1954); N. Y. DEC. EST. LAW, § 17.
9 CAL. PROB. CODE § 41 (1949); GA. CODE ANN. § 113-107 (Supp. 1951); IDAHO CODE ANN. § 14-326 (1948); MISS. CODE ANN. § 671 (1942); MONT. REV. CODES ANN. § 91-142 (1947).
10 IDAHO CODE ANN. § 14-326 (1948).
11 CONST. OF MD. art. 38 (note Amend. by Md. Laws 1947 ch. 623, and Md. Laws 1949 p. 1992).

of execution of the will, situs of property (real, personal, tangible and intangible) equitable conversion, total estate, etc., all these wraiths of the general law of conflicts drift into our mind, and it is with these problems as they have been resolved or projected within the singular area of charitable gifts that we are here concerned. To him well versed in the established rules of arms length conflicts, beware. A charity is involved and, like the beautiful blonde's affect on the jury, we know not what the result may be.

Problems Raised By The Restriction On Testamentary Gifts Executed Within A Certain Period Before Death

These restrictions are sometimes called limitations on the death-bed gift to charities. The restricted period varies from thirty days as in California, Idaho, Montana, and Pennsylvania[12] (one calendar month in the District of Columbia)[13] to one year in Ohio;[14] with Georgia and Mississippi having ninety day restrictive periods[15] and Florida six months.[16] A collation of these time restrictive acts shows close similitude in key wording,[17] and all may be quite accurately congeried into the general statement that all devises and bequests to charities executed within the designated period before death are void. One of the first specific problems to present itself may be graphically raised by the question: Against whom does this restriction fall? And that question suggests others: Is the restriction directed only against wills executed in that jurisdiction? Does it affect wills of its domiciliaries executed in other jurisdictions? How shall the restriction affect property within its jurisdiction when the domicile of the deceased and the execution of the will are in other states wherein there are no restrictions? What is the affect of a will executed within the prohibited period by one domiciled within the restricting jurisdiction, upon property located in a state where there is no restriction? The scope of these restrictive statutes is our first conflict problem.

The Scope Of The Time Before Death Restriction

In an early New York case (1880) the court there was confronted with the questions as to the affect of the Pennsylvania statute declaring void all devises and bequests made within one month of death. The will was executed in New York, December 8th, and testator died domiciled there twenty-three days later. A be-

---

12 CAL. PROB. CODE § 41 (1949); IDAHO CODE ANN. § 14-326 (1948); MONT. REV. CODES ANN. § 91-142 (1947); PA. STAT. ANN. tit. 10, § 17, tit. 20, § 195 (1950).

13 D. C. CODE ANN. § 19-202 (1951).

14 BALDWIN'S OHIO REV. CODE ANN. 2107.06 (1953).

15 GA. CODE ANN. § 113-107 (Supp. 1951); MISS. CODE ANN. § 671 (1942).

16 FLA. STAT. § 731.19 (Supp. 1953).

17 See note C *supra*. Examples: "No estate, . . . may be bequeathed or devised to any charitable . . . uses . . . unless the will was duly executed at least thirty days before the death . . . ." CAL. PROB. CODE. § 41 (1949); ". . . shall be invalid unless executed at least six months prior to death." FLA. STAT. § 731.19 (Supp. 1953); ". . . shall be invalid unless executed at least six months prior to death." FLA. STAT. § 731.19 (Supp. 1953); ". . . at least ninety days before the death . . . or . . . shall be void." GA. CODE ANN. § 113-107 (Supp. 1951); ". . . shall be void unless made at least thirty days before such death, ..." PA. STAT. ANN. tit. 10, § 17, tit. 20, § 195 (1950).

quest was made to a Pennsylvania charity.[18] The decision of this problem in first instance is controlled little by conflicts rules in areas other than that of charities.[19] The conflicting basic policies here may have been the long standing tendency favorable to charities, countered by a *malaise* over New York property going to a Pennsylvania institution. In any event, the decision was an extending one holding (by the New York Court) that the Pennsylvania statute caused bequests to Pennsylvania charities, executed in New York by one domiciled there, to be void.[20] Without travail a sister state decided the public policy of another to her benefit. The logical basis, as here used to bolster the decision, was to interpret the statute to restrict not only the power to bequeath but also the capacity to receive. The reasoning of the court, as indicated by the following, seems somewhat ostentatious:

> "Suppose a resident of Pennsylvania should pass over the line, and make a will there in violation of this statute. Will this avoid it and set it at naught? If it would, the law of the state would be entirely subverted and rendered of no avail, and its policy in regard to such devise and bequest evaded."[21]

It seems that the court conjured up its fear and then bowed to it. Several years later the Pennsylvania court decided that this time before death restriction had no effect outside of Pennsylvania and only limited the power of donors domiciled there.[22] This Pennsylvania decision interpreting its statute obversly in the face of the New York decision may be more easily understood when we see that the Pennsylvania court was confronted with a bequest executed in New Jersey, by one domiciled there, giving property to a Pennsylvania charity. To follow the New York decision would have voided the bequest. The decision was again bolstered by a neccessary collateral that the restriction did not limit the charity's capacity to take.[23] New York then recognized the Pennsylvania decision and permitted a bequest of New York property by one domiciled in New York to a Pennsylvania charity although executed within the time that would have rendered the bequest void if made in Pennsylvania.[24] Since that early time, it has generally been held that the restriction in the several state statutes delimiting the time before death when effective charitable bequests may be made, circumscribes only those domiciled in that jurisdiction.[25]

---

18 Kerr v. Daugherty, 79 N. Y. 327 (1880).

19 "Courts tend, unhampered by any fixed conflict-of-laws rule, to sustain charitable trusts which do not violate the policy of any state concerned." Beach v. Gilbert 133 F. 2d 50, 51 (D. C. 1943); note general policy background in Chamberlain v. Chamberlain, 43 N. Y. 424 (1871) and Toledo Soc. For Crippled Children v. Hickok, 152 Tex. 578, 261 S. W. 2d. 692 (1953) *cert. denied,* 347 U. S. 936 (1954); especially p. 152 and 155; see also Pottstown Hospital v. New York Ins. & Trust Co., 208 Fed 196 (S. D. N. Y. 1913); especially p. 197.

20 Kerr v. Daugherty, 79 N. Y. 327 (1880).

21 Kerr v. Daugherty, 79 N. Y. 327, 341 (1880).

22 Heldeburn's Estate, 16 C. C. 39 (4 Dist. 40) 1894.

23 See note 22 *supra.*

24 Pottstown Hospital v. New York Life Ins. and Trust Co., 208 Fed. 196 (S. D. N. Y. 1913).

25 See note 24 *supra; accord,* Vansant v. Roberts, 3 Md. 119 (1852), Thompson v. Swoope, 24 Pa. 474 (1855); *cf.* Hollis v. Drew, 95 N. Y. 166 (1884).

Although many of the general conflict of laws rules were stated in the early cases, it is quite obvious that these rules are used to bolster decisions in this area of charities but seldom to hinder them.[26] The very early "death-bed" charity restriction is now generally thought to have been directed at the charity and intended to limit its capacity to take and hold property.[27] Today, however, it is generally assumed that the restriction is to guide and limit the power to give.[28] This basic conclusion seems to have changed during the life of the statute as the social and economic picture changed from the early situation of a plethora of property in the hands of the church, to an extremely beneficent attitude toward charities endorsed in all phases of law. Is there now a cooling of this beneficence as charities amass wealth? May there be a trend again toward the power to take and hold basis for the limitation with which we are here concerned? It seems that here is the anlage of the conflict of laws decision in the area of charities and it may be to this point that one must go for a firm basis for future decisions.[29]

California courts originally applied the restrictive interpretation to their statute rendering gifts void if made within thirty days, thus permitting a bequest executed by one domiciled in another jurisdiction to be effective as to property in California, although executed within the restricted period,[30] but by statute evidencing a strong resentment against these charitable bequests executed outside the state, the restriction was made to apply to all bequests no matter where executed.[31] A strong policy against the evils of the death-bed charitable gift is logically one of improper influence. It follows that a jurisdiction with such policy would frown on these death-bed dispositions of property over which it has ultimate control, and it is strange that this was not the original decision. It seems clear, however, that the jurisdiction does have inherent right to extend the affect of its restriction on bequests in foreign wills of property over which it has control and this can be done without legislation.[32]

Time Restriction And Real Property

Thus far our concern has been the scope of the time before death restriction on testamentary gifts of personal property. However, the restriction itself is inclusive of both real and personal property and our attention next logically turns to the treatment of this restrictive provision when a devise of real estate is made within that forbidden time. If the real estate and the domicile of the devisor are the same, no conflicts situation arises as to our present problem. When the restrictive statute is of the testator's domicile and real estate has another situs, a con-

26 Beach v. Gilbert, 133 F. 2d. 50, 51 (D. C. Cir. 1943).
27 See Joslin, *"Mortmain" in Canada and The United States,* 29 CAN. B. REV. 621, 622 (1951).
28 *Id.* at 627.
29 Hollis v. Drew, 95 N. Y. 166 (1884) is often quoted as a primal case of importance in this area, but a careful consideration of the facts and statutes under which it was decided leaves little value in it.
30 CAL. PROB. CODE. § 40 (1949).
31 See Layton's Estate, 217 Cal. 451, 465, 19 P. 2d. 793, 798 (1933).
32 RESTATEMENT, CONFLICT OF LAWS § 306, comment *a* (1934).

flicts problem is evident, as it is in the situation where the testator's domicile has no restriction but the state of the real property's situs does have a statute declaring void all devises made within a certain period before death. Although it may be said, as a conflicts generalization, that the law of the situs of real estate will in the ultimate determine its disposition,[33] in this area dealing with charities, behind which there may be a very strong social policy, the liberal application of comity in other areas of law may not be followed. It will not then be unusual to find a court disregarding its established comity theories in arms length situations and in the atypical area of charitable gifts, returning to the fountainhead of its power over this real property.

In an early State of Washington case it was held that although a devise executed in California by one domiciled there was void under the California statute restricting gifts within thirty days of death, it was a valid devise as to real estate with its situs in Washington.[34] This holding seems a logical one for the Washington court, especially when it is noted that the devise was to a Washington charity. If the devise had been one of Washington property to a California charity, the court could logically have declared the devise void either on the theory that the California law was directed at charity's capacity to take, or that the execution within that time before death was so inconsistent with the policy and situation in California as to be properly recognized as void by other courts. If the devise executed in California, of Washington real estate, were to a charity of a third state, it seems the Washington court could hold it void on the second theory above mentioned. It may be that the policy of Washington or any state without restrictive legislation is so benignant toward all charities that they will recognize the devise of their real estate to a foreign charity even though void at the domicile of the devisor.[35]

In a recent case (1953), a Texas court took a similiar stand. A will was executed in Ohio, devising Texas real property to an Ohio charity. The devise was held absolutely void under Ohio law as it was executed within one year of death.[36] The Texas court stated:

> ". . . it is not disputed or disputable that under proper principles of the Conflict of Laws the validity of the devise is to be determined by reference to Texas Law (which permits it) and not by the domiciliary statute (which forbids it) . . .[37]
>
> "Our courts, by reason of their ultimate power over lands situated within our state, no doubt have the *jurisdictional* authority in a given case to vary the above rule and apply the domiciliary law in preference to our own, if they should find compelling reasons so to do. But such a case would be a rather exceptional one . . ."[38]

---

33 RESTATEMENT, CONFLICT OF LAWS § 249, (1934).
34 Pritchett v. Edwards, 26 Wash. 32, 66 Pac. 148 (1901).
35 Toledo Society For Crippled Children v. Hickok, 152 Tex. 578, 261 S. W. 2d 692 (1953) *cert. denied*, 347 U. S. 936 (1954).
36 Kirkbride v. Hickok, 155 Ohio St. 293, 98 N. E. 2d 815 (1951).
37 Toledo Society For Crippled Children v. Hickok, 152 Tex. 578, 261 S. W. 2d 692, 696 (1953) *cert. denied*, 347 U. S. 936 (1954).

That the effect given a foreign restriction by the jurisdiction of situs of realty is an uncertain one is evidenced by the Texas Court:

> ". . . If this view should impress one as legalistic . . . it is hardly more of a 'technical' approach than . . . in effect, to enforce here a legislative policy of Ohio, which is contrary to the policy of our own Legislature."[39]

The policy of Texas, however, was not put to a real test inasmuch as the property would go to either an Ohio charity or Ohio heirs. It would be interesting if one could know what the result would have been if the heirs were living in Texas so that the contest would have been between an Ohio charity and Texas domiciliaries.

An astounding aftermath of this type conflict between Ohio and Texas could result if the opposing policies are violent enough. If Ohio would hold after the Texas court directed the property to go to the Ohio charity, that its restrictive act goes not only to the power to give but to the charity's capacity to hold, and that property so received by the charity escheats to the State. Where the statute is interpreted as restricting the power of the charity to take and hold, this limitation is usually held to be assertable only by the State, and may be asserted causing escheat.[40] If such situation would develop, the Texas court undoubtedly would have a change of heart.

Since we have seen that these time restrictive acts may be held not to apply to personal property within their jurisdiction which has been bequeathed by will executed in a foreign domiciliary state wherein there is no such restriction,[41] a fortiori the devise of real estate with a situs in Mississippi executed by one domiciled, for example, in Illinois where there is no time before death restriction, a few days before death, may be held by the Mississippi court to be an effective devise, although the Mississippi statute declares that devises made within ninety days are void.[42] However, here again, to accept this as the certain result is to disregard the tocsins of decisions resting on comity in this area of charities with its shifting policy background. California asserted its inherent power over real estate within its jurisdiction by providing that all dispositions by will, whether made in or out of the state, are subject to the restrictions limiting devises to charities.[43] This statute may have a reverse affect not anticipated in the event one domiciled in another state should execute a devise giving considerable real estate with its situs in California to a California charity. If executed within thirty days, it would be void,[44] and the property go to heirs or other testamentary objects in all probability of the

---

38 *Ibid.*
39 *Id.* at 702.
40 Comonwealth ex rel. Attorney General v. New York R. R., 114 Pa. 340, 7 Atl. 756 (1887).
41 Pottstown Hospital v. New York Life Ins. & Trust Co. 208 Fed. 196 (S. D. N. Y. 1913). Cases cited note 25 *supra.*
42 MISS. CODE ANN. § 671 (1942). See Haily v. McLaurin's Estate, 112 Miss. 705, 73 So. 727 (1917).
43 "All dispositions by will, whether made in or out of this state, are subject to the provisions of this act limiting charitable bequests and devises." CAL. PROB. CODE § 40 (1949).
44 CAL. PROB. CODE § 41 (1949). 3 Cof. 279 (1907); 166 Cal. 286, 135 Pac. 1131 (1913).

testator's domicile. It seems that the California court would have a more fluid background from which to handle the individual case without the statute.

Problems Raised By The Percentage Of Estate Restriction On Charitable Gifts

Of these twelve jurisdictions restricting the testamentary gift to charities,[45] seven limit the percentage of the estate that may be so given.[46] This ranges from one-half of the estate, as in New York,[47] to one-fourth in Iowa,[48] with California, Idaho, Mississippi, and Montana falling intermediate with one-third of the estate restrictions.[49] Georgia is unique in its provision restricting the testamentary gift to one-third of estates evaluated at two hundred thousand dollars ($200,000) or less but no restriction on the percentage of an estate above that amount.[50] No problem in our present sphere of concentration presents itself where the entire estate of the deceased is intrastate, but the ever increasing tendency toward distribution of assets in several states calls for a careful analysis of the problem as to the effect of these restrictions on the estate or the portions of it which may be located in one of the jurisdictions having such legislation. Two basic problems present themselves.

(1) The effect of a restrictive statute in the domiciliary state upon assets in other jurisdictions and

(2) The effect of this restriction upon situs property when the domiciliary jurisdiction has no restriction.

The drafter of wills should act prospectively. The probator of estates will have had the die cast.

The first question raised was whether that legislation was meant to apply only to assets located within the state or to all assets wherever located. For example: The Idaho Code provides that no devises or bequests to charities shall collectively exceed one-third of the estate of the testator.[51] It seems doubtful that the legislator contemplated a limitation on extra-jurisdictional property, yet it has been uniformally held that these percentage of estate restrictions apply to the estate wherever located and in ascertaining the total estate for application of the percentage limitation, all assets are congeried for evaluation.[52] A casual glance at this situation leads one to conclude that this interpretation is unfavorable to charitable objects, and the actual factual situations under which this rule was announced do

---

45 Jurisdiction cited note 3 *supra.*

46 California, Georgia, Idaho , Iowa, Mississippi, Montana, and New York. Statute cited note 3 *supra.*

47 N. Y. DEC. EST. LAW, § 17.

48 IOWA CODE, § 633.3 (1954).

49 CAL. PROB. CODE, § 41 (1949); IDAHO CODE ANN. § 14-326 (1948); MISS. CODE ANN. § 671 (1942); MONT. REV. CODES ANN. § 91-142 (1947).

50 IOWA CODE, § 633.3 (1954).

51 IDAHO CODE ANN. § 14-326 (1948).

52 Gracey's Estate, 200 Cal. 482, 253 Pac. 921 (1927); Dwyer's Estate, 159 Cal. 680, 115 Pac. 242 (1911); Estate of Henckley, 58 Cal. 457 (1881); Decker v. Vreeland, 220 N. Y. 326, 115 N. E. 989 (1917); See Paschal v. Acklin, 27 Tex. 174 (1836). *contra,* Jones' Estate, 2 Cof. 178 (1909).

indicate a liberal interpretation of the restriction.[53] In holding that the statutes restricting the percentage of the estate which may be devised or bequeathed to charities apply to all assets wherever located, many troublesome conflicts problems were eliminated; especially those which would have arisen over the determination as to what property actually was within the state as a basis for the limitation. However, other conflicts problems may arise on the broader intrepretation. Suppose one domiciled in New York (where testamentary gifts are restricted to one-half the total estate)[54] bequeaths personal property in New York to a New York charity and the remainder of his property to a New Jersey charity. Suppose further that the personal property in New York is one-half the total estate and the other half is New Jersey realty. In probate in New York the court would in all probability determine that the bequest to the New York charity was valid, but the provision for the New Jersey charity invalid under the restrictive statue. Later the will could be probated in New Jersey and the New Jersey court decide that the New York restriction would not apply to New Jersey real estate, thus permitting the New Jersey charity to take. The end result would be that charities would take the entire estate. Although the time restriction was involved in the recent Texas case (*Toledo Society For Crippled Children v. Hickok*),[55] the application of its holding to the present problem would give this result. There will be many variations of the above situation according to location of assets in the many states, but the basic problem will be the same. In any one jurisdiction, it may be cleared by a reliable decision but it will in all probability be a first instance situation in most jurisdictions for many years. In fact, it seems that policy shift in the area of charities may be more rapid than the stabilizing effect of decisions, thus the indecision as to what the other jurisdictions will finally do, may continue to baffle the domiciliary court.

It could be that the domiciliary court would wish to temporize to wait decisions in other jurisdictions before determining how this percentage of estate limitation would affect its jurisdictional property, but that seems undersirable for property would be in an indecisive situation for years and probate would be impossible. To assign property contingent upon decisions in other jurisdictions would be even more undesirable and paralyzing.

The uncertainty of the final result of the percentage of estate limitation arises mostly in the situation where property is located in jurisdictions with no restriction. When foreign property is located in a state where legislation declares the particular charitable devises or bequests void, the domiciliary court may easily ascertain that fact and thus not include these charitable gifts in computating whether more than the percentage allowed is given to charities. Although the jurisdiction of the testator's domicile, may for purposes of deciding its percentage, try to forecast what the state of situs will do in the case where the problem is new, no certainty is gained by this attempted clairvoyance. Computation may be further

---

53 Cases cited note 52 *supra.*
54 N. Y. DEC. EST. LAW, § 17.
55 152 Tex. 578, 261 S. W. 2d 692 (1953), *cert. denied,* 347 U. S. 936 (1954).

complicated where property of the testator is located in several states wherein statutes provide for different percentage restrictions; as for example, Iowa with one-fourth; New York, one-half and Georgia, one-third.[56] A devise of Iowa real estate to charities by a New York domiciliary may be less than one-half the estate but more than one-fourth and thus may be limited by the Iowa Court.[57] More confusion may result if the testator devises or bequeaths more than one-half of his estate, including Iowa land, to charities. This will be effective as to less than one-half the estate if Iowa restricts to one-fourth in exercising its jurisdiction over situs property. Here again computations in any one jurisdiction could be quickly and accurately made if the decision of the other jurisdiction could be foretold. In this area of shifting policy toward charities the aleatory nature of such augury has been very noticeable.

Although it is uniformly held that all property wherever located will be included in arriving at the total value of the estate upon which the percentage restriction will apply,[58] an early California case did hold that "charities are entitled to one-third of the distributable assets of the estate, and that in determining what that one-third is, properly situated out of the jurisdiction of this court cannot be taken into account."[59] Three years later the California court said:

> "Such a construction would be arbitrary and not in harmony with the legislative intent and purposes. Its effect, too, would be, in many instances at least, to permit the heirs at law, under distribution in foreign jurisdictions and here, to receive an amount largely in excess of two-thirds of the aggregate of the estate of the testator and contrary to his intention.[60]
>
> . . . . "It seems to be the only construction which will permit the intention of a testator to be carried out as to the portion of his estate which he may devote to charity at the same time that gives to the heirs at law all that in the judgment of our Legislature they should have and prevents them from taking a proportion in excess of what they are entitled to."[61]

The genesis here again seems to be whether the policy is one against charities amassing property or one to protect the natural objects of the testator's bounty. If the intent of the legislator was to prevent charities from receiving excessive amounts of property, his concern probably was only with property within the state. It is not probable that he was worried over charities taking property from other jurisdictions. However, if his concern was over heirs of the testator, in all probability he was intending to withhold for them, as against charities, a portion of the testator's entire estate, no matter in what state it might have situs. Having con-

---

56 IOWA CODE, § 633.3 (1954). N. Y. DEC. EST. LAW, § 17. GA. CODE ANN. § 113-107 (Supp. 1951).
57 It is clear that the Iowa court with its inherent power over situs real estate could construe its one-fourth estate restriction to circumscribe all testamentary dispositions including those of foreign domiciliaries.
58 Cases cited note 52 *supra.*
59 Jones' Estate, 2 Cof. 178 (1909).
60 Dwyer's Estate, 159 Cal. 680, 115 Pac. 242, 245 (1911).
61 *Id.* at 246.

cluded that this latter was the basic and motivating concern of the legislator,[62] the now established interpretation seems right at the present time, but with a possible shift in policy in the future directed against amassing of property by charities this may again change. Certainly, however, such reflection of policy if it arises would be more clean cut and cause less travail if reflected by statutory provision.

The Extra State Range Of The Percentage Of Estate Restriction

Although we have seen that a statute restricting the percentage of an estate that may be bequeathed or devised to charities is interpreted to include property of the testator in other jurisdictions in computing the total estate,[63] a further basic problem is evident. What effect will this restriction have upon wills executed by one domiciled in a jurisdiction with no such restriction, when the state of situs having the restriction is confronted with the problem? How will the state of situs view the testamentary gift to charities executed by one domiciled in a jurisdiction having the percentage restriction in force? A few jurisdictions wherein the problem has raised to the reported level, have clear cut paths of decisions.[64] One can not be too sure as to what the others will do with this problem in the charities field, even though their conflicts rules, absolute or comity, are well established in other areas.[65]

Since an early time, it has been assumed that the percentage of estate restriction does not affect a testamentary gift by a foreign domiciliary of foreign property to charities of the restricting jurisdiction.[66] This makes it possible for a Massachusetts testator to bequeath or devise all his property to a New York Charity if none of the property has a situs in New York despite New York's one-half the estate limitation. The rationale again being that the restriction is intended to circumscribe the power of testamentary disposition to charities not the charities' power to take and hold property.[67] When, however, the foreign will acts upon property in New York, the restriction will be applied to real property and may be to personal property.[68] Thus an Indiana domiciliary willing all his estate to an Illinois charity may pass all except the New York property. This would be most easily depicted by a situation where all the estate is real property, one-half of which is in Indiana and the other half in New York. New York would permit only one-half

62 Cases cited note 52 *supra.*
63 Cases cited note 52 *supra.*
64 New York and California, cases cited note 52 *supra.*
65 "Each State determines those matters according to its own views of policy or right, and no other state has an interest in the question, . . ." Chamberlain v. Chamberlain, 43 N. Y. 424, 434 (1871). See Toledo Society For Crippled Children v. Hickok, 152 Tex. 578, 261 S. W. 2d 692 (1953), *cert. denied,* 347 U. S. 936 (1954); Beach v. Gilbert, 133 F. 2d 50, 51 (D. C. Cir. 1943).
66 See Chamberlain v. Chamberlain, 43 N. Y. 424 (1871); Decker v. Vreeland, 220 N. Y. 326, 115 N. E. 989 (1917), Merritt's Estate, 273 App. Div. 79, 75 N. Y. Supp. 2d 828 (1947); Thomas v. Swoope, 24 Pa. 474 (1855); Pottstown Hospital v. New York Life Ins. & Trust Co., 208 Fed. 196 (S. D. N. Y. 1913); Hailey v. McLaurin's Est., 112 Miss. 705, 73 So. 727 (1917).
67 American Bible Soc. v. Healy, 153 Mass. 197. 26 N. E. 404 (1891).
68 Decker v. Vreeland, 220 N. Y. 326, 115 N. E. 989 (1917).

of the total estate to go to charity and as the restriction runs only to jurisdictional property, none of the New York property could be taken by the charity.

It seems clear that the restricting jurisdiction could logically hold that its legislative restriction was not only meant to limit the power to give, but also was meant to restrict only its domiciliaries' power. If the purpose of the statute is to protect the close relatives of the testator as against excessive gifts to charities, it seems logical that the legislator was concerned with individuals in that state who might become a burden upon it by wholesale disherison. However, now perhaps more than earlier, the decision to extend the restriction to those not domiciled within the state as to property within it, is desirable as the ease with which domicile may be changed has increased, and the situation raising the fear of the Pennsylvania court become more prevalent; viz., that the restrictive act would be ". . . entirely subverted and rendered of no avail, and its policy in regard to such devise and bequest evaded."[69]

These jurisdictions have established, then, that their percentage restriction does not act extra-territorially so as to limit the right of their own charities to take,[70] by way of foreign wills, but that it does affect the foreign will as to real estate within their jurisdiction.[71] They may, however, be more lenient with personal property and permit it to go as determined by the domiciliary court as is usually found in general comity situations.[72] California, however, by statute provides that foreign wills can not dispose of California personal property contrary to its one-third estate restriction,[73] and it is clear that this is within its power either by legislative or judicial avenues.[74]

Conversely, the scope of the statute restricting the portion of a total estate which may be given to charities does extend extra-territorially when the domiciliary jurisdiction has the restriction and property has situs in other jurisdictions. Thus a Californian may devise all his property located in Texas to charities. The California court would recognize the one-third estate restriction but the Texas court may recognize it and limit the portion going to charity or it may disregard it and permit all to go.[75] Here again the domiciliary restrictive statute usually is permitted by the foreign court to apply to its personal property, but with more reluctance as to real estate. As California has seen fit to apply its restriction to situs personal property against the usual domiciliary comity, a possible retaliatory atmosphere may arise, when a non-restricting jurisdiction is confronted with a Californian's bequest of its property. The initial contention possibly being resolved

---

69 Kerr v. Daugherty, 79 N. Y. 327, 341 (1880).
70 Cases cited note 66 *supra.*
71 Decker v. Vreeland, 220 N. Y. 326, 115 N. E. 989 (1917).
72 RESTATEMENT, CONFLICT OF LAWS § 306, comment *a* (1934).
73 CAL. PROB. CODE, § 41 (1949). Layton's Estate, 217 Cal. 451, 19 P. 2d 793 (1933); Lathrop's Estate, 165 Cal. 243, 131 Pac. 752 (1913).
74 RESTATEMENT, CONFLICT OF LAWS § 306, comment *a* (1934).
75 Toledo Society For Crippled Children v. Hickok, 152 Tex. 578, 261 S. W. 2d 692 (1953), *cert. denied,* 347 U. S. 936 (1954).

by the ascertaining of whose charity will be benefited or injured thereby, or the domicile of the objects that will benefit by avoidance of the charitable gift.

Conclusions

The conflict of laws problems raised by the Modern Mortmain Acts are universal in scope inasmuch as the courts of any state may be required to interpret the effect of such acts, existing in foreign domiciliary jurisdictions, upon property both real and personal within its jurisdiction. Although a particular jurisdiction may have well maked avenues of conflicts decisions in other areas, this sphere of the testamentary gift to charities is anomalous and may develop rules of conflicts at variance with those in other spheres of law. The resulting decisions are apt to be controlled by the initial policy of the jurisdiction toward these charitable gifts, and general rules of conflicts may be disregarded where they tend to impinge upon this policy. It is entirely possible that the whole area of charitable gifts and charitable institutions generally will in the future meet a more direct and critical gaze with the resultant uncertainty in the law as policy shifts take form. This may be most pronounced in conflicts areas as policies of one state may tend to clash with those in another.