Problems in Probating Foreign Wills and Using Foreign Personal Representatives

Harold G. Wren

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THE purpose of this Article is to analyze some of the problems involved in the probating of foreign wills and the use of foreign representatives. In the research of this topic, chief consideration was given to the law of Mexico and Texas. Yet at the outset, it is important to emphasize the many different bodies of law which must be considered to solve a particular problem in this area. Initially, it is necessary to be familiar with the internal law of the two jurisdictions. Then one must apply the appropriate conflicts rule to determine the applicable internal law. Because of renvoi, conflict among the conflicts rules, and the use of different conflicts rules for different purposes, there is an agglomerate of threads which must be carefully unraveled to solve any given problem.

I. INHERITANCE

In the area of conflicts law, there are substantial differences between Mexico and Texas. Like the majority of civil law countries, Mexico relies principally on nationality of the decedent in deciding questions of choice of law governing the succession of property at death; whereas, Texas is guided by Anglo-American concepts which emphasize domicile if movables are involved and situs if immovables.

Since 1857, the federal form of government has prevailed in Mexico, and the states of the Mexican Union have enjoyed autonomy in matters of civil legislation. Each state has enacted its own civil code and laws of procedure, but the legislation of the Federal District has profoundly influenced this legislation. Thus, law of both succession and conflicts is relatively homogeneous throughout Mexico.
By way of contrast, in the United States there are many differences among the various states insofar as succession is concerned, although there is probably a greater uniformity with regard to conflicts. The latter may be attributed to such influences as Professor Beale, the Restatement, Conflict of Laws, and the full faith and credit and due process clauses of the United States Constitution. Since the United States emphasis is on domicile rather than nationality, primary concern is with the state in which the decedent was domiciled rather than his possible status as a United States citizen.

For example, suppose a domiciliary of Texas migrates to Mexico and becomes permanently domiciled there. He remains a citizen of the United States, and later dies intestate, owning assets in both Mexico and Texas. How would his property be distributed?

Under the Texas conflicts rule, the law governing movables owned at death is the law of Mexico. Under the Mexican conflicts rule, the law of the decedent's nationality, that is, the law of the United States, governs with respect to any assets (movables or immovables) located outside of Mexico. However, a reference to the law of the United States indicates that that jurisdiction, viz., the United States, has no inheritance law. The problem can be resolved by treating the law of the jurisdiction where the decedent was formerly domiciled (Texas) as the governing law of the United States for purposes of determining how the decedent's property should be distributed. This rationale provides the following results:

1. Property (movables and immovables) in Mexico pass under Mexican law whether the conflicts rule of Mexico (situs) or the conflicts rule of Texas (domicile) is applied.
2. Immovables in Texas pass under Texas law whether the conflicts rule of Texas (situs) or Mexico (nationality) is applied.
3. Movables outside of Mexico pass under Mexican law if the Texas rule (domicile) is applied, and under Texas law if the Mexican rule (nationality) is applied.

Whether Texas or Mexican conflicts rules are applied depends upon the law of the forum. Hence, if the takers are the same under the Texas and Mexican inheritance law, it matters little where we seek the initial administration. However, if the takers are not the same, it is necessary to choose carefully the forum for the administration.

Suppose that the Texas law of inheritance is more favorable to a client, who accordingly seeks an administration in Texas. On our facts, Texas will apply the Mexican law with respect to inheritance.

*In this respect Mexico departs somewhat from the traditional conflicts rule in civil law countries which places such a heavy emphasis on nationality.*
of movables outside of Mexico. But does this mean that the Texas courts will apply the Mexican conflicts rule or the Mexican law governing inheritance? If the former, a renvoi situation may result, since the conflicts rule refers back to Texas. If the Texas court applies renvoi, presumably it would "accept the renvoi" and apply Texas inheritance law to the movables outside Mexico. On the other hand, if the court looks to the internal law of Mexico governing inheritance, it would simply determine the takers based on such law.

II. Unity v. Plurality of Succession

The next factor to be kept in mind is the existence of varying concepts with regard to succession. Under the dominant Anglo-American conflict of laws view, when property is located in more than one jurisdiction or when the decedent's domicile at death is different from the situs of his property, it is possible to have a plurality of successions. Thus, there is an "original" probate or administration in the domiciliary jurisdiction and "ancillary" proceedings elsewhere. Since these proceedings are under the authority of equal sovereigns, no one proceeding takes precedence over another. Although there is little Texas case law on the subject, it is assumed that Texas follows this basic concept.

Mexico, however, follows a unity concept of succession based on nationality. By this view there is one jurisdiction which determines all matters with regard to the succession of a decedent's property. This is true even though Mexico recognizes that local law will govern domestic assets of a foreign decedent.

III. Form of Wills

The problem becomes more complex when the law governing the form of a will is considered. Under Mexican law, a will is either "ordinary" or "special." There are three types of ordinary wills (public open, public closed, and holographic) and four types of special wills (private, military, maritime, and those made in a foreign country). Texas recognizes three types of wills: attested, holographic, and nuncupative. The attested or holographic will may be "self-proved." It is necessary to consider each of these wills from the standpoint of formalities and then determine the conflicts rules to be applied when one of these wills is offered for probate in a jurisdiction other than the one where it was executed.

The private, military, and maritime wills of Mexico, and the nuncupative will of Texas, are permissible only in certain special situations and will not be considered further. This leaves the holographic wills in Texas and Mexico, the public open and public closed wills in Mexico, and the attested will in Texas.

A. Holographic Wills

A holographic will in Texas must be signed and wholly written in the handwriting of the testator. Mexico adds the requirement that it be dated. The code expressly permits aliens to execute a holographic will in their own language. Also, in Mexico, the testator must make his will in duplicate and impress his fingerprint on each

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6 A private will is permitted in the following cases: (a) when the testator is attacked by an illness so violent and serious that there is no time for a notary to appear; (b) when there is no notary in the town or judge to act as notary; (c) when it is impossible or at least very difficult for a notary or judge to appear at the execution of the will; or (d) when soldiers or persons attached to the army are on campaign or are prisoners of war. The testator must not be able to make a holographic will in order for the private will to be executed. Codigo Civil de Mexico art. 1561. The testator declares his last will in the presence of five witnesses and one of them draws it up in writing, if the testator is unable to write. Codigo Civil de Mexico art. 1567. Three witnesses are sufficient in cases of the greatest urgency. Codigo Civil de Mexico art. 1569. A private will takes effect only if the testator dies of the illness or in the danger in which he was at the time or within one month after the disappearance of the cause which authorized the will. Codigo Civil de Mexico art. 1571.

7 If a soldier or person attached to the army makes a will at the moment of entering into action or when wounded on the battlefield, it is sufficient for him to declare his will before two witnesses or to deliver to them a closed paper containing his last will, signed in his handwriting. Codigo Civil de Mexico art. 1579. A will made in writing is delivered after death of the testator to the Secretary of National Defense who remits it to the competent judicial authority. Codigo Civil de Mexico art. 1581. Oral wills are reported to the Secretary of National Defense for proper action. Codigo Civil de Mexico art. 1582. Texas formerly permitted "any soldier in actual military service, or any mariner or seaman being at sea" to dispose of his personal property without any formalities. Tex. Rev. Civ. Stat. art. 8290 (1925), repealed, Tex. Prob. Code Ann. § 434(b) (1956).

8 Persons on the high seas on board vessels of the national marine, whether war or merchant, may make wills in accordance with the following provisions: (a) the will must be written in the presence of two witnesses and of the ship's captain; (b) it must be done in duplicate and appear in the ship's log; (c) a copy must be deposited with a Mexican diplomatic agent if the ship should arrive in a port where such an agent is present; (d) when the ship reaches Mexican territory, the other copy (or both, if none was left elsewhere) must be delivered to the local maritime authority. Codigo Civil de Mexico arts. 1583-88.

Maritime wills produce legal effects only if the testator dies at sea or within one month after disembarkation. Codigo Civil de Mexico art. 1591.

9 Nuncupative, or oral, wills are valid when made in the last illness of the deceased and it is "proved by three credible witnesses that the testator called on a person to take notice or bear testimony that such is his will. . . ." Tex. Prob. Code Ann. § 65 (1916). For a recent case holding that a nuncupative will had not been proved, see Hargis v. Nance, 159 Tex. 265, 317 S.W.2d 922 (1958).


11 Codigo Civil de Mexico arts. 1550, 1551.

12 Codigo Civil de Mexico art. 1552.
copy.\textsuperscript{13} He then deposits the will in the public registry.\textsuperscript{14} The original is kept there, and the duplicate is sent back to the testator.\textsuperscript{15}

A holographic will which satisfies the formal requirements of Mexican law will satisfy those of Texas, although the reverse may not be true. Two further observations should be noted: (1) only nineteen American jurisdictions recognize holographic wills, with the result that there may be problems when the testator owns property in some state (e.g., New York) other than Texas; (2) it may not be feasible for an attorney to leave a lengthy and complex will with the testator for recopying in order to make it holographic.

B. Public Open Will

Texas has no counterpart to the Mexican public open will. That document is the same as the Louisiana "nuncupative will,"\textsuperscript{16} which is executed before a notary and three competent witnesses. A testator expresses his wishes to the notary, who then drafts the will and reads it aloud. If the testator agrees that the draft is in accord with his wishes, all parties sign the instrument, placing on it a statement of the place, year, month, day, and hour of execution.

C. Public Closed And Attested Wills

If the testator's estate is at all complicated, an attorney, whether a member of the Bar of Texas or of Mexico, must carefully draft the will and have it typed by his secretary. He may then adopt the following procedure to satisfy the formal requirements of both Texas and Mexico.

He calls the testator, three witnesses, and a notary into a room to be used for the execution ceremony. He closes the door, making sure that no one leaves the room during the ceremony and that all present concentrate without interruption on the business at hand. He hands the will to the testator, who examines it and signs or initials each page for identification purposes.\textsuperscript{17} The testator then declares to the notary and the witnesses that the instrument is his will and that he wants the witnesses to witness it and his signature. He then signs the will at the end, each witness carefully watching his signature as it is written. One witness reads the attestation clause aloud, and each witness signs his name and writes his address. The

\begin{itemize}
\item \textsuperscript{13} Codigo Civil de Mexico art. 1553.
\item \textsuperscript{14} Codigo Civil de Mexico art. 1554.
\item \textsuperscript{15} Codigo Civil de Mexico arts. 1555-64.
\item \textsuperscript{16} La. Civ. Code Ann. art. 1578 (West 1952); cf. Codigo Civil de Mexico arts. 1511-20.
\item \textsuperscript{17} Codigo Civil de Mexico art. 1522, requires that the testator put his "rubric" on all the sheets.
\end{itemize}
testator and the witnesses watch as each witness signs his name. The will is then closed and sealed, and the notary attaches the Texas self-proving clause, which he reads to the testator and the witnesses. The testator and the witnesses then each sign following the clause, and the notary affixes his signature, his seal, and the date.

Such a will would be "self-proved" in Texas, and could be probated without the necessity of producing the witnesses. In Mexico, either the witnesses would be called to testify at the probate or their absence would be explained.

IV. PROBATE OF FOREIGN WILLS

Suppose one is confronted with the problem of probating a will which satisfies the formal requirements of one jurisdiction but not of the jurisdiction in which probate is sought. What rules govern the admissibility of such a will to probate?

In Texas, in the absence of statute, the rules should be the same as in the case of inheritance. Generally speaking with respect to immoveables, the validity of the will is governed by the law of the situs while movables would be governed by the law of the domicile of the decedent at death. Fortunately, Texas has adopted some statutes which are helpful when one attempts to probate a foreign will. Some of these statutes have been law for many years. Others were added upon the enactment of the Texas Probate Code, effective in 1956. Section 103 of that Code provides:

Original probate of the will of a testator who died domiciled outside this State which, upon probate, may operate upon any property in this State, and which is valid under the laws of this State, may be granted under this Code, if the will does not stand rejected from probate or establishment in the jurisdiction where the testator died domiciled, or if it stands rejected from probate or establishment in the jurisdiction where the testator died domiciled solely for a cause which is not ground for rejection of a will of a testator who died domiciled in this State. The court may delay passing on the application for probate of a foreign will pending the result of probate or establishment, or a contest thereof, at the domicile of the testator. (Emphasis added.)

In short, this section, taken from the Uniform Probate of Foreign Wills Act, states that Texas will admit to original probate the will of a Mexican domiciliary (1) if his will is valid in both Texas and Mexico, and (2) if valid in Texas, even though not in Mexico.

Suppose, for example, a testator executed a valid Texas will when

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18 Restatement, Conflict of Laws § 249 (1934).
19 Restatement, Conflict of Laws § 106 (1934).
he was domiciled there. He later moved to Mexico where he died domiciled, leaving property in both Texas and Mexico. An "original" (in the sense of being the first, not in the sense of being the probate of the domiciliary jurisdiction) probate might be first obtained in Texas if this were deemed desirable.

However, suppose that the hypothetical client moved to Mexico and executed a new will, which satisfied the law of Mexico but not Texas. In such event, letters testamentary should first be obtained in Mexico with ancillary probate jurisdiction in Texas. Section 105 of the Texas Probate Code provides:

When a will or other testamentary instrument has been admitted to probate in any state of the United States, or in any of [the] territories thereof, or in the District of Columbia, or in any country out of the limits of the United States, and the executor named in such will or other testamentary instrument has qualified, and a duly authenticated copy of such will and of the probate thereof, and of the letters of such executor, has been filed and recorded in a proper county in this state under the provisions hereof, and such executor files application in the proper court for letters testamentary, such letters shall be granted to him, if he is qualified to serve in such capacity, and an order to that effect shall be entered as in other cases; and if letters of administration have previously been granted by such court in this state to any person other than such foreign executor, such letters shall be revoked upon the application of such executor after personal service of citation upon the person to whom the letters were granted. (Emphasis added.)

The statute requires that the foreign executor be "qualified to serve in such capacity." Section 78 (d)\textsuperscript{20} requires that a nonresident must appoint a "resident agent to accept service of process in all actions with respect to the estate" and file such appointment with the court before he can qualify to serve as executor in the Texas proceeding. The foreign executor must make this appointment of a resident agent before he is appointed executor, and yet it is difficult to see how he would have the power to make the appointment until he was first named executor.

Article 173 of the Texas Revised Civil Statutes requires that in order for an alien to be appointed an executor or administrator, he must legally be able to own land in Texas. But since "aliens who are natural born citizens of nations which have a common land boundary with the United States"\textsuperscript{21} are expressly exempted from the application of the statutes limiting alien land ownership, this rule would not prevent a Mexican executor from qualifying in Texas.


The converse situation exists when a Texas executor is seeking probate of a Texas will in Mexico. Traditionally, the general conflicts rule in civil law countries governing the validity of the form of a will is the law of the place of execution. However, during the nineteenth century, a number of European countries added the *lex patriae* as an option to the *lex loci actus*.

Mexico adheres to the law of the place of execution, as evidenced by the following statute: “Wills made in a foreign country shall be effective in the Federal District and Territories if made in accordance with the laws of the country where they were executed.” On the other hand, the code does allow a certain amount of voluntary subjection to Mexican law as evidenced by the following article:

> Juridical acts in everything relating to their form shall be governed by the laws of the place where they are executed. Nevertheless, Mexicans or aliens residing outside of the Federal District or Territories are at liberty to subject themselves to the forms prescribed by this Code, when the act is to be carried out in the said demarcations.

Thus, Mexico clearly recognizes the possibility that one owning assets situated in Mexico may desire to make a will in conformity with the formal requirements of Mexico, even though the will is executed outside of Mexico. Such a procedure would certainly be wise in view of the article 14 of the Civil Code: “Real property situated in the Federal District and Territories, and personal property found therein, shall be governed by the provisions of this Code, even though the owners be aliens.”

The formal requirements for a will do not present too great a problem if only Texas and Mexico are involved. The insertion of a third jurisdiction may further complicate the problem. For example, assume a situation in which A dies domiciled in Mexico, leaving movables located in Texas. A’s will was executed in jurisdiction X and does not satisfy the formal requirements of Mexico. In this instance, since Mexico has a statute which makes a will valid if it complies with the law of the place of execution, the will, insofar as it relates to movables, is valid everywhere.

Or, take the situation in which A, a Mexican national, dies domiciled in Texas. A leaves movables situated in jurisdiction X. X’s conflicts rule is the same as that of Texas (i.e., movables are governed by the law of the place of the domicile of the decedent at death).

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22 See, e.g., Códice Civil Italiano di 1865, art. 9, par. 1; see also Bürgerliches Gesetzbuch [German Civil Code of 1896] art. 11, par. 1 (inverted order).
23 Código Civil de Mexico art. 1593.
24 Código Civil de Mexico art. 15.
Accordingly, the validity of A’s will will be governed by sections 103 and 105 of the Texas Probate Code.

Finally, assume the same facts as immediately above except that X’s conflicts rule is that the validity of A’s will is governed by the law of the jurisdiction of which A is a national at death. Since A is a Mexican, and Mexico would look to Texas for purposes of determining the validity of A’s will, Texas law will govern.

V. SUBSTANTIVE REQUIREMENTS OF THE LAW OF WILLS

Assuming the formal requirements to have a will admitted to probate have been met, it is still necessary to determine (1) whether the will is valid, and (2) if valid, how it should be construed.

In Texas, one must be nineteen years of age in order to execute a will; in contrast, Mexico allows sixteen year olds to make wills. Of course, in both jurisdictions the more difficult questions of testamentary capacity center around soundness of mind.

Mexico has an interesting method for permitting one who is demented, but who may have a lucid interval, to make a will. The demented person petitions the court for an examination of his mental capacity. The court appoints two physicians to examine him, and if the judge finds the patient to have the necessary capacity, the will is executed forthwith. Such a will must contain an express statement that “the patient preserved perfect lucidity of mind” during the course of the execution.

Under Texas law, the burden of proving existence of requisite testamentary capacity lies with the proponent unless the will is self-proved. If not self-proved, the proponent must show that the decedent had testamentary capacity, that the execution was proper, and that the will was not revoked. If a witness is available, the easiest method for proving the will is to have one of the subscribing witnesses appear in open court and to take his sworn testimony or affidavit. Yet if the will was executed in Mexico, none of the subscribing witnesses may be available and depositions may become necessary.

Section 84 (c) of the Probate Code authorizes the taking of depositions when there is no contest. Section 22 of the Probate Code prescribes the procedure when the witnesses are located in Texas. However, if an attorney wishes to prove a will executed in Mexico

25 Tex. Prob. Code Ann. § 57 (1956). However, exceptions are provided for anyone who is (1) lawfully married, (2) a member of the armed forces, or (3) a member of the maritime service.

26 Código Civil de Mexico art. 1306(I).

27 Código Civil de Mexico arts. 1307-12.
in a Texas court, he will probably use article 3746(3) of the Texas Civil Statutes, which prescribes the method for taking depositions of persons residing in a foreign country. Rule 194 of the Texas Rules of Civil Procedure sets out the requisites for the commission which is forwarded to the officer, e.g., a notary, in the foreign country authorizing him to take the deposition.

Under the Texas conflicts rule, testamentary capacity, like validity of execution, is governed by the law of the domicile at death with respect to movables and the law of the situs with respect to immovables.\footnote{Singleton v. St. Louis Union Trust Co., 191 S.W.2d 143 (Tex. Civ. App. 1945)} Mexico applies the same conflicts rule for testamentary capacity as for questions of form. Accordingly, when capacity is in issue, there are much the same problems as when there is a problem of formalities. Problems of undue influence, fraud, or revocation would be resolved in much the same fashion as capacity.

VI. LIMITS ON POWER OF TESTATION

A more difficult problem is involved in the question of limitations on the testator's power of testation. In Texas, a widow is protected by community property and certain special rights such as the homestead, exempt property, and family allowance. Children may be disinherited, but after-born or after-adopted children may claim their intestate shares when they are pretermitted.

Under Mexican law, the testator may freely dispose of his estate but must leave means of support to the following persons if they have insufficient property of their own: (1) sons under twenty-one; (2) sons unable to work; (3) unmarried daughters who live honorably; (4) a widow while unmarried and living honorably; (5) a widower while unable to work; (6) ascendants; (7) concubines, in certain cases; (8) collaterals within the fourth degree if under eighteen years of age or incapacitated.

Although the conflicts rules are much the same as those discussed in connection with inheritance, the form of wills, and testamentary capacity, an additional element occasionally involved is whether the forum will recognize such restrictions even though against its own public policy.\footnote{4 Rabel, The Conflict of Laws: A Comparative Study 323 (1958).} Usually there will be no objection to a system of legitimate portions or forced shares different from its own. Conversely, if the foreign law gives a greater freedom, most courts have held that such freedom will take precedence over any local restraint.
Singleton v. St. Louis Union Trust Co. illustrates the problem. The testator was domiciled in Missouri. He died testate, leaving land in Texas, which was his separate property. His widow argued that her right of election was controlled by Missouri law. Since she renounced the will, she was entitled to none of its benefits, and the decedent should be treated everywhere as having died intestate as to her. Therefore, she argued, under Texas law governing the descent of separate realty, she was entitled to a life estate in one-third of the Texas lands.

The court of civil appeals held that since the husband, in Texas, could do as he pleased with his separate property, the widow's renunciation had the effect of relinquishing all interest which she might have had in his separate property, and she therefore took no interest in the Texas lands. In so holding, however, the court was not rejecting Missouri law as being against Texas public policy so much as it was applying the law of the situs to the wife's right of election as it affected Texas land. Had the question involved movables with a situs in Texas, the result would probably have been otherwise.

VII. Construction of Wills

When dealing with problems of construction, as distinguished from validity, some have argued that a testator can only be expected to know the law of his domicile at the time of the execution and should not be burdened with guessing the meaning of certain clauses as judged by the law of a later domicile at death. Accordingly, section 308 of the Restatement, Conflict of Laws, provides that: "The meaning of words used in a will of movables, in the absence of controlling circumstances to the contrary, is determined in accordance with the usage at the domicile of the testator at the time of making the will." The Fifth Circuit has quoted this rule as the appropriate conflicts rule of Texas in construing a will. However, the rule has been changed in the Restatement (Second) to make the governing law for construction "the local law of the state designated for this purpose by the testator in the will." If the testator makes no designation, the law governing construction will be the same as that governing validity, that is, the law of the domicile of the decedent at death.

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20 191 S.W.2d 143 (Tex. Civ. App. 1945) error ref. n.r.e.
21 Restatement, Conflict of Laws § 308 (1934).
22 Albuquerque Nat'l Bank v. Citizens Nat'l Bank, 212 F.2d 943, 948-49 (5th Cir. 1954).
23 Restatement (Second), Conflict of Laws § 308 (1958).
In drafting a will, it is certainly wise to insert an express designation of the controlling law. It is possible, of course, that “it may be otherwise apparent from the language of the will or from other circumstances that the testator wished to have the local law of a particular state govern the construction of the instrument. In such a case, the rules of construction of this state will be applied.”

The Mexican conflicts rule governing construction is apparently the same as that governing validity, viz., lex loci actus.

VIII. ENFORCEMENT OF PROBATE DECREES

Having once determined the proper choice of law in the execution, construction, and probate of wills, thus establishing “original probate jurisdiction,” and having obtained a decree, the problem of having the will admitted to probate in other jurisdictions then arises.

Two different questions are involved here: (1) the probate of the will, and (2) the construction of the will once admitted to probate. The first question is concerned with: “What is the testator’s will”? Once this is determined, we must ask the second question: “What does his will mean”?

Probate decrees often answer both of these questions, stating first that the instrument is “admitted to probate,” and then stating what the effects of the contents of the will are on the estate of the decedent. A second jurisdiction (F-2) might accept the decree of the original jurisdiction (F-1) for purposes of probate but construe the instrument in accordance with its own principles of construction without regard to the prior probate decree.

In dealing with problems of choice of law, it is necessary to ask: Where was the will executed? Where was the decedent domiciled at date of death? What was the decedent’s nationality at death? Did the property consist of movables, immovables, or both?

Then, moving from choice of law to the enforcement of probate decrees, it is necessary to consider some additional questions: Who were the parties in F-1? To what extent must F-2 give “full faith and credit” to the decree of F-1? What is the nature of the jurisdiction of F-1 and F-2 over (a) the property, and (b) the parties? What are the views of F-1 and F-2 with respect to concepts of “original” and “ancillary” probate proceedings?

The term “jurisdiction” is often used to refer to the power of a court of law to rule with respect to those persons or things before it. It is commonly said that probate jurisdiction is “in rem.”

*Restatement, Conflict of Laws § 308, at 231-32 (Tent. Draft No. 5, 1959).*
From this it might be argued that any decree with respect to property within the jurisdiction of the court would be binding everywhere. This was the view taken by the Massachusetts court in the early case of *Crippen v. Dexter* decided over one hundred years ago.

In that case, the decedent died domiciled in Connecticut owning Massachusetts land. The will was probated in Connecticut and then offered for probate in Massachusetts with an authenticated copy of the Connecticut decree, as permitted by the Massachusetts statute. The heir at law, residing in Massachusetts, contended that since he had no notice of the Connecticut proceeding, he was not bound by the Connecticut decree and might raise such questions as capacity, undue influence, and the like in the Massachusetts court. Chief Justice Shaw denied the contest, ruling that the judgment of a probate court allowing the probate of a will is a proceeding in rem binding upon all persons interested in the property, though not named as parties. The Massachusetts court could inquire only into the due authentication of the foreign record, the jurisdiction of the foreign court, whether there was local property upon which the will could operate if admitted, and whether there had been fraud in obtaining the foreign probate.

Chief Justice Shaw was probably influenced by two factors: (1) that both the wills law and the conflicts rules of Massachusetts and Connecticut were the same, and (2) that the adoption of a rule that probate decrees are to be considered conclusive would undoubtedly encourage a unified administration of the decedent's estate. Furthermore, he undoubtedly felt that once there had been a determination of testacy or intestacy by one state, all other states would be bound to follow this determination by reason of the full faith and credit clause of the Constitution.

The Supreme Court of the United States has never taken this position. On the contrary, it has left each state free to assert its full power over local property in disregard of foreign probate judgments. The Supreme Court has expressed its reasons as follows:

> Now a judgment *in rem* binds only the property within the control of the court which rendered it; . . . as a judgment *in rem* it merely determined the right to administer the property within the jurisdiction, whether considered as directly operating on the particular things seized, or the general status of assets there situated.

A fortiori, where the full faith and credit clause is not involved, as would be the case in any problem affecting Texas and Mexico, _F-2_
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is in no way bound by F-1's prior probate decree with respect to any property within F-2.

The Supreme Court has held that F-2 will be bound by a probate decree of F-1 with reference to any property within F-1's jurisdiction. This is in accord with the conflicts rule where immovables are involved but in conflict with the principle of *mobilia sequuntur personam*. For example, A dies domiciled in F-2 owning movables having a situs in F-1. A's executor goes into F-1 and obtains a probate decree. F-2 is bound by the decree of F-1 insofar as the movables located in F-1 are concerned.

Although the Supreme Court has stated that the state of the situs is not bound by the ruling in the domiciliary state, Texas, confusing enforcement of foreign probate decrees with choice of law, has held that when an ancillary proceeding is subsequently brought in the state of the situs of the property, such a state (F-2) is bound to follow the prior decree of the domiciliary state (F-1). The leading case is *Holland v. Jackson*.

A will was probated in California, the domiciliary state, in an ex parte proceeding in which the parties were cited by publication. Thereafter, probate was sought in Texas on an authenticated copy of the California record. The Texas claimants, having no actual notice of the California proceedings, contested on the ground that the will was a forgery. The Supreme Court of Texas said:

> It is fairly well settled by the weight of the authority in this country that jurisdiction of the original probate of a will is possessed exclusively by the courts of the state where the testator was domiciled when he died. When the will is regularly probated there, the constitutional provision under consideration requires all sister states to give full faith and credit to the order of probate as verifying the instrument. In such a case, the question of authenticity of the instrument would be res adjudicata; but the question as to the legal effect of the instrument would not be.

In 1951, however, a court of civil appeals distinguished *Holland v. Jackson* in a case involving an Oklahoma decedent who died owning land in Texas. The decedent was a woman who was unmarried at the time of the execution of her will. Under Oklahoma law, an unmarried woman's will is revoked by a later marriage. Proponents of the will, without waiting for an administration to be started in Oklahoma, sought probate of the will in the county where the Texas

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38 121 Tex. 1, 37 S.W.2d 726 (1931).
39 Id. at 5, 37 S.W.2d at 727-28.
land was located. The contestant, the intestate heir of the decedent, filed a plea to the jurisdiction of the court contending (1) that the Texas court had no jurisdiction since "original" jurisdiction lay with Oklahoma; (2) that under Texas law, the subsequent marriage of a woman revokes any will which she may have previously executed; and (3) that if this were not the correct Texas law, Texas should apply the Oklahoma law by reason of the full faith and credit clause of the United States Constitution. The court rejected all of these contentions and found that Texas was in no way bound by the law of Oklahoma, that under Texas law, a will of an unmarried woman was not revoked by her later marriage, and, therefore, that the decedent died testate as to the Texas lands.

A similar result was reached in another case involving an Oklahoma decedent and Texas lands. The proponent argued that "since the will was originally probated by a court of general jurisdiction in Oklahoma the judgment of that court is res judicata and protected by the full faith and credit provisions of the national Constitution . . . ." However, the court of civil appeals replied: "This cannot be, because courts of other states have no jurisdiction over real property in Texas and the vesting of title thereto is governed by the laws of this State."

In short, Texas is in no way bound by a prior probate decree of a sister state, insofar as property within Texas is concerned. A fortiori, Texas is not bound by a prior probate decree rendered in Mexico. Nor is Mexico bound by a prior Texas decree.

Would the result be different when the parties had appeared in F-I? By the doctrine of res judicata, if the parties were present in F-I, there is no reason why the same issues should be relitigated in F-2. Of course, for such persons to have been present, they must have been subject to the in personam jurisdiction of F-I.

Three cases from the Supreme Court of the United States illustrate the problem of present concern. In the first, a Tennessee decedent died intestate owning shares in a Kentucky corporation and a claim against the corporation for profits. Under Tennessee law, the widow would take all; under Kentucky law, she would receive one-half and the other one-half would go to the decedent's mother.

The widow opened, ex parte, an administration in Tennessee (F-1) stating that the decedent was a Tennessee domiciliary. She then sued in the Tennessee chancery court, citing the mother and corporation

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42 Id. at 382.
by publication, and obtained an adjudication that she was the owner of the shares and was entitled to have new certificates issued to her. Meanwhile, the mother obtained an administration in Kentucky, and a decree stating that the property should be divided between the widow and mother in accordance with Kentucky law. The widow then sued in Kentucky (F-2) on her Tennessee decrees, and the mother intervened, claiming her one-half based on her prior Kentucky judgment. Kentucky (F-2) denied the widow’s claim, and she appealed to the Supreme Court of the United States, contending that F-2 was bound to give full faith and credit to the judgment of F-1. The Court ruled for the mother, holding that if the F-1 judgments were considered to be in rem, they were conclusive only as to property in Tennessee; but that if in personam, they were binding only on parties before the Tennessee court.

In the second case, the will of a testatrix was originally probated in Georgia as a domiciliary probate and all persons entitled to be heard, including the decedent’s husband, were personally served in Georgia. The Georgia court appointed the person named in the will as the decedent’s executor after finding that the decedent was domiciled in Georgia. Meanwhile, a New York court appointed the New York Trust Company as administrator c.t.a. upon the suggestion of the husband and the New York authorities. Among the assets of the decedent’s estate were some shares of the Coca Cola International Corporation, a Delaware corporation. Coca Cola impleaded both the Georgia executor and the New York administrator before a Delaware court in order to determine to whom new certificates should be issued. Delaware ruled for the New York administrator, and the Georgia executor sought certiorari in the Supreme Court of the United States on the theory that Delaware was bound to give full faith and credit to the Georgia probate decree. The Court said:

While the Georgia judgment is to have the same faith and credit in Delaware as it does in Georgia, that requirement does not give the Georgia judgment extra-territorial effect upon assets in other states. So far as the assets in Georgia are concerned, the Georgia judgment of probate is in rem; so far as it affects personality beyond the state, it is in personam and can bind only the parties thereto or their privies.44

Hence, the Georgia decision was conclusive as to the husband’s rights, since he was before the Georgia court in personam. With respect to the right to tax the assets of the decedent, the New York administrator and the State of New York, not having been parties to

the Georgia proceeding, were bound by the Georgia determination only as to property having a situs in Georgia.

The difficulty of enforcing foreign probate decrees was again considered by the Supreme Court in 1958. The testatrix was originally domiciled in Pennsylvania. She executed a revocable inter vivos trust naming a Delaware trust company trustee, reserving the income to herself for life and the corpus to whomever she might subsequently appoint by deed or will. Then she moved to Florida, where she remained domiciled until her death. In Florida, she executed a second inter vivos instrument appointing 400,000 dollars of the trust property to certain beneficiaries. She also executed a will with a residuary clause appointing any remaining portion of the property which she might own at death to another set of beneficiaries.

Her will was probated in Florida, the Delaware trust company being served by mail and publication. The Florida court ruled that the trust and power of appointment were ineffective, that the 400,000 dollars passed by the residuary clause, and that the court had jurisdiction over the Delaware trust company.

Meanwhile, the trust company obtained a Delaware determination that the inter vivos appointment of the 400,000 dollars was valid. Upon certiorari to the Supreme Court from both state courts, it was held:

(1) Florida had neither in rem nor in personam jurisdiction over the Delaware trust company. Without such jurisdiction, it could not pass on the validity of the trust. Under the due process clause of the fourteenth amendment, its decree was void as to the trust company and all others over whom it had no jurisdiction.

(2) Although Florida had jurisdiction over the probate and construction of the decedent's will by reason of the decedent's domicile, it had no in rem jurisdiction over the trust assets, and its judgment was therefore invalid insofar as it rested on in rem jurisdiction.

(3) The exercise of the power of appointment in Florida did not justify the exercise of personal jurisdiction over the nonresident trustee.

(4) The fact that the decedent and most of the appointees and beneficiaries were domiciled in Florida did not give Florida jurisdiction over the trustee or the trust assets.

(5) Delaware was, therefore, under no obligation to give any faith and credit to the Florida judgment.

(6) The trust company was an indispensable party under Florida law. Accordingly, Florida had no power to adjudicate the contro-

versy without the trustee's presence. Hence, Delaware was not required to give the Florida judgment any faith and credit even against parties over whom Florida had in personam jurisdiction.

Mr. Justice Black dissented in an opinion in which he was joined by Justices Burton and Brennan. He argued that since Florida had extensive contacts with the decedent and the beneficiaries, it could adjudicate the effectiveness of the exercise of the power of appointment with respect to all those who were notified of the proceedings and given an opportunity to be heard. Alternatively, he argued that the case should have been remanded to have Florida, rather than the Supreme Court, determine whether the trustee was an indispensable party.

Mr. Justice Douglas dissented, arguing that Florida could find that there was sufficient privity between the estate of the decedent, i.e., the testatrix and her executors, and the nonresident trustee, and that the estate might therefore stand in judgment for the trustee insofar as the disposition of the property under the exercise of the power of appointment and the will was concerned.

These rulings will have a great effect on Texas conflicts rules regarding the enforcement of foreign probate decrees. In all probability, Texas will not now give effect to a foreign probate decree, except insofar as a court has in rem jurisdiction over assets or in personam jurisdiction over parties who are personally served or who appear in the prior litigation.

Will Mexico follow this trend of the Anglo-American law? Or will it follow the procedures of the civil law countries? Italy has indicated, for example, that foreign probate decrees will be recognized. France has stated that the official character of probate proceedings will be recognized, but uncontested foreign probate decrees may be examined. Germany permits the universal successor, e.g., the Texas heir or residuary testamentary beneficiary, or his representative, to obtain a certificate limited to assets situated in Germany and based on the foreign inheritance law.

Perhaps, if there is no contest, the Mexican courts will give recognition to a prior Texas probate decree. However, if the problem involves adjudicating rights of Mexican nationals with respect to property having a situs in Mexico, we may well expect that Mexico will want to examine the prior probate proceedings.

Although Texas is not bound to give effect to a foreign probate decree affecting property in Texas, even in the absence of in per-

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46 Rabel, op. cit. supra note 29, at 421.
47 Bürgerliches Gesetzbuch §§ 2368, 2369.
sonam jurisdiction in the prior proceeding, Texas statutes regarding these foreign decrees give more recognition than one might expect. Section 95 of the Texas Probate Code provides:

When application is made for the probate of a will . . . which has been probated according to the laws of . . . any country . . . , a copy of such will . . . and of the probate thereof, attested by the clerk of the court or by such other official as has custody of such will . . . and is in charge of such probate records, with the seal of the court affixed, if there be a seal, together with a certificate from the judge or presiding magistrate of such court that the said attestation is in due form, may be filed and recorded in the minutes of the court in this state having venue; and, when so filed and recorded, shall be deemed to be admitted to probate, and shall have the same force and effect for all purposes as if the original will had been probated in said court by order of the court, provided its validity may be contested in the manner and to the extent hereinafter provided.

This statute makes the probate of a foreign will automatic, so long as there is no contest. Section 96 provides a procedure for filing and recording a foreign will as a muniment of title in the deed records of the county where the land is located. It may be desirable to file under both sections. By so doing, one may establish a prima facie case for the validity of the prior probate as well as a record and notice of the existence of the will and of any titles that it may confer.

If a foreign will which is filed and recorded in Texas is subsequently contested in the foreign jurisdiction, the Texas probate will be set aside if notice of that contest is filed in Texas within two years following the filing of the foreign probate decree in Texas. The filing of such notice automatically suspends the effect of the will in Texas until verified proof is filed that the proceedings in the foreign jurisdiction have been terminated in favor of the will. If the will is rejected in the foreign jurisdiction, such rejection will cause the will to be rejected in Texas, unless the rejection is for a reason which is not grounds for rejection in Texas.

48 Tex. Prob. Code Ann. § 97 (1956); Holland v. Jackson, 121 Tex. 1, 37 S.W.2d 726 (1931) (ex parte recital that testator's domicile was in California held prima facie proof of facts recited).

49 Tex. Prob. Code Ann. § 99 (1956); Smith v. Allbright, 261 S.W. 461 (Tex. Civ. App. 1924) (deed from trustee, appointed by foreign court nineteen years after probate, as shown by certified copy of proceedings filed under statute, held sufficient, since presumption was that appointment was legally made and that trustee was proper grantor).


Some question may be raised as to the effect of the two-year provision. For example, assume that the executor in F-I obtains an ex parte probate decree in which he is awarded letters testamentary. He then files a recorded copy of the will and decree in Texas thereby establishing prima facie that the foreign decree is valid. More than two years from this date, a contest is begun in the foreign jurisdiction. Although such contest might be permitted in a foreign jurisdiction which has a longer statute of limitations, it is barred in Texas, since one who desires to contest a domestic probate decree must do so within two years after a will is admitted to probate.

IX. THE POWERS OF FOREIGN PERSONAL REPRESENTATIVES

Finally, the question arises as to what a foreign executor or administrator can do once he has received his letters of administration or letters testamentary from F-I. The term "executor" is used here to refer to all types of such personal representatives.

The law governing Texas executors parallels some of that of Mexico, because of the common Spanish origin. At common law, the executor took title to personalty; whereas realty descended directly to the heir. However Texas, following the Spanish concept of succession, provides that both realty and personalty shall descend directly to the heir subject to a right of possession in the executor for purposes of administration.

The Spanish law concerning universal executors also furnished the model for the rather unusual (by common law standards) Texas independent executor. Again, the Spanish law provided a number of methods whereby an estate might be settled extrajudicially. These likewise had a profound impact on Texas probate procedure.

Several Texas cases have indicated the importance of these statutes. In one, the testator died on April 2, 1952, in Louisiana, the state of domicile. On May 6, 1952, his widow offered a will, dated September 12, 1951, for probate in Caddo Parish, Louisiana. This will was later filed for record as a muniment of title in Gregg County, Texas, where some of the decedent's land was located. In 1954, the widow brought a proceeding in Gregg County to have the will of

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56 The civil code of Mexico uses the word "albacea," which means both executor and administrator. In the text, reference is made to "albacea" as "executor."
59 Id. at 47.
60 Jones v. Jones, 301 S.W.2d 310 (Tex. Civ. App. 1957) error ref. n.r.e.
September 12, 1951, declared null and void, on the theory that the decedent had executed a later will in December, 1951. The county court rejected her plea, and she appealed de novo to the district court. There, a jury found that the decedent had executed a will on December 12, 1951, and that he had intended to revoke the will dated September 12, 1951. The latter was not offered for probate.

The appellate court reversed, holding first, that the widow was estopped by reason of having secured the entry of such prior probate decree when she was aware of all facts affecting such decree. Secondly, since the will had been admitted to probate in the state of domicile, and filed for record where the property was located, Texas had no jurisdiction to entertain a suit to have the will declared null and void.

In another case, on similar facts, a court of civil appeals held that the contestants were not bound by the foreign decree. The testatrix was a widow who owned land in both Texas and Oklahoma. She executed a will in 1954, naming one Barney, an Oklahoma domiciliary, her executor. On her death, Barney probated her will in Oklahoma and filed certified copies of the will and probate proceedings in the deed records of Llano and Comanche counties, Texas. Meanwhile, the decedent’s brother, Huff, sought an appointment as temporary administrator in the county court of Llano County, contending that the decedent was domiciled there and that the will admitted to probate in Oklahoma and filed in Texas should be canceled as null and void.

In the district court, a jury found that the decedent was domiciled in Llano County at her death, and the trial court ruled the will void as to Texas land. Although Huff had begun contest proceedings in Oklahoma, which were not prosecuted to judgment, and had filed a creditor’s claim there for expenses incurred by him in the amount of 97.91 dollars, which was ordered paid, he was not estopped to seek to void the Oklahoma probate. It was held that “the only issue before the trial court was the domicile of Mrs. Denny at the time of her death and this issue when determined fixed the jurisdiction for the probate of her will in Texas which jurisdiction is not proved or conferred by estoppel.” Accordingly, the appellate court affirmed the trial court’s decision that the Oklahoma proceedings had no effect as to the Texas land.

If the foreign executor succeeds in obtaining admission of the

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62 Id. at 623.
foreign will in Texas, he will be issued letters testamentary. If letters of administration have been previously issued to another, the executor is entitled to have such letters revoked by giving bond, even though the will provided that such bond was not necessary.

Until last year, if a foreign corporation were named executor, it had to qualify to do business in Texas to serve in such capacity. As such qualification was difficult and expensive, rarely would an out-of-state bank or trust company seek to serve as an executor in Texas. This has been corrected, as to banks and trust companies in the United States, by the addition of section 105(a) to the Texas Probate Code. This section makes it possible for a foreign bank or trust company to serve in a fiduciary capacity in Texas if the jurisdiction where such bank or trust company is organized grants similar authority to Texas corporations.

Mexican corporations, of course, would still have to qualify under the old law. In such a situation, it would probably be easier for the Mexican bank to have a Texas resident seek an appointment as ancillary administrator c.t.a.

If it is expected that a Mexican will will be probated in Texas because of property located there, such a will should contain a clause giving the executor power to sell the property. This will eliminate the necessity of obtaining a court order for such a sale.

Despite the somewhat liberal attitude displayed by the Texas statutes insofar as foreign executors are concerned, Texas case law follows the more traditional Anglo-American concept of plurality of succession where administrators are involved. The office of administrator of the estate of the decedent in one state is legally separate from such office in another state, even though the same individual serves in both states. The ancillary administration will usually be much more complicated than the simple authentication of a foreign will and the filing of such will as a muniment of title. As in the case of the foreign executor, the foreign administrator is required to appoint a resident agent to accept service of process.

X. CONCLUSION

The law of Texas with respect to foreign wills and foreign personal representatives has vacillated between the civil law concept of

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66 Carrigan v. Semple, 72 Tex. 306, 12 S.W. 178 (1888); Cherry v. Speight, 28 Tex. 503 (1866); Jones v. Jones, 11 Tex. 463 (1855); Clarke v. Webster, 94 S.W. 1088 (Tex. Civ. App. 1906), aff'd, 100 Tex. 333, 99 S.W. 1019 (1907).
unity and the Anglo-American concept of plurality of succession. Texas is fortunate in having a number of statutes that simplify the work of the foreign personal representative, although much remains to be done. Many of the difficulties may be resolved, however, by the lawyer's careful drafting of the client's will, with an awareness of the countless problems that arise when persons have contact with several jurisdictions.