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Miscellaneous—Conflicts—Domestic Relations

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become joint tenants with the right of survivorship, and with the further right in each of them to terminate the joint ownership and create a tenancy in common by conveying his or her interest to a third party.[56] The presumption as to the husband-to-wife transfer was seen as a vestige of the common law rule that a husband owned all his wife's personality, and that thus, when he purported to pass to her an interest in his own personality, he could not have intended to give her anything greater than a right of survivorship.[57] Since this historical theory is seen as having no impact on a modern-day transfer, the court refused to extend the presumption applicable in a husband-to-wife transfer to a wife-to-husband transfer, in the absence of proof that the actual intent was to establish a right of survivorship only.

The dissenters would have enlarged the coverage of the presumption, so that proof of a gift by the wife of property solely belonging to her would make out a prime facie case of a joint tenancy, with a right of exclusive present enjoyment in the wife and a right of survivorship in the husband. Fairness was seen as dictating equal treatment for married women, especially when there was no reason for establishing a double standard. The historical theory argument was rejected, since the presumption was seen as based on the lack of consideration.[58] If the majority's decision is merely a step in the removal of the vestigial presumption admittedly an anomaly in the law of property, then it certainly is justifiable. However, if the presumption is to be retained in the husband-to-wife transfer, then the majority can be credited only with the creation of a new source of confusion by applying a double standard based solely on which spouse transfers the property.

Conflicts—Domestic Relations

Where a contractual transaction has elements in different jurisdictions, the New York courts have used various approaches to determine which law is to be applied: that of the jurisdiction where the contract was made; that of the place of performance; that intended by the parties; or that of the jurisdiction in which are grouped the significant contacts.[59] The Restatement of Conflict of Laws states that the law of the place of making should govern the validity of the contract and

56. *Matter of Suter's Estate,* 258 N. Y. 104, 179 N. E. 310 (1932).
57. *West v. McCullough, supra,* note 50.
58. 308 N. Y. at 523, 127 N. E. 2d at 320: "Surely an inquiry into who paid the consideration has not the rights under the slightest relation to married women's property rights under the common law. Rather it seeks a clue as to the donor's intent. Without proof of different intent, it can not be assumed that such donors intended to give their spouses such control over the donated asset that he or she may alienate one half of it without the permission of the spouse who supplied the sole consideration for the asset. Such an assumption ignores the unity of the marital relationship."
59. See *Jones v. Metropolitan Life Insurance Co.,* 158 Misc. 466, 286 N. Y. Supp. 4 (1936), for a partial review of the cases.

the capacity of the parties to enter into the agreement, while the law of the place of performance should govern all matters connected with its performance.[60] This position has been widely criticized, and the grouping of contacts theory is advocated by many authorities.[61]

In *Auten v. Auten* [62] the Court came out somewhat strongly for this latter theory. Husband and wife were citizens, domiciliaries and residents of England. They were married in 1917 and had two children. In 1931 the husband deserted his wife and children and came to the United States, settling in New York. In 1933 the wife came to New York and there negotiated a separation agreement with the husband; he was to pay a fixed amount per month to a trustee in New York for the benefit of the wife and children, who were to continue to reside in England. The wife then returned to England, and the husband neglected to make the payments to the trustee. In 1934 the wife instituted a suit in England for separation, which never came to trial.

In the present action the wife sued under the separation agreement. The husband moved for summary judgment, which was granted on the ground that, under New York law, the wife's institution of her suit for separation in England acted as a repudiation of the separation agreement. The Appellate Division affirmed the dismissal, and granted leave to amend.[63] On this appeal, the Court reversed and remanded, on the ground that English and not New York law controls. After discussing the Restatement rules, the Court explained the advantage of the grouping of contacts theory—that by choosing the law of the place having the most significant contacts with the matter in dispute, it allows the forum to apply the policy of the jurisdiction most intimately concerned with the outcome of the litigation and also to give effect to the probable intention of the parties. Applying this contact theory, the Court found that England had all the truly significant contacts with the matter in dispute, and that England was the jurisdiction with the greatest concern in defining the rights and duties of the parties under the agreement.

Unfortunately, from the point of view of clarifying New York law on choice of law problem, the Court went on to "note" that if the approach of the Restatement were used, English law would also control. Since repudiation is an aspect of performance, whether or not the wife repudiated would be determined by the

60. RESTATEMENT, CONFLICT OF LAWS, § 332 (1934).

61. Page, *Choice of Law Problems in Direct Action against Indemnification Insurers*, 3 UTAH L. REV. 490, 498-499 (1953); Nussbaum, *Conflict Theories of Contracts; Cases versus Restatement*, 51 YALE L. J. 893 (1942); *Cook, Contracts and the Conflict of Laws: Intention of the Parties*, 32 ILL. L. REV. 899 (1938).

62. 308 N. Y. 155, 124 N. E. 2d 99 (1954).

63. 281 App. Div. 740, 117 N. Y. S. 2d 881 (1st Dep't 1953).

law of England, the place of her performance. In other New York cases in which the grouping of contacts theory has been used, the more conventional approaches were also shown to lead to the same result. Judge Shientag, in *Jones v. Metropolitan Life Insurance Co.*[64] performed a judicial tour de force by showing that by any theory—place of contracting, place of performance, place intended, and grouping of contacts—an insurance policy was a New York contract. The *Jones case* illustrates more clearly than the instant case the dangers involved in the application of the grouping of contacts theory, that the judge will select as the significant contacts those which point to the result which he desires.[65] But it also shows that the more conventional approaches of place of making and place of performance are easily amenable to "interpretation" in the interests of justice.

It has been suggested[66] that the decided cases really apply the contacts theory, and use place of making, place of performance and intention of the parties as the significant contacts. As the New York Annotations to the Restatement of Conflicts states,[67] the law of New York is unsettled in this area. It probably will not be settled until the Court of Appeals is forced to decide which law governs when the place of significant contacts is found to be different from the place of making or performance. Whatever the center of gravity, it is, like the quest of the "proper" law, an approach which does not lead to absolute predictability; but does such an absolute predictability exist at all? May not an industrious lawyer's predictions as to facts to which the courts will look in finding the center of gravity be more than a mere guess? Will not such an approach be more reliable, even from the standpoint of predictability, than the old conceptualistic factors such as place of making or performance? Who knows whether the conceptualistic construction of choice of law will induce a court to prefer a connection of the case with the place of performance to that of the place of contact, or vice versa? The confusion dominant in New York under the sway of those old concepts has certainly not been increased by the approval shown by the Court of Appeals to the grouping of contacts test, and this alone points to some progress in the conflict law of New York.

MUNICIPAL CORPORATIONS

Zoning, Non-Conforming Use

A *non*-conforming use of real property will be permitted to continue, notwithstanding the contrary provisions of an otherwise valid zoning ordinance

64. 158 Misc. 466, 286 N. Y. Supp. 4 (1936).
65. Cf. *Rubin v. Irving Trust Co.*, 305 N. Y. 288, 113 N. E. 2d 424 (1953).
66. NUSSBAUM, *op. cit. supra* note 61.
67. RESTATEMENT, CONFLICT OF LAWS, N. Y. Annotations §332 (1935).