1954

Conflicts of Law: Trusts: Jurisdiction Over Foreign Testamentary Trusts

Joseph Perillo
Fordham University School of Law

Conflict of Laws: Trusts: Jurisdiction Over Foreign Testamentary Trusts: *Erdheim v. Mabee, 305 N. Y. 307, 113 N.E.2d 433 (1953).*—Plaintiffs were judgment creditors of defendant. In this action they sought to garnish trust income payable to the judgment debtor. The trust had been set up pursuant to a will probated in the District of Columbia. In 1931 the trustees settled the first account in the District of Columbia probate court. Included in the decree of settlement was a provision retaining jurisdiction for such orders and instructions regarding the administration of the trust estate as might be deemed necessary.

Defendant claimed that a New York court had no power to garnish the trust, asserting that exclusive jurisdiction was retained by the District of Columbia. The New York Court of Appeals held that New York does possess jurisdiction to garnish. The court held that the situs of the trust was in New York since the trust was actively being administered by a New York trust company. Moreover, the court took the position that even if the situs were in the District of Columbia, there still would be no lack of power in the New York courts to garnish funds within the territorial limits of New York. If exclusive jurisdiction for the administration of the trust was retained by the District of Columbia this would not prevent garnishment by a New York court since garnishment does not relate to the administration of the trust. Two judges dissented, questioning the advisability of subjecting the trustees to instructions which might not be approved by the court of probate in the District of Columbia. They did not seem, however, to dispute New York's power to exercise jurisdiction.

Continuing Jurisdiction of the Probate Court

Generally, the court which probates a will containing trust provisions retains continuing jurisdiction over both the trustees and the trust *res*. This jurisdiction has been termed *in rem* by one court;[1] several term it *quasi-in-rem*.[2] The theory of these decisions is that the trust *res* is constructively in the control of the probate court, such control being equivalent to a sheriff's attachment for jurisdictional purposes. If the trust *res* consists of personalty, it is immaterial that the *res* is physically outside the jurisdiction since the situs of personalty follows the domicile of the owner.[3] The jurisdiction of the probate court over the trustees also has been adjudged to be *in personam,* even though the trustee had not been personally served within the jurisdiction. This *in personam* jurisdiction has been based on the ground that testamentary trustees are officers of the court.[4] In jurisdictions where the trustee is not considered to be an officer of the court, the exercise of *in personam* jurisdiction has been held to be valid without service of process, since the trustee has impliedly consented to appear whenever called by the court.[5] As a precautionary measure the court should direct the trustee to appoint the clerk of the court, or some other official,

---

1 Letcher's Trustee v. German National Bank, 134 Ky. 24, 119 S. W. 236 (1909).

2 Boone v. Wachovia Bank and Trust Co., 163 F.2d 809 (D. C. Cir. 1947); Farmer's and Mechanic's Savings Bank v. Brewer, 27 Conn. 600 (1858); Chase v. Chase, 84 Mass. 101 (1861); Gassert v. Strong, 38 Mont. 18, 98 Pac. 497 (1908); Swetland v. Swetland, 105 N. J. Eq. 608, 149 Atl. 50 (Ch. 1930); Smith v. Central Trust Co. of N.Y., 12 App. Div. 278, 42 N.Y. Supp. 740 (1st Dep't 1896), aff'd, 154 N.Y. 333, 48 N.E. 553 (1897).

3 Boone v. Wachovia Bank and Trust Co., 163 F.2d 809 (D.C. Cir. 1947).

4 Lozier v. Lozier, 99 Ohio St. 254, 124 N.E. 167 (1919).

5 Michigan Trust Co. v. Perry, 228 U.S. 346 (1913).

as the trustee's agent to accept service of process.[6] In New York such an appointment is required by statute.[7]

The probate court's judgment will be entitled to full faith and credit under all of these theories.[8] However, if a court purported to retain *exclusive* jurisdiction over future controversies arising out of a testamentary trust, the decree to that effect might not be entitled to full faith and credit.[9] Unlike an executor, a trustee holds legal title to the trust *res* and may sue on behalf of the trust in any jurisdiction.[10] There is, however, much conflict in the cases as to the circumstances under which one may sue a testamentary trustee in a court other than the court of probate.

Foreign Jurisdiction Over Testamentary Trusts of Realty

A court of equity exercising its *in personam* jurisdiction has ordered a testamentary trustee to convey realty which is located in another jurisdiction.[11] Such a decree must presumably be accorded full faith and credit only if the defendant obeys it.[12] If the decree is not enforced within the jurisdiction, or if the conveyance is executed by an officer of the court, it is not entitled to full faith and credit under the Constitution, nor is it res judicata.[13] However, as a matter of local law, the court at the situs of the land may hold that such an *in personam* decree will be given full faith and credit,[14] or be considered res judicata.[15]

To avoid difficulties in enforcement, New York has held that it is without jurisdiction to determine the validity of a testamentary trust affecting lands in California.[16] On the other hand, a New York court in an action relating to the administration of a trust which involved New York realty has claimed to be without jurisdiction, holding that the only appropriate forum was Massachusetts where the will had been probated.[17] The cases may be distinguished in that no question of title to the land was involved in the latter case.

Similarly, it has been held that a substituted testamentary trustee appointed by a court acquires no title to real property outside the court's jurisdiction

---

[6] Land, Trusts in the Conflict of Laws, 266 n. 26 (1940).

[7] N.Y. Surr. Court Act § 167.

[8] Boone v. Wachovia Bank and Trust Co., 163 F.2d 809 (D.C. Cir. 1947).

[9] See, e.g., Goldsmith v. Salkey, 131 Tex. 139, 112 S.W.2d 165 (1938).

[10] Toronto General Trust Co. v. Chicago, B. & Q. R.R., 123 N.Y. 37, 25 N.E. 198 (1890).

[11] Jones v. Jones, 8 Misc. 660, 30 N.Y. Supp 177 (Sup. Ct. N.Y. County 1894). See also the following cases involving equitable conversion: Massie v. Watts, 6 Cranch 148 (U.S. 1810); Gardner v. Ogden, 22 N.Y. 327 (1860); Penn v. Lord Baltimore, 1 Ves. Sen. 444 (1750).

[12] Fall v. Eastin, 215 U.S. 1 (1909); Deschenes v. Tallman, 248 N.Y. 33, 161 N.E. 321 (1928).

[13] Fall v. Eastin, 215 U.S. 1 (1909); Carpenter v. Strange, 141 U.S. 87 (1891); Bullock v. Bullock, 52 N.J. Eq. 561, 30 Atl. 676 (Ct. Err. & App. 1894). The same rule prevails in Canada. Duke v. Andler [1932] S.C.R. 734.

[14] MacGregor v. MacGregor, 9 Iowa 65 (1859); Virginia v. Levy, 23 Gratt. 21 (Va. 1873).

[15] Burnley v. Stevenson, 24 Ohio St. 474 (1873).

[16] Knox v. Jones, 47 N.Y. 389 (1872). Accord, Matter of Osborne, 151 Misc. 52, 270 N.Y. Supp. 616 (Surr. Ct. N.Y. County 1934). Contra: Miller v. Douglass, 192 Wis. 486, 213 N.W. 320 (1927).

[17] Matter of Bradford's Estate, 165 Misc. 736, 1 N.Y.S.2d 539 (Surr. Ct. N.Y. County 1937).

without ancillary proceedings in the state of the situs.[18] However, a New York court has gone to the extreme of removing a trustee of an Illinois testamentary trust from his position even though part of the trust *res* consisted of real property in Illinois.[19] The decision is justified because of the gross misconduct of the trustee. Nevertheless, it is doubtful if the judgment was entitled to full faith and credit unless the trustee actually executed a conveyance. A decree, standing alone, or a conveyance executed by the sheriff is of no effect unless the court of the state in which the realty is located chooses to recognize it.[20] Where an action is brought against a testamentary trustee of realty and no issue is raised as to title, the same considerations should apply as in testamentary trusts of personalty.

Foreign Jurisdiction Over Testamentary Trusts of Personalty

Where the court of probate has not retained jurisdiction, any other court of competent jurisdiction in another state[21] may entertain a suit against a testamentary trustee.[22] But where the court of probate retains jurisdiction over the trustee and trust *res* there is a conflict of authority as to the conditions under which a foreign court will exercise jurisdiction. The courts of Massachusetts have long taken the view that they have no authority to hear a suit against a testamentary trustee if a probate court of another state retains jurisdiction, even where both trustee and trust *res* are in Massachusetts and the action is for a sum of money only.[23] In a more recent case the rule has been modified by a holding that Massachusetts will take jurisdiction if the testator has shown an intent to have the trust administered in Massachusetts.[24]

The New York cases do not follow the Massachusetts view, though it has been approved in some lower court decisions. These decisions are sustainable on other grounds.[25] In *Erdheim v. Mabee* the New York Court of Appeals held directly against the Massachusetts rule, allowing garnishment of a testamentary trust which was being administered under the direction of the courts of the District of Columbia.[26] The decisions clearly seem justified. The

---

18 Corbett v. Nutt, 10 Wall. 464 (U.S. 1871); West v. Fitz, 109 Ill. 425 (1884); De Lashmutt v. Teetor, 261 Mo. 412, 169 S.W. 34 (1914). Contra: Hoysradt v. Tionesta Gas Co., 194 Pa. 251, 45 Atl. 62 (1900).

19 Jones v. Jones, 8 Misc. 660, 30 N.Y. Supp. 177 (Sup. Ct. N.Y. County 1894).

20 See notes 12, 13 and 14 supra.

21 In New York, a suit on a foreign trust must be brought in the Supreme Court. The Surrogate's court has no jurisdiction. People ex rel Stafford v. Surrogate's Court, 229 N.Y. 495, 128 N.E. 890 (1920).

22 Strawn v. Caffee, 235 Ala. 218, 178 So. 430 (1938); Greenough v. Osgood, 235 Mass. 235, 126 N.E. 461 (1920); Farmer's Loan and Trust Co. v. Ferris, 67 App. Div. 1, 73 N.Y. Supp. 475 (1st Dep't 1901); In re Turner's Will, 195 Misc. 331, 90 N.Y.S.2d 481 (Sup. Ct. N.Y. County 1949); Farmer's Loan and Trust Co. v. Pendleton, 37 Misc. 256, 75 N.Y. Supp. 294 (Sup. Ct. N.Y. County 1902), rev'd on other grounds, 179 N.Y. 486, 72 N.E. 508 (1904); Schwartz v. Gerhardt, 44 Ore. 425, 75 Pac. 698 (1901).

23 Jenkins v. Lester, 131 Mass. 355 (1881).

24 Greenough v. Osgood, 235 Mass. 235, 126 N.E. 461 (1920).

25 Everhart v. Provident Life and Trust Co. of Philadelphia, 118 Misc. 852, 195 N.Y. Supp. 388 (Sup. Ct. N.Y. County 1922) (trustee was a non-resident, trust corpus was in Pennsylvania, testator had been a non-resident). In re Matthew's Estate, 64 N.Y.S.2d 662 (Surr. Ct. N.Y. County 1949) (the issues raised had already been decided by the Pennsylvania court).

26 305 N.Y. 307, 113 N.E.2d 433 (1953).

judgment could be enforced only in New York where the corpus was located. Moreover, the decree of garnishment is entitled to full faith and credit if the funds are actually garnished within the jurisdiction of the court.[27] These factors make New York the logical and convenient forum for the action. For many years the lower courts of New York have been anticipating this decision, exercising or withholding jurisdiction depending on whether New York was the convenient forum for the action. Often, however, the opinions are written in terms of the presence or absence of jurisdictional power.[28] New York has shown much resourcefulness in asserting jurisdiction or refusing to do so, and also in recognizing the decrees of other jurisdictions or rejecting them. The holding in every case depends on criteria such as whether the decree is enforceable within the jurisdiction, whether the testator or trustees were domiciliaries of New York, whether there is a more convenient forum elsewhere and whether justice demands the court's intervention.

The lower courts of New York have declined jurisdiction when there was no other contact with New York save that the trustee was doing some business in the state.[29] However, even where the presence of the trustee was the only contact, they have exercised jurisdiction where the trustee was guilty of misconduct.[30] In one old case even where no misconduct was involved a substituted trustee has been appointed where only the *cestui que trust* was in New York but great hardship would have resulted if the parties were sent back to the probate court.[31]

Where the funds were in New York and the trustees never accounted to their probate court, New York has appointed a substitute for a deceased trustee.[32] Prior to the decision in *Erdheim v. Mabee,* New York courts have taken jurisdiction to garnish testamentary trusts,[33] even where the garnishment was for the collection of a foreign alimony decree,[34] when both funds and trustee were in New York. They have construed a British will and have appointed a substituted trustee under it where the trust *res* was in New York.[35] In most of these cases some degree of control of administration appears to have been retained by foreign courts of probate, but grounds of convenience pressed the court into exercising its discretion to take jurisdiction.

Following similar principles, where the corpus was in New York, and testator died domiciled in New York, the courts of New York refused to recognize the appointment by a Swedish court of a trustee ineligible under New York

---

27 Clark v. Williard, 294 U.S. 211 (1935). Probably jurisdiction over the garnishee would be sufficient for a valid garnishment. Harris v. Balk, 198 U.S. 215 (1905).

28 See note 25 supra.

29 See, e.g., Everhart v. Provident Life and Trust Co. of Philadelphia, 118 Misc. 852, 195 N.Y.Supp. 388 (Sup. Ct. N.Y. County 1922).

30 Jones v. Jones, 8 Misc. 660, 30 N.Y.Supp. 177 (Sup. Ct. N.Y. County 1894). For similar considerations see La Vin v. La Vin, 179 Misc. 1000, 39 N.Y.S.2d 317 (Sup. Ct. Queens County 1943), aff'd without opinion, 266 App. Div. 674, 41 N.Y.S.2d 180 (2d Dep't 1943); Squier v. Houghton, 131 Misc. 129, 226 N.Y. Supp. 162 (Sup. Ct. N.Y. County 1927).

31 Curtis v. Smith, 6 Blatchf. 537 (C.C.S.D.N.Y. 1869).

32 Farmer's Loan and Trust Co. v. Pendleton, 37 Misc. 256, 75 N.Y. Supp. 294 (Sup. Ct. N.Y. County 1902), rev'd on other grounds, 179 N.Y. 486, 72 N.E. 508 (1904).

33 Keeney v. Morse, 71 App. Div. 104, 75 N.Y. Supp. 728 (1st Dep't 1902).

34 Braman v. Braman, 236 App. Div. 164, 258 N.Y. Supp. 181 (1st Dep't 1932).

35 In re Morris' Will, 197 Misc. 322, 97 N.Y.S.2d 740 (Sup. Ct. N.Y. County 1949).

law,[36] and rejected a British decree ordering dissolution of a New York trust.[37] These decisions appear correct since in the first case the only contact between Sweden and the trust was the domicile of the *cestui que trust* and in the second case the only contact with Britain was the presence in Britain of creditors of the *cestui que trust*. In contrast to these decisions, where the testator dies a domiciliary of another state New York has given full faith and credit to that state's decisions regarding the trust although the funds and trustees were in New York.[38] Presumably, a decree of a foreign country would also be recognized if testator were a domiciliary of that country or if part of the trust *res* were located there.[39]

It is apparent from the cases that there is no lack of jurisdictional power to render judgment against a trustee of a foreign testamentary trust. Where the action is for a sum of money and the funds are within the territorial limits and are levied upon, the decree is entitled to full faith and credit.[40] Under such circumstances jurisdiction will be exercised if the forum is not manifestly inconvenient. Where the court is called upon to take jurisdiction for purposes other than to render a judgment for a sum of money, a more stringent test should be applied. Except under compelling circumstances no testamentary trustee should be forced to account to or follow the direction of more than one court.

Difficulties arise where two courts concurrently attempt to control the administration of a trust. In *Ewing v. Ewing*[41] at the request of one of the *cestui que trust* an English court ordered the trustees under a Scottish will to account to the English court and to administer the funds according to its directions. In the meantime the Scottish probate court sequestered the funds and enjoined the trustees from accounting to any court outside of Scotland. The House of Lords on appeal reached the surprising result that both judgments were valid with the exception of the injunction against accounting to the English court. As a result the trustees were put in the distressing position of executing the possibly inconsistent instructions of two courts at some distance from each other. Their only consolation was that the Lords did not believe that the courts would be unreasonable in their directions.

Where the problem has arisen in the United States more sensible results have been reached. California has refused jurisdiction for an accounting where an accounting was pending on appeal from the probate court of Arizona.[42] However, in another case where no action was pending in the probate court of Illinois, the California court took jurisdiction on the ground that California had secondary jurisdiction which could be exercised when Illinois was not exercising her primary jurisdiction.[43] Except in cases of fraud or similar equitable considerations, this result is not entirely desirable. Certainly, the result which involves the least doubt and circuity of action was reached in *Equitable Trust Co. v. Schwebel*.[44] The United States District Court for the

[36] In re Fermer's Will, 177 Misc. 228, 30 N.Y.S.2d 248 (Surr. Ct. Bronx County 1941).

[37] In re Havemeyer's Estate, 127 Misc. 197, 216 N.Y. Supp. 334 (Surr. Ct. N.Y. County 1926).

[38] Smith v. Central Trust Co. of N.Y., 12 App. Div. 278, 42 N.Y. Supp. 740 (1st Dep't 1896), aff'd, 154 N.Y. 333, 48 N.E. 553 (1897).

[39] Schwartz v. Gerhardt, 44 Ore. 425, 75 Pac. 698 (1904).

[40] Clark v. Williard, 294 U.S. 211 (1935).

[41] [1885] L. R. 10 A. C. 453.

[42] Schuster v. Superior Court, 98 Cal. App. 619, 277 Pac. 509 (1929).

[43] Estate of Knox, 52 Cal. App.2d 338, 126 P.2d 108 (1942).

[44] 40 F. Supp. 112 (E.D. Pa. 1941).

Eastern District of Pennsylvania ordered the trustee to submit to the jurisdiction of the New Jersey court where an accounting was pending. A similar result was reached in *Marsh v. Marsh.*[45] The New Jersey court stayed a proceeding for an accounting until a New York accounting proceeding was settled.

The *Restatement of Conflict of Laws* provides that "the administration of the trust is supervised by the courts of that state only in which the administration of the trust is located."[46] Other provisions define the state of administration as meaning the state of the trustee's domicile.[47] The *Restatement* rule is desirable as a goal, but is too inflexible for our federal system. In the instances where the *Restatement* scheme has been followed, the results are laudable. An example is the case of *In re Shipman's Will.*[48] In 1898 testator's will was probated in New York. A Massachusetts Trust company was named testamentary trustee. Through ancillary proceeding the Massachusetts court took over the administration of the entire trust. In 1942, action was brought in the probate court of New York for an accounting. The New York court held that Massachusetts was the appropriate forum for the suit. The result clearly seems proper. The Massachusetts court had become familiar with the trust administration, and the administration of the trust would be governed by Massachusetts law.[49] Moreover, the trustees would not be beset with the onerous burden of defending suits far from the situs of their duties, possibly at the expense of the trust itself.

In the usual case, however, the probate court retains jurisdiction over the administration of the trust even though the trustee is to be a foreign trust company. An example of this practice appears in *Cronin's Case,*[50] where a trust was set up under the will of a New York domiciliary which had been probated in New York. A Pennsylvania trust company was named trustee. The Commonwealth of Pennsylvania brought suit in the Pennsylvania courts to dissolve the trust and to levy on the entire *res.* The highest court of Pennsylvania affirmed the judgment of the lower court which had held for the Commonwealth, but stayed execution of the lower court's judgment until the Commonwealth appeared in the New York court to determine if it was entitled to the judgment. If the New York court were to hold the same way as the Pennsylvania court had, the Commonwealth would be allowed to apply to the Pennsylvania court for execution. Thus Pennsylvania refused to follow the *Restatement,* recognizing that the trustee would be placed in the difficult position of responding to the possibly inconsistent demands of two courts if the restatement rule were followed. It bowed instead to the continuing jurisdiction of the New York court. Had New York released its jurisdiction, the Restatement view could have been followed with the same desirable results as were obtained in *In re Shipman's Will,*[51] or if the action merely had been for the collection of a debt a different result probably would have been reached.

To facilitate the problems of administration, a foreign trustee should be

---

[45] 73 N.J. Eq. 99, 67 Atl. 706 (Ch. 1907). Contrast with Rosenbaum v. Garret, 57 N.J. Eq. 186, 41 Atl. 252 (Ch. 1898) (the court refused to stay proceeding in New Jersey, even though a prior action was pending in Pennsylvania).

[46] Restatement, Conflict of Laws § 299 (1934).

[47] Id. §§ 298, 299, comment a (1934).

[48] 179 Misc. 303, 40 N.Y.S.2d 373 (Surr. Ct. Queens County 1942).

[49] Restatement, Conflict of Laws § 298 (1934).

[50] 326 Pa. 343, 192 Atl. 397 (1943). Another typical example is the principal case, Erdheim v. Mabee, 305 N.Y. 307, 113 N.E.2d 433 (1953).

[51] 179 Misc. 303, 40 N.Y.S.2d 373 (Surr. Ct. Queens County 1942).

able to ask permission of the probate court to transfer the administration of the trust to a competent court in his jurisdiction. Where such permission has not been requested, or has been refused, foreign courts should proceed with caution before taking jurisdiction for purposes of administration, accounting, or appointment of substituted trustees. No court should take action which it cannot enforce. Where justice demands some action it would be wise to follow the lead of the *Equitable Trust Co. v. Schwebel*[52] case and order the trustee to appear in the appropriate court of another jurisdiction. However, more boldness should be (and has been) exercised where the relief prayed for is a money judgment which may be satisfied within the jurisdiction. In these latter cases the weight of the full faith and credit clause of the United States Constitution lies behind the court's decree and there is no possibility that the trustee will be faced with the hardship of relitigating the same issues in the probate court.

Joseph M. Perillo, Jr.

Evidence: Constitutional Law: Determination of the Admissibility of Confessions: *Stein v. New York, 346 U. S. 156 (1953).*—All courts condemn coerced confessions and agree without question that no man shall be convicted by their use. Nevertheless courts have encountered considerable difficulty in deciding certain specific problems. What is coercion? Who determines when a confession is coerced, judge or jury? What weight should this determination in the first instance be given in appellate court review? These questions were considered once again by the Supreme Court in the principal case where three men were tried and convicted under the New York felony murder statute for the death of an employee during the robbery of a *Reader's Digest* mail truck. The prosecution offered into evidence confessions of two of the accused over timely objections that they were coerced.[1] These confessions came after 12 hours of intermittent interrogation stretched out over a 32-hour period, during which time the accused were allowed to sleep and eat. The trial judge held that this detention was in violation of the New York arraignment statute requiring the officer making the arrest to take the accused before a committing magistrate without undue delay.[2] There was circumstantial evidence of violent treatment of the defendants, but the record shows that the injuries could have been sustained with equal probability before or after arrest. The state's evidence on the issue of coercion was left almost unchallenged, because the defendants chose to remain silent rather than to have their impressive criminal records disclosed to the jury in the impeachment process.[3]

After a preliminary hearing in the presence of a jury, the trial judge determined that there was a fair question of fact on the issue of coercion and therefore the issue of coercion had to be determined by the jury. This is in ac-

[52] 40 F.Supp. 112 (E.D. Pa. 1941).

[1] N.Y. Code Crim. Proc. § 395.

A confession of a defendant whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefore; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed.

[2] N.Y. Code Crim. Proc. § 165.

[3] When a defendant in New York takes the witness stand his credibility is subject to attack. People v. Trybus, 219 N.Y. 18, 113 N.E. 538 (1916).