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Conflict Of Laws—Garnishment

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general feeling of the court toward allowing the claim in the instant case.[34]

In allowing recovery in *quantum meruit* after disallowing recovery on the contract, they pointed out that the doctrine of election of remedies did not act as a bar. A party is said to elect a remedy when he chooses between irreconcilable and inconsistent claims. This harsh doctrine has been criticised by the court in previous cases,[35] and the Legislature has enacted sections which have delimited the area of the doctrine's use.[36] "The concept of election of remedies . . . is out of line with modern procedural concepts of unlimited joinder of causes of action regardless of consistency, and the liberal allowance of amendment of pleadings."[37] Perhaps it will not be long before the doctrine will become completely obsolete.

IV. Conflict of Laws

The conflict of laws cases decided in the past term were predominantly occupied with choice of law questions. Of the four cases discussed in the section, all had this issue as their focal point, although the first also included a jurisdictional problem. While choice of law involves the evaluation of many factors,[1] it is interesting to note the role played by that of policy. Local policy considerations were given great weight in the first two cases, a fundamental public policy guided the third, and the last decision was involved mainly with the question of whether or not the application of foreign law was violative of local policy. It is also notable that the desire, although subconscious, of a forum to prefer the *lex fori* was laudably suppressed in two of the four cases.

Garnishment

Assuming a testamentary trust of personalty to have been validly created, a problem arises as to what law should be applied to questions concerning the administration of the trust. It is usually presumed to be the law of the testator's last domicile,[2] but this can be rebutted by a clear or implied indication that the testa-

34. *McKeon v. Van Slyke*, 223 N. Y. 392, 119 N. E. 851 (1918); *Harmon v. Alfred Peats Co.*, 243 N. Y. 473, 154 N. E. 314 (1926).

35. *Metropolitan Life Ins. Co. v. Childs Co.*, 230 N. Y. 285, 130 N. E. 295 (1921); *Schenck v. State Line Tel. Co.*, 238 N. Y. 308, 144 N. E. 592 (1924); *Clark v. Kirby*, 243 N. Y. 295, 153 N. E. 79 (1926).

36. C. P. A. § 112(a-h), (enacted since 1939).

37. Prashker, *op. cit. supra* note 28, 207-208.

1. See Cheatham and Reese, *Choice of the Applicable Law*, 52 Col. L. Rev. 959 (1952).

2. Restatement, Conflict of Laws § 298, comment *a* (1934).

tor intended that another law should govern.[3] If these rules lead to the conclusion that a foreign state controls the administration of a trust, are the New York courts then deprived of jurisdiction to garnish the income from trust funds admittedly located there? This question was answered in the negative in *Erdheim v. Mabee.*[4]

The issue arose in a garnishment proceeding[5] in which a judgment creditor was seeking to reach income payable to his debtor as beneficiary under a testamentary trust. The testator, a domiciliary of the District of Columbia, where the will was probated, had designated a New York trust company and a resident of Wisconsin as co-trustees. Property comprising the trust fund was on deposit at the head office of the trust company in New York City. In a proceeding brought by the co-trustees in the District of Columbia in 1931 for the settlement of their first account, the court had issued a decree containing a provision "that jurisdiction . . . is hereby retained for such further orders and instructions regarding the administration of the trust estate as may be deemed necessary."

The Court of Appeals, in affirming (4-2) the Appellate Division,[6] rested its decision on two grounds. Judge Conway first questioned the District of Columbia's declaring itself to be the place of administration, since the testator had appointed as trustee a trust company of another state.[7] This, together with the fact that he had provided for investment and commissions under New York law, and that the testator undoubtedly realized that the trustee would actively administer the trust and keep the *res* in New York, implied his intention of choosing a place of administration other than his own domicile.

The second, and main, basis of decision was that even if full faith and credit must be accorded the District of Columbia's retention of control over the administration of the trust, New York could still reach the income from a trust *res* which was physically within the state and apply it to the payment of judgments of resi-

3. Appointment of a trust company of a foreign state as trustee, *id.* § 298, comment *c;* another jurisdiction having a more "substantial connection" with the trust, 19 COL. L. REV. 486 (1919); another state having a "preponderance of the operative factors" which include domicile of the testator at death, language of the trust instrument, place of probate of the will, location of the trust *res,* domicile of the trustee, domicile of the beneficiary, place in which the business of the trust is carried on, and intention of the testator, Note, 89 U. OF PA. L. REV. 360 (1941); Swabenland, *The Conflict of Laws in Administration of Express Trusts of Personal Property,* 45 YALE L. J. 438 (1936).

4. 305 N. Y. 307, 113 N. E. 2d 433 (1953).

5. C. P. A. § 684.

6. 279 App. Div. 988, 112 N. Y. S. 2d 592 (1st Dep't 1952).

7. RESTATEMENT, *op. cit. supra* note 2, § 298, comment *c; see Bank of New York v. Shillito,* 14 N. Y. S. 2d 458, 462 (Sup. Ct. 1939). *But cf.* In re *Cronin,* 326 Pa. 343, 349-350, 192 Atl. 397, 400 (1937).

dent judgment creditors. The opinion stated, "The courts of this State are not wholly without power to protect a resident creditor at least so far as the relief to be secured relates to property within the jurisdiction of the court and unquestionably belonging to the judgment debtor."[8] The court concluded that such a statutory garnishment was not a violation of the "administration" of the trust.[9]

The dissent, by Judge Desmond, pointed out that the court was subjecting the trustees to two conflicting sets of instructions, by two different courts. New York courts were making a direction for payment of income contrary to the terms of the trust itself and the directions of the court administering the trust.

In the instant case there was no question raised as to the validity of the trust, the beneficiary's being alive, or the amount of income due to him. The New York court was merely attempting to reach what was admittedly due to defendant from property within the state, by statutory garnishment.[10] Irrespective of whether this may be said to be technically within the province of "administration" of a trust,[11] the jurisdiction whose law governs administration should not be heard to complain. The instant case was just another example of the fundamental principle that every state has jurisdiction to determine for itself the liability of property located within its territorial limits, especially where it is to be applied to the satisfaction of a judgment obtained in this state by a resident creditor.[12]

Statute of Frauds

Whether compliance with the Statute of Frauds is a matter of procedure or evidence to be ruled by the *lex fori,* or a matter of the substantive validity of a transaction, normally governed by the law of the place of occurrence, has long been the subject of

8. *Supra* note 4 at 315, 113 N. E. 2d at 437; *see Hutchison v. Ross, 262* N. Y. 381, 388-389, 187 N. E. 65, 68 (1933); *Bergmann v. Lord,* 194 N. Y. 70, 78, 86 N. E. 828, 831 (1909).

9. A consideration of the remaining issue in the case, compliance with the New York garnishment statute, resulted in the conclusion that the conditions of the statute were fulfilled.

10. If a somewhat analogous situation arose before judgment under the attachment statute, it is very probable that jurisdiction would be assumed, since the Court of Appeals has stated that the attachment and garnishment statutes must be read together, *in pari materia. See Morris Plan Ind. Bank v. Gunning,* 295 N. Y. 324, 331, 67 N. E. 2d 510, 513 (1946); *cf. Commercial Credit Corp. v. Young,* 258 App. Div. 323, 16 N. Y. S. 2d 324 (4th Dep't 1939).

11. 2 BEALE, CONFLICT OF LAWS 1024 (1935), states that the power of the beneficiary's creditors to reach the trust *res* or its income is a question of administration.

12. *Accord, Keeney v. Morse,* 71 App. Div. 104, 75 N. Y. Supp. 728 (1st Dep't 1902); *see Clark v. Williard,* 294 U. S. 211, 213 (1935); *Disconto Gesellschaft v. Umbreit,* 208 U. S. 570, 580 (1908).