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Conflict Of Laws—Statute of Frauds

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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).

controversy.[13] The problem arises most frequently where an oral contract is involved, valid and enforceable where made, but violative of the forum's Statute of Frauds if the latter is held to apply. The substantive or procedural characterization of the statute by the forum in accordance with its own conflict of laws principles[14] is of vital importance since, for all practical purposes, it will determine the final disposition of such a case. Curiously, the Court of Appeals has never met the issue squarely, although it has recognized the existence of the problem.[15]

In *Rubin v. Irving Trust Co.*,[16] the court, invoking a sort of judicial conservation of energy, again expressly refrained from generally characterizing the Statute of Frauds. The issue arose in a suit for specific performance of an oral contract between the defendant's testator, a New York domiciliary, and the plaintiff, in which the testator promised not to change his will without the plaintiff's consent and the latter promised to purchase certain shares in a family corporation (which he had done). The oral contract was concededly valid in Florida, where it was made, but unenforceable if the New York Statute of Frauds were applied. The denial of defendant's motions for summary judgment in Special Term[17] was reversed by the Appellate Division,[18] and judgment was directed for the defendant.

Affirming, the Court of Appeals specifically emphasized that it was not here concerned with a typical Statute of Frauds problem as related to a commercial contract, but with a contract in which the state had a greater than ordinary interest. It was initially assumed that, for the purpose of the New York Statute of Frauds, there was no difference between a contract "to bequeath property or make a testamentary provision"[19] and a contract to refrain from changing an existing will. Judge Conway reasoned that the result in this case would be the same, regardless of the characterization of the statute. Were the statute held to be procedural, the law of the forum would apply and the oral contract

13. See Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 YALE L. J. 311 (1923), for an excellent analysis of the problem, resulting in the author's preference for the view that the statute is substantive; 1 BFLO. L. REV. 340 (1952).

14. GOODRICH, CONFLICT OF LAWS § 81 (3d ed. 1949).

15. *See Russell v. Societe Anonyme des Etablissements Aeroxon*, 268 N. Y. 173, 180-181, 197 N. E. 185, 187-188 (1935); *Franklin Sugar Refining Co. v. Lipowicz*, 247 N. Y. 465, 469-471, 160 N. E. 916, 917-918 (1928); *Reilly v. Steinhart*, 217 N. Y. 549, 553, 112 N. E. 468, 469 (1916).

16. 305 N. Y. 288, 113 N. E. 2d 424 (1953).

17. 107 N. Y. S. 2d 847 (Sup. Ct. 1951).

18. 280 App. Div. 348, 113 N. Y. S. 2d 70 (1st Dep't 1952).

19. "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking; ...7. Is a contract to bequeath property or make a testamentary provision of any kind." N. Y. PERS. PROP. LAW § 31 (7).

would not be enforced. If determined to be substantive, the New York law would still be applied, based on the principle that the *lex loci* will be disregarded where contrary to a strong public policy of the forum.[20]

In the absence of an expression of a contrary intent, the law of the testator's last domicile is the law of the will, at least as far as personalty is concerned. An oral agreement which affects the terms of a will, such as the one in issue, interferes with an orderly devolution of the testator's estate under the will, and subverts the stringent requirements which the state of domicile has established for making agreements of a testamentary character. The final domicile, being vitally interested in the privilege of testamentation, which it has granted, and in preserving the estates of its domiciliaries, over which its courts have assumed jurisdiction, "is more concerned in the policy to be insisted on than any other jurisdiction, and justifies it in framing its rules accordingly."[21] Since, in the instant case, the forum was also the promisor's domicile, its policy, as expressed in Personal Property Law § 31 (7), was applied, thus preventing the enforcement of the oral agreement.

The court reinforced this reasoning by arriving at the same result through the application of a different choice of law rule, the "center of gravity theory," sometimes called accumulation of contact points. Under this rule the controlling law is that of the state in which are grouped the greatest number of significant elements relating to the matter in dispute. By the application of this test, New York law would govern the oral contract, since the instant case involved a claim against an estate administered under the supervision of a New York court, the basis of which was a promise by a New York domiciliary not to alter a will governed by New York law. Apparently, Florida's only contact was the fact that it was the place where the contract was made.

Judge Desmond concurred, but thought the court should have extended its decision by holding the Statute of Frauds to be procedural and evidentiary.

The *Rubin* case appears to be of limited precedent value. The court expressly refrained from determining the characterization of the Statute of Frauds as applied to an ordinary or commercial contract.[22] Nor did it decide that Personal Property Law § 31 (7) proclaims a local policy so strong that it must be applied every

20. *See Straus & Co. v. Canadian Pacific Ry. Co.*, 254 N. Y. 407, 414, 173 N. E. 564, 567 (1930).

21. *Emery v. Burbank*, 163 Mass. 326, 329, 39 N. E. 1026, 1027 (1895).

22. However, we do have a fairly clear indication of how at least one judge would decide.

time the facts of a case litigated in the New York courts fall within the section. Of great importance was the fact that the instant dispute affected the testamentary dispositions of a New York domiciliary. Because of the dominant interest which New York has in this matter, a strong protective policy appears justified. It should be remembered, however, that public policy should not be the sole ground for deciding a conflict of laws problem, except in a clear case.[23] That the court considered the instant case to be a clear one, there is no doubt; but it may be questioned whether New York, the forum, would have invoked the public policy argument had it not been simultaneously the domicile.

Marriage

Should a marriage, valid where celebrated but void were it performed in the parties' domicile, be recognized in the latter state? The generally recognized rule is that a marriage which is valid at the place of celebration is valid everywhere.[24] There are, however, two broadly stated exceptions to this rule:[25] the first includes marriages which are contrary to natural law as it is generally regarded in Christian countries,[26] and the second includes marriages which the legislature of the forum has declared to be invalid because violative of some particularly strong local policy.[27] The latter exception has caused some difficulty, since courts differ on the question of whether a particular prohibition is such a strong expression of local policy that a marriage must be declared invalid regardless of the place where it was contracted.[28]

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23. "Local policy should not . . . be an instrumentality for rationalization of refusal to give effect to the law of another state, unless there is some exceptional and unusually sound reason." STUMBERG, CONFLICT OF LAWS 146 n. 47 (2d ed. 1951); see Lorenzen, *supra* note 13, at 337.

24. 2 BEALE, *op. cit. supra* note 11, at 669.

25. In re *Miller's Estate*, 239 Mich. 455, 214 N. W. 428 (1927); GOODRICH, *op. cit. supra* note 14, § 116.

26. To bring it within the meaning of this exception, the marriage must be either incestuous (between persons in the direct line of consanguinity or between brother and sister) or polygamous. In re *Miller's Estate*, *supra* note 25 at 457, 214 N. W. at 429.

27. STUMBERG, *op. cit. supra* note 23, at 282. It may be noted that the second exception coincides, for all practical purposes, with the conflicts rule prevailing in some states requiring compliance with the law of the domiciliary state for the validation of a marriage, regardless of the law of the place of the marriage.

28. "A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this Commonwealth, and have gone abroad for the purpose of evading our laws, unless the Legislature has clearly enacted that such marriages out of the state shall have no validity here." *Commonwealth v. Lane*, 113 Mass. 458, 464, 18 Am. Rep. 509, 514-515 (1873). *But cf.* In re *Stull's Estate*, 183 Pa. 625, 632-633, 39 Atl. 16, 18 (1898), in which it was said that a marriage is invalid where it offends the prevailing sense of good morals of the domiciliary state and there was an intention to evade the positive law of the domicile.