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Testamentary Trusts—Accumulations—Choice of Law

Robert J. Blaney

ments, 24 Ore. L. Rev. 227 (1945); Rottschaefer, Constitutional Law Sec. 227 (1939). An award of a money judgment constituted "State action" in *Old Wayne Mutual Life Association v. McDonough,* 204 U. S. 8, 23 (1907). The Supreme Court will determine for itself whether the act complained of is "State action" for purposes of the Constitution and will not be bound by the characterization resorted to by the State courts. *Home Telephone & Telegraph Co. v. Los Angeles,* 227 U. S. 278 (1913).

Most legal commentators after the *Shelley* case who speculated as to the possibility of an action being allowed for damages concluded that this remedy was also foreclosed. Scanlan, *Racial Restrictions in Real Estate—Property Values Versus Human Values,* 24 Notre Dame Law, 155, 182 (1949); Ming, *Racial Restrictions and the Fourteenth Amendment; The Restrictive Covenant Cases,* 16 U. Chi. L. Rev. 203, 217 (1948); Crooks, *Racial Covenant Cases,* 37 Geo. L. J. 514, 525 (1949); Lathrop, *The Racial Covenant Cases,* 1948 Wis. L. Rev. 508, 527.

The coercive power of the State alone, standing behind racial covenants, indirectly effectuates the discriminatory purposes of these agreements. A judgment for damages is simultaneously a State authorized sanction against willing vendors for their refusal to voluntarily adhere to the terms of the covenant and a deterrant upon other willing vendors which hinders the right of non-Caucasians to freely acquire property. A racially discriminatory covenant, as a matter of constitutional law, should be treated as valid, but unenforceable in any manner by State courts.

Maynard C. Schaus, Jr.

TESTAMENTARY TRUSTS—ACCUMULATIONS—CHOICE OF LAW

Testatrix died in 1940, domiciled in California. By her will she established a trust for the benefit of her son. The trustees were directed: "To pay one-quarter of the net income thereof to or for the benefit of (the) son, until he shall have attained the age of thirty years, and upon his attaining the age of thirty years to pay one-half of the net income to or for the benefit of (the) said son until he shall attain the age of forty-five years, and upon his attaining the age of forty-five years to pay the principal of said trust fund together with accumulated income thereon to (the) said son." The California court transferred the property to New York state where the beneficiary resided. The son having attained his majority demanded that the trustees pay over to him the entire accumulated income of the trust and annually pay him the future income. The Surrogate directed them to do so; holding that the provisions for accumulation of income beyond the minority of the beneficiary, though valid in California, were illegal in New York and that he was not required to substitute the policy and laws of a foreign state for those

of New York. *In re Clarkson's Will,* —— Misc. ——, 107 N. Y. S. 2d 289 (Surr. Ct. 1951).

The validity of statutory provisions barring the accumulation of income by a trust has long been recognized. See *Woodford v. Thelluson,* 4 Ves. 227, 31 Eng. Rep. 117 (1799); 11 Ves. 112, 32 Eng. Rep. 1030 (1805). It has been generally assumed that the common law of the United States permitted accumulations for 21 years after lives in being. 21 R. C. L. Perpetuities §§82, 83; 48 C. J. Perpetuities §80. On this assumption thirteen states have passed statutes providing for a shorter period. New York in 1831 limited accumulations of income to the minority of the cestui que trust. The present provisions, making the same limitation, are incorporated in the Personal Property Law §16 and the Real Property Law §61.

California in her Civil Code of 1872 followed the minority period limitation established by New York. In 1929 the Code provision was amended so as to allow accumulations for the same length of time that alienation might be suspended, which is lives in being or in the alternative 25 years in gross. Thus the accumulation provisions in Mrs. Clarkson's will were valid under the law of her domicile. *Reiss v. Reiss,* 45 Cal. App. 2d 740, 114 P. 2d 718 (1941); *In re Hardy's Estate,* 62 Cal. App. 2d 958, 145 P. 2d 910 (1944).

As a general proposition the validity of a disposition of personal property is determined by the lex domicilii, and a trust valid by the law of a foreign jurisdiction where a testator was domiciled will not be declared invalid, though illegal under the rules of the state where it is to be administered. Goodrich, Conflict of Laws, 517, Third Edition (1949).

The New York courts have faced this problem before and the decisions consistently follow the general rule. In a case in which the property was located in New York and the trust was created in New York, the law of New Jersey was applied in order to effectuate the testator's intent. *Shannon v. Irving Trust Co.,* 275 N. Y. 95, 9 N. E. 2d 792 (1937). Massachusetts law was applied to a case where funds were deposited in a New York bank by a resident of Massachusetts in trust for his nieces in Ireland. *Morris v. Sheehan,* 121 Misc. 222, 184 N. Y. Supp. 121 (1920), *aff'd. without opinion* 199 App. Div. 968, 191 N. Y. Supp. 939 (1921). *aff'd.* 234 N. Y. 366, 138 N. E. 23 (1922). In *Cross v. U. S. Trust Company of New York,* 131 N. Y. 330, 30 N. E. 125 (1892), as here, a testator domiciled in a foreign state (Rhode Island) created a trust valid under the laws of that state but invalid by the laws of New York. The validity of the accumulation provisions were determined by the law of the testator's domicile.

Despite the precedents, however, in the instant case the Surrogate applied

New York law and found the provisions for the accumulation of income by the trust to be invalid. In arriving at this result he found that the public policy of this state was established by its laws. For this premise, surprisingly, he cited, among others, the *Cross* case, *supra,* in which it was said at page 341: "It does not follow that a trust created by the laws of another state is contrary to our public policy with respect to accumulations . . . simply because the law of that state differs in some respects from ours."

Conceding that the provision for accumulation beyond the minority of the beneficiary was valid under the laws of California, the Surrogate next found that he was not bound by comity to substitute the policy and laws of a foreign state for those of New York. For this premise he cited two decisions of lower courts, one involving a negligence action, the other an action against a foreign corporation doing a banking business in this state. *Clough v. Gardiner,* 111 Misc. 244, 182 N. Y. Supp. 803 (Sup. Ct. 1920); *Pennington v. Townsend,* 7 Wend. 276 (Sup. Ct. N. Y. 1831). The *Cross* decision, *supra,* at 349 says: "Every right that any party acquired by the law of domicile ought by comity to be respected here." The use of this misleading word "comity" has frequently occasioned the misconception that courts have an unregulated discretion in choosing the law to apply. Judge Cardozo dealing with the problem in 1918 wrote: "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal." *Loucks v. Standard Oil Company of N. Y.,* 224 N. Y. 99, 111, 120 N. E. 198, 202, (1918).

The Surrogate also found that when a person sends property into another jurisdiction he submits it to the laws of that foreign jurisdiction. It is true that it is the presence of the property within the state which gives the New York courts jurisdiction over this type of action. As is illustrated in all of the prior cases, however, the New York courts having taken jurisdiction apply the law of the testator's domicile. The *Cross* case, *supra,* applied the law of Rhode Island; the *Shannon* case, *supra* applied the law of New Jersey; the *Morris* case, *supra* applied the law of Massachusetts; one Court of Appeals case even applied the law of Peru. *Dammert v. Osborne,* 140 N. Y. 30, 35 N. E. 407 (1893).

The decision of the Surrogate in the instant case seems, therefore, to be erroneous and contrary to precedent in this state.

Robert J. Blaney