Annual Survey of Massachusetts Law

Volume 1954 Article 18

1-1-1954

Chapter 12: Conflict of Laws

Thomas F. Lambert Jr.

CHAPTER 12

Conflict of Laws

THOMAS F. LAMBERT, JR.

This chapter concerns many subjects — subjects undoubtedly within the vested interests of the authors of other chapters of the SURVEY. However, the cases discussed here are peculiarly the concern of this chapter because they contain the element which makes them the domain of conflict of laws, namely, a "foreign" element — foreign in that something in the facts of the case forced the Supreme Judicial Court to recognize that it could not be concerned with the law of Massachusetts alone.

§12.1. Characterization and the Statute of Frauds. *Lenn v. Riché*[1] brought to the Court an interesting question relating to the characterization of substance and procedure and the Statute of Frauds. The plaintiff brought an action for breach of a bailment contract against the defendant, who had been appointed in Massachusetts the ancillary administrator, with the will annexed, of the estate of one Bonn. Bonn, a resident of France, had died in 1941, leaving an estate in Massachusetts.

Bonn was the uncle of the plaintiff and a man of considerable wealth and distinguished taste, with a fondness for his niece. In 1930 in Germany he gave her a valuable painting and a number of Renaissance medallions, which she stored in a vault in Frankfurt. In 1935, apprehensive over the increasing Nazification of German life, Bonn urged the plaintiff to send the painting to him in Paris, where he would display it in his apartment and safeguard it until she settled somewhere and wished its return. The plaintiff agreed to this and sent the painting to Bonn in Paris for display and safekeeping until such time as she requested its return. In 1940, following the bombing of Paris, it was agreed that Bonn would place the painting along with other valuables in a Paris bank, to be returned to the plaintiff "whenever she asked for it, whenever she arrived in the United States."

About this time the plaintiff, being a German citizen, was imprisoned in a concentration camp by the French, and when she was released, Paris was under the yoke of the German authorities. Bonn

THOMAS F. LAMBERT, JR., is Professor of Law at Boston University School of Law.

§12.1. [1] 1954 Mass. Adv. Sh. 115, 117 N.E.2d 129.

had left the city. She never saw him again. She then made her way to the United States.

There was evidence that Bonn did deposit the painting at the specified Paris bank. Being of Jewish extraction he had reason to take flight from Paris; he escaped to southern France, leaving the painting behind. Upon his death in 1941, he left a will, admitted to probate in France, in which he named his wife as his "universal legatee." In 1945, the plaintiff requested Bonn's widow to return her property, but without success. The present defendant married Bonn's widow, and the evidence as to what became of the plaintiff's painting after its deposit in the Paris bank would warrant the jury's inference that Bonn's widow and the defendant had failed to exercise care in its custody, were wrongfully withholding it, or had wrongfully disposed of it, "setting it afloat upon a sea of strangers."

The Supreme Judicial Court held that since the painting had been delivered by the plaintiff to Bonn in Paris, French law controlled the substantive rights of the parties with respect to the bailment. The defendant, relying upon the fact that the bailment agreement was oral, invoked the French Statute of Frauds, which requires an instrument to be notarized or made under private signature in any case where the matter involved exceeds 5000 francs. The parties stipulated that the bailment agreement was oral and that the value of the plaintiff's painting exceeded 5000 francs.

The Court accepted the apparent French characterization of the French statute as "substantive," and hence, presumably, applicable in bar of the plaintiff's claim. The plaintiff, however, successfully invoked the doctrine of so-called "moral impossibility" in the French law under which the plaintiff is excused from the requirement of producing written evidence of the agreement if, for example, the relationship between the parties is so intimate that it would be seriously embarrassing to ask for a written memorandum. Thus, the French Statute of Frauds with its escape clause of "moral impossibility" proved no insuperable barrier for the plaintiff.

The defendant then argued that performance of Bonn's obligation as bailee to return the painting was excused by force majeure, under the familiar rule that excuse for nonperformance is governed by the lex loci solutionis.[2] The Court ruled that the issue of force majeure was for the jury, which had found against the defendant on the issue. The defendant, who, as stated, had married Bonn's widow, gave exculpatory evidence of his diligent efforts to ship the painting from the Paris bank southward across the occupation and demarcation line to Marseilles and sanctuary. He suggested that the Nazi authorities had pillaged the painting in course of transit. But this was all for the jury, and the jury disbelieved.

The absorbing problem of characterization or qualification can

[2] Louis-Dreyfus v. Paterson Steamships Ltd., 43 F.2d 824, 72 A.L.R. 242 (2d Cir. 1930).

be encountered more than once in the consecutive stages of a conflicts case. The first is conventionally called "primary characterization," and obliges the judge in the forum to characterize the issue or question before him. For example, is a suit by a passenger against a common carrier an issue of tort or contract liability? Does a widow's claim give rise to a question of marital property rights or to one in the administration of estates? Does the nonconsent of a parent to his minor child's marriage present a question of formalities of the marriage ceremony or go to the capacity of the party to enter into the marriage? And so, by analogy, the issue in the *Lenn* case might be phrased, does the plea of the Statute of Frauds raise a question of procedure, to be referred to the lex fori, or one of substance, for the lex loci? The pat rule on primary characterization is that it is for the forum.

The second stage in a conflicts case involves defining the connecting factor, such as "domicile," "place of contracting," "center of gravity of the contract," or "place of performance." The conventional rule is that the connecting factor is defined by the lex fori. Such a characterization may be merely provisional and tentative, however, subject to a controlling characterization by the lex loci in the interest of uniformity. This suggestion looks forward to the fourth stage and raises the question of whether the forum will use the renvoi, i.e., the foreign state's conflicts rule, when that rule and the forum's differ latently as well as patently.

The third stage involves the delimitation of the lex causae, i.e., the law selected by the forum's conflicts rule to govern the substantive rights of the parties. In the instant case the lex causae was, of course, French law, because the Massachusetts Court concluded that the issue (primary characterization) was liability for breach of the bailment contract, to be referred to the place of bailment, France. But how much of the lex loci, French law, was to be used? Not the French rules on the scope of cross-examination, the number of return days on a writ, whether the suit is in law or in equity, or the method of serving process. In other words, only French substantive law was to be used, not French rules of procedure. This leads to the critical question in the *Lenn* case: Do you label the French Statute of Frauds as substantive or procedural by the lex fori, do you accept the French label, or do you label it by the lex fori after studying its operative features in the context of the French conflict of laws? This question was not explicitly raised, referred to, or analyzed in the *Lenn* case.

The fourth stage, as has been mentioned, lies in determining whether the forum's reference to the lex loci involves a reference to just the internal, domestic rule of law on the one hand, or to the entire law of the locus on the other.

It is obvious that if you treat the issue of the Statute of Frauds as a question of primary characterization to be decided by the forum, you maximize uncertainty and lack of uniformity in the conflict of laws.

Sound policy calls for minimizing the role of the forum in cases containing foreign elements.

On the other hand, if you refer characterization of the Statute of Frauds issue to the lex loci, you encounter a paradox, for if the locus characterizes the issue as one of procedure and the forum accepts that label, that means each state, forum and locus, will apply its own statute, sacrificing uniformity. If each state is allowed to characterize its own statute by its own rule, you have the possibility of a gap (forum calls it substantive, locus calls it procedural) or an overlap (forum calls it procedural, locus calls it substantive). If you approach the problem in terms of the objectives of the conflict of laws, then either the substantive characterization or the rule of alternative reference may be preferable. If all states would agree to treat the issue as one of substance, as Massachusetts apparently did in the *Lenn* case, then regardless of where suit was brought, the reference would be to the law of the locus, and uniformity of result would be achieved thereby,[3] irrespective of the forum. On the other hand, as in formalities generally, there is much to be said for a rule of alternative reference in the interest of sustaining commercial transactions wherever conscientiously possible, i.e., using the statute of the forum or the locus, whichever upholds the contract. Ut res magis valeat quam pereat.

The entire problem of characterization may appear to be esoteric or wayward, but it is implicit not only in every conflicts case, but in all verbal thinking. It is the law's response to the fact that terms and concepts in the conflicts rules of different countries are differently defined. Massachusetts and France may both agree that procedure is for the forum and substantive rights in a bailment case are for the place of bailment. But what if one defines the Statute of Frauds to be a question of procedure and the other, a question of substance? Uniformity perishes.

The Court is to be commended for using the Statute of Frauds of the locus, France, in the *Lenn* case, for such a characterization tends to promote uniformity of result regardless of the form selected.[4]

§12.2. Foreign land and the Statute of Frauds. In *Herman v. Edington*[1] the Court had occasion to reassert the distinction between jurisdiction and choice of law in a case in which the plaintiff sought in the Massachusetts forum to impress a trust on Florida land or on the proceeds from a wrongful sale of this foreign land.

The decedent had lived meretriciously for several years with the plaintiff. He gave her an envelope containing deeds representing his title to two lots of Florida real estate, and wrote thereon that the property, though still retained in his name, was now the property of the plaintiff in repayment of loans advanced by her. Having ini-

[3] Louis v. F. H. Smith Co., 36 Del. 477, 178 Atl. 651, 105 A.L.R. 646 (1935).

[4] Compare the earlier Massachusetts case of Townsend v. Hargraves, 118 Mass. 325 (1875).

§12.2. [1] 1954 Mass. Adv. Sh. 337, 118 N.E.2d 865.

tialed and dated the legend, the decedent delivered the envelope to the plaintiff. The decedent, who died testate domiciled in Massachusetts, left his property to those entitled to receive it under Massachusetts laws of descent and distribution. One defendant, the adopted son of the decedent, met the plaintiff for the first time after his father's death. The plaintiff gave him the envelope containing the deeds, and he promised to have the title transferred to her. Instead of doing so, he engaged in stalling tactics and eventually refused to recognize that the plaintiff had any interest in the land. The son then got title through ancillary administration in Florida, and sold the two lots for $9500, $7000 of which he gave to his wife, the other defendant. The plaintiff then brought suit against the defendants, seeking to impress the proceeds of the sale of the Florida real estate with a trust in her favor. The critical issue, therefore, was whether at the time of the decedent's death the Florida lots were impressed with a trust in the plaintiff's favor.

Before reaching that question, however, the Court had to determine the threshold issue: whether the Massachusetts Court had jurisdiction to determine the plaintiff's interest in land located in another state. The Court, following settled principles of the conflict of laws, held that it had jurisdiction in the plaintiff's suit. All the plaintiff sought was a decree in personam against the defendants, ordering them to pay her a sum representing the proceeds of the wrongful sale of the two Florida lots by the son. She did not seek a decree operating directly on the Florida realty. The decedent had been domiciled in this Commonwealth during the entire period of his association with the plaintiff, including the period when he dealt with the plaintiff relative to the land, and at the time he died. He directed in his will that his estate should be administered according to the law of this Commonwealth. All parties in interest were before the Court. Both defendants were domiciled here, where they could be given their day in court. If the son had not sold the Florida property but had still retained title at the time of the plaintiff's suit, it is clear that since the Massachusetts Court had personal jurisdiction over the defendants, it could have ordered them to convey the land to the plaintiff. It is conventionally held that a court may exercise jurisdiction in personam to affect matters outside the state. The orthodox illustration is where a defendant personally before the court is ordered to convey foreign land.[2] In the *Herman* case, the Court said, conformably to the weight of authority, that it had jurisdiction to order the defendants to convey the Florida property to the plaintiff, or, since the lots had been sold, to account to her for the proceeds.

The second fundamental issue faced by the Court was what law determined whether the plaintiff had acquired an equitable interest in the Florida land. Again following the weight of authority, the Court held that this question was to be decided according to the law of the

[2] Goodrich, Conflict of Laws 217 (3d ed. 1949).

situs, Florida. The general rule that the law of the situs governs the creation of interests in land applies to equitable as well as legal interests, since under the doctrine of efficacy the exclusive control of the sovereign at the situs embraces equitable as well as legal interests in the land. Whether claimants work out their rights through the sheriff or the chancellor is ultimately a matter of procedure.[3] Our Court accordingly referred the issue whether the plaintiff had acquired an equitable interest in the decedent's Florida lands to the lex rei sitae, holding that a trust so created by the lex loci would be recognized at the forum, Massachusetts. The Court then ascertained that, under the law of Florida, the decedent's Florida lands were impressed at his death with a trust in the plaintiff's favor.

The final question was whether on the facts of the case the requirements of the Statute of Frauds were satisfied. The Court held on this issue that the delivery of the envelope with the written statements thereon and the deeds therein, in the light of the attending circumstances, satisfied the Statute of Frauds and showed that the decedent intended to make himself trustee of the lands for the plaintiff's benefit. The Court apparently concluded that both the Florida and Massachusetts Statutes of Frauds were satisfied. This enabled the Court to avoid an explicit decision on the controversial question of whether the Statute of Frauds embodies a rule of substance or procedure. It does not appear clear from the opinion of the Court where the agreement involving the delivery of the envelope with the legend thereon was entered into by the plaintiff and the decedent. At the time of the agreement, the decedent was domiciled in Massachusetts, and the plaintiff, apparently, in New York. Suppose that the agreement between the plaintiff and the decedent had been made in Florida, and that the suit in equity had been brought by the plaintiff in Massachusetts, and that the memoranda in the case satisfied the Statute of Frauds of one state but not the other. Unless Massachusetts adopted a rule of alternative reference in the interests of the security of transactions, upholding the declaration of trust if it satisfied the statute of either state, it would then be critical whether Massachusetts characterized the issue of the Statute of Frauds as substantive, to be referred to the place of contracting or possibly the situs of the land, or procedural, to be referred to the forum. Many commentators say that the preferable view is to regard the issue as a matter of substance and to recognize an agreement or declaration as valid which complies with the law of the state where it was made. In the *Herman* case, assuming that the declaration of trust occurred in either Florida or Massachusetts, the finding that the Statutes of Frauds of both states were satisfied enabled the Court to sidestep or defer a definitive ruling upon the vexing question of whether the statute is to be characterized as presenting an issue of substance or of procedure.

[3] Beale, Equitable Interests in Foreign Property, 20 Harv. L. Rev. 382 (1907).

§12.3. The domicile of minor children. In the interesting case of *State Tax Commission v. Felt*,[1] while all parties concerned were domiciled in the Commonwealth, a mother made a declaration of trust for the benefit of her minor children. Four years later, in 1946, the mother was validly divorced from the father, and the decree awarded her custody of the minor children. A year later, while still domiciled in the Commonwealth, she married her second husband, who was domiciled then and at all material times in Toronto, Canada. In June, 1947, the wife moved to her new husband's home, and in September, 1947, after attending summer camps in New England, the children, with the consent of their father, went to Toronto to live with their mother and stepfather and there they remained.

The nub of the controversy was whether the income from the trust payable to the children during the year 1950 was subject to tax in Massachusetts. Under orthodox rules relating to jurisdiction to tax, if the children were not domiciled in the Commonwealth during 1950 the trust income then payable to them was immune to tax liability.[2]

The essential question, therefore, primae impressionis in the Commonwealth, was as phrased by the Court: "If a mother is awarded custody of minor children by a valid decree of divorce entered in this Commonwealth, where the parents and children were domiciled, and she by remarriage acquires a domicil in another jurisdiction, to which she takes the children with the consent of the father, does the domicil of the children follow that of the mother?" [3]

The Court, in a carefully reasoned, realistic, and progressive opinion, answered the question in the affirmative and therefore concluded that the income payable to the children was not taxable in Massachusetts.

It is settled that a minor child's domicile, in the case of separation or divorce of his parents, is that of the parent to whose custody he has been legally given. At the time the divorce decree was issued, the wife retained her domicile in Massachusetts, the domicile of the children remaining with her. Upon her subsequent remarriage, she took the domicile of her second husband, thereby acquiring a domicile by operation of law in Canada. But the children did not automatically become members of the stepfather's family. He did not, for example, legally adopt them. Clearly, then, the children's domicile did not follow that of the stepfather by operation of law although the mother's did. Nor would their domiciles change by reason solely of a change in the domicile of the stepfather. Still, if the children actually move to the mother's new home and there live with her, should not the mother have the power to change the domicile of the children to her new location? Otherwise phrased, where a child actually moves to

§12.3. [1] 1954 Mass. Adv. Sh. 67, 117 N.E.2d 166.
[2] G.L., c. 62, §8, particularly (d); id. §10, first sentence.
[3] 1954 Mass. Adv. Sh. 67, 117 N.E.2d 166. See Beale, The Conflict of Laws, 1886-1936, 50 Harv. L. Rev. 887, 891 (1937).

his mother's new domicile and she there establishes a home for him, then does not the child's domicile follow to the new domicile of the mother, or does the child retain during the rest of his minority the premarital domicile of his mother, in this case, Massachusetts?[4] The older authorities generally agreed that a mother, no longer being sui juris, could not change the domicile of her child. Being herself a dependent person and taking derivatively the domicile of her new husband, she was powerless to change her child's domicile. Under this view a child would retain his mother's antenuptial domicile, even though he were living in her new home, until such time as he attained a capacity for acquiring a domicile of choice or his domicile was otherwise changed. This reasoning has lost much, if not all, of its force today.[5] It artificially divorces domicile in law from residence in fact, and it is manifestly desirable to avoid a spread between the facts of residence and the concept of domicile. The admirable feature of the present case is that the Supreme Judicial Court declined to follow the older and discredited view that a mother upon remarriage could not change the domicile of her child. In a sound opinion reflecting the increasing emancipation of women, the Court has held that, at least where a child, whose legal custody has been awarded to the mother, actually moves to the mother's new home, then the child's domicile follows that of the mother upon the mother's remarriage. This position is supported by the Restatement of the Conflict of Laws.[6]

It might be added that, since in the *Felt* case the children's father was personally subject to the jurisdiction of the Massachusetts divorce court, the decree awarding custody of the minor children to the libellant-wife effectively adjudicated the rights of the parties to the custody of the children. In the absence of changed circumstances sister states would be bound by the full faith and credit clause to recognize the custody portions of the Massachusetts decree. While the principle of "divisible divorce" is apparently now to be applied to custody decrees, it operates only in the case of ex parte decrees, where personal jurisdiction over the defendant parent is lacking. Where, as in the *Felt* case, the defendant-parent is domiciled in the divorce forum or is there served with process or personally appears and participates in the proceedings of the divorce court, the decree will effectively divest him of his rights to custody of the children of the marriage.

The instant case also tends to support the notion that the meaning of the term "domicile" varies, within limits, with the nature of the problem at hand. The context and circumstances of the particular case in which a definition of the term is sought should be kept in mind. While there doubtless is a hard core to the notion of domicile, consisting of physical presence and intent to remain, there are fringe differences which become critical when one considers what the intent is and how long the presence continues. In the *Felt* case, it was

[4] Lamar v. Micou, 112 U.S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751 (1884).
[5] Goodrich, Conflict of Laws 89 (3d ed. 1949).
[6] §38, Comment *d* (1934).

necessary to determine the domicile of the minor children in order to decide whether their income from a trust fund was taxable. Income taxation suggests a retrospective significance to the concept of domicile in terms of protection rendered and benefits afforded by the taxing state. When it is remembered that during 1950, both the minor children, as beneficiaries, and the parent to whom their custody had been awarded, were living in Toronto, Ontario, enjoying the protection of the Canadian laws, the Court's conclusion that the domicile of the children followed that of their mother to Canada seems eminently sensible. Clearly the children were residing in Canada during the taxable year, and the decision achieves an admirable result in narrowing the spread between residence in fact and domicile in law.

§12.4. Foreign corporations: Internal management. *Beacon Wool Corp. v. Johnson*[1] involved a bill in equity by a foreign corporation to compel two defendant directors to restore to the corporation sums paid by the directors to employees and to themselves. As disclosed by the evidence the corporation was a "one-man company" whose policies were dictated by its president and sole stockholder. After his death, the defendants continued to pay profit-sharing bonuses to employees and to themselves pursuant to a resolution which had been passed during the president's life. The Court accepted the judge's finding that the resolution did not contemplate such payments if the president died, especially where the corporation's financial outlook was bad. The Court affirmed the trial court's decree that under the applicable law of the charter state, Delaware, the defendants were liable to the corporation for amounts paid to the employees and themselves.

The conflicts question presented was: What law determines the liability of directors of a foreign corporation paying assertedly illegal bonuses to employees and to themselves? As stated, the corporation was incorporated in Delaware and was apparently a tramp corporation doing the bulk of its wool brokerage business in Massachusetts. The Court followed the weight of authority in holding that the liability of the defendants for their acts as directors was controlled by the law of the state of incorporation, Delaware. Under the internal law of that state, the Court found that the payments made by the defendants were "constructively fraudulent" and illegal.

A preliminary question in this case might have been: Will the trial court even take jurisdiction of the bill against the delinquent directors of a foreign corporation? The usual rule is that a court will not entertain suits against a foreign corporation or its directors or officers if the controversy concerns only the internal management or affairs of the corporation.[2] Considerations of convenience normally require that such suits be brought in the courts of the charter state. If, how-

§12.4. [1] 1954 Mass. Adv. Sh. 411, 119 N.E.2d 195.

[2] Rogers v. Guaranty Trust Co. of New York, 288 U.S. 123, 53 Sup. Ct. 295, 77 L. Ed. 652, 89 A.L.R. 720, 736 (1933); Restatement, Conflict of Laws §195 (1934).

ever, suit is brought at the corporation's principal place of business, at what has been termed the "commercial domicile," and there is nothing to indicate that defense of the action would involve undue hardship or inconvenience, the court may assume jurisdiction.[3] In the *Beacon Wool* case, as stated, Massachusetts was apparently the commercial center of the corporation's business activities.

It would seem, however, that Massachusetts, as the corporation's principal place of business, would be allowed to fix the standards for bonus payments by directors to local employees and to themselves. Such payments, of course, might prejudice the interests of local creditors, and Massachusetts would have an interest in policing and protecting the locally conducted portion of the affairs of the foreign corporation, including dividend- and bonus-paying policies. Why should Delaware, technical domicile of a tramp corporation, be accorded suzerainty over the possibly multistate activities of such a corporation? On the other hand, if each state wherein the foreign corporation does a substantial amount of business may apply its own law of dividends, bonus payments, and ultra vires acts, the absence of constitutional review and inhibition could result in an overlay of friction, inconsistency, and contradiction, calling, conceivably, for the corrective of the full faith and credit clause.[4]

§12.5. Pennoyer v. Neff and problems of jurisdiction. In *Katz v. Katz*[1] the Court had occasion to revisit and re-examine the celebrated case of *Pennoyer v. Neff*.[2] The *Katz* case concerned a petition brought by a wife against her nonresident husband containing the usual allegations of failure by the husband, without just cause, to furnish suitable support, and praying for such order as the court deemed expedient concerning the wife's support. A writ was issued to attach certain funds of the husband in designated banks and trust companies. It did not appear from the record, however, how much property of the nonresident husband had been caught by the attachment of funds in the banks upon which service was made. The Probate Court entered a decree favorable to the wife, part of which ordered the husband to pay fifty dollars a week for the support of the wife until the further order of the court. The husband appealed. The Supreme Judicial Court held that the trial judge was warranted in finding that the husband had deserted the wife and was now living in Indiana. Since the wife was living apart from the husband for justifiable cause, she had a capacity to retain a separate domicile in the Common-

[3] Williams v. Green Bay & W. R. Co., 326 U.S. 549, 66 Sup. Ct. 284, 90 L. Ed. 311 (1946).

[4] Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 63 Sup. Ct. 602, 87 L. Ed. 1772 (1943); International Ticket Scale Corp. v. United States, 165 F.2d 358 (2d Cir. 1948); German-American Coffee Co. v. Diehl, 216 N.Y. 57, 109 N.E. 875 (1915). See especially Freund, "Review and Federalism," Supreme Court and Supreme Law 107 (Cahn ed. 1954).

§12.5. [1] 330 Mass. 635, 116 N.E.2d 273 (1953).
[2] 95 U.S. 714, 24 L. Ed. 565 (1878).

wealth, and the Massachusetts courts, therefore, had jurisdiction to decree her separate support.

The Court then came face to face with the landmark case of *Pennoyer v. Neff*. Under the rule in that case the judgment forum does not have jurisdiction to enter a decree in personam for the payment of money against a nonresident not personally served therein. More precisely, *Pennoyer* held that where a personal judgment is given without jurisdiction over the defendant, and execution thereafter is levied on his land, no title passes to the transferee; the judgment is void under the due process clause of the Fourteenth Amendment. The presence of the defendant's property in the state of rendition does not validate the personal judgment. In the *Pennoyer* case, although the Court laid stress on the failure to seize or attach any property at the commencement of the action, the real vice was that the judgment sought and given was a judgment in personam, and this void judgment was not revitalized by the later discovery and seizure of property of the defendant. Since that part of the decree in the *Katz* case which required payment of money by the husband to the wife appeared to the Massachusetts court to be an in personam decree, the Court properly held that the Probate Court was powerless to enter it. This is simply a reaffirmation of the *Pennoyer* rationale that a court is constitutionally powerless to enter a personal judgment against a nonresident defendant not served within the state of rendition.

However, it was conceded that in the exercise of its quasi in rem jurisdiction, the Probate Court had power to enter a support decree against a nonresident husband provided his property in the Commonwealth had been attached. The husband, of course, could be made to respond to the satisfaction of such a decree only to the extent of the amount and value of such property. Since it did not appear from the record how much property had been caught by attachment served on the banks, the Supreme Judicial Court remanded the cause to determine the amount of the husband's funds actually caught. Consistent with the requirements of quasi in rem jurisdiction, the decree ordering the husband to pay a weekly sum to the wife would be modified to provide that only property caught by the attachment could be applied to the periodic support payments.

§12.6. The powers of foreign testamentary trustees. *Assessors of Everett v. Albert N. Parlin House, Inc.*,[1] brought to the Court a proceeding by a corporate charity to obtain an abatement of a realty tax. Pursuant to the will of a New Hampshire testator, the court of that state appointed certain executors and trustees who were directed by the will to buy or build a lodging house in or near the city of Boston for certain designated charitable purposes. The trustees bought two lots in Everett and caused a modern brick building to be erected for carrying out the specified charitable objects in the will. Thereafter the trustees caused a corporation to be organized under the laws of the

§12.6. [1] 1954 Mass. Adv. Sh. 389, 118 N.E.2d 861.

Commonwealth to execute the indicated charitable purposes, and to that end transferred to the corporation by trustees' deeds the two parcels of Everett realty. The board of assessors of Everett assessed a real estate tax for 1950 and 1951 upon the two lots. The Appellate Tax Board granted abatements, and the board appealed.

It is a familiar premise that in order to be entitled to an exemption the charitable institution must not only occupy the premises but it must be the owner. From the standpoint of the conflict of laws the principal contention of the assessors was that the corporation did not own the property. They contended that the authority of the trustees appointed by the New Hampshire court to act in a representative capacity ended at the state line. Since the authority of the trustees did not extend beyond the territorial jurisdiction of the New Hampshire court, it followed that the corporation did not acquire any title whatever. The crux of the argument for the assessors was that, generally, except when permitted by a statute of the situs, here Massachusetts, foreign trustees have no authority to convey realty in another state. In the instant case the trustees appointed by the New Hampshire court had failed to get the prior authorization of the Probate Court in Massachusetts for the transfer of the realty to the locally formed corporation. In view of the failure of the testamentary trustees to secure a license to convey the lots to the corporation, the Supreme Judicial Court held that the corporation failed to sustain the burden of proof relating to the ownership of the realty. Accordingly, there was error in granting an abatement of the tax on the realty.

This case is a melancholy example of the background rule that when a fiduciary is appointed by judicial action in one state, his authority to act ends at the borders of the appointing state.[2] Many a shipwrecked financial operation bears testimony to the inconvenience of the rule. It is to the interest of local landowners that the legislature enact a statute extending the extraterritorial land capacity of a foreign fiduciary. Massachusetts has passed such a statute which, broadly speaking, allows the foreign fiduciary to resort to local procedures for the sale, mortgage, or leasing of local land.[3] Great as are the statutory inroads on the traditional background rule, the instant case shows how vital it is, when problems arise as to the extraterritorial land capacity of a foreign fiduciary, to make careful search and compliance with local statutory provisions. For want of such compliance, a tax abatement was lost in the instant case.

[2] 1 Powell, Real Property 595 et seq. (1949).
[3] G.L., c. 201, §30; id. c. 202, §§32, 33.