

## NOTES

**CONFLICT OF LAWS—TRUSTS—LAW DETERMINING VALIDITY OF INTER VIVOS TRUSTS IN PERSONAL PROPERTY.**—John Doe, having his domicile in Massachusetts, executed a trust instrument in New York establishing a trust in certain securities located in Illinois for the benefit of his son who was domiciled in New Jersey. The trustee was domiciled in Pennsylvania and the trust was to be administered there. An attack is made on the validity of the trust and the court is faced with the problem of determining the appropriate law applicable to settle the validity of the trust.

As is suggested by the roll of states given above various possibilities present themselves. The law of the state of the domicile of the creator of the trust, the law of the place of execution of the trust instrument, the law of the situs of the property conveyed by the trust, the law of the state of the domicile of the beneficiary, the law of the domicile of the trustee, or the law of the place where the trust is to be administered, all have been cited as the proper law to resolve the problem under discussion. The decisions of the courts, however, are, on the whole, confused and they fail to lay down any fundamental principles.<sup>1</sup> In many of them the necessary facts are not revealed to help to clarify the issue.

The doctrine of domicile found early favor in settling problems relating to trusts of personal property as in other matters involving personal property.<sup>2</sup> The legal fiction that personal property adhered to the person of the owner and had no situs other than his domicile is embodied in the maxim "*mobilia sequuntur personam*". Under this maxim the validity of an inter vivos trust as well as that of a testamentary trust is to be determined by the law of the domicile of the settlor at the date of the execution of the trust instrument or the occurrence of the trust transac-

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1. 11 Am. Jur., sec. 95, Conflict of Laws.

2. *Swetland v. Swetland*, 105 N.J.Eq. 608, 149 Atl. 50 (Ch. 1930), *aff'd* 107 N.J.Eq. 504, 153 Atl. 907 (E. & A. 1931); *Liberty National Bank & Trust Co. in New York v. New England Investors Shares, Inc.*, 25 F. 2d 493 (Dist. Ct., Mass., 1928); *Cross v. U. S. Trust Co.*, 131 N.Y. 330, 30 N.E. 125 (1892); *Parsons v. Lyman*, 30 N.Y. 103 (1859); *Sullivan v. Babcock*, 63 How. Pr. 120 (N.Y., 1882); *Townsend v. Allen*, 59 Hun. 622, 13 N.Y.S. 73 (1891), *aff'd* 126 N.Y. 646, 27 N.E. 853 (1891); *Maynard v. Farmers' Loan & Trust Co.*, 208 App. Div. 112, 203 N.Y.S. 83 (1924).

tion.<sup>3</sup> Whatever value the maxim may have had in the epoch when personal property was comparatively unimportant it is now gradually losing its efficacy. It cannot always be carried to its logical conclusion because of practical considerations. An able jurist has said: "Physical presence in one jurisdiction is a fact; the maxim is only a juristic formula which cannot destroy the fact."<sup>4</sup> The rule of domicile is often defended on the ground that it is safer, more convenient and simpler because the res may be scattered in different jurisdictions. The fact that courts have found the need to steadily move away from the rule is proof of its practical difficulties.<sup>5</sup>

It would seem that both logic and the practicalities of the situation favor the theory that the *lex rei sitae*, the law of the place where the

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3. In the case of *Swetland v. Swetland*, *supra* note 2, a bill against a trustee for misappropriation and dissipation of the trust fund, seeking an accounting, the removal of the trustee and the appointment of a new trustee was filed. The trust agreement was executed in New York but the settlor was a resident of New Jersey. The case should be confined to a question of jurisdiction but the language of V.C. Berry is so sweeping the case is cited for the broader principle. In the case of *Cross v. U. S. Trust Co.*, *supra* note 2, Judge O'Brien of New York stated: "It is a general and universal rule that personal property has no locality. It is subject to the law of the owner's domicile, as well in respect to a disposition of it by act *inter vivos* as to its transmission by last will and testament, and by succession upon the owner dying intestate." This is obiter since the case dealt with a testamentary trust.

4. Judge Lehman in *Hutchison v. Ross*, 262 N.Y. 381, 187 N.E. 65 (1933). He attributes the failure to draw a distinction between trusts *inter vivos* and trusts testamentary to the paucity of decisions on conveyances in trust *inter vivos*.

5. Professor Cavers has made an extensive study of this whole problem. Cavers, *Trust Inter Vivos and the Conflict of Laws*, (1930) 44 HARV. L. REV. 161. Dealing with the rule of domicile he says: " \* \* \* it seems incongruous to limit one whose holdings are widespread to the law of his domicile in his dealings with them." "Mutually advantageous business would be impeded." In the case of *Curtis v. Curtis*, 185 App. Div. 391, 173 N.Y.S. 103 (1918) the trust instrument was executed and delivered in New Jersey, one settlor living in New York and one in New Jersey. New York court applied New York law although stating that New Jersey law would apply if both settlors lived in New Jersey. The court held that a foreign domicile must give way in favor of a domestic domicile in a case where the property was kept in New York and where cestuis and trustees are in New York.

property is kept and used, should control.<sup>6</sup> The situs rule arose by way of sales transactions and is applied to all dealings inter vivos with movables.<sup>7</sup> When an object has a definite location in a state it is impossible to disregard that state in dealing with the status of the res. It is the public policy of the state in which a trust is to be administered and not that of the state of the settlor which determines whether it will be recognized in the state of administration. The place of the owner's domicile does not govern the transfer of title to personal property but rather the jurisdiction where the property is situated. So too, in the case of a marriage contract the jurisdiction where the contract is made is powerless to change the status of the parties contrary to the law of their domiciles even though the contract is in itself valid. It seems apparent that the creation of a trust status is governed also by the law of the situs of the property. Those jurisdictions adopting the situs rule do not concur in dealing with intangibles having physical manifestations. One view applies the law of the situs of the certificate or other physical manifestation;<sup>8</sup> the other applies the law of the situs of the debtor or corporation if a share of stock is involved.<sup>9</sup>

A third solution of this problem is to resort to the application of the law of the place of execution of the trust. This approach likens the trust transaction to a contract. The analogy is dangerous because the two transactions may be very different.<sup>10</sup> The relationships created by a trust agreement are far different from those created by a mere contract for the benefit of a third person. The place of execution theory is further criticised because the place may be wholly fortuitous or carefully selected to take advantage of a rule of law.<sup>11</sup> The Restatement

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6. *Hutchison v. Ross*, *supra* note 4. This is the leading case supporting the situs rule. The New York Court of Appeals had to reverse a line of cases in New York in order to adopt what it believed to be the sounder approach to a complex problem. The rule is approved by the Restatement, Am. Law Inst. Restatement, Trusts, Vol. 2, Sec. 294.

7. *Cavers, op. cit., supra* note 5.

8. *Hutchison v. Ross, supra* note 4.

9. *Bouree v. Trust Francais*, 14 Del. Ch. 332, 127 Atl. 56 (1924).

10. V. C. Berry points this out in *Swetland v. Swetland, supra* note 2. Professor Cavers concluded that the theory "is too little related to the substance of the transaction." *Cavers, op. cit., supra* note 5.

11. *Cavers, op. cit., supra*, note 5.

applies the theory, however, when the res is a contract right.<sup>12</sup>

The cases in New Jersey are in conflict and the principles are so confused that it can not be determined what theory we apply. The earliest case<sup>13</sup> applies the contract approach when dealing with an inter vivos trust established in a bank account. This approach was specifically rejected later (although by dicta) and the rule of the domicile of the settlor was applied.<sup>14</sup> Very recently the Court of Errors and Appeals in a bank account case reversed the Court of Chancery for following the rule of domicile and reestablished the contract approach.<sup>15</sup> It is not clear whether the Court wished to limit its reversal to cases where the res is a contract right or whether the rule of domicile is entirely overthrown. Apparently confusion has resulted because the Prerogative Court has this year stated the domicile rule as controlling all trusts involving personalty, completely ignoring the reversal.<sup>16</sup>

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12. Restatement, Conflict of Laws, Sec. 294, subdiv. 2. "The validity of a trust of choses in action created by a settlement or other transaction *inter vivos* is determined by the law of the place where the transaction takes place." This was applied in *Cutts v. Najdrowski*, 123 N.J.Eq. 481, 198 Atl. 885 (E. & A. 1938).

13. *Fiocchi v. Smith*, 97 Atl. 283 (Ch. 1916). This case was followed on similar facts in *Hudson Trust Co. v. Holt*, 115 N.J.Eq. 34, 169 Atl. 516 (Ch. 1933). See criticism of this case in *Hasbrouck v. Martin*, 120 N.J.Eq. 96, 183 Atl. 735 (Prerog., 1936).

14. *Swetland v. Swetland*, *supra* note 2. This case was followed in *Second Nat. Bank of Paterson v. Curie*, 116 N.J.Eq. 101, 172 Atl. 560 (E. & A. 1934). The Court of Errors actually did not face the issue but the opinion of the Vice Chancellor from which the appeal was taken does so.

15. *Cutts v. Najdrowski*, 121 N.J.Eq. 546, 191 Atl. 867 (Ch. 1937), *reversed*, 123 N.J.Eq. 481, 198 Atl. 885 (E. & A. 1938).

16. *In re Johnston's Estate*, 127 N.J.Eq. 576, 14 Atl. 2d 469 (Prerog. 1940).