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Validity of Trusts Inter Vivos of Personal Property

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Panarese? He was running towards the car, between the up-and-down railroad tracks, alongside of a truck and only a few feet from the rear of it. If he had stopped for an instant the truck would have passed him and he could have stepped behind it out of all danger. The motorman would naturally suppose that the man running in the street toward him would do this thing. He would have no reason to suppose that another would deliberately commit suicide and run into his car without avoiding it or getting out of the way when it was possible for him to do so." [34]

To review, therefore, the necessary elements of the doctrine of "the last clear chance" we find from the case in question and an examination of the authorities that four elements must at all times be present before the doctrine is applicable: First, both parties must have been negligent; second, that the defendant failed to use ordinary care to avoid the accident; third, that his failure to use reasonable care was the proximate cause of the injury; fourth, that the knowledge of the plaintiff's peril, either actual or imputed, was brought home to the defendant. Many of the courts hold that imputed knowledge is sufficient, while the federal courts, the New York courts, and the majority of jurisdictions hold that actual knowledge is essential.

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VALIDITY OF TRUSTS INTER VIVOS OF PERSONAL PROPERTY.

Do the laws of the situs of the property or the domicile of the settlor govern the validity of a trust *inter vivos* of personal property? The Courts have persistently avoided a definite decision on that question.

In a recent case [1] the question was squarely presented to the Court. After discussing cases pro and con, the Court, in the writer's opinion, avoided the issue and decided the case on other grounds. The Canadian Trustee in bankruptcy of John K. L. Ross, a resident of Canada, as plaintiff, instituted an action against the trustee and beneficiaries under a trust agreement created by the bankrupt, John K. L. Ross. The action sought to set aside the trust agreement as void *ab initio*. In 1902, in Quebec, John K. L. Ross entered into an antenuptial agreement with his intended wife, wherein each agreed to keep their separate estates and provided for a settlement of $125,000. by the husband upon the wife and children. Under the laws of Quebec [2] the parties are prohibited from thereafter modify-

[34] Panarese v. Union R. Co., *supra* note 13, at 237.

[1] Hutchison v. Ross, 262 N. Y. 381, 187 N. E. 65 (1933).

[2] CIVIL CODE OF QUEBEC, art. 1265. "After marriage, the marriage covenants contained in the contract cannot be altered * * * nor can the consorts in any other manner confer benefits *inter vivos* upon each other * * *."

ing, enlarging or abrogating the provisions of the agreement and neither husband nor wife may transfer property to each other in any manner thereafter. In 1916 Mr. Ross acquired $10,000,000. under the will of his father, and shortly thereafter entrusted to his secretary, who was a lawyer, the preparation of the trust agreement which is now sought to be declared invalid. A trust agreement was finally drawn and executed in New York. However, both husband and wife were residents of Quebec at all times.

The trust agreement appointed the defendant, Equitable Trust Company, Trustee and conveyed to it $1,000,000. in securities, most of which were then in New York banks. The securities were delivered by Mr. Ross's agent to the Trustee in New York City at the time the Trustee executed and accepted the trust agreement. The trust agreement recites the marriage settlement of 1902, Ross's acquisition of money, that the trust is being made in lieu of said marriage settlement and that Mrs. Ross consents to renounce her rights in and to the marriage settlement. It stands admitted that at the time of signing the trust agreement Mrs. Ross did not read it nor did she agree to renounce her rights under the marriage settlement. This phase of the case is not discussed in this note.[3]

The Court at Special Term [4] held that the trust was void because the parties bound themselves to abide by the Quebec law against transfers after the antenuptial agreement and that the law of the domicile governed the validity of the trust agreement. The Appellate Division [5] held that the agreement was valid under the laws of New York State and that the Quebec law did not apply for the reasons that the trust was executed in this state and the trust *res* was in New York at the time of transfer and delivery, and further that the intention of the parties was that the law of New York State should govern the trust.

The question involved is primarily one of conflict of laws. Under civil law, which governs in Quebec, a sovereign state is deemed to have power to reach out and control the legal significance of the acts of its citizens everywhere. However, the theory of the common law—and New York is a common law jurisdiction—is that a sovereign state determines the legal significance of all acts done within its territorial boundaries in respect to property there located, without regard to citizenship or domicile.[6]

The better rule is, and most of the courts have held, that the

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[3] This involved the question of whether the unsuccessful attempt to renounce the marriage settlement prevented the creation of a valid trust.

[4] 137 Misc. 795, 243 N. Y. Supp. 418 (1930).

[5] 233 App. Div. 626, 253 N. Y. Supp. 871 (1st Dept. 1931).

[6] Goetschuis v. Brightman, 245 N. Y. 186, 156 N. E. 660 (1927); Weissman v. Banque de Bruxelles, 254 N. Y. 488, 173 N. E. 835 (1930).

validity of transfers of personal property is to be determined by the law of the situs.[7]

In *Goetschius* v. *Brightman* [8] the Court said:

> "The State where personal property is situated may unquestionably regulate by its own laws the creation, transfer or enforcement of rights in such property."

And in the Restatement of Conflict of Laws,[9] it is stated that,

> "The validity in substance of a conveyance of a chattel is determined by the law of the State where the chattel is situated at the time of the conveyance."

Intangible property like securities, negotiable paper, stocks and bonds have been considered and have been held to come within the meaning of chattels by distinguishing the document itself from the right embodied thereunder and the validity of the transfer of such property is determined under the rules applied to tangible personal property.[10] The validity of testamentary trusts has been consistently held to be determined by the law of the testator's domicile,[11] but even as to such trusts Courts, wherever possible, have sought to sustain their validity where they were to be administered in a jurisdiction other than the testator's domicile.[12] Where the trust is of real property, then it does not matter whether it be testamentary or *inter vivos,* the law of the situs controls.[13]

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[7] Guillander v. Howell, 35 N. Y. 657 (1866); Simpson v. Jersey City Contracting Co., 165 N. Y. 193, 58 N. E. 896 (1900); Lockwood v. U. S. Steel Corp., 209 N. Y. 375, 103 N. E. 697 (1913); Klotz v. Angle, 220 N. Y. 347, 116 N. E. 24 (1917); State of Colorado v. Harbeck, 232 N. Y. 71, 133 N. E. 357 (1921); Goetschuis v. Brightman, *supra* note 6; Youssoupoff v. Widener, 246 N. Y. 174, 158 N. E. 64 (1927); Weissman v. Banque de Bruxelles, *supra* note 6; Beale, *Living Trusts of Movables in the Conflict of Laws* (1932) 45 HARV. L. REV. 969.

[8] *Supra* note 6, at 191, 156 N. E. at 661.

[9] Conflict of Laws Restatement (Am. L. Inst. 1931, Proposed Final Draft No. 2) §277.

[10] Disconto-Gesellschaft v. U. S. Steel Corp., 267 U. S. 22 (1925); Simpson v. Jersey City Contracting Co., *supra* note 7, at 197, 58 N. E. at 898; Lockwood v. U. S. Steel Corp., *supra* note 7, at 382, 103 N. E. at 699; State of Colorado v. Harbeck, *supra* note 7; Pierpont v. Hoyt, 260 N. Y. 26, 182 N. E. 235 (1932); Conflict of Laws Restatement, *supra* note 9, §§53, 57, 281, 282; Beale, *op. cit. supra* note 7.

[11] Cross v. U. S. Trust Co., 131 N. Y. 330, 30 N. E. 125 (1892); Sweetland v. Sweetland, 107 N. J. Eq. 504, *aff'g,* 105 N. J. Eq. 608, 613 (1931).

[12] *Cf.* Chamberlain v. Chamberlain, 43 N. Y. 424 (1871); Cross v. U. S. Trust Co., *supra* note 11; Hope v. Brewer, 136 N. Y. 126, 32 N. E. 558 (1892); Dammert v. Osborn, 140 N. Y. 30, 35 N. E. 407 (1893).

[13] Deschenes v. Tallman, 248 N. Y. 33, 161 N. E. 321 (1928).

In the Restatement of Conflicts of Laws,[14] the rule as to trusts *inter vivos* is set forth as follows:

> "Except in the case of an assignment for creditors, or other conveyance of an aggregate unit, the validity of a trust of movables created by settlement or other transactions *inter vivos* is determined as to each item by the law of the state in which it is situated at the time of the creation of the trust."

This rule, although not supported by authority in this state, is supported by reason. In these days of commerce and far-flung interests, a residence is no longer the center of existence. It is common knowledge that men living in one jurisdiction conduct their affairs in others and most likely create trusts in the business and financial centers of the world. The probable reason for the lack of decisions in point is that the wide use of trusts *inter vivos* as a method of administration of property is of comparatively recent development, following the growth of trust companies.

No New York case has squarely ruled on the instant question, with the one exception of *Sullivan* v. *Babcock*.[15] In that case the Court at Special Term held that the law of the settlor's domicile and the place of execution determined the validity of a trust *inter vivos* of personal property. The Court based its decision on the rules set forth by Professor Story in his *Conflict of Laws:* [16] "That the laws of the owner's domicile should in *all* cases determine the validity of *every* transfer, alienation or disposition made by the owner whether it be *inter vivos* or *post mortem*." Subsequently, a number of cases have discussed the instant question, but only by way of *dicta*.[17] Unfortunately, however, it seems that all these subsequent cases fell under the sway of Professor Story's statement of the rule of law. True, the discussions of the question most often were not necessary to the decision of the case, but each time the Court cited with approval and authority the general rule of Professor Story, having failed to note that the rule as laid down was too broad and was no longer sound.

Thus in *Towsend* v. *Allen*,[18] the Court at General Term assumed that Professor Story's exposition of the law governed the validity of a trust *inter vivos* of personal property and was still sound and purported to follow that rule of law, although a discussion thereof was not necessary for the decision in that case. There the settlor was domiciled in New Jersey and the Trustees were domiciled in New

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[14] Conflict of Laws Restatement, *supra* note 10, §315.

[15] 63 How. Pr. 120 (N. Y. 1882).

[16] §283.

[17] Cross v. U. S. Trust Co., *supra* note 11, at 339, 30 N. E. at 127.

[18] 56 Hun 622, 13 N. Y. Supp. 73 (N. Y. 1891), *aff'd* without opinion, 126 N. Y. 646, 27 N. E. 853 (1891).

York, where the *res* of the trust was located. The question before the Court was whether the provision in the deed violated the statute of New York against accumulating income. The Court held that the trust was valid under the laws of both states and that case, therefore, is not decisive on the instant question.

In *Maynard* v. *Farmers Loan and Trust Company* the Appellate Division [19] again applied Story's rule that the law of the domicile governed every transfer. Although the case involved a trust *inter vivos* of personal property, the real question before the Court was whether the power of appointment was validly exercised. The Court of Appeals,[20] in affirming the judgment, expressly stated that it based its decision on different grounds, to wit, that the power of appointment had been validly exercised.

In *Equitable Trust Company* v. *Pratt*,[21] the Court, in a *dictum*, states that the law of the domicile governs the validity of trusts *inter vivos* of personal property. The Court, however, adds that the domicile of the settlor was not sufficiently proved and that even if it were, the law of New York would apply because it was in accordance with the settlor's intent and New York was the place of administration. Again the decision is not binding on the question in the instant case.

Robb v. *Washington & Jefferson College*,[22] seems to add a third rule governing the validity of a trust *inter vivos* of personal property. The settlor was domiciled in New York where the property was located at the time of the transfer. The trust was invalid under the laws of New York, but the Court held that inasmuch as the trust was to be administered in Pennsylvania and was valid under those laws, the trust should be sustained. We thus find that the Courts will sustain a trust if it is valid under the laws of the state where it is to be administered. This case may be considered as an authority for the instant case for here the trust was to be administered in New York, where it is valid.

A Louisiana case [23] is directly in point, but it was not discussed by the Court of Appeals. There the settlor was domiciled in Louisiana and while in New York executed a trust deed, conveying $10,000 to New York trustees to pay the income to his daughter for life, with the remainder to her children and in the event she died without children, to her husband. The action was brought by the settlor's heirs to require the husband to restore part of the fund he received on the death of the daughter without children, on the ground that the trust deed was contrary to the laws of Louisiana and, therefore, void. Under the laws of New York the trust was valid. The Court

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[19] 208 App. Div. 112, 203 N. Y. Supp. 83 (1st Dept. 1924).

[20] 238 N. Y. 592, 144 N. E. 905 (1924).

[21] 117 Misc. 708, 193 N. Y. Supp. 152 (1922), *aff'd* on opinion below, 206 App. Div. 689, 199 N. Y. Supp. 921 (1st Dept. 1923).

[22] 185 N. Y. 485, 78 N. E. 359 (1906).

[23] Hullin v. Faure, 15 La. Ann. 62 (1860).

held that the laws of New York governed the validity of the trust because the contract was made and executed in New York, and the trust *res* was in New York.

All of the foregoing cases seem to indicate a desire on the part of the Courts to get away from the broad rule of Professor Story. In some cases [24] involving testamentary trusts, the Courts, by way of *dicta* indicated that the law of the domicile would be applied to trusts *inter vivos* and some Courts [25] outside of the state have interpreted this *dicta* as the law prevailing in New York.

It is apparent, however, from these cases that the Court of Appeals had not as yet directly decided as to whether the law of the situs or the domicile should determine the validity of trusts *inter vivos* of personal property. It is respectfully submitted, therefore, that, in view of the unsettled state of the law in respect to the law to be applied to trusts *inter vivos* of personal property, the Court might have made a clear decision in the instant case. A definite decision was necessary in view of the fact that there are now millions of dollars in the hands of trustees in this state, and, it is respectfully submitted, the decision should have declared that the law of the situs governs the validity of a trust *inter vivos* of personal property.

Instead, the Court using the amendment to the Personal Property Law,[26] enacted long after the execution of this trust, as a declaration of public policy, held that the validity of a trust *inter vivos* of personal property "must be determined by the law of this State, when the property is situated here and the parties intended that it should be administered here, in accordance with the laws of this State." [27] The Court further states "the statute makes express declaration of intention conclusive, but a construction which would deny effect to intention appearing by implication would be unreasonable." [28] If the Court means that this implication is to be drawn from the four corners of the instrument and the acts of the parties, then drawing such an implication is reasonable, and proper. But if the Court means that the implication is to be drawn from parol testimony as to what the parties intended, then the implication is not reasonable because it would lead to endless litigation in cases involving these trusts and where the trust is a substantial one, it might open the door to perjury.

JOSEPH POKART.

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[24] Parsons v. Lyman, 20 N. Y. 103 (1859); Cross v. U. S. Trust Co., *supra* note 11; Dammert v. Osborn, *supra* note 12.

[25] Liberty Nat. Bank & Trust Co. v. New England Investors Shares, Inc., 25 F. (2d) 493 (D. Mass. 1928); Sweetland v. Sweetland, *supra* note 11.

[26] N. Y. PERS. PROP. LAW (1930) 12a: "Whenever a person * * * creates a trust of personal property situated within this state at the time of the creation thereof and declares in the instrument creating such trust * * *."

[27] *Supra* note 1, at 395, 187 N. E. at 71.

[28] *Ibid.*