Maryland Law Review

Volume 8 | Issue 4 Article 3

Action to Impress Trust on Stock is in Personam - Ortman v. Coane

Casenotes

ACTION TO IMPRESS TRUST ON STOCK IS IN PERSONAM

Ortman v. Coane[1]

Plaintiff brought an action in Maryland, the state of incorporation of X, alleging that he had bought every claim, right or ascertainable right, action or cause of action of any and every kind and nature which A, a non-resident of Maryland, had against X and its officers by virtue of the stock A owned in X; and seeking to have a trust impressed upon A's stock, to the end that A might be decreed to have no right to bring a stockholder's derivative suit on behalf of X against its officers and directors. A was not personally served within the state of Maryland. A appeared specially and pleaded that the Court lacked jurisdiction as the action was in personam, requiring personal service within the jurisdiction. The Court held with A and dismissed the suit, stating that as the question of the ownership of the stock was not presented, the situs of the stock could not be concluded to be in Maryland to support an action in rem.

The Court recognized that where there is a claim to ownership of corporate stock, the situs of the stock is regarded as being in the state of incorporation. This principle was established in the case of *Jellenik v. Huron Mining Co.*,[2] where the Supreme Court said: ". . . As the habitation or domicil of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner";[3] and was applied in the case of *McQuillan v. National Cash Register Co.*,[4] where the Circuit Court of Appeals for the Fourth Judicial Circuit recognized that the stock of a corporation incorporated in Maryland had a situs in Maryland within the meaning of the federal statute permitting action in the district in which property is situated, so that the federal

---

[1] 181 Md. 596, 31 A. 2d 320, 145 A. L. R. 1388 (1943).
[2] 177 U. S. 1, 44 L. Ed. 647, 20 S. Ct. 559 (1900).
[3] 177 U. S. 1, 13, 44 L. Ed. 647, 651, 20 S. Ct. 559, 563 (1900).
[4] 112 Fed. (2d) 877 (C. C. A. 4th, 1940), cert. den. 311 U. S. 695, 85 L. Ed. 450, 61 S. Ct. 140.

district court for the district of Maryland could entertain an action to cancel the stock.[5]

But the Court of Appeals made a clear distinction between the cases where the ownership of stock is questioned and the instant case where no such issue was raised. Here the sole relief sought was that a trust be impressed upon the stock. The situation appears to be novel. The establishment of trusts has been sought before, and has been allowed, where the stock was within the jurisdiction but the defendant was not. However, in the cases allowing such relief, there was, in addition to the request for the establishment of the trust, a claim to the title of the stock. For example, the cause of action in *Amparo Mining Co. v. Fidelity Trust Co.*,[6] was one against the executor of the president of a corporation situated within the jurisdiction of the court. It was contended that the president, who had acquired the stock of the corporation by advancing a sum of money in settlement of a claim against the corporation, held the stock in trust for the corporation. There was, as in the instant case, an attempt to impress a trust on the stock, and this was allowed, although the defendant was a non-resident. However, there was a further prayer in the *Amparo Mining Co.* case which is lacking here, namely a prayer to the effect that the defendant be required to assign, transfer and deliver the stock to the plaintiff. And other cases have held that suits to impress a trust upon stock are in rem, but in each such case there was an accompanying claim of ownership of the stock.[7]

---

[5] In the McQuillan case the Court also considered the effect of the Uniform Stock Transfer Act, which act is in effect in Maryland. See Md. Code (1939) Art. 23, Sec. 55 *et seq.* The District Court was of the opinion that "In the absence of some decision of the Supreme Court clearly indicating that the result reached in the Jellenik Case is not required where the Uniform Stock Transfer Act is in effect in the state of the corporation's creation, we are unwilling to attempt to qualify the full effect of that decision." 13 F. Supp. 53, 60 (D. Md. 1935). The Circuit Court of Appeals approved this conclusion. 112 F. 2d 877, 881 (C. C. A. 4th, 1940). Both courts relied upon a like holding in the case of Harvey v. Harvey, 290 Fed. 653 (C. C. A. 7th, 1923). See also 145 A. L. R. 1397.

[6] 75 N. J. Eq. 555, 73 A. 249 (1909).

[7] See, for example, Fahrig v. Milwaukee & C. Breweries, 113 Ill. App. 525 (1904) and Patterson v. Farmington Street R. Co., 76 Conn. 628, 57 A. 853 (1904), in which latter case the court said: ". . . We cannot doubt that an action calling upon our courts to enforce equitable liens, adjust equitable interests in such property, and to compel the registry in the books of the company of the legal title in the owner of the property, as determined by the court, is in the nature of a proceeding in rem, which justifies a court, in a proceeding against property within its jurisdiction, to bind all persons with respect to their interest in that property, upon giving them reasonable notice in the manner prescribed by law, and is fully consistent with the principle recognized in Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 . . ."

So the *Ortman* case appears to be unique in holding that an action to impress a trust upon stock in the domicil of the corporation is in personam, but it is not in conflict with any of the cases in the field, there being none precisely analagous. And while the holding appears at first glance to be somewhat narrow, yet its influence could be regarded as casting no small measure of doubt upon the validity of a number of decrees passed by the Maryland courts.

For the purposes of this note, actions may be classified as falling within three categories: first, those clearly characterized as actions in personam, e. g., those seeking an order that something be done by the defendant, such as an order that he pay a sum of money; second, those plainly denominated as actions in rem, that is, those against property or seeking to effect a change of status, such as attachment or divorce a vinculo; third, lying between these two extremes, those seeking neither an order that something be done nor a change of relationship or status, but rather, merely having for their object a declaration that a particular matter or relationship does or does not exist.[8] In addition to any proceeding for purely declaratory relief under the provisions of the Uniform Declaratory Judgments Act, there would be included in this last category of declaratory actions divorces a mensa et thoro,[9] annulments of marriage[10] and declarations that stock is impressed with a trust.[11] Each merely announces the truth as to a particular matter, without more. Up to the instant case there has been no holding by the Maryland courts as to whether decrees of this nature, that is, decrees of di-

[8] The Restatement on Judgments does not define actions in personam or actions in rem and quasi in rem. Nowhere in the Restatement is there set forth a definite standard or classification by which actions can be placed within one of the two major categories, other than in a rather unsatisfactory introductory portion ahead of Section 1. This makes no attempt to classify a vinculo divorce, nor to face the problem of the declaratory proceeding, here discussed.

[9] It is apparent that a mensa divorce (aside from any incidental grant of alimony) is nothing more than a declaratory ruling that the defendant has committed certain misconduct which justifies the plaintiff in living apart. This fact could as well be established collaterally in other litigation.

[10] Similarly, annulment of marriage is nothing more than a declaratory ruling that the marriage was defective ab initio. To be sure, for those marriages merely voidable, it is a required step so as to declare the necessary election by the aggrieved party to assert the voidness.

[11] Decrees effecting a change of name are also declaratory in nature. Md. Code (1939) Art. 16, Sec. 118 provides that one desiring to change his name by court decree may do so by filing a bill in equity. The problem of notice is not the same as in the cases where divorces, annulments and declarations of trust in stock are concerned, for the proceeding is *ex parte*, but the notice given is to the public at large. Anyone objecting to the change may appear before the court and state his reasons for such objection, but the action does not name a particular defendant, as do the other actions mentioned.

vorce a mensa, of annulment of marriage or declaring the existance of a trust on stock are to be treated as in rem or as in personam. However, as to partial divorces and annulments, the courts have, as a practical matter, treated them as in rem.[12]

In the case of divorces, it is customary to grant partial divorces as well as absolute divorces against non-resident defendants without personal service upon them within the jurisdiction. It is expressly provided by statute that ". . . if the party against whom the bill is filed be a non-resident, then such bill may be filed in the court where the plaintiff resides; and upon such bill the same process by summons, notice or otherwise, shall be had to procure the answer and appearance of a defendant, as is had in other cases in chancery, . . ."[13] And Article 16, Section 149 of the Maryland Code sets forth the procedure to be followed in chancery where the proceeding is directed against a non-resident, which procedure consists of service by publication or personal service outside of the jurisdiction.[14]

It is likewise the practice in Maryland to grant annulments of marriage against non-residents where the only service given to the absent defendant is by publication or by service outside the jurisdiction. Prior to 1947 there was no express statutory authority for the use of orders

[12] It is also true that the Restatement on Judgments regards divorces a mensa and annulments of marriage as being in the same category as divorces a vinculo. See RESTATEMENT, JUDGMENTS, section 33, comment a. It is interesting to observe in passing that the Supreme Court played havoc with section 113, RESTATEMENT, CONFLICT OF LAWS, upon which reliance is placed in the above comment, in the case of Williams v. North Carolina, 317 U. S. 287, 87 L. Ed. 279, 63 S. Ct. 207 (1942); 325 U. S. 226, 89 L. Ed. 1577, 65 S. Ct. 1092 (1945).

[13] Md. Code (1939) Art. 16, Sec. 38.

[14] "In all suits in chancery against non-residents or against persons who may be proceeded against, as if they were non-residents, the court may order notice to be given by publication, in one or more newspapers, stating the substance or object of the bill or petition, and warning such party to appear on or before the day fixed in such order and show cause why the relief prayed should not be granted, and such notice shall be published as the court may direct, not less, however, than once a week for four successive weeks, previous to 15 days before the day fixed by such order for the appearance of the party; provided, if a copy of the order be personally served on such party one month before the day fixed for his appearance, if he be within the limits of the United States, or three months if beyond, such service shall have the same effect as a publication. Proof of such service must be as follows: First, if served by the sheriff, his certificate thereof; second, if by any other person, his affidavit or affirmation thereof made and signed before a notary public and certified by him; third, the written admission of the defendant proved to the satisfaction of the court; and such certificate, affidavit, affirmation or admission shall state the time and place of service. And any person making a false affidavit or affirmation as to any such service shall be guilty of perjury, and any sheriff making a false certificate, as to the service of any such notice shall be liable for making a false return."

of publication in annulment cases, and there was doubt as to the proper county for an annulment case to be filed in when there were two or more possible ones under the given facts.[15] By a statute enacted in 1947,[16] annulment practice is assimilated to that for divorce, so that orders of publication may clearly be used, and the case may be filed either where the plaintiff resides, where the defendant resides, or where the ceremony of marriage was performed.

Thus, to reiterate, actions for divorces a mensa and for annulments of marriage have generally been treated as being actions in rem, or quasi in rem, for constructive service by publication or service outside of the jurisdiction has been regarded as sufficient to give the Court jurisdiction over the person of a non-resident. However, it seems that if an action seeking to impress a trust upon stock is in personam, requiring personal service within the jurisdiction, as was held by the Court of Appeals in the *Ortman* case, so too are suits for partial divorces and annulments of marriage, all three actions being of the same general nature. The same might be said for declaratory procedure in general, although that type of procedure is so novel both in Maryland and elsewhere, that no doctrine has been established about jurisdiction.

Of course, it might be pointed out that the *Ortman* case was decided under the existing general and common law of the State, and determined that jurisdiction to impress a trust was in personam, lacking any local statute authorizing it to be exercised on an in rem basis. On the other hand, a mensa divorce and, by recent change, annulment, can be said to involve the express statutory authorization of the in rem basis under the statutes set out above. This suggests a distinction between what is the local, conflict of laws rule of a given state, variable by statute, as to the jurisdictional basis of declaratory procedures, and what the Supreme Court of the United States will eventually tolerate as a minimum basis under due process of law. To date that Court has not ruled on the point and, until it does, it may be that a State may be allowed to choose one basis for one and another for the rest of the various declaratory procedures. This seems to be the current Maryland practice, as pointed out above.

[15] On which see Strahorn, *Void and Voidable Marriages in Maryland and their Annulment* (1938) 2 Md. L. Rev. 211, 256-59.

[16] Md. Laws (1947) Ch. 849, amending Md. Code (1939) and Md. Code Supp. (1943) Art. 16, Secs. 38, 39, Art. 62, Sec. 16, putting all civil annulment jurisdiction under the provisions of Art. 16, Sec. 38, as amended, but also providing that convictions of certain types of marital crime shall serve as annulments after recording on the Equity dockets.