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Federal Court Probate Proceedings

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A beneficiary, residing in state X, is convinced that the executor is mishandling assets of an estate. Probate proceedings have commenced in state Y but are not finalized. May a federal district court assume jurisdiction?

State courts have always had exclusive jurisdiction over strict probate proceedings. The exclusion of federal courts from this area stems from the refusal of Congress to bestow on federal courts the jurisdiction of the English ecclesiastical courts. Probate jurisdiction in England was in large part vested in the ecclesiastical courts. In combination with efficiencies of local administration, this situation resulted in entrusting state courts with probate matters.

On the level of doctrinal analysis, several justifications have been advanced which would prohibit federal court interference with state probate proceedings. The probate of an estate is a proceeding in rem to be conducted by the state tribunal established to adjudicate such matters. As an in rem proceeding, the probate court acquires control of

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1. In the mid-18th Century, in England, probate of wills as to personalty was vested in the ecclesiastical courts. ... The law considered spiritual men of better conscience than laymen ... with knowledge as to what things would conduce to the benefit of the soul of the deceased. J. SCHOULER, EXECUTORS AND ADMINISTRATORS, § 10 (2d ed. 1889). However, in dealing with realty, testamentary gifts were judged by the Court of Common Law, letters of administration were granted by the ecclesiastical courts, and a final settlement of an estate was for the Court of Chancery. R. POUND, ORGANIZATION OF COURTS, 136 (1940).

2. "... Statements [that federal courts can exercise no probate jurisdiction] ... have been made ... in approximately 250 reported federal cases." Vestal and Foster, Implied Limitations on the Diversity Jurisdiction of Federal Courts, 41 MINN. L. REV. 1, 13 (1957). The rationale for this holding seems to be that the U.S. Const. art 3, granting federal jurisdiction, does not explicitly mention probate administration, and Congress has never authorized appellate review. The Judiciary Act of 1789 gave federal courts the same equity jurisdiction as that held by the English chancery courts. "... Suits in equity shall not be sustained ... where a remedy may be had at law." Judiciary Act of 1789, ch. 20, 516, 1 Stat. 73, 82. Since, ostensibly, the probate of wills and the grant of letters of administration were the distinctive functions of the ecclesiastical courts in England, see generally H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 1013 (1953), it has always been assumed that federal courts had no jurisdiction in this area.

3. "Where a thing is subject to the power of a state, a proceeding ... brought to affect the interests in the thing ... of all persons in the world ... is called a proceeding in rem ..." Restatement of Judgments, § 32, Comment (a), 127 (1942).

4. In re Broderick's Will, 88 U.S. (21 Wall.) 503 (1874); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909); Ellis v. Stevens, 37 F. Supp. 488 (D. Mass. 1941). As an example, the early Virginia statutes stated, The several district, county, or corporation courts shall have power to hear and determine ... the will. ...
the estate or the res, and the possession of property cannot be disturbed by another court until the in rem proceeding is concluded and the state court no longer controls the res.\(^5\) Although federal courts cannot exercise jurisdiction in an in rem probate proceeding, federal jurisdiction is proper in an in personam action. After 180 years of litigation, the boundaries of the in rem—in personam jurisdiction distinction have yet to be fully delinated and resolution of the initial hypothetical remains uncertain.\(^6\)

**SUPREME COURT DECISIONS**

An analysis of Supreme Court decisions in the probate-related area reveals a great deal of vacillation. It was held, for example, that a federal court could not administer an estate,\(^7\) annul a will,\(^8\) or remove trustees

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\(^5\) When any will shall be exhibited to be proved, the court having jurisdiction as aforesaid, may . . . proceed the probat [sic] thereof: . . . Laws of Virginia, ch. 29, §§ 10, 11 (1 Hening's Stat. 1835).

\(^6\) The court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted. It applies as well [to] . . . trusts, . . . estates . . . where, to give effect to its jurisdiction, the court must control the property. United States v. Bank of New York & Trust Co., 296 U.S. 463, 477 (1936).

\(^7\) See also Covell v. Heyman, 111 U.S. 176, 179 (1884); Borer v. Chapman, 119 U.S. 587, 600 (1887), stating, "... [C]ourts of the United States, in the exercise of their jurisdiction over the parties, cannot seize or control property while in the custody of a court of the state."

\(^8\) See notes 40-44 infra and text accompanying. A proceeding which renders a personal judgment or a judgment in personam results when the court is said to have jurisdiction in personam. "The effect of a judgment may be to impose a personal liability or obligation upon one person to another person or to other persons or personal liabilities upon several persons to another person or to other persons." *Restatement of Judgments*, General Comments, 5 (1942). See, e.g. Note, *Federal Jurisdiction in Matters Relating to Probate and Administration*, 43 *Harv. L. Rev.* 462 (1930).

\(^7\) In Byers v. McAuley, 149 U.S. 608 (1893), a federal suit was filed one day prior to the scheduled state validation hearing. The plaintiffs, residents of Ohio and Pennsylvania, claimed the will was null and void and that large quantities of personalty was held by the defendant administrator. The petition specified that the state probate should be declared void and that another administrator should be appointed, that an accounting was needed, and that plaintiffs receive the distribution. The lower court granted relief to the plaintiffs, appointed a master to determine the rights involved, and issued a decree of distribution. The Supreme Court reversed this decision, finding the lower court in obvious error in assuming full control of the administration of the estate. In reference to the lower court decision, the Court stated, "It was not a judgment against the estate, but a decree binding personally the administrator, and compelling him . . . to administer the estate according to the orders of the federal, rather than those of the state, court, which had appointed him." *Id.* at 612. The reversal was justified on, . . . [S]ome general propositions . . . fully settled . . . and of general application . . . where property is in the actual possession of one court . . . such possession cannot be disturbed by process out of another court. . . .

An administrator appointed by a state court is an officer of that court. . . . *Id.* at 614-15.

This Court distinguished Payne v. Hook, 74 U.S. (7 Wall.) 425 (1868) (see
for mismanagement and order them to account for and repay any losses. However, the Court has not only found jurisdiction in an

text accompanying note 14 infra) by stating the plea there was neither to take possession of the res, nor to remove an administrator appointed by the state court. Payne, this decision held, was in personam. Even through Byers was reversed, the remand instructions were, "... [T]o enter a decree in favor of those citizens of other states than Pennsylvania, who have petitioned... for relief... that they recover from the administrator such sums found to be due." 149 U.S. at 621-22. Those plaintiffs fulfilling the complete diversity requirement obtained in part the relief sought—the administrator was bound in personam. The Court held that jurisdiction did not attach to that portion of the plea seeking nullification or distribution, and that to seek distribution was the same as seeking to take property away from the probate court. Id. at 616-17. The sweeping grant of jurisdiction by Payne was drastically reduced in Byers due to the recognition of possible interference with the state court's rights. Apparently a request for an accounting or for corpus restoration was viewed as a personal charge against the administrator rather than the local court.

At this point in history, other pleas had been held in rem also. Yonley v. Lavender, 88 U.S. (21 Wall.) 276 (1874) (payment of a judgment must come from a probate court); Games v. Chew, 43 U.S. (2 How.) 619 (1844) (probate adjudicated 33 years earlier could not be set aside in the federal courts).

8. In Sutton v. English, 246 U.S. 199 (1918), the plaintiffs sought to have annulled a joint will of Moses and Mary Jane Hubbard as well as one paragraph of a subsequent will of the testatrix and to have set aside a judgment in favor of certain devisees under the joint will. The Court disclaimed jurisdiction because the action was essentially one to annul a will which under Texas law was "supplemental to the proceedings for probate of the will cognizable only by the probate court." Id. at 208. Yet the Court added,

Questions related to the interests of heirs, devisees, or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration are within the jurisdiction of the federal courts where diversity of citizenship exists and the requisite amount is in controversy.

Id. at 205.

9. Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456 (1939) (hereinafter cited Princess Lida). The Princess and her three sons were beneficiaries of an inter vivos trust. Upon the death of one of the three trustees, an account was filed without exception in a Pennsylvania common pleas court. The next day, the nonresident plaintiff brought suit in a Pennsylvania federal district court against the trustees, alleging mismanagement of the trust. Plaintiff prayed that the trustees be removed and upon an accounting, be bound to repay all losses to the estate. The state supreme court affirmed the state court injunction prohibiting the federal court from proceeding. Thereupon, the federal court enjoined the state court. Restrained by both lower courts, the case reached the Supreme Court. See Note, Conflicting Jurisdiction Between State and Federal Courts, 14 IND. L.J. 366 (1939) (finding state jurisdiction desirable); Note, Courts—Administration of Trusts—A Proceeding in Rem, 27 Geo. L.J. 634 (1938) (discussing Princess Lida, advocating comity in both in rem and in personam topics because the distinction, while a nice "technicality," certainly is not "logical").

Plaintiff had amended the petition to attach additional trust investments and altered the prayer for relief. She asked that defendants be required to answer, to restore money lost in their illegal activities, to give bond; that defendants be removed; that she be granted general relief. The Court reiterated several principles, generally relying on the premise that where the judgment sought is strictly in personam, both the state court and the federal courts have jurisdiction and may proceed until one reaches a judgment. Conversely, where the judgment sought is in rem or quasi in rem, the court controlling the res has exclusive jurisdiction. Where diversity exists and the plaintiff seeks merely an adjudication of a right toward property held by a state court, the federal court can assume jurisdiction. The Court concluded,
action to obtain a distributive share, it has even gone so far as to allow a federal court to determine the precise share to which a petitioner would be entitled. Yet, on another occasion, the Court refused jurisdiction to compel an accounting of an estate. This inconsistency suggests the problem of how one determines a precise distributive share without un-

305 U.S. at 466-67. Since the cause of action was held in rem, the plaintiff was denied relief because the trustees had filed their account in the local probate court one day prior to plaintiff.

See Mandeville v. Canterbury, 318 U.S. 47 (1943), where the in personam suit was filed prior to the in rem action and the Court found it was not necessary to control property. Apparently prior notice of account filing is not given to beneficiaries. Notice of audit is given subsequent to the filing. 305 U.S. at 457. Plaintiff’s ex-husband was a citizen of Ireland, while the plaintiff’s residence is not given. It seems possible the trustees filed only one day prior to the plaintiff in anticipation of her cause of action.

The Court and counsel in Princess Lida did not refer to the Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909) (see note 18 infra and text accompanying) decision—yet, both cases levied an attack on probate jurisdiction and prayed for nearly the same relief. In Waterman the plaintiff expressly prayed for an accounting, but the Court through liberal construction granted relief by calling the action generally in personam. The Princess Lida Court denied jurisdiction by defining the prayer—restoration of corpus and removal of fiduciaries—to be quasi in rem.

The Court appears to have little doubt that distribution of the estate res or nullification of the probate is positively in rem and exclusively in the probate level court. Pleas for accounting, restoration, or removal of fiduciaries have met somewhat vacillating standards as discussed in the text. The principle applied is that the federal courts can adjudicate the rights of the parties to the res but cannot interfere with the state court control of that res. The court by viewing a requested cause of action as one in rem can properly deny jurisdiction.


11. Commonwealth Trust Co. v. Bradford, 297 U.S. 613 (1936), is one of the most liberal Supreme Court decisions in upholding jurisdiction. There the cestui que trust brought suit in a federal court against a trustee asking that it be entitled to a share in the trust estate. The trustee stated there was no federal jurisdiction because the controversy necessarily involved an accounting and would interfere with the state court controlled res. The Court held that the federal courts had jurisdiction to determine the right of the cestui que trust to share in the trust estate and also to determine in figures the precise share to which the cestui would be entitled. The Court pointed out that the judgment was one in personam and did not affect a res in the control of the trustee or the state court. The Court stated,

The original bill revealed that the receiver had been denied participation as the cestui que trust in the assets held by petitioner trust company, and was asking an adjudication of his rights therein. He did not seek direct interference with possession or control of the assets; he prayed that his right to partake thereof be determined. The claim was an equitable one, within the ordinary jurisdiction of the Chancellor. In all cases in which an action of was asking an adjudication of his rights therein. He did not seek direct inter-

Id. at 601.

dertaking an accounting. The scope of the paradox involved may be illustrated by a comparative analysis of two extreme results, both of which remain valid precedent today.

One of the earliest attempts to secure federal jurisdiction was in *Payne v. Hook.* Plaintiff, a citizen of Virginia, filed suit in a Missouri federal court against the county public administrator seeking a distributive share of her deceased brother's estate. The prayer for relief alleged that the administrator had been guilty of gross misconduct, had made false settlements with the probate court, had withheld a true inventory of the estate property, had used the money for private gain, and had obtained a settlement receipt from plaintiff by fraudulent means. The Court upheld federal court jurisdiction, even though a final accounting had not taken place in the state court:

... [A] court of chancery, as an incident to its power to enforce trusts, and make those holding a fiduciary relation account, has jurisdiction to compel executors and administrators to account and distribute the assets in their hands.

In the closing statements of this opinion, Mr. Justice Davis seemed concerned with usurping state power:

This case involves but a single matter, and that is the true condition of the estate... which... will determine the rights of the next of kin... [T]he bill seeks to open the settlement with the Probate Court...

This is necessary to arrive at the proper value of the estate...  

The court based its jurisdiction on diversity and did not discuss the effect on the pending state proceeding. The Court disregarded a state statute which was designed to confine this type of litigation to the state

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13. Kittredge v. Stevens, 126 F.2d 263 (1st Cir. 1942), where to determine his share one litigant argued,  
... [T]he exact meaning of the term accounting is not clear. On the one hand, it may mean merely a fairly involved mathematical process describing property transactions. On the other hand, it may also be taken to include an order of disposition of specific property. In the former sense it may be described as an accounting which does not affect a res and in the latter sense it may be described as an accounting which does affect the res.  
*Id.* at 266.
15. 74 U.S. (7 Wall.) 425, 431 (1868).  
16. *Id.* at 433.
probate system, and held that in personam jurisdiction existed between the plaintiff and the administrator.

In 1909, a similar fact situation resulted in a different determination of what matters are in rem or in personam. In *Waterman v. The Canal-Louisiana Bank and Trust Co.*, an Illinois resident filed suit against the executor bank in a federal court in Louisiana. The plaintiff claimed to be the decedent's sole heir-at-law since two nephews had previously accepted their legacies and were estopped from claiming any undisposed portion of the estate. The will bequeathed certain sums to charitable institutions, one of which did not exist as named, and therefore, plaintiff claimed the estate was not completely distributed. The plea asked to have an account taken of all the property in the possession of the executor, particularly the estate residue, to have plaintiff declared the sole heir-at-law, and for general relief.

The Court noted they could not actually seize and control property which was in the state court's possession, but they could entertain jurisdiction when the cause of action was in personam against the administrator. The Court cautioned petitioner, stating that she had asked for too much, that the power to require an accounting was outside the scope of federal jurisdiction and was retained exclusively within the in rem jurisdiction of the state court. But, in this same discussion, the Court concluded,

... [W]e think there is an aspect of this case within the Federal jurisdiction, and for which relief may be granted ... under the other prayers, and the prayer for general relief. ...

While finding jurisdiction in the lower court, the opinion reiterated the premise that probate proceedings could not be interfered with in

17. *Id.* at 430, quoting from *Hyde v. Stone*, 61 U.S. (20 How.) 170, 175 (1857), ... [*T*]hat the jurisdiction of the courts of the United States over controversies between citizens of different States, cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.


19. The will of Caroline Stannard Tilton bequeathed specific sums of money to several charitable organizations. Each amount was relatively modest, $1,000 to $3,000, but the residue of the estate was to be distributed to the organizations listed, on a pro rata basis. Plaintiff brought suit because the 'Home for the Insane' did not exist, and she argued that she was entitled to that share ($90,000) as the sole heir-at-law.


21. The Court relied heavily on *Byers v. McAuley*, 149 U.S. 608 (1893), (see note 7 *supra*).

determining estate residues but stressed the equitable principle that the rights of the parties involved could be adjudicated. Thus the plea was in part in personam,\textsuperscript{23} and the defendant’s contention that the plaintiff’s rights in the estate were properly and necessarily involved in the state court proceeding was overruled. The state court could not now determine plaintiff’s eligibility to the residue—only the residual amount.\textsuperscript{24}

The \textit{Waterman} Court used a liberal interpretation of federal jurisdiction to allow relief. It is arguable that the Court, in denying the plea for an accounting, could have denied all relief as interfering with the probate process. In contrast to \textit{Payne}, in rem proceedings now include the plea for an accounting. The federal courts can now exercise “original jurisdiction in favor of creditors, legatees, and heirs to establish their claims and have a proper execution of a trust,”\textsuperscript{25} but cannot enter the in rem areas of distribution, restoration, or accounting of the estate.

Before turning to subsequent lower court decisions, perhaps a middle ground might be suggested. Although it now seems doubtful that a federal court could determine the precise share due a litigant,\textsuperscript{26} federal court jurisdiction may be exercised to impress a constructive trust upon the proceeds, pending the outcome of state court computations. Authority for this proposition would be \textit{Waterman’s} holding that a federal court may cause the residue of the estate, as declared by the probate court, to be held in trust, and the \textit{Markham v. Allen}\textsuperscript{27} holding that a federal court...

\textsuperscript{23} “... [T]he decree can find the amount of the residue... to belong to the complainant and to be held in trust for her, thus binding the executor personally...” Id. at 46. See also Commonwealth Trust Co. v. Bradford, 297 U.S. 613 (1936). (See note 11 supra).

\textsuperscript{24} The arguments before the Court indicate Mrs. Waterman had presented her claim to the executor who promptly refused to honor it. The Louisiana Retreat, a nearby charitable mental institution, claimed to be the intended beneficiary of the bequest established for the non-existent ‘Home for the Insane.’ Perhaps the local executor and probate judge would have been more sympathetic to the “intended beneficiary” than to a niece from Illinois. See Commonwealth Trust Co. v. Bradford, 297 U.S. 613 (1936), holding that accounting to the precise share did not interfere with the possession or power to order distribution.


\textsuperscript{26} See note 15 supra.

\textsuperscript{27} The latest Supreme Court decision concerning probate is \textit{Markham v. Allen}, 326 U.S. 490 (1946). Heirs-at-law of the testator filed a petition in a California court seeking a declaration that the German legatees were ineligible beneficiaries. “The rights of aliens not residing within the United States... to take... property by succession on testamentary disposition... is dependent... upon... a reciprocal right... [with] foreign countries.” Cal. Prob. Code § 249. (West 1956), originally enacted as Cal. Stats. ch. 895, § 1 (1941). “... [I]t is necessary that the property and money of citizens dying in this country... not... be used... for the purposes of waging a war...” Cal. Stat. ch. 1160, § 1 (1945). The plaintiff, a United States Alien Property Custodian, brought the dispute to a California federal district court against the local heirs and the executor. See generally Trading with the Enemy Act § 5 (b) (1)(B), 50 U.S.C. App., Supp. IV, §616 (1944), amending Act of October 6,
may adjudicate a claim that certain proceeds of an estate belong to the Alien Property Custodian. However, the Markham case is of questionable precedential value since an act of Congress specifically conferred federal court jurisdiction in this area. Markham is consistent with Waterman, however, in requiring the custodian to wait until a final accounting is concluded by a state court.

The Markham Court did not clarify the prior distinctions of in rem—in personam pleas. The federal "inability to interfere" did interfere in this decision. While all of the cases granting jurisdiction exert some pressure upon the state courts, Markham denied the state court all options in the orderly administration of the corpus. While the result here may have been proper, had plaintiff's plea been to annul the will, or to set aside an order of probate, or to distribute the corpus, the Court could not have said the "administration was not disturbed."28 The lower federal courts after Markham were left with little certainty, the only guide being not to "disturb the administration of the estate," not to interfere directly with or control the res, and to adjudicate only the rights of those individuals who are parties and have an interest in the res.29

**Recent Federal Court Decisions**

An apparent lack of clarity in the Supreme Court's own mind, or a failure to provide consistent analysis30 is reflected in the confusion of

1917, 40 Stat. 411. For a discussion of the federal law in Markham, see Note, *Effect of War on Treaties Granting Inheritance Rights to Non-Resident Aliens*, 47 COLUM. L. REV. 318 (1947). Plaintiff asked that the executor be ordered to pay the entire net estate to the Custodian upon the executor's final account. The lower court determined the California statute was unconstitutional and the Custodian was entitled to the net distributable estate. Crowley v. Allen, 52 F. Supp. 850 (N.D. Cal. 1943), appeal reversed, Allen v. Markham, 147 F.2d 136 (9th Cir. 1945). The Supreme Court affirmed jurisdiction relying on Waterman and the equity jurisdiction of federal courts.

28. These are patently in rem state activities. The Act's grant of jurisdiction indicates the government importance of the matter involved in the instant case but could not be extended by implication to overrule all state probate activities. The federal activity in the limited factual situation of Markham v. Allen prohibits extensive application of the case to other probate disputes.

29. Martz v. Braun, 266 F. Supp. 134 (E.D. Pa. 1967), (see note 33 infra). The court discusses the guidelines mentioned above, and then comments, "This line is not always clear and there is considerable question in our minds whether it really has any validity at all in many situations." Id. at 138.

30. "The Sixth Tentative Draft contained a proposed section [TENT. DRAFT No. 6, A.L.I. STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS at 36, § 1330] intended to codify the existing judicial exclusion of . . . estate administration cases from federal jurisdiction. The idea of codification was a good one, but the Institute's members were unable to agree on the definition of the excluded subjects—not surprisingly, in view of the amorphous state of the law—and the section was removed from the draft by a unanimous vote." (footnotes omitted) (Currie, The
lower federal courts over the problem of probate jurisdiction.

In Beach v. Rome Trust Co.,\textsuperscript{31} plaintiff's mother died testate in 1951, establishing a trust for plaintiff and naming the defendant as trustee. After probate was initiated, plaintiff received a small annual income from the trust and persistently asked for an accounting.\textsuperscript{32} In federal court an accounting, removal of the defendant trustee, damages for the breach of trust, a declaration of her right to certain stock held by the estate, and relief as appropriate were sought. The district court denied the existence of jurisdiction. The appellate court held that a grant of accounting and an order to remove the trustee would necessarily interfere with the estate proceeding. The petition was termed in part quasi in rem and was not honored by that court. In remanding to the lower federal court, with respect to plaintiff's request for a declaration of rights, the court said,

\ldots [T]he jurisdiction of the Surrogate over testamentary trustees would not prevent claims such as these for money damages from being heard in the district court. \ldots\textsuperscript{33}

Despite the broad language of Beach, however, trust beneficiaries have not always gained access to federal court. In Kittredge v. Stevens, on similar facts, jurisdiction was denied.\textsuperscript{34} In Patterson v. Wynkoop,\textsuperscript{35}

\begin{footnotes}
\item 31. 269 F.2d 367 (2d Cir. 1959).
\item 32. "Johnson D. McMahon was counsel to \ldots [plaintiff's deceased parents] and is presently counsel to and a director and vice-president of [defendant] as well as counsel to and a director of the Beach Lumber Co. [a portion of the estate]." \textit{Id.} at 370.
\item 33. \textit{Id.} at 373. Although this case does uphold federal jurisdiction over certain claims, the import of this holding can be narrowed since no accounting was pending in the state court.
\item 34. Another trust beneficiary was successful in obtaining federal relief in Martz v. Braun, 266 F. Supp. 134 (E.D. Pa. 1967). Plaintiff, the beneficiary of two trusts established by his grandfather, accused the trustees of making false accountings to the probate court and of generally breaching their trust duty. His plea was for personal damages. Defendants raised jurisdiction insufficiency as a defense and the court thoroughly reviewed the applicable precedent,

In the instant action the plaintiff is not seeking to construe a will or have it annulled. \ldots He is not seeking to have an accounting, to have the trustees removed, or to have the trust corpus restored. \ldots He is not asking for a distribution of the res. \ldots The plaintiff seeks damages against the trustees of a testamentary trust on the ground that they have breached their fiduciary duty to him as an income beneficiary. The action \ldots does not call for our administration of the trust assets.

\textit{Id.} at 138. \textit{See also} Akrotirianakis v. Burroughs, 262 F. Supp. 918 (D. Md. 1967), where federal jurisdiction was upheld to aid a trust beneficiary. However, the special circumstances involved would seem to limit the percedential value of this decision.
\item 35. 126 F.2d 263 (1st Cir. 1942) (\textit{supra} note 13), was an action against a trustee, a temporary guardian, and an administrator, to hold them personally liable for withholding property belonging to the plaintiff, to order them to turn over to the plaintiff
\end{footnotes}
plaintiff was the domiciliary executor of decedent's Colorado estate. He brought suit in District Court for the District of New Mexico against the ancillary administrator of the New Mexico portion of the estate. The testator had entrusted a sum of money to the defendant prior to his death, and plaintiff sought an accounting and judgment for his personal indebtedness to the estate. The lower court denied federal jurisdiction, and the appellate court affirmed the denial.

The decision was based on New Mexico state law. The court held that the probate court had "exclusive original jurisdiction . . . [to hear and determine all controversies] . . . respecting the duties, accounts and settlements of executors, administrators and guardians. . . ." It was implied that since defendant was an officer of the state court and liable to that forum for the discharge of his office, he could not be held responsible by another court. The resulting denial of federal jurisdiction allowed defendant to account personally for his indebtedness to the state court. Yet, this situation was similar to that in Martz v. Brown. Plaintiff in both cases sought only compensation for loss caused by defendant's breach of a fiduciary duty to the decedent's estate. However, the holdings

property received in their fiduciary capacities, and for an accounting. The court first noted that insofar as the complaint requested the district court to order the defendants to turn over to the plaintiff property which they had received in their capacity as fiduciaries and for which they are accountable to the probate court, the federal district court had no jurisdiction. The court did concede the language in the Commonwealth Trust Company case (see note 11 supra) indicated that a federal court had jurisdiction to make an accounting not affecting the res. The court said, however, that the Waterman case (see note 18 supra and text accompanying) held that a federal court has no jurisdiction to make an accounting involving a decedent's estate even when it would not affect the res. The court felt Princess Lida v. Thompson (see note 9 supra) was decisive of the issue presented:

We do not think that it can be said that a federal court necessarily has jurisdiction over an action against a fiduciary so long as the court is not required to give a decree in rem immediately affecting property subject to the jurisdiction of a state court. Princess Lida v. Thompson would seem to hold that where the 'contentions are solely as to administration' a federal court has no jurisdiction over the suit even though the complainant was not asking the court to grant relief which would immediately affect a res within the custody of a state court. If the issues presented by the complainant involve a consideration of the actual handling of the trust property by the fiduciaries, then the federal courts would appear to have no jurisdiction.

126 F.2d at 267.

35. 329 F.2d 59 (10th Cir. 1964).

36. Id. at 60, quoting 4 N.M. Stat. Ann. § 16-4-10 (1953).

37. Martz v. Braun, 266 F. Supp. 134 (E.D. Pa. 1967) (see note 33 supra), in that the latter involved a pending estate accounting in the probate court. On the other hand, a trustee's periodic accounting due the probate court could be said to be pending, in that the accounting is only finalized upon a change of trustee or dissolution of the trust.

38. Another federal jurisdiction exclusion occurred in Lightfoot v. Hartman, 292 F. Supp. 356 (W.D. Md. 1968). The Kansas plaintiff alleged that defendant administrator intended to convert "withheld estate assets" to his own use, and that he had filed a false inventory with the probate court. The heir sought damages of $25,000.
What is the appeal of federal jurisdiction? Assuming diversity and in addition to policy of forum choice, federal courts could probate an estate with greater efficiency by placing responsibility for estate assets and liabilities in one forum. This latter consideration becomes important in several urban areas of the country. A decedent who lived in New Jersey but operated a business in New York City would otherwise be forced to invoke the jurisdiction of several local probate courts in two states for final disposition of the estate. A similar problem exists in Kansas City, Chicago, Louisville and other cites located near state jurisdictional boundaries. A federal court could expand its jurisdiction through Fed. R. Civ. P. 4 (a) over state boundary lines thereby dealing with the estate in one proceeding.

Proponents of greater federal court participation in the probate area must show that no compelling state interests will be subverted. In order to articulate fully the state interests in this area, it will be necessary to undertake a brief historical analysis to show how state courts first became vested with probate matters.

In mid-18th Century England, the resolution of an estate proceeding required adjudication by several courts. The Colonies felt this diverse jurisdiction to be not only inconvenient but arbitrary. Accordingly they often placed the entire matter of estates in a single forum.

The court denied jurisdiction because a final accounting had not been completed and continued, "... [F]ederal jurisdiction does not extend to cases which are purely controversies occurring in the process of the administration of an estate." Id. at 357. The court relied heavily on Patterson, concluding the action was in rem, and said, "... [A]ny person interested in an estate can file an affidavit stating good cause to believe that the executor or administrator thereof has concealed or embezzled, or is otherwise wrongfully withholding personal property of the decedent and has it in his possession or under his control. On conviction (proof of the charge), the probate court is empowered to compel such executor or administrator to inventory the property and cause it to be appraised as property of the estate.

Id. at 357-58.

39. See note 1 supra and text accompanying.

40. After the Revolution and prior to the Federal Judiciary Act of 1789, the several states established probate court systems. Massachusetts established Courts of Probate in a legislative act in 1784. In Rhode Island Probate jurisdiction remained in the Town Councils, acting as Courts of Probate. Probate Courts in Connecticut were held by a single judge appointed for each district by the legislature. A New York act of 1778 established a State Judge of Probate, with jurisdiction similar to the British Governor, with Surrogates in the several counties. R. Pound, Organization of Courts, 94-96 (1940). See text accompanying notes 1 & 2 supra. As was pointed out earlier, the passage of the Federal Judiciary Act of 1789 allowed the state courts to retain their probate power.
convenience and necessity was also a consideration in the establishment of the local court system. The early states were expansive and rural. Communication was at best difficult. Travel was both tedious and expensive. Thus, local magistrates were initially given the probate function.

This localized system for probating a decedent’s assets worked well when a person’s wealth was measured by the quantity of land he owned, and all of his assets were concentrated in his domicile jurisdiction. Thus, defining a state court’s in rem jurisdiction through the fiction that the local court had control of the res corresponded to the actual location of a man’s wealth. However, the quality of the res has changed over the years. Modern communication systems and extensive commerce have allowed individuals to control wealth in property other than local real estate. Geographical diversification of the res undercuts exclusive local probate jurisdiction.

Just as the historical concept of res has been altered, we have witnessed a corresponding expansion of the concept of in personam jurisdiction. For example, the actual notice within physical boundaries to achieve in personam jurisdiction has been altered by modern concepts. Long arm statutes allow states to achieve personal jurisdiction over persons outside the state by mail or other methods of notification. Out-of-state-motorists statutes allow courts to obtain jurisdiction over a nonresident automobile driver. A minimum of business within a state has been sufficient to gain jurisdiction over nonresidents.

Rather than retain an historical in rem-in personam distinction that is no longer valid and automatically precludes federal courts from the probate area, a better approach is to admit that out-of-state beneficiaries do have an interest in adjudicating mismanagement claims against executors in federal court. State court orders affecting the rights of the

41. See ILL. REV. STAT. ch. 110, § 17 (Smith-Hurd 1968).
42. Hess v. Pawloski, 274 U.S. 352 (1927) upheld a Massachusetts statute making the Registrar of Motor Vehicles the agent to accept process for suits caused by nonresident operators of vehicles in the state.
"successors" in interest of the decedent to the estate and undertaking an actual accounting are in rem decrees. However, when the adjudication is primarily concerned with the personal liability of a particular person, the action is in personam. Such ambiguous statements as "the res ought not be interfered with" as in Markham v. Allen, Waterman v. Canal-Louisiana Bank and Trust Co., do not really focus on the issue involved: the permissibility of federal court interference over a state probate proceeding. Visualization of the plaintiff as the "beneficiary of a trust," to determine if the relief sought would properly bind the "trustee" executor, would be an effective analytic device to use in deciding whether to grant federal jurisdiction. Plaintiff's request for a constructive trust in his prayer for relief, needed to rectify damage from a breach of duty, would prohibit an automatic interpretation that the relief sought was in rem. The court could then decide on the merits of the factual situation rather than simply repeating sterile doctrines.

If a federal court would recognize a constructive trust and place emphasis on the actual relationship between the plaintiff and defendant, the rights of the parties could be adjudicated without direct interference with the res. The trust res would remain undisturbed in the possession of the in rem state court, and the federal court could make an independent declaration of the rights violated by one party's breach of duty.

Whether or not any particular tool of analysis is employed, inconsistency of federal case law, lack of overwhelming state interest, and

The authors of Implied Limitations on the Diversity Jurisdiction of Federal Courts, supra note 2, assert by implication that a federal court will not accept jurisdiction until an accounting in the state court is completed, especially at page 13. But see Payne v. Hook, supra note 14, and Waterman v. Canal-Louisiana Bank, supra note 18, and text accompanying.

45. A. Scott, Law of Trusts, 3410 (3d ed. 1967), a discussion of the equitable remedy of constructive trusts and the statement, "... [I]t is available ... in numerous and varied situations wholly unconnected with express trusts ... where property is obtained by mistake or by fraud or by other wrong."

46. O'Donnell v. Dunspaugh-Dalton Foundation, 391 F.2d 226 (5th Cir. 1968), where plaintiff sought to nullify the state court probate by invoking a constructive trust. The involvement of fraud caused the completed probate to stand without federal court influence.

47. In re Watkin's Estate, 114 Vt. 109, 122, 41 A.2d 180, 188 (1945), the court termed the administrator a 'technical trustee.' The relationship necessary prior to the application of a constructive trust would be that of a fiduciary nature and primarily for the benefit of another.

48. This was the result in Martz v. Braun, 266 F. Supp. 134 (E.D. Pa. 1967) where the trustee-beneficiary relationship actually existed. The court stated, In light of the language in a myriad of Supreme Court cases discussed ... we conclude that the Federal District Court has jurisdiction over the subject matter where the beneficiary of a testamentary trust sues the trustees personally for damages he has suffered as a result of their breach of duty to him.

Id. at 138-39.
positive benefit in having jurisdiction vested in a single court for urban multi-jurisdictional areas, should, at least, compel re-examination of the classic position of federal probate jurisdiction.

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