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WHAT IS THE EFFECT OF THE PROBATE OF A WILL IN ONE STATE, WHEN IT IS OFFERED FOR ALLOWANCE AND PROBATE IN ANOTHER? DOES IT BIND IMMOVABLE PROPERTY BEYOND THE TERRITORIAL JURISDICTION OF THE FOREIGN COURT? OR DOES IT LEAVE THE QUESTIONS OF CAPACITY AND EXECUTION OPEN TO CONTEST IN THE DOMESTIC TRIBUNALS?

It is sometimes insisted that the foreign probate must be held conclusive upon general principles of public law.—Another view is that its conclusiveness is settled by the construction of local statutes, generally adopted, and with slight diversities of language, substantially the same. A third, and the one most confidently asserted, fixes its conclusiveness upon the provision of the Constitution of the United States, touching the degree of faith and credit which are to be mutually given to the judgments of the courts of the different States, as that provision has been applied by the act of Congress of May 26, 1790.

We shall look at these opinions in their order and make some references to the authorities; not with the notion of any exhaustive discussion of the subject, but merely to call attention to an important and interesting topic, and suggest some of the sources of inquiry to those who may wish to pursue it farther.

I. Does any fair interpretation of public law support this doctrine of conclusiveness?

Judge Story, in § 18, of his book on the Conflict of Laws, writes: "The first and most general maxim or proposition, is that which has been already adverted to, that every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is that the laws of every State affect and bind directly all property, whether real or personal, within its territory; and all persons who are residents within it, whether natural born persons or aliens; and also all contracts made, or acts done within it. A State may, therefore, regulate the manner and circumstances under which property, whether real or personal, or in action within it, shall be held, transmitted, bequeathed, transferred, or enforced; the condition, capacity, and state of all persons within it; the validity of contracts, and other acts done within it; the resulting rights and duties growing out of these contracts and acts; and the remedies, and modes of administering justice, in all cases calling for the interposition of its tribunals to protect, and vindicate, and secure the wholesome agency of its own laws, within its own domains.

And in § 20—" Another maxim or proposition is, that no State or Nation can, by its laws, affect or bind property out of its own territory, or bind persons not resident therein."

These principles are elementary, and the most obvious that human reason, unfettered by artificial modes, could suggest. It is needless to refer to the unbroken decisions upon this question. How, then, can a publicist argue that a foreign judgment, *proprio vigore*, can have any force, for any purpose, beyond the territory whose court has pronounced it? Public law is a system of rules which no supreme power prescribes, because no power exists that could lend to such a system, so prescribed, any sanction adequate to save it from universal contempt. These rules have such force given to them as results from the indulgence of a feeling of comity between nations, and no more. "It has been thought by some jurists," continues the same writer, at § 33, "that the term comity is not sufficiently expressive of the obligation of nations, to give effect to foreign laws, when they are not prejudicial to their own rights and interests. And it has been suggested that the doctrine

rests on a deeper foundation; that it is not so much a matter of comity or courtesy, as a matter of paramount moral duty. Now, assuming that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity and charity."

This, however, is reasoning in a circle. Laws of imperfect obligation are so called, by writers upon ethics, because they cannot be enforced. So with those which claim attention upon the ground of comity. All results in the forcible conclusion of Judge Story, at § 23: "And from these two maxims or propositions," (§ 18 and § 20) there flows a third, and that is, that whatever force and obligation the laws of one country have in another, depend totally upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent. * * * * * * *When its own code speaks upon the subject, it must be obeyed by all persons who are within the reach of its sovereignty.*"

It is of no moment in this discussion, to settle whether a probate is or is not a judgment *in rem.* Various courts have used various language in regard to the character of this form of proceeding, as will appear incidentally in the authorities hereafter submitted. One thing is apparent, that such a judgment cannot have the conclusive qualities thus ascribed to it. At common law, in England, the probate of a will in its appropriate jurisdiction, by an ecclesiastic Court, had no effect upon the transmission of real estate. Yet, the Court allowing the probate had passed upon the questions of capacity and due execution. The English Courts refused to recognize the validity of a Scotch probate, notwithstanding the same questions were settled by it; and to pass either real or personal estate, required the proper proceedings in the domestic Courts. And in numerous Courts in this country, from the Supreme Court of the United States, through nearly the entire series of State Courts, it has been ruled, that without domestic proof and allowance, a will of personalty, to say nothing of realty, is inoperative, unless some local statute has provided for giving it effect. In none of these instances, does it ever seem to have occurred to any lawyer or judge, that because the

probate was a judgment *in rem*, it was to be held extra-territorially binding and conclusive.

And for this omission there was, and is, adequate reason. A judgment *in rem* has not, and never had, any such capacity of extra-territorial expansion. It means, *ex vi terminorum*, a judgment of a local nature, designed to settle the *status* of some party, or determine the right to some thing, within the territorial jurisdiction of the Court pronouncing it. It is so in all admiralty proceedings; it is so in the proceedings of foreign and domestic attachment; it is so in judgments rendered upon constructive notice, to foreclose mortgages, and to enforce mechanics' liens; it is so in actions for divorces. It may well be said that such a judgment is binding upon all the world. It is binding to the extent of the jurisdiction. So far as the local Court can pronounce its decree, it ought to be respected elsewhere. If its process has been levied upon property, it may condemn and sell the property so levied; if it has acquired personal jurisdiction of a party, it may determine that person's *status* in a proper case; and to the extent of such transfers of title as follows one class of these acts, or of the condition affirmed by the other, the adjudication is binding in conscience, and ought to be respected, and probably would be respected, elsewhere.

It must be conceded that Judge Story, in his discussion of these subjects, in the work already quoted, was strangely oblivious of this principle. He says, at § 428: "The consent of the tribunals, acting under the common law, both in England and America, is, in a practical sense, absolutely uniform on the same subject. All the authorities in both countries, so far as they go, recognize the principle in its fullest extent, that real estate, or immovable property, is exclusively subject to the laws of the government within whose territory it is situate."

Again, at § 474: "We next pass to the consideration of wills made of immovable property. And there the doctrine is clearly established at common law, that the law of the place where the property is locally situate, is to govern, *as to the capacity or incapacity of the testator*, to the extent of his power to dispose of the pro-

perty, and the forms and solemnities to give the will or testament due attestation and effect." See, also, § 435.

Again, at § 512: "In regard to the title of executors and administrators, derived from a grant of administration in the country of the domicil of the deceased, it is to be considered that that title cannot *de jure* extend, as a matter of right, beyond the territory of the government which grants it, and the movable property therein. As to movable property situate in foreign countries, the title, if acknowledged at all, is acknowledged *ex comitate;* and, of course, is subject to be controlled or modified, as every nation may think proper, with reference to its own institutions, and its own policy, and the rights of its own subjects."

Again, at § 539: "No sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit, is a mere nullity, and incapable of binding such persons or property in any other tribunals."

And at § 551: "In respect to immovable property, every attempt of any foreign tribunal to found a jurisdiction over it, must, from the very nature of the case, be entirely nugatory, and its decree must be forever incapable of execution *in rem.*

We proceed to cite some of the authorities illustrative of this point, beginning with the decisions of the Supreme Court of the United States. It will be observed that, in citing an opinion, we extract from it all that bears upon any branch of our argument; preferring, for the sake of method in the citations, to refer, in the subsequent part of the discussion, to those passages having a more direct relation to the other topics.

Doe vs. *McFarland,* 9 Cranch, 151. "Letters testamentary give to the executor no authority to sue for the personal estate of the testator out of the jurisdiction of the power by which those letters were granted."

United States vs. *Crosby,* 7 Cranch, 115. "The question is presented for consideration, whether the *lex loci contractus* or the *lex loci rei sitæ* is to govern in the disposal of real estates."

"The court entertain no doubt upon the subject; and are clearly

of opinion that the title to land can be acquired and lost only by the manner prescribed in the law of the place where such land is situate."

Kerr vs. *Moon*, 9 Wheat. 565. "It is an unquestionable principle of general law, that the title to, and the disposition of, real estate, must be exclusively subject to the laws of the country where it is situate."

"If it could be conceded that it were personal property, it would still be property within the State of Ohio; and we hold it perfectly clear, that a person claiming under a will proved in one State, cannot intermeddle with or sue for the effects of a testator in another State, unless he be permitted to do so by some law of that State."

* * * "The act of 25th January, 1816 (Ohio,) permits authenticated copies of wills, proved according to the laws of any State of this Union, relating to any estate within that State, to be offered for probate in the court of the county where the estate lies, and authorizes the same to be there recorded; and it then proceeds to declare the effect of such recording to be to render the will good and valid, as if it had been made in the State, subject, nevertheless, to be contested as the original might have been. But it does not appear that the copy of this will was offered for probate and admitted to record. Had it been so offered, it might have been contested, and for anything that we can say, the sentence of the Court of Probate might have been not to admit it to record."

Vaughan vs. *Northup*, 15 Peters, 1. "Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it; and does not, *de jure*, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased in any other State; and whatever operation is allowed to it beyond the original territory of the grant, is a mere matter of comity, which every nation is at liberty to yield or withhold, according to its own policy and pleasure, with reference to its own institutions, and the interests of its own citizens. On the other hand the administrator is exclusively bound to account for all the assets which he receives under and in virtue of his administration, to the proper tribunals

of the government from which he derives his authority; and the tribunals of other States have no right to interfere with or control the application of those assets, according to the *lex loci.* Hence, it has become an established doctrine, that an administrator appointed in one State, cannot, in his official capacity, sue for any debts due to his intestate in the Courts of another State; and that he is not liable to be sued in that capacity in the Courts of the latter, by any creditor, for any debts due them by his intestate." 1 Cranch, 259; 3 Cranch, 319; 9 Wheat. 565.

McCormick vs. *Sullivant*, 10 Wheat. 192. "The next question is presented by the answer of Finley. At the death of Wm. Crawford, in the year 1782, he was entitled to a certain quantity of land, to be laid off between the rivers Scioto and Miami, under a promise contained in an act of the Legislature of Virginia. His interest in this land was purely an equitable one. After his death, a warrant to survey the same was granted to John Crawford, his only son and heir at law, who assigned to one Dyal a certain tract which had been surveyed under the warrant, and the defendant claims a part of the tract so surveyed, under Beauchamp, who purchased from Dyal. He alleges, in his answer, that he made the purchase *bona fide*, paid the purchase-money, and obtained a grant for the land, before he had notice of the will of Mr. Crawford, or of the claim of his daughters under it."

"Crawford's will, under which the female claimants claim title, was *proved in some Court* in the county of Westmoreland, in the State of Pennsylvania, and was there admitted to record; but it does not appear, nor is it even alleged to have been at any time proved in the State of Virginia, or in the State of Ohio, where the lands in controversy lie."

"At the time of the death of Wm. Crawford, lands lying in Virginia were transmissible by last will and testament, in writing, the same being signed by the testator, or by some person in his presence, and by his direction, and if not wholly written by himself, being tested by two or more credible witnesses, in his presence. But to give validity and effect to such a will, it was necessary that it should be duly proved, and admitted to record in the Court of

the county where the land devised lay, or it might be proved in the general Court, when the land was of a certain value. Subsequent to the death of Wm. Crawford, an Act of Assembly was passed, which permitted authenticated copies of wills, proved in any other State of the Union, or abroad, to be offered for probate in the general Court, or in the Circuit, County, or Corporation Court, where the whole of the estate lies."

"By the law of the State of Ohio, lands lying in that State may be devised by last will and testament, in writing; but before such will can be considered as valid in law, it must be presented to the Court of Common Pleas of the county where the land lies, for probate, and be proved by at least two of the subscribing witnesses. If the will be proved and recorded in another State, according to the laws of that State, an authenticated copy of the will may be offered for probate, in the Court of the county where the land lies, without proof by the witnesses; but it is liable to contest by the heir at law, as the original might have been."

"It is an acknowledged principle of law that the title and disposition of real property are exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another. For the establishment of this doctrine see 7 C. 115; 9 Wheat. 565. It follows, therefore, that no estate could pass to the daughters of Wm. Crawford, under his will, until the same should be duly proved according to the laws of Virginia, where the land to which he was entitled lay at the time of his death, or of the Territory of Ohio, after the cession by Virginia to the United States, under the ordinance of Congress of July 13th, 1787, or according to the law of that State, which has already been recited. The probate of the will in the State of Pennsylvania gave it no validity whatever in respect to these lands, as to which this Court is bound to consider Crawford as having died intestate, and consequently they descended to John Crawford, his only son and heir at law, according to the law of Virginia, as it stood in the year 1782."

Darby's Lessee vs. *Mayer*, 10 Wheat. 465. "In order to connect herself with the patent, the defendant proved a sale of the

inchoate interest of John Rice to one Solomon Kitts, and the next link in his title depended upon the will of Solomon Kitts. To prove that Kitts devised the land to the trustees, through whom the defendant made title, a copy and probate of the will was produced in evidence, duly certified from the Orphans' Court of Baltimore county, Maryland, in which, it seems, the will had been recently proved and recorded. This evidence was excepted to, but the Court overruled the exception, and it went to the jury. The question is, whether the evidence thus offered was legal evidence of a devise of land? The common-law doctrine on this subject no one contests; the ordinary's probate was no evidence of the execution of the will in ejectment. Where the will itself was in existence, and could be produced, it was necessary to produce it. When the will was lost, or could not be procured or produced in evidence, secondary evidence was necessarily resorted to, according to the nature of the case. But whatever proof was made, was required to be made before the Court that tried the cause, the proof before the ordinary being *ex-parte*, and the heir at law having had no opportunity to cross-examine the witnesses; neither were the same solemnities required to admit the will to probate as were indispensable to give it validity as a devise of real estate. At first, it was a question of controversy between the common law and Ecclesiastical Courts, whether a will, containing a devise of land, should not be precluded from probate, although containing a bequest of personalty also. And the question was one of serious import, since the common-law Courts required the production of the original, whereas the consequence of probate was, that the original should be consigned to the archives of the Court that proved it. This was at length compromised, and the practice introduced of delivering out the will, when necessary, upon security to return it. Upon general principles, there is no question that lands in Tennessee must, in all respects, be subject to the land laws of Tennessee. Their laws affecting devises, and the rules of their Courts respecting evidence in ejectment, must be the law of this case, as far as the Constitution of the United States does not control the one or the other. With regard to the modification under which the right of devising may

be exercised, there is no question that the power of the State is unlimited, and a will of realty wherever executed, must conform to the laws of Tennessee. The right of determining whether its laws have been complied with in this respect, is a necessary result from the power of passing those laws."

Armstrong vs. *Lear, Adm'r.*, 12 Wheat. 169. "The bill in this case is brought against the administrator, with the will annexed, of General Kosciuszko, for the purpose of establishing a right of the plaintiff to receive payment out of the assets of the testator, of a certain bequest to him, contained in a supposed testamentary writing, executed by the testator at Paris, in France, in June, 1806. This supposed testamentary writing is set forth in the bill, and averred to be in the nature, and of the effect of, a last will or writing testamentary, but it does not appear to have been admitted to probate, either in France, or in the proper Orphans' Court of this District. By the common law, the exclusive right to entertain jurisdiction over wills of personal estate, belongs exclusively to the Ecclesiastical Courts, and before any testamentary paper of personalty can be admitted in evidence, it must receive probate in these Courts. Lord Kenyon, in the *King* vs. *Inhabitants of Netherseal*, 4 Term Rep. 258, said, 'We cannot receive any other evidence of there being a will in this case, than such as would be sufficient in all other cases where titles are derived under the will; and nothing but the probate, or letters of administration, with the will annexed, are legal evidence of the will in all questions respecting personalty." This principle of the common law is supposed to be in force in Maryland, from which this part of the District of Columbia derives its jurisprudence; and the probate of wills of personalty to belong exclusively to the proper Orphans' Court here, exercising ecclesiastical jurisdiction. If this be so, and nothing has been shown which leads to a different conclusion, then it is indispensable to the plaintiff's title, to procure, in the first instance, a regular probate of this testamentary paper in the Orphans' Court of this District, and to set forth that fact in his bill. The treaty stipulations, the act of Congress, and the argument attributing to them the full force, which that argument supposed, to establish the validity of the instrument,

do not change the forum, which is entitled, by local jurisprudence, to pronounce upon it as a testamentary paper, and to grant a probate. It is one thing to possess proofs which may be sufficient to establish that a testamentary instrument had been executed in a foreign country, under circumstances which ought to give it legal effect here; *and quite a different thing to ascertain what is a proper tribunal here, by which those proofs may be examined, for the purpose of pronouncing a judicial sentence therein.*"

Passing over the cases of *Carmichal* vs. *Elmendorf*, 4 Bibb, 484; and *Barney* vs. *Brashear*, 2 B. Monroe, 382, we cite at some length from *Sneed* vs. *Ewing and wife*, 5 J. J. Marshall, 460, passages we regard as peculiarly applicable.

"A will concerning land and slaves, in Kentucky, had been admitted to probate in Indiana. Ewing and wife filed their bill in chancery, in the proper Court in Kentucky, founded upon an implied revocation of the will, and claiming the land by descent.

This claim was resisted on the ground that the Probate in Indiana was conclusive until it was reversed or revoked by the proper tribunal of that State; and that, therefore, no Court in Kentucky had power to decree that there had been an implied revocation of the will. To this objection the Court reply—1st. The probate was not conclusive in Indiana. 2d, If it were, it is not so here."

"Maritime Courts decide according to the law of nations; and their decisions, or what must be necessarily inferred from them, will be (so far as they had jurisdiction,) as to the *res*, or subject-matter, final and conclusive, wherever the law of nations is recognized, and upon all persons who were interested and had a right to be considered as parties. As the proceedings are strictly *in rem*, notice served on the thing is constructive notice to all who have any interest in it, and hence, as the jurisdiction of these Courts is exclusive, and they decide on a law of universal obligation, their judgment must be conclusive in the common-law Courts, to the extent which has just been intimated, if no farther. Whether judgments *in rem*, of all other Courts which decide, not according to the national, but the municipal or local law, should be equally conclusive, we do not now consider material; for, if they be so, the probate in

this case is not of that class of judgments. The probate may be considered as a proceeding *quasi in rem;* but there is no attachment of the thing or property devised, and, therefore, although all persons interested might have made themselves parties, there was not the same constructive notice as that given in maritime or other cases strictly *in rem.* And hence, the probate, without citation or controversey, ought not to be considered as conclusive as an admiralty decision; and it may be doubted whether it should be more so than an ordinary foreign judgment. See the reasoning of the Supreme Court in the case of '*The Mary*,' 9 Cranch, 144. But if the probate should even be considered as any other judgment *in rem*, it cannot operate conclusively on the property now in contest, because it was not within the jurisdiction of the Court of Indiana."

"Foreign laws cannot, *per se*, operate extra-territorially. Land is held and alienated according to the law of the place where it is situated; and cannot be held or appropriated otherwise than according to the will of the local sovereign, or the *lex loci rei sitæ*. *The United States* vs. *Crosby*, 7 Cranch, 115; *Clark* vs. *Graham*, 6 Wheat. 577; *Kerr* vs. *Moon*, 9 *id.* 566; *McCormick* vs. *Sullivant*, 10 *id.* 192. Vattel, book 2, ch. 8, §§ 110, 114. 'As the rights of a nation ought to be respected by all others, none can form any pretensions to the country which belongs to that nation, nor ought to dispose of it, without her consent, any more than of the things contained in the country.' Vat., book 2, ch. 7, § 80. 'How could she govern herself at her own pleasure, in the country she inhabits, if she cannot truly and absolutely dispose of it?' *Id.*, § 83. 'Every State has the liberty of refusing or granting to foreigners the power of possessing lands or other immovable property within her territory; and, as the sovereign may refuse to foreigners the privilege of possessing immovable property, he is doubtless at liberty to refuse granting it except with certain conditions annexed. Property possessed by aliens, remains subject to the jurisdiction and laws of the country.'" *Id.*, § 114. * * * *

"But if as to land in Indiana, the probate had been as effectual as a probate here of a will devising land here would have been, or as the probate in any other State, where the Courts of probate have

jurisdiction over wills devising land, would have been as to lands within the jurisdiction of the Court, the foregoing authorities, and many others which might be superadded, prove that it could not conclude the right to the land devised in this State. We will admit that a foreign will devising land in this State may be effectual to pass the title; but then it must be executed conformably to the law of this State. And it is clear that probate in a foreign State, is not conclusive evidence that the will was so executed as to pass land here. Therefore, the foreign will must be proved as an original document, on any trial involving the title to the land in this State, devised by it, and must, on such proof, be decided by the Court here to be valid and effectual, unless, according to the law of this State, there shall have been probate of it by the proper Court here, or what is equivalent to such probate. If such foreign probate should be conclusive, when introduced incidentally, it could not be so when directly attacked as the foundation of a suit, or of the defence to a suit for the land. 4 Bibb. and 10 Wheat., *supra*. There is an essential difference between a probate and the effect of a will. And the probate in Indiana, being in the nature of a judgment *in rem*, cannot operate conclusively on land which is in Kentucky. It cannot conclude more than the jurisdiction *in rem* gave the Court power to decide. The consequence is that, if the probate had been (which it was not) conclusive as to the property in Indiana, it could not conclude the rights of the parties as to the land in Shelby. As to that land, the will was liable to be contested whenever offered as evidence of title, unless it had been recorded in Kentucky according to her laws; and, whenever so recorded, the right to contest it in chancery resulted *ipso facto*."

In the same case, the learned Judge engages in an examination of the statutes of Kentucky bearing upon the subject. It will be observed the probate in Indiana was allowed in 1807. By a statute of Kentucky, of 1797, probate of foreign wills was allowed upon *copies*. Still a probate was necessary. An act of 1820 authorized foreign wills to be admitted to record in the Clerk's office of the Court of Appeals, without probate, but solely on a proper authentication of the foreign probate. The act, after further providing that

when so recorded, they shall have all the effect which they would have had if they had been proved and recorded in the Courts of the counties in which the devised property was situate, declares: "It shall, and may be lawful for any person who may be interested in the lands or other property devised, by his, her, or their bill in equity, to be filed in the Circuit Court having jurisdiction, to contest the validity of such will, in the same manner and within the same time that he, she, or they could do, had the said will been proved and admitted to record in the Court of the county where the land, or other estate may be at the time of the recording aforesaid."

Thus, proof upon copy was allowed in 1797; while in 1820 probate was dispensed with, upon the filing and recording of an authenticated copy of the original will with its foreign probate.

Upon these statutes, the following comments are worthy of observation: "Thus by legislative indulgence, the common law has been relaxed in a manner obviously beneficial to those interested in establishing and enforcing foreign wills of property in this State. Without the act of 1797, it would have been necessary to prove the original foreign will in the Court of the county in this State in which property devised by it was, at the death of the testator. Without the act of 1820, probate of an authenticated copy would have been necessary. Now, both are dispensed with. It will not be denied or doubted, that when a foreign will had been offered for probate before 1797, in any Court of this State, any person interested might have contested and resisted it; or might have filed a bill in chancery to try its validity. It is equally undeniable, that the same right of contestation has existed since 1797. The act of 1820, therefore, confers no new right on those who may be interested in defeating foreign wills of property in this State. It only secures to them, beyond any question, the right which they would have had if the act of 1820 had never been passed." * * * *

"The right to seek a decree as to the validity of the will, is not local; it is incidental to the property and parties in this State. No judgment decree or order, which could have been made by any Court in Indiana, could have been effectually availing to the appellees as to