Buffalo Law Review

Volume 6 | Number 1 Article 34

10-1-1956

Decedent's Estates—Trustees' Commissions

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sought must be a specific article or its equivalent in money. Money per se is discoverable only when traceable to a specific res, or, when not the subject of a debt or ordinary contract obligation, identifiable as the object sought. Thus where money was improperly withdrawn from a decedent's bank account, it became a trust fund of specific property and was properly discoverable.[16]

Keeping the principle in mind that discovery is limited to in rem proceedings, it follows that the Court was correct in holding, in the instant case, that where a debtor-creditor relationship existed, the Surrogate lacked jurisdiction, due to the in personam nature of an action for debt.

Trustee's Commissions

A testamentary trustee who collects the rent of and manages real property becomes entitled to two commissions upon the amounts so received and paid out. This entitlement is purely statutory since fiduciaries under the common law were not compensated for their services.[17] The first or regular commission is allowed for the collection of rents without more.[18] The second or additional commission allows an added six per cent commission on gross rents collected when the trustee manages the real estate.[19]

The propriety of the testamentary trustee's claim for this additional commission was considered in *In re Smather's Will.*[20] The trustee merely received rent payments under the terms of a 99 year lease, negotiated by the testator himself. Despite the clear language of the statute, the trustee based its claim on its ultimate responsibility for the administration of the real property, attempting to bring itself within the terms of *Matter of Brennan's Will,*[21] a decision construing section 285. In the instant case, the Surrogate held that the assumption and exercise of ultimate responsibility constituted requisite management of the property within the meaning of the statute, and therefore that the *Brennan* case was controlling.[22]

In reversing and refusing the additional commissions, the Court looked

16. *In re Akin's Estate,* 248 N. Y. 202, 161 N.E. 471 (1928).
17. *Collier v. Munn,* 41 N. Y. 143, 147 (1869); *Lent v. Howard,* 89 N. Y. 169, 178 (1882).
18. N. Y. SURR. CT. ACT §285-a (2).
19. N. Y. SURR. CT. ACT §285-a (7). Where a trustee is for any reason or cause whatsoever entitled or required to collect the rents of and manage real property, . . . in addition to the commissions hereinbefore provided he shall be allowed and may retain for such services six per centum of the gross rents collected, . . .
20. 309 N. Y. 487, 131 N.E. 2d 896 (1956).
21. 251 N. Y. 39, 166 N.E. 797 (1929).
22. ——Misc.——, 133 N. Y. S. 2d 15 (Surr. Ct. 1954), *aff'd,* 285 App. Div. 1163, 140 N. Y. S. 2d 492 (1955).

primarily to the clear unambiguous language of the statute which specifies that the added amounts are allowed to compensate for additional services in the management of the real property. Otherwise, any trustee of real property would be entitled to the six per cent commissions automatically. Further, the terms of the lease were negotiated by the testator himself and explicitly relieved the landlord of all obligations and of all control over the management of the premises. In contrast, the lease in the *Brennan* case placed many duties upon the trustee and was, in fact, negotiated by the trustee. The two cases then are basically different, both as to applicable statute and fact situation.

The central contention in all cases of this nature is the significance which the word "management" should have. Surrogate Foley in 1924 articulated the test, indicating that the statute contemplated positive acts.[23] However, the Court of Appeals in the *Brennan* case gave the same language the broadest scope and extended the right to commissions where the rents were derived from a net lease.

The line then between what is and what is not requisite management is difficult to draw.[24] In the principal case, the Court has seriously questioned the rationale of the *Brennan* case and has restricted it to its own fact situation. The mere possibility that the trustee might have to re-enter the premises if the lessee defaulted will not satisfy the management requirement. Rather the trustee must do something positive to earn his additional six per cent. Precisely where the dividing line will be is still not clear but the trend appears to be toward requiring a more strict literal compliance with the statutory terms.

23. *In re Knight's Estate,* 124 Misc. 424, 430, 208 N. Y. Supp. 822, 823 (Surr. Ct. 1924). Management implies the supervision, maintainance and care of the premises, the making of necessary repairs, and the payment of taxes and water rents.

24. *Compare In re Beeler's Will,* 204 Misc. 797, 127 N. Y. S. 2d 607 (Surr. Ct. 1953) (trustee's payment of real estate taxes in addition to collecting royalties on oil properties did not constitute management) *with In re Burrow's Will* ——Misc.——, 139 N. Y. S. 2d 135 (Surr. Ct. 1954) (the assumption and exercise of ultimate responsibility qualified as management).