

Trust Companies — Foreign Corporations — Trustees — Testamentary Trustee.

A foreign corporation cannot act as a trustee under a will, though it does not intend to do any other business than that involved in the particular estate.

Mr. W. E. Harmon,
Secretary of State,
Helena, Montana.

May 14, 1931.

My dear Mr. Harmon:

You have submitted to this office your file of correspondence with O. B. Kotz, attorney at law, Great Falls, Montana, with a request that we examine the same and advise you whether the foreign trust company mentioned therein may qualify as a trustee under the will referred to for the purpose of discharging the duties of the trust imposed by the will.

In an opinion of this office to you under date of August 9, 1929, it was held that a foreign corporation could not be admitted to do business in Montana as a trustee. It is asserted, however, that inasmuch as this foreign corporation would only handle this estate and does not intend to engage in the general business of a trustee in the state of Montana, the business done by the trustee would constitute only an isolated transaction such as would not amount to doing business in the state.

As the terms of the will are not before me I cannot determine just what duties are imposed upon the trustee except that in Mr. Kotz's letter he states that they are to hold the property for the purpose of selling the same and distributing the proceeds as directed in the will. I have no doubt in carrying out this provision of the trust that the trustee would have to act as a conservator of the estate and probably, in the absence of immediate sale, to rent the same or operate the property, if it is real estate, and in fact become the general manager of the estate until such time as the same could be sold to advantage. This time, of course, is indefinite and may extend over a number of years.

In Montana the handling of a trust that has been created by a will and which continues after distribution, is, by section 10352, R.C.M. 1921, under the jurisdiction of the district court in which the estate was probated and in such cases the court does not lose jurisdiction by reason of final distribution but retains it for the purpose of the settlement of accounts under the trust. The trustee in such cases bears to the court a relation somewhat similar to that of executors and administrators. The court has jurisdiction over his acts as trustee and has the power to supervise the acts of the trustee and enforce compliance by him with the terms of the trust.

The Montana laws provide that an executor or administrator must be a resident of the state of Montana. The reason for this is that in the administration of estates not only the property but the person administering it as an arm of the court should at all times be subject to the jurisdiction of the court until the estate is closed, as otherwise the court might find itself powerless to enforce its orders and decrees by reason of the fact that the executor or administrator and perhaps the property is beyond the jurisdiction of the court. The purpose of section 10352, no doubt, was to retain jurisdiction in the district court even after the estate had been distributed for the purpose of giving the court power to compel full compliance with the terms of the will by the trustee.

The administering of the trust is a part of the probate proceedings and while said section 10352 does not in terms require the trustee to be a resident of the state of Montana, nor does any other law so expressly provide, nevertheless, said section does contemplate by its terms that the trustee must be subject to the jurisdiction of the court, for it provides among other things, that he may be cited into court by service of citation as provided for the service of summons in civil cases. If a foreign corporation or person may be appointed a trustee under the will and never subject himself to the jurisdiction of the court but remain without the state and possibly remove a large part of the property from the state, it can at once be seen that the court though by law entitled to retain jurisdiction, might in fact and for all practical purposes, lose it by reason of its inability to enforce its orders and decrees.

I believe it was the intention of the law in such cases that the trustee should also be a resident of the state of Montana the same as is required of executors and administrators.

Attention has been called to the case of General Fire Extinguisher Co. vs. Northwestern Auto Supply Co., 65 Mont. 371, wherein the court quoted with approval from Fletcher's Cyclopedia Corporations, wherein it is said, among other things, that an isolated act of a foreign trust company in acting as trustee under a deed of trust and as such collecting interest, taking title to property, etc., does not constitute "carrying on business" within the state. The case did not involve the question of a foreign trust company doing business in Montana either under a will or under a deed of trust and therefore cannot be said to be a declaration by our court that a foreign corporation may act as a trustee under a will in this state. Furthermore, it will be observed that the quotation from Fletcher was with reference to a trusteeship under a deed of trust and

not under a will and therefore the provisions of section 10352 are pertinent in the one case, while in the other they are not. Also the fact of what constitutes doing business within the state is always a question to be determined from the acts done or which are determined to be done. A foreign corporation could under a deed of trust perform such acts in a state as would constitute it doing business therein and even Fletcher's statement of the law is not authority that a foreign trust company may as a matter of right exercise all of the powers of a trustee in a single estate without placing itself in the position of doing business in the state. If the powers exercised amount to doing business in the state it is doing business therein even if it is the first and only trusteeship in which it will act within the state.

A somewhat similar question was before the supreme court of the state of Massachusetts in the case of *Petition of Guaranty Trust Company*, 143 N. E. 46, in which the petitioner, a foreign trust company, claimed the right to act as trustee under a will being probated in Massachusetts without qualifying to do business in the state. The court said:

"As trustee under the will of Mrs. Jones, the Guaranty Trust Company would have active duties to perform, extending over an uncertain period of time; the funds would have to be cared for and invested, the income paid to the beneficiary for life, accounts rendered and in the administration of the trust it would be under the direction and supervision of the courts of this commonwealth. The trustee was not called upon to perform a single isolated act of business, but was required to carry on a series of acts during the life of the beneficiary * * *. If the petitioner can be appointed a testamentary trustee, it will be engaged in doing business, not casual or merely incidental but as part of its usual occupation and in fulfilling one of the purposes of the corporation. It will be transacting business in violation of the statute. * * *."

In the absence of any holding of our supreme court to the contrary, it is my opinion that the above decision is in harmony with our laws which exclude a foreign corporation from doing a trust business in Montana, and in view of the fact that the trustee in this particular case must act under the jurisdiction of the district court and be subject to its jurisdiction so that the court may enforce its decrees and orders, it is further my opinion that the foreign corporation seeking to act as trustee under the will is prohibited by the laws of the state from so doing.

Very truly yours,

L. A. FOOT,

Attorney General.