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CONTRACTS - EFFECT OF AGREEMENT THAT INSTRUMENT SHALL BE WITHOUT LEGAL EFFECT

CONTRACTS — EFFECT OF AGREEMENT THAT INSTRUMENT SHALL BE WITHOUT LEGAL EFFECT — Defendant gave one of its employees a certificate stating that in case of the death of the employee while still in defendant's employ, defendant would pay to the beneficiary designated by the employee a stated sum of money. The certificate contained this further provision: "The issue and delivery of this certificate is understood to be purely voluntary and gratuitous on the part of this Company and is accepted with the express understanding that it carries no legal obligation whatsoever or assurance or promise of future employment, and may be withdrawn or discontinued at any time by this company." In a suit by the beneficiary on this certificate, *held*, that the beneficiary could recover. *Mabley & Carew Co. v. Borden*, 129 Ohio St. 375, 195 N. E. 697 (1935).

It is generally accepted that, where it is apparent that there was no intention to contract, there can be no contract.[1] The court has apparently overlooked this fundamental principle in the instant case, as it has not squarely faced the problem of whether the parties intended a contract, but has rather based its decision upon a question of consideration. The court, in passing upon the construction of the provision against the creation of a legal obligation, directed its attention to only

[1] 1 WILLISTON, CONTRACTS, § 21 (1931), and cases cited. A well-known example of a case where the parties do not intend a contract is where an offer is made or a transaction is entered into in jest. See 16 MINN. L. REV. 203 (1932). And the basis of the rule that husband and wife cannot enter into a contract is that the law implies that they did not *intend* to contract. Balfour v. Balfour, [1919] 2 K. B. 571 at 579.

one phase of that provision, saying:[2] "neither was the company, by reason of the certificate, obligated to give her continuous or definite employment. But neither of these facts in any wise affected the right of the beneficiary, so far as Anna Work was concerned after this contract was executed." The court ignored that part of the provision which states that the issue of the certificate is intended to be purely voluntary and gratuitous, and that it may be withdrawn or discontinued at any time by the company. Looking to the provision in its entirety, it is obvious that it was not intended to create a binding obligation of *any* kind.[3] It is well recognized that if the parties to an agreement stipulate that their writing, which in all other respects appears to be a contract, is not to be a contract, the courts will not enforce it.[4] Moreover, there is a strong line of authority to the effect that parol evidence is admissible to show that no contract was intended to be entered into even though it appears that the writing was executed for the sole purpose of deceiving a third party.[5] It is submitted that if the courts will allow the parties to evade obligation by the use of parol evidence, in many cases setting up their own fraud as a means of evading legal liability, there is no reason in policy why the court should not give effect to a stipulation on the face of the instrument declaring it to be of no legal effect.[6]

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[2] Mabley & Carew Co. v. Borden, 129 Ohio St. 375 at 380, 195 N. E. 697 at 699 (1935).

[3] An early Ohio decision passed upon the legal effect of a promise to pay "when I can make it convenient." The court held this was a promise to pay within a reasonable time. This case was not cited in the principal case, and cannot be considered authority for it, because (1) a motivating factor in the early decision was that the defendant had received value in the form of money, and (2) the language of the contract was ambiguous, as opposed to the clear-cut denial of liability in the writing in the principal case. The court indicated by way of dictum that it might have reached a different result if there had been a promise never to compel payment. Lewis v. Tipton, 10 Ohio St. 88 (1859).

[4] See Rose & Frank Co. v. J. R. Crompton & Bros., [1923] 2 K. B. 261, affd. in [1925] A. C. 445. Commented upon in 22 MICH. L. REV. 158 (1923); 37 HARV. L. REV. 154 (1923); 39 L. Q. REV. 400 (1923); 1 CANADIAN BAR REV. 807 (1923). In that case the court refused to enforce as a contract what purported upon its face to be a "gentlemen's agreement," pointing out the uniqueness of a stipulation that the writing should be attended by no legal consequences. But the court also said, "It cannot however be denied that there is no reason in law why they should not so provide if they desire to do so." Likewise, all American courts which have passed upon writings containing express stipulations against legal effect have refused to enforce such writings as contracts. Martin v. Monroe, 107 Ga. 330, 33 S. E. 62 (1899); Barnard v. Cushing, 45 Mass. (4 Met.) 230, 38 Am. Dec. 362 (1842). See also GREENHOOD, THE DOCTRINE OF PUBLIC POLICY IN THE LAW OF CONTRACTS 469 (1886), and cases cited; ANSON, CONTRACTS, 5th Am. ed., 4, n. 1 (1930), and cases cited.

[5] See, N. Y. Trust Co. v. Island Oil & Transport Corp., (C. C. A. 2d, 1929) 34 F. (2d) 655; comment in 28 MICH. L. REV. 448 (1930). The cases on this question are fully discussed in L. R. A. 1917B 263, and 33 MICH. L. REV. 410 (1935).

[6] It might be worth while to speculate upon the future of employee's death benefit certificates in Ohio. It would seem that employers, having in mind the principal case, will be wary of giving certificates intended to be purely gratuitous, for fear that they may be held legally liable therefor. On the other hand, the result of this case may be

satisfactory in that it prevents employees from being lulled into a false sense of security. But it can also be argued that employees have no right to rely upon an instrument which purports to be not legally binding.