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ABSTRACTS

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APPEAL AND ERROR—FEDERAL PRACTICE—FINALITY OF JUDGMENT OF STATE SUPREME COURT FOR PURPOSES OF APPEAL TO UNITED STATES SUPREME COURT—The Supreme Court of California rendered a decision in this case affirming the order of the court below on July 1, 1944. A petition for rehearing was denied July 27, 1944 and an appeal to the Supreme Court of the United States was applied for and allowed July 31, 1944. The California Rules on Appeal provide that a decision of the supreme court "becomes final thirty days after filing unless otherwise ordered prior to the expiration of said 30-day period." [1] Remittitur issued on August 1, making the decision final under the California rule. On the chance that the first appeal might be dismissed as premature, a second appeal to the Supreme Court of the United States was presented and allowed on September 21. *Held,* the second appeal is dismissed. "Finality of a judgment of a state court for determining the time within which our jurisdiction to review may be invoked is not controlled by the designation applied in state practice. . . ." [2] The Court applied the following test: "When the case is decided, the time to seek our review begins to run. A timely petition for rehearing defers finality for our purposes until it is acted upon or until power to act upon it has expired as here it would appear to do at the end of the 30-day period. If rehearing is granted the judgment is opened, and does not become final as a prerequisite to application for a review by us until decision is rendered upon rehearing." [3] *Market St. Ry. Co. v. Railroad Commission of State of California,* (U.S. 1945) 65 S. Ct. 770.

CONTRACTS—RIGHTS OF THIRD-PARTY BENEFICIARY ON GOVERNMENT WAR BOND AFTER DEATH OF REGISTERED OWNER—One Griffen owned United States War Bonds registered in the "beneficiary" form, as provided in

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[1] California Rules on Appeal, rule 25.

[2] Principal case at 773.

[3] Ibid.

Treasury Regulation 350,[1] in his own name and payable to one Mrs. Covel on his death. Griffen died and Mrs. Covel died shortly thereafter, and the bonds were cashed, according to treasury regulations,[2] by appellant who was Mrs. Covel's administratrix. In a controversy between appellant and the administratrix of the estate of Griffen over the proceeds the administratrix of Griffen has contended that this case is controlled by *In re Garland*,[3] where a bank deposit in the names of two persons or the survivor of them was held to belong not to the survivor but to the deceased's estate if he reserved the right of control over it in life; otherwise the gift was intended to take effect after death and was made in violation of the Statute of Wills. The probate court ruled in favor of Griffen's administratrix. On appeal, *held*, reversed. The *Garland* case is not controlling. The United States contracted to pay money to the survivors, and the performance of the contract is an essential on which depends the federal government's ability to borrow money on a reasonable basis; no state law can stand in the way of that performance.[4] *Harvey v. Rackliffe*, (Me. 1945) 41 A. (2d) 455.

CORPORATIONS—RIGHT OF PREFERRED STOCKHOLDER TO SUE FOR UNDECLARED DIVIDENDS DUE UNDER PROVISIONS OF FORMULA FOR DIVIDEND PAYMENTS—Appellant is a preferred stockholder in appellee corporation, organized under the laws of Indiana. The stock certificate evidencing her ownership provides that under certain conditions "Dividends shall be paid on the preferred stock out of earnings. . . ." In the court below appellant filed a complaint alleging the terms of the stock certificate, and alleging that every material condition stated therein as a prerequisite to a payment existed but that appellee had failed and refused to pay any dividend; and praying for a judgment for $150 and all other appropriate relief. The court below sustained the corporation's demurrer to this complaint and the stockholder appealed, contending that the existence of facts making payment of a dividend lawful creates a prima facie right under her contract to receive the same. *Held*, affirmed. Appellant's complaint sounds in express assumpsit, which is an action predicated upon a debtor-creditor relationship. Such a relationship does not exist between a corporation and its stockholders until after a dividend has been declared by the directors; until that time the stockholder's right, based upon his contract with the corporation, is an equitable right to have the dividend declared and even though the

[1] The applicable provisions are §§315.1, 315.2, 315.4(c), 315.8, 315.34, 315.35, 315.36, 315.37.

[2] It was provided that the form of registration "will be considered as conclusive of such ownership and interest"; that the bonds may be paid to the registered owner during his lifetime and after his death, to the surviving beneficiary as the sole and absolute owner, and if the beneficiary should die the bond may be reissued or paid "as though it were registered in the name of the surviving beneficiary alone."

[3] 126 Me. 84, 136 A. 459 (1927).

[4] See annotations on rights of beneficiary under obligation or deposit payable to him at death of holder or depositor if not previously paid to latter, in 144 A.L.R. 1523 (1943), 146 A.L.R. 1498 (1943), 131 A.L.R. 967 (1941), 155 A.L.R. 174 (1945). For abstract of similar case see 42 MICH. L. REV. 944 (1944). For a case contra see 27 MINN. L. REV. 401 (1943).

distinction between law and equity has been abolished in Indiana, the question of the complaint's sufficiency to support a suit in equity is not before this court. *Rubens v. Marion-Washington Realty Corporation,* (Ind. 1945) 59 N.E. (2d) 907.[1]

FAIR LABOR STANDARDS ACT—MEANING OF "PROFESSION" AS USED THEREIN—The Fair Labor Standards Act exempts from its wages and hours provisions "any employee employed in a bona fide . . . professional . . . capacity." [1] Plaintiffs were employed by defendant company as machine designers at a salary exceeding $200 per month. Their work consisted of conceiving designs for machinery on order of their superior, laying out the designs, and doing the detail work on them. The work required a background of mechanical engineering and was, in the main, creative. There had been no agreement at the time of their employment as to their hours of work, and as the hours of work for the factory had increased from forty to forty-eight, and from forty-eight to fifty-one, theirs had increased also. Plaintiffs brought this action to recover additional compensation under section 7 of the act [2] for hours worked in excess of forty hours. Defendants contended that plaintiffs were employed in a "professional capacity," and were therefore exempt from the provisions of the act. *Held,* plaintiffs were employed in a professional capacity, as that term is defined by the administrator; [3] i.e., they were engaged in work predominantly intellectual and varied in character; the job required consistent exercise of discretion and judgment; the hours of work during which the nature of the work was the same as that performed by non-exempt employees did not exceed 20 per cent of the time worked, unless the non-professional duties were incident to the professional; the work required knowledge of an advanced type; it was predominantly creative; and the compensation was at least $200 per month. The court decided that the lay-out and detail work were incidental to the designing. *Auben v. Triumph Explosive, Inc.,* (Md. D.C. 1944) 58 F. Supp. 4.[4]

FEDERAL COURTS—REVIEW UNDER NATURAL GAS ACT—VENUE DISTINGUISHED FROM JURISDICTION—Section 19(b) of the Natural Gas Act of 1938 provides: "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia. . . ." [1] The Panhandle Eastern Pipe Line Co. sought a review of an order issued in a proceeding under this act in the Circuit Court of Appeals for

[1] See generally annotation on right of holders of preferred stock in respect of dividends 133 A.L.R. 653 (1941), 98 A.L.R. 1526 (1935), 67 A.L.R. 765 (1930), 6 A.L.R. 862 (1920).

[1] 29 U.S.C. (1940), § 213.
[2] 29 U.S.C. (1940), §§ 207, 208.
[3] Regulation ¶ 541.3, Oct. 24, 1940, 5 FED. REG. 4077.
[4] For annotation on the point involved see 151 A.L.R. 1089 (1944).

[1] 16 U.S.C. (1940) § 717r(b).

the Eighth Circuit, and in its petition for review stated that its principal place of business was in Kansas City, Missouri. The circuit court of appeals affirmed the Commission's order and thereafter the City of Cleveland filed a brief as amicus curiae challenging the jurisdiction of the court over the subject matter on the ground that petitioner did not have his principal place of business in the eighth circuit. The Supreme Court granted a petition for a writ of certiorari. *Held*, that the statute contained a general grant of authority to all courts of appeal, and the question of which court should exercise the power in a particular case is a question of venue: the right to proper venue may be waived if not seasonably raised, and since neither party to the proceeding below raised it, it was waived. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, (U.S. 1945) 65 S. Ct. 821.

LABOR LAW—NATIONAL LABOR RELATIONS ACT—EXCLUSIVE RIGHTS OF BARGAINING REPRESENTATIVE AS TO ADJUSTMENT OF INDIVIDUAL GRIEVANCES AND DEDUCTION OF UNION DUES—The employees of the Hughes Tool Company were represented in part by the Independent Metal Workers' Union, in part by the United Steelworkers, and in part by an A. F. of L. affiliate. The United Steelworkers was certified as bargaining representative by the N.L.R.B. Thereafter the company entered into a collective bargaining agreement with the United Steelworkers but continued the practice, in which it had long engaged, of deducting dues of Independent members upon written authorization by the individual employee, and continued to adjust individual grievances with the individual or with the representative of his particular union. At the instance of the United Steelworkers the N.L.R.B. conducted a hearing at which it found that deducting dues for Independent members, handling grievances without calling in the Steelworkers, and permitting the Independent to represent its members in the adjustment of grievances were acts in derogation of the Steelworkers' exclusive right to bargain, and ordered the company to cease and desist. The company petitioned this court to set aside the order and the court *held* that the decree of the board would be enforced if, within thirty days, the board would modify it "to require the company specifically to cease and desist from failing to notify the Steelworkers of grievances not presented by it before adjusting them, except those presented to foremen under the contract, and from adjusting grievances through any other union. . . ." [1] The court thought that section 9 (a) of the act intended to distinguish between collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment and "grievances." In the case of the latter, the representative does not have the exclusive right to present the grievance; it may be presented by the individual, but unless it is presented in the manner provided by contract, notice must be given the representative so that he may determine whether any other issues are involved. But the right of the individual to present his own case does not include the right to be represented by an organization other than the bargaining agent. Collection of dues, the court thought, is not a matter in the nature of collective bargaining, under the act, and so long as done impartially, no law forbids the company to deduct dues for members of other unions upon their request. *Hughes*

[1] Principal case at 75.

Tool Co. v. National Labor Relations Board, (C.C.A. 5th, 1945) 157 F. (2d) 69.[2]

TAXATION—"FUTURE INTERESTS" UNDER THE GIFT TAX LAW—The Revenue Act of 1932 provides that in case of gifts "other than future interests in property" the first $5,000 need not be included in the total amount of gifts made during the year, for purposes of gift tax returns.[1] "Future interests" are defined in the Treasury Regulation to include ". . . interests or estates . . . which are limited to commence in use, possession, or enjoyment at some future date or time. . . ." [2] Petitioner and her now deceased husband claimed the statutory exclusion for each of seven gifts made to seven irrevocable trusts set up by themselves for their seven grandchildren. The purpose of the trusts as stated in the trust instruments was "to provide for the support, maintenance and education" of each beneficiary, "using only the income . . . if it be sufficient," but "if it be necessary to use any of the corpus of the estate for that purpose and in the judgment of the Trustees it is best to do so, said Trustee may make advancements out of the corpus of the said trust estate for such purposes. . . ." The instruments go on to say, however, that it is contemplated that the beneficiaries will have other means of support, in which case the income of the trust estate should be passed to capital and the capital and accumulated income should be given to the beneficiary, 25 per cent when he is twenty-five years of age, 33 1/3 per cent when he is thirty, and the remainder when he is thirty-five. The Commissioner of Internal Revenue disallowed the exclusions on the ground that the gifts were of "future interests in property" under the above quoted section of the Revenue Act. The Tax Court upheld the commissioner's decision [3] and the circuit court of appeals affirmed.[4] On certiorari, *held*, affirmed. "The case is one . . . in which the gift, if presently vested, made enjoyment contingent upon the occurrence of future events, not only uncertain, but by the recitals of the instrument itself improbable of occurrence. The gifts consequently were of 'future interests in property' within the meaning of Section 504(b)." [5] *Fondren v. Commissioner of Internal Revenue*, (U.S. 1945) 65 S. Ct. 499.

WILLS—PERFORMANCE OF CONDITION IN A WILL—The will of Selma Kaufman, deceased, provided for a trust for the equal use of certain beneficiaries, but provided that, if during the existence of the trust any country in which any beneficiary resides should be at war with the United States, then the share of that beneficiary should immediately terminate and should, after six months, be divided equally among the beneficiaries who are within the United States. It was provided further that: "The decision of the trustee with reference to any distributions of principal and income hereunder or as to matters of residence of

[2] On right of employer to settle disputes with individual see 44 COL. L. REV. 97 (1944).

[1] Section 504, 47 Stat. L. 169 (1932).
[2] Treas. Reg., 1936 ed., Art. 11.
[3] 1 T.C. 1036.
[4] 141 F. (2d) 419 (1944).
[5] Principal case at 503.

beneficiaries shall be final and conclusive and shall not be subject to question or review by anyone." [1] The trustee determined that three of the named beneficiaries were residents of Germany, who was at war with the United States during the existence of the trust, and petitioned the court below for a decree ratifying his action and authorizing him to distribute the foreign legatees' shares between the other two beneficiaries. Answers were filed by the Alien Property Custodian and by the guardian ad litem appointed by the court to represent insane persons or minors, known or unknown, who might be interested. The court overruled the guardian's motion to stay the proceeding and his demurrer, and, having found that the trustee acted in good faith, rendered a decree in his favor. On appeal, *held*, affirmed, modified and remanded. The court could not order the enforcement of the trustee's determination unless it found that the will has been properly interpreted, and that enforcement would be just and equitable under existing conditions, and the alien legatees are entitled to be heard on these questions. The decree of the circuit court is modified so that it will be interlocutory, and so that its effect will be suspended until the circuit court shall upon application find that there is such a termination of hostilities as to permit such foreign legatees voluntarily to remove from Germany or have free communications with residents of the United States. *Sanderson v. Gabriel*, (Ala. 1945) 21 S. (2d) 256.

ZONING—ORDINANCE RESTRICTING SALE OF LIQUOR IN RESTAURANTS LOCATED NEAR OTHER RESTAURANTS AS ZONING ORDINANCE—An ordinance of the city of Meriden prohibits the sale of alcoholic liquor in restaurants which are within three hundred feet of another restaurant which sells liquor. In an action for a writ of mandamus to require the city clerk to certify to the Liquor Control Commission that zoning ordinances and by-laws of the city do not prohibit the sale of liquor in the premises of the relator, the question raised was whether the above ordinance constituted a zoning regulation, or merely an independent police regulation. If it was a zoning regulation it was invalid, since the terms of the Massachusetts statute requiring a hearing and publication of notice of such hearing upon the adoption of proposed ordinances [1] was not complied with. *Held*, the judgment of the lower court in favor of the relator affirmed. Whether or not a regulation is part of the general plan of zoning in the city depends upon the "nature and purpose of the ordinance, its relation to the general plan . . . its provisions and the terms it uses." [2] The original zoning laws of Meriden were enacted during prohibition, and therefore did not regulate places for the sale of liquor. The ordinance in question (together with another ordinance passed at the same time), when read with the original zoning ordinances, provides such regulations. Furthermore, the ordinances in question are in language that is usual in zoning ordinances; together they cover six zoning districts in the city; and they contain provisions usually found in zoning ordinances. *State ex rel. Spiros v. Payne*, (Conn. 1945) 41 A. (2d) 908.[3]

[1] Quoted by court at 258.

[1] Mass. Gen. Stat. 1930, § 425.
[2] Principal case at 911.
[3] See 37 HARV. L. REV. 834 (1924).