Michigan Law Review

Volume 44 | Issue 3

1945

ABSTRACTS

Mary Jane Plumer
University of Michigan Law School

ABSTRACTS

Mary Jane Plumer *

APPELLATE PRACTICE—ATTORNEY AND CLIENT—RIGHT OF MEMBER OF BAR TO APPEAL FROM ORDER ADMITTING ANOTHER TO THE BAR—Shields, a member of the bar of New London County, Connecticut, appealed from a decision of the superior court of that county granting the application of one Dodd for admission to the bar on motion without examination. Dodd moved that the appeal be erased from the docket on the grounds that: (1) Shields was not a party to the action; he had no interest in it, and he was not aggrieved by the court's decision. (2) The action of the court in admitting Dodd was not a final judgment. *Held,* motion to erase the appeal denied. The fact that the court rule requires members of the bar to be notified of the bar meeting at which the application is to be considered and of the court hearing on the application entitles an attorney who has contested the matter at the hearing to take an appeal upon the issues decided against him. The judgment admitting the applicant "expresses the final action and judgment of the court. It is as final as any judgment could be under the circumstances." [1] *Application of Dodd,* (Conn. 1945) 42 A. (2d) 36.

CONSTITUTIONAL LAW—RIGHT TO COUNSEL—HABEAS CORPUS—Charles Williams petitioned the Supreme Court of Missouri for a writ of habeas corpus on the ground that he had been deprived of counsel contrary to the due process clause of the Fourteenth Amendment. His petition stated that he had been charged with armed robbery; that he had requested counsel and had not waived

* Managing Editor, MICH. L. REV.

[1] Principal case at 38.

his constitutional right to the aid of counsel, but that counsel had not been appointed; that being incapable of making his own defense, he had been "compelled to plead guilty," and that he had been convicted and sentenced to a term in the state penitentiary where he was confined at the time of the action. The Supreme Court of Missouri denied the petition without requiring the state to present its case, and without delivering an opinion, on the ground that it stated no cause of action. The Supreme Court of the United States granted certiorari and *held*, reversed. A judgment based upon a plea of guilty is not to be "lightly impeached"; but in the case of a plea of guilty to robbery, which is a capital offense in Missouri, by one who was "incapable of adequately making his own defense," the rule of *Powell v. Alabama* is applicable.[1] There it was said that "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy or the like, it is the duty of the court whether requested or not, to assign counsel for him as a necessary requisite of due process of law." [2] If the allegations in the petition in this case are true, petitioner was denied due process of law.[3] Justice Frankfurter delivered a dissenting opinion concurred in by Justice Roberts which was based on the theory that the Missouri decision, handed down without opinion, since it can reasonably be justified on failure to comply with a requirement of Missouri law, must be so justified and affirmed. *Williams v. Kaiser*, (U.S. 1945) 65 S. Ct. 366.[4]

CORPORATIONS—APPLICATION OF BY-LAW RESTRICTING ALIENABILITY OF STOCK WHERE STOCK DISPOSED OF BY WILL—A corporation by-law provides that the exclusive procedure for transferring stock in the corporation shall be to offer it first to the corporation, and if it is not taken within five days, to offer it then to the stockholders, and if none of them offer to purchase it within five days, the holder is then privileged to sell it. This court is asked to decide whether this provision prevents a stockholder from disposing of his stock by will. The district court decided that it did not. *Held*, affirmed. The requirement of the by-law "obviously means that the stockholder must make these offers before he voluntarily transfers his stock, not that he must make them before he dies." [1] *Stern v. Stern*, (C.C.A. D.C. 1945) 148 F. (2d) 870.

[1] 287 U.S. 45, 55 S. Ct. 55 (1932).

[2] Id. at 71.

[3] In a companion case to the principal case, decided the same day, the petition of a prisoner stated that he was charged with murder in the first degree, pleaded guilty and was sentenced to death. In the proceedings "he was not represented by counsel and the court did not make an effective appointment of counsel." The Supreme Court of Missouri denied the petition and the Supreme Court of the United States, on certiorari, reversed. Justices Frankfurter and Roberts again dissented. Tompkins v. Missouri, (U.S. 1945) 65 S. Ct. 370. Compare Hawk v. Olson, (U.S. 1945) 66 S. Ct. 116.

[4] See 43 MICH. L. REV. 761, items 76, 77, 78 (1945). See also Holtzoff, "The Right of Counsel under the Sixth Amendment," 68 N.J.L.J., 1, 3, 7, 29, 31, 35 (Jan. 4, 25, 1945); and for discussion of another case involving constitutional right to counsel see 42 MICH. L. REV. 1125 (1944).

[1] Principal case at 870.

DAMAGES—MEANING OF "MARKET VALUE"—Plaintiff, a retail dealer, brought an action against defendant for conversion of six drums of denatured alcohol. The conversion occurred at a time when, in the court's view of the evidence, there was no wholesale market, and only a little alcohol available on the retail market. The question raised was whether plaintiff was to be held to the O.P.A. ceiling price from wholesalers to retailers of 87 cents a gallon, or whether he could recover on the basis of the rate of $1.40 prevailing in the only available market. The district court awarded damages on the basis of the O.P.A. wholesale ceiling and was reversed by the supreme court. On appeal to the court of errors and appeals, *held*, judgment of the supreme court affirmed. The applicable measure of damages in conversion is the market value of the goods at the time the conversion occurs. Market means "that phase of commercial activity in which articles are bought and sold. . . . It is a meaningless use of formula to say . . . that the measure of recovery was the value in the wholesale market when there was no such market. The O.P.A. ceiling prices were not promulgated to protect one who converts another's property from making the owner whole in accordance with the established rule of recovery." [1] *Zemel v. Commercial Warehouses*, (N.J. 1945) 40 A. (2d) 642.

EQUITY—POWER OF FEDERAL DISTRICT COURT TO MODIFY FINAL DECREE IN PATENT CASE ON BASIS OF LATER DECISION IN CIRCUIT COURT INVALIDATING PATENT—The Lehman Company brought an action against Appleton Toy and Furniture Company in the United States District Court for the Eastern District of Wisconsin for infringement of a patent. The court held that the patent was valid and granted an injunction and damages for infringement. The injunction was modified in respect to damages for past infringement and costs, in accordance with an agreement between the parties making Appleton a non-exclusive licensee and calling for the payment of royalties, and, as modified, the injunction was made final. Subsequently, the Lehman Company sued a second company in the United States District Court for the Northern District of Illinois for infringement of the same patent; the patent was held invalid, and the decision was affirmed in this court. In a petition to the court out of which the injunction issued, Appleton prayed that the interlocutory and final decrees be modified to declare the patent invalid; that the injunction be dissolved; and that petitioner be awarded judgment for the amount paid in royalties both before and after the date on which the District Court for the Northern District of Illinois declared the patent invalid. The district court denied the petition and the United States Circuit Court for the Seventh Circuit *held*, affirmed. "As between the parties the interlocutory and final decrees of the District Court for the Eastern District of Wisconsin are conclusive." Having failed to appeal, Appleton's petition amounted to a bill of review "which may only be granted for error of law apparent on the face of the record, or for new facts then existent but since discovered which would materially affect the decree or induce a different result, or for fraud in procuring the decree." That a decree is erroneous under the law and evidence by reason of a subsequent decision on the issue but between different parties does not constitute a basis for a bill of review. More-

[1] Principal case at 643.

over, so long as Appleton remained a non-exclusive licensee of Lehman, he could not raise the question of validity of the patent. *Lehman Co. of America, Inc. v. Appleton Toy & Furniture Co.*, (C.C.A. 7th, 1945) 148 F. (2d) 988.

EXECUTORS AND ADMINISTRATORS—CONSTITUTIONALITY OF STATUTE DISPENSING WITH ADMINISTRATION—A Florida statute [1] provides that when an estate is shown to be in one of the classes defined therein, any person who would be eligible to be administrator or executor of that estate may petition for an order of "No Administration Necessary." If the statutory grounds for such an order are alleged, and the allegations are found to be true, the court is obliged to enter the order, enumerating in its findings (1) the names of the legal heirs entitled to receive the estate, (2) what property of the estate, if any, is exempt from claims of creditors, (3) whether or not there are any lawful debts against the estate, and (4) the amount of real and personal property belonging to the estate. The entry is prima facie evidence of the findings therein for one year, at which time it becomes conclusive. Margaret Hart obtained an order of "No Administration Necessary" in the estate of her husband, and was named his sole heir. Appellant bank, being indebted to the husband's estate, brought this action, less than one year after the "No Administration Necessary" order was entered, to determine the order's validity. Appellant contended that it was a denial of due process of law to give the probate court jurisdiction to bind the interests of heirs and creditors who had no notice; and that if appellant were required to pay over the money claimed, it would then become liable to others who might later claim as heirs or creditors. From an adverse ruling in the lower court the bank appeals. *Held*, affirmed. The statute, properly interpreted, makes the heir, during the year immediately following the order, "the authorized agent of the law to collect debts and give acquittances for claims against the estate." [2] Thus interpreted, the statute is not unconstitutional. Devolution is a matter for legislative discretion: the legislature is competent to say that property shall pass directly to the heirs rather than through a personal representative; and creditors, having only a chose in action, may sue the heir, as may any other heir who may later show up. *Coral Gables First National Bank v. Hart*, (Fla. 1945) 20 S. (2d) 675.[3]

FUTURE INTERESTS—EFFECT OF GIFT WHEN ONE OF TWO CONDITIONS PRECEDENT VOID AS AGAINST PUBLIC POLICY—Testator, having first provided in his will that his son, George, should have a share in his estate, later

[1] Fla. Stat. Ann. (1941) §§ 735.01 et seq., 735.02, 735.04.

[2] See also Coral Gables First National Bank v. Colee, (Fla. 1945) 20 S. (2d) 675. The heir, having obtained an order of "No Administration Necessary," sued on a claim of decedent against defendant bank which claim was the estate's only asset. The defense was (1) that the estate was indebted, contrary to the statement made in the petition for the order, for the funeral expenses of the decedent, and (2) that the order was unconstitutional. The court *held*, citing the principal case, that the order was constitutional; but ordered that the amount of the judgment should be the amount claimed less the amount of the funeral expenses "which the bank may disburse to the rightful claimant.' Id. at 676.

[3] See Basye, "Dispensing With Administration," supra page 329, especially at 379, note 195.

added a codicil giving George's share in trust to another son, the income payable to George for life or "until his present wife shall have died or been separated from him by absolute divorce." If either event should occur during George's life, the principal was to become immediately payable to him; if not, then the principle was to be divided among the other children of the testator. George died before either condition was performed and his wife and son have brought this action to have the codicil declared void on the ground that it tended to promote divorce and was contrary to public morals. The circuit court decided in favor of plaintiffs and this court *held*, reversed. The gift was conditioned upon two independent contingencies; one that George should survive his wife, one that he should become divorced from her. The first was valid; the second was void. Although where a void condition is precedent, an estate conditioned thereon is also void; where the conditions are independent, the estate depending upon a valid condition precedent is valid. The trust estate should be divided among the testator's other children or their representatives. *Winterland v. Winterland*, (Ill. 1945) 59 N.E. (2d) 661.

LABOR LAW—NEWSPAPER CARRIER AS EMPLOYEE RATHER THAN INDEPENDENT CONTRACTOR UNDER OREGON UNEMPLOYMENT COMPENSATION ACT—One Johnston was awarded unemployment compensation as an employee of appellant, newspaper publisher, by the Oregon State Unemployment Compensation Commission. The statute under which the award was made defined employment as ". . . service for an employer . . . performed for remuneration or under any contract of hire. . . ." [1] The relationship between Johnston and appellant was based upon a contract under which appellant leased to Johnston a rural paper route and list of subscribers, and Johnston agreed to purchase papers from appellant; to pay for them monthly at the wholesale price; to deliver the papers promptly to subscribers; to collect from subscribers for the papers; and to turn in any advance payments to The Journal immediately. He agreed that he would not disclose without authorization the list of subscribers to anyone, and upon cancellation of the contract, that he would turn over to appellant a complete list of those persons to whom he had been delivering The Journal. Appellant could cancel the lease "for good and sufficient reason" and Johnston could give it up on thirty days notice. In addition to current collections from subscribers Johnston received from The Journal an allowance, which varied from time to time, to help cover the expense of using his automobile on the route. The circuit court affirmed the commission's decision granting compensation and on appeal to the supreme court, *held*, affirmed. ". . . the test of coverage of the law is whether a case falls within the statutory definitions, which are 'broader than the scope of the employer-employee relation or that of master and servant as those terms are known to the common law.' " [2] It has been held in Oregon that sale of a product to the purchasing public is a "service" within the meaning of the statute; [3] and appellant's attempt to distinguish this case on the ground that here

[1] Ore. Comp. Laws Ann. (1940) § 126-702(f).

[2] Principal case at 574.

[3] The court cited Rahoutis v. Unemployment Compensation Commission, 171 Ore. 93, 136 P. (2d) 426 (1943); Singer Sewing Machine Company v. State Unem-

the relationship was one of vendor-vendee must fail, since, Johnston being "bound by contract to sell and deliver the papers promptly to a list of subscribers which was the property of the plaintiff and to repeat the process daily," [4] that term does not apply to the relationship. Remuneration is not necessarily an obligation from employer to employee, and it does not cease to be remuneration under the statute because the one performing services assumes part of the risk of loss. The commission's finding that Johnston received remuneration was supported by the evidence. One judge dissented. *Journal Publishing Co. v. State Unemployment Compensation Commission*, (Ore. 1945) 155 P. (2d) 570.[5]

LABOR LAW—RULE AGAINST SOLICITATION OF ANY KIND IN PLANT AS UNFAIR LABOR PRACTICE—Petitioner, Republic Aviation Corporation, had adopted, before any union activity had begun in its plant, a rule against "soliciting of any type . . . in the factory or offices." An employee who persisted after being warned in passing out union application cards to employees during his lunch periods, was discharged. The N.L.R.B. decided that the "promulgation and enforcement of the 'no solicitation' rule violated section 8(1) [1] of the N.L.R.A., as it interfered with, restrained and coerced employees in their rights under Section 7 [2] and discriminated against the discharged employees under Section 8(3)," [3] and directed that the discharged employees be reinstated with back pay and that "the rule against solicitation insofar as it prohibits union activity and solicitation on company property during the employees own time" [4] be rescinded. The circuit court of appeals affirmed and the Supreme Court granted certiorari. Petitioner contends that the board based its order not upon substantive evidence but upon its knowledge of industrial relations; they object that there was no finding by the board that the rules of the employers interfered with and discouraged union organization; or that the plant's physical location made solicitation elsewhere ineffective. *Held*, affirmed. In view of the administrative presumption that a rule prohibiting union solicitation by an employee outside of working hours is an unfair labor practice, unless the employer can show special circumstances, the ruling of the N.L.R.B. was correct. *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 65 S. Ct. 982 (1945).

REPLEVIN—POWER OF COURT TO RETAIN SUIT FOR OTHER PURPOSES AFTER WRIT OF REPLEVIN QUASHED—Plaintiff sought to begin an action designated by statute as replevin to recover certain property, then in the hands of

ployment Compensation Commission, 167 Ore. 142, 203 P. (2d) 708 (1940), 116 P. (2d) 744 (1941).

[4] Principal case at 575.

[5] For a similar case decided under the N.L.R.A. see 12 GEO. WASH. L. REV. 242 (1944). See also 151 A.L.R. 1331 (1944); 144 A.L.R. 740 (1943); 152 A.L.R. 520 (1944); 129 A.L.R. 525 (1940).

[1] 29 U.S.C. (1940) § 158 (1).

[2] 29 U.S.C. (1940) § 157.

[3] Principal case at 984.

[4] The court quoted at p. 984 from the board's opinion, 51 N.L.R.B. 1186 at 1189 (1944).

defendant, to which plaintiff claimed to be entitled under the terms of a chattel mortgage. He filed a petition setting forth the facts on which his claim was based, served a summons issued thereon upon defendant, and procured a paper purporting to be a writ of replevin under which the property in dispute was seized. Thereafter the writ was quashed for want of the clerk's signature and an alias writ subsequently procured was also quashed, although the possession of the property was retained by plaintiff. Plaintiff then amended his petition, alleging that possession had been taken under the chattel mortgage and asking damages and a declaratory judgment. The court first granted plaintiff the relief requested and then, upon application of defendant, granted a new trial and dismissed the action, on the ground that the court was without jurisdiction in a replevin action so long as no writ of replevin had been issued. On appeal, *held*, reversed and judgment for plaintiff reinstated. The statute provides for an action called replevin to take the place of the common law actions of replevin and detinue.[1] The court acquired jurisdiction of the action by the filing of the petition and the issuance of the summons, and the jurisdiction was retained notwithstanding the fact that the writ of replevin was quashed. *Deschenes v. Beall*, (Wyo. 1945) 154 P. (2d) 524.

TAXATION—INCREASE IN VALUE OF OPTION AS PRESENT INCOME—Respondent received from his employer as compensation for services rendered, an option to purchase stock in another corporation at a price not less than its then market value. Later, when the market value went up, respondent exercised his option. The Commissioner of Internal Revenue determined that the difference between the option and the market value was "compensation" under the applicable provision of the Revenue Acts and regulations,[1] and taxable as income in the years in which the stock was purchased. Upon petition to review the commissioner's findings the Tax Court sustained him. The Court of Appeals for the Ninth Circuit reversed [2] on the ground that the stock was not compensation for services but that exercise of the option was a "mere purchase of a capital investment which could result in taxable income only upon sale of the stock." [3] The Supreme Court granted certiorari on a petition which asserted a conflict with the decision in *Connolly's Estate v. Commissioner*.[4] *Held*, circuit court of appeals reversed, decision of the Tax Court affirmed. When the option price is less than the market value the option has present value and might be

[1] Wyo. Laws, 1931, art. 40.

[1] Revenue Act of 1932, § 22(a) defines "gross income" as including "gains, profits, and income derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid. . . ."

Treas. Reg. 101, art. 22(a)-1 provides: "If property is transferred . . . by an employer to an employee, for an amount substantially less than its fair value, regardless of whether the transfer is in the guise of a sale or exchange, . . . such employer shall include in gross income the difference between the amount paid for the property and the amount of its fair market value to the extent that such difference is in the nature of (1) compensation for services rendered. . . ."

[2] (C.C.A. 9th, 1944) 142 F (2d) 818.

[3] Principal case at 592.

[4] (C.C.A. 6th, 1943) 135 F. (2d) 64.

found to be compensation for services rendered; but here it had no value when given, and it did not operate to transfer any shares of stock. Under these circumstances it could operate as compensation only as a means of securing a transfer at a price less than market value "or, possibly, which we do not decide, as the option might be sold when that disparity of value exists." [5] The majority of the Court thought it was plain that "the compensation for respondent's services, which the parties contemplated, . . . was not confined to the mere delivery to respondent of an option of present value, but included the compensation obtainable by the exercise of the option given for that purpose." [6] Justice Roberts thought that the judgment should have been affirmed for the reasons stated by the circuit court of appeals. *Commissioner of Internal Revenue v. Smith*, (U.S. 1945) 65 S. Ct. 591.[7]

TAXATION—MARRIAGE OR WAIVER OF INCOME CONTINGENT UPON REMAINING SINGLE AS CONSIDERATION UNDER GIFT TAX LAW—Taxpayer, one month before his marriage to one Mrs. More, transferred to her a block of stock for the reason that Mrs. More, under the terms of a trust set up by her first husband was to receive an income so long as she remained unmarried, and she was unwilling, otherwise, to give up her income to marry the taxpayer. The Commissioner of Internal Revenue ruled that this transfer of stock was subject to the Federal Gift Tax [1] and assessed a deficiency. The Tax Court upheld the commissioner's assessment, saying that marriage, though sufficient consideration to support a contract, did not satisfy the requirement of section 503 in that it was not "a consideration reducible to money value," [2] and that the loss of income was not consideration because it did not move to the taxpayer. The circuit court of appeals reversed the Tax Court, having found in the marriage agreement an "arm's length bargain and an absence of 'donative intent' which it deemed essential. . . ." [3] On certiorari, *held*, reversed. The "donative intent" test of the common law has been replaced by the test of "adequate and full consideration in money or money's worth." Under the terms of Treasury Regulation 79 a business transaction is excluded from the gift tax but the Tax Court has found that this was not a business transaction. On the question of whether the consideration must benefit the donor to be consideration under section 503, the ruling of the Tax Court was correct. Justice Roberts dissented. *Commissioner of Internal Revenue v. Wemyss*, 324 U.S. 303, 65 S. Ct. 652 (1945).[4]

[5] Principal case at 592.

[6] Ibid.

[7] Petition for rehearing denied, 65 S. Ct. 891 (1945).

[1] Revenue Act of 1932, §§ 501, 503, 47 Stat. L. 169 (1932), 26 U.S.C. (1940) §§ 1000, 1002.

[2] 2 T. C. 876 (1943). Section 503 reads: "When property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall . . . be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

[3] 144 F. (2d) 79 at 82 (1944), quoted by the Court at p. 305.

[4] Principal case discussed in Cahn, "Contract or Gift?" 80 T. & E. 489 (1945); 13 UNIV. KAN. CITY L. REV. 107 (1945). C.C.A. decision noted in 58 HARV. L. REV. 282 (1944). See also 156 A.L.R. 1025 (1945).

TAXATION—WAIVER OF DOWER AS CONSIDERATION IN GIFT TAX CASES —Pursuant to a prenuptial agreement made with his wife, the taxpayer transferred to a trust in her favor $300,000 in consideration of her promise made before their marriage to release her marital rights. The Commissioner of Internal Revenue assessed a gift tax on this transfer and this action was brought in a federal district court for a refund, on the ground that release of marital rights is "adequate and full consideration" under section 503 of the Internal Revenue Act of 1932.[1] The district court gave judgment for petitioner and the circuit court of appeals reversed. On appeal, *held*, affirmed. Since the term "adequate and full consideration" as used in the estate tax was intended by Congress to exclude relinquishment of dower and other marital rights, the words "adequate and full consideration" in the gift tax are entitled to the same interpretation, even though in the case of the inheritance tax Congress specifically provided that relinquishment of dower did not constitute "consideration in money or money's worth." Justice Reed delivered a dissenting opinion concurred in by Chief Justice Stone and Justice Douglas. Justice Roberts also dissented. *Merrill v. Fahs*, 324 U.S. 308, 65 S. Ct. 655 (1945).[2]

TORTS—LIABILITY OF EMPLOYEE OF MUNICIPAL GOVERNMENT FOR INJURIES NEGLIGENTLY CAUSED WHEN EMPLOYER IS NOT LIABLE—Plaintiff, the owner of a retail store located near a state highway, brought an action against two employees of the North Carolina State Highway Department for damages for injury to plaintiff's store and stock of goods caused by defendants' negligence in failing to take any precautions to keep out of plaintiff's store dust and dirt swept up by defendants with a sweeper and blower while they were cleaning the highway in preparation for resurfacing it. When plaintiff's evidence was in, the defendants demurred on the theory that there was no evidence that they had acted wilfully or wantonly. The lower court sustained the demurrer, and the supreme court, upon appeal, *held*, reversed. There is a rule that "an officer charged with the performance of a governmental duty involving discretion cannot be held for mere negligence with respect thereto, but on the contrary, is not liable unless his act or his failure to act, is corrupt or malicious";[1] otherwise it would be difficult to induce persons to accept public offices carrying discretionary duties. But this immunity has not been extended to a mere employee because the reason for it is absent. "The mere fact that a person charged with negligence is an employee of others to whom immunity from liability is extended on grounds of public policy does not thereby excuse him from liability for negligence in the manner in which his duties are performed, or for performing a lawful act in an unlawful manner."[2] Three judges dissented: one on the ground that if the character of the duty is ministerial, individual liability does not attach where the duties are of a public nature. This was a case of that kind. Two judges dis-

[1] 47 Stat. L. 169 (1932), 26 U.S.C. (1940) § 1002.

[2] The principal case is discussed in Cahn, "Contract or Gift?" 80 T. & E. 489 (1945).

[1] Principal case at 597.

[2] Ibid.

sented on the ground that there was not enough evidence of negligence to go to the jury. *Miller v. Jones*, (N.C. 1945) 32 S.E. (2d) 594.[3]

TRUSTS—ORAL AGREEMENT OF BENEFICIARY OF WAR RISK POLICY TO CARRY OUT DIRECTIONS OF INSURED WITH REGARD TO PROCEEDS AS CONTRACT TO ESTABLISH TRUST—Jose Bayonet, now deceased, designated as beneficiary of his war risk insurance policy one of his sisters, who is the defendant here. This action was brought by his other sisters for a share of the insurance money collected by defendant on the theory that an oral declaration of trust had been made by the insured and accepted by the defendant. There was evidence to the effect that some time before the policy was written the insured had asked defendant if she would do as he wanted with the money and she had said, "Why, sure; why not?" The lower court found that a declaration of trust was made and accepted by defendant and ruled accordingly. *Held*, reversed. The evidence established, at most, a contract to create a trust, which was of no effect because section 31 of the Personal Property Law [1] forbids an oral contract to establish a trust; and because subdivision 1 of that section forbids an oral contract that "is not to be completed before the end of a lifetime." One justice voted for affirmance on the ground that plaintiffs were seeking to enforce against the trustee a trust which was established when Jose Bayonet "placed the insurance in the name of the defendant pursuant to the arrangement previously made that it was for the benefit of all the members of the family." [2] *Blanco v. Velez*, 54 N.Y.S. (2d) 217, 269 App. Div. 113 (1945).[3]

[3] Principal case noted in 23 N.C.L. REV. 270 (1945).

[1] N.Y. Personal Property Law (McKinney 1938) § 31 (1).

[2] Principal case at 221.

[3] See 102 A.L.R. 588 (1936) on promise of beneficiary of life insurance to hold in trust for another as giving rise to a trust; on grantee's oral promise to grantor as giving rise to a trust, see 129 A.L.R. 696 (1940); 80 A.L.R. 196 (1932); 45 A.L.R. 851 (1926); 35 A.L.R. 281 (1925).