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ABSTRACTS

Mary Jane Plumer
University of Michigan Law School

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CORPORATIONS — CONSIDERATIONS INDICATING PROPRIETARY RATHER THAN DEBTOR-CREDITOR RELATIONSHIP—The Commissioner of Internal Revenue petitioned this court to review a decision of the Tax Court of the United States in which that court held that the interest paid on twenty year income debenture bonds issued by defendant taxpayer was not deductible in computing income and excess profits tax as interest on investment under the Revenue Act.[1] The defendant is a closely held family corporation organized under the laws of Indiana. The bonds in question were authorized as part of a reorganization scheme to be issued in return for preferred stock then outstanding, or to be sold to raise additional capital; but buyers were limited to stockholders in the company. The 8 per cent interest on the debentures was payable only out of net income, and defaulted payments did not accumulate. Holders at liquidation or insolvency took after all creditors and were superior only to common stockholders. The president and secretary of the corporation were trustees for the bondholders and both had purchased debentures but had not paid for them in cash. Under these circumstances the court reversed the Tax Court's decision. It *held* that the definite maturity date was not controlling since it is not unusual, and in fact the Indiana statute [2] provides, that preferred stock may have a maturity date. A case of this kind must be decided upon the provisions of the instrument evidencing the obligation in the light of the circumstances in each case. The distinguishing feature of proprietary relationship is risk, that of debtor-creditor is security. Here the debenture holders took the risk. *Commissioner of Internal Revenue v. John Kelley Co.*, (C. C. A. 7th, 1944) 146 F. (2d) 406.[3]

* Managing Editor, MICHIGAN LAW REVIEW.

[1] Revenue Act 1936 §§ 23 (b), 115 (a), 26 U.S.C.A., Int. Rev. Code (1940), § 23 (b), 115 (a).

[2] Burns' Ann. St. Ind. (1933), § 25-205.

[3] See 43 MICH. L. REV. 628 (1944); 123 A.L.R. 856 (1939).

CORPORATIONS—DUTY OWED TO OTHER STOCKHOLDERS BY ONE DISMISSING APPEAL, TAKEN UNDER CHANDLER ACT, FROM CONFIRMATION OF REORGANIZATION PLAN—Respondents, preferred stockholders in the Higbee Company, appealed from the confirmation of a plan for the reorganization of that company under the Bankruptcy Act,[1] basing their appeal largely on objections to allowances for junior indebtedness which prejudiced preferred stockholders, and asking that the confirmation be set aside. Subsequently they sold their stock and their appeal to the claimants under the junior debt, for seven times the market value of the stock. After attempting unsuccessfully to intervene in the appeal one Young, a preferred stockholder of the same class as respondents, filed a petition in the district court to compel respondents to account to the debtor corporation, or to themselves for the amount received over and above the fair value of the stock. The district court affirmed a special master's finding that respondents had appealed on their own behalf and not as representatives of a class, and dismissed the petition. The Circuit Court affirmed,[2] and the Supreme Court granted certiorari. *Held,* reversed. Where two preferred stockholders appealed as individuals but relied on the fact that every other preferred stockholder, as well as themselves, would be injured by confirmation, they owed a duty to other preferred stockholders to deal fairly with their rights, and could be required to account for proceeds of the sale when the appeal was dismissed by stipulation. The court also considered the fact that the respondents had appealed under the Chandler Act,[3] and since the purpose of that act is to protect creditors from each other, and to secure a ratable distribution of the bankrupt estate, it cannot be said that Congress intended that the right of appeal should be sold to the prejudice of other creditors. *Young v. Higbee,* (U.S. 1945) 65 S. Ct. 594.

INSURANCE—EFFECT OF FACILITY OF PAYMENT CLAUSE IN LIFE POLICY ON DISPOSITION OF PROCEEDS WHEN INSURER STANDS INDIFFERENT—An endowment policy issued to one Wade provided that in the event of his death before the date of maturity of the policy, the proceeds would be paid to "the executor or administrator of the insured" unless paid in accordance with the provision that the company "may make any payment" to the insured, husband or wife or any relative by blood or marriage of the insured, "or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his burial." Before his death, Wade made a written application to the company requesting that they designate plaintiff as beneficiary, subject to the company's option to pay to any of the aboved named persons, including the executor or administrator. When Wade died the plaintiff contracted for the debts connected with his last illness, made arrangements for his burial, and in the meantime demanded payment of the proceeds of the policy. Before consummation of plaintiff's plans, Wade's estranged wife procured the services of the Granberry Mortuary Com-

[1] 11 U.S.C. (1943), § 207, 52 Stat. L. 883-905 (1938); 11 U.S.C. (1943), §§ 501-676.

[2] (C.C.A. 2d, 1944) 142 F. (2d) 1004.

[3] (U.S. 1945) 65 S.Ct. 71.

pany to bury her husband, and on the basis of the debt thus contracted, T. C. Granberry of that company secured the appointment as administrator of Wade's estate and as such claimed the proceeds of the policy. Plaintiff brought an action in the lower court to recover the proceeds from the insurance company and at the company's instance Granberry was interpleaded. The lower court decreed that the proceeds of the policy, after allowance of attorney fees and court costs for the company and plaintiff, be paid to Granberry, personally. *Held*, reversed with instructions to the trial court to adjudge in favor of plaintiff for the proceeds of the policy and for costs. "The facility of payment clause . . . is for the protection of the insurer and does not grant or take away any cause of action from any person." [1] If, as here, the insurance company voluntarily does not discharge its obligation pursuant to the facility of payment clause, only the beneficiary can enforce payment. Plaintiff is the undisputed beneficiary under the terms of the policy; the fact that someone else paid the last illness and funeral bills does not entitle him to the proceeds unless the insurance company has chosen to exercise its option. The company is not entitled to recover costs and attorney fees since, having failed to exercise its right under the facility of payment clause, it was bound to pay the beneficiary and could not maintain interpleader between her and another. The *dissent* favored affirmance on the theory that the facts showed an intent on the part of Wade that his last illness and funeral expenses be paid out of his insurance. Therefore, plaintiff was intended only as trustee of the proceeds of the policy, and since the trustee could not carry out the trust, the court should have applied the *cy pres* doctrine and permitted the execution of the trust by Granberry. *Jenkins v. Metropolitan Life Ins. Co.*, (Colo. 1944) 155 P. (2d) 772.[2]

LABOR LAW—JURISDICTION OF DISTRICT COURT TO ENJOIN ELECTION ORDERED BY N.L.R.B. WHERE N.L.R.B. HAS EXCEEDED ITS AUTHORITY—In a representation proceeding before the N.L.R.B. under section 9(d) of the National Labor Relations Act,[1] petitioner union was found to be the successor of a company-dominated union previously disestablished by the board, and was denied a place on the ballot. Petitioner then asked this court to enjoin the regional director from conducting an election under the act on the ground that since intermediate action by the board in representation proceedings is not subject to court review, while its action in complaint proceedings is subject to review; when the board made a finding of successorship in a representation proceeding, the union was cut off from the right of appeal on the question of successorship which it would otherwise have had. *Held*, petitioner is entitled to an appropriate restraining order. The board was without authority under the act to determine a successorship question in an employee-representation proceeding. "Since . . . the Board has transgressed the bounds of its statutory

[1] The Court at p. 774 in principal case quoted from 29 AM. JUR. p. 956, § 1280.

[2] See annotation on right to enforce facility of payment clause in 28 A. L. R. 1350 (1924); 49 A.L.R. 939 (1927); and annotation on rights inter se of persons other than the insurer in respect of proceeds paid by insurer under facility of payment clause in 75 A.L.R. 1435 (1931).

[1] 29 U.S.C. (1940), § 159 (c).

authority . . . nothing further is required to justify equitable relief since clearly there is no adequate remedy at law." *Brotherhood and Union of Transit Employees of Baltimore v. Madden,* (Md. D.C. 1944) 58 F. Supp. 366.

RES JUDICATA—DISMISSAL IN FEDERAL COURT AS A BAR TO NEW ACTION IN STATE COURT ON SAME CAUSE OF ACTION—Plaintiff, as administratrix, brought suit in a state court against defendant railway for the wrongful death of her intestate. This suit was instituted by plaintiff on a pauper's oath. Upon application of the defendant the case was transferred to the federal district court. Plaintiff refused to give bond or file a pauper's oath as required by the local rules of the federal court. For this reason, the court dismissed the plaintiff's suit. She then reinstituted her suit in the state court within twelve months after the alleged wrongful death. The trial court held that the dismissal of plaintiff's case in the federal court was a bar to its prosecution in the state court and dismissed the suit. On appeal, *held,* reversed and remanded. Defendant relies on Federal Rule 41 (b) which provides that on failure of plaintiff to comply with court rules, defendant may move for dismissal of an action and "unless the court in its order for dismissal otherwise specifies, dismissal . . . other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." [1] The cases cited by defendant in support of his contention do not involve the question of a disposition on the merits. Also in none of these is reference made to the federal statute which provides that the rules shall not enlarge, abridge or modify the substantive rights of any litigant.[2] The right of plaintiff here under section 8572 of the Tennssee Code [3] to commence a new action within one year, following a judgment of dismissal without a trial on the merits, is a substantative right and Rule 41 (b) should be so construed that the rights of litigants under this section will not be impaired. The federal court did not state whether the case was dismissed with or without prejudice and it cannot be held to be a "dismissal on the merits because it is not true either in law or fact." [4] *Adcox v. Southern Ry. Co.,* (Tenn. 1944) 184 S. W. (2d) 37.

TAXATION—GIFT IN CONTEMPLATION OF DEATH BY AN INSANE PERSON—In 1926 Helen Hall Vail, incurably insane, was adjudicated incompetent by the Supreme Court of New York, and a committee was appointed to take care of her property which was then producing an income of $300,000 per annum. She was then 70 years of age. Application was made to the court to make allowances out of the income for Mrs. Vail's daughter, the three sons of a deceased daughter, and her brother and sisters. The court, after reciting that the daughter and grandchildren or their issue would be the only heirs, upon the death of the incompetent, and that if she were competent she would desire "that the allowance hereinafter fixed be made," directed that certain allowances be paid to the daughter, the grandchildren, the brother and the sisters out of Mrs. Vail's income. Later, upon the increase of the annual income, the court increased the allowances, retroactively to the date of the original order. Mrs.

[1] 28 U.S.C. (1940) following § 723c.
[2] Act of June, 1934, 28 U.S.C. (1940) following § 723c.
[3] Tenn. Code Ann. (Michie, 1938) § 8572.
[4] Principal case at 40.

Vail died in 1935, and the Commissioner of Internal Revenue included in her gross estate the total sum paid out in allowances from the date of the order of the New York Supreme Court, on the ground that the allowances were gifts made in contemplation of death and should be included under section 302 (c) of the Revenue Act.[1] It was the contention of petitioner that (1) Mrs. Vail made no transfer, and therefore could have had no motive with respect to it; and (2) that the court under the state law had no power to act on the property after the incompetent's death, and therefore, to assume that the court sanctioned transfers of a testamentary character is to assume that it exceeded its powers. *Held*, "that where, as in New York, the court is to substitute itself as nearly as may be for the incompetent, and to act upon the same motives and considerations as would have moved her, the transfer is, in legal effect, her act and the motive is hers." [2] Since in the case of the heirs, one of the strongest arguments for the order providing for the gifts was that the entire estate would go to the heirs eventually anyway, and since there was no showing of need on the part of the heirs, the gifts to them were within section 302 (c), except for the amount allowed to the daughters by Mrs. Vail while competent. As to the amounts allowed collateral relatives, that order was made on a showing of need and the gifts were not, therefore, within section 302 (c). To the extent indicated the judgment of the Circuit Court of Appeals, affirming the ruling of the Commissioner was reversed. *City Bank Farmers Trust Co. v. George T. McGowan*, (U.S. 1945) 65 S. Ct. 496.[3]

TRUSTS—STATUTE OF FRAUDS—DOES THE STATUTE WHICH EXECUTES A DRY TRUST (SIMILAR TO STATUTE OF USES) APPLY TO AN ORAL TRUST OF LAND?—John Peterson, in contemplation of death, distributed his property among his children. He deeded certain land to William under an oral trust for the use of Charles, the father of plaintiffs. Charles was indebted to the defendant in the amount of $800 and William, at the request of Charles, deeded the land to defendant. Emma, the wife of Charles and mother of plaintiffs, never consented in writing to this transfer, as she had, prior to the time of transfer, been adjudged insane and continued in that condition until her death which occurred after the death of Charles. No part of the indebtedness to defendant has ever been paid except by the land transfer. Plaintiffs sued in the lower court to determine the claim of defendant to the land and that court held that plaintiffs owned an undivided one-third thereof and defendant an undivided two-thirds thereof. On appeal by both parties, *held*, affirmed. Had John Peterson conveyed the land directly to Charles and had he died before his wife, the inchoate right of Emma to one-third of Charles' lands would have descended to her and passed to the plaintiffs. Since William had a mere passive trust in the land, a similar result

[1] 26 U.S.C. (1940).

[2] Principal case at 498.

[3] On question of when transfer deemed to be in contemplation of death see 7 A.L.R. 1028 (1920); 21 A.L.R. 1335 (1922); 41 A.L.R. 989 (1926); 75 A.L.R. 544 (1931); 120 A.L.R. 170 (1939).

is reached and Emma's undivided one-third passed on her death to her daughters, plaintiffs here.[1] *Peterson v. Anderson*, (Minn. 1944) 16 N.W. (2d) 185.[2]

WILLS—DOES RENOUNCED LEGACY PASS TO RESIDUARY LEGATEE OR TO HEIRS?—By the will of Fred Gates, Ilo Crabtree was left a legacy of $15,000 and Fred's wife, Viola, was made the residuary legatee. Ilo renounced her legacy in order that it might become a portion of Fred's estate and pass to the residuary legatee under his will. Viola was executrix of the will of her husband and, in the court order discharging her as executrix and closing the estate, a finding was made that Ilo had filed in that court her written relinquishment of rights under the will. No notice of a hearing on this matter was given to the plaintiffs, heirs of Fred, who now bring suit against Ilo in her representative capacity as executrix of the will of Viola, now deceased, asking that Fred's estate be reopened and that the estates of Fred and Viola be charged in favor of the plaintiffs with the amount of the legacy claimed to have been renounced. The trial court gave judgment for plaintiffs and defendant appeals. *Held*, reversed. The question is whether the renounced legacy should go as intestate property or by way of assignment to the heirs; or as a part of the residuary estate to the residuary legatee. There is no case directly in point in this state. The rule as stated by Page is: "If the will contains a general residuary clause, which by its terms, may pass the property in question, a renounced legacy or device passes under such residuary clause, unless the will shows testator's intention to make some other disposition . . . in case of renunciation." [1] Since the legacy was conditioned on the legatee surviving the testator and is followed by the residuary clause to his wife, it is certain he intended his wife to have all the property if the legatee did not survive him. This is unlike a case where a residuary legatee renounces so that the legacy must go as intestate property; and it is a sound rule because, when a testator attempts to dispose of all his property by will, the instrument should be construed so as to avoid intestacy, if possible. It is analagous to a lapsed legacy which passes under the residuary clause unless a contrary intent appears. *Myers v. Smith*, (Iowa 1944) 16 N. W. (2d) 628.[2]

WILLS—WHEN IS BANK DEPOSIT AGREEMENT TESTAMENTARY?—The five plaintiffs and two defendants are all brothers and sisters, children of Elizabeth Hamara, who died intestate. At the time of her death the mother and the two defendants had a joint bank account, the signature card designating all three as owners. The printed portion of the card stated that the amount deposited belonged to them "as joint tenants and not as tenants in common" with right of

[1] Minn. Stat., 1941, § 525.16, Minn. Stat. (Mason Supp., 1940) § 8992-29.

[2] Cf. Bryant v. Klatt, (D.C. N.Y. 1924) 2 F. (2d) 167 where father of defendant deeded land to him under an oral trust for the father. Defendant, on the eve of bankruptcy, reconveyed to the father. The property was held to belong to the father as against defendant's creditors, the court saying that "the law treats the trust as valid as long as the trustee does not choose to insist upon the absence of any writing" and that the grantee may recognize his "moral obligation" and his creditors cannot complain.

[1] Principal case at 632, citing 4 PAGE, WILLS, lifetime ed., 156-157 (1941).

[2] For collection of cases on interpretation of residuary clause see 10 A.L.R. 1522 (1921).

survivorship. The words, "Pay to Dtrs. only after death of mother," were written immediately above the printed matter. The defendants, after the mother's death, withdrew this fund which they claim as their property. The plaintiffs sued in assumpsit in the lower court claiming that this account is part of their mother's estate and therefore included under the terms of an agreement, executed by all the children soon after their mother's death, which provided for an equal division of her estate among all the children. From a judgment for defendant, plaintiffs appeal. *Held*, reversed. A bank account opened as a true joint account with right of survivorship ordinarily vests a present interest in the parties. This would have been such an account if the printed portion of the card had not been modified by the written words which negative the idea of a present interest vested in the defendants. This provision excluded the daughters from participating in the fund until after the death of the mother, leaving it at her disposal until that time.[1] "Such a deposit agreement was therefore testamentary in character, and the balance remaining in the account was part of the mother's gross estate." [2] This case differs from *In re Lewis' Estate* [3] where a depositor directed that his account be made a joint one with his son, "the money to be drawn only in case of my death." There the instrument was not testamentary in character as no money could be drawn by either father or son during the former's life. *Dissent.* A present interest, similar to that of the son in *In re Lewis' Estate*, supra, was here created in the daughters, although the enjoyment of such interest, by the words "Pay to Dtrs. only after death of mother" was postponed until the mother's death. *Onofrey v. Wolliver*, (Pa. 1944) 40 A. (2d) 35.[4]

[1] Pa. Stat. Ann. (Purdon, 1939) tit. 7, § 819-903 provides that when a deposit is made in the name of two or more persons the bank shall not pay out except on the order of both or all of such persons "unless at the time of making the deposit a different arrangement shall have been specifically provided for. . . ."

[2] Principal case at 39.

[3] 139 Pa. Super. 83, 11 A. (2d) 667 (1887).

[4] On bank deposits in the name of depositor and another see 149 A.L.R. 879 (1944); 135 A.L.R. 993 (1941); 103 A.L.R. 1123 (1936); 66 A.L.R. 881 (1930); 48 A.L.R. 189 (1927).