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Recent Decisions

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legal right to deal with the property or no competent person entitled to hold it.⁴⁰

Fraud may justify the appointment of a receiver⁴¹ when such was used in obtaining the property or where there is fraud coupled with other facts or circumstances such as the insolvency of defendant or insolvency and other matters.⁴²

A receiver appointed in foreclosure proceedings is an officer of the court, and not the agent of the mortgagee.⁴³ He is bound to obey the orders of the court appointing him and his authority is measured by the order of appointment and such subsequent directions as may from time to time be given. In order to consider the receiver as a trespasser his appointment must have been wrongful and it must be judicially declared void. He cannot be sued without leave of the court appointing him. It has been held that as to the mortgagor the receiver is his agent for all purposes and that such receiver is not restricted to matters between the mortgagor and the mortgagee, but may affect the mortgagor's relations with third persons.⁴⁴

Leonard J. Dunn.

RECENT DECISIONS

BILLS AND NOTES—QUALIFIED OR REGULAR INDORSEMENT?—RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.—In the case of *Fay v. Whitte*, 262 N. Y. 215, 186 N. E. 678 (1933), the defendant transferred a negotiable instrument by the following indorsement:

"I hereby assign all my right title and interest in this note to Richard Fay in full,

"Harry C. Whitte."

It was held that this was not a qualified indorsement and that the defendant was liable as a regular indorser.

A qualified indorser, according to section 65 of the N. I. L., warrants merely that the instrument is genuine, that he has good title to the instrument, that prior parties had capacity to contract and that he has no knowledge of any fact which would impair the validity of the instrument. A regular indorser, accord-

⁴⁰ *Taylor Finance Corp. v. Oregon Logging & Timber Co.*, 118 Or. 440, 241 Pac. 388 (1925).

⁴¹ "A receiver for property may properly be appointed in a suit before the defendant has answered, where the complainant can satisfy the chancellor that he has an equitable claim to the property and that the receiver is necessary to preserve it from loss, or where a clear case of fraud is shown, or from imminent danger to the property, and such procedure is especially proper in cases of creditor's bills in aid of the enforcement of judgments." *J. J. Martzik v. Fred C. Enman*, 191 Ill. App. 71 (1914), Syl. § 1.

⁴² *Martin v. Burgwyn*, 88 Ga. 78, 13 S. E. 958 (1891).

⁴³ *Robinson v. Arkansas Loan & Trust Co.*, 74 Ark. 292, 85 S. W. 413 (1905).

⁴⁴ *Hersh v. Arnold*, 318 Ill. 28, 148 N. E. 882 (1925).

ing to section 66 of the N. I. L., warrants, in addition to the things that a qualified indorser warrants, that he will pay the instrument if it is dishonored and the necessary proceedings on dishonor are taken. Thus, it is vitally important to determine whether the liability to be imposed is that of a qualified or of a regular indorser.

A regular indorsement creates two implied contracts: an executed contract of assignment and an executory contract of conditional liability. When an indorsement is in the form, "I assign my interest in this instrument," the executed contract of assignment which the law implies is specifically stated. Does this expression of the implied contract of assignment show an intention to exclude the implied contract of conditional liability? If it does these words constitute a qualified indorsement. On the other hand, if this statement of the one contract does not amount to an exclusion of the other contract, it is of no effect and leaves the transferor a regular indorser.

One line of authority adopts the maxim, "Expressio unius est exclusio alterius" (The expression of the one thing is the exclusion of another). The transferor by specifically detailing the contract of assignment meant to exclude his conditional liability and is therefore only a qualified indorser. Tiedeman, in his work on Commercial Paper, section 265, adopts this view: "The declaration that the payee assigns or transfers all his right, title and interest in the paper would seem to limit in a most effective way the rights acquired by the transferee to those which the transferor had therein, and thus prevent the writing from operating as an indorsement." This argument is also pithily stated in *Spencer v. Halpern*, 62 Ark. 595, 37 S. W. 711 (1896): "Had the payee intended to be bound as indorser, why use so many words? Had the transferee expected more than the interest of the transferor, why did he accept the instrument transferring only his interest? We must accept and interpret the completed contract as the parties made it. They have seen proper to express it at length, and have used unambiguous terms. Construing the term, 'my interest,' most strongly against the transferor we do not feel authorized to say they mean anything more than simply my interest." The cases holding this position are: *Hailey v. Falconer*, 32 Ala. 536 (1858); *Spencer v. Halpern*, *supra*; *Hammond Lumber Co. v. Kearsley*, 36 Cal. App. 431, 172 Pac. 404 (1918); *Evans v. Freeman*, 142 N. C. 63, 54 S. E. 847 (1906); *Lyons v. Divelbis*, 22 Pa. 186 (1853); *Marion National Bank v. Harden*, 83 W. Va. 119, 97 S. E. 600 (1918). *Harden*, 83 W. Va. 119, 97 S. E. 600 (1918).

The other line of authority adopts the maxim, "Expressio eorum quae tacite insunt nihil operatur" (The expression of what is tacitly implied is inoperative). In other words, the expression of the contract of assignment, which is tacitly implied, is of no effect and a regular indorsement is created. Daniel, in his work on Negotiable Instruments, section 688c, supports this view: "Does the writing over a signature an express assignment which the law imports from the signature per se, exclude and negative the idea of conditional liability, which the law also imports if such assignment were not expressed in full? We think not. . . . When the thing done creates the implication of another to be done, we cannot think that the mere expression of the former in full can be regarded as excluding its consequence, when that consequence would follow if the expression were omitted." This view is supported by the weight of authority. *Vanzant v. Arnold*, 31 Ga. 210 (1880); *Henderson v. Ackelmire*, 59 Ind. 546 (1876); *Sears v. Lantz*, 47 Iowa 658 (1878); *Farnsworth v. Burdick*, 94 Kan. 749, 147 Pac. 863 (1915); *Fannon v. Ball*, 202 Ky. 222, 259 S. W. 73 (1924); *Adams v. Blethen*, 66 Me. 19 (1877); *Main Trust & Banking Co. v. Butler*, 45 Minn. 506, 48 N. W. 333 (1891); *Maddox v. Duncan*, 143 Mo. 613, 45 S. W. 688 (1898); *Davidson v. Powell*, 114 N. C. 575, 19 S. E. 601 (1894); *Lenhart v. Ramey*, 3 Ohio C. C.

135 (1888); *Markey v. Corey*, 108 Mich. 184, 66 N. W. 493 (1895); *Copeland v. Burk*, 59 Okl. 219, 158 Pac. 1162 (1916); *Merrill v. Hurley*, 6 S. D. 593, 62 N. W. 958 (1895); *Behrens v. Kirkgard*, 143 S. W. 698 (Tex. 1912); *Citizens National Bank v. Walton*, 96 Va. 435 (1898).

The supreme court of Michigan, in the case of *Aniba v. Yeomans*, 39 Mich. 171 (1878), held that the words, "I hereby assign all my right title and interest in the instrument," constituted a qualified indorsement. The same court in a later case, *Markey v. Corey*, 108 Mich. 184, 66 N. W. 493 (1895), held that the words, "I assign my interest in the note," constituted a regular indorsement with the usual liability. In the latter case, the court held that there was a sharp distinction between the words, "I assign my right, title and interest," and the words, "I assign my interest." In the one case there is a sufficiently clear intention to create a qualified indorsement and in the other case there is not. The distinction is groundless and it appears that the court in the later case was merely trying to gracefully change its position on the point.

The rule generally followed in Indiana is that an assignor is not a qualified indorser. *Henderson v. Ackelmire*, 59 Ind. 540 (1876). But in the case of *Bond v. Holloway*, 18 Ind. App. 251, 47 N. E. 853 (1897), it was held that where the instrument is payable to two payees jointly, an assignment of the interest of one payee to the other payee is a qualified indorsement. The holding is not as anomalous as it seems since where the assignment is from one joint payee to the other, the parties merely intended to make one party the owner of the entire instrument.

In most cases, parties who make and accept an indorsement in the form of an assignment do not understand the nature of the legal relationship they are forming. It is useless for the courts to try to discern the intent of the parties from the uncertain expression since the parties themselves had no precise intention. Therefore consideration should be given to common equitable principles in solving the problem. The assignee has paid a valuable consideration for the instrument. He has had no notice that the assignor intended merely to transfer the title of the instrument and to negative his conditional liability. The assignee is therefore entitled to the instrument with the usual conditional liability of the transferor attached in the absence of a clearly expressed intention to the contrary.

Louis Jackson.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—REGULATION OF TRADE OR BUSINESS IN GENERAL.—*People v. Nebbia*, 202 N. Y. 259, 186 N. E. 694 (1933), is a decision of the Court of Appeals of New York rendered July 11, 1933, dealing with the police power of the state to regulate private business in a "paramount industry," under "exceptional circumstances" and the legal effect of a legislative finding and declaration of a public emergency. In view of the probability that the police power will be invoked to sustain the constitutional validity of the National Industrial Recovery Act passed by the recent Congress, the decision is of immediate importance. Also, it illustrates the elasticity of constitutional provisions under an application of the police power, to keep pace with changing economic conditions. The facts were as follows:

Leo Nebbia was convicted of violating an order of the Milk Control Board which was created by an act of the New York Assembly, in 1933, and given power to fix minimum and maximum prices of milk for retail and wholesale disposition. This act contained certain findings of fact made by the legislature which passed the act, and one of the questions in the case was what the legal effect of such findings was. Affirming the conviction, the Court of Appeals sustained the

validity of the act and findings. The chief question in the case, however, is stated by the court to be the constitutional right of the state to regulate private business and industry under the police power. This is the language of the court:

"The fixing of minimum prices is one of the main features of the act. The question is whether the act, so far as it provides for fixing the minimum prices for milk, is unconstitutional under New York Constitution, article 1, section 6, and United States Constitution, Fourteenth Amendment, in that it interferes with the right of the milk dealer to carry on his business in such manner as suits his convenience, without state interference as to the price at which he shall sell his milk."

The decision makes a sharp distinction between normal economic conditions and those prevailing during an emergency. During the course of the opinion, the court says:

"It is argued that the Supreme Court of the United States has definitely excluded the production and sale of food from the field of price regulation. This is not so. *Wolf Packing Co. v. Court of Industrial Relations of State of Kansas*, 262 U. S. 522, 43 S. Ct. 630, 67 Law. Ed. 1103, 27 A. L. R. 1280. Even if it were true under normal conditions, the same might have been said of the regulation by law of rents. Yet, when an emergency arose after the war, resulting in burdensome rental conditions, emergency rent laws, temporary in their nature, were upheld. *Block v. Hirsch*, 256 U. S. 135, 41 S. Ct. 458, 65 Law. Ed. 865, 16 A. L. R. 165."

The following highly significant language appears near the close of this opinion:

"With full respect for the Constitution as an efficient frame of government in peace and war, under normal conditions, or in emergencies, with cheerful submission to the rule of the Supreme Court that legislative authority to abridge property rights and freedom of contract can be justified only by exceptional circumstances and, even then, by reasonable regulation only, and that legislative conclusions based on findings of fact are subject to judicial review, we do not feel compelled to hold that the "due process" clause of the Constitution has left milk producers unprotected from oppression and to place the stamp of invalidity on the measure before us."

One of the several questions which might arise under this decision is, When does such an "emergency" cease to exist?

*William M. Cain.**

HUSBAND AND WIFE — POST-NUPTIAL AGREEMENTS OF SEPARATION — BAR TO WIDOW'S STATUTORY ALLOWANCE.—The appellant married Higgins and after living as man and wife for four years they separated and did not cohabit thereafter. At the date of separation the parties entered into a written property settlement whereby the husband agreed to pay certain sums of money to the appellant and to transfer to her certain chattel properties; the appellant agreed to accept the monies and chattels; to release and waive all claims in any property her husband then owned or might subsequently own; and agreed "to forever relieve and release the second party (husband), from providing for any support and maintenance of the first party." Higgins performed. In May, 1931, he died and the appellant widow filed her verified claim for the statutory widow's allowance. The appellee administrator answered, alleging the execution and performance of the settlement contract. The statutory allowance was denied. *Held*, under the agreement the wife had relinquished her right to the statutory allowance. *Higgins v. St. Joseph Loan and Trust Co. of South Bend*, 186 N. E. 910 (Ind. 1933).

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This decision is not unusual in its conclusion, nor does it deviate in its basis from the bases upon which similar decisions have proceeded. The court applied the general rules for the construction of contracts for the purpose of ascertaining the intention of the parties. It construed the release and relief of "any" support to mean a release of all support; that the time intended was not the natural life of the husband since the period was specifically described by the use of the term "forever." So the decision rests upon the intention of the parties as evidenced by the contract.

In California a statute provides for an allowance for the "family" of the deceased. And the decisions of that state deny an allowance following a post-nuptial agreement of settlement and separation, the decisions being based upon the family relationship. *In Re Estate of Noah*, 73 Cal. 583, 15 Pac. 287 (1887), held the widow "did not constitute the immediate family of the deceased, within the meaning of the statute"; *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358 (1892), held "the right to support rested upon the family relationship" which did not exist after an agreement of separation was carried out; and *In Re Yoell's Estate*, 164 Cal. 540, 129 Pac. 999 (1913), held "the wife was not a member of the family." In Massachusetts the allowance "is a question solely of her (widow) actual necessities," and the widow being given separate property by the post-nuptial agreement is not entitled to an allowance. *Hollenbeck v. Pixley*, 3 Gray (Mass.) 521 (1855). The widow was denied allowance in *Fisher v. Clopton*, 110 Mo. App. 663, 85 S. W. 623 (1905), the court saying the "contract for separation, being irrevocable, will bar allowance, provided it appears in such contract that it was the intent and purpose to renounce all claims in the husband's property." Allowance was refused in North Dakota because an agreement of separation destroys the ordinary family relationship and the "Legislature unquestionably had in mind the usual and ordinary cases where the parties to the marriage relation domicile together and exist as a family." *Fisher v. Fisher*, 207 N. W. 434 (N. D. 1926). Pennsylvania and Utah follow California in holding that under such an agreement, the widow is not a member of the husband's family at the time of his death. *Speidel's Appeal*, 107 Pa. 18 (1884); *In Re Arnou's Estate*, 283 Pa. 49, 128 Atl. 661 (1925); *In Re Park's Estate*, 25 Utah 161, 69 Pac. 671 (1902).

The court in the case of *Deeble v. Alerton*, 58 Colo. 166, 143 Pac. 1069 (1914), arrived at a decision opposite to the cases cited above, granting an allowance after a separation agreement. However, the case is not *contra* in principle. It differs from the case at hand in that the agreement provided that neither party should have or claim any part of the other's estate. The court held a waiver of allowance was not to be presumed, saying, "If it [the allowance] may be waived at all, it must be in terms that do not admit of doubt." Thus it may reasonably be inferred that where the intention to waive was clear and unambiguous, the court would disallow the widow's claim; and the case may thus be reconciled with the present Indiana decision.

Aside and apart from the fact that the present case is in accord with cases from other jurisdictions in denying a statutory allowance to a widow after an agreement of separation and settlement, it is only reasonable that the court should arrive at such a decision. The purpose of the statute providing for a widow's allowance is to charge the husband's estate that the widow may have a means of support during the period from the husband's death until the settlement of his estate. Surely, if the post-nuptial contract releases the husband from support of his wife during his life, his estate should be discharged of such a claim where the contract clearly shows the intention of the parties to be the relinquishment of all claims subsequent to the making of the contract. And, as the court remarks, what other construction can be placed upon a release of "any" support "forever"?

Harry Kilburger.