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Constitutional Law—Commerce Clause—Tax on Exports; Contracts for Life Employment—Performance and Breach—Consideration; Declared Dividends—Statute of Limitations—Trusts; Possessor of Business Premises—Duty to Control Third Persons; Wills—Construction of Statute—Pretermitted Heirs

W. C. I.

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RECENT CASES

CONSTITUTIONAL LAW—COMMERCE CLAUSE—TAX ON EXPORTS. Defendant, an Oregon corporation, contracted to sell several million feet of railroad ties to the Chinese government. Pursuant to this contract, defendant made purchases from various tie mills near Portland, Oregon, with directions to deliver the ties to a dock in Portland. The ties were on the dock in December, 1936, ready for loading aboard ship, but were held up for about three months by a longshoremen's strike. During this time, a tax was assessed against the property, which defendant refused to pay. *Held:* The ties were immune from taxation by the state of Oregon, since they were exports and also because they were in foreign commerce. *Multnomah County v. Dant & Russel, Inc.*, 75 P. (2d) 986 (Ore. 1938).

It is well settled that the mere intent to enter goods into interstate or foreign commerce does not immunize them from state taxation. *Bacon v. Illinois*, 227 U. S. 504 (1913); *Minnesota v. Blasius*, 290 U. S. 1 (1933). Nor does a general tax on goods, not then intended for exportation, become transformed into a duty on exports, or on interstate commerce because the goods are later exported. *Brown v. Houston*, 114 U. S. 622 (1885). Further, the assembling of goods at a point ready for interstate shipment does not, unless actual delivery is made to a carrier, put the goods out of the state taxing power. *Coe v. Town of Errol*, 116 U. S. 517 (1886).

Even after articles have been actually launched on their way out of a state, certain types of interruptions may break the transit so as to restore the state taxing power. Thus, state taxes may be levied where the transit is broken by the owner in order to subject the goods to a finishing process of some sort. *Bacon v. Illinois, supra; Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17 (1934). The same is true where the owner interrupts the transit in order to store the goods for re-sale to out-of-state customers. *Diamond Match Co. v. Village of Ontonagon*, 188 U. S. 82 (1904). In these cases the goods are brought to rest for the purposes of the owner, and he cannot be heard to complain against state taxes.

A different type of case arises where the goods are brought to rest due to the exigencies of transportation. This may be done to affect a change in method of carriage contemplated at the time of original shipment. Thus, in *Hughes Bros. Timber Co. v. State of Minnesota*, 272 U. S. 469 (1925), logs were floated to a certain place and then loaded aboard ship for carriage to the ultimate destination. Again in *State v. Hammermill Paper Co.*, 149 Minn. 414, 184 N. W. 182 (1921), the change was from railway transportation to water carriage. In both cases it was held that the continuity of interstate shipment was not broken so as to subject the goods to state taxation. Sometimes the bringing to rest in transit comes about through unforseen physical impossibility. Thus in *Champlain Realty Co. v. Town of Brattleboro*, 260 U. S. 366, 25 A. L. R. 1195 (1922), the floating of logs to another state was temporarily halted midway in the journey by high water. The court held that the logs were immune from state taxation.

Assuming, in the instant case that the transit of the railroad ties had actually begun, there is little doubt that the delay in Portland on account of the strike comes within the class of interruptions due to the exigencies of transportation. The serious question in the instant case is whether interstate transit had actually been commenced, since it was intended that the lumber should be shipped by vessel, and the ties had not yet been turned over to the steamship company. Thus, no other facts appearing, it would seem by the rule expressed in *Coe v. Errol, supra*, that the state of Oregon could validly lay a tax on the lumber. However, the ties, instead of being hauled by private means to the dock in Portland, had been delivered from various parts of Oregon by common carrier—*i. e.*, by trucking companies. In view of this fact, it can be plausibly argued in defense of the decision that the ultimate journey had begun and that the carriage to Portland was something more than a mere preliminary assembling of the timbers.

The authorities used by the Oregon court are not entirely convincing. The court relied mainly on the railroad rate cases, where the problem is to ascertain when goods are in interstate commerce so as to be subject to the regulation of the Interstate Commerce Commission. This problem is not in all respects identical with that arising where states levy taxes on goods allegedly in interstate commerce. For example, the first case discussed by the Oregon court is the case of *Southern Pac. Terminal Co. v. Interstate Commerce Comm.*, 219 U. S. 498 (1911). In that case, cotton was purchased throughout the state of Texas for delivery at Galveston, where it was reprocessed and shipped out of the state. The court held that the cotton was nevertheless in interstate commerce so as to be subject to the regulation of the Interstate Commerce Commission. But the rule in the tax cases, as shown by *Federal Compress & Warehouse Co. v. McLean, supra*, is that where the owner interrupts the transit for the purpose of putting a finishing process on the goods, they become subject to local taxation. Consequently, the rate cases seem to be doubtful authority for the type of problem raised in the case under consideration.

W. C. I.

CONTRACTS FOR LIFE EMPLOYMENT—PERFORMANCE AND BREACH—CONSIDERATION. Plaintiff left his present position and went to work for defendant at the request of the president of the defendant company and upon his assurance that he could work for the rest of his life. After a few months plaintiff was laid off, and later, dismissed. *Held*: The employment was one at will only, there being no consideration moving to the defendant from the employee to support a contract for life employment other than the current service. *Heideman v. Tall's Travel Shops, Inc.*, 192 Wash. 513, 73 P. (2d) 1323 (1937).

An employment contract should be subject to the same rules and considerations as others. These rules concern themselves with a determination of the intention of the parties and an attempt to place this intention within one of the accepted categories of legally enforceable contracts.

Contracts of employment which do not purport to be for a definite period, or in which the period is so indefinite as to be incapable of reasonably accurate determination, are terminable at the will of either party. I WILLISTON, CONTRACTS (2nd ed. 1936) § 39; 1 LABATT, MASTER AND SERVANT (2nd ed. 1913) § 159. These contracts are unilateral, the performance of the service giving rise to the obligation to pay for it, there being no promise to furnish employment and no promise to work. RESTATEMENT, CONTRACTS (1932) § 12. If the contract is one in which the employer promises to provide employment for a definite period, and the employee to work for that period, there is a bilateral contract, *ibid;* and a breach of this agreement by either party should give rise to an action for damages.

If the period of employment has been expressed as being "permanent" or "for life" the contract does not fall squarely within either of these classes. They have been handled in different ways by the courts with various results, but without a thorough analysis of the type of contract with which they were dealing. It is commonly recognized that a contract of this kind, if supported by consideration, will be sustained. *Heaman v. Rowell*, 261 N. Y. 229, 185 N. E. 83 (1933). The cases hold that the absence or presence of consideration is merely a factor to be considered in the interpretation of the contract to determine, with other circumstances, whether the parties really intended that the contract should be for life employment. Thus, where the employer promises permanent employment in consideration for the employee's giving up a claim for damages for personal injuries, the contract is generally construed as meaning that the employee will have a job for as long as he is able and willing to perform and the employer has work for him to do. Such contracts are uniformly held to be supported by adequate consideration. *Pierce v. Tenn. Coal, Iron & R. R. Co.*, 173 U. S. 1 (1899); *Harrington v. Kansas City Cable R. Co.*, 60 Mo. App. 223 (1895); *Louisville & Nashville R. Co. v. Cox*, 145 Ky. 667, 141 S. W. 389 (1911). A like result has been reached in cases in which the independent consideration, aside from the performance of the service itself, was the giving up of another position. *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488 (1897); *Riefkin v. DuPont De Nemours & Co.*, 290 Fed. 286 (App. D. C. 1923). On the other hand a large number of cases hold that the giving up of other interests and activities is not such consideration as will support a contract for life employment, this being something that almost every desirable employee does upon entering a new service. *Minter v. Tootle, Campbell Dry Goods Co.*, 187 Mo. App. 16, 173 S. W. 4 (1915); *Lord v. Goldberg*, 81 Cal. 596, 22 Pac. 1126 (1889); *Heaman v. Rowell*, *supra*; *Arentz v. Morse Dry Dock Co.*, 249 N. Y. 439, 164 N. E. 342, 62 A. L. R. 342 (1928); *Rape v. Mobile & O. R. Co.*, 136 Miss. 38, 100 So. 585, 35 A. L. R. 1422 (1924). These cases also emphasize the fact that the contract lacks mutuality of obligation in that the employee is not bound to stay with the job, while the employer is bound.

It is suggested that the usual situation in which the employer requests the service of the employee, or gives him the opportunity to work, is not a contract, but rather an offer which becomes a contract only upon performance of the requested service. See WILLISTON, CONTRACTS (2nd ed. 1936) § 36. If the parties themselves intended that the giving up of another position, or the relinquishment of a claim for damages, should be the act of performance on the part of the employee, and the employee did this pursuant to the employer's request, the adequacy of this consideration should not be material. RESTATEMENT, CONTRACTS (1932) § 81. The employer has not requested that the employee promise to continue at the job. The failure to continue at the job or the inability of the employer to provide work might be treated as a condition subsequent which would terminate the liability of the employer under the contract in much the same way as the conditions of forfeiture in insurance policies. See VANCE ON INSURANCE (2nd ed. 1930) p. 290.

Such a treatment of these contracts could bring about reasonable results without doing violence to the doctrine of consideration. Of course, there would still be the difference and difficulties due to the various ideas on the revocability or irrevocability of offers for unilateral contracts. The inquiry in such cases would, however, be simplified into the following: 1. Was there a request by the employer for an act or forbearance, other than the performance of the work, which could be construed as an offer? 2. Did the offeree give this consideration, or a part of it, with the intention of accepting the offer? 1 WILLISTON, CONTRACTS (2nd ed. 1936) § 65; RESTATEMENT, CONTRACTS (1932) §§ 45 and 46.

In the instant case it is flatly said that even if there had been evidence of a contract for life employment, the agreement would be unenforceable for want of consideration moving to the employer, other than the rendition of services. This seems *contra* the established doctrine that mere inadequacy of consideration is never a bar to the enforcement of a contract. 1 WILLISTON, CONTRACTS (2nd ed. 1936) § 115; RESTATEMENT, CONTRACTS (1932) § 81. If the employee has given up another position at the request of the employer, he has suffered a legal detriment. It is not necessary that the promisor receive a corresponding benefit. 1 WILLISTON, CONTRACTS (2nd ed. 1936) § 102.

There was evidence in this case to the effect that the plaintiff did not leave his former position with the intention of accepting the offer for life employment. The court could have reached its result without inquiring into the adequacy of the consideration by saying that the offer was not accepted. D. W. G.

DECLARED DIVIDENDS — STATUTE OF LIMITATIONS — TRUSTS. The defendant company paid dividends declared on the plaintiff's cumulative preferred stock to a third person of the same name for a period of ten years under a mistake of fact. Upon the application of the third party, on grounds that the stock had been lost, the company issued new stock to him and paid dividends to the same third party for another ten years. The plaintiff, ignorant of the company's action and of the fact that dividends had ever been declared, sold his stock and upon a refusal of the defendant to make a transfer upon the books brought this action to recover the value of the stock and the accumulation of dividends thereon for the past twenty years. The court in giving judgment to the plaintiff held that the statute of limitations was not applicable on the grounds that the corporation was a trustee as to the dividends which had been declared. *Holly Sugar Co. v. Wilson*, 75 P (2d) 149 (Col. 1938).

In holding that the corporation was a trustee of the declared dividends the court reasoned that "there can be no substantial difference between the trusteeship of a corporation as it relates to the stock of a shareholder and its duty to him in respect to the profits or dividends upon the stock."

Although the corporation holds the stock of its shareholders in trust, when a dividend is declared the great weight of authority holds that the relationship of the stockholder and the corporation as to the dividends declared is not that of trustee and *cestue que* trust, but is rather one of debtor and creditor. The rule is very well stated in *McLaren v. Cement Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819, 821 (1906) where the court said: ". . .if a declaration of the dividend is fairly and properly made, out of profits existing at the time it is declared, the relationship of debtor and creditor is thereby established between the corporation and the stockholder for the amount due on the stock held by him." This relationship arises the moment the dividend is declared and segregated, and the statute of limitations runs against a stockholder in an action to recover dividends which have been declared. 11 FLETCHER, CYCLOPEDIA CORPORATIONS (Perm. ed. 1933) § 5370; *Bryon v. Welch*, 74 F. (2d) 964 (1934); *Ford v. Snook*, 205 App. Div. 194, 199 N. Y. S. 630 (1923); *In re Booth's Estate*, 139 Misc. Rep. 253, 248 N. Y. S. 264 (1931); *Bishop v. Bishop*, 81 Conn. 509, Atl. 583 (1909); *Hunt v. O'Shea*, 69 N. H. 600, 45 Atl. 480 (1899). The stockholder's remedy against a corporation that refuses to pay dividends which have been declared is an action at law for their collection. *In re Sutherland*, 23 F. (2d) 595 (1928).

In the case of preferred stock the result is the same, and as to declared dividends the stockholder bringing an action for their recovery is deemed a creditor of the corporation. *Miller v. M. E. Smith Bldg. Co.*, 118 Neb. 5, 223 N. W. 277, 280 (1929). See 11 FLETCHER, CYCLOPEDIA CORPORATIONS (Perm. ed. 1933) § 5293.

In a debtor-creditor relationship the debtor does not owe the creditor particular money but any money, and hence can not be said to be a trustee. 1 BOGERT, TRUSTS AND TRUSTEES (1935) § 7; RESTATEMENT, TRUSTS (1935) § 12.

But, where a dividend has been declared and following such declaration there is a definite fund created out of which the dividends are to be paid, the fund which is so set apart then becomes a trust fund. 1 BOGERT, TRUSTS AND TRUSTEES (1935) § 20; 11 FLETCHER, CYCLOPEDIA CORPORATIONS (Perm. ed. 1933) § 5366. *In re Interborough Consol. Corporation*, 267 Fed. 914 (1920) held that when a dividend is declared and a fund set aside out of which it is to be paid the debtor-creditor relation which formerly existed is transformed into a trust. See also *In re Le Blanc*, 14 Hun (N. Y.) 8, *aff'd.* 75 N. Y. 599 (1878). *Accord: Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. (N. Y.) 657 (1836); *Van Dyck v. McQuade*, 86 N. Y. 38, 52 (1881); *Ford v. Easthampton Rubber Tread Co.*, 158 Mass. 84, 32 N. E. 1036, 20 L. R. A. 65, 35 Am. St. Rep. 426 (1893); *Staats v. Biograph Co.*, 236 Fed. 454, 458, 149 C. C. A. 506, L. R. A. 1917B, 728.

In determining if the fund so set apart is a trust the distinguishing feature is whether the fund is subject to the control of the corporation otherwise than for the payment for which it was created. *In re Interborough Consol. Corporation*, 288 Fed. 334, 344, 32 A. L. R. 932 (1923).

A problem presented in the instant case is whether the payment of the declared dividends to a third person under a mistake of fact was equivalent to a setting aside of a separate "dividend account" so as to bring the decision within the rule of the *Interborough Consol. Corporation* case, *supra*, 267 Fed. 914 (1920).

It could very well be reasoned that there is no material difference between a situation where a separate dividend fund is first created and then payment made to a third person out of that fund, and the situation, as in the instant case, where the payment was made directly to the third person. If the Colorado court had based its result on this approach, or if they in fact found that a separate dividend fund had been set aside then there would be no question raised as to the soundness of the decision. The declared dividends would then have become a trust fund, and the statute of limitations could not be invoked as a defense to an action for their recovery.

Either the court should have found that a declared dividend fund had been set aside against which the statute could not run, or they should have found that it was merely a declared dividend against which the statute had run. However, to reason that declared dividends are held in trust by the corporation in the same manner as ordinary stock, without determining whether a separate and distinct fund has been set aside with which to pay them, seems unwarranted and contrary to the rule expressed by the majority of courts.

J. P. H.

POSSESSOR OF BUSINESS PREMISES—DUTY TO CONTROL THIRD PERSONS. The plaintiff, a customer in the defendant's store, was struck and injured by a tricycle owned by the defendant, but operated by a child. Sustaining a nonsuit, the court found no evidence of negligence on the part of the defendant; no evidence of placing the child upon the tricycle, or in leaving the tricycle in such a position as to invite its appropriation. *Barnes v. J. C. Penney Co.*, 190 Wash. 633, 70 P. (2d) 311 (1937).

The possessor of business premises will be subject to liability to invitees for bodily harm caused to them by the accidental, negligent, or intentional acts of third persons or animals if the possessor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected them by controlling the conduct of the third persons. RESTATEMENT, TORTS (1934) § 348.

Thus, each case necessarily turns upon its own facts, the question being whether the defendant was negligent in the exercise of the control over others which, as possessor, he was bound to use for the safety of the plaintiff. Accordingly, similar cases can be merely suggestive. In the following cases the defendant was found to have been negligent: *Exton v. Central Ry. of New Jersey*, 662 N. J. L. 7, 42 Atl. 486, 56 A. L. R. 508 (1899) (scuffling hackmen in depot); *Kuhlen v. Boston & N. St. Ry. Co.*, 193 Mass. 341, 79 N. E. 815 (1907) (jostling passengers); *Dufur v. Boston & M. Ry. Co.*, 75 Vt. 165, 53 Atl. 1068 (1903) (passenger in car struck by bullet from rifle range on defendant's property); *Muhlhause v. Monongahela St. Ry. Co.*, 201 Pa. 237, 50 Atl. 937 (1902) (jostling passengers); *Greeley v. Miller's, Inc.*, 111 Conn. 584, 150 Atl. 500 (1930) (injury by crowd at sale); *Mastad v. Swedish Brethren*, 83 Minn. 40, 85 N. W. 913, 85 A. S. R. 440, 53 L. R. A. 803 (1901) (battery by intoxicated customer).

However, in the succeeding cases the defendant was found not to have been negligent: *Ellinger v. Philadelphia W. B. Ry. Co.*, 153 Pa. St. 213, 25 Atl. 1132 (1893) (jostled off car by fellow passengers); *Graeff v. Philadelphia R. R. Co.*, 161 Pa. St. 230, 28 Atl. 1107 (1894) (struck by the car door pushed open violently by another passenger); *Noonan v. Sheridan*, 230 Ky. 162, 18 S. W. (2d) 976 (1929) (boys playing in store toppled linoleum); *Crump v. Hellams*, (Tex. Civ. App.) 41 S. W. (2d) 288 (1931) (bumped by refrigerator door opened by another customer).

It is often said that one should not be liable for injuries caused by the independent action of a third party. *Barnes v. J. C. Penney Co.*, *supra; Hartnett v. Boston Store of Chicago*, 265 Ill. 331, 106 N. E. 837, L. R. A. 1915C 460 (1914). But this is a neat descriptive summary of the result in the particular case rather than a formula for its solution. If by the eye of reasonable vigilance the "independent action" could have been foreseen, and by reasonable care controlled, the defendant possessor will be subject to liability, *Greeley v. Miller's Inc., supra.* "Independent action" means, in reality, "unforeseeable action", and thus phrased has less tendency to mislead. As the rule is applied in the instant case, the conduct of the child on the tricycle was "independent" only in the sense that the evidence failed to show the J. C. Penney Company negligent in not anticipating or discovering his use of it in the aisle.

H. M. T.

WILLS—CONSTRUCTION OF STATUTE—PRETERMITTED HEIRS. Testatrix executed a non-intervention will on October 7, 1925, in which she named her five children and then declared that she would "make no provision as to them, knowing that my said husband will deal justly with them." One of the five children named died, after the execution of the will, on July 26, 1929, survived by his wife, *P*, and their four minor children, one of whom was alive when this will was executed. Testatrix died April 16, 1936, without changing her will. This action was brought by the mother and guardian of the four minor children to have an undivided one-fifth interest in the estate of the testatrix distributed to her children as pretermitted heirs under the statute (REM. REV. STAT. § 1402; Pierce, § 10029). *Held:* For *D*, executor; that the testatrix having named her son in her will, is not to be deemed to have died intestate as to any of his children even though he was deceased at the time of the death of the testatrix. *In re Phillips Estate*, 193 Wash. 194, 74 P. (2d) 1015 (1938).

This court has declared that the purpose of this statute is to provide against unintentional disinheritance of any child or descendant by the inadvertence of the testator. *In Re Harpers Estate*, 168 Wash. 101, 10 P. (2d) 991 (1932). It is not to compel the testator to make some provision for his descendants nor to prevent him from disinheriting any of them. *Gehlen v. Gehlen*, 77 Wash. 17, 137 Pac. 312 (1913). Thus, when the omission appears to be intentional and not by lapse of memory, the statute will not apply.

In the instant case, the Washington court for the first time construes REM. REV. STAT. § 1402 as to the failure to name descendants whose deceased parent is named. Arriving at a sound result, it is submitted that the court confines itself to a strict interpretation of the statute when a similar result could be reached by adopting a less technical approach.

The legislature in 1917 (REM. REV. STAT. § 1402) omitted the phrase "or their descendants" in the clause which prior to that time had read—"every such testator, as to such child or children *or their descendants* not provided for, shall be deemed to die intestate." REM. AND BALL. CODE (1910) § 1326; see LAWS OF 1917, Chap. 156, § 233, at p. 707. The court found the omission to be intentional and hence that "the testatrix is deemed to die intestate only as to her child or children not named or provided for." Since her child here was named, the statute is inoperative. The words "child" and "descendants" are not synonymous, said the court, citing *Turner v. Monteiro*, 127 Va. 537, 103 S. E. 572, 13 A. L. R. 383 (1920).

It would seem that the same result as that reached in the instant case could be attained by reading REM. REV. STAT. § 1402 and REM. REV. STAT. § 1404 in conjunction with each other. By § 1404, where a child named as devisee predeceases the testator, the lineal descendants of the child take that estate which the child would have taken. Thus, when the named child is disinherited, the descendants of such child should also be considered as disinherited unless a contrary intention appears in the will. The intention of the testator is to be determined as of the date of the execution of the will. *O'Shaughnessy v. Brooks*, 153 Wash. 247, 279 Pac. 591 (1929); *In Re Tremens Estate*, 152 Wash. 82, 277 Pac. 383, 68 A. L. R. 753 (1929); *Shufeldt v. Shufeldt*, 130 Wash. 253, 227 Pac. 6 (1924); *In Re Lotzgesell's Estate*, 62 Wash. 352, 113 Pac. 1105 (1911). Here at the time of executing her will, the testatrix must have had in mind the children of her named child since one was living at that time.

Missouri has a statute which "in all material respects" is identical to the Washington "pretermitted heir" statute as it stood prior to the change of 1917. *Gehlen v. Gehlen*, 77 Wash. 17, 137 Pac. 312 (1913); REV. STAT. OF MISSOURI, 1929, § 525, p. 304. Also, REM. REV. STAT. § 1404 and Missouri statute § 527 are the same. The Missouri court has adopted the view advanced in this note, irrespective of the fact that the phrase "or their descendants", as now omitted from the Washington statute, is present in the Missouri statute. In a decision "written by one of its greatest jurists", the Missouri court held that a mention in the will of a deceased daughter of the testator was sufficient to show that he had not forgotten her children. *Guitar v. Gordon*, 17 Mo. 408 (1853). This view in Missouri is founded on the theory—"Whenever the mention of one person by the natural association of ideas suggests another, it may reasonably be inferred that the latter was in the mind of the testator and was not forgotten or unintentionally omitted." *Guitar v. Gordon, supra; Fugate v. Allen*, 119 Mo. Appeals 183, 95 S. W. 980 (1906); *Lawnick v. Schultz* (Mo. 1930), 28 S. W. (2d) 658. Since the Washington court recognized this "Missouri doctrine" without adopting or repudiating it, *In Re Harper's Estate*, 168 Wash. 98, 10 P. (2d) 991 (1932), when the court thought the respective statutes of the two states were "in all material respects the same", it would not be too forward a step for Washington to adopt this view.

W. J. W.