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Bills and Notes—Accommodation Acceptor; Constitutional Law—Citizenship—Dual Allegiance—Right of Election; Declaratory Judgments—When Another Remedy Is Available; Evidence—Res Gestae Statements by Unidentified Bystanders—Necesssity of Observation; Taxation—Inheritance Taxation of Intangibles Held in Trust—Jurisidiction to Tax—Multi-State Taxation

S. J. K.

A. S. Q.

J. M. D.

N. B. F.

RECENT CASES

BILLS AND NOTES—ACCOMMODATION ACCEPTOR. In an action to recover the amounts of four trade acceptances from the drawer-payee who indorsed them in blank to the plaintiff's assignor, the defendant contended that he was entitled to notice of presentment and dishonor as required in REM. REV. STAT. § 3479. The evidence failed to reveal any presentment or notice of dishonor to the defendant. Plaintiff alleged that he was an accommodation acceptor thereby coming under an exception to the above requirement as stated in REM. REV. STAT. § 3505: "Notice of dishonor is not required to be given to an indorser . . . where the instrument was made or accepted for his accommodation." *Held:* The defendant was entitled to notice. The plaintiff did not come within this exception. The word "accepted" did not refer to the receiving by a holder, but to the acceptance of a bill of exchange by the drawee. *Legal Discount Corp. v. Martin Hardware Co.*, 199 Wash. 476, 91 P. (2d) 1010 (1939).

The general rule of construction under the Negotiable Instruments Law is that "acceptance" means the signification by the drawee of his assent to the order of the drawer on a bill of exchange. *Lucas v. Swan*, 67 F. (2d) 106 (C. C. A. 4th, 1933), 90 A. L. R. 218 (1934). "Accommodation" is the lending of credit, by the use of the lender's name on the instrument, to the person primarily liable. *First Nat. Bank v. Bach*, 98 Ore. 332, 193 Pac. 1041 (1920).

Prior to this decision, the Washington law was unsettled because of two conflicting holdings on this point. In *Fosdick v. Government Mineral Springs Hotel*, 115 Wash. 127, 196 Pac. 652 (1921), which is specifically overruled by the instant case, it was held that a bank which discounted a note for an insolvent maker in lieu of suing on a former note was an "accommodation acceptor" as to the indorsers, who were the same on both notes, and therefore they were not entitled to notice of dishonor. It is apparent that the court misinterpreted the words "acceptance" and "accommodation" by giving them a literal construction. This case has been criticized in *Lucas v. Swan, supra*, and in BRANNAN, NEGOTIABLE INSTRUMENTS LAW (6th ed. 1938) § 115.

Clausen v. Forehand, 152 Wash. 310, 277 Pac. 827 (1929), ruled in accord with the recent holding without mentioning the *Fosdick* case. The substantiation of the *Clausen* case brings this state into line with the weight of authority. *Liberty Bank & Trust Co. v. Hand*, 269 Ky. 342, 107 S. W. (2d) 285 (1937); *Nolan v. Brown*, 152 La. 333, 93 So. 113 (1922); *First Nat. Bank v. Bach, supra; Commercial Nat. Bank v. Ashley Corp.*, 133 S. C. 304, 130 S. E. 890 (1925); 8 Am. Jur. 342.

It is worthwhile to note that the correlative duty of presentment must be fulfilled before the indorser's liability can be established, unless it was shown that failure to present for payment was excused on the grounds that the indorser had no reason to expect that the instrument would be paid if presented. REM. REV. STAT. § 3471.

S. J. K.

CONSTITUTIONAL LAW—CITIZENSHIP—DUAL ALLEGIANCE—RIGHT OF ELECTION. Plaintiff, born in the United States of naturalized Swedish parents, assumed residence in Sweden during her minority due to her parents'

return and resumption of citizenship there. At majority she applied successfully as a United States citizen for an American passport, returned to the United States, and established permanent residence. The Department of Labor now orders her deportation as an alien. Both the district court and circuit court of appeals found her a United States citizen. On writ of certiorari the Supreme Court affirmed the decree. *Perkins v. Elg*, 59 Sup. Ct. 884 (1939).

Dual citizenship of persons arises because most nations define citizenship by both *jus soli* (nationality by place of birth) and *jus sanguinis* (nationality by blood), 1 HYDE, INTERNATIONAL LAW (1922) § 372. The United States has adopted *jus soli* as a part of its basic law: "All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U. S. CONST., Art. XIV, § 1 (1868). By statute it has adopted *jus sanguinis:* "All children born out of the limits and jurisdiction of the United States, whose fathers may be at the time of their birth citizens of the United States, are declared to be citizens of the United States . . ." 48 STAT. 797 (1934), 8 U. S. C. § 6 (1934).

Every United States citizen has the right of expatriation. REV. STAT. § 1999 (1878), 8 U. S. C. § 15 (1934). Expatriation is "The voluntary act of abandoning one's country and becoming the citizen or subject of another." BALDWIN, BOUVIER'S LAW DICTIONARY (Stud. Ed. 1928) 388. But Congress exercises the power to define what acts shall expatriate a citizen. *United States* ex rel. *Wrona v. Karnuth*, 14 F. Supp. 770 (W. D. N. Y. 1936). Naturalization by another nation expatriates an adult. 34 STAT. 1229 (1907), 8 U. S. C. § 17 (1934). Pledging allegiance to another government expatriates an adult. *United States* ex rel. *Fracassi v. Karnuth*, 19 F. Supp. 581 (W. D. N. Y. 1937). Formal renunciation upon marriage to an alien destroys the citizenship of a woman. 46 STAT. 1511 (1931), 8 U. S. C. § 9 (1934). And avoidance of the draft or desertion in time of war forfeits one's citizenship. 37 STAT. 356 (1912), 8 U. S. C. § 11 (1934). Each of these methods of losing American citizenship involves a voluntary act of the citizen. It has been suggested that no act of legislation can destroy one's native American citizenship without his concurrence. *Mackenzie v. Hare*, 239 U. S. 299 (1915).

However, whether a minor lost his American citizenship of nativity by reason of his parents' expatriation had not been settled prior to the instant case. Several opinions in the last decade supported the view that citizenship was lost. *Ostby v. Salmon*, 177 Minn. 289, 225 N. W. 158 (1929); *Koppe v. Pfefferle*, 188 Minn. 619, 248 N. W. 41 (1933). These decisions argued that the text of Section two of the Act of March 2, 1907 (34 STAT. 1229 (1907), 8 U. S. C. § 17 (1934), reading "Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws . . .", applied equally to a minor though his naturalization was derivative through his parents. In 1932 Attorney General William D. Mitchell rendered a departmental opinion wherein this interpretation was adopted. 36 OPS. ATT'Y GEN. 535 (1932). These three opinions influenced the decision of the Circuit Court of Appeals for the 9th Circuit in *United States v. Reid*, 73 F. (2d) 153 (C. C. A. 9th, 1934), which further argued that Congress in this statute intended to reach the same result as that reached under the British act (33 & 34 Vict., c. 14, § 10 (1870)) which provided that the minor child lost

his British citizenship when his parents' expatriation conferred upon him a new citizenship.

The contrary view held that no act of a parent, subsequent to the child's birth within the United States, could have the effect of depriving him of his American citizenship. *State* ex rel. *Phelps v. Jackson*, 79 Vt. 504, 65 Atl. 657, 8 L. R. A. (N. S.) 1245 (1907); *Ludlam v. Ludlam*, 26 N. Y. 356 (1863) 84 Am. Dec. 210 (1887). Previous to 1932, opinions of both the State Department and Attorney General Department reached the same conclusion. FOR. REL. (1885) 171; 15 OPS. ATT'Y GEN. 15 (1880); 3 MOORE, DIGEST OF INTERNATIONAL LAW (1906) § 430. This view seems to be better for it recognizes that the assumption of another citizenship by an adult is voluntary while that of a minor is necessarily involuntary. Hence it would seem proper to construe statutes and treaties in such a way as to preserve an election for the minor, as was done in the instant case.

The minor, within a reasonable time after attaining majority, must exercise the right of election by affirming his United States citizenship and refusing allegiance to all other nations. Continued residence in the foreign jurisdiction after majority often establishes a conclusive presumption of the election of foreign citizenship. FOR. REL. (1903) 595. Acts speak more forcefully than words: ". . . If they decided to retain their American citizenship, 'the best evidence of this fact would be their return to the United States to remain and discharge their obligations and duties as such'." 3 MOORE, DIGEST OF INTERNATIONAL LAW (1906) 542.

A. S. Q.

DECLARATORY JUDGMENTS—WHEN ANOTHER REMEDY IS AVAILABLE. Action by the lessor against the lessee for a declaratory judgment that the lease was invalid or to cancel the same. *Held:* Plaintiff is entitled to a declaratory judgment as to the *validity* of the lease, but "a declaration will not be made as to the *rights of parties* to a contract, where it appears that the controversy relates to acts which have already been committed and for the redress of which there exists an action at law". *People's Park and Amusement Ass'n, Inc. v. Anrooney*, 100 Wash. Dec. 43, 93 P. (2d) 362 (1939).

This action was brought under the Uniform Declaratory Judgments Act, REM. REV. STAT. §§ 784-1 to 784-17. The pertinent sections here are the first two. Section 784-1 gives to courts of record the power to declare rights, status, or other legal relations *whether or not further relief is or could be claimed.* Section 784-2 states that a person interested under a contract, or whose rights, status, or other legal relations are affected by a contract may have determined any question of construction or validity arising under the contract and may obtain a declaration of rights, status, or other legal relations thereunder.

By § 784-2 the plaintiff in this case is entitled to a declaratory judgment, and the court so held but limited his right to the determination of the validity of the contract. The plaintiff was denied the right to maintain an action to establish his right to cancel the lease since he had "a full and complete remedy in an action in unlawful detainer". In taking this view the Washington court held that the Act was not designed to be an alternative remedy when another established remedy existed. The courts of many other states have come to this same conclusion. *Miller v. Siden*, 259 Mich. 19, 242 N. W. 823 (1932); *Lisbon Village District v. Lisbon*, 85 N. H. 173, 155

Atl. 252 (1931); *Nesbitt v. Manufacturers' Cas. Ins. Co.*, 310 Pa. 374, 165 Atl. 403 (1933); *Kaleikau v. Hall*, 27 Hawaii 420 (1923). See also 9 Uniform Laws Annotated 123 (1932) and Supplement (1938) p. 55; Notes (1930) 68 A. L. R. 119, (1933) 87 A. L. R. 1219; 16 Am. Jur. 287.

There is another line of authority which holds that the declaratory judgments acts were designed specifically to provide alternative remedies to those in existence when the act went into effect. *Tuscaloosa County v. Shamblin*, 233 Ala. 6, 169 So. 234 (1936); *Woollard v. Schaffer Stores Co.*, 272 N. Y. 304, 5 N. E. (2d) 829 (1936). The argument for this position is a strong one based primarily on the language of the first section of the Uniform Declaratory Judgments Act which states that courts may give the declaration *whether or not further relief is or could be claimed.* The language is clear and evidently means that the declaration may be given whether another remedy (1) is also claimed, (2) could be claimed but is not claimed, or (3) could not be claimed. Furthermore, declaratory judgments were designed to allow an alternative remedy and were uniformly so construed until the Supreme Court of Hawaii handed down an adverse decision in the case of *Kaleikau v. Hall*, 27 Hawaii 420 (1923); see BORCHARD, DECLARATORY JUDGMENTS (1934) pp. 147-162. In Professor Borchard's most recent article on the subject he points out: "An error which still persists in isolated quarters is the assumption of a few courts . . . that when another remedy is available, the declaratory judgment may not be invoked." Borchard, *Declaratory Judgments, 1939* (1939) 9 BROOKLYN L. REV. 5.

The view championed by Professor Borchard would tend, in cases like the instant one, to avoid a multiplicity of suits. In the instant case our court could have given a declaration of the rights of the parties at the same time it gave a declaration as to the validity of the contract since both parties were already before the court. The judgment given forces them to have a new trial. It must be admitted that there is abundant authority from the courts of other states for the construction here adopted by the Washington court. But in view of the very clear language of the legislative mandate, and in view of the policy which the Act was meant to subserve, it is submitted that the Act should be construed to provide an alternative remedy.

J. M. D.

EVIDENCE—RES GESTAE STATEMENTS BY UNIDENTIFIED BYSTANDERS—NECESSITY OF OBSERVATION. The plaintiff, while attempting to cross a downtown street at an intersection, was struck by the defendant's automobile. The plaintiff offered in evidence the exclamation of an unidentified bystander made soon after the accident to the effect that the defendant had driven through a red light. The court set forth the following six requirements as tests for the admissibility of a *res gestae* statement: 1. The statement must relate to the main event and must explain or elucidate it. 2. It must not be a mere narrative of a past event. 3. It must be a statement of fact and not opinion. 4. It must be a spontaneous or instinctive utterance. 5. It must be made at such time and under such circumstances as will exclude the presumption of deliberation. 6. It must be made by a participant in the transaction or by one who witnessed the incident about which the declaration was made. *Held:* Here although the declaration satisfied the

first five requirements, it was excluded because there was no showing that the declarant actually observed the accident. *Beck v. Dye*, 100 Wash. Dec. 1, 92 P. (2d) 1113 (1939).

The majority rule regarding *res gestae* statements of bystanders admits the declarations in evidence subject to the requirements normally applied to such statements when made by a participant in the transaction, with the additional qualification of showing that the declarant observed the event. The difficulty arises, however, in determining the quantum of proof necessary to establish the fact of observation.

Two contrasting lines of authority have developed in those jurisdictions which admit statements of unidentified bystanders. One group of cases apparently agrees with the instant case and makes the admissibility of statements by non-participants depend upon direct proof of an opportunity to observe. *Hines v. Patterson*, 146 Ark. 367, 225 S. W. 642 (1920); *Gose, Adm'x v. True*, 197 Iowa 1094, 198 N. W. 528 (1924); *Rooker v. Deering S. W. Ry. Co.*, 215 Mo. App. 481, 247 S. W. 1016 (1923); *Hambright v. Atlanta & C. Air Line Ry. Co.*, 102 S. C. 166, 86 S. E. 375 (1915). In other jurisdictions the requirement has been less rigorously applied, and in those cases the courts have been willing to infer the fact of actual observation either from incomplete testimony tending to show the opportunity of the bystander to view the accident, *N. Y., Chicago & St. Louis R. R. Co. v. Kovatch*, 120 Ohio 532, 166 N. E. 682 (1929), or merely from the facts that the declarant was present immediately after the occurrence of the event and that he made a spontaneous declaration about it. *Standard Oil Co. v. Johnson*, 299 Fed. 93 (C. C. A. 1st, 1924); *Armborst v. Cincinnati Traction Co.*, 25 F. (2d) 240 (C. C. A. 6th, 1928); *York v. Charles*, 132 S. C. 230, 128 S. E. 29 (1925); *Johnson v. St. Paul & W. Coal Co.*, 126 Wis. 492, 105 N. W. 1048 (1906).

The instant case is apparently the first Washington case directly to raise the question of observation; but there are numerous cases discussing the admissibility of *res gestae* statements of non-participants. The following cases allowed the use of the particular statement involved: *Britton v. Wash. Water Power Co.*, 59 Wash. 440, 110 Pac. 20 (1910) (declarant a passenger of a street car); *Heg v. Mullen*, 115 Wash. 252, 197 Pac. 51 (1921), and *Duvall v. Pioneer Sand & Gravel Co.*, 191 Wash. 417, 71 P. (2d) 567 (1937) (declarants passengers in automobiles); *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111 (1902); *Lambert v. La Conner Trading & Transportation Co.*, 30 Wash. 346, 70 Pac. 960 (1902); *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795 (1910) (the declarants in each of the three cases, servants, agents, employees etc.). Cases which exclude *res gestae* statements for failure to fulfill some particular requirement are: *Dixon v. Northrn Pacific R. Co.*, 37 Wash. 310, 79 Pac. 943 (1905); *Henry v. Seattle Electric Co.*, 55 Wash. 444, 104 Pac. 776 (1909); *Barnett v. Bull*, 141 Wash. 139, 250 Pac. 955 (1926); *Field v. North Coast Transportation Co.*, 164 Wash. 123, 2 P. (2d) 672 (1931); *Spokane County v. Great Northern Railway Co.*, 178 Wash. 389, 35 P. (2d) 1 (1934). The failure to discuss this requirement in the past may be explained on the ground that in the normal case the requirement of observation will not become an issue in itself since the other facts will sufficiently suggest that the bystander has witnessed the event to which his statement relates. 3 WIGMORE, EVIDENCE (2d ed. 1930) § 1751.

The court in the instant case divided upon the issue as to whether or not the presence of the unidentified person soon after the accident and his spontaneous declaration were in themselves sufficient proof that the declarant had observed the event. The dissenting opinion indicates that in this, as well as in past cases, the fulfillment of all the other requirements makes it more reasonable than not to infer that the bystander actually saw the car go through the red light; while the majority opinion stresses the lack of proof as to the actual fact of observation. Whether a valid distinction for requiring further proof of observation can be found on the basis that the statement was in the past tense rather than in the present tense, or on the ground that the bystander was in a constantly shifting group rather than in a definitely constituted one, as for example, passengers in a car, bus or street car, or workers on the deck of a ship, are are questions which will have to be determined by future cases.

Although it is true that a *res gestae* statement may be used when the declarant is known or is in court, such statements become of particular value when the declarant is an unidentified bystander who is unavailable as a witness. Thus, although a desirable result may have been reached in the instant case, the strict application of the requirement of observation as indicated by this decision may mean that spontaneous exclamations of such non-participants will not in the future be admitted except upon actual proof of their observations—as perhaps by another witness. If this is the result, the use of *res gestae* statements of unidentified bystanders—valuable testimony otherwise inaccessible—may be effectually destroyed.

N. B. F.

TAXATION—INHERITANCE TAXATION OF INTANGIBLES HELD IN TRUST—JURISDICTION TO TAX—MULTI-STATE TAXATION. An Alabama trustee held certain stocks and bonds for a beneficiary domiciled in Tennessee, who had the power to dispose of the property by will. This she did. Both Alabama and Tennessee sought to levy inheritance taxes upon the transfer. *Held:* The states of Alabama and Tennessee each constitutionally may impose death taxes upon the transfer of an interest in the intangibles held in trust. *Curry v. McCanless*, 307 U. S. 357 (1939). Accord: *Graves v. Elliott*, 307 U. S. 383 (1939).

The wealth of this country being represented to so great an extent by intangibles the problem of double taxation in situations similar to that involved in the above cases is acute. As to tangibles the law is more certain, the state of the decedent's domicile being able to exact a transfer tax on the succession to only those tangibles located permanently in the state. *Frick v. Pennsylvania*, 268 U. S. 473 (1925) (tax by Pennsylvania upon transfer of tangible personalty having actual situs in other states contravenes due process clause of the Fourteenth Amendment). Until 1930 it seemed that intangible property, unlike tangible property, might be subjected to a death transfer tax in more than one state. *Blackstone v. Miller*, 188 U. S. 189 (1903) (deposit in a New York trust company to the credit of the decedent domiciled in Illinois, subject to transfer tax imposed by New York notwithstanding similar tax imposed by Illinois).

This was thought to be the law until a series of four cases was handed down by the court, the first of which expressly overruled *Blackstone v. Miller, supra. Farmers' Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930) (testamentary transfer by decedent domiciled in New York of bonds issued

by Minnesota not taxable in Minnesota); *Baldwin v. Missouri*, 281 U. S. 586 (1930) (credits consisting of deposits in Missouri banks, United States bonds and promissory notes located within the state passing under the will of a testator domiciled in Illinois not taxable in Missouri); *Beidler v. South Carolina Tax Commission*, 282 U. S. 1 (1930) (transfer of the Illinois testator's stock in and indebtedness owed by a South Carolina corporation not taxable in South Carolina); *First National Bank v. Maine*, 284 U. S. 312 (1932) (transfer of shares of stock in a Maine corporation left by decedent domiciled in Massachusetts not taxable in Maine). The broadest implication of these cases is that the due process clause prevents multi-state taxation of intangibles to the same extent it prevents multi-state taxation of tangibles. The narrowest implication is that the due process clause prevents a state other than that of the domicile from imposing a tax upon the intangibles of the decedent in the specific foregoing cases. Rottschaefer, *The Power of the States to Tax Intangibles* (1931) 15 MINN. L. REV. 741. The rather broad language of these 1930-1932 cases might be taken to indicate that the law regarding taxation of intangibles is to be settled in favor of single taxation by attributing to intangibles a situs. But equally broad language in *Curry v. McCanless, supra*, indicates that the narrowest premise may be the proper one and that the protection of the due process clause of the Fourteenth Amendment is limited to those specific cases heretofore decided.

Relief from double taxation in similar circumstances, under this view, is to be had by action on part of the states. As pointed out in the *Farmers' Loan & Trust Co.* case many states have reciprocal exemption provisions in their inheritance tax statutes. Washington had such a provision (Wash. Laws 1929, c. 202, § 1; Wash. Laws 1931, c. 134, § 10), under which intangibles of residents of another state were not subject to inheritance taxes where such state did not tax intangibles of residents of this state. *In re Eilermann's Estate*, 179 Wash. 15, 35 P. (2d) 763 (1934). This section was specifically repealed by Wash. Laws 1935, c. 180, § 125.

Shortly after the decisions in the *Curry* and *Elliot* cases the Tax Commission of the State of Washington ruled that ". . . except as to intangibles held by a resident trustee under a trust agreement", it will "collect an inheritance tax upon intangibles only in case the decedent was a resident of this state at the time of death". Tax Commission ruling, September 25, 1939. It is therefore possible that non-resident owners of intangibles located in Washington may escape double taxation, except in the trust cases, while residents of Washington with intangibles located in sister states may be subjected to inheritance taxes in both states, unless the Tax Commission ruling be accepted by the sister state as of equal force to a reciprocal exemption provision in an inheritance tax enactment. It would seem desirable that a specific reciprocal provision should be passed by the legislature.

For further discussion of the problem see: Euwer, *The Supreme Court of the United States: Jurisdiction to Tax Intangibles* (1939) 28 GEO. L. J. 69; Tweed and Sargent, *Death and Taxes Are Certain, But What of Domicile?* (1939) 53 HARV. L. REV. 68; Notes (1939) U. OF PA. L. REV. 120, (1939) 5 U. OF PITTSBURGH L. REV. 295; and viewing the cases as relating to a different problem, Cherry, *The Taxation of Trust Intangibles* (1939) 27 CALIF. L. REV. 674.

H. A. B.