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Recent Decisions

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son, injured when a criminal actor steals them and sets them off, claims that such negligence was the proximate cause.[32]

When a criminal sets a train in motion that is negligently left in a position and manner that he could do so, the defendant was relieved of the liability as not being able to foresee the act or its consequences of injuring third persons.[33]

It is readily seen that leaving hoboes linger in box cars that are on a siding is not the proximate cause of their setting fire to a proximate building when such an event has never occurred before.[34] And again the former lessee is not liable for not fastening the doors when an arsonist three weeks after the lessee moves out sets fire to the house.[35] Time plays an important part in determining the liability for there was time for the lessor to inspect.

So it is seen that in the majority of the courts, the one who is negligent and whose negligence is the proximate cause or who can foresee that through his negligence a criminal act will or might result which will injure another, exposed by his negligence, is liable for such injury. Justice demands this for the criminal actor may escape, may be insolvent or in some way be rendered pragmatically undesirable for prosecution.

James O. Lang.

RECENT DECISIONS

BOND INTEREST COUPONS GIVEN AWAY BEFORE MATURITY HELD TO BE TAXABLE INCOME OF THE DONOR.—The taxpayer, whose books were kept on a cash basis, gave his son interest coupons detached from negotiable bonds. The question presented was whether or not the taxpayer should include in his return as gross income the proceeds from the coupons. The Board of Tax Appeals upheld the commissioner who had ruled against the taxpayer, 39 B. T. A. 757 (1939); the Circuit Court of Appeals for the Second Circuit overruled the Board of Tax Appeals, 107 F. 2d 906 (1939); and the Supreme Court of the United States overruled the Circuit Court of Appeals and upheld the Board of Tax Appeals and the commissioner, Helvering v. Horst, 61 S. Ct. 144 (1940).

The Circuit Court of Appeals cited the refusal of the board to follow *Rosenwald v. Commissioner*, 33 F. 2d 423 (1929) (certiorari denied 280 U. S. 599, 50 S. Ct. 69) wherein the court held that detached coupons from Third Liberty Loan Bonds given to a charitable institution by the donor were *not* taxable as income of the donor; and *Matchette v. Helvering*, 81 F. 2d 73 (1936), wherein a stockholder, assigning dividends before their payment date, was held to be *not* taxable for the dividends. In the latter case Judge L. Hand distinguished between such a

[32] Horan v. Watertown, *op. cit.*

[33] Mars v. Delaware and H. Canal Co., 54 Hun. 625, 8 N. Y. S. 107 (1889); Bowers v. Southern R. Co., 10 Ga. App. 367, 73 S. E. 677 (1912).

[34] Aune v. Oregon Trunk Ry., 151 Ore. 622, 51 P. 2d 633 (1935).

[35] Winfree v. Jones, 104 Va. 39, 51 S. E. 153, 1 L. R. A. (N. S.) 201 (1905).

case and that of assignment of future earnings by showing that future earnings were necessarily left to the control of the assignor since his continued activity was a condition upon their receipt. Thus, Hand distinguished between the facts of the principal case and those of *Lucas v. Earl,* 281 U. S. 111, 50 S. Ct. 241 (1930) and *Burnet v. Leininger,* 285 U. S. 136, 52 S. Ct. 345 (1932), the latter cases being the cases relied on by the commissioner in the principal case. Because of the complete disposal of dominion over the coupons by the donor, the lower court decided the case on the rule laid down in *Blair v. Commissioner,* 300 U. S. 5, 57 S. Ct. 330 (1937), wherein the beneficiary of a trust assigned a portion of his interest to the income from the trust. The Supreme Court held that the assignor was *not* liable for the tax on the assigned income. The lower court distinguished the facts there from the Earl case and the Leininger case by showing that the statutes laid the tax on the salary of the person who earned the salary. The court held in the Blair case that the assignment by the beneficiary was not a question of one assigning future earnings as in the Earl case or of a husband assigning to his wife a portion of his interest in a partnership as in the Leininger case. Neither was it an assignment of income to discharge an obligation of the assignor. The court held the case to be one where tax liability attached because of ownership, the assignee of the beneficiary owning the beneficial interest in receiving the income. In the principal case, in stressing the absence of dominion by the father over the interest coupons after giving them to his son, the Circuit Court of Appeals presents an interesting query in posing the case of a trust created of income-producing property wherein the settlor creates a life estate in the trust in another with the reversion to himself, retaining no control over the trust corpus. It is apparent to the court that the trustor would not be taxable on the income from the trust during the life estate. The court further suggests that the result would be the same if the life estate were reduced to one of years. The lower court cites the distinction drawn in the Blair case between assignments of future income from earnings and assignments of future income from property, and the difference in taxability in each case.

The Supreme Court granted certiorari "because of the importance of the question in the administration of the revenue laws and because of an asserted conflict in principle of the decision below with that of *Lucas v. Earl. . . .*" In a six-three decision the court reversed the Circuit Court of Appeals and upheld the commissioner and the Board of Tax Appeals, Mr. Justice Stone delivering the majority opinion. The majority opinion stressed the fact that the taxpayer had acquired the right to demand payment of the interest and to command its payment if he so chose. In admitting that realization of income does not occur until it is paid, the court said, "But the decisions and regulations have consistently recognized that receipt in cash or property is not the only characteristic of realization of income to a taxpayer. . . . Where the taxpayer does not receive payment of income in money or property realization may occur when the last step is taken by which he obtains the fruition of the economic gain which has already accrued to him." Here the court cites *Old Colony Trust Co. v. Commissioner,* 279 U. S. 716, 49 S. Ct. 499 (1929), *Corliss v. Bowers,* 281 U. S. 376, 50 S. Ct. 336 (1930) and *Burnet v. Wells,* 289 U. S. 670, 53 S. Ct. 761 (1933). It will be interesting to examine these cases and point out their irrelevancy, at least to this writer, in the decision of the principal case.

In the Old Colony Trust Co. case it was determined that if the employer of a taxpayer pays the personal income taxes of the taxpayer, such payment by the employer constitutes additional income to the taxpayer and is taxable as such. There the court held, "The discharge by a third person of an obligation to him is equivalent to receipt by the person taxed." In *Corliss v. Bowers* the court held that income from a revocable trust is taxable to the grantor though paid to a beneficiary. In *Burnet v. Wells* the taxpayer created an irrevocable trust to pay the premiums on insurance on the trustor's life. The income of the trust which was

held taxable was that income of the trust used to keep the policies alive. The policies were all for named beneficiaries. The case arose on the constitutionality of an express statutory provision taxing such income. The statute was held constitutional. Thus the court relied on the case of payment of an obligation of the taxpayer, the case of income from a revocable trust, and a case wherein the validity of a statutory imposition of tax liability is determined. None of these seem in point with the principal case.

The court argued that by giving the coupons to his son, the taxpayer fully enjoyed the benefit of the economic gain. The court in placing the tax on the taxpayer said: "This may occur when he has made such use or disposition of his power to receive or control the income as to procure in its place other satisfactions which are of economic worth." The court says that the reasoning in such cases is that because the assignor can control the source of the income, he can control the disposition of that which he could have had himself. The giving of it to others is the satisfaction of his wants. It seems that the same test could be applied to an irrevocable trust wherein the creator of the trust would hardly be held taxable on the income of the trust. In a revocable trust, wherein the creator is taxed for the income of the trust, the creator has *not* lost dominion over that which he purports to give to another. In the principal case, the taxpayer could not have retaken the income from the coupons.

In regard to the taxpayer's use of the coupons, the court said, "Such a use of his economic gain, the right to receive income, to procure a satisfaction which can be obtained only by the expenditure of money or property, would seem to be the enjoyment of the income whether the satisfaction is the purchase of goods at the corner grocery, the payment of his debt there, or such non-material satisfactions as may result from the payment of a campaign or community chest contribution, or a gift to his favorite son. Even though he never receives the money he derives money's worth from the disposition of the coupons which he has used as money or money's worth in the procuring of a satisfaction which is procurable only by the expenditure of money or money's worth. The enjoyment of the economic benefit accruing to him by virtue of his acquisition of the coupons is realized as completely as it would have been if he had collected the interest in dollars and expended them for any of the purposes named." In answer to this it might be said that such a criterion of satisfaction of the trustor's desires would apply just as well to any trust which might be created with the free will of the trustor even though it is wholly irrevocable. Such a trust would be satisfying some desire of the trustor certainly. Yet, income from such trusts is held *not* taxable to the trustor.

Further, in saying that the taxpayer enjoyed the benefit of the income when the son cashed the coupons seems to stretch the facts of the case. He gave his son only the evidences of, or a right to the income. By the time that the coupons were converted into cash, the taxpayer had lost any control over the proceeds that he might have had. There is no close connection between the control or dominion which he could exert over the cash from the coupons after giving them to his son, and the control or dominion he could have exerted if he had kept the coupons and cashed them himself.

This writer is wholly of the opinion that the court reached a proper result in its decision. The facts of the case indicate that if it were to be decided in favor of the taxpayer the case would offer a precedent for far-reaching tax avoidance. The objection to the case is the possible door it may leave open for subsequent taxation of the trustor for the income from an irrevocable trust. The case presents too close a point to be left to court decision; it is a matter which should be taken care of by Congress. As it stands, it leaves too much room for the taxing agencies to tax the income from bona fide gifts as income of the donor.

Richard F. Swisher.

DOMESTIC RELATIONS, FRAUD AS BASIS OF ANNULMENT OF MARRIAGE CONTRACT — CONCEALMENT OF VENEREAL DISEASES — SYPHILIS. — Plaintiff married defendant after she had told him she was in good health and had no venereal disease. Actually she knew she was suffering from syphilis and plaintiff had no knowledge of this. After discovering her disease he immediately ceased to cohabit with her and sought an annulment on grounds of fraud. The trial court dismissed the case on grounds of no cause of action since plaintiff had failed to allege reliance on statement of defendant. The Court of Appeals reversed the decision stating that such reliance appears by necessary intendment and remanded the cause to the Circuit court with directions to enter judgment annulling the marriage. *Watson v. Watson* 143 S. W. 2d 349 (Mo., 1940).

There are three conflicting views as to what constitutes fraud as grounds for annulment. Only the leading cases will be considered here.

According to the English rule as expressed in *Moss v. Moss,* (1897) L. R. P. D. 263, once a marriage has been contracted when there is consent no fraud inducing that consent is material.

The American rules vary greatly — a leading case — *Reynolds v. Reynolds,* 85 Mass. 605 (1862), held that where fraud related to an essential element of the contract the marriage was void or voidable.

Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800 (1898) held that a marriage was void for fraud because of concealment of venereal disease, syphilis — where it was discovered by wife before consummation. The case intimated that the annulment would not have been granted if the marriage had been consummated.

In *Di Lorenzo v. Di Lorenzo,* 174 N. Y. 467, 67 N. E. 63, L. R. A. 92 (1903) it was held that the essentials of the marriage relation need not be involved to have the marriage annulled and that it may be annulled after consummation. It is sufficient to prove that consent was obtained by fraudulent representations.

In *Ryder v. Ryder,* 66 Vt. 158, 44 Am. St. Rep. 833 (1892) the defendant was fully aware of the condition of syphilitic infection at the time of the marriage but the annulment was granted under the statute which provided for annulment where either party was physically incapable of entering the marriage state or the consent of either was obtained by fraud. The court stated that any cause rendering sexual intercourse dangerous to health or life would warrant annulment under physical incapacity.

In *Kaufman v. Kaufman,* 86 N. J. Eq. 13, 29 N. E. 940 (1916) the defendant had had a sore on his lip examined a few days before his marriage. The doctor advised that it could be syphilitic. He was not duty bound in this case and the court did not grant the annulment holding that it must appear by appropriate and sufficient proof that the defendant either represented to complainant that he was free from syphilis or that he concealed the fact when he was duty bound to disclose it.

The principal case seems to be in agreement with the line of cases following the Reynolds case which is probably the majority rule in this country; for the court in speaking of the fraud involved states: "such a fraud pertains to an Essential Relation and obviously entitles the plaintiff to an annulment of the marriage." This seems to be the better rule since under it one would never be deprived of any essentials of the full marriage relationship if there were any defect of which either party had full knowledge before hand as would be the case

in the English rule. The Rule expressed in the New York case which also has considerable following regards the marriage state purely and wholly as a civil contract. When the rule in the New York case is adhered to it seems that one would be apt to use a greater degree of care in entering into the contract since annulment could not be granted unless the fraud concerned an essential element of the marriage relation.

John H. Verdonk.

LABOR LAWS — TIPS AS WAGES. — Plaintiffs are red caps selected by defendant Terminal Company and permitted to offer their services, especially as porters to passengers taking or leaving trains. Defendant Terminal Company regarded red caps as lisencees doing their own business until September 29, 1938, when the Interstate Commerce Commission decided, Ex. Parte No. 72 2991cc410, that the red caps were employees. Defendant then required red caps to report daily the tips received and declared that it would pay each person enough in addition to meet the minimum requirements of the Fair Labor Standards Act Section 6, 99 U. S. C. A. Section 206. The red caps were not agreeable but did do as requested. Between October 24, 1938 and July 1, 1940 the company supplemented tips to the amount of $8,321 and tips amounting to $3,019 in excess of minimum wages had been retained by recipients.

Plaintiff red caps claim that the tips received belong to them personally and that they are entitled to a minimum wage under the Fair Labor Standards Act over and above their tips. They claim the sum of $59,923.00.

The court ruled for the defendants and held that when the red cap became recognized as an employee of the company the company became entitled to his services and what was received for them. The red caps reward was to be wages. The notice given the red cap was sufficient to make his receipts the money of the employer. Tips to red caps were held to be wages not personal gifts or gratuities but compensation for services. *Williams v. Jacksonville Terminal Co.*, 60,312 LABOR LAW SERVICE (*Commerce Clearing House, Inc.*) (1941).

There is some conflict on this matter and some cases hold *contra* as in *Pickett v. Union Terminal Company*, 33 Fed. 244 (1940), wherein it was held that the payment of tips by the public to the employee of another is a "gift" to that employee and they remain the property of the employee in the absence of any contract between the employee and employer that such tips shall be the property of the employer.

So also we find in *Zappas v. Roumeliote*, 156 Iowa 709, 137 N. W. 935 (1912) that a minor working in a shoeshining establishment under a salary contract was entitled to tips which were personal gifts to him from the patrons of the house in the absence of a contract that they should belong to his employer and that he could recover them back when paid to the employer by mistake, although the wages agreed upon had been paid to him. This case is cited and the ruling confirmed in *Ex parte Farb* California Supreme Court, 174 Pac. 320, 178 Cal. 592 (1918) where the court said "Even if we concede that the gratuity is essentially a personal earning of the employee's, nevertheless it must be true that one may enter into a contract involving the expenditure of one's earnings."

In argument with the principal case we find *Penn v. Spiers and Pond Limited*, 1 K. B. 766 (1908), where the court held that where the employment is of such a nature that the habitual giving and receiving of tips is open and notorious, and is sanctioned by the employer the money thus received with his knowledge and approval must be brought into account in estimating the average weekly earnings in respect to which compensation is to be awarded.