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Recent Decisions

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It is interesting to note that a foreign corporation doing business in Ohio and having a managing agent who is served with summons is subject to suit therein upon transitory actions arising outside of the State.[28] This enables the citizens of sister states, who have done business in their own states with a foreign corporation which has since stopped doing business and has withdrawn agents from those states, to sue the corporation in the courts of Ohio, provided the corporation has agents in Ohio, thus saving these citizens the expense and inconvenience of suing in some distant state where the company may be incorporated. Residents of Ohio, who may have transacted business with the foreign corporation outside of the State, are also protected thereby.

Francis M. Marley.

RECENT DECISIONS

TAXATION—BENEFICIAL ASSOCIATIONS—NEBRASKA COURT HOLDS FREEMASONRY RELIGIOUS.—In the case of *Ancient and Accepted Scottish Rite of Freemasonry v. Board of County Com'rs.*, 241 N. W. 93 (1932), the Supreme Court of Nebraska *held* that one of the purposes of freemasonry is religious, within the meaning of the constitutional and statutory provisions of that State exempting from taxation "all property owned and used exclusively for educational, religious or charitable purposes when such property is not owned or used for financial gain or profit."

The property involved in the suit was the Scottish Rite Temple and grounds in the city of Lincoln which had been entered upon the tax lists for the year 1926 at an assessed valuation of $110,000. The equitable title was in the Ancient and Accepted Scottish Rite of Freemasonry and the legal title in the Scottish Rite Building Company. The holder of the equitable title filed an application with the Board of County Commissioners praying for an order striking this property from the tax lists of 1929 on the ground that it was exempt from taxation under the provisions of the law above referred to. The Board dismissed the application and complainant appealed to the district court which sustained the Board's decision; and, upon appeal the supreme court reversed the judgment of the district court.

In an elaborate opinion by Judge Eberly, the supreme court reviews the adjudicated cases. Article VIII, Section 2, of the Nebraska Constitution is as follows: "The Legislature by general law may exempt property owned by and used exclusively for agricultural and horticultural societies, and property owned and used exclusively for educational, religious, and charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user." Under the foregoing constitutional provision, the legislature provided: "The following property shall be exempt from taxes. . . . Property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either owner or user." Neb. Comp. Stat. (1929) § 77-202.

In discussing the religious aspect of the claim for exemption the court uses the following language: "Masonry is traditionally and generally described as a system of morality veiled in allegory and illuminated by symbols. It teaches as

28 Maichok v. Bertha-Consumers Co., *op. cit. supra* note 8.

a foundation principle, faith in God and immortality of the soul. Masonry is not sectarian in its religious teaching. It aims to bring its devotees a deeper and more conscious contact with spiritual things. To the extent that religious purposes include the field of morals, Masonry makes common cause with organized religion. Masonry is tolerant of all faiths and builds a moral and spiritual fellowship on the foundations of fundamental morality common to them. It brings its members to the altar of prayer and by its very teaching and effort, seeks to make real the invisible power of love, the intrinsic worth of harmony, and the beauty and eternal reality of the ideal. Outside of the activity of Masonry which is devoted to charity, which constitutes a very substantial and major part of its endeavors, all of its activities in all of its bodies are devoted to those purposes which properly fall within definition of 'educational' and 'religious.' The positive testimony based upon the positive knowledge of the witnesses testifying in summarizing is that, measured by its purpose as exemplified by appellant, and as applied in its work as a lodge or society (to quote from the record before us), 'Masonry falls entirely, without exception, within the three categories of charity, educational purpose and religious purpose. It has no other function or purpose and does no other work.' Further that the statements thus made 'may be fully verified in every particular by reference to a large body of masonic literature available to anyone who is interested in studying it, open to everybody representing the best masonic thought for centuries back in time.'"

It is curious to note that, in 1921, this same court held the same property used exclusively for the same purposes, and under essentially the same claim, not to be exempt. So, in rendering the decision under consideration, the court was compelled to and did overrule its own previous decisions in *Appeal of Scottish Rite Building Co.*, 106 Neb. 95, 182 N. W. 574, 17 A. L. R. 1020, (1921), and *Mt. Moriah Lodge, No. 57 A. F. and A. M., Syracuse, Neb., v. Otoe County*, 101 Neb. 274, 162 N. W. 639 (1917), in so far as they conflicted, and they are in direct conflict on the decisive point in the case. It is believed that this is the only case in which a court of last resort has held freemasonry to be religious.

William M. Cain.

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WILLS—CONSTRUCTION—IDENTIFICATION OF BENEFICIARY—TESTAMENTARY INTENT—ASCERTAINMENT FROM WILL ALONE.—The appellants are the sister and the several nephews and nieces of the deceased. The respondents are seven orphan asylums of the city and county of San Francisco. The appeal is from a decree of final distribution which distributed the estate in equal shares to the seven respondents. The portion of the decree appealed from was reversed. The olographic will of the deceased, duly admitted to probate, read as follows:

> "When I am dead I wont everyting to go to Offens home of San-Francisco. You find everything in box 3608 Humbolt Bank. This is my last Will.
>
> "March 20, 1927
>
> Edward J. A. Zilke."

It was stipulated upon the hearing of the petition for distribution that appellants are the heirs at law and next of kin of the deceased and that the seven orphan asylums are situated in the city and county of San Francisco. No further evidence on the subject was offered. The parties assumed in the briefs that there was no institution, association or corporation bearing the name "Offens home of San-Francisco" or "Orphan's Home of San Francisco." And it is further assumed that the seven respondents conduct all the orphan's homes in San Francisco.

Neither assumption is supported by evidence in the record. *Held,* that the gift failed because of the indefiniteness in description of the beneficiary. *In re Zilke's Estate,* 1 Pac. (2d) 475 (1931).

The court argued that if there was no institution bearing the name of the beneficiary used in the will, and, as there were seven institutions in San Francisco conducted as orphan's homes, a latent ambiguity arose which might have been removed by parol evidence; that since no evidence was offered to remove the ambiguity, the court was compelled to ascertain the intention of the testator from the face of the will alone. Looking at the face of the will, the court said that since the testator had capitalized the word "Offens" it indicated that he intended to describe a particular institution, especially since the word "home" was in the singular, so the language used was insufficient to support a decree in favor of all the orphan's homes in San Francisco.

The court's argument is open to criticism. First, it would seem that no particular stress could be laid upon the fact that the word "Offens" was capitalized since the word "home" was not capitalized and that would be a part of the designation of a particular beneficiary. Furthermore, the word "Will" was capitalized which would go to show the testator laid no particular emphasis upon the capitalization of "Offens." Second, it seems that the testator's ultimate intention was to benefit the orphans of San Francisco; but the immediate intention is not to make a direct gift to them. Sufficient appears from the face of the will to show this, and it is a general rule that the courts will uphold the will and carry out the testator's intent if it can reasonably do so without doing violence to the Statute of Wills, *ut res magis valeat quam pereat.*

The manner in which the will was written and executed does not permit of too much emphasis upon clerical errors.

The word "you" might be of advantage in limiting the bequest to a particular institution, but a more reasonable conclusion would be that it referred to the testator's personal representative, and the sentence begining with this word was probably intended as merely an administrative aid in the settlement of the estate.

It appears that the testator intended a direct gift to the legatee or legatees named in will rather than a gift in trust for the benefit of the orphans of San Francisco.

With the aid of intrinsic evidence it might appear that a particular orphan's home was meant. But without the aid of this testimony the solution will not be aided by striking out any of the words used describing the beneficiary. If we struck out the word "home" there would not be enough left on the face of the will to indicate with a reasonable degree of certainty what legatee or legatees were in the mind of the testator. And the courts have consistently refused to insert words in a will. In *In re Goods of Bushell* [1887] 13 P. D. 7 the court substituted the word "Bristol" for "British" in a gift to the "British Royal Infirmary." But this case was disapproved in *In the Goods of Louis Schott* [1901] P. D. 190, where the court refused to allow the order of substitution made in *In re Goods of Bushell* to be carried into practice. This is a much stronger case than the principal case because, first, the will was not read over to the testator, and second, affidavits showed the real intention of the testator.

The writing failing as a will, is it possible to work it into something of value and effect by construing it a trust? The same has been suggested on the strength of *Hunt v. Fowler,* 121 Ill. 269, 12 N. E. 331 (1887). 27 Ill. Law Rev. 98, 99 (1932). A will in this case contained the following residuary clause: "All the rest and residue of my estate including that which may lapse for any cause, I direct to be invested or loaned upon the best terms possible, so as to produce the largest income, and said income to be distributed among the worthy poor of the city of La Salle, in such manner as a court of chancery may direct." The

heirs at law brought suit, to have testatrix declared intestate in respect to that part of the estate contained in the residuary clause, and that they, the heirs at law, be declared owners of such estate on the ground that there is no agency of any sort for the distribution of charity to the poor of the city of La Salle; that its authorities have no such duty, and that the codicil containing this residuary clause is incapable of execution because of the uncertainty of the beneficiaries intended by the testatrix and is therefore void. *Held:* "It is an essential feature of public or charitable trusts that the beneficiaries are uncertain, —a class of persons described in some general language, often fluctuating, changing in their individual numbers, and partaking of a *quasi* public character." The class here is definite but the individuals of the class to whom the bounty is to be distributed are uncertain. The fact that a trustee is not made certain will not be fatal to a charitable trust, for a court of equity will carry the trust into effect either by appointing a trustee, or by itself acting in place of a trustee. Such is true where the class of beneficiaries is sufficiently definite. "But if a testator makes a vague and indefinite bequest to charity, and names no trustee, and gives no power to the court to appoint, there is no power in the American courts to administer such an incohate and imperfect gift." Perry on Trusts and Trustees, § 731. But the charity here is specific and will entail no great difficulty in execution. Distribution within the power of the chancery court has been requested and such administration will fulfill the donor's intention, and it was so decreed.

Any effort to apply the principles of the *Fowler* case to *In re Zilke's Estate* is frustrated by Zilke's will itself. First of all, no intention to create a trust, charitable or otherwise, appears. Next, there is a failure of designation to a particular class, wherein is the essential, distinguishing feature from the *Fowler* case. So obscure is Zilke's meaning that we cannot say whether he wished to benefit a single orphan's home or all the orphan's homes, and, as before stated, the presence of the word "home" removes the orphans themselves from the sphere of direct recipients of the testator's bounty. Finally, Zilke has failed to designate a trustee or leave the power of distribution to the discretion of the court. While this omission of itself, according to the *Fowler* case, is not fatal if the court finds its power sufficient to carry out the bequest, yet, when it is coupled with a failure to sufficiently designate a class of beneficiaries, it is not within the power of the American courts, as Mr. Perry states, "to administer such an incohate and imperfect gift."

E. L. Barrett.

CONTRACTS—CONSIDERATION—THE RESTATEMENT OF CONTRACT LAW.—The case of *W. B. Saunders Co. v. Galbraith,* 178 N. E. 34 (Ohio 1931), provides a very interesting point for discussion. It contains an application of the principles of the Restatement of the Law of Contracts, now being prepared by the American Law Institute. The facts of the case are not important in regard to this discussion and they therefore will not be considered. The principle under discussion is that contained in Section 90 of the Restatement. However, it is the remarks which accompany the statement which make this case outstanding.

This opinion is written by Judge Mauck. He says: "By following the admirable notes of Professor Ferson it would not be difficult to sustain the soundness of Section 90 as the boiled-down essence of the law of Ohio. We are content, however, to take the Restatement as the law of this state without exploring its soundness, and hold that of its own vigor it is adequate authority. This is not to say that the Restatement is of necessity perfect, and that in it is to be found the law's last word. We only hold that he who would not have it followed has the burden of demonstrating its unsoundness."

This is certainly an astounding statement. The first sentence of the quotation seems entirely logical, and if true, open to no criticism. If Section 90 contains the boiled-down essence of the law of Ohio, then certainly it is authority in Ohio, not because it is the Restatement, but because it conforms to the existing law there. But when the learned judge proceeds to go further, and to say that the Restatement is law in Ohio because it is the Restatement, and not because it conforms to the already existing law there, the statement seems to be open to almost unlimited criticism. Of course, he, in all probability, means that the Restatement is *prima facie* the law, and if the law is in fact different, the opposing party may introduce proof to show this, but even this seems to go beyond the province of a judge, in that it makes the Restatement the standard to which the existing law must be shown to conform or not to conform, instead of making the existing law the standard to which the Restatement must be shown to conform or not to conform.

This certainly is contrary to the expressed intention of the American Law Institute. In their official booklet "The American Law Institute, A Short Summary of Pertinent Facts," p. 3, they say: "The purpose of the Restatement is to make a clear and accurate statement of the fundamental principles of the common law. The hope is that the work will be so well done that inherent excellence and the personnel of the Institute will enable the Restatement to command the respect and attention of the courts. It is not desired that the Restatement shall be adopted by the legislatures as a code. The Institute has been founded to preserve the common law system of developing law through the judicial determination of actual cases. . . . The Institute is created to preserve the common law system, not to destroy it." And is it any less destructive of the common law system to have the Restatement adopted as law itself by the courts, than to have it adopted as a code by the legislatures? Certainly this is more than the respect and the attention of the courts, which is all that the framers of the Restatement desired.

This assumption of the Restatement as law is also contrary to the general trend of the authorities in the country. From the examination of twenty-five citations of cases in which the Restatement is referred to as authority, which practically exhaust these citations down to the present time, we find that it is quoted with varying effect. Two of these citations come from the Federal courts, and the rest from ten supreme courts of various states. In order to get a true perspective on the real weight given the Restatement in these courts, the references may be classified. In eleven of these twenty-five cases, the Restatement was merely referred to, in support of other authorities. In ten of the twenty-five, it was quoted in support of other authorities, which were quoted before it. In one of these twenty-five, it was quoted in support of the judge's position, and then other references were brought in as supplementary authority. In three of the twenty-five, it was the only authority quoted in support of a point which the judge made. And in one of the twenty-five, it was quoted and the judge took exception to it, holding that it was contrary to the law of that state, in this particular matter, These of course, do not include the principal case under discussion. The stand that this learned judge takes is unique.

The Restatement has been quoted by nineteen judges in these twenty-five citations. Some of these are outstanding for their learning and authority. Chief of these is Judge Benjamin Cardozo; but it might be noted that all of his references fall into the first division of the classification given above.

From this we see that the Restatement of Contract Law is exercising a great deal of influence on the courts, and is being accepted by them as an authority. It is however, the authority of a text-book which is being, and which should be

accorded to it. It gains its eminence from the learning of its authors, and its propositions deserve a consideration which is commensurate to those authors; but to step from quoting it as a text, and in support of the judge's interpretation of the existing law to the acceptance of it as the law itself appears to demand more authority than the weight of one isolated decision affords, and to give to the Restatement more authority than even the eminence of its authors can justly expect.

John M. Crimmins.

LIBEL AND SLANDER—PRIVILEGED PUBLICATIONS—TRUTH—MALICE OF AGENT IMPUTED TO PRINCIPAL—CHARGES OF ARREST.—The plaintiff, Thompson, brought three suits for libel against the Globe Publishing Company, the Boston Publishing Company, and the Boston Transcript Company, which were tried together. The alleged libels, contained in the newspapers published by these companies, were in substance that the plaintiff had been arrested on a warrant charging him with being a fugitive from justice, and that he was wanted in Concord, New Hampshire, to answer a charge of larceny in connection with inducing one Callahan to steal eight printed pages of the May, 1927, issue of the Atlantic Monthly. The answers set up truth and privilege, and the main question in each case arises on the correctness of the rulings by the trial judge as to what evidence, as a matter of law, justified these defenses, and as to the correctness of the plaintiff's requests for rulings. *Thompson v. Globe Publishing Company,* 181 N. E. 249 (Mass. 1932). A few of these rulings and requests will be considered *seriatim.*

1. That the proceeding before the judge of the district court that issued the warrant was a judicial proceeding, within the privilege rule. *Held,* the privilege rule extends to the application for the issuance of warrants. The general rule is that a fair report in a newspaper of a pending judicial proceeding is privileged; and the privilege extends to all matters that have been made the subject of judicial action, though such proceedings may be merely preliminary or interlocutory, *Kimball v. Post Publishing Co.,* 199 Mass. 248, 85 N. E. 103, 19 L. R. A. (N. S.) 862, 127 Am. St. Rep. 492 (1908), *Kimber v. Press Asso.* [1893] 1 Q. B. 65, 62 L. J. Q. B. N. S. 152, or ex parte, *Conner v. Standard Pub. Co.,* 183 Mass. 474, 67 N. E. 596 (1903), *Meriwether v. Publishers: George Knapp & Co.,* 211 Mo. 199, 109 S. W. 750, 16 L. R. A. (N. S.) 953 (1908). But this privilege is limited to matters that have been made the subject of judicial action. It does not extend to publication of matters contained in declarations or other papers filed in court, where no judicial action has been taken. Chapin on Torts, 329; *Cowley v. Pulsifer,* 137 Mass. 392, 50 Am. Rep. 318 (1884).

2. The plaintiff requested a ruling that the plea of truth could not be established until the jury had been satisfied that a theft had actually been committed. *Held,* that the publication of the fact that an arrest had been made, and upon what accusation it had been made, is not actionable, if true. "The defense against an action for writing of one that he has been arrested upon a particular charge is that the fact is true. But if to this fact there is added by way of comment words which amount to an accusation that the charge is true, or comment which assumes the guilt of the person arrested, by headlines or otherwise, the mere fact that the person was arrested upon the charge stated is no justification for words imputing guilt." Lurton, J., in *Commercial Publishing Company v. Smith,* 149 Fed. 704 (1907).

3. The trial court ruled that the plaintiff was entitled to submit evidence of publications of the defendants, subsequent to those set out in the declarations, to show express malice. Upon exceptions taken by the defendants it was *held,* that the jury is entitled to consider subsequent publications in determining

whether or not, because they were subsequently published, the defendants were actuated by actual malice. "Evidence of other or similar slanderous words, spoken at other times and places, is admissible to show that the words charged in the complaint were spoken with malice and ill-will! So if repetitions of the slander charged of the defendant whether before or after the occasion sued for, or before or after the suit was commenced." Thockmorton's Cooley on Torts, 352, 353.

4. The plaintiff sought to show express malice on the part of two of the newspaper companies involved by showing such malice on the part of the persons employed in editorial and reportial capacity by these companies. *Held,* that the actual malice which is imputable from an agent to his principal in such cases is restricted to those agents who are entrusted with the responsibility of determining what should and what should not be published. Accord: *Friedell v. Blakely Printing Company,* 163 Minn. 226, 203 N. W. 974 (1925).

Philip L. Konop.

NEGOTIABLE INSTRUMENTS—REFORMATION OF INSTRUMENTS.—The recent case of *Renihan v. Piowaty,* 179 N. E. 568 (Ind. 1932), deals with the reformation of a negotiable promissory note to conform to the true intent of the maker and the payee. It is a case which challenges the attention of one who has just completed a course in Negotiable Instruments and at first glance the decision startles such a student. The subject itself is governed by such definite rules, and embodied in such formalism, that to the average student a negotiable note takes the form of a very sacred instrument. To him its negotiability confers on the instrument a solemnity not possessed by a deed or a judgment. He gathers the idea that it is immutable, a veritable *deus ex machina* ruling with an iron hand all it touches. He has been so immersed in rules of interpretation, and so governed by rules of construction that the possibility of getting at the true intent and meaning of the parties by altering the subject matter and thus bringing a new set of rules into play takes on the aspect of heresy to him. At least so it was with me. And it needs just such a case as this to bring him back to a true sense of perspective, and to make him realize that law, and even the law of negotiable instruments, is primarily a matter of rational justice and not of formalistic reasoning; that the rules are only means toward arriving at the truth and not the truth itself.

The facts of the case are briefly these. The defendant, Ernest Piowaty, was a resident of South Bend, Indiana. He had a brother, Fred Piowaty, in Grand Rapids, Michigan, who was general manager of M. Piowaty & Sons, a corporation engaged in the wholesale fruit business, in which the defendant was in no way interested. Fred became ill and Ernest went to Grand Rapids to assume control of the corporation during his brother's illness. During this period, two notes held by the banker, of whose estate the plaintiff is administrator, fell due, and the defendant renewed them for the corporation, signing them "M. Piowaty & Sons, Ernest Piowaty." The cashier of the bank, with whom defendant dealt through an intermediary, contented himself with the knowledge that Fred had power to bind the corporation, and did not enquire into the defendant's personal financial responsibility. When these notes fell due, Fred had died and Ernest had returned to South Bend. The corporation was in financial difficulties and went into the hands of receivers. The bank, having no security, was unable to collect the notes. Five years later they sued this defendant on these notes.

The defendant, in his answer to plaintiff's complaint, filed a general denial with an affirmative paragraph as a defense. To this a demurrer was sustained. Then defendant introduced a third paragraph, claiming that at the time of the execution of the notes that there was an understanding between the parties that Ernest Piowaty was signing in a purely representative capacity, and asking

that the instrument be reformed to conform to the true intent of the parties by placing the word "by" after the words "M. Piowaty & Sons," and the words "acting manager" after the signature of Ernest. The plaintiff's demurrer to this paragraph was overruled. Judgment was given for the defendant, and the plaintiff appealed on the grounds that this demurrer was wrongfully overruled and that the evidence did not sustain the judgment.

The proof substantiated the facts as given, and they were not disputed. The principal point in the contention was the disagreement as to the understanding between the parties at the time of the execution of the instruments. Counsel for the plaintiff argued that there was no mutuality of mistake, that the defendant only was in error, and that thus there was no ground for equity intervention. Also he further argued that if there was a mistake, it was a mistake of law and equity will not step in to correct a mistake of law. Counsel for the defendant ably answered these propositions. In regard to the first, he placed the plaintiff on the horns of a dilemma by saying that either both parties were mistaken in the transaction, or that the defendant was mistaken and the plaintiff was knowingly attempting to take an unfair advantage of his mistake at the time mistake was committed, which amounts to fraud; and in either of these possibilities equity will interfere in the interests of natural and substantial justice. In regard to the second point made by the plaintiff, defendant answers that it is settled law that "even though there is a misapprehension of the law intermixed with a mistake of fact, which defeated the mutual intent of the parties, the remedy by reformation is still available. The courts long ago departed from the ancient rule that only mistakes purely of fact could be corrected in equity."

Thus a mistake was established by the reasoning of the counsel for the defendant. On this mistake, from the acts of the parties, the law construes a contract such as the parties really intended. In this case, the parties really intended that Ernest Piowaty should sign in a representative capacity only. Therefore the court, in accordance with good reasoning, and according to defendant's prayer, ordered that the instrument be reformed by placing the word "by" after "M. Piowaty & Sons" and the words "acting manager" after the signature "Ernest Piowaty."

It is a matter for speculation as to whether this result could have been attained without resorting to equity. It seems that before the Negotiable Instruments Law was passed that the fact of the actual agency would have been a good defense to the suit, even though the defendant apparently signed as a principal. We have three leading cases to support this view. The first of these is *Mechanics Bank of Alexander v. Bank of Columbia,* 5 Wheat 326, 5 L. Ed. 100 (1820), which holds that "it is enough for the purposes of the defendant to establish that there existed on the face of the paper circumstances from which it might reasonably be inferred that it was either one or the other (signature of agent as agent or as principal). In that case it became indispensible to resort to extrinsic evidence to remove the doubt." And later "It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing, on the face of them, to have been done in the exercise of their agency." The second authority is that of *Second Nat. Bank v. Midland Steel Co.,* 155 Ind. 581 (1900), which holds that "Rules of form in certain cases, have been prescribed by law, and where that is so, those rules in general must be followed, but in the diversified duties of general agent, the liability of the principal depends upon the fact that the act was done within the limits of the powers delegated, and those powers are necessarily inquirable into by the court and jury." And finally the case of *Ford v. William,* 21 How. 289, 16 L. Ed. 36, (1858), holds that "The contract of the agent is the contract of the principal, and he may sue or be sued thereon though not named therein. Parol proof may be admitted to show the real nature of the transaction, and it is