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Notes on Recent Cases

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NOTES ON RECENT CASES

BANKS AND BANKING—*Champion v. Big Stone County Bank, et al,* 224 N. W. (Minn.) 258, 1929. The plaintiff, as treasurer of the village of Graceville, deposited with the Big Stone County Bank a sum of $16,000 which had been obtained from the sale of bonds and which was to be used for the purpose of constructing a village well and for the construction of streets. The fund was deposited with the bank by the treasurer, at direction of the town council, in an account designated as "Village of Graceville Street and Well Fund." The village instructed the bank that no part of the fund was to be used for any purpose other than that designated. Subsequently the bank became insolvent and the defendant, Veigel, took possession of the assets for liquidation. The plaintiff brought this action to recover $2,088.30, which was the amount of the fund remaining in the bank at the time it became insolvent, alleging that this was a preferred claim against the assets of the bank. The plaintiff had judgment in the trial court but on appeal this judgment was overruled, the court stating that there was no fiduciary relationship between the bank and the plaintiff. The bank had no special duty in respect to this fund other than to restrict payments from it to the specific purpose for which it was created. Such a duty did not create the relationship of bailor and bailee, but of debtor and creditor; therefore the plaintiff had no right to a superior claim over the other creditors of the bank.

BRIBERY—Giving money to village police officer to refrain from instituting criminal proceeding in Federal court for violation of the National Prohibition Act for selling liquor held to constitute offense of bribing public officer.

In the recent case of *People v. Lafaro* (New York) 165 N. E. 518, the defendant, Lafaro, owned and operated a public billiard room in the village of Waverly where he sold intoxicating liquor. The village chief of police visited the premises and found some whiskey. The next morning the defendant went to the office of the chief of police and gave him twenty dollars. According to the testimony of the chief of police, defendant offered to pay him the further sum of twenty dollars every month. At the

trial, the defendant was convicted and the Appellate Division affirmed the conviction on appeal. From that decision the defendant appeals to the Court of Appeals for a reversal.

The defendant's chief contention on appeal was that the payment of money as charged in the indictment was not made with the intent to influence the police officer in respect to any act in the exercise of his powers or functions as an officer of the state and therefore that the statute concerning the bribery of public officers was not violated by him and his conviction could not stand. The question is, whether, complaint to the federal authorities of a violation discovered by the officer in the course of his duty is not part of the function of a state police officer, at least where the continued violation tends to affect the health, morals and good order of the public.

In answer to this question the court said: "The gist of the crime of bribery is the wrong done to the People by corruption in the public service. None can doubt that this defendant sought corruptly to influence a public officer, in the performance of an act which, it is evident, the defendant, the police officer and the Governor of the state considered a public duty owed by a public servant. We have given to the statutory definition of bribery a construction broad enough to cover cases where a public officer has accepted a bribe to act corruptly in a matter beyond his official powers or duties. People v. Jackson, 191 N. Y. 293; 15 L. R. A. (N. S.) 1173; People v. Clougher 246 N. Y. 106, 158 N. E. 38."

The court further went on: "Duties and functions of police officers have never been limited rigidly to the field of law enforcement in which police officers exercise special powers and enjoy special immunities. Police officers are the guardians of public peace, but the public is accustomed to look upon them also as guardians of the comfort, safety, and good order of the locality against dangers arising from other causes than offenses against the peace and dignity of the state. No line of demarcation can be drawn definitely. . . . . In matters germane to the official functions of police officers, there may be a wide scope for the exercise of discretion as to the form and range of services to be rendered; but it can hardly be doubted seriously that a police officer might be directed by his official superior to

report violations of a federal statute to federal authorities and that failure to carry out such directions would be an official dereliction."

The defendant further contended that while traffic with a public officer of the state in the privilege or duty of invoking the public justice of the state constitutes the crime of bribery, traffic with such a public officer in the privilege o rduty of invoking the public justice of the nation does not. The court said in answer to this: "Such distinctions have no place in the administration of the criminal law. We refuse to read them into the statute At times the violation of the Federal Prohibition law may constitute an offense also under the law of the state. See People v. Van DeWater 250 N. Y. 83. In the present case the defendant's sale of intoxicating liquor in a billiard room constituted an offense against both the state and the nation. Clearly under such circumstances, a decision to institute proceedings in the Federal court to end an act which disturbs the peace and order of the community cannot be said to be wholly outside the functions of the police officer. Even where the act which violates the Federal statute is not a violation of any law of the state, in a broad sense, the public peace and order may yet be disturbed by violation of any law, regardless of its source."

In the final paragraph of the court's opinion it strongly urged co-operation between federal and state governments which shows the reasoning behind the court's entire opinion. The court stated as follows: "If enforcement of state law is confided solely to the public officers of the state, and the enforcement of the federal law is confided solely to the public officers of the United States, then in the interests of the community there may well be co-operation between the two. At least, we may say that such co-operation in the interests of the public is not outside the functions of officers to whom law enforcement has been confided. Otherwise the complications inherent in our system of dual sovereignty would become intolerable. Bribes offered to police officers to refrain from co-operation with federal authorities must bring corruption into our police force. We will not impute to the legislature any intention that narrow distinctions should be drawn between traffic with a public officer affecting the peace, order and justice of the state and the

traffic with the same officer affecting the peace, order and justice of the United States where the purpose and natural effect of the act is to corrupt the police of the state." Judgment affirmed.

J. S. Angelino.

CARRIERS AND PUBLIC SERVICE COMMISSIONS— *Gilchrist v. Interborough Rapid Transit Co.*, 48 Supreme Court Reporter 282, is an appeal from the District Court (Southern District) of New York which authorized an interlocutory injunction to restrain the appellants, the Transit Commission and New York City, from forcing on the appellee the acceptance of a five cent fare on the lines operated by it.

The contention of the appellee is that the five cent fare originally stipulated and long observed had become non-compensatory and that under the Public Service Law of 1907, directing reasonable rates, they should be allowed an increase in fare. The Transit Commission insisted on observance of the five cent rate and the appellee insists that this amounted to action by the state which would deprive the Interborough Company of property without due process of law, contrary to the Fourteenth Amendment.

In 1891 the legislature of New York passed the Rapid Transit Act which provided for a board of Rapid Transit Railroad Commissioners who were to have the power to contract for the construction of Rapid Transit lines and for the fare to be charged. The present rapid transit lines in New York are the result of this act.

In 1907 the Public Service Commission Law was passed to provide for the regulation and control of Public Service Corporations. In May, 1920, the Interborough Company, purporting to proceed under the Public Service Commission Law, complained to the Commission that a five cent fare was insufficient. Relief was denied because of no jurisdiction on the part of the Commission to fix a rate different from that fixed by the contract as made under the Rapid Transit Act.

In 1928 the Interborough Company, adopting the method prescribed by the Public Service Law, filed with the Commission new schedules that purported to establish a seven cent fare. No action was taken by the Commission but it appears that counsel

for the Commission and the Mayor expressed opinion that no relief should be granted. The next action taken by the Transit Company was to file a bill asking for an injunction against the Commission, so that there would be no interference with the establishment of a seven cent fare.

The first question to be decided was concerning the right of the Transit Company to resort to the Federal Court for an injunction before the statutory period had run after the filing of its application for a new rate. On this point the court held that the Transit Company was without authority to file its suit for injunction before the expiration of the thirty days as allowed by statute even though the Commission had prior thereto expressed the opinion that it lacked the jurisdiction to permit the new rate, because of the existing contract entered into under the Rapid Transit Act.

Mr. Justice McReynolds in his opinion said that the ruling was put on the single ground that the franchise contract was subject to the statute and by the statute may be changed. This is under the doctrine approved in Prentis v. Atlantic Coast Line. 211 U. S. 210.

The court also said that considering the probable fair value of the subways and the current receipts therefrom no adequate basis is shown for claiming that the five cent rate is confiscatory. The interlocutory order was reversed and the cause remanded to the District Court for further proceedings in conformity with the Supreme Court's opinion.

Marc Wonderlin.

CENSORS—Right to Censor Movietone.

In Re Fox Film Corporation, 145 A. 515.

Under an act of May 15, 1915 (Pa. St. 1920-sec. 21120 et seq.) all motion picture film, before being exhibited, must be approved by the Pennsylvania state board of censors. This board of censors, in conformity with the right conferred upon it by the said act, required all films submitted which were to be exhibited in conjunction with any mechanical device for the utterance of language, to be submitted to the board together with such language.

The film company refused to do this on the ground that

such a requirement was beyond the authority of the board of censors. The board on its behalf alleged that without a knowledge of the language proposed to be uttered in connection with the picture, it would be unable to determine whether or not the film was moral or improper, as was required of them by the said act.

The court held that movietone, viewed from a common-sense standpoint, is the recordation of spoken language upon a film and constitutes merely a recordation differing in matter and kind from that on a silent film, and designed to reach the hearing of the audiences instead of its sight or vision. It is thus only an incidental variant style or kind of film and therefore comes within the scope of the meaning and application of the term "film" as used in the act of 1915 (supra) which therefore gives the board the power to require that such language be submitted together with the film to the board of censors.

W. S. McCray.

CRIMINAL LAW.—Search of defendant's room without warrant, during her absence and without her consent was unlawful. Admission into evidence of property found there was error.

Confession obtained under promise that it would inure to defendant's benefit at trial held incompetent.

People v. Stokes. Supreme Court of Illinois, Feb. 20, 1929. 165. N. E. 611. This was an appeal from a conviction of manslaughter. Affirmed.

Florence Stokes had been keeping company with James Glennon from October, 1924 until the night of his decease, Feb. 27, 1927. They had had illicit relations on several occasions and on the night of Glennon's death. On the evening of February 27, the defendant and Glennon had gone to a movie and then returned to defendant's rooming house. They had intercourse and when they were finished the defendant asked Glennon if she meant anything to him. He said, "No." She told him in that event she had better go east. He handed her a revolver and told her that this would be a better way. She took the gun and pointed it at her head. A struggle ensued. During this struggle the defendant got possession of the gun and shot the deceased twice.

After the shooting the police took the defendant, Stokes, into custody. There she made a confession that she had shot Glennon. The police advised her to make the confession as that would help her as the police in Chicago would do all they could to help her if she gave them evidence.

The police also searched the defendant's room without obtaining a warrant, without consent of defendant and during her absence from the place. A brush, the type used to clean revolvers was found there, also a piece of paper with notations pertaining to the operation of a revolver.

The court held there was error in admitting into evidence the property found in defendant's room. The court likewise found that there was error in admitting into evidence the defendant's confession over the objection of defendant's attorney, as the confession was not voluntary. However as the defendant had given her testimony voluntarily in court and it had become part of the record, the errors assigned could not reasonably have affected the verdict and there would be no good purpose in reversing the judgment. Judgment affirmed.

John P. Berscheid.

INTOXICATING LIQUORS—Defendant's statement that he had liquor held sufficient to justify search of automobile without warrant and use of information discovered thereby in evidence.

Defendant, while driving his automobile on a public highway in the county of St. Joseph, Michigan, was stopped by a state police officer, who had observed that there was no license plate on the front of the automobile and that the rear plate was not readily discernible; after some conversation with the officer, defendant admitted that he had liquor in the car and expressed a desire to "fix it up." The officer searched the car, found the liquor, and placed the defendant under arrest; the liquor thus obtained uas used as evidence against him and conviction resulted. *People v. Goss,* 224 N. W. 364, Supreme Court of Michigan, 1929.

It was the contention of defendant that the search and seizure was unreasonable and unlawful in that no offense was being committed in the presence of the officer at the time of the arrest, and that the evidence so obtained should therefore have been suppressed, a motion to this effect having being denied. The

court, however, affirmed the ruling of the lower court in denying the motion, saying that the fact that intoxicating liquor was found in the car showed that an offense was being committed in the officer's presence. That fact alone would not justify a search and seizure; in order that it be justified, it was necessary that the officer act upopn some fact or circumstance or upon such information as would create in his mind a reasonable and honest belief that the law was being violated. In this case the information, coming from the defendant himself before the search was made, was sufficient to justify the search and the subsequent arrest of defendant, and there was no error in the refusal of the court to suppress the evidence thus obtained.

J. J. Canty.

MASTER AND SERVANT—Mental disability, the effect of injury in employment, is compensable.

Petitioner in *Reynolds Case,* 145 Atlantic 455, a man of 60 years, was employed as carpenter, and while installing forms, fell, injuring his left shoulder. He received compensation until the 2nd day of the following June, when he signed a settlement receipt, with the Insurance carrier, which was duly approved by the Industrial Accident Commission. Two weeks later he petitioned for further compensation on account of the same injury, and the Commission ordered compensation for temporary total incapacity from June 2, 1928 to October 10, 1928; any further compensation, total or partial to result from employee's further compensation, total or partial to result from employees own demonstration of his capacity. This was an appeal from the decree sustaining the Industrial Commission's finding. It appears that due to a fracture of the ulna, the left arm of the petitioner was in an abnormal condition and a cerebral abnormality had been affecting him for ten years. However the record proves that the petitioner suffered both physically and mentally from the accident.

Supreme Judicial Court of Maine held that mental disability, if a sequence as the effect of injury to a great nerve center, received in the course of his employment and arising out of it, is compensable. Further that citations of authorities are not necessary; that from complete paralysis, or coma, down through the grades of disability that lessen an operative's capacity to do work

of his employment, mental inefficiency is to be considered in appraising the economic value of man. "Worry" is the term used by the commissioner to express the mental abnormality which ensued after the accident. He found it was either caused by the injury. or that a pre-existing state of mental abnormality or subnormality was excited and caused to flame up with overpowering vigor by the injury.

J. J. Lyons.

MUNICIPAL CORPORATIONS—Not liable for tort in operating golf links in public city park.

This is an action against the city and the members of the park and recreation board of the city for the negligent shooting of the plaintiff's intestate by the caddy master on the public golf links of the city. The caddy master was alleged to be the servant, agent, or employee of the defendants in the operation of the golf links in a public city park. The liability of the city in such a case depends on whether the city was then engaged in a corporate function, or a public and governmental function, the court holding that it is liable when engaged in a corporate function and not liable when engaged in a public and governmental function. The court said, "It may be conceded that the question is judicial and not legislative in its nature, and that the Legislature cannot by a declaration make a public governmental function out of one which is inherently merely corporate in its nature. In this case because the function is delegated to the city to promote public health and comfort to the public as a whole, it is governmental and the city is not liable." The court pointed out that there is a conflict in the decisions in other jurisdictions. *Williams v. City of Birmingham, et al,* 121 So. 14. Supreme Court of Alabama, March 21, 1929.

R. C. Kuehl.

MUNICIPAL CORPORATIONS—City is not liable, where there has been no material use of property purchased, and no one having authority has taken part in the matter.

Plaintiffs, residents and taxpayers of the city of Owatonna brought suit against individual members of city council and the city officers to enjoin them from accepting a certain truck and from issuing any order, warrant or check in papyment thereof by

said city, without proper authority so to do. The city charter provided that all contracts be approved by the mayor and signed by him and that they should be void unless so signed and attested by city clerk after same had been ordered by resolution of a majority of the city council. At a meeting of the council, the chairman, being authorized by a vote of the council, appointed a committee of three to purchase a truck for the street department, they to have full power to act in the matter. One Pavek, as chairman of the committee, signed order for truck and obtained same from General Motors Truck Company. It was brought to city, a sign painted on it and was used for two days by the street department. A restraining order was issued and the use of the truck ceased. Upon its being shown that the mayor had never signed order, an injunction was granted and an appeal was taken. *Wiliiams, et al v. Klemmer, et al,* (Minn.) 224 N. W. 261.

The court stated that the question of the liability of the city on quantum meruit or otherwise was not involved, the sole question being the authority of the defendants, as officers of the city, to accept for the city, or issue warrants for the city in payment for this truck. No valid acceptance by the city was shown and the limited use made of the truck by the street department and the painting of the sign on the truck were not sufficient. *Tracy Cement Tile Co. v. City of Tracy,* 143 (Minn.) 415.

The contract for the truck involved the expenditure of a considerable sum and the city officials, as well as those seeking to deal with the city, are bound to take notice of and comply with the charter provisions. The council could not delegate the power to make a contract. *Jewel Belting Co. v. Village of Bertha,* 91 (Minn.) 9.

The right to an injunction appears sufficiently clear. The injury is irreparable where threatened acts complained of would result in the unauthorized or unlawful expenditure of a substantial sum of money out of funds of the city raised by taxation and no there prompt remedy is provided. Equity will enjoin unauthorized acts of city officials, where such acts will result in unauthorized or unlawful expenditure or diversion of public funds. Where, as here, prompt objection is made by tax payers

before there has been any material use of the property, and no action has been taken in reference thereto except by one or two officials who had no authority to bind the city, the rule that where the city receives property, consumes it or cannot restore it, the city will be held liable, does not apply.

D. M. Donahue.

PUBLIC SERVICE COMMISSIONS—This was a petition to dismiss an appeal of the plaintiff from an award of the Public Service Commission for damages caused by the abolition of a grade crossing. *Howe et al v. Pennsylvania R. R. Co.*, 1929, 14 A. 282.

Thirteen property owners, alleging that they had been or would be injured by the making of the improvement, applied to the Commission to assess the amount of their damages, as provided by the Public Service Law of July, 1913. The Commission decided that none of the claimants had been or would be damaged and dismissed all claims. They separately appealed to the court of common pleas, where the present appellant filed a petition, in each case, praying a dismissal of the appeal for want of jurisdiction in that court.

The Supreme Court held that an appeal from Public Service Commissions to the Common Pleas is permissable only where damages are awarded and there is a right to jury trial.

The case nearest in point is *Donnelly v. Public Service Commission,* 268 Pa. 345, 112 A. 160., where the appeal was taken to the court of Common Pleas. There, however, the Commission had made an award, and the property damage had a constitutional right to a trial by jury.

M. E. McGeogehgan.

SEARCHES AND SEIZURES—Immunity from unreasonable search is personal to the owner of the premises and may be waived.

From a conviction on a charge of violating the liquor law the defendant appeals. *Millar v. State,* (Ind. App.) 166 N. E. 554. It appears that warrant was duly issued to proper officers for the search of the premises of one Andy N. Miller. The search was made and three hundred and twenty-three pint bottles of "home brew beer" and two capping machines were found on the prem-

ises. These were confiscated and Andy N. Miller arrested. The appellant, Walter Miller, it appears, followed the officers to the police station, claiming the articles seized under the warrant to be his. Upon this assertion of ownership he was immediately placed under arrest, and upon trial in the city court of Muncie, Indiana, was found guilty and appealed to the Circuit Court.

In the latter court he field a motion to suppress all evidence, which motion was overruled. This court held that motion was properly overruled; since appellant was a stranger to the search warrant proceedings, and not the owner of the premises searched, he could not avail himself of the privilege personal to the owner of the premises alone, and a privilege which may be waived. *Tungat v. State,* 197 Ind. 539, 151 N. E. 427.

G. L. Housley.

WATER RIGHTS—In re water rights of Utah Construction Co. District Court (Federal) of Idaho, January 12, 1929.

The Utah Construction Co., incorporated in Utah and a resident thereof, instituted proceedings before the Commissioner of reclamation of the State of Idaho, under provisions of compiled Ida. Stat. for the purpose of securing permission to change the point of diversion and place the use, of the waters of Big Lost River.

Protestants appeared at the hearing and alleged they were all citizens and residents of the State of Idaho, and objected to the proposed transfer.

Commissioners found for the Utah Construction Co. by granting requested, permission.

Protestants upon appeal to the district court, as provided by statute (see 5382 Ida. Com. stat.) gave notice of appeal to the Dept. of Reclamation and the Utah Construction, and later served notice on the Dept. of Reclamation, but failed to serve notice on the respondent Utah Construction Co.

Respondent thereupon asked removal of cause of action to the Federal Court. Request granted.

Questions on appeal were: (1) Is the Commissioner of the State of Idaho, who is a resident thereof and a citizen, a necessary and indispensable party to the controversy so as to prevent the removal on the grounds of diversity of citizenship? (2) Who is the real party in interest. the Utah Const.

Co? Who claims a water right of the nine resident protestants who appealed?

Protestants' apparent contention, that, the purported water right sought to be transferred is subject to the protestants, as the same having been abandoned for more than five years prior to the filing of the application for transfer by Utah Construction Co., and that as a result the respondent had no water right to transfer.

The Court in finding for the respondent Utah Construction Co., said: Where an appeal to a Court *of equity of Common Law jurisdiction* (italics mine)- from an order of such administrative officer is provided, it then becomes a suit, if made to a Court or tribunal having power to determine questions of law and fact, either with or without a jury. *Upshur County v. Rich,* 135 U. S. 467, 10 S. Ct. 651. 34 L. Ed. 196.

The State is not through its administritive officer ,the commissioner of reclamation, making any contest as to the right of the Company to transfer the right of use of its water right or whether the Company had a water right at all. Then, if the respondent is directly interested in the subject matter of the controversy it is entitled to notice of all steps taken in the proceedings, whether it be provided for in the statute or not.

The jurisdiction of a Circuit Court of the United States depends upon the acts passed by Congress and can not be enlarged or abridged by any statute of a state. The legislature or the judiciary of a state can neither defeat the right given by a Constitutional act of Congress to remove a case nor limit the effect of such removal. Goldey v. Morning News, 156 U. S., 518. Courtney v. Pradits, 196, U. S., 89. Central Union Fire Ins. v. Kelley 282 F. 772.

The citizenship, or resident of the real, as distinguished from the nominal parties, governs the matter or removal. Salem Trust Co. v. Man. Finance Co., 264, U. S. 182.

Their being no requirement of the statute or rule of Court undre consideration for the Utah Const. Co. to answer and plead in the proceedings in the State Court, the steps of removal taken in this cause would seem to have been taken properly, and entitles the respondent to have the cause removed to this court.

Motion denied to protestants.

Thomas J. Jones, Jr.

WILLS—In the case of *Moss et al v. Axfor et al,* reported in 224 N. W. 425, the Supreme Court of Michigan held that a devise of property to A, with instruction to pay it to person who had given testatrix best care in declining years, was not personal, but, if valid, created trust; language being mandatory in effect.

The action was brought to construe the fifteenth paragraph of the will of Caroline M. Girard, made when she was about 77 years of age.

The paragraph read:—"I give, devise and bequeath all the rest, residue and remainder of my property to Henry W. Axford with the instruction to pay the same to the person who has given me the best of care in my declining years and who in his opinion is the most worthy of my said property. I make him the sole judge and request that his signature with the signature of the person receiving said property shall be sufficient release for my said executor."

The plaintiffs are sisters of Mrs. Girard and claim as her heirs. Defendant Mary Piers took care of the testatrix from the time the will was made until her death, and was designated by Mr. Axford as the person entitled to the residue of the estate under the above clause.

The plaintiffs contended that the clause was an invalid attempt to create an express trust, because there was no beneficiary fully expressd and clearly defined upon the face of the will, as required by statute.

The court said in its opinion while the words used in the residuary clause are precatory, the intent of the testatrix in the in the disposition of the residue of her property to the person who should care for her is manifest, and the language is mandatory in effect. 145 Mich. 257; 68 N.H. 241; 73 Am. St. Rep. 581. The devise of the residue to Mr. Axford was not personal. but, if valid, created a trust in him. 58 Mich. 494; 25 N. W. 481.

The purpose of Mrs. Girard was lawful and should be carried out, "unless there is such uncertainty that the law is fairly baffled." 41 Mich. 7. It is not necessary that a beneficiary be

designated by name, or by a description which makes indentification automatic. 40 Cyc. 1446. Nor that the testator have in mind the particular person upon whom his bounty may fall. 137 Va. 502; 120 S. E. 261; 38 A. L. R. 767.

It is enough if the testator uses language which is sufficiently clear to enable the court by extrinsic evidence to identify the beneficiary. If by such evidence the court can make the identification necessary to give effect to the invention of the testator, the devise will be sustained. 155 Mich. 126, 118 N. W. 938; 138 Mich. 157; 101 N. W. 217.

A trust is not invalidated by the fact that the trustee is vested with discretion. 39 Cyc. 316. In Lear vs. Manser, 114 Me. 342, 96 A. 240, a case closely in point, the residue of the estate was given to the executor in trust, "to be paid by him to such person or persons, or to such institution as shall care for me in my last sickness, such sickness, such payment to be made to the person or persons, or intitution, or any or all of them as may in the discretion of any executor be equitably entitled thereto, and the payment by my said executor and receipt taken by him therefor shall be a sufficient voucher and discharge to him under the provisions of this item."

The court held the identification of the beneficiary sufficient, as the testator had "prescribed a rule whereby his beneficiary could be identified with certainty. The court also pointed out that, although the trustee was invested with discretion, the trust would not perish with him, but "it could be executed by another trustee appointed by the court if necessary, for the duty imposed upon the trustee, and the discretion given to him in the exercise of that duty, are imperative and not optional, they were intended by the testator to be executed at all events."

In the case at bar the will provided no restriction on alienation. The beneficiary, whoever it might be, was in being, and she and the trustee could have conveyed an absolute fee at any time. Moreover, the ordinary delays in the settlement of an estate are not within the reason of the statute. 123 Mich. 281, 82 N. W. 56. Judgment of the lower court affirmed.

F. Earl Lamboley.