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Robert A. Milne

and a more thorough research into applicable state law might have suggested to government attorneys the desirability of issue of the bonds under conditions less litigious. "To A and B, not as tenants in common, but as joint tenants with the right of survivorship" is fairly well recognized as creating an interest in the survivor free from the necessity of probate. The present issues are yet to be tested. One does not like to buy into a law suit, either for himself or for his successor in interest. With all of their attractiveness in the present emergency, the bonds might, under more conventional terms of issue, have been made even more attractive to the buying public. And the social interest in saving the time of our already overburdened courts is a matter not to be lightly considered.

—Joe McElwain.

THE APPLICABILITY OF CONTRACT AND TRUST THEORIES TO WAR BONDS

In its financing of the present war, the United States Government is currently issuing two types of bonds which are calulated to prove litigious. In the first, when A invests, the bond provides that for a stated consideration, and at ten years from date, the government will pay a certain sum to "A or B." In the second, it will pay "to A, payable on his death to B." The Government regulations make provision only for these two tyes of "coownership" bonds. Controversy arises, when upon A's death, A's estate seeks to prevail over B, on the theory that such a disposition is testamentary. According to state laws on devolution of property, the estate prevails if the disposition is considered to be a gift.[1] It has been argued that contract theories apply and that federal regulations should prevail over state laws as regards devolution of property.[2] This comment will attempt to consider the applicability of trust and contract theories to the situation. Another comment in this issue treats the problem in so far as it involves applicability of the law of wills and of gifts.[3]

First, as to the contention that a trust is created, it is apparent that no express trust is found in the words used, since the requisite manifestation of an intention is lacking. An express trust can be created only upon an outward expression of

[1]Deyo v. Adams (1942) 36 N. Y. S. 734; Decker v. Fowler (1939) 199 Wash. 549, 92 P (2d) 254.
[2]Warren v. United States (1929) 68 Ct. Claims 634.
[3]McElwain, *The Application of the Law of Wills and of Gifts to War Bonds*, 4 MONT. L. REV. 61 (1943).

the settlor's intention. His undisclosed state of mind has no effect.[4] It seems clear that merely buying a bond and taking title thereto as indicated does not express any intention to create a trust.[5] So, also, the cases which have worked out a trust in a joint bank account are believed to be wrong in principle.[6] This reasoning also precludes application of the "Totten" doctrine.[7]

As to the possibility of applying contractual doctrines, especially the donee-beneficiary theory, a much more plausible case can be made out. While this may not be a traditional donee-beneficiary type of contract, nevertheless there is authority for saying that A can contract with C for the benefit of B and still retain some of the benefits to himself.[8]

[4]SCOTT ON TRUSTS, (1940) §23, page 146.

[5]SCOTT ON TRUSTS, (1940) §24, page 147.

"The question is whether the settlor manifested an intention to impose upon himself or upon a transferee of the property equitable duties to deal with the property for the benefit of another person."

[6]Bell v. Moloney (1917) 175 Calif. 366, 165 P. 917. George v. Daly City Bank (1927) 83 Calif. App. 684, 257 P. 171. For a text discussion see 1 BOGERT, TRUSTS AND TRUSTEES (1935) §47, p. 222.

[7]Where a person deposits money in his own name as trustee for another, reserving power of revocation, the trust appears to be testamentary. In New York, the right of the beneficiary is upheld because of the convenience of this method of disposing of small sums of money without the necessity of resorting to probate, and because there is not great danger of fraud. In Matter of Totten (1904) 179 N. Y. 112, 71 N. E. 748, the court said:

"A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."

Minnesota has approved this doctrine in Walso v. Latterner (1918) 140 Minn. 455, 168 N. W. 353; 143 Minn. 354, 173 N. W. 711. For general discussion see Scott, *Trusts and the Statute of Wills*, (1930) 43 HARV L. REV. 521.

[8]RESTATEMENT, CONTRACTS §133 (1).

"Where performance of a promise in a contract will benefit a person other than the promisee, that person is, ... (a) a donee-beneficiary, if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or a part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary."

For a discussion see Burgess, *Rights of Persons Not a Party to a Contract to Sue in Montana*. 3 Mont. L. Rev. 97 (1942), in which the position is taken that any donee-beneficiary should be allowed recovery.

In order to analyze the legal status of the coownership bond issue more fully, it is necessary to consider certain analogus situations. In *Chippendale v. The North Adams Savings Bank,*[9] decedent and his sister went to two banks in which decedent had funds in his own name. At one, his accounts were changed by the words "payable also to Abbie Worthington" and "either party or the survivor of them may draw the whole or any part now or hereafter deposited on this account with interest." At the other bank, his book was changed to "may be drawn by his sister Abbie Worthington." At both banks, Mrs. Worthington signed the by-laws of the bank and the necessary identification card. An action was brought by the administrator of the decedent who claimed that no valid gift was ever made. The court held for Mrs. Worthington. As regards the funds in the first bank, the court held that the depositor through a novation had made a new contract with the savings bank by virtue of which either party had discretion to draw such sums as either chose, during their joint lives, and the balance was to be withdrawn by, and so was to belong to, the survivor. As to the funds for which no survivorship was provided, the court held that the interpretation should be that the deposit might be withdrawn by the sister at any time, i.e., after the death of the depositor. Further, the court said it was unnecessary to consider whether there was a valid gift of the deposits as a piece of property.

In a Colorado case,[10] a woman confined in a hospital, executed the following instrument. "Gentlemen: I hereby request that my checking account be made joint with my brother, "[B]," for him to check on only in case of my death." Signed "[A]." After the depositor's death, which occurred four months later, suit was brought against the bank by the brother to recover the balance of the deposit. The court held for B, saying that it was a matter of contract by which the bank agreed to pay B the amount of whatever balance should remain upon his sister's death.

In *Dunn v. Houghton,*[11] A had an account in a bank in the name of A or son F. F died and the account was changed to A or niece B. Both A and B signed the depositor's book. After A's death a controversy arose over the money between B and A's executor. It was held for B, the court saying in effect that where two persons are accepted as depositors by a savings bank,

[9](1916) 222 Mass. 499, 111 N. E. 371.
[10]First National Bank of Aurora et. al v. Mulich (1928) 83 Colo. 518, 268 P. 1110.
[11]Dunn v. Houghton (1902) 51 Atl. 71.

and both sign the depositor's book kept by the bank for that purpose, and the moneys are made payable to either, the contract of the bank is with both jointly, and has the incident of survivorship.

Whether the contract may be rescinded or not is a matter of some conflict. Most cases hold that it may.[12] However, a Montana case, *In re Sullivan's Estate*,[13] apparently finds an irrevocable right in B. There A had made a joint survivorship account with her danghter B, over both of their signatures. Later on, she made a different disposition of the account by will. The court held that the will could not accomplish what testatrix' earlier action had put it out of her power to do.

These cases and those in the footnotes demonstrate that there is some authority for the contractual theory. Two limitations seem to be indicated. The first is that some provision be made for survivorship in the contract; the second, that both parties sign the depositor's book. In applying the law of these cases to the "A or B" bond situation, it might be argued that the bond fails in the sufficiency of its provisions. No pretense of signing is made by B, nor are words of survivorship contained in the bond itself. However, why should it be necessary for B to sign anything similar to a depositor's book? Certainly not to show his consent, because that can be presumed. And the parties surely can contract to give B a right of enforcement paralleling A's. As to words of survivorship, it is submitted that from all the circumstances involved, the parties intend the contract to have the element of survivorship. The bond is issued pursuant to a regulation[14] providing that the survivor will be considered the sole and absolute owner. The buyer makes application for its issuance subject to the regulation. The bond is issued subject to the regulation, and the regulation, therefore, is incorporated by reference, into the contract and the terms of the bond. A has consented to the regulations by making application for and buying the bond, and B's consent can be presumed. Therefore, I submit that B's rights in the "A or B" bond can be upheld under theories of contract.

Coming now to the beneficiary type bond, many of the cases treat such an instrument from a gift or wills standpoint.[15] Can it be treated as a contract, vesting sole ownership in the bond

[12]12 AM JUR., *Contracts*, §290; but see RESTATEMENT Contracts, §142.
[13]In re Sullivan's Estate (1941) 112 Mont. 519, 118 P (2nd) 383.
[14]Treasury Department circular No. 530, Fourth Revision, dated April 15, 1941, issued in pursuance of the Second Liberty Bond Act, 31 U. S. C. A. §757c.
[15]Supra, note 3.

in B, at A's death? In *McCarthy v. Pieret*,[16] the defendant executed a mortgage in which it was provided that if the mortgagee died prior to maturity, the interest and principal were to be paid to certain relatives. Upon the mortgagee's death, when these relatives brought suit to collect, the court denied their claim on the ground that the agreement was testamentary in nature. The court said in part:

> "Contracts made for the benefit of third parties are well recognized today, but they are executed contracts, where the promisee is unable to revoke or control the promisor. . . . The donor must divest himself of all interest and vest it in the beneficiary."

Such an analysis is not universal in the law, however. In the law of trusts, the fact that power to revoke a trust is reserved by the settlor is not fatal to the trust. This is a well settled doctrine.[17]

The fact that a party takes an interest which is totally defeasible does not necessarily mean that no interest at all is taken. This becomes evident from an examination of some of the insurance cases, arising out of endowment policies. In *Lambert v. The Penn Mutual Life Insurance Co.*,[18] a policy provided for the payment of the endowment to the insured, should he be yet living at the end of the endowment period. The face of the policy was payable to the insured's wife in case of his prior death. The court held, upon the death of the insured in the meantime, that the wife was an active beneficiary during the period, and that her rights were superior to the rights of an assignee of the insured. And in *Condon v. The New York Life Insurance Co.*,[19] the court held that the rule that the interest of a beneficiary of a life insurance policy vests immediately upon execution and delivery of the policy applies to endowment policies, and the insured cannot assign the policy to defeat such interest.

Other cases have gone even further and upheld the vested right of the beneficiary as against the estate, where the insured reserved the right to change the beneficiary, or to surrender the policy for cash or paid up insurance.[20] From this it follows that the beneficiaries took an immediate right subject to being de-

[16](1939) 281 N. Y. 407, 24 N. E. (2nd) 102.
[17]Supplement to SCOTT ON TRUSTS, Vol. 1, §57.2, p. 26. BOGERT ON TRUSTS (2nd Ed. 1942) §165, p. 622.
[18](1898) 50 La. Ann. 1027, 24 So. 16.
[19](1918) 183 Iowa 658, 166 N. W. 452.
[20]19 A. L. R. 654. VANCE ON INSURANCE (2nd ed. 1930) §144, 145 especially at p. 548.

feated by the happening of certain contingencies.[21] That is what occurs in the beneficiary bond agreement. B has a vested right which becomes sole and absolute should A die within ten years. If A lives, then B's rights are ended. Therefore, I submit that the bond does not attempt to transfer property in the gift sense. Rather, it creates a right to enforce a promise upon the happening of a contingency and should be upheld as such.

Thus far, I have cited cases involving analogical reasoning. There remains to be considered the cases presenting the precise question. The matter has not yet reached the U. S. Supreme Court. A number of cases have been decided in State Courts and in the lower federal courts.[22] The first of these, *Warren v. The United States*,[23] involved a controversy arising between A's executrix and B in a beneficiary type bond. The executrix had possession of the bond and attempted to collect in her representative capacity. The Secretary of the Treasury refusing her claim, she brought suit. The court denied recovery saying that the refusal had been in conformity with the provisions of the contract entered into with A and that the executrix was not entitled to the money notwithstanding the laws of devolution of property in the state of A's domicile.

In a similar factual set-up, a Washington case[24] held for the estate over B. The court said B's rights turned on whether there had been a valid gift of the proceeds of the bonds, and of course could find none. Two justices dissented and held in line with the Warren case. They pointed out that as A had no right to recall the designation of the beneficiary, the case is even stronger than the Warren case or some of the insurance cases cited (in which cases A had this right).

Another case is pending in the New York Courts, and the Federal Government is attempting to intervene.[25] An adjudication was had in the Supreme Court for Kings County, New York. In that case, with a beneficiary type bond involved, B was A's sister. After purchase of the bonds A married. Upon A's death his wife sued as executrix to recover the bonds. In the present state of the case, she has been upheld on the authority of the Washington case of *Decker v. Fowler*,[26] and the New York

[21] VANCE ON INSURANCE p. 548, especially note 45.
[22] Warren v. United States, supra note 2; Decker v. Fowler, supra, note 1; In re Stanley's Estate (1938) 102 Colo. 422, 80 P(2d) 332; Sinift v. Sinift (1940) 229 Iowa 56, 293 N. W. 841; In re Owen's Estate (1941) 32 N. Y. S. (2d) 747; Deyo v. Adams, supra, note 1.
[23] Supra, note 22.
[24] Supra, note 1.
[25] Deyo v. Adams, supra, note 22.
[26] Supra, note 1.

decision in *McCarthy v. Pieret*,[27] both of which cases have been roundly criticized.[28] The court said that the regulations of the Treasury Department in pursuance of an act of Congress do not preclude the application of state laws determining the validity of the devolution of property, but said such regulations merely protect the government against suits or controversies.

In practical application this makes for a confusing and anomalous situation. An instrument which everywhere is the same in its inception might have a number of different constructions placed upon it in our forty-nine jurisdictions. This problem was considered in a Colorado case.[29] There A had made a will providing for disposition of all her personalty equally among B, X, and Y. Six years later she bought federal bonds of the coownership type, making B coowner. At her death X and Y claimed that the will gave them severally a one-third interest in the bonds. The Colorado court held that B was entitled to the whole of them, saying:

> "When Congress, in its wisdom, determined that direct obligations of the government should be payable as provided by the act and regulations thereunder, it is not for us to say that it thereby exceeded its powers."

It may be over-sanguine to anticipate a crystallization of authority in line with the decision of the Colorado court. Nevertheless, the holding in *Deyo v. Adams*[30] seems to create an empty right. It milks the contract of its substance and comes to a conclusion that was intended by no one. It is not a necessary result even if state law is held to be controlling. It can be avoided by applying the principles of the insurance and joint bank account cases which are available. To uphold the bonds under contractual theories will be in harmony with the intentions of the parties and will in some measure avoid the flood of litigation that is certain to arise under gift theories. Therefore, I submit that the views of the Warren case and the dissent of the Decker case should be sustained in the final adjudication of the case of *Deyo v. Adams*.

—Robert A. Milne.

[27]Supra, note 16.
[28]Decker v. Fowler is criticized in 14 Wash L. Rev. 312 (1940). McCarthy v. Pieret is criticized in 38 Mich. L. Rev. 900 (1940), in 24 Minn. L. Rev. 1009 (1940), and in the supplement to SCOTT ON TRUSTS §57.2 (1942).
[29]In re Stanley's Estate, supra, note 22.
[30]Supra, note 1.