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Jurisdiction of a Probate Court Where Supposed Decendent is in Fact Alive [Hamilton v. Orange Savings Bank N.J.]

Ernst W. Puttkammer

In arriving at its conclusion, the court proceeds upon the intention of the testator, apart from the intention of the statute. The court's position seems to be based on this ratiocination: Conceding that the statute, by its terms, in effect intended to give an adopted child the same status as the lawful issue of the adoptive parent, the statute, nevertheless, cannot control the intention of the testator, and if, notwithstanding the intention of the statute, the testator had a different intention, then the intention of the testator must control. Indeed, it would be like all rules of construction. The intention of the testator must first be sought from the language of the will, unassisted by any rules of construction, and if, then, there is any doubt of his intention, then only can rules of construction be invoked. If the intention is clear without the assistance of outside aids, then those have no place in the consideration.[2] If the argumentation is sound, the conclusion arrived at in the case must also be sound, for the court has found it to be the intention of the testator *not* to include within that designation adopted children.

E. M. LEESMAN.

OTHER JURISDICTIONS

ADMINISTRATION—JURISDICTION OF A PROBATE COURT WHERE SUPPOSED DECEDENT IS IN FACT ALIVE.—In 1894 the plaintiff opened an account in the defendant bank, there being sundry transactions until shortly before the plaintiff's departure for Ireland in 1897. Nothing further was heard from him, and in 1917 letters of administration were issued to M, who duly qualified. Upon M's demand the defendant bank paid to him the amount of the deposit with interest. Shortly thereafter the plaintiff appeared and demanded payment of the same items, and on refusal commenced this suit. In the circuit court judgment was given for the defendant on the ground that the policy of the courts of the state had been shown in *Plume* v. *Howard Savings Institution*,[1] to be that payment to an administrator duly appointed upon proof of the death and intestacy of the person supposed to be dead, but who, it is later learned, was actually alive at the time such letters were granted, is an absolute discharge of the debt. The opinion of the circuit court, with the reasons there given, was adopted, without further opinion, by the unanimous vote of New Jersey Court of Errors and Appeals: *Hamilton* v. *Orange Savings Bank*.[1a]

The first reference to the point under consideration seems to have been in *Allen v. Dundas*,[2] where the defendant had made payment to a duly appointed executor under a will later discovered to be a forgery. This was held a good defense to a suit by the administrator, but, it was added, had the decedent been alive, the ecclesiastical court would have had no jurisdiction, and its whole

2. *Aldendifer* v. *Wylie* 306 Ill. 433, *Hollenbaugh* v. *Smith* 296 Ill. 561.

1. (1884) 46 N. J. Law 211.
1a. (1924) 124 Atl. 62.
2. (1789) 3 T. R. 125.

proceeding would have been a nullity. No such statement was called for by the case, however. A similar dictum was expressed by Marshall, C. J., in *Griffith* v. *Frazier*.[3] Since then there have been numerous decisions so holding, of which the first of any importance was *Jochumsen* v. *Suffolk Savings Bank*.[4] The most convincing is *Thomas* v. *People*,[5] but in general the arguments used are merely an unsatisfactory repetition in varying words and forms of the conclusion already reached, viz., that the probate court has no jurisdiction except in the event of death, that the proceedings are a mere nullity, etc. In the *Jochumsen* case, when the possible hardship of such a decision on innocent parties was urged, it was replied that such was always the effect of holding decrees void for want of jurisdiction, a contention better calculated, it would seem, for narrowing this undesirable result than for broadening it. More effective arguments may be found in a note by Mr. Redfield.[5a] The opposing authorities are very few in number. Besides those referred to in the opinion in the instant case may be mentioned *Scott* v. *McNeal*.[6] This case was carried to the United States Supreme Court, where it was reversed on the ground that to hold the proceedings valid as against the supposed decedent would be a deprivation of property without due process of law.[7]

The tendency in general is to increase the powers of probate courts and to make of them courts of limited jurisdiction, but not inferior courts.[8] And this is in response to sound, practical considerations, all of which are fully operative here. Hence the early enactment of statutes authorizing the probate courts to administer upon the property, not only of deceased persons, but also of persons shown to have been absent for a specified number of years. In *Lavin* v. *Emigrant Industrial Bank*[9] it was held that a state statute making conclusive the surrogate's determination of death was itself a deprivation of property without due process, and beyond the power of the state, there being no provision for notice of the proceeding, either by publication or by seizure of the thing itself.[10] In *Carr* v. *Brown*[11] provision was made for such publication; nevertheless it was believed to fall foul of the Fourteenth Amendment.

Fortunately this was not the view adopted by the Supreme Court in *Cunnius* v. *Reading School Dist.*[12], which held that the property of absentees might well be administered on, provided that the statute call for suitable notice to the absentee as well as otherwise safeguard his interests as far as possible. Such judicial discussion as there has been since that case has dealt with the question

3. (1814) 12 U. S. 9 at 23.
4. (1861) 3 Allen (Mass.) 87.
5. (1883) 107 Ill. 517.
5a. Am. L. Reg. XV 212.
6. (1892) 5 Wash. 309.
7. (1894) 154 U. S. 34.
8. *Woerner* "American Law of Administration" (3d ed. 1923) I 484.
9. (1880) 1 Fed. 641.
10. To the same effect see *Clapp* v. *Houg* (1904) 12 N. Dak. 600.
11. (1897) 20 R. I. 215.
12. (1905) 198 U. S. 458.

whether particular statutes did or did not provide such sufficient safeguards.[13] The instant case, however, contains no reference to the state statutes governing the administration of absentees' property.[14] It treats the question as being solely of the power of a probate court conclusively to establish the fact of death, without in any way resting its jurisdiction simply on the independent ground of unexplained absence. To this extent it would appear to be a throw-back to a view no longer open since the decision in *Scott* v. *McNeal*.[15] E. W. PUTTKAMMER.

BILLS AND NOTES—QUASI-CONTRACT—MISTAKE BY DRAWEE AS TO GENUINENESS OF DRAWER'S SIGNATURE.—What are the rights of a drawee bank which pays to a non-negligent holder in due course a check whereon the signature of the drawer is forged? Since the check is not the order of the person whose name appears as drawer, it cannot be charged to his account[1] unless the payment results from a breach of his duty to the bank—as, for instance, in failing to use reasonable care in promptly discovering and reporting previous forgeries of his name.[2] Upon quasi-contractual principles it would seem that the bank ought to be able to recover the amount from the holder. For the money is paid under a mistake of fact, and the payee, receiving money of the bank to which he is neither legally nor equitably entitled, should make restitution. But Lord Mansfield, in the familiar case of *Price* v. *Neal*,[3] established the rule that the drawee cannot recover, a rule which, it is now generally agreed, rests on considerations of business policy.[4] Although generally followed in America, this rule, before the adoption of the uniform Negotiable Instruments law, had been rejected in three states—in Pennsylvania, by statute,[5] and in North Dakota[6] and Oklahoma[7] by judicial decision.

In the Negotiable Instruments law the question, it must be confessed, is not dealt with in a very satisfactory way. Section 62 provides that the acceptor, by accepting the instrument, admits,

13. *Nelson* v. *Blinn* (1908) 197 Mass. 279 (affirmed, 1911, 222 U. S. 1); *Selden* v. *Kennedy* (1906) 104 Va. 826.

14. N. J. Comp. Sts. 1910, pp. 3823 and 3824 sec. 30 and 32. Also Acts of 1912 ch. 324 sec. 3.

15. (1894) 154 U. S. 34.

1. *McCarthy* v. *First National Bank* (1920) 204 Ala. 424, 85 So. 754; *Janin* v. *London and S. F. Bank* (1891) 92 Cal. 14, 27 Pac. 1100; *Morgan* v. *United States Mtg. and Trust Co.* (1913) 208 N. Y. 218, 101 N. E. 871; *Denbigh* v. *First National Bank* (1918) 102 Wash. 546, 174 Pac. 475.

2. *First National Bank* v. *Allen* (1893) 100 Ala. 476, 14 So. 335; *National Dredging Co.* v. *Bank* (Del. 1908) 6 Penn. 580; *Critten* v. *Chemical National Bank* (1902) 171 N. Y. 219.

3. (1762) 3 Burr. 1354. For cases accord, see 7 C. J. 688, note 5.

4. See *Germania Bank* v. *Boutell* (1895) 60 Minn. 189, 62 N. W. 327.

5. See *People's Savings Bank* v. *Cupps* (1879) 91 Pa. 315. See also the Act of April 27, 1909, amending sec. 137 of the Neg. Inst. Law.

6. *First National Bank* v. *Bank of Wyndmere* (1906) 15 N. D. 299, 108 N. W. 546.

7. *American Express Co.* v. *State National Bank* (1911) 27 Okl. 824, 113 Pac. 711.