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Notes and Comments

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NOTES AND COMMENTS

TIME AND PLACE OF MAKING OF CONTRACT WHERE OFFER IS MADE BY MAIL AND ACCEPTANCE BY TELEGRAM OR THE REVERSE

Since a contract is created when the offer is accepted, and both the time and place of contract is the time and place where the acceptance becomes effective, a pertinent inquiry is: Is a mailed offer accepted at the time and place when and where a telegram of acceptance is delivered by the offeree to the telegraph company, or is it accepted only when the telegram is received by the offeror? For example, in *Shurter et al.* v. *Ricker,*[1] defendant, a married woman in New York, sent a letter to the plaintiff in Texas offering to borrow money. The plaintiff wired assent from Texas and the money was given. In an action for the money, if it was a Texas contract it would have been void, because the debtor was a married woman, whereas under New York law the wife would be liable as though she were a *feme sole.* The court held the telegram of acceptance was effective only when received by the wife in New York and that New York law governed.

To discuss this point, cases wherein mailed offers are accepted by mail and where offers by telegram are accepted by mail or telegram must also be treated. Of course, if the offer provides the manner, time, or place of acceptance, its terms must be complied with in order to create a contract.[2] Such cases are beyond the scope of this discussion. Only the cases wherein the offer is silent on the mode of acceptance will be dealt with.

Various reasons are assigned by the courts for holding that a telegraphic acceptance of a mailed offer is or is not effective when put in the control of the telegraph company. The reasons vary equally regarding other means of communications. It is quite generally accepted today that a mailed acceptance of a mailed offer is effective when posted, but the courts have not agreed as to the reason therefor.

The theory of agency has been invoked, and it has been held that the mail is the common agent of both offeror and offeree.[3]

[1] 62 F. (2d) 489 (1933), certiorari denied without opinion in 289 U. S. 732, 77 L. Ed. 1481, 53 S. Ct. 593 (1933).

[2] American Law Institute Restatement of the Law of Contracts (American Law Institute Publishing Company, St. Paul, Minnesota, 1932) I, sec. 61; William Herbert Page, The Law of Contracts (2d ed., Cincinnati, Ohio: The W. H. Anderson Company, 1920), I, sec. 206; 13 Corpus Juris 279.

[3] Household Fire & Carriage Accident Insurance Co. v. Grant, L. R. 4 Exch. Div. 216, 48 L. J. Ex. 577, 41 L. T. 298, 27 W. R. 858 (1878); Lucas v. Western Union Tel. Co., 131 Iowa 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016 (1906).

However, this theory fails, because if the letter of acceptance is lost or delayed, it is held that the contract was, nevertheless, complete when the acceptance was posted and the consequences of the loss or delay are charged to the offeror. This can hardly be done if the post office is the agent of both offeror and offeree. The offeror should not suffer more than the offeree for the mistake of a common agent.

It has also been held that the post office is the agent only of the offeror and that depositing the letter in the mail is, in effect, delivery to the offeror.[4] This is sheer fiction. Agency includes both authorization and control. There is in fact no authorization, and clearly there is no control. Further, in some cases, mailing an acceptance has been held to create a contract even where the offer was not made by mail.[5] The theory of agency could not apply in such cases. So also, the courts are tending to abandon this theory where the offer is made by telegram. The trend of the modern decisions is that the telegraph company is not the agent of the sender but rather is an independent principal or contracting party, and the offeror is not bound if the company changes or alters the terms of the offer and it is so delivered to the offeree.[6]

Some of the courts have recognized the fallacy of the agency rule and have applied the doctrine of "implied authorization" to use only the same means in accepting as was used in making the offer.[7] This was suggested in *Lucas* v. *Western Union Telegraph Company*,[8] where the court stated: "The proposition of an exchange was made to plaintiff by letter. In committing it, properly addressed, to the mails for transmission, the post office became the agent of Sas to carry the offer, he taking the chances of delays in the transmission. . . . Having sent the proposition by mail he impliedly authorized its acceptance through the same agency. Such implication arises (1) when the post is used to make the offer and no other mode is suggested, and (2) when

[4] Averill v. Hedge, 12 Conn. 424 (1838); Shurter v. Ricker, 62 F. (2d) 489 (1933).

[5] Henthorn v. Fraser, L. R. 2 Ch. 27, 61 L. J. Ch. 373, 66 L. T. 439, 40 W. R. 433 (1892); Northwestern Mutual Life Ins. Co. v. Joseph, 31 Ky. L. 714, 103 S. W. 317, 12 L. R. A. (N. S.) 439 (1907); Scottish-American Mortgage Co. v. Davis, 96 Tex. 504, 74 S. W. 17 (1903).

[6] 13 Corpus Juris 300.

[7] Scottish-American Mortgage Co. v. Davis, 96 Tex. 504, 74 S. W. 17 (1903); Lucas v. Western Union Tel. Co., 131 Iowa 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016 (1906); Elkhorn-Hazard Coal Co. v. Kentucky River Coal Co., 20 F. (2d) 67 (1927); Dickey v. Hurd, 33 F. (2d) 415 (1929).

[8] 131 Iowa 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016 (1906).

the circumstances are such that it must have been within the contemplation of the parties that the post would be used in making the answer. . . . The contract is complete in such a case when the letter containing the acceptance is properly addressed and deposited in the United States mails. . . . This is on the ground that the offerer, by depositing this letter in the post office, selects a common agency through which to conduct the negotiations, and the delivery of the letter to it is in effect a delivery to the offerer."

This theory is also illogical. An offeree needs no authorization to use any mode of communication he wishes. He should be permitted to accept in whatever manner he wishes and without "implied authority" to use only one means of becoming bound if the offeror does not condition his offer on one mode of acceptance. In *Henthorn* v. *Fraser*,[9] the plaintiff, a nonresident of Liverpool, while in that city was handed an option by the defendant to purchase property. He took the offer home with him, and the next day he mailed a letter of acceptance. Some of the lord justices held the acceptance effective when mailed, because the offeror contemplated that the offeree would accept by post and therefore gave the offeree "implied authority" to send his acceptance by mail, but Herschell, L. J., stated: "It strikes me as somewhat artificial to speak of the person to whom the offer is made as having the implied authority to transmit the acceptance through any particular channel; he may select what means he pleases, the Post Office no less than any other."

Perhaps the logical theory is that an acceptance by mail or by telegram is customary and is therefore impliedly assented to by the offeror as the means of binding him when he makes his offer. The fact is that in cases of this nature the parties expect that the letter or telegram of acceptance when deposited in the mails or delivered to the telegraph company will be duly transmitted; they do not contemplate the consequences of the delay or loss of such an acceptance. It must be remembered that a contract is founded on the agreement of the parties, an offer by one and acceptance of that offer by the other. The offeror is bound when acceptance is personally made to him. But he may dispense with personal notification by indicating another mode of acceptance which he will treat as binding upon him. This indication may be made expressly[10] or impliedly.[11] It may be implied if the

[9] L. R. 2 Ch. 27, 61 L. J. Ch. 373, 66 L. T. 439, 40 W. R. 433 (1892).

[10] William Herbert Page, The Law of Contracts (2d ed., Cincinnati, Ohio:

offeror could fairly contemplate at the time he makes his offer that the offeree would use a mode other than personal notification for acceptance. What might fairly be in the contemplation of the offeror is not what he may secretly intend but what may be inferred from the circumstances of the case and what is customary in similar transactions at the time when and the place where the offer is received. By failing expressly to indicate the mode of acceptance, he impliedly assents to be bound by such an acceptance.

In *Henthorn* v. *Fraser*,[12] Kay, L. J., stated: "Posting an acceptance of an offer may be sufficient where it can fairly be inferred from the circumstances of the case that the acceptance might be sent by post."

In *Bishop* v. *Eaton*[13] the court says: "What kind of notice is required depends upon the nature of the transaction, the situation of the parties, and the inferences fairly to be drawn from their previous dealings, if any, in regard to the matter. If they are so situated that communication by letter is naturally to be expected, then the deposit of a letter in the mail is all that is necessary."

These principles were adopted in the *Restatement of the Law of Contracts*[14] as set forth in sections 61, 64, 66 and 68:

"If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded."

"An acceptance may be transmitted by any means which the offeror has authorized the offeree to use and, if so transmitted, is operative and completes the contract as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror, unless the offer otherwise provides."

"An acceptance is authorized to be sent by the means used by the offeror or customary in similar transactions at the time when and the place where the offer is received, unless the terms

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The W. H. Anderson Company, 1920), I, secs. 185, 206; 13 Corpus Juris 279.

[11] William Herbert Page, The Law of Contracts (2d ed., Cincinnati, Ohio: The W. H. Anderson Company, 1920), I, sec. 199.

[12] Supra, footnote 9.

[13] 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437 (1894).

[14] American Law Institute, Restatement of the Law of Contracts (St. Paul, Minnesota: American Law Institute Publishers, 1932), I, secs. 61, 64, 66, 68.

of the offer or surrounding circumstances known to the offeree otherwise indicate."

"An acceptance inoperative when dispatched only because the offeree uses means of transmission which he was not authorized to use is operative when received, if received by the offeror within the time within which an acceptance sent in an authorized manner would probably have been received by him."

These sections, then, permit acceptance to be made in the mode expressly or impliedly indicated by the offeror. If he expressly prescribes the place, time, or manner of acceptance, this must be complied with. If he does not do so, then the acceptance may be made in the same manner as the offer or a manner customary at the time and place where the offer is received, unless the surrounding circumstances known to the offeree indicate a different mode of acceptance. If these principles are not complied with, the acceptance is effective only when received by the offeror. The *Restatement,* then, gives the logical rule in these cases and should be adopted *in toto* by the courts. It is flexible enough to fit any case. It is not based on the fiction of agency or implied authority, but on fact. If the custom in similar transactions is to accept such offers in a certain mode, that custom is sanctioned. This is a recognition of present day methods in the commercial world. It also is a rule founded on fact, because, despite the manner in which the offer was made or any custom, if the surrounding circumstances known to the offeree indicate another mode of acceptance should be used, then unless such other mode is followed the acceptance can be effective, if at all, only when received by the offeror.

It is apparent that under either the agency rule or the rule of implied authorization to use only the same mode in accepting, if the acceptance of an offer by mail were made by telegram, the acceptance would complete the contract only when received by the offeror; because, since the offeree did not select the same means of communicating his acceptance, there was no delivery of the acceptance to the "agent" of the offeror nor did the latter give the offeree "implied authority" to use the telegraph as the means of communicating his acceptance.[15] Thus, in *Dickey* v. *Hurd*[16] the plaintiff, Dickey, mailed an offer from Massachusetts to the defendant in Georgia offering to sell the latter certain

[15] Lucas v. Western Union Tel. Co., supra, footnote 8; Dickey v. Hurd, 33 F. (2d) 415 (1929); Shurter v. Ricker, 62 F. (2d) 489 (1933), certiorari denied without opinion, 289 U. S. 732, 77 L. Ed. 1481, 53 S. Ct. 593 (1933).

[16] 33 F. (2d) 415 (1929).

Georgia land. Immediately on receipt of the letter, the plaintiff wired that he would buy the property subject to survey and approval of title by his attorneys. Thereafter the defendant refused to convey because the plaintiff had "not complied with requirements." In holding that the telegram of acceptance could be effective only when received, the court stated:

"Where parties are at a distance from one another, and an offer is sent by mail, it is universally held in this country that the reply accepting the offer may be sent through the same medium, and, if it is so sent, the contract will be complete when the acceptance is mailed, properly addressed, to the party making the offer and beyond the acceptor's control; the theory being that, when one makes an offer through the mail, he authorizes the acceptance to be made through the same medium, and constitutes that medium his agent to receive his acceptance; that the acceptance, when mailed, is then constructively communicated to the offeror. . . . But in this case, although the offer was by mail, the acceptance was by telegraph, and, not being sent through the same medium, it cannot be said that Mr. Hurd authorized an acceptance by telegraph and constituted that medium his agent to receive the acceptance. In this situation the acceptance, when delivered at the telegraph office, was neither actually nor constructively communicated to Mr. Hurd, and the contract was not consummated, if it was ever consummated, until the telegram was delivered to Mr. Hurd in Massachusetts. Therefore, if a contract was consummated, whether unilateral or bilateral, it was made in Massachusetts; and its validity, construction and effect are to be determined by the law of that state."

Of course, under either the agency or implied authorization theory where the offer was made by telegram, an acceptance by mail would be effective only when received by the offeror. In those jurisdictions adopting either of these two theories this question has not been passed upon by the courts.

On the other hand, under the rules of the *Restatement of the Law of Contracts* an acceptance by telegram of an offer by mail may or may not be effective when transmitted. In fact, the comment under section 66 reads: "a. A method of acceptance may be customary, although it differs from the method adopted by the offeror. Thus, under some circumstances acceptance by telegraph, may be customary, although the offer is by mail. Under other circumstances the contrary may be true."

The courts adopting the principles of the *Restatement* in such

cases are not uniform in the reasons advanced.[17] In *Weld Company* v. *Victory Manufacturing Company*,[18] the plaintiffs were dealers in cotton in Philadelphia and defendant was a cotton mill company in North Carolina. They had dealt together for a long time both by mail and telegraph. On September 7, 1911, the defendant wrote to the plaintiffs: "If the market should recede, you can buy 300 bales October, November and December at 11½ cents. You can accept this as an open order subject to withdrawal before execution." On September 20 at 10:15 A. M. plaintiffs deposited with the Western Union Telegraph Company at Philadelphia for transmission to defendant a telegram reading: "We accept your offer eleven one half three hundred mentioned." This telegram was received by defendant in North Carolina at 12:35 P. M. However, that day, at 9:55 A. M., the defendant had deposited with the telegraph company in North Carolina a telegram cancelling its offer of September 7. This telegram was not received by plaintiffs until 10:40 A. M., after they had wired defendant accepting the offer. In directing a verdict for the plaintiff, the district court stated:

"The letter of defendant to plaintiffs of September 7, 1911, was a 'firm offer . . . subject to withdrawal before execution.' When the plaintiffs on September 20th filed with the Telegraph Company at 10:15 A. M. the telegram accepting the offer, the contract was complete. There was a proposal on the one part, and an acceptance on the other. The withdrawal of the offer or proposal was not completed by filing with the Telegraph Company the message at 9:55 A. M.—it was only effectual for that purpose, when received by plaintiffs at 10:40 A. M. The contract is complete 'when the answer containing the acceptance of a distinct proposition is dispatched by mail or other usual mode of communication . . . and before any intimation is received that the order is withdrawn. Putting a letter in the mail containing the acceptance, and thus placing it beyond the control of the party, is valid as a constructive notice of the acceptance.' 2 Kent, Com. 447; *Patrick* v. *Bowman*, 149 U. S. 411, 13 S. Ct. 811, 866, 37 L.

[17] Weld Co. v. Victory Manufacturing Co., 205 F. 770 (1913); College Mill Co. v. Fidler, 58 S. W. 382 (Tenn. Ch., 1899); Perry v. Mount Hope Iron Co., 15 R. I. 380, 5 A. 632 (1886). See also Grover v. Western Union Tel. Co., 45 Cal. App. 451, 187 P. 973 (1920); Stein-Gray Drug Co. v. H. Michelson Co., 116 N. Y. S. 789 (1909); Trounsine v. Sellers, 35 Kan. 447, 11 P. 441 (1886); Burton v. United States, 202 U. S. 344, 50 L. Ed. 1057, 26 S. Ct. 688, 6 Ann. Cas. 362 (1905). See also case notes: 39 Yale L. J. 424, Jan., 1930; 18 Cal. L. Rev. 82, Nov., 1929; 15 Cornell L. Q. 273, Feb., 1930; 8 Texas L. Rev. 137, Dec., 1929.

[18] 205 F. 770 (Dist. Ct. N. C. 1913).

Ed. 790; *Burton* v. *U. S.*, 202 U. S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 379, and notes; Pollock, Cont. (Wald.) 135."

The court held the acceptance by wire effective when given to the telegraph company because it was a "usual mode of communication." It said nothing of the previous method of dealing between the parties by wire and letter or the custom in similar transactions.

In *Perry* v. *Mount Hope Iron Company,*[19] the defendant's purchasing agent, Leonard, made an *oral* offer in Boston, Massachusetts, to the plaintiff's agent that the defendant would purchase iron from the plaintiff at a certain price. The plaintiff's agent requested that the offer be held open until the next day, to which Leonard agreed. The next day, the plaintiff telegraphed from Providence, Rhode Island, accepting the offer. The defendant contended the contract was not complete until the acceptance reached him in Boston and was therefore governed by Massachusetts law and unenforcible under the statute of frauds of that state. The court held it was a Rhode Island contract and referring to the case of *Household Fire & Carriage Accident Insurance Company* v. *Grant*[20] stated:

"Its doctrine is that the contract is binding on the proposer as soon as a letter accepting the proposal, properly directed to him, is posted by the recipient, whether it reaches the proposer or not, if posted without reasonable delay, and the post is the ordinary and natural mode of transmitting the acceptance. In that case the letter did not reach the proposer, and Bramwell, L. J., who dissented, conceded that, 'where a posted letter arrives, the contract is complete on posting.' In the case at bar the arrival of the telegram is not disputed. We are of opinion that the contract, if made, was completed in Rhode Island, notwithstanding it was to be performed in Massachusetts. *Hunt* v. *Jones,* 12 R. I. 265. If there be any question that the telegraph is a natural and ordinary mode of transmitting such an acceptance, that is a question of fact for the jury; but we are of opinion that, if it be shown that the acceptance duly reached the defendant, the question of the mode, no mode having been specified, is immaterial."

While the offer was oral and not made by mail, it is apparent from the opinion, that the court would have held the same way had the offer been mailed.

[19] 15 R. I. 380, 5 A. 632 (1886).

[20] 4 Ex. D. 216, 48 L. J. Ex. 577, 41 L. T. 298, 27 W. R. 858, 6 Brit. R. Cas. 115 (1878).

The reasons advanced in these and other cases for holding that the telegram of acceptance completed the contract when delivered to the telegraph company show that the rules of the *Restatement* are much more complete.

Where the offer is sent by telegram, the usual inference is that that mode of communication was used because a prompt acceptance was desired. That inference should be read into the offer so that a slower mode of acceptance, as by mail, would not be assented to by the offeror. Yet surrounding circumstances might render acceptance by mail valid when posted. Under section 66 of the *Restatement* an acceptance by mail might or might not be effective when posted, depending on the facts of the case. In such cases the courts have followed the rule of the *Restatement*. In *Quenerduaine* v. *Cole*,[21] the court held the offer by telegram was notice that a prompt reply was required and the acceptance by letter was not in time. But in *Farmers' Produce Company* v. *Schreiner*,[22] after the offer by telegram was made, the parties continued negotiations by letter and wire, and then the offer was accepted by letter. The court held that under the facts the acceptance was binding, stating:

"After a careful consideration of the few authorities we have been able to find on the subject, we are of the opinion that the reasonable and best rule should be, where there is no direction as to the mode of communicating the acceptance it may be accomplished through the post office, unless it can be fairly and reasonably inferred from the offer, or other prior communications, that some other means is expected, and that would be a question of fact to be determined by the jury or the trial court."

A case which on hasty reading would seem to be contrary is *Phenix Insurance Company* v. *Schultz*.[23] The court held no contract was created when the letter was posted, because the offer by telegram was conditional and reserved to the insurance agents the right to determine whether or not the "specific form" was such as was required by the previous correspondence. The court did say that if by the telegram such right had not been reserved "then the claims of appellee that the contract was closed when the letter of J. B. Moore & Co. of that date was deposited in the Richmond post office must be conceded. In such cases the authorities almost uniformly hold that the acceptance dates from

[21] 32 Wkly. Rep. 185 (1883).

[22] 48 Okla. 488, 150 P. 483, L. R. A. 1916A, 1297 (1915). See also Ferguson v. West Coast Shingle Co., 96 Ark. 27, 130 S. W. 527 (1910).

[23] 80 F. 337 (1897).

the posting of the letter or the sending of the telegram."

This statement was clearly dictum, and the authorities cited by the court are cases wherein an offer by mail was accepted by mail or where an offer by telegram was accepted by telegram. In none of them was an offer made by wire and accepted by mail.

Of course under either the agency or implied authorization theories where the offer is made by mail, an acceptance by mail is effective when posted,[24] and if the offer is by telegram, acceptance by telegram completes the contract when the message of acceptance is delivered to the telegraph company.[25] Under section 26 of the *Restatement* the acceptance may "be sent by the means used by the offerer . . . unless the terms of the offer or surrounding circumstances known to the offeree otherwise indicate." This is permissive, however; not mandatory. If acceptance is sent by a different means, it may still be effective when transmitted if the means selected by the offeree might have been contemplated by the offeror as a probable means of reply.

M. J. SEYK

RIGHT OF WIFE AND CHILDREN TO REACH INCOME OF SPENDTHRIFT TRUST CREATED FOR HUSBAND

The recent trend in a few jurisdictions toward liberality in construing spendthrift trusts where the wife of the *cestui* attempts to reach the *cestui's* interest is exemplified in its furthest limits in the case of *Keller* v. *Keller et al.*[1] This late decision of the Illinois Appellate Court holds that the grantor of a spendthrift trust intends the wife and children of the named *cestui* to have a claim upon the trust for support and maintenance unless express words to the contrary appear in the trust instrument. The Illinois and Pennsylvania cases relied upon fail to support the court's position.

The facts of the case are simple. The appellee had obtained a divorce from a beneficiary of a trust of which the appellants were trustees. The beneficiary had failed adequately to support the appellee and the two children of the marriage, and the Superior Court had ordered the trustees to make certain income distributions to the appellee. From this order the trustees appealed, citing the spendthrift clause of the trust instrument. The

[24] James Kent, Commentaries on American Law (7th ed., New York: Van Norden & Amerman, 1851), II, 606; Joel Prentiss Bishop, Commentaries on the Law of Contracts (Chicago: T. H. Flood & Company, 1887), sec. 328; 13 Corpus Juris 300.

[25] 13 Corpus Juris 298; 47 A. L. R. 159, annotation.

[1] 284 Ill. App. 198 (1936).

trust provided in part for a portion of the income to be paid to the appellee's former husband semiannually or oftener, "each installment to be paid personally to the child entitled thereto, and not to be capable of anticipation or assignment." Appellee's former husband was one of the children referred to.

On this state of facts, the court affirmed the ruling of the lower court, saying in part: "We hold that because the will creating this trust fund does not expressly disclose an intention to the contrary, because the claim for support of children is one which transcends any contractual obligation, and because of the recognition in our law of the unity of the family, the court did not err in subjecting the income from this trust fund to the support of the minor children of the beneficiary." In other words, the court's reasons are, first, presumed intention of the testator, second, public policy, and third, identity of the family as a unit.

For support, the court relies chiefly on *In Re Moorehead's Estate,*[2] *England* v. *England,*[3] and *Tuttle* v. *Gunderson,*[4] and it cites portions of Bogert,[5] Griswold,[6] and *Restatement of Law of Trusts,*[7] which review the theory of the Moorehead case and similar decisions.

The Moorehead decision is the most influential of recent cases on this subject and is relied upon by both of the Illinois decisions which came after it. In the Moorehead case, the plaintiff was the wife of William H. Moorehead (formerly known as William H. Watt), whose grandmother had left in trust for him her residuary estate. Moorehead had twice wrongfully deserted the plaintiff, once to enter a bigamous marriage, the second time to live in adultery with the plaintiff's sister-in-law. The plaintiff then sought a writ directing the trustees of the grandmother's residuary estate to pay for her support from funds due her husband. The trustees relied upon the following spendthrift clause appearing in the will:

"I will and direct that neither the income payable to my grandson, William H. Watt, nor the corpus from which the same is derived, shall be liable to or for the contracts or debts of said William H. Watt, or to execution or to attachments at the suit

[2] 289 Pa. 542, 137 A. 802, 52 A. L. R. 1251 (1927).
[3] 223 Ill. App. 549 (1922).
[4] 254 Ill. App. 552 (1929), dismissed on appeal on other grounds, 341 Ill. 36, 173 N. E. 175 (1930).
[5] George G. Bogert, The Law of Trusts and Trustees (St. Paul, Minn.: West Pub. Co., 1935), I, 727, sec. 223.
[6] Griswold's Spendthrift Trusts, Ch. V, p. 292, secs. 331-340 (1936).
[7] Restatement of Law of Trusts, I, p. 389, sec. 157.

of any of his creditors; but shall be absolutely free from the same, and he shall have no power to sell, assign or incumber the same or any part thereof, or to in any way anticipate the said income."

The plaintiff and Moorehead had married several years before the grandmother died, and the plaintiff was known to the grandmother, but she was not referred to by name or description in the will.

The court found for the plaintiff in a lengthy decision giving three reasons for its ruling—the three reasons picked up in the Keller case and adapted to suit its facts. The first basis for the decision was that the testatrix intended the plaintiff to be a beneficiary of the trust. The court recited that the plaintiff was not mentioned in the will but the court relied upon the general pious intent evidenced in the will and upon the use of the word "all" in the part of the will where the testatrix said, "I hope you[8] may live an undivided happy family . . . and hope and expect to meet you *all* on the other shore, where parting is no more. . . ."

The second basis given for the decision was that, because the testatrix could not anticipate them, she had not provided for circumstances which had arisen and which would make the provisions found in the will void because contrary to public policy. This standard objection to spendthrift trusts was raised by the court in words characteristic of the whole decision. "To ignore or dismiss this controlling factor," the court said, "would be to attach the seal of judicial approval to the misconduct of this respondent against his deserted wife and grant him a commission of right to continue those offenses and persist in his career of shamelessness and criminality, in which the crimes of bigamy and adultery signal his triumphs as a violator of law and of public morals."

As a third basis for its decree, the court distinguished between obligations arising from marriage status and obligations arising from ordinary contracts and found that the testatrix's direction that the income should not be liable "for the contracts or debts of said William H. Watt" did not exempt the income from liability for what the court termed the "fundamental duty" of the beneficiary to support his wife.[9]

[8] Who is meant by "you" is not indicated in the decision.

[9] The decision is an example of a hard case that makes bad law. The court says in justification of its finding, "Certainly property available for the purposes of pleasure or profit should be also answerable to the demands of justice." But if the wife is permitted to reach the trust income here, are not

It should be noted that the first basis, that is, the finding as a fact that the testatrix intended to include the wife as a beneficiary, along with Moorehead, is a sufficient basis for the decision and that the second and third grounds are unnecessary. The second ground, public policy, was given chiefly as a justification of the decision. And the third point, dwelling on the duty of a husband to support his family, is raised chiefly to show that the spendthrift clause did not expressly exclude the trust income from the reach of the wife.

Referring back to the three reasons given in the Keller case, one finds that they are parallel to the Moorehead theory. The first deals with intention, the second with public policy, and the third with the common law view of marriage as a status rather than a mere contract. The public policy argument is equally strong or equally weak in both cases and is matter in justification. But the first and third points in the Moorehead case are essentially findings of fact after construing the testatrix's will, yet the Keller case treats them as matters of law.

Proceeding to the other two cases relied upon as precedent for the Keller decision, one finds that each court made an affirmative finding of fact that the testator intended the wife of the *cestui,* though not expressly mentioned, to benefit along with the *cestui.* The England case relied partly upon a provision that the income go to the issue of the *cestui,* if he should die leaving issue, and the Gunderson case relied upon the provision, among others, that the trustees help the *cestui* "in all lawful matters whatsoever." However strained the constructions may have been, the courts did find in each case that the testator included the wife along with the named *cestui,* and they did not hold, as does the Keller case, that the wife was included because she was not expressly excluded.

In noting the position of other jurisdictions in relation to the Moorehead and Keller decisions, one finds numerous cases where courts have been liberal in construing trust instruments to include a wife with a named *cestui,* but generally they do not go so

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others entitled to the same privilege? Could not an invalid sister qualify as one of the "undivided happy family"? Could not an unemployed brother qualify, or a bankrupt uncle? Would, also, the court give the same decision for the benefit of a wife who was unknown to the testatrix or who married the beneficiary after the testatrix's death? So far as public policy is concerned, the husband's refusal to pay his tailor is contrary to public morals and public policy. And, on the third point, that the obligation to support a wife is not a debt, the local tax collector could use the same argument in asking the trustees to pay the cestui's taxes.

far as the Pennsylvania court did[10] and no case speaks of the presumption of law set out in the Keller decision.

Iowa found no such presumption in one case where a wife sought to reach the interest of her husband as *cestui* of a spendthrift trust[11] and, in a case where a former wife sought to subject to a decree for alimony certain property impressed with a valid spendthrift trust for the benefit of her former husband, it was held that an alimony decree has no better standing than any other money judgment.[12]

In a New Hampshire case where the trustee of a spendthrift trust had been given power by the will to pay out income according to the needs of the *cestui,* the court said that the trustee had authority to make payments for the support of the *cestui's* wife and children.[13] "As the needs of a married man are sometimes construed," the court said, "they include not only his needs, but also the needs of his family."

Decided on narrow ground, a much cited New York case, *Wetmore* v. *Wetmore,*[14] contains dictum that has been quoted to support liberal construction of spendthrift trusts. The case was decided under a New York statute providing that the income of a spendthrift trust beyond what is necessary for the support of the beneficiary shall be liable in equity to the claim of his creditors. The former wife of the *cestui* in question, having an alimony judgment against the *cestui* and having unsuccessfully exhausted legal methods of reaching the *cestui's* property, resorted to equity under the statute. It was found that she could, under the statute, reach the income of the trust, none of which was actually necessary for the *cestui's* support. The phrase of the court that, "Equity will not feed the husband and starve the wife," has been a favorite in this type of case ever since.

The California case of *San Diego Trust and Savings Bank* v. *Heustis,*[15] which presents the stricter view of the question and reaches a result opposite to that of the Keller case, contains an able review of the leading cases on the subject.

[10] The Moorehead case is followed in Thomas v. Thomas, 112 Pa. Super. 578, 172 A. 36 (1934).

[11] Kiffner v. Kiffner, 185 Iowa 1064, 171 N. W. 590 (1919).

[12] DeRouse v. Williams, 181 Iowa 379, 164 N. W. 896 (1917).

[13] Eaton v. Lovering, 81 N. H. 275, 125 A. 433, reported as Eaton v. Loveren in 35 A. L. R. 1034 (1924). For another case construing the testator's intent in the light of the wife's claim, see Gardner v. O'Loughlin, 76 N. H. 481, 84 A. 935 (1912).

[14] 149 N. Y. 520, 44 N. E. 169, 33 L. R. A. 708, 52 Am. St. Rep. 752 (1896).

[15] 121 Cal. App. 675, 10 P. (2d) 158 (1932).

As an example of a spendthrift clause which puts the beneficial interest of the trust beyond the reach of the *cestui's* wife, the Pennsylvania decision *Board of Charities and Correction* v. *Lockard*[16] is noteworthy. Here the spendthrift clause read, in part, "All moneys or legacies herein bequeathed are to be paid to the legatees in person, and to no one else. . . ." This portion of the clause has been cited frequently as one which, under all circumstances, would prevent the *cestui's* wife from reaching his interest.

The case is significant also in its refusal to relax the law of spendthrift trusts or construction of trust instruments on grounds of public policy. "We agree entirely," the court said, "with all that has been said about the duty of the beneficiary to support his wife and child; but that does not authorize interference with the right of another individual to dispose of his own property as he may see fit." This principle seems to have been lost sight of in the Keller case.

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[16] 198 Pa. 572, 48 A. 496, 82 Am. St. Rep. 817 (1901).