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LEGAL NOTES

B. M. ANDERSON*

ESCHEAT—ABANDONED PROPERTY—CONSTITUTIONALITY: *Western Union Telegraph Company v. Pennsylvania* (United States Supreme Court, December 4, 1961) 368 U.S. 71. The Pennsylvania law escheated to the Commonwealth any real or personal property "within" or subject to control of the Commonwealth where the rightful owner remained unknown for a period of seven years. Pennsylvania commenced this action against Western Union, claiming the right to escheat monies paid in Pennsylvania for money orders where neither the purchaser nor the payee could be located. While the proceedings were pending New York claimed part of the money and Pennsylvania relinquished its claim to this portion. However, as to the balance of the monies the courts of Pennsylvania, including the Pennsylvania Supreme Court, held that constitutional requirements had been satisfied and Pennsylvania was entitled to judgment. Thereafter Western Union appealed to the United States Supreme Court on the basis that the effect of the Pennsylvania judgment was to deny to Western Union due process of law in that the Pennsylvania judgment could not protect Western Union against claims by other states.

The United States Supreme Court by a unanimous decision reversed the judgment of the Supreme Court of Pennsylvania and held that the Pennsylvania court should have dismissed the case when it appeared that conflicting claims of other states might be involved. The majority of the Justices were of the opinion that a proceeding should have been brought in the United States Supreme Court because of the conflicts between the several states, with the added suggestion that perhaps the case might be referred by the Supreme Court to a United States District Court. Mr. Justice Stewart, concurring in the reversal, took the position that the funds were located in New York, where Western Union had its principal office, and that only New York had the power to escheat the property involved in the case. He suggested that the Court's opinion would create more problems than it would solve.

This case is difficult, if not impossible, to reconcile with the case of *Connecticut Mutual Life Insurance Company v. Moore*, 333 U.S. 541, which was decided in 1948. (For a digest of this case, see *TASA* XLIX, 92–95.) In the *Moore* case, which was brought by Connecticut Mutual and a number of other out-of-state life insurance companies doing business in New York against the State Comptroller, the United States Supreme Court upheld the right of New York to take custody as "conservator" of unclaimed funds where the policies were issued for delivery in New York for persons then resident in New York. In the *Western*

* B. M. Anderson, not a member of the Society, is a member of the Alabama, Connecticut and United States Supreme Court Bars and is the author of the Third Edition of *Vance on Insurance.*

Union case the Court attempted to distinguish the *Moore* case on the basis that it was not there decided what another state than New York may do. It seems clear, however, that the *Western Union* case comes very close to overruling the *Moore* case. The validity of life insurance escheat laws in the various states is questionable where multiple state claims are possible.

In its opinion the Court stated:

The claims of New York are particularly aggressive, not merely potential, but actual, active and persistent—best shown by the fact that New York has already escheated part of the very funds originally claimed by Pennsylvania. These claims of New York were presented to us in both the brief and oral argument of that state as *amicus curiae*. In presenting its claims New York also called our attention to the potential claims of other states for escheat based on their contacts with the separate phases of the multi-state transactions out of which these unclaimed funds arose, including: the state of residence of the payee, the state of the sender, the state where the money order was delivered, and the state where the fiscal agent on which the money order was drawn is located.

Arguments more than merely plausible can doubtless be made to support claims of all these and other states to escheat all or parts of all unclaimed funds held by Western Union. And the large area of the company's business makes it entirely possible that *every state* may now or later claim a right to participate in these funds. But even if, as seems unlikely, no other state will assert such a claim, the active controversy between New York and Pennsylvania is enough in itself to justify Western Union's contention that to require it to pay this money to Pennsylvania before New York has had its full day in court might force Western Union to pay a single debt more than once and thus take its property without due process of law.

Our Constitution has wisely provided a way in which controversies between states can be settled without subjecting individuals and companies affected by those controversies to a deprivation of their right to due process of law. Article III, § 2 of the Constitution gives this Court original jurisdiction of cases in which a state is a party. The situation here is in all material respects like that which caused us to take jurisdiction in *Texas* v. *Florida*, 306 U.S. 398. There four states sought to collect death taxes out of an estate. The tax depended upon the domicile of the decedent, and this Court said that "by the law of each state a decedent can have only a single domicile for purposes of death taxes. . . ." Thus, there was only one tax due to only one state. The estate was sufficient to pay the tax of any one state, but the total of the claims of the four states greatly exceeded the net value of the estate. For this reason, as we said, the risk of loss to the state of domicile was real and substantial, unless we exercised our jurisdiction. Under these circumstances we exercised our original jurisdiction to avoid "the risk of loss ensuing from the demands and separate suits of rival claimants to the same debt or legal duty." The rival state claimants here, as in *Texas* v. *Florida*, can invoke our original jurisdiction.

While we have previously decided some escheat cases where it was apparent that rival state claims were in the offing, we have not in any of them closed the door to the exercise of our jurisdiction. In *Connecticut Mutual Life Ins. Co.* v. *Moore*, 333 U.S. 541, we sustained the power of New York to take custody as a conservator of unclaimed funds due persons insured by that company through policies issued for delivery in New York to persons then resident in New York. In doing so we rejected an argument that the state of domicile of the insurance companies involved alone had jurisdiction to

escheat. But there we were careful to point out that "the problem of what another state than New York may do is not before us. That question is not passed upon." Even though this reservation was made and New York only took custody of the funds, leaving the way clear for all claimants to bring action to recover them at any time, there were dissents urging that a way should be then found for the conflicting claims of states to be determined. Several years later a divided Court in *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428, upheld the right of New Jersey to escheat certain unclaimed shares of stock and dividends due stockholders and employees of the Standard Oil Company. In that case New Jersey's jurisdiction to escheat was rested, at least in part, on the fact that Standard Oil was a domiciliary of that State. Again, however, the Court justified its conclusion by saying as to claims of other states: "The claim of no other state to this property is before us and, of course, determination of any right of a claimant state against New Jersey for the property escheated by New Jersey must await presentation here." Later New York sought leave to file an original action here against New Jersey, alleging a controversy between the two states over jurisdiction to take custody of monies arising out of unclaimed travelers checks, outstanding for more than 15 years, issued by American Express Company, a joint stock company organized under New York law with its principal office in New York. Answering, New Jersey pointed out that under New York's then controlling law it disclaimed any purpose to escheat property claimed for escheat by any other state. In this state of the New York law, we refused to take jurisdiction. 358 U.S. 924. By an act effective March 29, 1960, New York amended its law eliminating the disclaimer and now strongly asserts its claim to these funds under its new law.

The rapidly multiplying state escheat laws, originally applying only to land and other tangible things but recently moving into the elusive and wide-ranging field of intangible transactions have presented problems of great importance to the state and persons whose rights will be adversely affected by escheats. This makes it imperative that controversies between different states over their right to escheat intangibles be settled in a forum where all the states that want to do so can present their claims for consideration and final, authoritative determination. Our Court has jurisdiction to do that. Whether and under what circumstances we will exercise our jurisdiction to hear and decide these controversies ourselves in particular cases, and whether we might under some circumstances refer them to United States District Courts, we need not now determine. Nor need we, at this time, attempt to decide the difficult legal questions presented when many different states claim power to escheat intangibles involved in transactions taking place in part in many states. It will be time enough to consider those complicated problems when all interested states—along with all other claimants —can be afforded a full hearing and a final, authoritative determination. It is plain that Pennsylvania courts, with no power to bring other states before them, cannot give such hearings. They have not done so here; they have not attempted to do so. As a result, their judgments, which cannot, with the assurance that comes only from a full trial with all necessary parties present, protect Western Union from having to pay the same single obligation twice, cannot stand. When this situation developed, the Pennsylvania courts should have dismissed the case.

It seems ironical that New York, which resisted the claims of the insurance companies in the *Moore* case, should take this contrary position with respect to the right of the Commonwealth of Pennsylvania to escheat in the *Western Union* case.

GROUP LIFE INSURANCE—MISTAKE OF ASSOCIATION REPRESENTATIVE: *Washington National Insurance Company v. Burch* (C. A. 5, August 4, 1961) 293 F.2d 365. Washington National issued its group life insurance policy to the American Turpentine Farmers Association Cooperative, insuring owners, executors and directors. Those with 20,000 or more trees being worked for turpentine were entitled to $10,000 coverage, and those with less than 20,000 "faces" were entitled to $2,500.

Burch paid premiums or contributions on $10,000 of insurance on his life. Just before he died, and through error, it was claimed that the number of faces worked by his concern, Burch Brothers, was less than 20,000 and that therefore he should be covered for only $2,500. The error was discovered shortly after Burch died.

The insurance company claimed that it was liable for $2,500 and not for $10,000 on the basis that the insurance was reduced through an error of an agent of the insured and not an agent of the insurance company. The District Court agreed with the beneficiary and entered judgment against the insurance company. On appeal, the Court of Appeals for the Fifth Circuit likewise held that the mistake was not chargeable to the policyholder since under Georgia law the Association was the agent of the insurance company and not of the policyholder.

SURRENDER FOR CASH VALUE—COVERAGE DURING GRACE PERIOD: *Clairelaine Garden Apartments, Inc. v. Occidental Life Insurance Company of California* (C. A. 5, May 9, 1961) 290 F.2d 456. Clairelaine owned a life insurance policy in the amount of $340,000 on the life of its president. An application for surrender of the policy, duly executed, was sent to Occidental on March 15, 1955, two days prior to the due date of the annual premium, and was received by Occidental on the policy's anniversary. Occidental issued its check in the amount of the net cash surrender value. This check was duly cashed and the proceeds applied by an assignee bank to a loan secured by the policy, and the balance was transmitted to Clairelaine.

The insured died within 31 days of the due date of the annual premium but after the policy had been surrendered. Clairelaine claimed that the insurance remained in force during this 31-day period because of a grace period required by Texas law and contained in the policy.

The United States District Court and, on appeal, the Circuit Court for the Fifth Circuit held that the policy was duly surrendered and that there was no insurance in force on the date of the insured's death. The Court in its opinion stated:

> Appellant's sole contention here is in effect that, since it was not to the insured's interest to cancel the policy for its cash surrender value, the cancellation was not effective.
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> We know of no decision or principle which supports this view. Certainly the Satery case, on which appellants place their full reliance, does not support it. It seems to us that the appellants, in making their contention, are seeking to read out of the policy

the option to take the surrender value and cancel the policy. This option was expressly availed of and precisely complied with by the parties here.

In making these contentions, the appellants are undertaking not to enforce, but to rewrite, their contract so as to obtain a windfall and, thus, to eat their cake and have it too. Nothing in the policy so provides. The policy was surrendered in exact accord with the cash surrender option. In the same exact accord the money was paid to, and received by, the owner and beneficiary. The policy was surrendered, and thereafter it no longer remained in force.

LIABILITY OF POLICYHOLDER TO AGENT FOR COMMISSIONS—ORAL AGREEMENT: *Arden v. Freydberg* (New York Court of Appeals, March 30, 1961) 9 N.Y.2d 393, 174 N.E.2d 495. Arden, a licensed insurance agent, brought this action against the policyholders, claiming they were liable to him for commissions on life insurance policies. Arden had worked out a stock purchase agreement for the officers and stockholders of the corporation. Thereafter policies had been purchased on the lives of these officers from the same life insurance company Arden represented, but through another officer of the corporation who had been licensed for the purpose. Arden claimed that there was a promise on the part of the policyholders to take out the insurance from him and he had done his work in reliance on this promise.

In the trial court a judgment was rendered in favor of Arden for an amount equal to the commissions he would have received under the policies. On appeal to the Appellate Division of the Supreme Court, First Department, that Court reversed on the basis that the policyholders were under no obligation to the agent for commissions. On further appeal to the New York Court of Appeals, that Court, by a four-to-three vote, affirmed the judgment of the Appellate Division holding the policyholders were not liable to the agent. The Court found that there was no binding agreement to accept the policies at the time the work was done and that the alleged promise to accept the policies, made at a later date, was not legally binding. The Court, speaking through Judge Dye, stated:

> The most that appears is that the plaintiff acted with high hopes and great expectations that his past personal friendship with the principals coupled with his co-operation and suggestions, would induce them to buy the required policies through him. Such a belief on his part may have been warranted; nonetheless, it was purely subjective and fell short of establishing a cause of action. It was not until after the plan had been devised and submitted that any assurances were given that the policies would be bought through him. Such assurances, although in the nature of promises, came too late to benefit the plaintiff. He had already performed what he had undertaken to do His past performance, although rendered upon request, afforded no consideration for the belated oral promises.

The three dissenting judges were of the opinion that policyholders were liable by reason of oral promises to take the insurance from Arden. These judges pointed out that a provision in the New York Insurance Law denying compensation where there was no written agreement applied only to insurance brokers and not to insurance agents, such as Arden. These judges were of the opinion that the matter should have been submitted to a jury.

STAND-BY FEE—MORTGAGE LOAN: *Boston Road Shopping Center v. Teachers Insurance and Annuity Association* (New York Supreme Court, Appellate Division, First Department, April 18, 1961) 13 A.D.2d 106, 213 N.Y.S. 522. Teachers agreed to loan Boston Road Shopping Center $1,100,000 and the Center agreed to accept the loan. The Center paid Teachers $22,000, which under the agreement was to be repaid if the loan was actually made. The loan was not made because suitable tenants could not be procured for a proposed shopping center and the Center brought this action to recover the $22,000.

The loan agreement was specific in requiring eight "major tenants." It also specified the term of years of each lease, the number of square feet taken, the minimum annual rental, and other details. The Center was unable to comply with the terms of the agreement and abandoned the project.

In the trial court judgment was granted for the plaintiffs and Teachers took this appeal. On the appeal, the Court found that the payment was not unreasonable or oppressive since Teachers was required to hold the money in reserve over a 15-month period and that the $22,000 was proper to charge for this privilege. It denied that the charge was usurious, that actual damages had to be shown, and that the retention of the money by Teachers was not proper under the New York Insurance Law.

The Court in its opinion stated:

> Nothing in the public policy of New York requires the court to strike down this payment in the nature of liquidated damages for a breach of contract by plaintiff. It is entirely reasonable in relation to the nature and extent of defendant's undertaking and arrangement; no oppression or overreaching which might suggest the need for equitable intervention is demonstrated. The additional points that the payment was usurious as to the corporate plaintiff and beyond the power of the defendant as an insurance company are without substance.

PREMIUM TAX IMPOSED ON POLICYHOLDER—LLOYDS CONTRACT—CONSTITUTIONAL LAW: *State Board of Insurance v. Todd Shipyards Corporation* (Texas Supreme Court, February 8, 1961) 343 S.W.2d 241. Todd Shipyards Corporation purchased insurance from Lloyds of London covering its properties in Texas. No part of the transaction occurred in Texas and loss payments were handled entirely outside of Texas.

A Texas statute imposed a 5 percent premium tax on the policyholder who purchased a policy from a nonlicensed insurer. The premium tax rates on licensed insurers range from a maximum of 3.85 percent to a minimum of 1.1 percent. Todd Shipyards Corporation paid the 5 percent tax under protest and brought this suit to recover.

In the trial court judgment was rendered for Todd Shipyards Corporation on the basis that the tax was in violation of the Federal Constitution and particularly the due process and equal protection clauses. There was also a claim that the Texas Constitution was violated. The Texas Court of Civil Appeals considered numerous United States Supreme Court cases bearing on this question and affirmed the judgment below on the basis that under the authority of

these cases the rights of Todd Shipyards Corporation under the Federal Constitution were violated. In its opinion, however, the Texas Court of Civil Appeals stated (340 S.W.2d 339, at page 343):

> We are confident that the Supreme Court of the United States, enlightened by its own criticism of the Allgeyer and Cotton Compress cases, will, upon proper application, re-examine those cases and pronounce a decision sustaining the Legislature of Texas in enacting this statute for the protection of its citizens in a field subject to rigid regulation by the State. Until such time, however, it is our duty to follow those cases. This we do, and affirm the judgment of the Trial Court.

On further appeal by the State Board of Insurance to the Supreme Court of Texas, that Court agreed with the Court of Civil Appeals that the United States Supreme Court decisions relied on below by Todd Shipyards Corporation were controlling. The Texas Supreme Court expressed the view that it should not take the position that the Supreme Court of the United States would probably overrule these United States Supreme Court cases. The Court said:

> We abide by what the Supreme Court has held and refuse to speculate upon what said Court may hold.

The State Board of Insurance appealed to the United States Supreme Court and that Court "noted probable jurisdiction" and set down the case for hearing. The United States Supreme Court will presumably review that line of cases holding in effect that a state may not tax insurance transactions taking place elsewhere. Reversal of this case would result in complications.