PITTOCK WILL IS HELD TO BE VALID

Supreme Court Supports Publisher's Testament.

DECISION BY FULL BENCH

All Allegations of the Contestant, Mrs. Leadbetter, Are Overruled. Every Point Is Covered.

(Continued From First Page.)

and the will in that respect is a valid document declaratory of his disposition of his estate.

Circuit Court Jurisdiction Upheld.

"Summing up, we hold that there was no error in striking out of the original petition the conclusions of law stated for the contention that the will was void. The petitioner has had the benefit of a full argument and examination of his questions so raised.

"The circuit court before which this proceeding was instituted had ample jurisdiction of the suit, whether it be one merely to set aside the will as void for undue influence, or whether the issue was the construction of the will with a view of having it declared void. In the absence of an allegation of an illegal contract void as against public policy the will cannot be attacked upon that ground.

"Further, no agreement of stockholders proceeding from any private mercenary consideration of benefit to themselves, in which other members of the corporation could not share, has been shown. The testator in disposing of his own property had a right to direct his trustees to vote and act as he himself could have done while living. Even conceding that there was a contract, there is nothing to show that it was hostile to the interest of any stockholder or disqualifying in its effect upon the trustees who have succeeded to the interests of the testator. Finally, the trust established by the will is sufficiently certain in all of its features for practical operation."

The suit to break the Pittock will originally was filed in the circuit court for Multnomah county, with the result that after an extended hearing Judge Tazwell upheld the validity of the document. Mrs. Leadbetter, through her attorneys, later appealed the case to the supreme court for final determination. O. L. Price, as executor, and O. L. Price and C. A. Morden, as trustees under the last will and testament of Mr. Pittock, were named as defendants.

The opinion of the court in full is as follows:

FULL TEXT OF THE DECISION

Supreme Court Is Unanimous in Its Conclusions.

This is a proceeding to contest the validity of the will of Henry L. Pittock, deceased, on the petition of his daughter, Caroline P. Leadbetter, in which the relief desired is to set aside, annul and cancel the testamentary document, with a view of distributing the estate according to the statute of descents, as in a case of intestacy. The original petition stated the death of the deceased, that at the time thereof he was a resident and inhabitant of Multnomah county, Oregon, having real and personal property therein, gives the names and residences of the heirs and avers that about February 17, 1919, a writing purporting to be his will was admitted to probate. The petition then goes on to allege that the will mentioned "should be set aside and annulled for the following reasons," among others these:

(c) That said paper writing is void as a last will and testament, because the trustees therein named are vested with unrestricted and unlimited discretion as to whether they shall accumulate the income arising from the estate of said testator and keep intact the corpus thereof during the period of the trust purported to be created by said paper writing, or, whether they shall sell the assets of said estate and make distribution thereof and of the income arising therefrom within the period of said alleged trust.

(d) That said paper writing is void as a last will and testament, because it does not specify, with sufficient certainty, the beneficiaries of the trust therein purported to be created.

(e) That said paper writing is void as a last will and testament because it is in contravention of the statutes of the state of Oregon and against public policy, particularly in that clause B of paragraph second thereof directs said trustees to vote the stock of The Oregonian Publishing company, owned by said decedent at the time of his death, in favor of themselves as directors of said company for the period of the trust purported to be created by said paper writing to-wit: twenty years.

The circuit court, in which this proceeding was instituted, on motion of the proponents of the will, struck out paragraphs c, d and e, above quoted, whereupon the contestant filed an amended petition. The allegations about the death of the decedent, the heirs and the presentation and admission to probate of the will are substantially the same as in the original pleading. It goes on to state with a wealth of verbiage that the trustees were intimately connected with the deceased as confidential advisers, that at the time of the execution of the will the decedent was eighty-one years of age; that the trustees named therein had acquired great influence over him; and that, conspiring, intending and devising to secure large power, influence, emoluments, salaries and commissions as executors of the last will and testament and as trustees of his estate amounting approximately to $8,000,000, the individuals named as trustees so persuaded and overcame the will, free agency, volition and judgment of the deceased that their will was substituted for his and the paper mentioned, for the reasons foregoing, was not and did not represent the will of the decedent.

It is averred also in substance that the trustees and others to the petitioner unknown unduly influenced and induced the deceased to keep secret the fact that he had signed the paper. The resultant of all the allegations of the amended petition is concentrated in the eleventh paragraph thereof, reading thus:

That said provisions of said will creating said trust and conveying to said O. L. Price and C. A. Morden all of the estate of decedent and giving to said persons unrestricted and unlimited discretion as to the accumulation of the income arising from the estate of deceased and keeping intact the corpus thereof during the period of twenty years as provided in said paper writing, or selling the assets of said estate and making distribution thereof and the income arising therefrom within said period of twenty (20) years, and failing to specify with sufficient certainty the beneficiaries of said trust attempted to be created by said paper writing, and directing the said persons to vote for themselves during the period of said alleged trust and to elect and retain said C. A. Morden as manager of The Oregonian Publishing company are illegal and void, against public policy and in contravention of the statutes of the state of Oregon.

It is alleged that the decedent was ignorant of the legal effect of the provisions of the will and that he relied upon the representations of the trustees and did not seek independent advice; that he would not have executed the will or created the trust mentioned if he had known or been advised that the writing in the particulars mentioned, or in any of them, was illegal and void. The prayer is to the effect that the will be set aside and canceled and an administrator be appointed to take charge of the estate. A copy of the will is attached to the petition, marked "Exhibit A," and reads as follows:

Know all men, that I, Henry L. Pittock, of Portland, Multnomah county, state of Oregon, of the age of 81 years, being of sound and disposing mind and memory, and not acting under duress, menace, fraud or undue influence of any person whomsoever, do make, publish and declare this my last will and testament in manner and form following, to-wit:

First—It is my will, and I do order that all my just debts and funeral expenses be duly paid and satisfied as soon as can conveniently be done after my decease.

Second—In order to avoid, as far as possible, any loss or depreciation which might be caused by any sudden changes and to preserve my estate, I hereby give, devise and bequeath unto C. A. Morden and O. L. Price, both of Portland, Or., all of my property, real, personal and mixed, of which I may die seized or to which I may be entitled, including property held in trust for me and after acquired property, wheresoever the same may be located to be held by them in trust for a period of twenty (20) years from the date of my decease for the following purposes, to-wit:

A. The trustees shall have full and complete power and authority over my estate, they shall have full and complete possession and control of same, they shall keep the surplus funds invested in good securities. I grant unto them full power and authority to sell at public or private sale, as they may see fit, any of my property, except as herein otherwise provided, upon such terms and conditions as to them shall seem meet and for any purpose whatever; and I exonerate any purchaser from the necessity of seeing to the due application of the proceeds of sale, in making such sale said trustees shall not be obliged either to obtain the authority or consent or confirmation of any court therefor or thereof, either before or afterwards or to make any report thereof. They shall have power and authority to borrow money and bind my estate for the repayment thereof and to loan or advance money from my estate either with or without security when they shall deem it necessary for the protection of my estate. They shall have power to vote my stock in the various corporations at all meetings of the stockholders of such corporations and shall have all powers incident to the ownership of such stock.

B. None of my stock in The Oregonian Publishing company shall be sold, but shall be held intact during the entire period of this trust. I direct that my trustees shall vote said stock in favor of themselves as directors of said corporation, and it is my desire and I request that C. A. Morden shall be elected manager of The Oregonian and shall be retained as such, and that Edgar B. Piper shall be retained as managing editor of The Oregonian until he shall become incapacitated or until he may voluntarily resign.

C. None of my stock in the Crown-Willamette Paper company shall be sold, but shall be held intact during the entire period of this trust.

D. None of my stock in the Northwestern National bank of Portland, Or., shall be sold unless all of my stock in the Northwestern Fidelity company shall also be sold at the same time, or unless all of my stock in the Northwestern Fidelity company shall have been previously sold.

E. My trustees shall pay to my wife, Georgiana M. Pittock, if she shall survive me, the sum of $1000 monthly during her lifetime or until the termination of this trust. They shall also pay the sum of $500 monthly to each of my five children, namely: Susan Emery, Fred F. Pittock, Kate P. Hebard, Caroline P. Leadbetter and Louise Gantenbein, during their lifetime or until the termination of this trust; provided, that if any of my said children should not survive me or should die before the expiration of this trust, such amount as would otherwise have gone to such deceased child shall be paid to the then living heirs of the body of such deceased child by right of representation, and in the event such deceased child shall leave no living heirs of his or her body then the payment which would otherwise have gone to such deceased child shall cease upon the death of such child.

F. When all of my debts and obligations shall have been paid or when a sufficient amount of cash shall be on hand to pay the same, I direct my trustees to pay semi-annually thereafter fifty (50) per cent of all cash on hand in excess of such reserve and in excess of such amount otherwise needed to preserve my estate, to my said wife, if living, and if she shall not then be living said amount shall be paid semi-annually, share and share alike to my five children during their lifetime or until the termination of this trust, provided that if any of my said children shall not then be living the payment which would otherwise go to such deceased child shall go to the then living heirs of the body of each deceased child by right of representation and in the event that such deceased child shall leave no living heirs of his or her body, such payment shall cease. It must be understood that when I refer to "my debts and obligations" I mean not only my direct obligations, but all mortgages either upon my own property or upon property in which I am jointly interested and all obligations of the Northwestern Fidelity company so long as my stock in said company remains unsold.

G. Upon the termination of this trust, to-wit: Twenty (20) years after the date of my decease, all the property remaining in the hands of my trustees shall be turned over to my said wife, if living, to be held by her during her lifetime, and upon her death to go to my children as hereinafter provided for in case my said wife shall not be living at the termination of this trust; and in the event my said wife shall not be living at the termination of this trust all the property remaining in the hands of my trustees shall be turned over to and become the property of my then surviving children, share and share alike, providing that if any of my five children shall not then be living but shall leave living heirs of his or her body, the proportion of said property which would otherwise have gone to such deceased child shall go to the then living heirs of the body of such deceased child by right of representation.

H. If either of my trustees above named shall die, resign or become incapacitated either before or after my decease, the survivor or remaining trustee shall act alone, and in the event both of said trustees should die, resign or become incapacitated, I hereby appoint the Portland Trust company of Oregon to fill such vacancy and to act alone. It is understood that wherever and whenever in this will I have referred to "trustees" it shall mean the trustees herein named, the survivor or successor.

Lastly, I nominate, constitute and appoint my wife, Georgiana M. Pittock, to be the executrix and O. L. Price to be the executor of this, my last will and testament, to act jointly and without bonds; in the event of the death or resignation of either of the above then the survivor shall act alone. I hereby revoke all other legacies and wills by me made and declare this and no other to be my last will and testament. I direct that no bond shall be required of the trustees herein named or of the survivor or successor.

In witness whereof I have hereunto set my hand and seal this 23d day of August, A. D. 1916.

HENRY L. PITTOCK (Seal.)

The attestation by the witnesses is in the usual form and is consequently omitted.

The answer admits the allegations about the death, relationship of the heirs and the admission of the will to probate, but otherwise denies the petition in toto. As new matter the answer avers the death of the decedent, his residence in Multnomah county, Oregon, at the time of his death; that he made a will of date August 23, 1916; that he signed the same in the presence of two named witnesses, who then and there at his request and in his presence signed the same as witnesses, and he published the same as his will; that he was in every respect competent to make the will; that his wife and O. L. Price were named as executors, but that the wife had died prior to the testator's death; and that the will was admitted to probate, and letters testamentary were issued to O. L. Price, who entered upon the discharge of his duties as executor, and ever since has been and still is such executor. The answer prays for the admission of the will to probate in solemn form and that the second amended petition to revoke the same be dismissed.

The reply denies every allegation of new matter in the further and separate answer, except as stated, admitting the death of Pittock, his residence and his estate situated in Multnomah county, and prays for the same relief as asked in the petition.

After hearing testimony and argument of counsel the circuit court denied the petition and entered a decree admitting the will to probate in solemn form, establishing the same as the last will and testament of the testator, confirming also the appointment of O. L. Price as executor and awarding costs against the petitioner and she has appealed.

Burnett, C. J. No harmful error resulted in striking out of the original petition, the parts thereof above quoted, for they were only conclusions of law and the questions raised by them appear on the face of the writing and have been discussed in our presence. A great deal of space was taken in the briefs and much attention devoted in the argument, to the matter of probate jurisdiction, the proponents contending that the sole question which can be considered in this proceeding is whether or not the will was the authentic document whereby the testator undertook to dispose of his property, while the petitioner maintains there is involved not only the decedent's freedom from undue influence in the execution of the document, but also the validity of the instrument as a matter of law.

Referring to article VII of the constitution of this state as it now stands, we find that by section 1-a thereof it is provided that:

The judicial power of the state shall be vested in one supreme court and such other courts as may from time to time be created by law.

This was part of the amendment of 1910, which also provided in section 2-b that:

The courts, jurisdiction and judicial system of the state of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted, until otherwise provided by law.

The argument seems to have proceeded on the assumption that throughout the state the old system prevailed as described in the original constitution, whereby the county court "shall have the jurisdiction pertaining to probate courts"; section 12, article VII. The basis of the argument would be sound, had it not been for the provision by law embodied in the act of February 17, 1919, codified as sections 3132-3140 Or. L. That statute provided in substance that in every judicial district comprising only one county having over 100,000 population, there should be elected one circuit judge in addition to those then holding office in such district; that he should sit in a department to be designated by rule of the circuit court by an appropriate number, and be known as the department of probate, and that the judge in such department should, in addition to the duties prescribed in the act, perform the general duties of a judge of the circuit court. The county court of such districts and the office of county judge were abolished, and upon the taking effect of the act all judicial jurisdiction, power and authority of the county judges and county courts, as distinguished from the power and jurisdiction as exercised in the transaction of county business was conferred upon the circuit court of the judicial district comprising such county. The act goes on to say also, in substance, that in any proceeding or cause over which by existing laws the county court has jurisdiction, all of which are by the provisions of the act transferred to and heard by the circuit court, the procedure and practice shall be governed by the existing laws applicable to such proceeding without any change, except that appeals may be taken direct to the supreme court. The court will take judicial notice that the act applies to Multnomah county, in the circuit court of which this proceeding was instituted.

The jurisdiction of the circuit court was not in any respect lessened or restricted by the enactment mentioned. Its powers were increased by the addition of probate jurisdiction. The conclusion, therefore, is that so far as jurisdiction is concerned, and whether we consider this proceeding as merely a contest of a will to determine its authenticity or whether we treat it as a suit to construe the will, the tribunal before which the proceeding was had was possessed of full jurisdiction to hear and determine the questions involved. It is true that the original judicial scheme was to continue under the new constitution until otherwise provided by law, but the act of February 17, 1919, has effected the necessary provision for change. Having before us, then, for review, a decision of a court having all the necessary original jurisdiction to consider any question which might be litigated, we proceed briefly to scan the pleadings upon which the proceeding is based.

Reduced to its lowest terms, the effort of the petitioner is to set aside the will on the ground that it was the product of undue influence exercised over the testator by the trustees named in the will, whereby in fact it was their disposition of the property that was embodied in the will, instead of that of the testator, so that their will was substituted for his; and further, that the result achieved was a will which is void on its face for reasons which were assigned in the original petition and re-embodied in paragraph 11 of the amended petition already quoted.

As to the mental capacity of the testator, no question is made, and it is sufficient on that feature to dismiss the matter with a quotation from the testimony of the petitioner herself:

Q. There never was any question in your mind, was there, but what your father was in possession of all his mental faculties up to the time of his death?

A. No. There never was any question about that. He was in full possession of all of his faculties to within a couple of hours before his death.

As to the matter of undue influence, the testimony goes no further than to show that for some years the defendant Morden had been in the employ of The Oregonian Publishing company, officiating as manager of the newspaper published by that corporation, of which the decedent held the majority of the stock, and that for a like period the defendant O. L. Price had been the private secretary of the testator, who had large business interests, having accumulated a fortune estimated in millions of dollars. These two defendants manifestly had the confidence of the testator and had opportunity to exercise over him such influence as they possessed. This is the utmost that the testimony shows. But the evidence is convincing that at no time or place did either of the defendants exercise or attempt to exercise any influence over the decedent in the matter of making his will. On the contrary, the testimony is clear that the initiative in the matter came from him and that the will was the product of his own mind and of his own dictation, without the least suggestion from any one, so far as the record discloses, about what the document should contain or what disposition should be made of his property. In other words, as disclosed by the record before us, it is apparent that he had very much more influence over the defendants than they had over him; that his word was the law of his business and that it was theirs to obey and not to influence or dictate. On the question of undue influence, it is not enough to show that the defendant had an opportunity to exercise such influence, but it must also appear that the influence was actually exercised, and not only so but that it was pushed to such an extent that the resultant will was not that of the testator but that of the parties procuring its execution: Hubbard vs. Hubbard, 7 Or. 42; Estate of Dolbeer, 153 Cal. 652, 96 Pac. 266, 15 Ann. Cas. 207. In re Shell's Estate, 28 Colo. 167, 63 Pac. 413, 89 Am. St. 181, 53 L. R. A. 387; Ginter vs. Ginter, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. n. s. 1024.

The principal point of attack on the will is what we may call for convenience the "Oregonian clause," reading thus:

None of my stock in The Oregonian Publishing company shall be sold, but shall be held intact during the entire period of this trust. I direct that my trustees shall vote said stock in favor of themselves as directors of such corporation, and it is my desire and I request that C. A. Morden shall be elected as manager of the corporation and shall be retained as such, and that Edgar B. Piper shall be retained as editor of The Oregonian until he shall become incapacitated or until he may voluntarily resign.

The effort of the pleader is to show, not that this will was the product of any corrupt agreement, but that it is void upon its face, no matter how pure the motive of the maker. The argument by the petitioner, and she devoted much attention in the evidence trying to prove the same, is that without consulting the minority stockholders, Mr. Pittock, being the owner of two-thirds of the stock of The Oregonian Publishing company, for the purpose of retaining control of the paper, perpetuating his policies and directing its policy, management and board of directors for twenty years after his death and to keep Piper as editor and Morden as manager from leaving him, entered into an agreement with Piper to have the corporation pay him an increased salary and to keep him in his position as managing editor until Piper should become incapacitated or voluntarily resign, but not exceeding twenty years after Mr. Pittock's death, and that he carried out his part of this agreement by directing his trustees to vote for themselves as directors and requesting them to elect Morden as manager and to retain Piper as editor. Further, according to her brief, petitioner insists that this agreement is null and void, illegal and contrary to public policy. No hint of such an agreement is found in the pleadings.

So far as the petition is concerned, it might be called a demurrer to the sufficiency of the will on the ground that it carried upon its face defects to its validity. A great many cases have been cited where combinations have been entered into by stockholders among themselves whereby for personal advantage not to be shared by other stockholders they sought to dictate the policy of the corporation of which they were members. That is not the present case. We have before us an individual stockholder dealing only with his own property, exercising an attribute of such property, that of testamentary disposition. It is not made to appear by the pleading that he so disposed of it on account of any sinister motive or by reason of any corrupt consideration or advantage accruing to himself which did not equally inure to the benefit of the minority stockholders. The vicious principle of illegal combinations of directors to pursue certain policies generally for their own aggrandizement seems to be that each surrenders in advance his individual judgment irrespective of the good of the corporation or the rights of other stockholders. The essence of the fault lies in the combination which cannot exist where a single majority stockholder, for himself and in the management of his own property, formulates a certain corporate policy and undertakes to carry it out. "Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise; and the very fact of the combination may show that the object is simply to do harm and not to exercise one's own just rights." Beach on private corporations, section 854.

Some of the precedents cited by the petitioner are here noted: In Scripps vs. Sweeney, 160 Mich. 148, 125 N. W. 72, it is held, according to the syllabus, that:

The execution of a contract between four of the directors and stockholders of several corporations holding a majority of stock in each, without the consent of other stockholders, for purposes of personal gain, containing provisions for the continued employment of one of the contracting parties as manager at a fixed salary, and determining the business policy of the several corporations, is contrary to public policy and may not be enforced specifically.

In that case Scripps and Sweeney were leading stockholders in several newspaper corporations. In effect they, while occupying a position of trust, were contracting with each other for their own personal gain at the expense of the corporation, and consequently to the injury of other stockholders. Here, however, if contracting at all, Pittock was bargaining with strangers, or at least nonstockholders so far as appears, and was carrying out with his own property what he had a right to do, if he had lived.

In Manson vs. Curtis, 223 N. Y. 313, 119 N. E. 559, a section of the syllabus reads thus:

It is not illegal or against public policy for two or more stockholders owning the majority of shares of stock of a corporation to unite upon a course of corporate policy or action or upon the officers whom they will elect. An ordinary agreement among a minority in number but a majority in shares for the purpose of obtaining control of the corporation by the election of particular persons as directors is not illegal. Agreements upon a sufficient consideration between them, of such intendment and effect, are valid and binding if they do not contravene any express charter or statutory provision or contemplate any fraud, oppression or wrong against other stockholders or other illegal object.

The vice upon which the court condemned the agreement in question consisted in the express stipulation that the president of the corporation should be only nominally so; that no interference with plaintiff's policy as manager should be tolerated, and in effect the board of directors should be mere dummies, whereas the statute required that the affairs of the corporation should be controlled by the directors either in person or by subordinates under their authority. In the instant case the testator proposed to work out his policy by the legal election of directors by a majority of the stock which he himself owned and would have had a right to vote in that way without question, if he had lived.

In Funkhouser vs. Capps, 174 S. W. 897, it was held that a contract pooling what constitutes a majority of corporate stock on condition that the same shall be voted so as to put one of the parties in the management of the company with certain advantages in sale of his stock on severance of his relations with the concern, is void as against the Texas statute giving to the directors the general management of the affairs of corporations. In that case, as in others, one of the conditions of the agreement was to give to one of the parties thereto a private advantage not enjoyed by other members of the corporation. The same vicious element appeared in Gage v. Fisher, 5 N. D. 297, 31 L. R. A. 557, where it was decided that a contract to allow another to control the voting of stock based upon a promise of one who is to control such stock to secure for the owner of the stock an office in the corporation, is illegal. So, in Gilchrist v. Hatch, 106 N. E. 473, it is said that:

As a general rule a contract by a director or a majority stockholder of a corporation whereby he undertakes in consideration of a private benefit or advantage accruing to himself, to secure the appointment of another to a lucrative office or a position of profit in the corporation, is against common honesty, and therefore against public policy.

In Guernsey v. Cook, 120 Mass. 501, the defendants, owners of a majority of the stock of a corporation, agreed to make the plaintiff treasurer of the company in consideration of his taking part of the defendants' stock. The court there said, among other things:

The contract if reasonably susceptible of two meanings, one legal and the other not, must indeed receive an interpretation which will support rather than defeat it and the presumption is in favor of its legality. But this contract necessarily implies that the defendant intended to derive and the plaintiff intended to give him a private advantage not shared by the other stockholders in consideration of his election as treasurer. . . . It was the purpose and effect of the contract to influence the defendant in the decision of a question affecting the private rights of others by considerations foreign to those rights. The promisee was placed under direct inducement to disregard his duties to other members of the corporation who had a right to demand his disinterested action in the selection of suitable officers. He was in a relation of trust and confidence which required him to look only to the best interest of the whole, uninfluenced by private gain. The contract operated as a fraud on his associates.

All through the authorities cited by the petitioner runs the vein of pooling among a group of stockholders whereby they conspired either to seek some private advantage not common to other members of the corporation, or to pass the control of the concern to others than the directors in whom the statute vests the management. Such instances are found in Woodruff vs. Wentworth, 133 Mass. 309; Hampton vs. Buchanan, 51 Wash. 155, 98 Pac. 374; Jackson vs. Hooper, 76 N. J. Eq. 592, 75 Atl. 568, 27 L. R. A. (N. S.) 658; Luthy vs. Ream, 270 Ill. 170, 110 N. E. 373, Ann. Cas. 1917 B. 368; Rush vs. Aunspaugh, 179 Ala. 542, 60 So. 802; Timme vs. Kopmeier, 162 Wis. 571, 156 N. W. 961; Withers vs. Edwards, 26 Tex. Civ. App. 189, 62 S. W. 795.

There is another class of cases, which holds that each stockholder has a right to rely upon the judgment and interest of his fellow stockholders and that no shareholder has a right to separate himself irrevocably from the power of voting his own stock. One sample of such cases is Morel vs. Hoge, 130 Ga. 625, 61 S. E. 497, 16 L. R. A. (N. S.) 1136.

On the other hand, viewing the present situation as a combination among several stockholders, which it is not, however, the rule is thus laid down in 14 C. J. 913, section 1418:

While there is some authority apparently opposed to this view, the weight of authority holds that stockholders may combine for the purpose of controlling the management and business of a corporation, and agree in pursuance thereof that they will vote their stock as a unit according as a majority of them may determine, provided no fraud is committed or undue advantage taken of stockholders who are not members of the combination.

See also 1 Thompson on Corporations, 2d Ed., sections 893, 894 and 895. In Winsor vs. Commonwealth Coal company, 63 Wash. 62, 114 Pac. 908, 33 L. R. A. (N. S.) 63, it is said:

Persons owning stock have the unqualified right to combine their interests to secure the management of the corporation when such management is fair to all stockholders alike.

In White vs. Snell, 35 Utah 434, 100 Pac. 927, a majority of stockholders placed their stock in the hands of other stockholders to vote, manage the corporation and generally to do all things with the shares that the owners themselves might do, for two years and five months, the trustee to pay the owners a fixed sum per month as well as all assessments and indebtedness incurred by them, and it was held not to be void as against public policy to do this. Barnes vs. Brown, 80 N. Y. 527, was a case where the plaintiff was director and president of a corporation and owned a majority of the stock then issued. The corporation owed him for money loaned. Prior to his election as director and president third parties had made a construction contract with the company. After taking office he bought an interest in the contract. In this state of affairs he sold his stock and interest in the contract to the defendants, who agreed to pay him the amount owed him by the company and to deliver to him 2000 fully paid-up shares of its stock. Both parties performed, except that defendants delivered stock not legally issued and not fully paid. In an action to recover damages, it was held:

That assuming it was part of the scheme that plaintiff should transfer the control and management of the corporation, he had the right to transfer all his stock and interest and with it the control which he had the right to exercise, as he held the majority of the stock then issued; and that in the absence of proof of any wrongful or fraudulent intent, no policy of the law was violated by the arrangement.

In Bonta vs. Gridley, 77 App. Div. 33, 78 N. Y. S. 961, affirmed in memorandum opinion in 185 N. Y. 614, two stockholders in a bank agreed that the plaintiff should be elected cashier for five years at $2500 a year; that he should exercise his influence in favor of the bank and the retention of the then board of directors; and that he should buy 50 shares of the bank's stock, which they agreed to repurchase from him at $135 per share on his ceasing to be cashier. The court there held:

So far as we have been able to discover, it has not yet been held by any court that two stockholders of a corporation may not legitimately agree between themselves to use their influence jointly to secure the election of a certain board of directors of such corporation, even if one of such stockholders happens to be its cashier, provided only that the proposed agreement is entered into in good faith and for the purpose of promoting the best interests of the corporation and in fact does promote its best interests.

In Elger vs. Boyle, 126 N. Y. S. 946, it was said:

The power to vote stock incidental to its ownership may not be taken from the holder in invitum but he may qualify his ownership by his own consent that another may vote it for him or may accept the ownership with a condition involving that consent.

In that case a testator directed his executors to form a corporation to carry on his business, the stock to be sold according to the direction of certain named individuals, and the arrangement was held to be valid, the court saying:

These trustees became possessed of the stock, not as their own asset but solely by virtue of the will and of the conditions which the will imposed. One condition involved their consent to the restriction of their voting power and no rule of law or public policy is offended by giving effect to that contract.

Again, in Carnegie Trust Co. vs. Security Life Insurance company, 111 Va. 1, 68 S. E. 412, 21 Ann. Cas. 287, 31 L. R. A. (N. S.) 1186, the second paragraph of the syllabus reads thus:

An agreement between holders of shares in a life insurance company to place their stock in the hands of trustees for a period of 25 years to enable the trustees more efficiently to manage the corporation, is not against public policy.

In Venner vs. Chicago City Ry. Co., 258 Ill. 523, 101 N. E. 949, the doctrine was thus inculcated:

It has been expressly held that a contract by the owners of more than one-half of the shares of stock of a corporation to elect the directors of the corporation so as to secure the management of its property, to ballot among themselves for directors and officers if they could not agree to cast their vote as a unit as a majority should decide so as to control the election, and not to buy or sell stock except for their joint benefit, is not dishonest violation of the rights of others or in contravention of public policy.

A majority of the stockholders may therefore by uniting in the same proxy confer upon an agent unlimited discretion to vote their stock and there is no policy of law to prevent their transferring their stock to a trustee with the like unrestricted power. It is the purpose for which the trust was created which must determine its legality.

In Smith vs. San Francisco & N. P. R. R. Co., 115 Cal. 584, 47 Pac. 582, three parties combined to buy 42,000 shares of the railroad company's stock belonging to the Donahue estate and to vote it in one block so as to retain control of the company for five years, the vote to be cast according to the wish of the majority of the block ascertained by ballot. The court said:

It is not in violation of any rule or principle of law for stockholders who own a majority of the stock in a corporation to cause its affairs to be managed in such a way as they may think best calculated to further the ends of the corporation and for this purpose to appoint one or more parties who shall vote in such a way as shall carry out their plan.

In Bowditch vs. Jackson Co., 76 N. H. 351, 82 Atl. 1014, Ann. Cas. 1913 A. 366, according to the syllabus we learn that:

An agreement whereby three-fourths of the stock of a corporation is transferred to trustees who are to hold the same for one year, vote it in favor of a proposed sale of the corporate property, distribute the proceeds, and take the necessary steps to wind up the company's affairs, is not open to objection, where it appears that its execution will work no wrong to the corporation and confer no special benefit upon the share holders who are party to the compact.

Speaking of voting trusts and defining them, the definition is thus formulated in section 1705, 3 Fletcher's Cyclopedia of Corporations:

A voting trust may be comprehensively defined as one created by an agreement between a group of the stockholders of a corporation and the trustees, or by a group of identical agreements between individual stockholders and a common trustee, whereby it is provided that for a term of years, or for a period contingent upon a certain event, or until the agreement is terminated, control over the stock owned by such stockholders, either for certain purposes or for all, shall be lodged in the trustee, either with or without a reservation to the owners or persons designated by them of the power to direct how such control shall be used. A mere deposit of shares of stock in the hands of a depositary with directions to vote in the manner in which he is instructed by a committee appointed by the stockholders and subject to their control, is not a voting trust, it not appearing that the ownership of the stock and the voting power were separated by the agreement under which the committee was appointed and the stock deposited.

In the instant case there was no voting trust within the meaning of the definition. There was no combination of stockholders. The testator was the owner in his individual right of a majority of the stock of the corporation. He had a right as an attribute of property exercised in testamentary form, to direct how and for whom the stock should be voted. No one can rightly say that if Pittock living had announced his intention steadily for 20 years to vote for certain directors who would in turn carry out certain policies as to employes, he could have been enjoined from the consummation of his purpose. How, then, can it be said that he cannot direct his trustees to do that same thing after his death, for a limited period? The will does not purport to perpetuate the limitation upon this property for more than the length of any life then in existence and 21 years thereafter. The period of the trust is expressly limited to 20 years. It does not constitute a perpetuity. In other words, considering the face of the will, there is no voting trust, no combination of a group of stockholders. There is only the expression of a single individual, doing as he had a right to do with his private property.

But it is urged upon us that this was the result of an agreement which is contrary to public policy. As we have pointed out, agreements to vote stock in a certain way are not necessarily per se void. In the cases cited in support of the petitioner's contention there has been always some element of private personal gain to accrue to the contracting parties, not to be enjoyed by other members of the corporation. In this instance, during his life time the testator could and probably did vote his stock so as to secure the election of directors to his liking. From the testimony it is plain that Mr. Pittock desired to perpetuate for a time, at least, the existing personnel of the editorial and managerial departments of his corporation, The Oregonian Publishing company, of which he was the principal owner, and to maintain the standing of The Oregonian, which under his direction had attained wide influence in the newspaper world. He had been assisted in this matter for some years by the trustees, who were familiar with the property and its requirements as a going concern and who, it is probable, were best qualified, at least in the judgment of the testator, to carry it on as a successful venture for some time to come. It was certainly lawful for the living owner of two-thirds of the stock so to shape the directorate as to accomplish this purpose. Equally after his death, so far as he lawfully could direct by testamentary disposition of his property, it was competent to promote the same end by the same means.

It is urged, however, that the effect of his will was to compel the trustees not only to vote for themselves as directors but to retain both Morden as manager and Piper as editor, with the result that the trustees, taking office as directors, would be compelled without regard to the real interests of the corporation to carry out the policy indicated by the will, whether it be for the benefit of the corporation or not; in other words, that their duty as trustees would thus be brought in conflict with their obligations as directors, to the detriment of the latter relation. This argument is predicated upon the theory that the words "desire" and "request" used in The Oregonian clause with respect to Morden and Piper are necessarily mandatory. The significance of such words as "desire" and "request" was considered in Beakey vs. Knutson, 90 Or. 574, 174 Pac. 1149. We there laid down the rule in substance that in construing words such as "desire" and "request" when used in a will, the testator's intention is controlling, and where the words must necessarily be followed to carry out the clear purpose of the testator they are to be regarded as words of command or direction. The conclusion there was strengthened by the fact that the will disposing of the property involved used this language as expressing the testator's desire and request to his executrix:

I direct and request that she use such or all of the money which may be the proceeds of any property she may sell.

The term "desire" was held to be imperative in its purport, and construing the whole will together, having in view the plain intent of the testator, it was determined that in the light of all these circumstances and accompanying words the request and desire expressed by the will were controlling. The doctrine is thus stated in 3 Alexander on Wills, section 1096:

A trust may or may not be created according to whether or not the precatory expressions are directed to the executor or to the beneficiary. Expressions of desire, recommendation, hope, or the like, addressed to the beneficiary, may be regarded as being merely words of request and not of command, while if addressed to the executor of the testator's will, the testator having the right to command the manner of the disposition of his property, such expressions will be considered and construed as commands, although clothed merely in the language of civility, and the courts will enforce them as a duty imposed upon the executor.

We note in passing that the desire and request in the present instance are addressed not to the executor as such, but to the trustees, successors of that executor. Trustees as a rule have more discretion than the immediate mandatory of the testator. The duties of an executor are plainly defined by the terms of the will as measured by the provisions of the statute. The trustees are in a sense beneficiaries, rather than occupying the character of executors. The language of the will as to the trustees will bear a more liberal construction than if addressed directly to the executor as such. We find the rule thus laid down by Mr. Justice Semmes in Lines vs. Darden, 5 Fla. 51, 73:

The words "will and desire" are not necessarily mandatory, nor does the question turn upon their grammatical construction. Their import and signification depend, not so much as to whom they are addressed as to the party using them, the act to be performed and the certainty of the subject matter.

Again, in Coulson vs. Alpaugh, 163 Ill. 298, 302, the principle is thus expressed:

The words "request" and "requesting" are, under many circumstances, precatory words sufficient to raise a trust, and under other circumstances it is otherwise. It depends not only upon the sense in which the words are used—whether intended as imperative, or as merely the expression of a wish or preference, the observance of which is left to the discretion of the first taker—but even where it is clear the language is intended as mandatory, it also depends upon the fact whether the intention is defeated by the other provisions of the will, for it is just as essential to the creation of a trust there should be certainty of object and certainty of subject matter as it is that the words in which the intention is expressed should be imperative.

In Williams vs. Worthington, 49 Md. 572, the syllabus in part declares that:

Words of recommendation and other words precatory in their nature are not to be construed as peremptory unless by the context of the will that meaning is forced upon them.

It is taught in Floyd vs. Smith, 59 Fla. 485, 51 So. 537, 138 Am. St. 133, 21 Ann. Cas. 318, 37 L. R. A. (N. S.) 651, that:

The real question is: What was the intention of the testator? Did he intend that the words expressing the wish, desire, recommendation or confidence or the like should govern the conduct of the party to whom they may be addressed, or whether they are an indication of what he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion. It does not seem to have been found possible to formulate any definite statement of principle which will apply to every case.

And in a note to this case in 21 Ann. Cas., supra, we read this:

The cardinal rule used in the interpretation of wills that the intention of the testator shall govern applies to the creation of precatory trusts and no hard and fast meaning can be given to words apart from their connection and the atmosphere of the instrument in which they are used.

It is said in Estate of Pforr, 144 Cal. 121, 77 Pac. 825, that "desire" is a request when addressed to the devisee, but a command when addressed to the executor. To the same effect is Post vs. Moore, 181 N. Y. 15, 2 Ann. Cas. 591.

Reverting to The Oregonian clause, we find that the will "directs" the trustees to vote the stock in favor of themselves as directors of said corporation. Immediately the tone of the language changes, "and it is my desire and I request," etc. If the testator, familiar as he was from his experience as a newspaper man with the use of words and their shades of meaning, had desired to make the employment of Morden and Piper imperative, he most likely would have grouped all those matters under the mandatory word "direct." In the immediately preceding clause of the will he had declared that "the trustees shall have full and complete power and authority over my estate; they shall have full and complete possession and control of same." Finally in that clause, speaking directly about share of stock, he employed this language: "They shall have power to vote my stock in the various corporations at all meetings of the stockholders of such corporations and shall have all powers incident to the ownership of such stock." In view of this strong and comprehensive language, the change of his expression immediately from "direct" to "desire" and "request" is very significant and we think it is legitimate to construe the latter clause as merely precatory and advisory, but not mandatory.

More than all that, it is not shown or intimated that the agreement, if there was one, to employ Morden and Piper would be harmful to the best interests of the corporation or hurtful to the interests of the other stockholders, or that it was based upon any benefit private or personal to Pittock. Their long retention in the service of the corporation attests their ability and faithfulness, and in the light of the best authorities it was legitimate for the controling stockholder so to shape the direction of his property and his testamentary instructions to his trustees as to express his best judgment and give it effect in corporate operation through the regular channel of a board of directors elected by that stock.

Again, it is said in the attack upon the will that the trust created is void for uncertainty. Some of the precedents supporting that contention are here noted: McMonagle v. McGlinn, 85 Fed. 88. In determining whether to apply the statute of limitations to plaintiff's suit to declare a trust and to subject thereto certain property dependent upon whether the bill showed an express trust to which the statute would not apply, or a constructive trust to which it would apply, the court, quoting from 2 Pom. Eq. Jur., sections 1008-1010, said an express trust must be reasonably certain as to terms, property, beneficiaries, their interests and the manner of performance of the trust. In that case the plaintiff claimed that her brother had collected part of an estate coming to her, had paid her part of the proceeds and retained the rest. The exact amount of the property retained was not certain. There was no showing as to what use it was agreed he should make of the property, how long he should keep it, or what disposition he should make of it. Hence there could be no express trust; but that was the substance of her declaration and the court held that the plaintiff's complaint did not show an express trust. In Greenwood v. Greenwood, 97 Kans. 380, 155 Pac. 807, Mrs. Greenwood obtained a decree of divorce from her husband in which it was "ordered, adjudged and decreed that the said plaintiff shall have and there is hereby set apart to her as her separate estate and as and for her alimony in said action the following described real estate (describing it), to be held by said Anna Greenwood in trust for Grace and Helen Greenwood until the said Helen Greenwood shall attain her majority, and at the expiration of said time or upon the death of both of said children before said time, the title to said property shall vest in the said Anna Greenwood absolutely and in fee."

Mrs. Greenwood had contracted to sell this property to her former husband, who sued for specific performance, and she resisted on the ground that the realty was held in trust. Concerning her estate, the court held that it was not affected by the words "in trust" and that owing to the utter absence of terms of the trust or of its administration, she took a fee. In Orr v. Yates, 209 Ill. 222, 70 N. E. 731, William H. Yates devised a farm to a trustees for the sole use and benefit of his daughter during her life and at her death without issue, for the benefit of the widow if living, and at the widow's death, the land was to be divided between the testator's brothers and sisters and their heirs. No provision was made for accounting or manner of conducting the farm. The court said:

It may be conceded that the declaration of a trust must be reasonably certain in its material terms, and that this requisite of certainty includes, first, the subject matter or property embraced within the trust; second, the beneficiaries or persons in whose behalf the trust is created; third, the nature and quantity of interests which they are to have, and fourth, the manner in which the trust is to be performed. If the language is so vague, general or equivocal that any one of these necessary elements of the trust is left in real uncertainty, the trust must fail; or if any one of the three things necessary to constitute a trust is wanting—that is, first, sufficient words to raise it; second, a definite subject, and, third, a certain or ascertained object—the trust will fail. It is not practicable to adopt any specific definition of a trust which can be applied to all cases. Many attempted definitions are to be found in the textbooks and decided cases, but it is unimportant here to accept one rather than another. All must agree that it is not necessary to the validity of a trust that every element necessary to constitute it must be so clearly expressed in detail in the instrument creating it that nothing can be left to inference or implication. No particular form or words are necessary, but wherever an intention to create a trust can be fairly collected from the language of the instrument and the terms employed, such intention will be supported by the courts. . . . The fact that the times and manner of accounting for the rents and profits of the trust estate are not fixed cannot render the trust void. The law will compel the trustee to render accounts in proper manner and at proper times. The absence of specific directions as to when and in what manner the trustee shall render his accounts, simply leaves that matter to be determined by construction. If the trustee and cestui que trust disagree on that subject, the courts may be resorted to for a settlement of the differences.

In Colton v. Colton, 127 U. S. 300, the will reads thus:

I give and bequeath to my wife, Ellen L. Colton, all of the estate real and personal, of which I shall die seized or possessed or entitled to. I recommend to her the care and protection of my mother and sister and request her to make such gift and provision for them as in her judgment will be best.

Notwithstanding this indefinite language, which hardly could be more uncertain, the court held that the widow took the property affected by a trust for the benefit of the decedent's mother and sister.

But giving a trust in discretion as to the method of carrying out a definite purpose does not render the trust void and if the trustee refuses altogether to exercise that discretion with which he is invested, the trust must not on that account be defeated. 28 R. C. L., 1184.

Weatherhead v. Sewell, 28 Tenn. (9 Hemp.) 272, was a case where the language of the will was, "my estate to be equally divided among my children, to each of my daughters a small tract of land . . . my lands and slaves to be equally divided amongst my children." It was held in construing the will that the clause, "to each of my daughters a small tract of land," was void for uncertainty; but the court did not set aside the whole will for the minor uncertainty. Other authorities are cited in the brief of the petitioner, but in the main they are precedents which deal only with a certain clause of the will but do not allow it to overturn the entire instrument.

The trust created by this will, however, is reasonably certain for all practical purposes for the management of a business during so long a period as twenty years. It declares that it is made "to avoid as far as possible any loss or depreciation of the estate." Here we have the principal object for which the trust was formed. As a means and manner by which this result is to be attained with a view of final distribution of the property among his descendants, the testator has given to his trustees full and complete power and authority over his estate, with the right to full and complete possession and control of the same, and they are directed to keep surplus funds invested in good securities. As part of it, they are to pay monthly allowances to his wife and children and to their descendants by right of representation. The trustees are directed to accumulate enough to pay off the debts and obligations and when that is accomplished they shall disburse the excess of such reserve to his wife and children; and finally upon the termination of the trust, at the end of twenty years, they shall divide the property among his descendants. It would be impossible for a testator to foresee and provide for all of the details to be observed in the management of a trust estate of such magnitude. It is sufficient if it be done so that anyone of reasonable discretion and judgment could take the property and manage it in a reasonably faithful manner. The action of the testator in thus reposing so large a trust in two employes who had been faithful to him through many years may or may not have been provident, as the sequel shall prove, but it was not unlawful, and the will in that respect is a valid document, declaratory of his disposition of his estate.

Summing up, we hold that there was no error in striking out of the original petition the conclusions of law stated as grounds for the contention that the will was void. The petitioner has had the benefit of a full argument and examination of the questions so raised. The circuit court before which this proceeding was instituted had ample jurisdiction of the suit, whether it be one merely to set aside the will as void for undue influence, or whether the issue was the construction of the will with a view of having it declared void. In the absence of an allegation of an illegal contract void as against public policy the will cannot be attacked upon that ground. Further, no agreement of stockholders proceeding from any private mercenary consideration of benefit to themselves in which other members of the corporation could not share, has been shown. The testator in disposing of his own property had a right to direct his trustees to vote and act as he himself could have done while living. Even conceding that there was a contract, there is nothing to show that it was hostile to the interest of any stockholder or disqualifying in its effect upon the trustees who have succeeded to the interests of the testator. Finally, the trust established by the will is sufficiently certain in all of its features for practical operation.

To close this opinion, we employ the final words of the court's deliverance in Carnegie Trust Co. vs. Security Life Insurance Co., 111 Va. 1, 68 S. E. 412, 21 Ann. Cas. 287, 31 L. R. A. (N. S.) 1186:

As was said in Brightman vs. Bates, 175 Mass. 105, 55 N. E. 809, the question before us is not whether or not it would be possible to carry out the contract in a way which would have made the contract bad if specified in it, but whether it was impossible to carry out the contract in a way which might lawfully have been specified in advance. If in the future the trustees are guilty of a breach of trust, or do any unlawful act to the prejudice of the interests of the corporation or its stockholders (in this instance the cestuis que trustent), a court of equity is always open to give such relief as the nature of the case may require.

The decree of the circuit court is affirmed.

MR. PITTOCK'S PLANS UPHELD

Statement of Counsel as to Meaning of Decision.

The following statement was given out yesterday in behalf of counsel for the defendants in the Pittock will case, Carey & Kerr, John F. Logan and D. P. Price:

"The decision of the supreme court in the matter of the Pittock estate closes litigation over one of the largest estates probated in the courts of Oregon. By a unanimous opinion of the entire court the purposes of Mr. Pittock in the preservation and conduct of his estate for 20 years after his death are confirmed as the wish and will of a careful, judicious pioneer, who, through long years, amassed a fortune. Every contention of the contestants is by this decision

(Concluded on Page 7, Column 1.)

WE WILL remain closed all day today to give all "Voganites" a chance to attend the Grocers' Picnic at Bonneville and enjoy themselves to the utmost.

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