OREGON SUPREME COURT DECISIONS

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Estate of James W. Young, Multnomah County.

In the matter of the estate of James W. Young, deceased. Appeal from circuit court for Multnomah county. Hon. H. J. Bran, judge. On motion for rehearing. Reversed May 31, 1911. 116 Pac. 95. Fee & Slater and Frederick W. Steiwer, for appellants. Douglas W. Bailey, for respondent. McBride, J. Motion denied

McBride, J. The petition for rehearing in this case is based solely upon the failure of contestants to serve a notice of appeal upon the personal representatives of Mrs. Caroline Phillips who died pending the hearing of this cause in the circuit court.

The facts of the case are these: Mrs. Phillips and the other contestants appeared together in the county court to contest the validity of the will presented by Mabel Warner, proponent. In that court they procured a decree, declaring the proposed will a forgery, and void. Proponent appealed from this decree to the circuit court, and, pending a hearing in that court, Mrs. Phillips died. No substitution was made and the cause was heard and determined as though Mrs. Phillips were alive, and the decree of the county court was there reversed, and a judgment for an unspecified amount of costs was entered against all the defendants, including Mrs. Phillips. The contestants appealed to this court and here, for the first time, on motion to dismiss the appeal, counsel for proponent suggested that Mrs. Phillips was an adverse party; that counsel could not appear for her on this appeal without substitution; and that, as her legal representative had not been so substituted, all adverse parties had not been served and, therefore, that the attempt to appeal was nugatory.

This court has not yet decided whether a judgment, given against a person who dies before the hearing and submission of a case, is void or whether it is merely voidable, and the authorities are hopelessly divided upon that subject. But upon every principle of reason and justice such a judgment ought to be held an absolute nullity. Mrs. Phillips at her death had a decree in her favor, conferring upon her valuable property and pecuniary rights. Her death revoked the authority of counsel to appear and represent her on her estate in the circuit court. The decree of the circuit court attempted to take these rights away and further to give a practical judgment against her for costs. While many courts, and perhaps a majority, have held that such a judgment is voidable and not void, their reasoning does not convince us that a judgment against a person not in existence is anything other than wholly void, or that it can possibly bind any one. It may well be granted that, where a cause has been argued and submitted and the decision is in the breast of the judge and nothing remains but the ministerial act of causing it to be recorded, this function may be performed nunc pro tunc after the death of a party; or where default has been taken and before entry of judgment the death of a party occurs, the entry of judgment, which is a mere ministerial act of the clerk, may be proper and regular but that, where death occurs before a hearing upon the merits, the court may pass judgment upon the rights of a decedent and deprive him or his unrepresented estate of valuable property, is a proposition so illogical and unjust that we cannot assent to it, even though decisions parroted down from one court to another, with hardly a pretense of reasoning to support them, may preponderate in number over those holding the contrary doctrine.

At common law a suit was abated by the death of a party: 2 Mod. *308; 2 Saund. 72 M. This rule is relaxed by Sec. 38 L. O. L. which provides that the action shall not abate by the death of a party, if the cause of action continue or survive, and that the court, at any time within one year thereafter, on motion, may allow the action to be continued against his personal representatives or successors in interest. The effect of this section is to suspend the suit until such substitution is made: McBride v. N. P. R. R. Co., 19 Or. 64. It is conceived that such suspension has the same temporary effect on the rights of the parties as though the suit were actually abated; that neither party can move in the case until a substitution is ordered; and that during the interval between the death of the party and substitution of his legal representatives, the disabilities of either party remain the same as at common law.

Commenting upon an act similar in terms to that in force in this state, the supreme court of Illinois say: "In the nature of things, the deceased defendant cannot plead in abatement, or otherwise interpose the fact of his own death, and his legal representatives, until brought into court by the plaintiff as contemplated by the statute, are not supposed to be present, or to know anything about the pendency of the suit, and to hold a judgment obtained under such circumstances binding upon them, would seem not only inconsistent with well settled principles, but would probably lead to the perpetration of great frauds. We are, therefore, clearly of opinion that such judgments are, as already stated, absolutely void." Life Association of America v. Fassett, 102 Ill. 315, 328.

Among other cases holding to the same effect may be cited: Tarleton v. Cox, 45 Miss. 430; New Orleans & C. R. Co. v. Bosworth, 8 La. Ann. 80; McGreery v. Everding, 44 Cal. 284; Lynch v. Tunnell, 4 Harrington 284; Meyer v. Hearst, 75 Ala. 390; Guyer v. Guyer, 6 Houston (Del.) 430; Weis v. Aaron, 75 Miss. 138; Kager v. Vickery, 61 Kan. 342. Many other cases might be cited to the same effect and quite as many, perhaps more, to the contrary, but from a consideration of the rule as it existed at common law, and giving our statute a fair and reasonable construction, we do not believe that the common law rule has been so far abrogated as to permit a trial and decree upon the merits as against a dead person and that such decree is an absolute nullity.

We do not understand that decisions of this court hold the contrary. In Mitchell v. Schoonover, 16 Or. 212, a defendant duly served with summons, appeared and demurred to the complaint. The demurrer was overruled and he failed to plead further. Being in default for want of answer, the plaintiff took judgment against him. He died on the same day. The judgment against him was held valid upon appeal. But in that case the defendant was in default before his death. Nothing remained to be done but to enter the judgment which was a mere ministerial act of the clerk, flowing naturally from the default. In considering cases of this character, courts have not always been careful to distinguish between the rendition of a judgment which is a judicial act and the mere entry of a judgment on the record, which is a ministerial act, and from failure to make this distinction have been frequently led into the illogical and mischievous position of holding that a valid judgment could be rendered against a person not then in existence—a mere memory.

Technically speaking, the transcript discloses no decree in favor of proponent for costs, that could in its present condition be enforced against anybody. That amount of the taxed costs nowhere appears in the decree which adjudges that she recover "her costs and disbursements herein sustained and expended on this appeal; and the costs and disbursements for transcript on this appeal; and the costs and disbursements paid the stenographer for extending stenographic notes of the testimony of witnesses taken in the trial in the court below amounting to $—; and that she recover from respondent all her costs and disbursements in the county court sustained and expended in this cause to be taxed, and that execution issue therefor." Such a judgment is a nullity as to costs until they are properly taxed and entered in the judgment: Black on Judg. (2 ed.) Sec. 118.

Whatever may be the condition of the law in cases where the success of one plaintiff upon appeal may impose an additional burden upon a coplaintiff, who has not joined in the appeal or been served with notice thereof, we are satisfied that in this case no such burden can be thrown upon the estate of Mrs. Phillips and that, therefore, she is not an adverse party within the meaning of our statute.

The petition is denied.

Peek v. Skelley Lumber Co., Douglas County.

G. W. Peek, appellant, v. Skelley Lumber company, a corporation, respondent. Appeal from the circuit court for Douglas county. The Hon. J. W. Hamilton, Judge. Argued and submitted July 27, 1911. Albert Abraham, and (Otto Irving Wise, on brief) for appellant. F. G. Miceill, John T. Long and (Chas. L. Hamilton, on brief) for respondent.

Eakin, C. J. Reversed and remanded.

This is an action on a promissory note for the sum of $1389.38. Defendant is a corporation organized under the laws of Oregon, doing business in Douglas county. Plaintiff had sued defendant in Douglas county and also in San Francisco, California, upon an alleged debt of about $4,000. On February 10, 1909, while these actions were pending, the subject of the litigation was compromised between them for the sum of $1350, for the payment of which defendant issued to plaintiff its draft upon itself, payable at McKeesport, Pennsylvania. John K. Skelley was the president and general manager of defendant company and resided and had his office in McKeesport. This draft was presented to him for payment, but he was unable to pay it, and this note, which is signed "Skelley Lumber Co., John K. Skelley, President," was tendered to plaintiff through defendant's attorney at San Francisco, in lieu of payment. Plaintiff would not accept the note until it had been endorsed by Skelley and White, two of defendant's directors. The note is payable five months after date and included interest.

The only defense to the action is that the president had no authority to sign the note, and, therefore, that it is void. Section 3 of Art. IV of the By-laws of defendant corporation reads as follows: "The President shall be general executive officer of the corporation * * * shall sign all stock certificates, written contracts, deeds, checks or warrants upon the treasurer, and shall perform generally all the duties usually appertaining to the office of president of a corporation. He shall have general charge (subject to the control of the board of directors) of the business affairs of the corporation, may sign and endorse bonds, bills, checks and promissory notes on behalf of the corporation, but he shall have no power to incur any debt on behalf of the corporation, without the previous consent of the board of directors. * * *"

Upon the trial of the action before a jury verdict was rendered for defendant by direction of the court. Plaintiff appeals.

Eakin, C. J. There is but one question before us. Had the president authority to sign the note, and this seems to be determined in favor of the plaintiff by the language of Art. IV. Sec. 3 of the by-laws, by which he is made the general executive officer of the corporation and is given general charge of the business affairs of it, and is authorized to sign promissory notes on its behalf. By the succeeding clause, it is provided that he shall have no power to incur indebtedness, but in this case the liability was incurred by the corporation which was adjusted and the amount ascertained by it, and by its authority a draft was issued upon itself for the payment of the amount, which was presented to Skelley at McKeesport for payment, and he being unable to pay the draft executed the note sued on as evidence of the debt. This was within the express authority given him by the by-laws. It is not questioned that the corporation owed the debt evidenced by the note.

The authorities cited by defendant's counsel in support of its contention, relating to the power of the managing agent of the corporation, are cases of implied authority, and most of them are expressly placed upon the ground that there was no express authority to the agent. Cases in this court fully settle this question. Crawford v. Albany Ice Co. 36 Or. 535 upon which defendant largely rests its case, recognizes the distinction between the express and implied authority, in which Mr. Justice Bean says: "No by-law or resolution was ever adopted by the corporation atuhorizing its president and secretary or any one else to make and execute promissory notes for or in its behalf * * *. It is elementary law that the president and secretary of a corporation, as such, have no power to bind the corporation by the execution of promissory notes or other contracts, but such authority 'must be derived from some by-law of the corporation, or some special order, or must be implied by some acquiescence or ratification on the part of the corporation'". And in Baines v. Coos Bay Nav. Co., 45 Or. 307, after stating that Mr. Graham, the general manager of the defendant corporation, had no express authority to execute negotiable instruments on behalf of the corporation, Mr. Chief Justice Moore says: "The rule is general that no managing agent of the corporation, * * * possesses implied power to bind it by issuing, accepting or indorsing on its behalf negotiable instruments * * *. The law requires that such an agent must possess express authority before he can bind his principals by putting in circulation negotiable instruments." This is a statement of the general rule and then the opinion discusses the exceptions.

We think the by-law quoted is not of doubtful meaning and disposes of the case against defendant's contention. In the by-law quoted, the words in brackets—"subject to the control of the directors"—means that they may control his acts even in the matters expressly delegated to him, but, unless they do take some action, the acts authorized may be done by him without other authority from the board. That language is a reservation in the board of a right to control his acts, but the authority is complete in the matters enumerated until the board has affirmatively directed otherwise. See Bates v. Keith, Iron Co. 7 Metcalf, 224.

The judgment is reversed and the cause remanded.

His Dream Is True.

[UNITED PRESS LEASED WIRE.]

Stockton, Cal., Aug. 11.—Charles W. Rathbun, of Lodi, who recently became imbued with the idea that he was dead, brought his hallucination to a reality today at Clark's sanitarium, when he hanged himself to the bar of the cell with a towel. Rathbun had to bend his knees to throw his weight on the improvised noose.

Storehouse Blew Up.

[UNITED PRESS LEASED WIRE.]

Newburgh, N. Y., Aug. 11.—A storehouse on the New York aqueduct, near Cornwall, containing 1100 pounds of dynamite, blew up today. No trace of the building was left, and the caretaker is missing. The concussion shook the earth for miles around.

Gates' Son to Wed.

Minneapolis, Minn., Aug. 11.—That Charles G. Gates, son and heir of John W. Gates, the spectacular millionaire who died recently in Paris, will wed Florence Hopewood, of Minneapolis, was the announcement made here today. Miss Hopewood is now in Paris with her mother.

GLAVIS IS GIVEN A PROFITABLE JOB

Sacramento, Cal., Aug. 11.—At a special meeting of the California Conservative Commission, held this afternoon, Louis R. Glavis, who was ousted from the department of the interior by Secretary Ballinger for exposing alleged fraudulent Alaskan coal land deals, was appointed as secretary of the commission at $3600 a year.

Glavis will be in Sacramento tomorrow to meet the members of the commission, and discuss plans for immediate work.