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Abstracts of Recent Cases

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The West Virginia Supreme Court of Appeals has apparently not been presented with a case similar to the case at bar. Without the sometimes restrictive bonds of precedent, West Virginia would be free to adopt the reasonable New York view, which appears to best satisfy the problem of balancing property and personal interest.

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ABSTRACTS

Federal Courts—Abstention Doctrine—Preserving Right to Federal Determination of Constitutional Issue

Ps, graduates of schools of chiropractic, sought to practice in Louisiana without complying with the educational requirements of the Louisiana Medical Practice Act. LA. STAT. ANN. TIT. 37, §§ 1261-1290 (1952). *Ps* brought this action against *D* in the federal district court for an injunction and a declaration that the Act violated the fourteenth amendment. The district court refused to hear the case until the state court could determine the applicable issues of state law. *Ps* submitted all the legal issues, both state and federal, to the state court. The state intermediate appellate court held that the Act applied to chiropractors and, as applied to *Ps,* it did not violate the fourteenth amendment. *Ps* attempted to return the proceedings to the federal district court but the district court upheld *D's* motion that the courts of Louisiana had passed on the federal issues raised, and thus the proper remedy was by appeal to the United States Supreme Court. *Held,* reversed. The district court should rule on the merits of whether the Act violated the fourteenth amendment. Although *Ps* submitted their claims to the state court for decision, *Ps* did not forego their right to return to the federal district court when *Ps'* actions were based on a mistaken view that they were required to litigate their federal claims in the state court. *England v. Louisiana State Bd. of Medical Examiners,* 84 Sup. Ct. 461 (1964).

One of the biggest problems that has arisen is the subsequent course of a case once the abstention doctrine has been applied. In theory the doctrine does not involve the abdication of federal jurisdition but only the postponement of its exercise until the state issues are determined. *Harrison v. NAACP,* 360 U.S. 167 (1958). Frequently, the complaining party, after the abstention doctrine has

been applied, has both the state and federal issues litigated in the state court and then seeks appeal to the United States Supreme Court. Thus, a party was allowed to appeal a state decision that a statute requiring the passage of a literacy test in order to vote was constitutional to the United States Supreme Court when the federal district court had originally abstained from ruling on the federal issue of constitutionality. *Lassiter v. Northampton County Bd. of Elections,* 360 U.S. 45 (1958).

In the recent case of *NAACP v. Button,* 371 U.S. 415 (1963), the Court held that where a party submitted involuntarily to the state court, he could not return to the federal district court if he had sought complete and final adjudication of both the federal and state issues; review of the state decision by the Supreme Court was immaterial. The Court stated, however, that a party had the right to return to the district court if he had not voluntarily submitted the federal issue to the state court.

A misunderstanding of a case, *Government & Civic Employees Organizing Comm. v. Windsor,* 353 U.S. 364 (1956), caused the plaintiffs in the principal case to submit all their claims for adjudication to the state court. In the *Windsor* case a union claimed a state statute was unconstitutional if it applied to it. The district court abstained and the case was submitted to the state court to rule on whether the statute applied to the union. The district court then refused to hear the constitutional issue because the state court did not interpret the statute "in the light of" the constitutional objections presented to the district court. The Supreme Court upheld this decision. The *Windsor* case merely held that the state court, in determining how to construe a state statute, must know that on its choice may depend the statute's validity. See Note, 73 HARV. L. REV. 1358, 1364 (1960). According to the present decision, the *Windsor* case does not require a party to litigate his federal claims in state courts but only to inform the state courts what his federal claims are so that the statute may be construed in light of those claims. The principal case corrects the misunderstanding in the *Windsor* case and states the rule that the courts will hereafter follow: a party can return to the district court by an express reservation on the state court record that he intends to return to the district court should the state court decision go against him, and that he is exposing his federal claims only for the purpose of complying with the *Windsor* case. With such a reservation, his right to return will be preserved.

The concurring opinion of Mr. Justice Douglas indicates concern with the inefficiency and complexity of the abstention doctrine. He also pointed out the hardships placed on the plaintiff due to the great expense of being shunted from the district court to the state courts and then back to the federal courts. This usually results in a long delay before a final decision is reached. The uneasiness expressed by Mr. Justice Douglas may foreshadow a growing feeling on the Court that the doctrine should be narrowed or abolished.

Two solutions have been proposed to limit the use of the abstention doctrine: (1) allow the district court to refer matters to the state court for a declaratory judgment when the state offers such relief, and (2) have the district court tender a certificate to state supreme courts asking their determination of a state law (similar to the certified question under state law). Florida is the only state which has passed a statute giving the state supreme court authority to provide by rule for answering certificates concerning state law questions. Note, 16 U. MIAMI L. REV. 413 (1962). The certificate method does not give the state court jurisdiction to decide a controversy before the federal courts but only to render to the federal judiciary an advisary opinion. Note, 65 W. VA. L. REV. 209, 218 (1963).

Income Taxation—Rejection of Proximate Cause

Taxpayer, stockholder in *X* company, contributed 17,000 dollars to a stockholder's committee soliciting proxies in the hope that the committee would be able to seat enough new members on the board of directors to carry out new policies which would produce larger dividends to stockholders. The committee indirectly brought about a change of policies which led to increase dividends. When the taxpayer made the contribution, it was speculative whether a series of events would occur which would culminate in additional income for the taxpayer. The district court held that the contribution was not deductible as a non-business expense since there was lacking the proximate relationship between the expenditure and the production of income or management of income producing property. *Held,* reversed. It is immaterial whether the expenditure was directed towards prevention of loss of income producing property or enhancing its value as long as it is ordinary and necessary. The proximate cause of the expense to the production of income was too rigid a

standard to apply. *Surasky v. United States,* 325 F.2d 191 (5th Cir. 1963).

The INTERNAL REVENUE CODE OF 1954, § 212 (1) (2), provides that an individual may get a deduction for all the ordinary and necessary expenses incurred for the production of income or for the conservation and maintenance of property held for the production of income. There is nothing in the statutes or regulations which expressly requires a showing that the expense, to be deductible, must be a proximate cause of the production of income or conservation of income producing property. The Code also applies the "ordinary and necessary" test to business expenditures. INT. REV. CODE OF 1954, § 162. Thus, the same law which is applicable to deduction of expenses for production of income or maintenance of income producing property will be applicable to deduction of business expense.

It is a question of fact whether an expense is ordinary and necessary for the production of income or maintenance of property held for the production of income. *Price v. Usury,* 209 F. Supp. 660 (E.D. La. 1962). The courts have allowed the taxpayer to deduct an expenditure which was genuinely based on his reasonable business judgment even though it fell far short of being a proximate cause of any income produced. In *Welch v. Helvering,* 290 U.S. 111 (1933), the taxpayer was allowed a business deduction when he felt that the expense would be helpful and appropriate in developing his business. Justice Cardozo pointed out that the distinction was one of degree and not of kind; that there was no ready formula for determining when an expenditure was ordinary and necessary. The expense is ordinary and necessary if the taxpayer incurred the expense believing in good faith that it was necessary to facilitate either his business or his production of income. *Harris & Co. v. Commissioner,* 48 F.2d 187 (5th Cir. 1931). In this case, the expense was ordinary and necessary when payments were made to past creditors whose claims were barred by compromise agreements in order to restore a good credit rating to the business.

Most of the cases concern the taxpayer making an expenditure to prevent the loss of his business or his income producing property. Since the "ordinary and necessary" test is applied in such instances, the court in the principal case held that the same test should be applied when the taxpayer is attempting to increase his income or the value of his income producing property.

It is only when the court is looking at the origin of the expense that it requires a proximate relationship between the expense and the income produced or property preserved. If the court finds that the underlying cause of the expense is personal which is a nondeductible expense even thought it appears to be on its face a business expense, it will be disallowed as a deduction. *United States v. Patrick,* 372 U.S. 53 (1963). Thus, payment made by a husband to his wife in a divorce proceeding to protect his business property from her was not a business expense since origin of dispute was in a personal matrimonial affair. *United States v. Gilmer,* 372 U.S. 39 (1963). The dispute was the product of taxpayer's personal life, not his profit-seeking activities.

In determining if an expense is deductible, the court must first determine if the expense bears a proximate relationship to a profit-seeking activity rather than a purely personal expense; then the expense must pass the "ordinary and necessary" test and be reasonable in amount in order for a taxpayer to get a deduction.

Procedure—Right to Order Physical and Mental Examinations of Persons under Federal Rules of Civil Procedure

Ps instituted action in federal district court against *D* bus company and its driver *X* for injuries sustained in a collision between a trailer pulled by *Y* company and *D's* bus driven by *X*. *D* filed a cross-claim against *Y* for damages to its bus, and *Y* filed a cross-claim against *D* for damages to its trailer. *Y* named *X* as co-defendant in his cross-claim against *D* and claimed that *X's* poor eyesight and other physical defects were the proximate cause of damage to *D's* bus along with *D's* negligence in hiring *X*, knowing his condition. *X* admitted that he had been involved in a similar accident in the past and admitted seeing lights some ten to fifteen seconds before the collision but made no effort to stop. *Y* asked the court to order *X* to submit to a series of mental and physical examinations. The district court upheld *Y's* motion and ordered *X* to appear before nine experts for psychiatric and physical examinations. *X* petitioned for writ of mandamus against the district judge on the order. *Held,* writ denied. The district judge did not abuse his power in requiring the party, whether plaintiff or defendant, to submit to mental or physical examinations in compliance with Rule 35 of Federal Rules of Civil

Procedure, being satisfied of good cause therefor. *Schlagenhauf v. Holder,* 321 F.2d 43 (7th Cir. 1963).

The principal case is concerned with Rule 35(a), Federal Rules of Civil Procedure, which reads in part:

> "In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician."

Shortly after Federal Rule 35 was promulgated, the Supreme Court held in *Sibbach v. Wilson & Co.,* 312 U.S. 1 (1941), that (1) Congress had delegated power to the Court to make such rules, and (2) a physical or medical examination of a party was procedural in character and did not abridge or violate substantive rights of a litigant. When a condition is vital in actual litigation, the sanctity of the body and mind and the outmoded feeling of false modesty must yield to expedience and the practical administration of justice in the courts. Dobie, *The Federal Rules of Civil Procedure,* 25 VA. L. REV. 261, 280 (1939).

The two immediately significant words in the rule are "party" and "controversy." In *Wadlow v. Humbard,* 27 F. Supp. 210 (W.D. Mo. 1939), the court held that the rule was limited to personal injury cases and the mental or physical condition of the party must be in controversy. The rule will most frequently be applied where the plaintiff is seeking redress for injuries and defendant seeks a medical examination, claiming that plaintiff's injuries are not as extensive as he alleges. The rule has been given broader limits since the *Wadlow* case, however, to include any party in any type of action. *Beach v. Beach,* 114 F.2d 479 (D.C. Cir. 1941). Also, the physical or mental condition does not need to be "immediately and directly" in controversy as long as there is need for discovery of a party's condition. MOORE, FEDERAL PRACTICE § 35.03 at 2557 (Supp. 1962).

Some states have rules which allow compulsory mental and physical examinations of persons not parties to the litigation, but Rule 35 of the Federal Rules of Civil Procedure is only applicable to allow compulsory examinations of a party to the controversy in the legal sense. Annot., 62 A.L.R.2d 1291, 1293 (1958). Thus, plaintiff's guardian cannot be required to submit to an examination because he

is not a party whose physical or mental condition is in controversy. *Fong Sik Leung v. Dulles,* 226 F.2d 74 (9th Cir. 1955). The rule has been applied to force a child as well as its mother to submit to a blood grouping test for comparison of their blood with that of the mother's husband when he had counterclaimed for divorce on grounds of adultery. *Beach v. Beach, supra.* The court held that the child and wife were both parties within the rule even though only the wife was being sued for divorce. The word "party", as used in the rule, must be liberally interpreted. *Yee Szet Foo v. Dulles,* 18 F.R.D. 237 (D.C. N.Y. 1955).

While no prior decisions directly in point with the principal case are found, it should be noted that the dissenting judge in the case approved extension of the rule to cover and include situations as here involved, but questioned whether the trial court had discovered "good cause" for granting the motion for the examinations. The granting of a motion to order a physical examination of a party whose physical condition is in issue is discretionary with the court. *Bucher v. Krause,* 200 F.2d 576 (7th Cir. 1953). The view of the dissent was that the record disclosed no adequate basis for discretion, and that the district court should have held a brief hearing to determine if an adequate alternative method of proof of X's condition was available. This hearing would establish an adequate basis for exercising the court's discretion as to whether or not the order ought to be issued. The dissent felt that ordering nine mental and physical examinations without such a hearing was an abuse of discretion.

Rule 35 of the West Virginia Rules of Civil Procedure is nearly identical with Federal Rule 35 and would probably follow the federal interpretation of the words "party" and "controversy" as used in the rule. Suggestions have been made that the language of the federal rule be amended to provide that a party may be ordered to produce for examination "an agent or a person in . . . [his] custody or under . . . [his] legal control. . ." Note, 74 HARV. L. REV. 942, 1024 (1961). The Advisory Committee to the United States Supreme Court on Rules of Civil Procedure has proposed such an amendment. Wright, *Amendment to the Federal Rules,* 7 VAND. L. REV. 543 (1954). But the rule has yet to be broadened in scope to include persons other than those who are parties to the litigation.

Wills—Letters of Administration

On August 7, 1958, *P* applied for letters of administration upon her husband's estate to become his personal representative. On the same day, *P* became entitled to letters of administration upon taking the oath and giving an approved bond as required by law. *P* took the oath, executed the bond, but the surety named in the bond did not execute it. On August 17, 1959, *P* instituted this action as personal representative to recover damages for wrongful death of her husband. A two year statute of limitations ran against a cause of action for wrongful death from date of death. *P* was not issued her letters of administration until April 2, 1962, when the surety executed her bond. The lower court held that *P's* claim was barred by the statute of limitations since *P* could not amend her complaint by alleging her subsequent qualification as personal representative after the time limitation for bringing this action had expired. *Held,* reversed. *P's* letters of administration issued after cause of action was barred by statute of limitations related back to the commencement of the action which was within the time period allowed. *Graves v. Welborn,* 133 S.E.2d 761 (N.C. 1963).

It is a general rule that beneficial acts by a person for the estate before he is properly appointed and qualified as personal representative are validated upon his qualification if such acts would have been within the scope of his authority had he been duly qualified. Annot., 26 A.L.R. 1359 (1923). The qualification of the personal representative relates back to intestate's death. Thus, the retention of an attorney by a widow before she was appointed administratrix to investigate facts leading to husband's death in order to prepare for filing claim under Federal Employer's Liability Act was validated when she later was properly qualified; the appointment related back to her husband's death. *Phelps v. Elgin Joliet & E. Ry.,* 37 Ill. App.2d 46, 184 N.E.2d 799 (1962). Executrices were allowed credit for amount paid as a valid claim against the estate before they were duly qualified since acts of executor in line of duty relate back to decedent's death upon issuance of testamentary letters to him. *In re Kuhn's Estate,* 320 Ill. App. 648, 69 N.E.2d 729 (1946).

A person's prior acts are viewed as if they had been done by a rightful administrator if he is later duly qualified. *Magner v. Ryan,* 19 Mo. 196 (1853). But the "relation back" doctrine will not validate acts committed by a person before qualifying as an adminis-

trator if the things he did would be beyond the scope of a lawful administrator. *Dockery v. Sparks,* 170 Mo. App. 651, 157 S.W. 365 (1913). Acts done by one who was later appointed aministrator will not be legalized by subsequent grant of letters of administration on the "relation back" doctrine to the death of intestate if the acts are clearly detrimental to the estate. *Walker v. Portland Sav. Bank,* 113 Me. 353, 93 Atl. 1025 (1915). Thus, an executrix who gave a ring of the deceased's to a third person before her qualification was not precluded from bringing an action for return of the ring after she was duly qualified. *Sweeney v. Provident Loan Soc'y,* 65 Misc. 580, 120 N.Y.S. 967 (1910). An estoppel doctrine has been applied in some cases which would otherwise result in injury to a third person. Consequently payment to an executor who was named in the will but administered the estate without proper appointment was held to be a good defense on the same demand later brought by an administrator duly appointed for the estate. *Russell v. Davison,* 184 Okla. 606, 89 P.2d 352 (1939).

A personal representative is not barred by the statute of limitation on a cause of action if he instituted suit believing he had a valid appointment prior to the statute of limitations but because of a technical defect he did not become a valid personal representative until after the statute of limitations barred the action. Annot., 123 A.L.R. 768 (1939). A case similar to the principal case is *Douglas v. Daniels Bros. Coal Co.,* 135 Ohio St. 641, 22 N.E.2d 195 (1939). Plaintiff received forms which she erroneously believed to be letters of administration and instituted suit one day before statute of limitations would have barred any suit. Plaintiff later amended her petition when she was properly appointed personal representative but after the statute of limitations had barred the action. The court allowed plaintiff to amend her petition after her valid appointment and suit was not barred since she had initially brought her action believing she was acting in a representative capacity.

When the statute of limitations is running for the estate, the administrator can plead the statute even if he had made an intermediate promise to pay before the statute had run if promise was made before he was duly qualified. Annot., 26 A.L.R. 1359, 1367 (1923). The acts here are detrimental rather than beneficial for the estate.

The federal courts have always allowed the subsequent appointment of a personal representative to relate back and validate the suit any time before hearing, regardless of the statute of limitations.

McGlothan v. Pennsylvania R.R., 74 F. Supp. 808 (E.D. Pa. 1947). An action filed in federal district court to recover for damages under Federal Tort Claims Act for decedent's death before two year limitation had run was not subject to dismissal because plaintiff was not duly appointed as administratrix under state law until after expiration of such period. *Pflough v. United States,* 124 F. Supp. 607 (W.D. Pa. 1954).

The "relation back" doctrine applies when the statute of limitations is not in question as long as plaintiff honestly believes he is duly qualified as personal representative. When plaintiff failed to take the oath of office but instituted suit and during the trial had the oath and letters issued, the letters were allowed to relate back to time of suit. *Anderson v. Union Pac. R.R.*, 76 Utah 324, 289 Pac. 146 (1930). The court has even gone so far as to allow the appontment to relate back to the time suit was instituted even though the order of appointment was signed after verdict but before judgment was rendered on the verdict. *Clinchfield Coal Corp. v. Osborne's Adm'r,* 114 Va. 13, 75 S.E. 750 (1912).

The "relation back" doctrine does not validate all benefical acts done by personal representative prior to his qualifying. It never applies to validate prior acts of a person when (1) he has never applied for letters, *Pearson v. Anthony,* 218 Iowa 697, 254 N.W. 10 (1934), or (2) he has no reasonable grounds for believing that he has been duly appointed when he performed the acts. *Wrinkle v. Trabert,* 174 Ohio St. 233, 188 N.E.2d 587 (1963). In both cases, the statute of limitations was a bar to the personal representative bringing an action when he became administrator even though he had instituted an action before the statute of limitations had run, falsely asserting his right as a duly appointed personal representative.

Some states have statutes relating an appointment of a personal representative back to the death of the decedent, thus validating all beneficial acts committed for decedent's estate before he was qualified. ANNOT. CODE OF MD. ART. 93, § 54 (Michie 1952). Even in states where such statutes do not exist, it appears certain that courts would apply the "relation back" doctrine whenever the person actually believes he was qualified as personal representative and the acts were beneficial for the estate.

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