Public Policy--Rule of Swift v. Tyson--Attorney's Fee Provision in Promissory Note

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termination of the lease conditional upon the lessor’s giving the proper notice.

It is submitted that in oil and gas law, the use and effect of the “unless” clause has become so universally recognized that courts will go far in giving it, where possible, predominance over all conflicting clauses, as is the case with the granting clause in the ordinary conveyance.⁹

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PUBLIC POLICY — RULE OF Swift v. Tyson — ATTORNEY’S FEE PROVISION IN PROMISSORY NOTE. — Residents of West Virginia executed and delivered notes in Virginia which contained a provision, valid under the laws of Virginia, for the payment of a ten per cent. attorney’s fee in case of default. In a suit on the notes in the District Court of the United States for the Southern District of West Virginia, recovery on this provision was denied on the ground that the public policy of West Virginia, as declared by the Supreme Court of Appeals,¹ forbade the enforcement of such a provision by the courts. Plaintiff appealed. Held, that this was a matter of general law, as to which, by the rule of Swift v. Tyson,² the federal courts exercise their independent judgment and apply their own conclusion, and that such provisions are not contrary to public policy. Reversed. Citizens National Bank of Orange, Va. v. Waugh.³

Here West Virginia had no substantial connection with the contract whereby to invoke her public policy. On the bare facts, the case would be determined by a United States Supreme Court decision in which the court enforced a contractual limitation which was valid in Tennessee, the state where made, but invalid


² 41 U. S. (16 Pet.) 1, 4 S. Ct. 128 (1842).

³ 78 F. (2d) 325 (C. C. A. 4th, 1935).
by statute in Mississippi, wherein suit was brought.\(^4\) There the court said that Mississippi's connection with the contract was too remote to warrant invocation of the statute.

The federal courts, however, have previously gone to the full extent of disregarding the public policy\(^5\) of a state as declared by the state courts in regard to a contract made and to be performed in that state.\(^6\) The bringing of the doctrine into West Virginia for the first time should be worthy of comment.

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\(^4\) Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143, 150, 54 S. Ct. 63 (1934): "Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (Home Insurance Company v. Dick, . . . page 408 of 281 U. S., 50 S. Ct. 338, 74 L. Ed. 926, 74 A. L. R. 701), it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi." This language would seem even broad enough to enforce a gaming contract in a state where void, if valid where made.

\(^5\) The question thus presents itself of what is that "public policy" which the federal courts will determine for themselves. In analyzing this element in the English common law Lord Haldane, in Rodriguez v. Speyer Bros. [1916] A. C. 59, 77-81, has made a classification of the influences of public policy which is summarized as follows: "(a) rules which, though originally based on public policy have become so crystallized that only a statute can alter them, for example, the rule against perpetuities; (b) cases in which public policy has never crystallized, in which public policy depends on no real legal principle, in which it is accepted as a matter of fact, and in which its application depends on the circumstances of each particular case, for example, cases concerning the legality of wages; (c) cases in which public policy has partially precipitated itself into legal rules which, however, have remained subject to its molding influence in the sense of current national policy, as illustrated by covenants in restraint of trade." Winfield, Public Policy in the English Common Law (1928) 42 HAV. L. REV. 76, 96.

Dean Pound enumerates ten public policies which have been declared by common law courts: "(1) a policy against acts promotive of dishonesty; (2) a policy against acts tending to oppression; (3) one against acts promotive of crime or violation of law; (4) one against acts destructive of competition; (5) one against acts offending the general morals; (6) one against acts prejudicially affecting the public service, whether performed by public officers or by individuals professing a public calling; (7) one against acts affecting the security of the domestic relations or in restraint of marriage; (8) one against acts affecting commercial freedom; (9) one against permanent or general restrictions on the free use and transfer of property; and (10) one against general or extensive restrictions upon individual freedom of action." A Theory of Social Interests (1920) 15 PUBLICATIONS OF AMERICAN SOCIOLOGICAL SOCIETY 16, 22.

There would seem to be a difference between that "public policy" which is a rule of law, and that which is a paramount ideal of the law and which, in event of conflict, will override a mere rule of law. We might say that the latter is a nascent manifestation of what later becomes a rule. New legal problems, presented for the first time, summon into play the contemporary ideals of the law. Repetition of the problem gradually callouses the "public policy" into a rule which the courts may thereafter recognize as such; or
West Virginia is in the minority in holding such provisions for attorney's fees to be against public policy, and perhaps a legislative change should occur.7 If the policy were embodied in a statute, then the federal courts would be bound to recognize it within the state at least.8 Uniformity of law on the subject is perhaps even desirable enough to warrant an incorporation into the uniform statute, but the common law decisions of the federal courts should not be expected to perform the office of a uniform statute, as has in effect been suggested by Judge Parker.9

Even though the correctness of the view of our Supreme Court of Appeals is doubted, "the question of which rule is or is not sound is not nearly so important as that there shall not be one rule on this question for the man who must sue in the State Court, and a different rule for the one who is fortunate enough to be able to get his cause into the Federal Court."10 The fact that West Virginia has so many border counties makes her problem particularly acute, since a generalization from the instant case is a very

they may refuse such recognition and nominally say they are applying public policy, when in truth they are applying a rule of law.

If West Virginia's declaration that provisions for attorney's fees are against public policy is merely a statement of a rule of law, then the instant case goes no further in impinging on states' rights than did Swift v. Tyson. If, on the other hand, our Supreme Court of Appeals reaches its result by a determination of public policy, truly as such, then we may conclude that West Virginia's right to determine her own public policy has been invaded. But still, Judge Parker might well answer, there is a national public policy in the true sense which will overbalance the public policy dictated to West Virginia by her local social and economic equities.

8 Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U. S. 518, 48 S. Ct. 494 (1927). It is believed that the instant case does not go as far as the Taxicab case, for in the latter not only was the contract made in Kentucky, but the suit involved the occupation of real estate, which has always been regarded as solely within the range of judicial law making of the local courts.

7 Note (1926) 32 W. VA. L. Q. 147.

8 28 U. S. C. A. § 725 (1928): "The laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Swift v. Tyson, supra n. 2. Our Supreme Court of Appeals cites reasons for the rule that certainly are sufficient to justify its embodiment in statute; see cases cited supra n. 1. This device would of course be limited by the doctrine of Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., supra n. 4, (i. e., by virtue of the Fourteenth Amendment).

9 Hewlett v. Schadel, 68 F. (2d) 502, 504 (1934). But see as contra at least in result, Boston & M. R. R. v. Breslin, 80 F. (2d) 749 (1935), where plaintiff was denied benefit of the federal "turn table doctrine" because the alleged tort was held to be governed by the lex loci, which rejected it.

practical invitation to foreign corporations to lend money in West Virginia.

The question really resolves itself into one of practicality. From that standpoint, the instant case results in an unwholesome extension of the doctrine of Swift v. Tyson by disputing West Virginia's public policy with our Supreme Court of Appeals.

TRUSTS — CORPORATION AS BENEFICIARY UNDER CONSTRUCTIVE TRUST OF OUTSTANDING CORPORATE BONDS. — The Wayne United Gas Company contracted to sell its entire output to the Owens-Illinois Glass Company and the Libby-Owens Sheet Glass Company. Subsequently, the gas company issued first mortgage bonds secured by its entire property. The only source of revenue of the gas company was the contract proceeds, which, if paid, would have been sufficient to meet all of its indebtedness. In 1932, due to business conditions, the glass companies broke the contract, whereupon the gas company was forced to default on its obligations. The glass companies immediately bought up ninety-two per cent. of the mortgage bonds at depressed prices, and threatened to foreclose on their security. The petitioners, a minority stockholder, and an unsecured creditor, now seek the appointment of a receiver who will take over the assets of the gas company, including any rights resulting from the breach of contract, and pay off outstanding claims, the glass companies being limited in their claim to the amount actually paid for the bonds, on the theory that a constructive trust devolved upon them as to the bonds. Held, that no fraud having been alleged, and no fiduciary relationship having been shown, there are no grounds for a constructive trust. 1 Bell v. Wayne United Gas Company. 2

A constructive trust is a remedial device by which courts of equity restore property to the true owner, where legal ownership has been obtained by the constructive trustee in some unconscionable fashion. 3 The petitioners in the present case can show no

1 Maxwell, J., dissented on the ground that the facts disclosed a fiduciary relationship. Woods, J., concurred.
2 181 S. E. 609 (W. Va. 1935).