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The Validity of Trusts for Accumulation Under the Rule Against Perpetuities

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tions. Hence that case, while cited to sustain the position taken in the case being considered, is not strictly in point in this connection. It is interesting to note that the question of the effect of a provision for a trust, the objects of which are accumulation and postponement of the vesting of absolute title in the devisees, had been suggested but had remained undecided:

> "If the main object of an executory trust were to create too remote limitations, so that apart from such object there remained nothing substantial to carry out, it is probable that the whole trust would fail, although there is no case so holding."[12]

These words appear in the 1915 edition of Gray's work and may be taken to establish that, when they were written, the question was still an open one. A somewhat casual search has failed to reveal any American case between that date and the decision now being considered which squarely raised and decided the effect of an attempt to create a trust for the purpose noted. And in that case there was, in the opinion of the court, such an attempt. There the trust for accumulation was made, as it were, a peg from which to suspend executory devises otherwise void. With the devises, the court holds, must also fall their support. The Court said:

> "The whole purpose of creating the trust was to preserve the property so that it might pass to those intended by the testator on the 1st day of January 1950, and inasmuch as that purpose is invalid the whole scheme by which it was intended to accomplish it will fall."[13]

It is believed that the solution of this very interesting and novel question thus worked out is quite correct from the legal view point. And it may be welcomed as one more blow at prolonged posthumous control of property.

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THE ANSWER IN EQUITY AS EVIDENCE IN WEST VIRGINIA.—The opinion has long prevailed, it is believed among the great majority of practitioners in West Virginia, that an answer in equity in this state is in no case evidence for the defendant. This opinion, it

[12] GRAY, *supra*, § 418. It is believed that, while it might be said that the trust provided for in Prichard *v.* Prichard, *supra*, is not executory, it is the kind of trust which the learned writer quoted believed to be invalid.
[13] Prichard *v.* Prichard, *supra*.

seems, is based chiefly upon the provisions of the West Virginia Code, section 59, chapter 125, which reads as follows:

> "When a defendant in equity shall, in his answer, deny any material allegation of the bill, the effect of such denial shall only be to put the plaintiff on satisfactory proof of the truth of such allegation, and any evidence which satisfies the court or the jury of the truth thereof shall be sufficient to establish the same."

It will be noted that this statute provides that the only effect of an aswer denying the allegations of a bill shall be "to put the plaintiff on satisfactory proof." In other words, the *only effect* of of such an answer shall be to *cast the burden of proof* on the plaintiff. It would seem beyond controversy that, under this provision alone of the statute, such an answer could not function as evidence for the defendant, because to permit it to do so would be to let it have an additional "effect" to that of putting "the plaintiff on satisfactory proof." Yet the statute, further to insure that an answer denying the bill shall function only as a traverse, provides that the plaintiff may sustain his allegations by "any evidence which satisfies the court or the jury of the truth thereof." If the answer could be considered as evidence for the defendant, the plaintiff would have a much greater burden than this to sustain.

It will be noted that the statute quoted above refers only to denials in an answer; or, in other words, to answers denying the allegations of the bill. Conceding that, for reasons stated above, answers which deny can not be used as evidence for the defendant, it remains to inquire whether answers which do not deny may under any circumstances so operate.

It would seem that there is no such possibility. If the answer does not in some manner deny, it must admit, confess and avoid, or profess ignorance. In none of these instances, according to the orthodox, and it would seem proper, rule, can it be evidence for the defendant, although it may of course operate by way of admission in favor of the plaintiff. This is only common sense. A defendant needs no evidence as to things which he admits, and none will avail him. It is fundamental that he is bound by his admissions. Obviously, his confessed ignorance could not avail him as evidence. Nor could he be permitted to use his answer as evidence to establish new matter set up by him by way of confession and avoidance. As to such new matter he has the burden

of proof, and, according to the great weight of authority, a defendant can not use his answer as evidence to establish matters as to which he has the burden of proof.[1] In fact, such matter is not in issue until traversed by the replication. Hence it may be that the West Virginia statute mentions only denials in an answer because only denials come within the scope of the equity rule allowing the answer to serve the purpose of evidence. Following such a course of reasoning, the writer can not escape the conclusion that the earlier West Virginia decisions[2] are correct when they assert that in West Virginia an answer in equity is in no case evidence for the defendant.

In Virginia, the rule has always been different, and an answer there may be used as evidence by the defendant, because, the writer has assumed, there seems to have been no statute in Virginia corresponding to the West Virginia statute hereinbefore quoted. In fact, the Virginia court seems to have been enthusiastically indulgent toward defendants in this respect. Following what has been termed an original heresy of the New York decisions, the Virginia court has recognized an anomalous doctrine whereby a defendant is permitted to use his answer as evidence even in suport of new matter set up therein by way of avoidance. Since the West Virginia Supreme Court seemingly has recently adopted this so-called heresy, it would seem worth while to discuss it at some length, and the discussion may very well be set forth in the language of a modern writer on equity pleading who perhaps has given the best demonstration of it. After explaining that an answer is evidence for the defendant only to the extent that it responds to the bill, he proceeds:

> "The term 'responsive,' as used in connection with the allegations of an answer, must not be understood as necessarily covering all matter that directly responds to the charges in the bill or that directly answers the interrogatories contained in the bill. The term refers rather to that which meets the case made in the bill than to that which falls within the compass of the interrogatories or charges. In other words, responsive is here used in a limited and technical sense and not in the broadest sense of which it is capable. If matter is new in the sense of constituting an affirmative defense, that is, if it is in avoidance of the case made in the bill, it is not responsive, and it is therefore not evidence for the defendant,

[1] FLETCHER, EQUITY PLEADING AND PRACTICE, § 646; 1 WHITEHOUSE, EQUITY PRACTICE, 488; STORY, EQUITY PLEADING, (10 ed.), 693, note; 1 HOGG, EQUITY PROCEDURE, (2 ed.), § 467.
[2] See cases cited in 1 HOGG, EQUITY PROCEDURE, (2 ed.), § 468.

though there should actually be found some question in the interrogating part of the bill that calls for an answer on the particuar point, or some charge in the bill covering the matter contained in the answer. For the purpose of determining whether matter is really in avoidance, it is necessary to look to the nature of the case and to consider the ordinary canons governing the burden of proof on the particular facts. If the burden is on the defendant to establish a certain defense set up in his answer, the answer itself cannot be taken as evidence of the matters constituting that defense. On the other hand, if there is no legal rule or presumption imposing on the defendant the burden of proof, as to particular matters, the answer as to those matters is evidence in his favor, if the statements are relevant at all. For instance, if a bill states a case of fraud, and the circumstances are such as to raise a legal or equitable presumption against a defendant, his answer denying the fraud in question will not be evidence in his favor, but the defense must be supported by proof. If, however, the circumstances, in the case imagined, are not such as to give rise to any presumtion of fraud on the part of the defendant, his denials of fraud contained in his sworn answer will be evidence in his favor to the same extent as any other sort of denials.

"A failure to note the distinction between matter responsive to the equity of the bill and matter responsive to the mere interrogatories of the bill has led to some confusion in the equity courts of several of the states. The court of appeals of the state of New York seeems to be chargeable with having first made this blunder. For instance, that court, on appeal, reversed the case of *Hart* v. *Ten Eyck*, (2 Johns. Ch. 62), which had been decided by Chancellor Kent in the court below in conformity with the orthodox rule. The ground on which the court of appeals based its reversal appears to have been this, that the defendant had been interrogated in the bill and required to set forth an account of all just debts owing by the intestate, and how and in what manner his estate had been applied or *disposed of*. It was considered that, in so far as the answer showed what had become of the estate, it was no more than a fair compliance with the interrogatories in the bill. Accordingly the defendant was given the benefit of the matter of discharge in his answer. This ruling of the court of appeals of New York led to the adoption in that state of the doctrine that an answer is always to be considered as being responsive to the bill and as being evidence in favor of the defendant when the answer is within the discovery sought in the bill. The effect is to make an answer evidence even as to facts set up by way of avoidance merely, whenever the interrogating part of the bill or the charges can be construed as being broad enough to include the matter in

question. This heresy appears to have exercised considerable influence upon the equity practice of some other states. Thus, in Virginia, it has been said that the rule making a responsive answer evidence in favor of the defendant not only applies where a material allegation of the bill is denied by the answer, but also where a material disclosure is called for by the bill and made by the answer. 'The answer is as much responsive to the bill in the latter as in the former case, and comes plainly within the very terms of the rule.'[3] In those jurisdictions where everything in the answer is taken to be responsive that is within the scope of the interrogating part of the bill, the plaintiff, in framing a bill for discovery and relief, should take care to confine the discovery within a narrow compass, so as not to call for details but only for such matter as will directly meet the equity of the plaintiff's case. The circumstance that such a necessity arises shows that the rule in question is not in harmony with fundamental principles of equity pleading. The policy of courts of equity in regard to discovery has always been to allow the plaintiff the utmost range and latitude in framing his questions and in making charges of evidence. To impose on the plaintiff a condition to the effect that he can only obtain discovery at the cost of making all answers called for by him evidence in the defendants favor greatly hampers the right of discoverey and violates sound principle. The New York doctrine has received no countenance in the supreme court of the United States, and is repudiated by the federal courts generally.'[4]

After holding uniformly, with one exception,[5] since the creation of the state, that an answer in equity is not evidence for the defendant, the West Virginia Supreme Court, in a recent case,[6] has decided that, at least in some instances, the contrary is true. In this case an administrator brought suit for the purpose of marshaling the assets of his decedent and selling the decedent's real estate for the payment of debts. The bill alleged that a defendant, Bode, by a deed purporting on its face to convey absolute legal title, held certain realty of the decedent in trust,

[3] Quotation from Fant *v.* Miller, 17 Grat. 206 (Va. 1867), cited by the West Virginia court as a leading case in Woodyard *v.* Sayre, hereinafter cited and discussed.

[4] 2 STREET, FEDERAL EQUITY PRACTICE, §§1610-1611, citing numerous cases.

[5] In Jones *v.* Cunningham, 7 W. Va. 707 (1874), cited by the court in Woodward *v.* Sayre, *infra,* as superior authority to subsequent cases holding that an answer is not evidence, the court seems to recognize that an answer may be evidence for the defendant in West Virginia. Yet what the court actually decided in Jones *v.* Cunningham was that affirmative matter in an answer could not be taken as evidence for the defendant. The dictum to the effect that an answer might serve as evidence may be explained, it is believed, by the fact that the court looked to the Virginia decisions, where the answer always has been considered evidence, instead of referring to the West Virginia statute. This inadvertence would more easily occur in an early case, not long after separation of the states, than in later cases where the matter was positively decided in the light of the statute.

[6] Woodyard *v.* Sayre, 111 S. E. 313 (W. Va. 1922).

> "The exact nature of which was unknown to plaintiff, and asked for full discovery from Bode of the terms, conditions, and provisions of the trust, and propounded interrogatories for that purpose. It also averred the possession of the certificate of shares of bank stock by Bode, alleging that the latter claimed to hold the same as collateral security for a debt owing by Sayre to him, and that he was demanding payment of his debts against the estate, and refused to surrender possession of the certificate until payment was made to him. Bode answered the bill, stating specifically and fully his transactions with Sayre, the amount of the debts he claimed, how and when contracted, when due, when and for what purpose the house and lot was deeded to him and how and for what purpose he held the certificate of stock."

He admitted that he held title to the realty in trust and averred that he held the certificate of shares of stock as collateral for the purpose of securing the payment of certain debts due him from the estate, which debts were evidenced by a protested check and by certain promissory notes of the decedent held by him. The Supreme Court held that Bode's answer was evidence for him for the purpose of proving the respective debts and liens.

It would seem that this answer responds to the equities of the bill only to the extent that it answers in regard to the existence of the trust, and it admits the existence of the trust. Hence the answer is not needed for evidence as to the existence of the trust. So far as it undertakes to set up Bode's claims against the estate, and the liens, it would seem to be responsive to the interrogatories only. With reference to these claims and liens, not only does the answer not deny anything in the bill, but it would not seem even to set up a defense by way of avoidance. These matters would seem to be mere claims for affirmative relief. There is nothing alleged in the bill which they could avoid. That the burden of proof rests upon the defendant with reference to them would seem obvious[7] and is indicated by the fact that the court recognizes the defendant's need for evidence. The court seems to concede that, by virtue of the statute hereinbefore quoted, an answer denying the allegations of a bill can not be evidence for the defendant, although the statute is so discussed that its full effect in this

[7] 1 WHITEHOUSE, EQUITY PRACTICE, 487, note 27, has the following statement of Gilmore *v.* Patterson, 36 Me. 544 (1843):

> "In that case the defendant was charged with fraudulent possession of certain notes belonging to plaintiff. The defendant answered showing how the notes had come into his hands as collateral security and further stated the amount of the indebtedness to him for which the notes were held as collateral. Held that the part showing the amount of indebtedness was not responsive and must be proved."

respect is not readily apparent. The effect of the decision would seem to be, therefore, that an answer in West Virginia which does not deny the allegations of the bill may be evidence for the defendant.[8] In support of this proposition, the Virginia decisions, headed by *Fant* v. *Miller* as the leading case, are cited. This latter decision, as already noted, is condemned by Mr. Street as following the New York heresy. Hence it is believed that the principal case is opposed to principle and the weight of authority.

The court refers to West Virginia Code, chapter 125, section 48, as sustaining its position. This statute provides that a defendant may be compelled to answer interrrogatories under oath. It is argued that, if the plaintiff is permitted to use answers to such interrogatories so far as favorable to him, it must follow that the defendant shall be allowed to use those which tend to prove his case. It is believed that this is a *non sequiter*.[9] That it should not be true where the defendant has the burden of proof, is clearly indicated by Mr. Street. The writer has never been fully satisfied as to the precise intention of this statute, but has assumed that it was put in the Code for the benefit of the plaintiff, rather than of the defendant. It is believed that plaintiffs in West Virginia rarely put interrogatories in their bills when they have sufficient information upon which to frame the allegations of their bills. Rather, they will frame allegations upon such information and leave it to defendants to disclose their defenses or to suffer a decree *pro confesso*. It has been assumed by the writer that section 48 was intended to extend to plaintiffs, in difficult cases, a means of obtaining *admissions* from defendants, where from the necessities of the case it would be necessary for the plaintiff to stand or fall upon such admissions. In such instances, a plaintiff would seem to be in bad enough straits relying upon the admissions alone, without being compelled to grant a defendant the handicap of being permitted to use the residue of his answer as evidence in such a way as to compel the plaintiff to do more than merely sustain the burden of proof as to his allegations not admitted. Moreover, if the plaintiff should offer evidence to sustain his controverted allegations, ordinarily the defendant can testify in opposi-

[8] Former decisions are distinguished on the ground that in them the answers denied.

[9] "Upon a bill for discovery only, the answer being produced as evidence, the whole must be read. But when, upon the hearing of a bill for relief, passages are read from the answer, which is replied to, they are read, not as 'evidence', in the technical sense, but merely as a pleading to show what the defendant has admitted, and which therefore needs not to be proved, and hence the complainant is not required to read more than the admissions." FLETCHER, EQUITY PLEADING AND PRACTICE, § 656.

tion. If the rules of evidence in any case unjustly forbid him to do so, it would seem that the evil primarily reposes in the rules of evidence and a remedy should be sought there. As to the argument based on supposed statutory inconsistency, if section 48 be conceded to be inconsistent with any of the other provisions of chapter 125, this will not be the first instance of statutory inconsistency in the West Virginia law. Furthermore, it is worth-noting that a defendant is compelled to swear to many defenses at common law, and yet his verifed plea serves him only as a pleading, and not as evidence. What difference should it make that his answers to interrrogatories go more into details than his pleadings?

Is the new rule expedient? It is admitted in the principal case that the original equity rule allowing an answer to function as evidence is mostly archaic and based on reasons which have largely ceased to exist. The existence of the rule tends toward complication in procedure, while the modern tendency is toward simplicity. Apparently, henceforth all answers in West Virginia will have to be divided into two classes: (1) those which deny the bill and (2) those which do not deny. Likewise, in proper instances, distinct allegations of the same answer will have to be so classified. A plaintiff can in no case safely propound interrogatories without resorting to the subtle distinctions hereinbefore indicated in the language of Mr. Street. Moreover, he may find that the very effort to obtain information from the defendant will put him in a worse position than if he permitted the defendant to keep him in the dark. The writer, as a student and as a practitioner, has uniformly found comfort in the simple rule heretofore announced by the court to the effect that the answer serves the defendant only as a pleading. It is believed that many others have looked upon such a rule as a distinct advance in equity procedure. It would seem unfortunate if the rule heretofore prevailing has been invaded by an exception not sustained by orthodox practice. It seems that the decision of the court in the principal case was actuated in no small degree by a commendable reluctance to permit apparently just claims to be defeated by the rule of evidence prohibiting an interested party from testifying against the estate of a decedent as to a personal transaction with the decedent. Some condemn this rule of evidence, others praise it. In the principal case, it is believed that it can be demonstrated, and that the court did demonstrate, that these claims were established without a resort to the answer as evidence. Even if the claims had been rejected, they would have been in no different position than that of many just

claims against estates of decedents which the writer has seen defeated by this rule of evidence. If a change from the previous practice is advisable, it is believed that it would have been more expedient to seek a legislative change in the rules of evidence than to undertake to avoid the effect of the statute by introducing complications into the rules of pleading.

—*L. C.*

PARENT'S LIABILITY FOR CHILD'S NEGLIGENCE IN OPERATING FAMILY AUTOMOBILE.—The question whether the owner of an automobile bought for, and used by, his family with his premission should be held liable for the negligence of his child while driving the car solely for his own pleasure, has been answered recently for West Virginia in the case of *Jones* v. *Cook*.[1] In that case the minor stepdaughter of the owner of a pleasure vehicle was, with his permission, driving it home from a football game with some of her friends and on her way negligently injured the plaintiff. The court below directed a verdict for the defendant which the Supreme Court reversed. The grounds of the decision were two: first, that the facts of ownership by the defendant and possession by the stepdaughter raised a presumption that she was in his service and acting on his account; second, that regardless of the presumption, the facts were sufficient to make defendant liable under the rule *respondeat superior*.

In spite of the frequency with which this question has come before the courts and the consideration given to its solution, the direct conflict between two lines of decisions shows no signs of abating.[2] While all agree that a parent is not liable for the wrongful acts of his child unless he induced or approved the acts or unless the relation of master and servant existed between them,[3] one class of cases[4] denies that the mere use of the family car by a child for his own pleasure creates any such relation, and consequently refuses to impose liability on the owner. On the other

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[1] 111 S. E. 828 (W. Va. 1922).

[2] "The Doctrine of the Family Automobile," by Edward W. Hope, 8 Am. Bar Ass'n Jour. 359.

[3] Denison *v.* McNorton, 228 Fed. 401, 142 C. C. A. 631 (1916); Smith *v.* Jordan, 211 Mass. 269, 97 N. E. 761 (1912); Blair *v.* Broadwater, 121 Va. 301, 93 S. E. 632, L. R. A. 1918A, 1011 (1917). If the father entrusts his car to a very young or incompetent son, he would be held, of course, because of his own negligence. Meers *v.* McDowell, 110 Ky. 926, 62 S. W. 1013 (1901).

[4] Arkin *v.* Page, 287 Ill. 420, 123 N. E. 30 (1919); Watkin *v.* Clark, 103 Kans. 629, 176 Pac. 131 (1918); Farnum *v.* Clifford, 118 Me. 145, 106 Atl. 344 (1919); Weiner *v.* Mairs, 234 Mass. 156, 125 N. E. 149 (1919); Loehr *v.* Abell, 174 Mich. 590, 140 N. W. 926 (1913); Hays *v.* Hogan, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918C, 715 (1917); Doran *v.* Thomsen, 76 N. J. L. 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335 (1908); Van Blaricom *v.* Dodgson, 220 N. Y. 111, 115 N. E. 443, L. R. A. 1915F, 363 (1917); Blair *v.* Broadwater, *supra* n. 3.