1970

In The Matter of the Estate Of Amasa Lyman Clark, Also Known As A. L. Clark : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate of AMASA LYMAN CLARK, also known as A. L. CLARK, Deceased,

Case No. ~~11628~~ 11837

BRIEF OF RESPONDENT

Appeal from a Judgment of the District Court of Davis County Honorable Charles G. Cowley, Judge

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

The respondent takes mild exception to some of the statements made by appellant in its statement of facts. There is no evidence to support the following recitals on page 2 of appellant's brief:

> "* * * had been a resident of Davis County for many years and an outstanding citizen of the community. He was one of the founders of the Davis County Bank and had during his lifetime owned considerable stock in the bank. * * * at the age of 103 years and a resident of Davis County, State of Utah."

In the same paragraph the statement is made:

> "Mr. Bird, the attorney for Dale D. Clark, prepared this agreement (Tr. 36)."

which statement is repeated at page 6 of the appellant's brief. The testimony as to the document was at Tr. 36: "This is one of the drafts prepared by my attorney." There was no testimony as to what other drafts were prepared or how the particular one evolved.

At page 5 of appellant's brief is a statement that after a colloquy about who should go forward with proof the respondent "then" put in a copy of the agreement as an exhibit. The record discloses that Exhibit "A" was offered by the attorney for the Estate (Tr. 3) and that the Estate also offered Exhibit "B" (Tr. 4, 24) and that respondent simply substituted the original of Exhibit "A" for the copy offered by the Estate. (Tr. 3, 4)

Point 5 contains a premise of facts which are not in evidence.

Appellant raises five points in his brief which respondent will state affirmatively from the standpoint of the decision and argue in this brief. Respondent also raises a sixth point, which will be argued first, challenging appellant's points 1 and 2 as having been not timely raised.

POINTS OF RESPONDENT'S ARGUMENT

1. Utah's non-claim statute is not applicable to this proceeding.

2. The issue of specific performance was properly before the District Court.

3. The agreement for sale of stock is not illusory and is not an option, but a binding agreement.

4. The agreement for sale of stock does not constitute a gift.

5. The agreement for sale of stock is not a testamentary disposition.

6. Points 1 and 2 were not properly before the District Court.

ARGUMENT

POINT 6

POINTS 1 AND 2 WERE NOT PROPERLY BEFORE THE DISTRICT COURT.

The case came on for trial on May 9, 1969 on the issues raised by the original Petition for Confirmation of Sale (R-1,2), the "Objection" (R-4), the "Answer to Objection" (R-6), the "Amended Objection" (R-8, filed April 15, 1969) and the ruling of Judge Swan on April 22, 1969 (R-18, p. 5: "the Court could make an order at this time that this is a proceeding to authorize the executor to perform a contract entered into by the deceased during his lifetime.") The Order is supplied as a second supplement to the record and make the issue of specific performance plain.

On May 9 the Executor offered in evidence the agreement (Tr. 3) and then the appellants moved to dismiss the proceeding because "no petition for any determination" had been filed by the respondent and also because "no claim has been filed with the estate" (Tr. 8, lines 17 and 22).

Respondent objected to both issues as not timely raised and not raised by the executor, whose right it was to object (Tr. 11).

Judge Swan had fixed the issues for trial as being for specific performance over the objections in paragraphs (a) to (e) of the Amended Objections, paragraph (f) being stricken (R-18, p. 5, lines 26 to 29 of the record of April 22 hearings). See Finding of Fact 4, Conclusions of Law 5 and 6 (R-11 and 12).

Failure to file a claim could of course be raised at the trial if jurisdictional.

POINT 1

UTAH'S NON-CLAIM STATUTE IS NOT APPLICABLE TO THIS PROCEEDING.

Respondents admit that where there are no special circumstances and no facts taking the case out of 75-9-4 UCA 1953, the Utah cases hold that certain claims must be presented within the time provided. The Utah cases cited hold nothing more and involve no facts analogous to the facts of this case. *In Re Anjewierden's Estate*, 13 Utah 2d 378, 374, Pacific 2d 845, it was held

that mailing to the wrong address was not a sufficient filing and did not excuse filing; *In Re Neff's Estate,* 8 Utah 2d 368, 335 P.2d 403, stands for the proposition that the pendency of an action at the time of death of one of the parties is not a substitute for filing a claim in the estate; *In Re Agees Estates,* 69 Utah 130, 252 P. 891, it is held that an attorney has a lien against the product of litigation conducted by him, and that even though the funds are in the hands of the executor, the lien applies and his action therefore is not barred by the provisions of the non-claim statute; in *Halloran-Judge Trust Co.* vs. *Heath,* 70 Utah 124, 258 P. 342, it is held that a contract to manage a building for ten years, during which ten year period the owner died, had to be filed as a contingent claim and was barred under the statute for non-filing.

The appellants also cite cases from Colorado, Washington and Idaho, and refer to annotations in 41 ALR 144 and 47 ALR 896. *Lieber* vs. *Sherman,* (Colorado 1954) 274 P.2d 816 simply holds that a lessor's claim for rent was not an expense of administration and therefore required the filing of a claim; *James* vs. *Corvin* (Washington 1935) 51 P.2d 689 simply holds that a lessor must file a claim for rent not yet due against the estate of a lessee. In *Lundy* vs. *Lemp,* (Idaho 1919) 179 P. 738, there was a contract to convey land which had been partially paid when the grantor died. No claim was filed and the court held that no action could be maintained, the statute there requiring filing of "any

claim against an estate." The statute is so broad as to be no precedent in this case.

In 41 ALR 144 where objectors say the cases are "collected" there are no cases in point.

Respondents submit that with the death of A. L. Clark the rights reserved to A. L. Clark ceased and the stock belonged to Dale D. Clark, subject only to payment of money.

It must be borne in mind that the executor here is making no objection to the delivery of the stock upon payment of the funds (Tr. 18, lines 17 to 29, also Tr. p. 2), and no issue as to filing a claim was raised by the estate or by the objectors by their objections or preserved in the order of Judge Swan.

Respondent's position is that the executor is prepared to perform and has constantly indicated to respondent that it will perform and that the right of respondent to the stock is not a claim required to be filed. (Tr. 12, lines 27 to 30; See also testimony of respondent, Tr. 29 to 32).

This position has general support. In 31 Am. Jur. 2d Title "Executors and Administrators" at Section 276 on page 143 this statement si made:

> "Presentation of a claim or demand has been held unnecessary in actions to quiet title to real or personal property, actions for specific performance of a contract to convey, actions for the recovery of a specific property * * *"

At Section 318 on page 158:

> "Thus, it is not only within the power of an executor or administrator to complete a contract made by his decedent, it is his duty to carry out the contract. If he fails to perform a contract of his decedent which is binding on the estate, he may be compelled to pay damages out of the assets in his hands."

It is the position of respondent and evidently the position of the executor and the District Court that Dale Clark, having given valuable consideration to A. L. Clark, which was received and acknowledged by A. L. Clark, has purchased the bank stock, and has such an interest that the estate does not have clear title and the claim of Dale Clark is in the nature of an action for specific performance, to declare a lien, or to compel delivery of the property. (Decree of Specific Performance R-13-14).

The non-claim statute (U.C.A. 75-9-4) concludes:

> "Provided further, that nothing in this title contained shall be so construed as to prohibit the foreclosure of liens or mortgages as hereinafter provided."

Section 75-9-11, after requiring that an action shall not be maintained unless a claim is first filed then says:

> "Except that an action may be brought without notice by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint * * *"

Thus it appears that an action for specific performance or to compel delivery of personal property is not treated at all under the claim section of the statute but appears in Chapter 11 of Title 75, Section 26 of which provides that where a person dies being

> "bound by contract in writing to assign, transfer or deliver any personal property, shares of capital stock, bonds or other choses in action" and where the decedent if living "might be compelled to make such conveyance, assignment, transfer or deliver such personal property, shares of capital stock, bonds or other choses in action, to the person entitled thereto."

Under a similar statute the Idaho Supreme Court has held that the correct procedure is not by filing a claim but by application to the probate court for a decree. *Blake* vs. *Lemp,* 32 Idaho 158, 179 Pac. 737.

The subject of presentation of claims before bringing action is annotated at 34 A.L.R. 362, in which it is said at page 383 as the general rule:

> "It has been held that a statute requiring presentation of a claim does not apply where the claim is one for the recovery of specific property."

to which a number of cases are cited. And at page 383 it is stated also that a suit to compel specific performance does not require the filing of a claim as a prerequisite.

It was also held by the District Court that the bank stock belongs to Dale Clark as a matter of agreement on March 22, 1968, which was a present contract trans-

ferring the stock to Dale, but reserving the right of A. L. Clark to use it and to hold title until his death and precluding him from making any use of the stock inconsistent with the sale to Dale, or of delivering any of the stock to any other person or agreeing so to do. The estate is now in a position where it must dispose of the bank stock and it is precluded by the contract of A. L. Clark from disposing of it to any person other than Dale D. Clark. If A. L. Clark were living and desired to dispose of the stock he could be compelled by Dale D. Clark to deliver the stock to him and to no other person in exchange for which the payment would be made.

To support the proposition that A. L. Clark during his lifetime was not required to do anything under this agreement, the objectors at page 7 include the following citations:

> "In *Wilson v. Fackrell,* 34 P. 2d 409 (Idaho 1934), the Court held that 'in order for appellant to be entitled to relief sought the proof must show the decedent was bound, by contract in writing, to convey . . . and that it was such a contract that he, if living might be compelled to make the conveyance.' 34 Pac. 2d at 411. See also *In re Lewis Estate,* 98 P.2d 654 (Wash. 1940)."

These two cases have no support for the appellants but rather support the position of respondent. The language quoted in appellants' Brief at page 16 is indeed language found in the opinion in *Wilson* vs. *Fackrell,*

but it is simply a paraphrase of the statute in Idaho which is Section 15-1001 and is similar to the Utah statute, except that the Idaho statute is limited to real estate. The facts in *Wilson* were that one Fackrell prepared a contract of sale to his sister, Annie F. Wilson, calling for sale of property for $2,000.00, endorsed on the back of it a receipt for $2,000.00 and put both in an envelope which he handed to the "grantee." The sister did not read the contract, did not sign it, and did not know what it contained until after the death of Fackrell. The District Court, upon trial as a Probate Court refused specific performance, holding that Wilson had shown only an executory contract and not an enforceable contract. The Supreme Court held that there was a completed gift inter vivos and therefore an executed contract which was enforceable and indicated by the opinion and by the authorities cited therein that it is the obligation of the Court to carry out the indicated intention of the deceased if possible and ordered a new trial on that theory.

In re Lewis Estate likewise is a holding that the intention of the deceased shall be carried out. There the owners of property made a conveyance and took a mortgage back providing for payment by installments with the provision that if any sum remained due and owing upon the death of the grantor-mortgagee the note and mortgage should be declared null and void. The issue arose in the Probate Court on whether the mortgage was valid or should be cancelled by the execu

tor who was also the "mortgagor." The executor had cancelled the mortgage with approval of the Court, and then upon objections of creditors the Court had reversed itself and ordered the mortgage reinstated and paid. From this an appeal was taken and the Supreme Court again reversed and held that the mortgage was properly cancelled and that the provision of the contract that the balance should be cancelled as to any amount remaining upon the death of grantor was an enforceable provision. The Court carefully reviews other cases, viewing the problem as an unusual one. The Court concludes:

> "In this case it is clear from the initial agreement and all the subsequent instruments that the dominant purpose of the decedent was to enter into a contract for the sale of his property on definitely expressed terms. There was consideration for the contract, and mutual performance by the parties. We see no reason why persons should not enter into such an undertaking nor any reason why the Court should interfere with their expressed intention, in the absence of any fraud * * *. Had the note and mortgage been fully paid before death, satisfaction of record could have been compelled by the party entitled thereto under the contract. Since the decedent's death marked the termination of the obligation under the contract, the appellant was entitled to the same relief." (Page 658 of 98 P.2d).

It is not a prerequisite to stating a claim for specific performance against an estate to allege that the peti-

tioner filed a claim before filing the petition or before bringing an action for a specific performance.

In *Gammon* vs. *Bunnell,* 22 U 421, 64 P. 948, the case was heard on the demurrer to the complaint. The District Court held and the Supreme Court affirmed that a cause of action was stated in a complaint for a specific performance which alleged the filing of a petition in the Probate Court and the dismissal there without prejudice and the essential elements of the claim for specific performance on the merits. There was no allegation of filing a claim with the exceutor or in the estate. Likewise, in *Free* vs. *Little,* 31 U 449, 88 P. 407, the Court ruled that a specific performance action was not maintainable where there had not first been a petition filed with the Probate Court and denied there without prejudice, with no statement as to a requirement of first filing a claim in the Probate Court.

POINT 2

THE ISSUE OF SPECIFIC PERFORMANCE WAS PROPERLY BEFORE THE DISTRICT COURT.

Respondent's Point 6 urges that this issue was not timely raised, as the District Court held.

The Executor here filed a verified petition in substantial compliance wiht Section 75-11-27 U.C.A. 1953.

The District Court, with all parties represented, on

April 22, 1969, ordered the case to trial on the issue of specific performance (Supplement record).

The appellants' Brief in its Point II chooses to call this "a jurisdictional prerequisite." The only case cited which is helpful on this subject is *Rogers* vs. *Nichols,* 75 Utah 290, 284 P. 992. But that case was far from the facts of this one. There an objection was made to the final account of the executor in which it was suggested that title should be quieted to part of the property and the Court granted specific performance to a contract without any request therefor in any pleading. There is no statement that no objection was made to this conduct of the Court and nothing there is precedent for the situation here where there have been pleadings filed by the parties and merged in an order of the Court which specifically states that the matter to be determined on the trial is "that this matter is to be considered by the parties and by the Court as a proceeding for the specific performance of a contract of the Decedent and is not a confirmation of a sale by the Executor under the provisions of 75-10-8, U.C.A. 1953." It thus appears that with the acquiescence of the parties and after the filing of pleadings the Court has made a determination that the proceeding is under Section 75-11-26 and no objection was made to that by any pleading or notice.

Furthermore, no time limit is dictated in Section 75-11-27 and if the Court regards the objection as timely and as important, the petition can now be filed. The Executor has in effect waved the requirement of the

petition by itself filing a verified petition seeking authority to deliver the property.

POINT 3

THE AGREEMENT FOR SALE OF STOCK IS NOT ILLUSORY AND IS NOT AN OPTION, BUT A BINDING AGREEMENT.

The contract between A. L. Clark and his son, Dale D. Clark, executed March 22, 1968 is classified as a "bilateral" contract, which is defined as one involving promises on the part of both parties thereto. 17 Am. Jur. 2d, Contracts Section 5, p. 339 — *Restatement of Contracts,* Section 12, *Williston on Contracts,* 3d ed., Sec. 13.

It is said in *Manwill* vs. *Oyler,* 11 Utah 2d, 433, that in order to have a valid and binding contract, each party must be bound to give some legal consideration to the other by confering a benefit upon him or suffering a legal detriment at his request.

In this case each party gave to the other valuable and binding consideration.

A. L. Clark received first what he requested of respondent, i.e. an agreed settlement of a lawsuit between Dale and one Howard S. Clark. Secondly, he sold to Dale Clark 530 shares of stock of the Davis County Bank for $60.00 per share reserving the right to vote, control and own said stock for his lifetime or

until he should be paid in full for said stocks following tender and demand by him for payment.

To analyze this last consideration, A. L. Clark had the right to hold said stock during his lifetime and by the promises of respondent he could demand $60.00 a share irrespective of whether the market value of said stock fell below or rose above $60.00. This was the right A. L. Clark bargained for and respondent gave at the time the contract was signed by both parties.

Without question, A. L. Clark sold this stock to Dale D. Clark, reserving only for his lifetime a right to vote the stock and control same. At his death his reservation ended in accordance with the plain contract language and then the stock upon payment of $31,800.00 would be delivered absolutely to respondent.

Dale D. Clark by signing the contract was bound to pay $31,800.00 for 530 shares of stock of the Davis County Bank. He thereby assumed a market risk. If the stock fell in value he would suffer disappointment, or if the stock increased in value he would realize a bargain. He was bound to pay for the stock when his father demanded payment or at his father's death if no demand had been made. He also gave up his position in the action against Howard S. Clark as bargained for by his father. This was the essence of the contract.

This contract cannot be properly classified as an option. *Williston on Contracts,* 3d ed., Sec. 61A, thus defines an option: "A contract to keep an offer open,"

and as involving an offer "which the offeror may not withdraw until the expiration of the time fixed for the reason that the promise is based on a consideration." And again, "The crux of the matter is the open discretion of the optionee to take or to leave the proposal." "The obligation by which one binds himself to sell and leaves it discretionary with the other party to buy."

Thus it is plain that the respondent had no option but was absolutely committed to pay the price when demanded or when A. L. Clark died. The seller did not make an offer, which was kept open, but entered into a binding agreement based on separate and independent consideration and had on discretion as to who was the owner of his stock but only as to the time when he would require payment which would automatically be required at his death if he chose to enjoy his reserved rights to the end.

The Agreement is Not Illusory.

In this case both parties were bound from the time the contract was signed by the terms thereof, inasmuch as the contract was given for mutual promises. Thus from the time the contract was signed it was a completed contract in that both parties were bound by all the provisions thereof. It was executory only in part. Respondent did not have the right to decide whether or not he should purchase the stock. He had purchased the stock with the reservation retained by his father. The contract reads "A. L. Clark is the owner of 530

shares * * * which he agrees is sold to Dale D. Clark." His father was bound by the contract having received valuable consideration therefor, and it was only by the reservation of the lifetime rights that he held control of the stock during his lifetime. After his death this reservation ended by the terms of the contract and the contract gave full rights in the stock to Dale. In other words, he conveyed a present right in the stock subject to a life estate. (Conclusions of Law, 2 and 3, R-12).

At pages 17 and 18 the appellants cite four cases to their argument that the agreement is illusory because it permits performance "only when it pleases" A. L. Clark. On the contrary, A. L. Clark was bound by the sale of stock to Dale Clark reserving the right to exercise the indicia of ownership only so long as he lived and at his age the period from the date of agreement to the uncertain date of death was a reasonable period of time. Death would certainly come and at death the reserved rights would terminate and the only thing that left a choice to A. L. Clark was whether he would choose to demand payment before death.

And in the meantime, A. L. Clark received the consideration for which he bargained, viz., settlement of the intra-family lawsuit.

As to appellants' four cases: *Tatsch* vs. *Hamilton-Erickson Manufacturing Company*, 76 NM 729, 418 P.2d 487 says, as to the point here at page 190:

> "The fact that an acceptance was to become effective only upon the happening of a condition

> does not prevent a binding contract from coming into effect upon the happening of that condition if that was the manifested intention of the parties."

And, of course, that was not the manifested intention of A. L. Clark and Dale Clark who made a binding contract on the spot with time of delivery of stock and payment of money postponed until demand by A. L. Clark or his death, whichever would be sooner. The same language is used by the Utah Supreme Court in *R. J. Daum Construction Company* vs. *Child,* 247 P.2d 817 at 820. The Court there observed that there was clearly no binding contract intended "unless and until the government awarded to appellant the general contract." which does not apply to the instant case because there was a binding contract both as to the stock and as to the lawsuit. In *Lawrence Block Company* vs. *Palston,* 266 P.2d 856 the Court found no binding contract because the offeree made a conditional acceptance under which he would be bound only if he approved OPA rent statements and subject to his inspection and approval of all apartments, with no standards for either approval. The Court concluded that this "was not an offer to enter into an agreement, but an offer to enter into an agreement if he later wished to do so. This illusory promise is the only offer that was submitted by plaintiff to defendant" which is again readily distinguishable from the case at bar. And finally, *Mitchell Novelty Company* vs. *United Manufacturing,* 94 Fed. Supp. 412 involves a contract with "a reasonable royalty

to be fixed later" which the Court found unenforceable for uncertainty.

POINT 4

THE AGREEMENT FOR SALE OF STOCK DOES NOT CONSTITUTE A GIFT.

Appellants at page 21 argue from facts which are not in evidence. There is no evidence that the value of the stock was greater than the sum that Dale Clark agreed to pay and there is no evidence that there was a gift of any kind involved in the agreement before the Court. The settlement of the lawsuit was bargained for on the face of the agreement, as well as by the precautionary acknowledgment stated on the back of Exhibit B.

Respondent has at no time suggested that there was a gift or has ever argued the principle of a gift causa mortis as a substitute for delivery to a donee.

POINT 5

THE AGREEMENT FOR SALE OF STOCK IS NOT A TESTAMENTARY DISPOSITION.

The contract states that A. L. Clark agrees that the 530 shares of the capital stock of the Davis County Bank are sold to Dale Clark. Upon signing the contract he was not free to sell the stock to a third person

or to bequeath it to anyone else. His control of the stock was to exist only during his lifetime and ended with his death. Dale Clark, by the contract, was obligated upon demand or at his father's death to pay for the stock in cash and then obtain full indicia of ownership and possession of the stock. There was no question as to whether the stock was sold, and no option or reserved right in A. L. Clark to determine whether or not Dale would get the stock. His only right was to determine when he would require payment, the amount of which was fixed by the contract.

This is not a situation where there was an open offer of A. L. Clark awaiting acceptance. The bargain of the parties was for consideration which was exchanged and the stock was sold but Dale agreed that certain rights as to the stock could be exercised until he paid in full for it.

Page on Wills (*Bowe-Parker Revision*), Section 6.7, page 261, states this rule:

> "If an instrument creates a right in the promisee before the death of promisor, the instrument is a contract regardless of the date set for performance."

A similar situation is with deeds containing provisions limiting or postponing the grantee's rights until the grantor's death. These are uniformly held to pass a present interest to the grantee and postponing merely his enjoyment thereof, subject to enjoyment of the grantor during his life. See annotation at 31 A.L.R.

2d, 538, Section 5; *Kimbler's Administrator* vs. *Sanford,* 310 Ky. 66, 221 SW 2d 638; *White* vs. *Wester,* 170 Ok. 250, 39 P.2d 32; *Patellis* vs. *Tanner,* (1944) 197 Ga. 471, 29 SE 2d 419; *Fonda* vs. *Miller,* (1951) 411 Ill. 74, 103 NE 2d 98; *Mealtis* vs. *Kruckenberg,* 171 Kansas 450 233 Pac. 2d 472, 31 A.L.R. 2d 525.

In *Nelley* vs. *First National Bank,* 135 Ore. 409, 293 P. 721, a deed granted and conveyed personal property which was construed as conveying a remainder interest to the grantee. The provision in the deed that the conveyance should not go into effect until after grantor's death did not preclude the Court from holding that a present interest was created in the grantee.

McHenry vs. *McHenry,* 158 Ga. 105, 108 SE 522, involved an instrument which purported to give, grant and convey certain shares of corporate stock to others, but reserved in maker the right to receive and use dividends declared thereon during his lifetime. The Court said the reservation of the right to use the dividends during grantor's life was inconsistent with the idea that the instrument was testamentary in character.

An article in the Michigan Law Review, Volume 18, page 470, entitled "When are Deeds Testamentary" by Henry H. Ballantine a law professor in the Illinois University, says that in the majority of states the language that the deed is "to be in force and effect from and after the decease of grantor" is interpreted very liberally. Such language, he states, may be regarded

as representing a confusion of two events (1) the intent to give an estate to commence in futuro, but to reserve the possession, use and enjoyment of the property during grantor's lifetime, and (2) the intent to make a present dispositive instrument, but to keep the deed ambulatory like a will during grantor's lifetime. The probable intention is effectuated by holding the instrument operative in praesenti as a grant of a future estate.

Shackelton vs. *Sefree*, 86 Ill. 616 is relied upon partly by the professor. In commenting on that case, the professor said

> "In view of the act of delivery to the grantee in the lifetime of grantor and the intention to be gathered from the whole transaction the provision 'that title shall not pass until death' does not mean that grantee shall acquire no right or interest under the deed until grantor's death. The deed conveys a vested interest to commence in futuro and necessarily cuts down the estate remaining in grantor."

So here, the agreement transferring the right was delivered to respondent passing present rights.

Another article is found in the Harvard Law Review, Volume 30, in a note on page 508. The facts are as follows:

A signs, seals, records and delivers to B an instrument drawn in the form of a warranty deed conveying Blackacre to B, and his heirs. Consideration recited in deed. In the habendum clause is inserted "this deed

is to take effect upon the death of grantor." The great majority of cases seem to take an intermediate position. They hold the instrument to be a valid deed which apparently vests the fee in B at once, with the enjoyment thereof postponed until A's death, with more or less vaguely defined "life estate" reserved "by implication" or by operation of law in A. If the clause had read "The estate to vest" instead of "deed to take effect" it would seem impossible in the author's view to have questioned its validity. In Note 4 of this article, many cases are cited as supporting the majority view.

In *Frawley* vs. *Forrest*, 310 Mass. 446; 38 NE 2 631, 138 ALR 999, the deed reserved to the grantor and her husband a life estate during the lifetime of either or both of them. This reservation operated to give the grantor a life estate and by operation of law to give a remainder in the plaintiff who was a grantee. This remainder was an immediate interest.

SUMMARY

Respondent submits that the attack on the formal insufficiency of the petition for right of specific performance is not timely, having been acquiesced in by the parties and made plain by the order of Judge Swan of April 28.

Respondent takes the position that the necessity for filing a claim is also not properly before the Court as not timely raised; but more importantly, this proceeding

is not governed by Section 75-9-1, but by Section 75-11-26, UCA 1953.

The agreement between the respondent and his father was a binding bilateral contract by which a present interest was transferred to the respondent for a promised price and by which the deceased had the benefit for which he bargained, namely settlement of the family litigation.

The intentions of the parties to the contract were clear and unambiguous; the executor of the estate is prepared to go forward and raises no objection to performance of the contract as ordered by the District Court.

The order of the District Court should be affirmed.

Respectfully submitted,

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