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Skernswell v. Schonfeld

Roger J. Traynor

withheld payments after 'the distraint warrants were lifted.' We are of the opinion that this claim cannot be sustained.

"The trust instrument provided that in the event of the plaintiff's 'doing any of these inhibited things, or in the event that an attempt is made to subject said income or property, or any part thereof, to the payment of any of his debts or obligations, the trustee in its sole discretion may withhold any further payment or payments to said Romie C. Jack.' This language appears to be clear and unambiguous. It was obviously the trustor's intention to protect the gift from either attempts by plaintiff to anticipate the payments or attempts by plaintiff's creditors to subject such payments to the satisfaction of their claims. To that end, the trustor gave to the trustee the sole discretion 'to withhold any further payment or payments' in the event any such attempt might be made. It was stipulated that such an attempt was made.

"While the word 'withhold' may sometimes be used to connote a mere temporary holding back as contended by plaintiff, it is probably more frequently used to connote a permanent retention or refraining 'from granting, giving, allowing, or the like.' (See Webster's New Inter. Dict., 2d ed.) A consideration of all of the terms creating the trust here compels the conclusion that the trustor intended to use the word 'withhold' in the latter sense. We are dealing here with a typical spendthrift trust and the obvious purpose of the trustor in creating such a trust would be defeated by a construction which would permit the accumulation of the prescribed payments and the distribution of a large lump sum to the beneficiary at any one time.

"In view of the conclusions which we have reached, it becomes unnecessary to discuss the question of the right of plaintiff to interest as that right, if any would have existed, was dependent upon his right to judgment for some of the payments claimed by him."

The judgment is reversed.

Edmonds, J., did not participate herein.

[S. F. No. 16673. In Bank. July 2, 1942.]

JOSEPH SKERNSWELL, Petitioner, v. GEORGE W. SCHONFELD, as Judge, etc., et al., Respondents.

[1] **Appeal—Record—Bill of Exceptions—Mandamus.**—Mandamus is an appropriate remedy where a trial court improperly refuses to settle a bill of exceptions.

[2] **Id.—Record—Bill of Exceptions—Time for Presentation.**—The time within which to present a proposed bill of exceptions does not start to run where the copies of the orders appealed from served on the respondent do not indicate that the orders had been filed with the clerk, and where no written notice of the filing or entry of the orders is given. (See Code Civ. Proc., §§ 650, 651, 953d.)

[3] **Id.—Record—Bill of Exceptions—Duty of Judge.**—A trial judge is not justified in refusing to settle a proposed bill of exceptions on the ground that the orders specified in the notice of appeal are nonappealable.

[4] **Id.—Record—Bill of Exceptions—Reference to Parts of Record.**—It is proper in a proposed bill of exceptions to make reference to certain documents that are to be copied at length in the final engrossed bill.

PROCEEDING in mandamus to compel the Superior Court of the City and County of San Francisco and George W. Schonfeld, Judge thereof, to settle and certify a bill of exceptions. Writ issued.

Marcel E. Cerf, Robinson & Leland and Henry Robinson for Petitioner.

Joseph A. Brown and A. E. Cross for Respondents.

TRAYNOR, J.—This case raises a problem of procedure upon which the parties have presented a stipulation of facts. In March, 1940, Julius Neustadt brought an action in the superior court against Joseph Skernswell, and on May 26, 1941, that court gave judgment in favor of Neustadt. On

[1] See 2 Cal. Jur. 567.

McK. Dig. References: [1] Appeal and Error, § 625; [2] Appeal and Error, § 604; [3] Appeal and Error, § 594; [4] Appeal and Error, § 583.

May 29th findings of fact, conclusions of law, and the judgment were filed with the county clerk. On July 10th a motion for a new trial was denied, and on July 18th defendant filed notice of appeal. The appeal is now pending in this court. On July 28th the trial judge, at plaintiff's request, signed an order setting time of hearing the accounting by the referee, an order directing the referee to take possession of real property and to collect all rents and income, and an order directing the referee in partition to sell real property. Copies of the orders were served on defendant's attorney the same day but the orders were not filed with the clerk of the court until the following day. On August 1st the trial judge, at plaintiff's request, signed a written order requiring a bond on appeal. This order was filed with the clerk of the court on the same day after a copy had been served on defendant's attorney. None of the copies served on defendant's attorney contained any statement indicating that the orders had been filed with the clerk. The parties agree that no written notice of the filing or entry of any of these orders was given defendant before the filing of the bill of exceptions. On September 10th defendant filed notice of appeal from these orders, and on September 19th served and on September 20th filed a proposed bill of exceptions to be used on the appeal. Plaintiff moved to strike the bill of exceptions from the record, and after a hearing the trial court made an order granting the motion. Defendant has petitioned this court for a writ of mandate ordering the trial court to settle and certify the bill of exceptions.

[1] If a trial court improperly refuses to settle a bill of exceptions, mandamus is an appropriate remedy. (See cases cited in 2 Cal. Jur. 567.) **[2]** A bill of exceptions must be presented within twenty days after written notice of entry of the judgment or order from which the appeal is taken. (Code Civ. Proc., secs. 650, 651, 953d.) Notice of a judgment or order does not constitute notice of entry of the judgment or order. (*Leach* v. *Pierce,* 93 Cal. 614, 621 [29 Pac. 235]; *Tobin Grocery Co.* v. *Spry,* 201 Cal. 152 [255 Pac. 791].) Since petitioner received no notice of the entry of the orders before the filing of the proposed bill of exceptions, the latter was presented in time.

[3] Respondents contend that the trial court was justified in refusing to settle the proposed bill of exceptions, on the ground that the orders with which it is concerned are not

appealable. Sections 649, 650, and 651 of the Code of Civil Procedure, however, contain no requirement that an order must be appealable before a bill of exceptions can be settled with respect to it. It is not the function of the trial court to pass upon the appealability of an order in settling a bill of exceptions. (*Gutierrez* v. *Hebbard,* 106 Cal. 167, 170 [39 Pac. 529, 935]; *Foley* v. *Foley,* 120 Cal. 33, 38 [52 Pac. 122, 65 Am. St. Rep. 147].) It is the trial court's duty to prepare a record that accurately indicates what happened in that court. If the particular order is not appealable, the bill of exceptions may be used upon appeal from some later judgment or order when the correctness of the order in question will be reviewed. (*Foley* v. *Foley, supra.*) If an appeal is taken from the particular order, the question of appealability should be presented to the appellate court by a motion to dismiss after the record has been completed and placed before that court. (*Gutierrez* v. *Hebbard, supra.*)

[4] Respondents contend finally that the proposed bill of exceptions is a skeleton bill, so incomplete as to justify the trial court in refusing to settle it. Respondents, however, make no showing of fraud or lack of good faith on the part of petitioner in presenting the bill. (See *Dainty Pretzel Co.* v. *Superior Court,* 7 Cal. App. (2d) 437 [45 P. (2d) 817]; *Nichols* v. *Smith,* 25 Cal. App. (2d) 94 [76 P. (2d) 525]; *Ambrose* v. *American Toll Bridge Co.,* 12 Cal. (2d) 276, 279 [83 P. (2d) 499]; *Walkerley* v. *Greene,* 104 Cal. 208, 212 [37 Pac. 890].) It appears that the draft of the bill is incomplete only to the extent that it merely makes reference to certain documents that are to be copied at length into the final engrossed bill. This is an established procedure. (*St. Clair* v. *Bullock,* 12 Cal. (2d) 450, 454 [85 P. (2d) 867]; *Lakeshore Cattle Co.* v. *Modoc Land & L. Co.,* 127 Cal. 37, 39 [59 Pac. 206]; *Houghton* v. *Superior Court,* 128 Cal. 352, 354 [60 Pac. 972]; *Reclamation District* v. *Hamilton,* 112 Cal. 603 [44 Pac. 1074].)

Let a peremptory writ of mandate issue as prayed.

Gibson, C. J., Shenk, J., Curtis, J., Edmonds, J., and Carter, J., concurred.