Real and Personal Property

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of police power comes about when the property is restricted for public benefit, as opposed to public harm.

MARK W. SCHNEIDER

REAL AND PERSONAL PROPERTY

I. WATER LAW—DIFFUSE SURFACE WATERS

The most radical change in the law affecting real property rights to come out of the August 1974 Term of the Wisconsin Supreme Court was the new water law set down in State v. Deetz. The State of Wisconsin on a public trust theory brought action against an individual property owner, a development association, and a town to enjoin them from permitting deposits of sand and dirt to accumulate in Lake Wisconsin and on adjacent roads. The deposit of debris was caused by erosion which resulted from the construction of roads and clearing of land for housing. The State also sought forfeitures under the statute for obstruction of navigable waters and for deposit of deleterious substances in state waters.

The trial court had dismissed the State’s complaint in reliance on the common enemy doctrine which gave a property owner the right to cause diffuse surface water to be diverted from his land without regard for any damage which it might do to neighboring property. The supreme court, after reexamining the common enemy doctrine in light of other recent decisions of the court relating to land use and water, announced the adoption of a new rule governing diffuse surface waters—the reasonable use rule of the second Restatement of the Law of Torts. The case was remanded to the trial court for a determination of whether the utility of the conduct outweighed the gravity of the harm caused under the rule of reasonable use.

II. HOMESTEAD EXEMPTION AND CREDITORS’ RIGHTS

In Schwanz v. Teper the supreme court addressed the ques-

1. 66 Wis. 2d 1, 224 N.W.2d 407 (1975). This case will not be discussed in any detail here because of its extensive treatment in the recent article Comment, Wisconsin Strives to Minimize Conflicts Over the Use of Water, 59 MARQ. L. REV. 145 (1976).
5. 66 Wis. 2d 157, 223 N.W.2d 896 (1976).
tion of whether a debtor-owner of a duplex, who lives in one half and rents the other half, may claim the protection of the homestead exemption statute for the rental income as well as for the part of the house he occupies. The court also clarified whether the trial court had power under this statute to hold in escrow the proceeds from the sale of an exempt homestead so long as the debtor intends to purchase another homestead during the two year period of protection allowed under the statute.

First, the supreme court determined that the public policy of affording protection to a debtor’s homestead has resulted in a liberal construction of the exemption statute in favor of the debtor. Second, the court found the rule allowing a judgement debtor to dispose of the proceeds of a homestead sale in whatever manner he pleases to be well settled law. In addition to the case law, the court cited Wisconsin Statute section 266.12 which prohibits the attachment of exempt property. The combination of these factors led to the court’s conclusion that a trial court may not order exempt property to be held by the clerk of court. Since the plaintiff’s duplex was held to be an exempt homestead, the trial court erred in ordering the proceeds from the sale held in escrow.

On the question of whether rental income from the leased portion of an exempt homestead is included in the statutory protection, the court found the general rule to be that such income is exempt, so long as it is not rent from a business

Homestead exemption definition. (1) An exempt homestead as defined in s. 990.01(14) selected by a resident owner and occupied by him shall be exempt from execution, from the lien of every judgment and from liability for the debts of such owner to the amount of $10,000, except mortgages, laborers’, mechanics’ and purchase money liens and taxes and except as otherwise provided. Such exemption shall not be impaired by temporary removal with the intention to reoccupy the premises as a homestead nor by the sale thereof, but shall extend to the proceeds derived from such sale to an amount not exceeding $10,000, while held, with the intention to procure another homestead therewith, for 2 years.

This statute was amended by Wis. Laws 1973, ch. 168 to raise the value of the homestead interest protected from $10,000 to $25,000.

8. See Kopf v. Engelke, 240 Wis. 10, 1 N.W.2d 760 (1942).
What may be attached; how attached. All the property of the defendant, not exempt from execution, may be attached. Personal property shall be attached as upon an execution and the provisions respecting the levy of an execution thereon shall be applicable to an attachment.
homestead. The court examined cases relying on this rule from three neighboring states, and concluded that although Wisconsin’s exemption statute does not specifically include the rental income, it would be in keeping with public policy favoring preservation of the debtor’s homestead to so interpret the statute. The trial court’s judgment was reversed on both issues, and the cause remanded for payment to the plaintiff of the money held in escrow by the clerk of court.

III. UNEXECUTED JUDGMENT LIEN AND JOINT TENANCY

In *Northern State Bank v. Toal*, the Wisconsin Supreme Court had its first occasion to look at Wisconsin Statute section 700.24 since its enactment by the 1971 state legislature:

700.24 Death of a joint tenant; effect of liens. A real estate mortgage, a security interest under ch. 409, or a lien under ss. 45.37(12), 71.13(3)(b), 72.86(2), chs. 49 or 289 on or against the interest of a joint tenant does not defeat the right of survivorship in the event of the death of such joint tenant, but the surviving joint tenant or tenants take the interest such deceased joint tenant could have transferred prior to death subject to such mortgage, security interest or statutory lien.

The court ruled that the statute had not changed the case law with regard to judgments docketed but not executed. Such judgments are not included among the liens preserved by the statute in cases of death of a joint tenant. The court cited *Musa v. Segelke & Kohlhaus Co.* for the proposition that the mere docketing of a judgment without execution does not sever the joint tenancy. Since the debtor’s interest during his life is subject to the right of survivorship, no interest remains after his death upon which an execution could operate and the lien is extinguished.

10. 66 Wis. 2d at 165, 223 N.W.2d at 900 (1975), citing 40 C.J.S. Homesteads § 70 (1944); Annot., 40 A.L.R.2d 897 (1955).
12. 69 Wis. 2d 50, 230 N.W.2d 153 (1975).
13. *Wis. Stat.* § 700.24 (1973). This statute is a re-enactment of former *Wis. Stat.* § 230.455 (1971) with minor changes in phraseology. The prior statute had also not been interpreted by the Wisconsin court.
15. For further discussion of the effect of *Wis. Stat.* ch. 700 on joint tenancy, see
IV. INTER VIVOS GIFT OF BANK DEPOSIT

_Estate of Schreiber_ is a relatively uncomplicated case dealing primarily with the sufficiency of the evidence to establish an _inter vivos_ gift after the donor has died. What makes the case of more than routine interest might be summed up as a riddle: When is a bank deposit not a bank deposit? Answer: When it is a partnership interest.

Barbara Schreiber was given her husband's partnership interest in a large shopping center project just before he died. The decedent had left a will which had been executed prior to his marriage to Barbara which did not include her. The trial court had determined that there had been no gift of the partnership interest; and therefore, the interest was properly included in the inventory of the estate. On appeal, the supreme court held that the gift to Barbara of all of the personal property of the partnership had been proven by the great weight and clear preponderance of the evidence.

Although both the trial court and the supreme court had found bank deposits to be part of the partnership property, they differed on whether a gift of the property had been effectuated. The trial court had ruled against the validity of the gift of the deposits, basing its decision upon the fact that Robert had not made any formal written assignment of the deposits to Barbara. The trial court found this to indicate a specific lack of donative intent, since Robert had been free to withdraw money from any of the accounts up until the day of his death. In support of the trial court's finding, the bank, as personal representative of Robert's estate, relied upon Wisconsin Statute section 241.25:

_Transfer of bank book to be in writing._ No gift, sale, assignment or transfer of any saving fund bank book bearing evidence of bank deposits or of any interest in the deposits represented thereby, shall be valid unless the same shall be in writing and the same or a copy thereof delivered to the bank issuing such bank deposit book.17

In a prior case, the supreme court had stated the purpose

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16. 68 Wis. 2d 135, 227 N.W.2d 917 (1975).
17. Wis. STAT. § 241.25 (1971).
18. Estate of Detjen, 34 Wis. 2d 46, 55, 148 N.W.2d 745, 749 (1967).
of the statute to be protection of the bank before it received written notice of a gift of the savings deposit. In this case, however, the court concentrated solely on the issue of whether there had been a valid delivery of the bank deposits and ignored the question of whether the bank was entitled to rely on the statute for its own protection against possible multiple claims to the same deposit. One can only surmise as to the court's reasoning—the bank here presumably no longer needed the protection of the statute because the depositor was dead and the estate was being probated under the supervision of the trial court.

The court then addressed the remaining question of whether the gift had been completed by a valid delivery of the bank deposits to Mrs. Schreiber. Without discussing any theory of constructive or symbolic delivery, the court simply concluded that the bank books were a part of the partnership property and that the partnership interest had been a valid gift. Mrs. Schreiber's assumption of dominion over the partnership property after the time of her husband's expressed intent to give her the property completely disposed of the delivery issue.

This case in no way clarifies the nebulous area of gift law. While it seems to stand for the proposition that an excess of donative intent will suffice for a lack of delivery, the court insists that all four elements of a gift must be proved. The court lists these elements as: (1) intention to give on the part of the donor; (2) delivery, actual or constructive, to the donee; (3) termination of the donor's domination over the subject of the gift; and (4) dominion in the donee.19

The court's interpretation of the statute,20 which it views as designed to protect the bank, is highly unsatisfactory. On its face the statute is clear that there is only one way to make a valid gift of bank deposits; that is, in writing with a copy delivered to the bank. Although in this case the bank does not subject itself to multiple liability from the donor/depositor's demand of the money on deposit since the donor is dead, there remains the claim of the beneficiaries, the successors in interest of the donor. The bank still has an interest in avoiding a claim of liability by the beneficiaries, and it would seem that the

19. 68 Wis. 2d at 145, 227 N.W.2d at 922.
beneficiaries also have a right to rely on the statute for the protection of their interest in the deposits.

However disquieting this decision, it is Wisconsin law. Banks and beneficiaries alike are left without statutory protection in the case of gifts of bank deposits where those gifts are sustainable with clear and convincing evidence of strong donative intent. There need be no possession of the bank deposit book by the donee nor any writing indicating the gift delivered to the bank so long as the bank deposits are part of a larger interest, a partnership interest, given as a valid gift to the donee.

BARBARA BECKER

TAXATION

The Wisconsin Supreme Court, in its 1974 term, was confronted with very few tax questions. Of those encountered, three are especially noteworthy. The first is significant for a Wisconsin resident who invests as a limited partner in a partnership which is not engaged in business in Wisconsin, the second for a Wisconsin manufacturer who contracts with the federal government, and the third for a Wisconsin landowner who is concerned with the methods used to determine real estate assessments.

I. INCOME TAXATION

Generally, income or loss is included in one’s Wisconsin adjusted gross income if the situs of the income or loss is Wisconsin.1 Determining the situs of income is controlled by Wisconsin Statute section 71.07(1).2 In that statute, various categories of income or loss are described, and the situs of each category is specified.3

1. Wis. Stat. §§ 71.02(2)(e), 71.05(1), and 71.07 (1973).
2. Wis. Stat. § 71.07(1) was amended by Wis. Laws 1971, ch. 125. The 1971 amendment applies to tax returns for calendar year 1973 or the corresponding fiscal year and years thereafter. For income years prior to 1973, the 1969 statute should be used. It must be noted that although the 1969 statute was applied in Sweitzer v. Department of Revenue, 65 Wis. 2d 235, 222 N.W.2d 662 (1974), the principal case in this Income Taxation section of the Term of Court, the outcome of the case would not have been affected by the 1971 amendment, the bulk of which affects corporations, not individuals.