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Notes on Recent Missouri Cases

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NOTES ON RECENT MISSOURI CASES

CORPORATIONS—PRELIMINARY STOCK SUBSCRIPTION AGREEMENTS. *State ex rel. Thompson* v. *Reynolds*.[1]—The Supreme Court issued a writ of certiorari to the St. Louis Court of Appeals on the relator's contention that the latter court in *De Giverville Land Co.* v. *Thompson*[2] had failed to follow the last controlling decision of the Supreme Court, viz., *Sedalia, Warsaw & Southern Railway Co.* v. *Wilkerson*.[3] The latter case was decided with reference to a preliminary stock subscription agreement under the statute as to railway companies,[4] and it was held that the estate of a subscriber who had agreed to take shares but who died before the incorporation was completed was not liable. *De Giverville Land Co.* v. *Thompson* was decided under the statute as to manufacturing and business companies of 1909,[5] the terms of which are quite different from those of the statute under which *Sedalia, Warsaw & Southern Railway Co.* v. *Wilkerson* was decided; and on facts quite different from those which the Supreme Court had considered, it was held that the subscriber was bound and that the decision in the Supreme Court was not controlling. The sole question before the Supreme Court was whether the Court of Appeals had failed to follow its last controlling decision as the constitution requires, for it had previously been held that on certiorari to a court

1. (1916) 186 S. W. 1057.
2. (1915) 190 Mo. App. 682, 176 S. W. 409.
3. (1884) 83 Mo. 235.
4. Wagner's Statutes 1870, p. 299, and Laws of 1877, p. 371.
5. Revised Statutes 1909, § 3339 *et seq.*

of appeals the Supreme Court will not go into the correctness of its previous decision to reopen a discussion of the whole subject on its merits;[6] any other rule would convert the writ of certiorari into a writ of error. But the Supreme Court speaking thru BLAIR, J., made no effort to determine whether the case in the St. Louis Court of Appeals was distinguishable from *Sedalia, Warsaw & Southern Railway Co.* v. *Wilkerson*, but proceeded to determine what the rule should be as to preliminary stock subscription agreements and concluded that "the decision in the Wilkerson Case, in so far as it conflicts with this holding, should be overruled." The court then announced that in view of this conclusion "the grounds upon which" the court of appeals had "distinguished the Wilkerson Case, cannot be considered as authoritative," and it proceeded to quash the writ of certiorari.

This opinion is indeed surprising. It is certainly a departure that in certiorari directed to a court of appeals to determine whether the last controlling decision of the Supreme Court has been followed, the Supreme Court should deliberately refuse to say whether its decision was controlling and proceed to consider the case on its merits as tho there had been no previous decision. The profession will doubtless feel that this is an undesirable departure, for it would leave little difference between review by certiorari and on writ of error and thus further restrict the final jurisdiction of the courts of appeals. But it was wholly unnecessary in this case to take any such position, for there is a very clear difference between the statute under which *Sedalia, Warsaw & Southern Railway Co.* v. *Wilkerson* was decided, and the statute which the court of appeals was applying in *De Giverville Land Co.* v. *Thompson*, as the writer has shown in a previous number of the Law Series.[7] This difference amply justifies the court's quashing its writ.

But it is even more objectionable that the court should on such apparently scant consideration announce a willingness to overrule a decision which has been accepted by the bar for more than thirty years, and which has been followed by the court of appeals against its will.[8] It may be too much to expect of a busy court a thoro analysis of preliminary subscription agreements, but the subject has been extensively studied[9] and it is disappointing that a change in the law should be intimated without any reference to available aids. Tho the writer believes that the decision in *Sedalia, Warsaw & Southern Railway Co.* v. *Wilkerson* should be overruled, it is a subject of intrinsic

6. *In State ex rel. Zehnder* v. *Robertson* (1914) 262 Mo., 613, 172 S. W. 6, the court said: "In certiorari of the kind and character involved here, we are not really concerned as to what the true rule shall be, but are only concerned in what the rule is in Missouri, as established by this court prior to the time the court of appeals acted." But see Professor McBaine's article on "Certiorari From the Missouri Supreme Court to a Court of Appeals." *infra*, p. 68.

7. 9 Law Series, Missouri Bulletin, pp. 26, 33.

8. In *Shelby County Railway Co.* v. *Crow* (1909) 137 Mo. App. 461.

9. See the article on "Preliminary Stock Subscription Agreements In Missouri" in 9 Law Series, Missouri Bulletin, pp. 3-37, and citations therein.

difficulty and the rule quoted from Ruling Case Law is grossly inadequate. Furthermore, since the court was purporting to decide the original case on its merits, it should have analyzed the statute as to manufacturing and business companies and the effect of the failure to include the defendant subscriber among the original incorporators.

The case has not the effect of overruling the Supreme Court's previous decision in spite of the gratuitous expression in the opinion, however, for it is submitted that such a result could not be achieved on certiorari to a court of appeals. Tho its authority is very much weakened, *Sedalia, Warsaw & Southern Railway Co.* v. *Wilkerson* must still represent the law and numerous questions on the effect of the various statutes on preliminary subscriptions are still open, as the writer has shown in a previous number of the Law Series.

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WILLS—GIFT CUT DOWN BY LATER WORDS. *Howard* v. *Howard*.[1]—A testator devised one fourth of his property to each of his four children and provided that three of the children should act as guardians of the fourth, Augustus, "giving to him every twelve months the interest or proceeds." This was "done to keep Augustus from spending or squandering" his fourth, and it was provided that "should Augustus die then will is that his share of my estate be divided amongst his heirs." In an action of partition, brought to obtain a judicial construction of the will, the Supreme Court held that Augustus took his fourth in fee, unaffected by an testamentary trust, and purported to apply the rule that a devise in unequivocal terms will not be cut down by later words in a will less unequivocal.

This seems to be a clear misapplication of the principle which the court purported to apply. No reason is perceived why the intent of the testator should not have been effectuated and a testamentary trust created. To be sure, the *cestui que trust* might at any time have compelled the trustees to convey the legal title to him since no one else was beneficially interested, inasmuch as the provision for Augustus' death clearly referred to his death during the testator's lifetime. The court had no doubt that this was the meaning of the words in the will, but it seems to have regarded the words creating the trust as somehow cutting down the absolute interest previously given. The principle invoked had not previously been applied where the later words merely denominated the nature of the devisee's title, making it equitable instead of legal; and it is submitted that there is no good reason for so extending its application. The result in this case was not serious, but it deserves to be pointed out that the case involves an undesirable extension of this artificial rule for the construction of wills.

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1. (1916) 184 S. W. 993.

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