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Contract--Services--Evidence--Promise to Pay an "Appropriate Percentage" (Von Reitzenstein v. Tomlinson, 249 N.Y. 60 (1928))

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CONTRACT—SERVICES—EVIDENCE—PROMISE TO PAY AN "APPROPRIATE PERCENTAGE."—Defendant's testator, a lawyer, held for himself and on behalf of clients, bonds of the Havana Tobacco Co. to the extent of $2,000,000. In April, 1922, a foreclosure suit was imminent, for default had been made in payment of interest. Defendant's testator in anticipation of this event sought to improve his chance of a favorable settlement by unearthing evidence of graft in the conduct of the business and hired plaintiff for this purpose. For his services he was to be paid $25. per day and expenses as well as an "appropriate percentage" of the benefits, if any, accruing through his efforts. His reports were received as satisfactory. The foreclosure action was started but the attorney was allowed to intervene and subsequently a plan of reorganization was adopted. Plaintiff then demanded to be paid his "appropriate percentage" which he estimated at $125,000. and payment was refused. He sues on *quantum meruit*. *Held,* promise is void because too indefinite. He is entitled to payment according to market value.[1] Von Reitzenstein v. Tomlinson, 249 N. Y. 60 (1928).

The attorney's promise to pay an "appropriate percentage" in addition to the agreed daily wage is unenforceable as a promise for payment of anything more than reasonable value of such services. The trial court erred in permitting the jury to consider the case upon the theory that gains accruing to defendant's testator after reorganization might be found to be due to plaintiff's efforts. To prove value of the services before and after reorganization, the court received reports of the National Quotation Bureau, an association which supplied subscribers with quotations of current prices of bonds and shares of stock. These figures were compiled from reports of their employees who were detailed to interview a group of bankers reputed to be dealers. There was absolutely no proof that these figures were authentic or generally recognized by traders in the market. This, at least, must be proved before they can be admitted as evidence of market value.[2] All that we have here is the fact that the Bureau sells its service to subscribers in numbers not disclosed. On this evidence, bid and asked quotations were allowed to be read from the lists, there having been no actual sales.[3] This evidence determined the verdict. Besides this infringement of the hearsay rule, there was other error committed. There was no evidence that plaintiff's sole efforts were the proximate cause of defendant's saving. The jury's verdict was merely guesswork, and speculation can never serve as the basis of a verdict.[4] The promise to pay a percentage of gains is void, for indefiniteness, and if any have accrued, there is no

[1] Vainey v. Ditmars, 217 N. Y. 223, 111 N. E. 822 (1916).

[2] Watts v. Phillips-Jones Corp., 242 N. Y. 557, 152 N. E. 425 (1926).

[3] Harrison v. Glover, 72 N. Y. 451 (1878).

[4] Pauley v. Steam Gauge & Lantern Co., 131 N. Y. 90, 100, 29 N. E. 999 (1892).

evidence that what plaintiff did, affected the amount. Neither the terms of reorganization nor prices of the new securities had anything to do with the value of the services. Plaintiff should be paid for his work according to the standard of the market, or as nearly thereto, as can be ascertained.[5]

CORPORATIONS—INSURANCE COMPANIES—INSOLVENCY—INTEREST.—In this case the Norske Lloyd Company made the customary deposit required by the Insurance Law [1] as a condition of doing business in this State. It also had created certain trusts in accordance with the provisions of the Statute. The corporation has been adjudicated a bankrupt in its domicile and the State Superintendent has taken possession of these and other free assets for the purpose of liquidation and distribution. Claims were presented by those who dealt with the company in the United States and who, consequently, were entitled to the protection of the statute. The question to be decided is whether such creditors are entitled to be paid interest from the day their claims were proved until paid, in addition to the payment of their claims in full. *Held,* they are entitled to such payment. If, as is the case here, the assets are sufficient to pay all claims in full with interest, then interest will be allowed. Matter of People (Norske Lloyd Insurance Company) 249 N. Y. 139 (1928).

The funds deposited by the insurance company are primarily for the benefit of creditors in the United States.[2] Only those who claim under transactions with the United States branch of the company are entitled to share as such creditors in the distribution under the statute.[3] If there remains a surplus after all proper charges and claims have been deducted, this must be transferred to the domiciliary receiver.[4] As a general rule, after property of an insolvent passes into the hands of a receiver interest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate.[5] When the fund is insufficient to pay in full all the creditors who have the right to share in it, the burden of consequent loss and injury should be equitably distributed among them. Where, however, the fund in question proves sufficient to pay all claims in full with interest, the

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[5] Winch v. Wainer, 186 App. Div. 710, 174 N. Y. S. 819 (1st Dept. 1919); Plattenberg v. Briggs, 166 App. Div. 326, 151 N. Y. S. 925 (3rd Dept. 1915).

[1] State Ins. Law (Cons. Laws, Ch. 28), Sec. 27.

[2] Matter of People (City Eq. Fire Ins. Co.) 238 N. Y. 147, 156, 144 N. E. 484 (1924).

[3] *Supra,* 242 N. Y. 148 at 167 (1926).

[4] People v. Granite State Provident Asso., 161 N. Y. 492, 55 N. E. 1053 (1900); Southern B. & L. Assn. v. Miller, 118 Fed. Rep. 369 (C. C. A. 4th Cir. 1902).

[5] Thomas v. Western Car Co., 149 U. S. 95 (1893).