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Contracts--United States Savings Bonds--Treasury Regulations as a Term

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ployees and officials.18 Also, some have speculated that the overthrow of the doctrine would result in a substantial saving of time and money by eliminating the necessity of litigants debating whether the municipal act in question is immune from liability,19 and that litigation would actually be lessened by the absence of the "governmental–proprietary" distinction which has been so difficult to apply.20

The tenacity of the courts in adhering to the doctrine of municipal tort immunity is at least partially attributable to their allegiance to the doctrine of stare decisis. Although stare decisis is entitled to deference, when a rule of law is fallacious and unjust, it should be discarded.

One of the most controversial aspects of the Haney case is that the court chose to apply the decision retroactively in all actions not barred by the statute of limitations. At least two other courts which have overthrown the immunity have applied their decisions retroactively.21 This retroactive application is not likely to be too onerous, as the statute of limitations in Kentucky for many tort actions is one year, and five years is ostensibly the longest period allowed in tort.22

Edwin Abell

CONTRACTS—UNITED STATES SAVINGS BONDS—TREASURY REGULATIONS

As a Term.—During his lifetime, the now deceased father bought a number of Series E, United States Savings Bonds issued pursuant to 31 U.S.C.A. section 757(c). These were issued in his name jointly with either one or the other of two sons, with the exception of a bond issued solely in the name of one son. Subsequent to the purchase of the bonds, the father married for the second time. Upon the authority of Henderson's Arm'r v. Bewley,2 the circuit court, in a declaratory judgment, determined that all of the bonds passed as intestate property, the disposition of which was to be governed by the laws of descent and distribution. Held: Reversed. The Treasury Department Regulations are a part of the government contract, and under those regulations "if either co-owner dies without the bond having been

18 Fuller & Casner, supra note 11, at 460; Borchard, supra note 1, at 134.
19 Fuller & Casner, supra note 11, at 462.

1 264 S.W.2d 680 (Ky. 1953).
presented and surrendered for payment or authorized reissue, the
survivor will be recognized as the sole and absolute owner."\textsuperscript{2} \textit{Marcum v. Marcum}, 377 S.W.2d 62 (Ky. 1964).

There are two distinct legal theories with respect to rights in
United States Savings Bonds issued in the names of two individuals
in the alternative, upon the death of one of the individuals. "The
rule followed by a majority of the courts, frequently called the 'ma-
jority rule,' . . . is that the surviving co-owner is vested with the sole
ownership in such bonds. . . ."\textsuperscript{3} There is a joint tenancy, and upon
the death of one of the co-owners, the bonds belong exclusively to the
survivor by right of survivorship.\textsuperscript{4} This rule is qualified by the words,
"at least in the absence of fraud or other inequitable conduct on the
part of the survivor."\textsuperscript{5}

The majority rule is based on the theory that this is a question
of property rights under a contract and not one of gift.\textsuperscript{6} The Treas-
ury Regulations, having the force and effect of law, form a part of
the bond contract between the United States and the individual under
the well-established doctrine that the laws effective at the time of
the making of the contract form a part of it whether expressly re-
ferred to in the agreement or not.\textsuperscript{7} The contract may then be enforced
as a contract for the benefit of a third party.\textsuperscript{8} The issuance of savings
bonds being a proper exercise of the federal government's power to
borrow money, the federal statutes are supreme under article 6, clause
2 of the federal constitution, and any state law or policy in conflict
therewith must give way.\textsuperscript{9}

The minority view is that the Treasury Regulations:

merely provide a convenient method of payment thereof to discharge the
government's obligation in that respect. Accordingly, upon the death
of one of the co-owners, the rights of the survivor as against the estate
of the deceased co-owner or claimants to the interest of the decedent
are governed primarily by the source of the funds used to purchase

\textsuperscript{2} 31 C.F.R. § 315.61.
\textsuperscript{3} Annot., 37 A.L.R.2d 1221 (1954).
\textsuperscript{4} Hill v. Havens, 242 Iowa 920, 48 N.W.2d 870 (1951).
\textsuperscript{5} Annot., supra note 3. It was argued in Marcum v. Marcum 377 S.W.2d
62 (Ky. 1964) that designation by the father of his sons of a former marriage
constituted a constructive fraud on the marital rights of his surviving widow,
but this argument received no mention in the opinion handed down by the
court. This was probably because the bonds were purchased prior to the second
marriage at a time when the father was living with his children without paying
for any board or lodging.
\textsuperscript{6} Ervin v. Connecticut, 225 N.C. 267, 34 S.E.2d 402 (1945).
\textsuperscript{9} Free v. Bland, 369 U.S. 663 (1962). This would apparently solve any
problem arising in a jurisdiction where third party beneficiary contracts are not
recognized.
the bonds and by the application of state law as to devolution of property.\textsuperscript{10}

In the \textit{Marcum}\textsuperscript{11} case, the Kentucky Court of Appeals accepted the majority view by holding that the issuance of a United States Savings Bond naming the buyer of the bond and another as co-owners is a third party beneficiary contract incorporating the Treasury Regulations. In doing so, the court expressly overruled \textit{Henderson's Adm'r v. Bewley}.\textsuperscript{12} But the overruling of the \textit{Henderson} case does not leave it void of legal significance. Even though there may no longer be a gift inter vivos or a gift causa mortis\textsuperscript{13} of savings bonds, an attempt to defeat a spouse's marital rights will result in the court declaring a constructive trust in favor of the surviving spouse.\textsuperscript{14}

The decision is undeniably correct in view of the recent Supreme Court case of \textit{Free v. Bland}\textsuperscript{15} holding that a Texas law which required a husband to reimburse his deceased wife's estate, upon the taking of bonds bought with community funds in the name of the husband or wife, must yield to the federal law expressed in Treasury Regulations conferring right of survivorship. The \textit{Marcum} case appears to be a logical extension of the Kentucky case of \textit{Moore's Adm'r v. Marshall}\textsuperscript{16} where a bond issued in the name of one person only was held not to be the proper subject of an inter vivos transfer.

\textit{R. Cletus Maricle}

\textsuperscript{10} Annot., supra note 3, at 1233.
\textsuperscript{11} 377 S.W.2d 62 (Ky. 1964).
\textsuperscript{12} 264 S.W.2d 680 (Ky. 1953).
\textsuperscript{13} \textit{Henderson's Adm'r v. Bewley}, 264 S.W.2d 680 (Ky. 1953), concerned what the court thought was an attempted gift causa mortis which failed for lack of delivery. The \textit{Marcum} case held that this was entirely a question of contract and not of gift.
\textsuperscript{14} \textit{Henderson Adm'r v. Bewley}, 264 S.W.2d 680 (Ky. 1953).
\textsuperscript{15} 369 U.S. 663 (1962).
\textsuperscript{16} 302 Ky. 729, 196 S.W.2d 369 (1946).