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Recent Decisions

RECENT DECISIONS

ADMINISTRATIVE LAW—PROCEDURE—JUDICIAL REVIEW—CONCLUSIVENESS OF BOARD "FINDINGS".—The National Labor Relations Board filed a petition in the Circuit Court of Appeals for the enforcement of its own order directed against the defendant, alleging that the defendant had been found guilty of unfair labor practices. The defendant attacked this order, claiming that it was illegal and invalid for want of a fair and open hearing in that the Board itself did not read and give judicial consideration to the evidence, but rather permitted its employees to make a report which was adopted without further consideration. It asked to be permitted to take the testimony of the Board upon the point. *Held,* that the Board's testimony may be taken to discover the details of its method of finding the facts, in order to determine if the Board complied with the correct method in using its review division. The Board may be likened to a busy Chancellor, and as a Chancellor may seek assistance from a Master, so the Board may be assisted by its "Review Division". But the parties ought to be given the opportunity for argument before the Board upon the recommendations of this division. *National Labor Relations Board v. Cherry Cotton Mills,* 98 F. (2d) 444 (C. C A. 5th, 1938).

The problem raised in this case concerns the extent to which the Circuit Court of Appeals will go in investigating the method by which the National Labor Relations Board arrives at its decision. The court points out that the Circuit Court of Appeals retains the right to pass on the fairness of the hearing before the Board. The very National Labor Relations Act itself provides for a review of the Board's final order,[1] on behalf of any person aggrieved by such an order. This act further provides that the findings of the Board shall be conclusive if supported by the evidence.[2] Previous cases involving the National Labor Relations Board have concerned themselves generally with an inquiry into whether the evidence supported the Board's conclusion.[3] Now, in determining whether the hearing in this case was fair, the court holds that it must take and hear the evidence to decide whether the Board proceeded lawfully in making up the findings of fact. In other words, it is held that the court can, and should, investigate the *method* by which the National Labor Relations Board had arrived at its decision, whereas formerly, the court did not concern itself with this. It did not before this case have the occasion to investigate the methods of the National Labor Relations Board in its fact finding.

Close to the present case, however, is the case of *Morgan v. United States.*[4] It was there held that under the Packers and Stockyards Act,[5] a full hearing before

1. 49 STAT. 453, 29 U. S. C. A. § 160 (f) (1935).

2. *Ibid.*

3. National Labor Relations Board v. Oregon Worsted Co., 96 F. (2d) 193 (C. C. A. 9th, 1938), where the court said that the fact finding of the Board is conclusive if supported by the evidence. To this effect see also, National Labor Relations Board v. Wallace Mfg. Co., 95 F. (2d) 818 (C. C. A. 4th, 1938); and Agwilines v. National Labor Relations Board, 87 F. (2d) 146 (C. C. A. 5th, 1936). The rulings of the court were in effect that it is up to the Board and not the court to say what evidence should be believed and what inferences should be drawn from it.

See also, National Labor Relations Board v. Washington, Virginia & Maryland Coach Co., 85 F. (2d) 990 (C. C. A. 4th, 1936); *certiorari* granted, Washington, Va. & Md. Coach Co. v. N.L.R.B., 299 U. S. 533, 57 Sup. Ct. 648 (1936). The law up to this time was, in effect, that the court would reverse and modify only those findings which were clearly improper due to a lack of supporting evidence.

4. 298 U. S. 468, 56 Sup. Ct. 906 (1936).

5. 42 STAT. 166, 7 U. S. C. A. § 211 (1921).

the Secretary of Agriculture required an opportunity to present evidence and to have it considered by the person in whose hands rested the final decision. It was implied that the court should make a complete inquiry into the case as to the evidence and facts found by an Administrative Board, and that the court would necessarily have to look to the method of the making of the order, in order to reach a fair result.[6]

The particular problem raised in the present case is whether the Board may delegate its judicial power to its employees, and if so, how far. The law, in this respect heretofore, has allowed Boards and Administrative Officers to delegate only certain ministerial acts, and has refused to permit the delegation of duties by any officer in which discretion and the exercise of judgment is required.[7] An official charged with discretionary action must perform the act himself and be guided by prescribed rules, and unless this is done, the act is arbitrary and unfair.[8] Despite the fact that administrative discretion is involved in the principal case the court does not cut off all possibility of delegation. It declares that the Board may use a reviewer of facts who is not a member of the Board. The procedure may be compared to equity practice which permits a busy Chancellor to seek assistance from a Master. But the warning follows: "if great reliance is to be placed on their conclusions and recommendations, argument before them or upon their recommendations, ought to be afforded the parties, after the analogy of proceedings before Masters. If this is not done, it seems . . . that the Board members must substantially master the record before adopting a report made to them which is unknown to the parties and unargued by them."[9] This analogy pointed out by the court seems to be new. Federal Practice allows for the appointment of Masters in Chancery by the district courts of the United States, provided that a majority of all the judges in the district concur in their selection.[10] A master is required to do all that he deems just and necessary to discover the truth of any matter referred to him,[11] but he has no authority to make judicial rulings,[12] his authority being merely regulatory in nature.[13]

6. A later case between the same two parties held that in order to constitute a fair hearing, there must be a reasonable opportunity to know the claims of the opposing party, and to meet them. Morgan v. United States, 304 U. S. 1 (1938). In National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U. S. 333, 351 (1938), it was said that so long as the latter requirement was complied with, there was a fair hearing, and no particular procedure was necessary.

7. State of Louisiana v. McAdoo, 234 U. S. 627, 34 Sup. Ct. 938 (1914), defines a ministerial act as an act involving neither the exercise of judgment nor discretion. Judicial functions cannot be delegated. Maroulas v. State Accident Commission, 117 Ore. 406, 244 Pac. 317 (1926).

8. See Morgan v. United States, 304 U. S. 1, 22 (1938); *cf.* United States v. Standard Oil Co., 20 F. Supp. 427, 449, n. 6 (D. C. Cal. 1937).

9. The court here cites *In re* National Labor Relations Board, 58 Sup. Ct. 1001, 82 L. Ed. 987 (1938), as confessing the essential fairness of such a procedure. The fact is that since the principal case arose, the Board has begun a practice of having an intermediate report made, and serving it on the parties and giving them an opportunity to discuss it. See instant case at p. 447.

10. FEDERAL RULES OF CIVIL PROCEDURE, Rule 53 (a), 28 U. S. C. A. (Supp. 1938).

11. See *id.*, Rule 53 (c), 28 U. S. C. A. (Supp. 1938). Goss Printing Co. v. Scott, 119 Fed. 941 (C. C. N. J. 1902).

12. Shapiro v. Engel, 257 Fed. 854 (E. D. N. Y. 1919).

13. FEDERAL RULES OF CIVIL PROCEDURE, Rule 53 (c), 28 U. S. C. A. (1938). Hoe v. Scott, 87 Fed. 220 (C. C. N. J. 1898).

His report is not adopted by the judges until the litigants have been given an opportunity to debate it before the judge.[14] Now by the principal case the "Review Division", like the Master in Chancery, would not be allowed to make any finally conclusive ruling in the case, without giving the litigants an opportunity to object to the report submitted and to argue its correctness before the Board.

The case discloses the unfolding of a new feature of administrative law which combines at once a widening power of delegation in boards and commissions and a guaranty of a fair review of the findings by the board members. The innovation is a promising and a commendable one.

CONTRACTS—ARBITRATION—STATUTE OF FRAUDS.—The petitioner sold certain goods to respondent. In confirmation of the sale, the petitioner sent respondent a standard form of sales note which he had signed. The respondent retained the note, but never signed it. The transaction involved goods in excess of $50.00 in value. The respondent neither accepted delivery nor paid the purchase price, nor any part thereof. In this sales note there was a provision that all controversies under the agreement were to be submitted to arbitration. When the respondent refused to submit to arbitration proceedings, the petitioner sought by this application to compel it to do so. The respondent opposed the application upon the ground that the contract in question, not having been signed by the party sought to be charged, was unenforceable under the provisions of the Statute of Frauds and that, therefore, there were no questions for determination at arbitration. On appeal from an order of the Special Term denying petitioner's application, upon the ground that the agreement was in violation of the Statute of Frauds and that arbitration would be academic, *held,* one justice dissenting, a new trial must be had on the issue whether a valid contract to arbitrate existed. If so found, the Statute of Frauds cannot be set up in bar of a petition to compel arbitration in a controversy arising under a written agreement, even if not signed by the party to be charged. Order reversed. *Matter of Exeter Manufacturing Company,* 254 App. Div. 496, 5 N. Y. S. (2d) 438 (1st Dep't 1938).

Under the provisions of the Statute of Frauds, contracts for the sale of goods over $50.00 in value are unenforceable *by an action* unless the buyer shall accept part of the goods, and actually receive the same; or give something in earnest to bind the contract, or as part payment; *or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged* or his agent in that behalf.[1]

The agreement in question involves goods worth more than $50.00 and does not satisfy the Statute of Frauds. Does, then, the mere presence of an arbitration provision in the agreement eliminate this legal defense and thus create an enforceable obligation to arbitrate? The answer will be found and better understood in the light of an analysis of the law which governs arbitration proceedings.

Arbitration agreements were always valid and legal at common law;[2] but only damages were recoverable for a breach of a contract to arbitrate;[3] no specific performance of the promise could be enforced; nor could the promise be pleaded to de-

14. See *id.,* Rule 53 (e), 28 U. S. C. A. (1938). In a non-jury action this rule provides 10 days to except after the master's report is filed. In a jury action the master shall not be directed to report evidence.

1. N. Y. PERS. PROP. LAW (1911) § 85.

2. See Luedinghaus Lumber Co. v. Luedinghaus, 299 Fed. 111, 113 (C. C. A. 9th, 1924).

3. Haggart v. Morgan, 5 N. Y. 422 (1851).

feat an action brought despite the arbitration provision.[4] Obviously such legal impediments to the enforcement of one's right to arbitrate did little to encourage the growth of this form. To stimulate its use in the settlement of controversies, the legislature in New York passed an arbitration law.[5] Its purpose was to put "teeth" in an arbitration agreement by making the promise to arbitrate specifically enforceable.[6] If an agreement for arbitration exists and there is a dispute which comes within the provisions of the contract, it is the duty of the court under the present state of the law to enforce the agreement.[7] The arbitrator assumes complete jurisdiction as the legal substitute for the court in the settlement of the controversy.[8] In any proceeding to compel arbitration, then, there is but one primary issue before a court of law,—is there in existence a valid agreement between the parties to arbitrate the dispute in question?[9] If there is, the Court must compel arbitration; there is no discretion. All remaining questions are not within the province of the court; they are for the arbitration tribunal.[10]

In the case at bar, the dissenting justice suggests that the agreement be considered as a whole, and as primarily an agreement for the sale of goods, in determining whether the Statute of Frauds applies to defeat the agreement and the application to compel arbitration. The Statute of Frauds would then defeat the plaintiff. Although the majority comes to an opposite conclusion, it does not expressly state

4. Finucane Co. v. Board of Education, 190 N. Y. 76, 83, 82 N. E. 737, 739 (1907). Although arbitration was recognized at early common law as a mode of adjusting matters in dispute, it appears that the earlier tendency of the courts was to construe provisions for arbitration so as to defeat them. Such provisions were not originally favored by the courts. See Simmonds v. Swaine, 1 Taunt. 549, 554, 127 Eng. Reprints 947, 949 (C. P. 1809). This hostility, however, has long since disappeared. Courts now encourage arbitration because the proceeding represents a method of the parties' own choice and furnishes a more expeditious and less expensive means of settling controversies. Milwaukee American Ass'n v. Landis, 49 F. (2d) 298 (E. D. Ill. 1931).

5. N. Y. ARBITRATION LAW (1920).

6. Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109 (1924); Matter of Berkovitz v. Arbib & Houlberg, Inc., 230 N. Y. 261, 130 N. E. 288 (1921).

7. Matter of Kelley, 240 N. Y. 74, 147 N. E. 363 (1925), *rev'g*, 209 App. Div. 870, 205 N. Y. Supp. 931 (1st Dep't 1924).

8. American Eagle Fire Ins. Co. v. New Jersey Ins. Co., 240 N. Y. 398, 148 N. E. 562 (1924), *rev'g*, 210 App. Div. 879, 206 N. Y. Supp. 879 (1st Dep't 1924). In Matter of General Silk Importing Co., Inc., 200 App. Div. 786, 194 N. Y. Supp. 15 (1st Dep't 1922), the court held that although arbitration agreements in this state are now enforceable, the rules heretofore applicable to the interpretation of contracts to determine whether the parties had agreed to arbitration, have not been abrogated. It is clear that in cases where parties agree to arbitrate, the courts, of course, will enforce such an agreement. But, on the other hand, since the contract to arbitrate presupposes an agreement to forego the right to resort to the courts for redress, an alleged contract to arbitrate, which is disputed, will be subjected to strict construction in order that the parties may not be deprived of their constitutional rights to seek redress in the courts.

9. Matter of Kelley, 240 N. Y. 74, 147 N. E. 363 (1925). In the instant case, the dissenting justice expresses the belief that the pleadings raised an issue as to the existence of a contract to arbitrate, and that therefore, a jury trial should have been granted pursuant to N. Y. CIV. PRACT. ACT (1937) § 1450. For an interesting case, holding that an agreement to submit to the arbitration laws of a foreign country is not against public policy, see Gilbert v. Burnstine, 255 N. Y. 348, 174 N. E. 708 (1931).

10. N. Y. CIV. PRACT. ACT (1937) § 1450.

a belief that two separate contracts exist. Even adopting a theory that there were two separate contracts in the agreement, an argument could be made that no relief would be afforded to the plaintiff because the separate contract for the sale of goods would be unenforceable under the Statute of Frauds. Arbitration would be academic. However, the majority arrived at its conclusion without concerning itself with the separability of the clauses into two contracts. It seems quite sound in assuming that while it might be true that the primary purpose of the contract was to sell goods, the parties indicate by their arbitration clause an intention to have that purpose effectuated by the rules of arbitration proceedings.

The enforceability of an agreement to arbitrate is governed by the provisions of the Civil Practice Act.[11] Such an agreement, to be binding, need merely be in writing.[12] Unless properly revoked upon such grounds as may exist at law or in equity for the revocation of an agreement, a written arbitration provision leaves the court with no jurisdiction other than to compel submission to the arbitration tribunal.[13] The Statute of Frauds here involved is not a ground at law or in equity for the "revocation" of the contract; nor does it make a contract within its purview void, but merely *unenforceable* by an *action*.[14] It is a rule of procedure.[15] A court of law then, on a motion to compel arbitration, need only consider whether or not a *valid* contract exists and hence the Statute of Frauds does not affect the validity of an agreement to arbitrate. Furthermore this Statute of Frauds was not intended to cover agreements to arbitrate which have their own separate Statute of Frauds.[16]

11. N. Y. Civ. Pract. Act (1921) § 1448.

12. N. Y. Civ. Pract. Act (1937) § 1449.

13. Newburger v. Lubell, 257 N. Y. 213, 177 N. E. 424 (1931). In this case the contract involved transactions between customer and stockbrokers. The contract provided that ". . . any controversy arising between us shall be determined by arbitration. . . ." Thereafter the customer executed a written guarantee for any debit balance of his brother. The customer being called upon to pay a deficit resulting from his brother's account, claimed that the guaranty had been canceled, whereupon the brokers charged his account with the deficit and closed it out. The court held that it was the clear intent of the agreement between the parties that any controversy concerning the manner in which brokers dealt with securities in their customer's account should be determined by arbitration. It is immaterial how the controversy arose. See Gilbert v. Burnstine, 255 N. Y. 348, 354, 174 N. E. 706, 707 (1931).

14. Prior to the passage of the Personal Property Law or that part of it regulating the sale of goods (N. Y. Pers. Prop. Law (1911) § 82 *et seq.*), the Statute of Frauds made a contract for the sale of goods for the price of $50 or more void unless it complied with the provisions set forth therein. By the N. Y. Pers. Prop. Law (1911) § 85, the law was changed so that the same Statute of Frauds made a contract merely unenforceable by action. The effect of this amendment would seem to be that the contract was declared valid for at least some purposes, although it could not be "enforceable by an action."

15. Crane v. Powell, 139 N. Y. 379, 34 N. E. 911 (1893).

16. N. Y. Civ. Prac. Act (1937) § 1449. This section distinguishes between future and existing controversies to be submitted to arbitration, the former need only be in writing, while the latter must be both in writing and signed by the party to be charged. It is evident from these distinguishing features that the legislature intended to bring agreements for arbitrating future controversies beyond the scope of the Statute of Frauds. The dissenting opinion of Callahan, J., in the instant case, states the belief that the legislature in adopting the above section intended merely to exclude oral proof of agreements for arbitration. It did not intend to repeal the provision of the Statute of Frauds requiring a memorandum signed by the party to be charged. Japan Cotton Trading Company v. Farber, 233 App. Div. 354, 253 N. Y. Supp. 290 (1st Dep't 1931).

Likewise from the fact that arbitrators, in their consideration of any controversy, are bound by no rules of law or evidence,[17] it may be seen that rules of procedure for enforcing actions do not cover them. They are the sole judges of the manner in which the hearing shall proceed and of the nature of the testimony to be presented.[18] In the absence of fraud, undue influence, or similar circumstances, their decisions are final and not subject to review.[19]

A careful reading of Section 85 of the Personal Property Law reveals that a contract which violates its provisions is merely declared to be unenforceable by an action. Were this an *action* at law there would be no doubt that this statute would constitute a complete bar to any recovery by the plaintiff.[20] But as neither arbitration proceedings nor applications to compel submission to an arbitration are actions,[21] it would appear that for this reason alone the Statute of Frauds is inapplicable to defeat a party's right to arbitrate. It seems readily understandable, therefore, why, under general principles of law, the majority of the justices adopted the view that the Statute of Frauds cannot be set up in bar of an application to compel arbitration of the present dispute.

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY OF LIE-DETECTOR.—The defendant was indicted for murder in the first degree. A motion was made by him to allow him to be subjected to an examination by a lie-detector. The motion was denied in the lower court[1] on the ground that there was no general scientific recognition that such a test was valid and feasible. On appeal from the judgment of conviction, *held,* judicial notice cannot be taken of the effectiveness of the lie-detector in the absence of evidence tending to show its general scientific recognition. No error was committed in the denial of the motion. Conviction affirmed. *People v. Forte,* N. Y. L. J. Dec. 22, 1938, p. 1, col. 1.

17. Wheat Export Company v. New Century Company, 185 App. Div. 723, 173 N. Y. Supp. 679 (1st Dep't 1919), *aff'd, In re* Wheat Export Company, 227 N. Y. 595, 125 N. E. 926 (1919).

18. Pine St. Realty Company, Inc. v. Coutroulos, 233 App. Div. 404, 253 N. Y. Supp. 174 (1st Dep't 1931), application for leave to appeal denied, 258 N. Y. 609, 180 N. E. 354 (1932).

19. *Ibid.*

20. Fancher v. Bradley, 111 N. Y. Supp. 684 (Sup. Ct. 1908), where it was held that the Statute of Frauds, when properly pleaded and sustained by the evidence, is an absolute defense to an action.

21. N. Y. ARBITRATION LAW (1923) § 6a. The proceedings to compel arbitration and the arbitration itself are special proceedings, and therefore various statutory provisions which apply only to actions do not apply to such proceedings. It has been held that there may be no bill of particulars in an arbitration proceeding. Smyth v. Board of Education, 128 Misc. 49, 217 N. Y. Supp. 799 (Sup. Ct. 1925), nor an examination before trial, Matter of Isidor Schwartz, 127 Misc. 452, 217 N. Y. Supp. 233 (Sup. Ct. 1925) although depositions may be obtained for use in such proceedings. Matter of Interocean Mercantile Corp., 207 App. Div. 164, 201 N. Y. Supp. 753 (1st Dep't 1923). The earlier cases *contra,* involving the same petitioner [236 N. Y. 586, 142 N. E. 294 (1923), and 204 App. Div. 284, 197 N. Y. Supp. 706 (1st Dep't 1923) *aff'd,* 236 N. Y. 587, 142 N. E. 295 (1923)], were based on the belief that the arbitration itself was not a special proceeding. In order to meet these decisions, § 6a, making the arbitration a special proceeding, was added to the Arbitration Law of New York.

1. People v. Forte, 167 Misc. 868, 4 N. Y. S. (2d) 913 (County Ct. 1938).

The instant decision does not terminate the interesting debate among members of the New York bench and bar on the question of the admissibility of the lie-detector test. In *People v. Kenny*[2] the Queens County Court admitted into evidence the results of a lie-detector test. In the present case the Kings County Court, shortly after the *Kenny* case, denied what was accepted in the *Kenny* case, namely, that the pathometer test was based on principles scientifically acceptable. The present Court of Appeals decision does not side with either view but simply asserts that in the printed record there is no evidence of the scientific value of the lie-detector upon which to admit it. In previous cases, *Frye v. United States*[3] and *State v. Bohner*,[4] the validity of a lie-detector as a scientific instrument was denied because its principle had not achieved sufficient scientific recognition to warrant a reliance on its findings. But it must be pointed out that those cases involved systolic blood-pressure tests which are entirely different from the pathometer used in New York.

Based on the premise that conscious deception is accompanied by physical reactions, various scientific methods have been proposed[5] since the turn of the century to gauge as accurately as possible the manifestations of true and false testimony. The Marston systolic blood-pressure test[6] which was denied admission in the *Frye* case in 1923 claimed an accuracy rating of approximately 94%.[7] Ten years later a Keeler polygraph test (which was a modification of the blood-pressure method but was said by its proponents to be more efficient than the Marston test[8]) was refused admission in the *Bohner* case.[9] The Summers pathometer[10] which was recognized in the *Kenny* case but refused admission in the instant case operates on a wholly different principle from that of the blood-pressure method. It records the electrical phenomena which are developed in the sweat glands when an emotional disturbance occurs. The subject holds an electrode in the palm of each hand while a stylograph records his reactions to the interrogation. An important factor of the test is the manner and sequence of the questioning,[11] which necessitates a high degree of psycho-

2. 167 Misc. 51, 3 N. Y. S. (2d) 348 (County Ct. 1938), noted in (1938) 86 U. PA. L. REV. 903. This was the first reported case in the United States to admit the results of a lie-detector test. Trial courts in a few unreported cases in Illinois, Indiana, Ohio and Wisconsin are also said to have admitted a lie-detector test. See MARSTON, THE LIE DETECTOR TEST (1938) 69. A search has revealed no reported civil cases involving the lie-detector.

3. 293 Fed. 1013 (App. D. C. 1923), noted in (1924) 37 HARV. L. REV. 1138 and in (1924) 24 COL. L. REV. 429.

4. 210 Wis. 651, 246 N. W. 314 (1933), noted in (1933) 18 MINN. L. REV. 76 and in (1933) 24 J. CRIM. LAW 440.

5. There have been five types of tests developed: the Jung association word-reaction time test, the Benussi respiration test, the blood-pressure test, the "truth serum" or "twilight sleep" test, and the psychogalvanometric test. See McCormack, *Deception-Tests and the Law of Evidence* (1927) 15 CALIF. L. REV. 484.

6. For a description of the Marston test, see Marston, *Psychological Possibilities in the Deception Tests* (1921) 11 J. CRIM. LAW 551.

7. *Id.*, at 569.

8. LARSON, LYING AND ITS DETECTION (1932) 266.

9. As a matter of fact, in the Bohner case the test had not been performed because Prof. Keeler felt it was not ready for the courts. See (1933) 24 J. CRIM. LAW 440.

10. The pathometer, a refinement of the psychogalvanometer, is the work of the late Rev. Walter G. Summers, S.J., head of the psychology department of the FORDHAM UNIVERSITY GRADUATE SCHOOL.

11. In the pathometer test, questions wholly extraneous to the investigation at hand and

logical training on the part of the operator.[12] To date the pathometer has been used in over 6,000 laboratory tests and forty-nine actual pre-trial cases[13] with an accuracy rating of 98%.[14] Hence materials showing the weakness of the blood-pressure test which were cited by the Kings County Court in the instant case have no bearing on the pathometer's reliability.[15]

The result of a lie-detector test—if eventually granted admission by the courts—will be presented to the jury by the testimony of the expert[16] who performed the test on the witness. For this reason it is said to be nothing more than expert opinion evidence as to the credibility of the witness.[17] It makes no claim in court of ascertaining conclusively whether the accused—if he becomes a witness on his own behalf[18]—did or did not commit the crime charged. It is merely intended as an aid to the jury in determining if the witness is worthy of belief. Some margin of error might be allowed in the general results of the test without rendering the evidence inadmissible. Waiting for the advent of an absolutely infallible lie-detector[19] is like waiting for the irrefutable proof. Such a lie-detector would lessen, to a degree, the value and necessity of the jury, due to the omniscient nature of this "infallible instrument".

Because of the psychological element involved—both in the subject of the test and in the interpretation of its results by the operator—a lie-detector even nearly perfect is utopian. Surely if sufficient data can be accumulated to substantiate the 98% accuracy rating of the pathometer—and this to the satisfaction of the scientific world—that would be sufficient to insure its admission into evidence.[20]

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designed to elicit a normal emotional response are asked in order to determine the subject's emotional norm. Hence when a significant question is asked, there is said to be no difficulty in distinguishing a reaction caused by conscious lying from one caused by fear or nervousness.

12. Members of law enforcement agencies who intend to use the pathometer are first required to take a course in its theory and operation in the psychology department of the Fordham University Graduate School. (Conversation with Dr. Joseph F. Kubis, acting head of the psychology department of the FORDHAM UNIVERSITY GRADUATE SCHOOL.) This procedure is also recommended by Marston. See MARSTON, THE LIE DETECTOR TEST (1938) 149.

13. At present, the pathometer is being used in pre-trial investigation by the New York State Police, the Westchester County (N. Y.) District Attorney's office, the Sheriff's office of Paterson, N. J., and the Michigan State Police. (Conversation with Dr. Kubis.)

14. (1938) 29 J. CRIM. LAW 287, 289.

15. People v. Forte, 167 Misc. 868, 870, 4 N. Y. S. (2d) 913, 915 (County Ct. 1938).

16. This procedure was followed in People v. Kenny, 167 Misc. 51, 3 N. Y. S. (2d) 348 (County Ct. 1938), and was proposed in Frye v. United States, 293 Fed. 1013 (App. D. C. 1923) and State v. Bohner, 210 Wis. 65, 246 N. W. 314 (1933).

17. People v. Forte, 167 Misc. 868, 869, 4 N. Y. S. (2d) 913, 914 (County Ct. 1938); 2 WIGMORE, EVIDENCE (2d ed. 1923) 237; 3 WHARTON, CRIMINAL EVIDENCE (1935) 2338; N. Y. L. J., April 12, 1938, p. 1762, col. 1.

18. Would the introduction of lie-detector testimony which was against the defendant amount to self-incrimination? Some writers say not. See (1924) 37 HARV. L. REV. 1138; N. Y. L. J., Oct. 5, 1935, p. 1134, col. 1.

19. See People v. Forte, N. Y. L. J. Dec. 22, 1938, p. 1, col. 1, where it was said: "Can it be depended upon to operate with complete success on persons of varying emotional stability?"

20. In the principal case the court said: "Evidence relating to handwriting, finger printing and ballistics is recognized by experts as possessing such value that reasonable

DIVORCE—DUTY OF STEPFATHER TO SUPPORT CHILDREN.—The claimant sues the estate of the natural father to recover moneys expended for the support of three infant children. The claimant's present wife had been divorced from the deceased and the custody of the children was awarded to the deceased. Illness rendered him unable to work. The mother then undertook to care for the children and, with the claimant, moved into the house owned by the deceased as a tenant in common. On proceeding to establish the claim, *held*, the deceased's estate was not liable to the claimant for the support of the children since by marrying the mother the claimant assumed the obligation of support which devolved on her. *In re Weber's Estate*, 168 Misc. 757, 6 N. Y. S. (2d) 417 (Surr. Ct. 1938).

One of the most sacrosanct rules of the natural law is the mandatory obligation of the parent to develop the child physically, intellectually, and spiritually.[1] The great majority of jurisdictions recognize this moral obligation as a legal duty.[2] If the parent neglects that duty he remains liable to any third party who undertakes to furnish the child with necessaries or who supplies the wife with funds to purchase such necessaries.[3] A divorce is not considered a sufficient reason to release the father from his obligation to support his child even though the custody of the child is awarded to the wife.[4] Nor does the remarriage of the wife after a divorce release

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certainty can follow from tests. Until such a fact, if it be a fact, is demonstrated by capable witnesses in respect to the 'lie detector', we cannot hold as matter of law that error was committed in refusing to allow defendant to experiment with it."

1. 2 KENT COMM. 189. The right and duty of educating and developing the child in all its capacities is inalienable and its violation is an offense against commutative justice. 2 COX, LIBERTY—ITS USE AND ABUSE (1937) 174. See 6 FORDHAM L. REV. 462.

2. Authorities disagree as to whether or not a common law and independent of statutory provision a parent is under a legal obligation to support his children. Early English and American decicions generally held that the duty of a father was merely moral. Mortimore v. Wright, 6 M. & W. 482, 151 Eng. Reprints 502 (1840); Kelley v. Davis, 49 N. H. 187 (1870).

The weight of authority in this country regards the obligation as a legal one. Van Valkinburgh v. Watson, 13 Johns. 480 (N. Y. 1816); Edward v. Davis, 16 Johns. 281, 285 (N. Y. 1819); *In re* Ryder, 11 Paige 185, 187 (N. Y. 1844). For a further discussion see 1 SCHOULER, DOMESTIC RELATIONS (6th ed. 1921) 687.

In New York by statute it is a criminal offense for parents or those liable for the support of infant and minor children to abandon or refuse to support them. N. Y. PENAL LAW (1909) §§ 480-482.

3. See De Brauwere v. De Brauwere, 203 N. Y. 460, 463, 96 N. E. 722, 723 (1911); Laumeier v. Laumeier, 237 N. Y. 357, 364, 143 N. E. 219, 221 (1924). See WOODWARD, THE LAW OF QUASI-CONTRACTS (1913) § 194.

However, those jurisdictions which regard the duty of the father to support the children merely as a moral one logically refuse to recognize his liability to any third party who might support them. Kelley v. Davis, 49 N. H. 176 (1870); *In re* Ganey, 93 N. J. Eq. 389, 116 Atl. 19 (1922).

4. Many decisions hold that the father's legal obligation is discharged because he is deprived of the services of the child. Burritt v. Burritt, 29 Barb. 124 (N. Y. 1859); Husband v. Husband, 67 Ind. 583 (1879).

However, the weight of authority refuses to absolve the father from this duty despite the custody of the children being awarded to the wife. Alvey v. Hartwig, 106 Md. 254, 67 Atl. 132 (1907); White v. White, 154 App. Div. 250, 138 N. Y. Supp. 1032 (2d Dep't 1912). See (1928) 42 HARV. L. REV. 112; also, (1930) 15 CORN. L. Q. 624.

the father of his duty even though the children are in her custody.[6] It is the rule in New York today that the father is legally chargeable with the support of his child, while the obligation of the stepfather is only secondary and may be only invoked and enforced by a public welfare official when the child is or may become a public charge.[6] But the court, in the instant case, seems to be flying in the face of the principles of law which place the stepfather's responsibility on a secondary level and the natural father's duty in a primary position.

It is true that the law sometimes casts responsibility on the step-father. Thus, if a step-parent voluntarily receives the stepchild into his family and treats it as a member thereof, the rights, duties, and liabilities of such person become the same as those of the lawful parent.[7] The step-parent, in such a case, stands in *loco parentis* to the child, thus assuming the burden of the parental duties. The assumption of this relation is a question of intention which may be shown by the acts and declarations of the person alleged to stand in that relation. It is not necessary that a person go through the formalities necessary to legal adoption in order to assume the parental obligations.[8] Nor does the relation in *loco parentis* merely arise by the marriage of the stepfather to the mother.[9] The circumstances in each individual case must determine the result. However, it may be said that the law encourages the assumption of such a relation since it tends to promote the best interests of the children and is conducive toward a happy family group.

In prior cases, where the stepfather has been held legally responsible for the support of his stepchildren, there were facts which indicated an intent by the stepfather to assume the obligation. The facts in the leading New York case, *Sharp v. Cropsey*,[10] disclose that the natural father had died and that the stepfather received the child of his wife into his family and clothed, schooled, and treated him in all respects as he did his own children. Similarly, in other cases where the stepfather has been held liable, the courts have been able to find clear evidence disclosing the voluntary assumption of the parental duties by the step-father.[11]

The facts in the instant case do not clearly indicate that the claimant had the

5. Jones v. Jones, 161 Misc. 660, 292 N. Y. Supp. 221 (Dom. Rel. Ct. 1937); People *ex rel.* Wagstaff v. Matthews, 168 Misc. 188, 5 N. Y. S. (2d) 516 (Sup. Ct. 1938).

6. N. Y. PUBLIC WELFARE LAW (1929) § 125; People v. Fermoile, 236 App. Div. 388, 259 N. Y. Supp. 564 (4th Dep't 1932); People *ex rel.* Wagstaff v. Matthews, 168 Misc. 188, 5 N. Y. S. (2d) 516 (Sup. Ct. 1938). An action to enforce the liability of the stepfather must be brought by a public welfare official and not by any interested party. People *ex rel.* Wagstaff v. Matthews, *supra.*

7. 2 KENT COMM. 192; Cooper v. Martin, 4 East. 77, 102 Eng. Reprints 759 (K. B. 1803); Sharp v. Cropsey, 11 Barb. 224 (N. Y. 1851); Rule v. Rule, 204 Iowa 1122, 216 N. W. 629 (1927). It is reasonable to presume, in the absence of evidence to the contrary, that a stepfather consents to become legally responsible for the support of stepchildren whom he receives into his home and treats as members of his own family. The presumption is stronger when the natural parent of such children is dead than when he is alive. It is also true that the stepchild cannot sue the stepfather for services performed when such child has been treated as a member of the family. Williams v. Hutchinson, 3 N. Y. 312 (1850); Sharp v. Cropsey, 11 Barb. 224 (N. Y. 1851).

8. Meisner v. United States, 295 Fed. 866 (W. D. Mo. 1924).

9. Davis v. Gallagher, 37 App. Div. 626 (4th Dep't 1899).

10. 11 Barb. 224 (N. Y. 1851).

11. Cohen v. Lieberman, 157 Misc. 844, 284 N. Y. Supp. 970 (Munic. Ct. 1936); Inhabitants of Guilford v. Inhabitants of Monson, 134 Me. 261, 185 Atl. 517 (1936); State *ex rel.* Deckard v. Macom, 186 S. W. 1155 (Mo. 1916).

intention of becoming legally responsible for the support of his wife's children.[12] There is nothing to show that he held the children out to the world as his own, nor that he adopted them. The court points out that the evidence does not disclose that the claimant made any objection to the arrangements and he in fact moved into the home owned by the former husband and wife as tenants in common. However, it is submitted that the claimant's apparent consent to the arrangement by his silence and occupation of the deceased's home fails to prove sufficiently that he intended to become responsible for the support of the children. It is conceivable that the claimant moved into the home of the deceased believing that the deceased would bear all expenses incurred in the support of the children as the natural father.[13]

The court appears to conclude that the responsibility of caring for the children automatically became the legal obligation of the claimant by his marriage to the mother.[14] Concededly, it became the duty of the wife to assume the care of the children when the natural father became disabled.[15] However, her duty did not become the duty of the claimant. It seems that she had no authority to bind the claimant by taking the children into the home and caring for them. He was an independent third party in respect to the children. It is submitted that the artificial relationship between him and the children could not be substituted for the natural relationship without more evidence of an intention to assume such a relationship.

Perhaps the decision can be explained on the ground that the court, as it said, viewed the entire situation from an equitable standpoint. Yet equitably and morally the result seems hard to justify. If the father is primarily liable and another has relieved him of that burden at expense to himself there is no reason why he or his estate should not reimburse the stranger if he is able. In the absence of any express agreement the stepfather was under no moral obligation to support the children who

12. The care of the children by the claimant and his wife seemed to have been a temporary arrangement during the illness of the deceased. This appears from the following statement of the deceased while he was in the hospital: "I don't know whether I will ever get out of here again but if I do I will take care of the kids." This remark affords some inference that the deceased considered himself legally responsible for the support of his children and that the surrender of their custody to the wife and the claimant was not to remain permanent.

13. The mere fact that the stepchildren live with the stepfather is not conclusive against his right to be compensated for the expense of their support. Freto v. Brown, 4 Mass. 674 (1808); Marshall v. Macon Sash, Door, and Lumber Co., 103 Ga. 725, 30 S. E. 571 (1898).

14. It is provided in N. Y. Dom. Rel. Ct. Act (1933) § 101 (5) and N. Y. Pub. Welfare Law (1929) § 125 that the step-parent is legally chargeable with the support of a step-child likely to become a public charge. In the case of Jones v. Jones, 161 Misc. 660, 292 N. Y. Supp. 221 (Dom. Rel. Ct. 1937) it was held that where the mother of a child obtains a divorce from the father thereof, and thereafter remarries, the obligation to support the child rests upon both the natural father and the stepfather, whoever is in a position to support such child, if the child is in imminent danger of becoming a public charge. However, it must be understood that the liability of the stepfather is only secondary, the natural father being primarily liable. People *ex rel.* Wagstaff v. Matthews, 168 Misc. 188, 5 N. Y. S. (2d) 516 (Sup. Ct. 1938). There was no evidence in the instant case that the children were likely to become public charges so that the above statutes would not be applicable.

15. The mother generally becomes liable for the support of her minor children upon the death of the father. Gray v. Durland, 50 Barb. 100 (N. Y. 1867); Furman v. Van Sise, 56 N. Y. 435 (1874). She will not be liable if the child has an estate or income of its own. *In re* Lyons' Estate, 137 N. Y. Supp. 171 (Surr. Ct. 1912).

were not in any blood relationship. According to the principles of quasi-contracts, the natural father was under a duty to reimburse the claimant for the service he rendered. The court's line of reasoning by which the result was reached is difficult to follow.

EQUITABLE LIENS—AGREEMENTS FOR THE SUPPORT OF AGED PERSONS.—The plaintiff brought a suit to obtain an interest in, and impress an equitable lien upon, certain real property. He had furnished the defendant with the purchase money for the lot and had built a house upon it for him. Later, in consideration of the plaintiff's relinquishing the debt, the defendant and his wife agreed to board the plaintiff for the remainder of his life and give him a decent burial at death. This agreement was made within the time allowed the plaintiff to file a statutory lien for the work done on the house, which lien was not filed. Upon the death of the defendant's wife some five years later, the defendant refused to perform the agreement. After the plaintiff filed this suit, the defendant fraudulently conveyed the property to a third party. On appeal from a judgment dismissing the complaint, *held,* one justice dissenting, that an equitable lien will not be granted as there was no evidence that the plaintiff was an aged person or that a fiduciary relationship existed between the parties. The remedy at law was adequate. Judgment affirmed. *Van Sickle v. Keck,* 42 N. M. 450, 81 P. (2d) 707 (1938).[1]

For the past century, contracts for the support of persons have been placed by the majority of the courts in a particular category of cases.[2] Most of these agreements are made by aged persons seeking security in their twilight years without the burden of assuming responsibilities necessarily connected with the ownership of real property. Such persons part with their property relying upon the promises of their grantees to support them. Often when the promised support is not forthcoming, it is found that subsequent conveyances have carried the original property to other parties and the defendant is irresponsible. Because, then, a suit at law will generally give the plaintiff a worthless paper judgment, and, in equity, a suit for specific performance could not succeed in the face of equity's repulsion to the enforcement of affirmative agreements for intimate personal services,[3] the type of relief appropriate for the aged person presents a question of some difficulty.[4] Many courts have found a

1. The court also assigned as grounds for refusing relief the fact that the plaintiff's improvements were not made in ignorance of the defendant's title, nor was there any actual fraud in the transaction's inception. These grounds are not discussed in this note.

2. "By the modern trend of authority these transactions are placed in a class by themselves and enforced without reference to the form or phraseology of the writing by which they are expressed." Bruer v. Bruer, 109 Minn. 260, 262, 123 N. W. 813, 814 (1909); *cf.* Lewis v. Wilcox, 131 Iowa 268, 108 N. W. 536 (1906); notes (1912) 43 L. R. A. (N. S.) 916.

3. CLARK, EQUITY (1921) § 62.

4. In some cases, relief, whether equitable or legal, is granted without any pretense of attributing legal causes to a conclusion which is undoubtedly just and proper. Peck v. Hoyt, 39 Conn. 9 (1872); Lewis v. Wilcox, 131 Iowa 268, 108 N. W. 536 (1906); Bruer v. Bruer, 109 Minn. 260, 123 N. W. 813 (1909), disapproved in Peters v. Tunell, 43 Minn. 473, 45 N. W. 867 (1890). Of course, where the agreement expressly creates an estate upon condition, the courts find little difficulty in rescinding the contract and ordering a reconveyance of the realty. Johnson v. Paulson, 103 Minn. 158, 114 N. W. 739 (1908); Sanchez v. Sanchez, 22 N. M. 95, 159 Pac. 669 (1916); 5 WILLISTON, CONTRACTS (rev. ed. 1937) 4068, n. 4. Where a condition is not expressed, courts will sometimes imply a condition in law. Jancovech v. Christenson, 100 Ind. 299, 195 N. E. 287 (1935); Glocke v.

solution by impressing an equitable lien upon the property.[5] The net result of such a decision is that the property itself is subjected to the payment of the support and subsequent purchasers with notice take subject to the lien.[6] Although it seems that on theory the nature of an equitable lien should require that there exist at the time that the transaction affecting the property took place, an intent to charge the realty with a lien,[7] yet, there is considerable conflict when such a doctrine is applied to agreements, for support. Some courts hold that an express intent is necessary,[8] others educe intent from meager evidence[9] while some courts ignore the question entirely.[10] The court in the principal case seems to be arguing that an express intent to charge the realty involved in the transaction with a lien is necessary.[11] Suffice it to say, some courts do not expressly require this element.

However, without emphasizing the question of intent, the majority opinion in the principal case refuses a lien on other grounds which seem to be, at least, debatable. Its first contention is that the plaintiff did not plead or prove that he was in fact sufficiently *aged* to come under the rule granting relief in this class of cases. While it is true that the majority of cases are those concerned in fact with aged people, yet, it appears that such a condition is only incidental rather than essential.[12] Up to the

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Glocke, 113 Wis. 303, 89 N. W. 118 (1902). *Contra*: Bruer v. Bruer, 109 Minn. 260, 123 N. W. 813 (1909); Lowman v. Crawford, 99 Va. 688, 40 S. E. 17 (1901). Other times the courts declare that the grantee has violated a trust which was created under the contract. Stephens v. Daly, 266 Fed. 1009 (App. D. C. 1919); RESTATEMENT, RESTITUTION (1937) § 201 (1). Other grounds for relief are found where there has been fraud in the conveyance because of the misrepresentations of the grantee. Salyers v. Smith, 67 Ark. 526, 55 S. W. 936 (1900); Sherrin v. Flinn, 155 Ind. 422, 58 N. E. 549 (1900); Spangler v. Yarborough, 23 Okla. 806, 101 Pac. 1107 (1909). *Contra*: Gardner v. Knight, 124 Ala. 273, 27 So. 298 (1899). Tyson v. Adams, 116 Va. 239, 81 S. E. 76 (1914) (the failure to support is treated as a failure of the consideration of the contract). Shepardson v. Stevens, 77 Mich. 256, 43 N. W. 918 (1889) (the remedy at law would be inadequate).

5. Stephens v. Daly, 266 Fed. 1009 (App. D. C. 1919); Webster v. Cadwallader, 133 Ky. 500, 118 S. W. 327 (1909); Chase v. Peck, 21 N. Y. 581 (1860). "Less violence is done to established principle by raising a lien or charge *ex aequo et bono* in the grantor's favor than by annulling the deed." 2 POMEROY, EQUITABLE REMEDIES (3d ed. 1905) 686 n. 56.

6. "If the owner of the property subject to an equitable lien disposes of it, in hostility to the lien, to a *bona fide* purchaser without notice of the lien so that the lien is destroyed, the lienor has a cause of action against the person so selling the property for the restoration of such equitable lien." JONES, LIENS (1888) § 95. *Cf.* 1 JONES, MORTGAGES OF REAL PROPERTY (1928) § 225; THOMAS, MORTGAGES (1914) § 68.

7. Di Niscia v. Olsey, 162 App. Div. 154, 147 N. Y. Supp. 198 (2d Dep't 1914); *cf.* 1 JONES, LIENS (2d ed. 1894) § 31.

8. Loar v. Poling, 107 W. Va. 280, 148 S. E. 114 (1929); Whipp v. Whipp, 110 W. Va. 361, 158 S. E. 382 (1931).

9. Childs v. Rue, 84 Minn. 323, 87 N. W. 918 (1901); Doescher v. Doescher, 61 Minn. 326, 63 N. W. 736 (1895).

10. Stephens v. Daly, 266 Fed. 1009 (App. D. C. 1919).

11. See instant case 81 P. (2d) 707, 709. "The agreement for plaintiff's support and burial was apparently not thought of until after the house was completed", and at p. 712, "He [the plaintiff] never owned any interest in the land in question nor did he convey any to defendant."

12. Relief was given to a grantor described as "a widow, not aged" (although it appears she was about 67 years old). Peck v. Hoyt, 39 Conn. 9 (1872). It might very well appear, as the dissenting opinion in the principal case argues [81 P. (2d) 707, 714], that the

present case *age* has not been expressly made a necessary condition for relief although an agreement for support is of a type generally appealing to aged people only. Throughout the whole of its argument for restitution of the realty upon the defendant's failure to support, the Restatement[13] makes no mention of the necessity of the plaintiff's being an aged person. Of course, on principle, there is no reason why the aged should receive greater protection when they are competent in handling their affairs.

Secondly, it is contended that the plaintiff and the defendant are not in any fiduciary connection as they were not related. But the cases do not demand that the plaintiff prove any such condition. Admittedly, blood relationship (or that arising from marriage) is the usual situation and provides the occasion for confidence but courts have often granted relief where the relationship was not that of blood or affinity.[14] It is not the blood relationship which is the determining factor but rather the trust relation whereby one person reposes special confidence in the other.[15] Although the plaintiff may not have attained the age at which he would have been completely dependent upon others for his support, and although he was not in the peculiar circumstances which often accompany such cases of agreement for the support of adult persons, yet it seems that this case satisfies the requirements of the fiduciary relationship. It is truismatic to note that no person strips himself of any property right on the word of a mere stranger that he will receive due compensation in the future, unless he takes a mortgage or some security. Nor does one make requests for the intimate personal service of support from mere strangers. These situations arise only when the person seeking support places implicit trust in the object of his bounty.

The learned court goes on to argue that the plaintiff's remedy at law is adequate when judgment is given at law in a suit for breach of contract and the property is attached. It points out that the conveyances to the later holders may be set aside because they were fraudulent.[15] Yet, it fails to note that the proceeding to set aside the fraudulent conveyances will again bring the plaintiff before the same bar of equity.

The final barrier to relief in this case is raised by the prevailing opinion when it invokes the Statute of Frauds requiring that an interest in land be created by an instrument in writing. Principles are stated in some cases from which it might be argued that the Statute of Frauds should not defeat the plaintiff. Although these cases are somewhat different on their facts they indicate that where the plaintiff has entirely performed his part of the agreement and a confidential relationship exists, these courts might consider the case as falling outside the Statute of Frauds.[16]

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plaintiff is in fact sufficiently aged as, at the time of the agreement, he had retired from his trade of carpentry and was conducting the business of a small hardware store. Furthermore, the agreement itself contemplating as it does the *burial* of the plaintiff, furnishes an indication of his advanced years.

13. RESTATEMENT, CONTRACTS (1932) § 354.

14. Peck v. Hoyt, 39 Conn. 9 (1872) (widow and son of tenants); Jancovich v. Christenson, 100 Ind. 299, 195 N. E. 287 (1935) (old man and his housekeeper); Lewis v. Wilcox, 131 Iowa 268, 108 N. W. 536 (1906) (aged couple and friendless boy); Chase v. Peck, 21 N. Y. 581 (1860) (foster parent and adopted son).

15. "A fiduciary relation is not limited to cases of trustee and *cestui que trust*, guardian and ward, attorney and client, or other recognized legal relations, but it exists in all cases in which confidence has been reposed and betrayed and in which influence has been acquired and abused." Catherwood v. Morris, 345 Ill. 617, 628, 178 N. E. 487, 493 (1931).

16. Wood v. Rabe, 96 N. Y. 414, 426 (1884) cited with approval in Quinn v. Phipps,

If the operation of the statute would defraud the plaintiff of his rights in the property on which he has expended his money, then the Statute must be prevented from becoming an instrument of fraud in the hands of unscrupulous parties and a court of equity should disregard it. In the case of *Leary v. Corvin*[17] where a daughter contributed the purchase price of a home to her parents upon the promise that the realty would revert to her on their death, the New York Court of Appeals gave the daughter an equitable lien on the property emphasizing the fact that the breach of the promise occurred while the parties were in a relation of "trust and confidence."

In conclusion, it should be admitted that the instant case differs from the majority of cases where equitable liens were imposed because of the circumstance that there was no actual conveyance of property by the plaintiff in consideration of the defendant's promise to support, nor was there any express promise of the defendant to charge his property in favor of the plaintiff. But the plaintiff did more than merely relinquish a debt for the defendant's promise. He forebore filing his statutory lien; he in effect gave up a legal lien on the real property involved, having the agreement for support in mind. It is submitted that such a relinquishment of the defendant's debt and his lien approximates a release of a property interest.

The purpose of a court of equity in these cases is to follow property interests unfairly acquired in transactions involving trust relationships, and it would seem that without doing violence to equitable principles, the court in the instant case might have granted the relief asked, instead of withholding it for a transaction which falls into formal grooves.

TRUSTS—SALVAGE OF MORTGAGES—DISPOSITION OF NET RENTS FROM PROPERTIES BOUGHT IN BY TESTAMENTARY TRUSTEES AFTER FORECLOSURE OF DEFAULTED MORTGAGES.—A testamentary trust provided for the payment of income to a beneficiary for life. Mortgages held by the trust estate were foreclosed and the properties covered thereby were bought in by the trustees. On the accounting of the trustees, an issue arose as to the disposition of the net rents during the time the properties remained unsold and were held by the trustees. The guardian *ad litem* for the living remainderman and the trustee *ad litem* for unborn remaindermen appealed from an adverse decree. *Held,* one judge dissenting, that the life tenants should be paid the net rents as a matter of right as they accrue. The net rents shall be based upon the return from each individual property. Deficits on the unproductive properties can be advanced out of the principal of the trust and such sums can be recouped when the properties are sold. Decree modified, and as modified, affirmed. *In re Nirdlinger's Estate,* 331 Pa. 135, 200 Atl. 656 (1938).

Unless specifically allowed by the trust instrument, no testamentary trustee is justified in investing funds in fee-simple or leasehold estates in land.[1] However,

93 Fla. 805, 113 So. 419, 422 (1927) and in Foreman v. Foreman, 251 N. Y. 237, 240, 167 N. E. 428 (1929), but see Sleeth v. Sampson, 237 N. Y. 69, 142 N. E. 355 (1923). In Wood v. Rabe, *supra,* there was a blood relationship and applicant for relief had been induced to give up his property in a transaction initiated by the defendant. But the court seemed to emphasize the trust relationship as the basis for affording relief. But see, Sleeth v. Sampson, 237 N. Y. 69, 142 N. E. 355 (1923). In that case there was no fiduciary relationship.

17. 181 N. Y. 222, 73 N. E. 984 (1905).

1. Under the common law rule only real property securities and government bonds were regarded as proper trust investments. King v. Talbot, 40 N. Y. 76 (1869); 3 BOGERT,

this general rule is subject to exception when it is necessary for the trustee to buy in property on the foreclosure of a mortgage held by the trust estate.[2] But it becomes the duty of the trustees to dispose of the realty as soon as practicable and reinvest the proceeds in legal securities.[3] The forced acquisition of the properties and their subsequent sale are operations to salvage the sums originally invested in the mortgages. Upon the resale of the properties the net salvage proceeds are apportioned between the life tenants and the trust corpus.[4] Consequently, any rents obtained from the properties during the time they remain unsold lose their character as income and are disposed of as part of the salvage proceeds.[5] Although these principles have received the approval of the courts, whenever questioned, there still remains to be determined the problem of whether while the properties remain unsold, the net rents, as they accrue, should be paid the life tenants on account of their ultimate distributive share in apportionment.

In the instant case the court points out that there are three possible methods of disposing of the net rents: (1) the net rents may be held by the trustees until the properties are sold, when they shall be apportioned according to a formula fixed by the court; (2) the trustees may pay over the rents or a portion thereof to the life tenant in the trustees' discretion; (3) all the net rents may as they accrue be paid to the life tenant as a matter of right (a) with a liability to refund to the corpus of the trust any amount received in excess of that which the formula gives,

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TRUSTS (1935) § 678. At present, in a great number of states, statutes enumerate the kinds of securities in which a trustee may invest. For typical statutes, see N. Y. DEC. EST. LAW § 111 (1938); PA. STAT. ANN. (Purdon, 1936) Tit. 20, § 801. Any other investment would be a breach of duty on the part of the trustee. *In re* Leonard's Will, 118 Misc. 598, 193 N. Y. Supp. 916 (Surr. Ct. 1922). For an interesting article discussing the standard of trustees see Woodruff, *Legal and Investment Standard of Trustees* (1935) 4 FORDHAM L. REV. 391, 407.

2. Valentine v. Belden, 20 Hun. 537 (N. Y. 1880); *In re* Baker, 8 Del. Ch. 355, 68 Atl. 449 (1899); 3 BOGERT, TRUSTS (1935) § 678; N. Y. BANKING LAW (1938) § 239 (9); PA. STAT. ANN. (Purdon, 1930) tit. 20, §§ 804, 3172.

3. Furniss v. Cruikshank, 191 App. Div. 450, 181 N. Y. Supp. 522 (1st Dep't 1920), *modified* on other grounds, 230 N. Y. 495, 131 N. E. 625 (1921), motion for new trial *denied*, 231 N. Y. 550, 132 N. E. 884 (1921); Willis v. Holcomb, 83 Ohio St. 254, 94 N. E. 486 (1911); RESTATEMENT, TRUSTS § 230.

4. On a former appeal concerning this estate [327 Pa. 171, 193 Atl. 30 (1937)], the trustees were instructed by the court to apportion the net salvage proceeds between the life tenants and the trust corpus, and the rule set forth in the RESTATEMENT, TRUSTS, § 241 was adopted as the method of apportionment. Apportionment is allowed in order to reimburse the life tenants for loss of income occasioned by the default of the mortgage investment. The New York Courts concur with Pennsylvania that apportionment in such a case should be allowed, but adopt a different formula. *In re* Chapal's Will, 269 N. Y. 464, 199 N. E. 762 (1936). See Vaughn, *The Salvage of Mortgages by Trustees* (1937) 37 COL. L. REV. 61 and Bailey and Rice, *The Duties of a Trustee with Respect to Defaulted Mortgage Investments* (1935) 84 U. OF PA. L. REV. 157.

5. *In re* Chapal's Will, 269 N. Y. 464, 199 N. E. 762 (1936); *In re* Otis' Will, 276 N. Y. 101, 11 N. E. (2d) 556 (1937); *In re* Nirdlinger's Estate, 327 Pa. 171, 193 Atl. 30 (1937); *In re* Nirdlinger's Estate, 331 Pa. 135, 200 Atl. 656 (1938); RESTATEMENT, TRUSTS, § 241; DODGE, ESTATE ADMINISTRATION AND ACCOUNTING (1932) [Supp. No. 1 (1933)] 293. The net rents plus whatever is realized from the sale of the properties less advances made from principal for foreclosure costs, accrued taxes and carrying charges constitute the net proceeds of the salvage operation.

or (b) without the requirement to refund anything. The second method has been selected by the courts of New York, the only other American jurisdiction in which the issue has been raised.[6] But Pennslyvania now refuses to follow the New York rule and adopts method 3(a) by decreeing that the net rents shall be paid to the life tenant as a matter of right with a liability to refund to the corpus of the trust any amount received in excess of that which the formula gives.

The tenet upon which the decision of this case rests is that the life tenants, being the primary objects of the bounty of testators, must *presently* receive accruing income.[7] It seems that the Pennsylvania rule, by requiring the mandatory payment of the net rents to the life tenants, gives better effect to the testator's intent than does the New York rule.[8] For by withholding the rents from the life tenants, the relief of their present distress is sacrificed to the trustees' convenience. To allow the trustees to distribute the net rents in their own discretion is an unsatisfactory solution because, in most instances, the trustees for their own protection will not pay anything to the life tenants until the property has been sold and the exact sums allocated. On this point the instant case offers departure from the New York attitude for which a strong argument may be made.

The jurisdictions, which permit a distribution of the net rents to the life tenants, have held that the parcels of property acquired by trustees through the foreclosure of mortgages are to be treated as separate units.[9] Where some of the properties are productive and others unproductive or underproductive the carrying charges on the unproductive properties, pending sale, are to be advanced out of principal.[10]

6. *In re* Otis' Will, 276 N. Y. 101, 11 N. E. (2d) 556 (1937); *In re* Chapal's Will, 269 N. Y. 464, 470, 199 N. E. 762, 764 (1936); *In re* Crimmins' Estate, 159 Misc. 499, 288 N. Y. Supp. 552 (Surr. Ct. 1936); *In re* Eggers' Estate, 167 Misc. 66, 3 N. Y. S. (2d) 474 (Surr. Ct. 1938).

7. Edwards v. Edwards, 183 Mass. 581, 67 N. E. 658 (1903); *In re* Nirdlinger's Estate, 331 Pa. 135, 200 Atl. 656 (1938).

8. The reason for the New York rule is to allow the trustees to provide against a possible lack of cash funds in the future by being permitted to use their business discretion in the present disposition of the rents. *In re* Gatehouse's Will, 149 Misc. 648, 267 N. Y. Supp. 808 (Surr. Ct. 1933). This doctrine seems inconsistent with the view of a line of cases which hold that where no funds can be obtained from the trust principal to pay expenses entailed in acquiring and carrying the property, such funds may be obtained by borrowing from outside sources rather than by applying any of the income from other investments of the trust for that purpose. *In re* McKeough's Will, 158 Misc. 734, 286 N. Y. Supp. 862 (Surr. Ct. 1936); Matter of Schmutz, 159 Misc. 454, 288 N. Y. Supp. 93 (Surr. Ct. 1936); *In re* Pelcyger's Estate, 157 Misc. 913, 285 N. Y. Supp. 723 (Surr. Ct. 1936). In *In re* McKeough's Will, *supra*, the court said: "If the property is of sufficient intrinsic worth to justify a salvage operation at all, it should furnish ample security for a salvage loan."

9. *In re* Chapal's Will, 269 N. Y. 464, 199 N. E. 762 (1936); *In re* Otis' Will, 276 N. Y. 101, 11 N. E. (2d) 556 (1937); *In re* Nirdlinger's Estate, 331 Pa. 135, 200 Atl. 656 (1938).

10. In Pennsylvania, interest is allowed on such sums, which is treated as income of the trust and as such distributed to the life beneficiaries. *In re* Nirdlinger's Estate, 327 Pa. 171, 193 Atl. 30 (1937). It is contended that if the money were borrowed from outside sources interest would have to be paid thereon, and inasmuch as income loses the interest which would have been earned if these sums were otherwise invested, the same result should follow when the principal is called upon to advance the fund. Such interest will be charged at the current rate earned by trust investments. Nirdlinger's Estate, 26 D & C (Pa.) 3 (1936). On the other hand, the New York Court of Appeals holds that the

For, the life tenants are in a sufficiently bad situation by being deprived of income from the unproductive properties without being made to suffer a further loss by having income from other sources used to meet the deficits on the unproductive properties. Behind this rule is the belief that the testator did not intend to starve the life tenants so that the remaindermen may later feast. Upon the sale of the property the trust corpus is reimbursed for the advances made to meet salvage charges.[11] The proceeds are used first to pay the expenses of the sale, next to reimburse the capital account for advances to meet carrying charges, which are a first lien on all proceeds of the sale,[12] and the balance is apportioned between the life tenants and the remaindermen.[13] If the property is of sufficient worth to justify a salvage operation in the first instance, upon sale it will undoubtedly bring in enough to repay all advances made from principal.

While the rules laid down in the principal case are grounded upon the fact that the salvage operation constitutes a venture for the benefit of both the life tenants and the remaindermen, they emphasize the idea that the testator in creating the life estate *primarily* intended to insure a constant income to the life tenants and to guard them against their own imprudence, rather than to preserve a fund intact for the remaindermen, some of whom may not be in existence during the testator's lifetime. Therefore, in the course of the salvage operation, the life tenants are to be favored whenever possible.

WILLS—DEDUCTION FROM A LEGACY OF BARRED DEBTS DUE FROM THE LEGATEE TO THE TESTATOR.—Testatrix provided in her will that the amount of any indebtedness due her, from either of her children, was to be deducted from a certain bequest to her child. At the time of her death, her son was thus in debt, but the debt was barred by the Statute of Limitations. On a proceeding brought by the corporate executor for the construction of the will, *held,* the debt could be deducted in spite of the bar, because of the direction of the testatrix. *In re Cordier's Estate,* 168 Misc. 577, 6 N. Y. S. (2d) 270 (Surr. Ct. 1938).

While the precise question in the instant case was never before passed upon by any court in this state, the problem of deducting from a debtor's legacy the amount of his debt dates back to early English law.[1] The general rule is that debts due a testator from a beneficiary are to be deducted from the bequest;[2] and this is so whether the testator so directs in his will[3] or not.[4] The court's reasoning in arriving

salvage operation is something in the nature of a joint venture participated in by the life tenants and the remaindermen and to charge interest on principal advances is an unfair penalty placed upon the remaindermen. *In re* Otis' Will, 276 N. Y. 101, 11 N. E. (2d) 556 (1937).

11. See note 10, *supra.*

12. *In re* Pelcyger's Estate, 157 Misc. 913, 285 N. Y. Supp. 723 (Surr. Ct. 1936).

13. See cases cited in note 10, *supra.*

1. Jeffs v. Wood, 2 P. Wms. 128, 24 Eng. Reprints 668 (Ch. 1723).

2. Noble v. Tait, 140 Ala. 469, 37 So. 278 (1904); Blackler v. Boott, 114 Mass. 24 (1873); Smith v. Kearney, 2 Barb. 533 (N. Y. 1848); Jeffs v. Wood, 2 P. Wms. 128, 24 Eng. Reprints 668 (Ch. 1723).

3. Jordan v. Jordan, 274 Ill. 751, 113 N. E. 631 (1916); Sibley v. Maxwell, 203 Mass. 94, 89 N. E. 232 (1909); Matter of Van Tassell's Will, 119 Misc. 478, 196 N. Y. Supp. 491 (Surr. Ct. 1922); Game v. Trollope, [1915] 1 Ch. 853; 2 JESSUP-REDFIELD, LAW AND PRACTICE IN THE SURROGATE'S COURT (3d ed. 1930) § 937.

Where the testator specifies a certain amount as the amount of the indebtedness, some

at this rule proceeds by two steps. First, it holds that the proof of the mere legacy is not proof of an extinguishment or release of the debt.[5] It may be true that the testator in fact intended that the debts should be released; however, the courts will not find such an intention, unless it be clearly expressed by the testator, either in the will or otherwise.[6] Secondly, the courts go on to say that, since the debts are still due, they are assets of the estate. And it is against conscience that the debtor-legatee should receive anything out of the fund without deducting the amount which is already due, and which, if kept out, would deprive other legatees of their full share.[7]

While all jurisdictions seem to be in harmony with the general rule, this harmony disappears when the Statute of Limitations complicates the problem. Although it has been held that the running of the Statute of Limitations, in effect, operates to divest the original owner of the title he had in the land,[8] in most jurisdictions, so far as debts are concerned, the running of the statute does not discharge the debt.[9]

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jurisdictions permit the deduction of that amount, even though it be more or less than the amount in fact due. Dunshee v. Dunshee, 273 Pa. 599, 90 Atl. 362 (1914); *In re* Wood, 32 Ch. D. 517 (1885).

4. Liberty Bank and Trust Co. v. Marshall, 269 Fed. 103 (C. C. A. 5th, 1920); Blackler v. Boott, 114 Mass. 24 (1873); Smith v. Kearney, 2 Barb. 533 (N. Y. 1843); *In re* Ackerman, [1891] 3 Ch. 212.

Certain jurisdictions hold that debts cannot be deducted from a devise of land or of specific chattels. LaFoy v. LaFoy, 43 N. J. Eq. 206, 10 Atl. 266 (1887); Schultz v. Locke, 204 Iowa 1127, 216 N. W. 617 (1927); *In re* Ackerman, [1891] 3 Ch. 212. The reason for the rule, as given by these courts, is that realty passes to the devisee directly from the testator; and title vests in the devisee immediately. Therefore the executor never gets the necessary control over the devise to deduct debts from it. *Contra*: Avery Power Machinery Co. v. McAdams, 177 Ark. 518, 7 S. W. (2d) 770 (1928); Warren v. Warren, 143 Misc. 43, 255 N. Y. Supp. 706 (Sup. Ct. 1932).

5. Blackler v. Boott, 114 Mass. 24 (1873); Brokaw v. Hudson's Executors, 27 N. J. Eq. 135 (Ch. 1876); Clark v. Bogardus, 2 Edw. Ch. 387 (N. Y. 1834); Jeffs v. Wood, 2 P. Wms. 128, 24 Eng. Reprints 668 (Ch. 1723); 2 JESSUP-REDFIELD, *loc. cit. supra* note 3.

6. Smith v. Chandler, 1 Gray 524 (Mass. 1854); Brokaw v. Hudson's Executors, 27 N. J. Eq. 135 (Ch. 1876); Clark v. Bogardus, 2 Edw. Ch. 387 (N. Y. 1834); Sibthorp v. Moxom, 3 Atk. 580, 26 Eng. Reprints 1134 (Ch. 1747).

7. Noble v. Tait, 140 Ala. 469, 37 So. 278 (1904); Smith v. Kearney, 2 Barb. 533 (N. Y. 1848); Courtenay v. Williams, 3 Hare 539, 67 Eng. Reprints 494 (Ch. 1844). The English case succinctly puts it that: "They [the executors] may say to the legatee, 'We admit your right to the legacy; you have assets of the testator in your hands; pay your legacy *pro tanto* out of those assets. . . .'" Courtenay v. Williams, *supra*, at 553, 67 Eng. Reprints, at 500.

8. Sharon v. Tucker, 115 U. S. 620 (1892); Cannon v. Stockman, 36 Cal. 535, 95 Am. Dec. 205 (1869); Barnes v. Light, 116 N. Y. 34, 22 N. E. 441 (1889).

9. Campbell v. Holt, 115 U. S. 620 (1885); Holmes v. McPheeters, 149 Ind. 587, 49 N. E. 452 (1898); Hulbert v. Clark, 128 N. Y. 295, 28 N. E. 638 (1891); Higgins v. Scott, 2 B. & Ald. 413, 109 Eng. Reprints 1196 (K. B. 1831). *Contra*: Greene v. Greene, 145 Miss. 87, 110 So. 218 (1926); Milne's Appeal, 99 Pa. 483 (1882).

In contracts there is a firmly established principle that even after the Statute of Limitations has run, a moral obligation to pay the debt exists. See Cook v. Bradley, 7 Conn. 57, 62, 18 Am. Dec. 79, 84 (1828); Nulls v. Wyman, 3 Pick. 207, 209 (Mass. 1825); Davis v. Anderson, 99 Va. 620, 622, 39 S. E. 588, 589 (1901). See 1 WILLISTON, CONTRACTS (1936) § 148.

These cases have held that this moral obligation to discharge the now unenforceable

The theory upon which this is based is that the statute " . . . simply bars a remedy thereon [the debt]. The debt and the obligation to pay the same remain, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment."[10] Therefore, in the law of wills, the weight of authority reasons that, since the debt is still due and owing, the general rule applies and the statute-barred debt should be deducted, whether or not there is a direction to this effect in the will.[11] No court refuses to deduct the statute-barred debt when the testator directs that all debts due him from the beneficiaries should be deducted from their gifts.[12] They support this result on the ground that by law the legatee is a volunteer who must take the bounty of the testator upon the terms in which it is given.[13] The fundamental rule in enforcing a will is to follow the intention of the testator, and he has indicated that the debtor's bequest is to be reduced by the amount of his debt.

Thus it is apparent that by the present decision a rule of law, sound and consistent with generally accepted principles of law, is announced. Yet, the history of the precedents in New York until the present case made it difficult to predict how the court would treat a situation like the present one. The earliest decision, dealing with the set-off of debts barred by the Statute of Limitations, was handed down in *Rogers v. Murdock*.[14] That case permitted the deduction of a statute-barred debt where the testator had not directed such a deduction. But, the case limited the application of the rule to cases where the question arose in a surrogate court in a proceeding to settle an executor's account. The court, by dictum, claimed that if the question arose in an action, or in a proceeding in the nature of an action, brought by the legatee against the executor to recover a legacy, the legatee's pleading of the bar, as against the claim of the executor to retain the legacy because of the debt, would be a good defense.[15] Subsequent cases,[16] being special proceedings for the accounting of an executor, permitted the deduction of the statute-barred debt. Later, in the *Matter of Flint's Estate*,[17] the court, following the dictum in a previous

liability, is sufficient consideration to support a new promise to pay the debt. In New York the subsequent promise must be in writing. N. Y. CIV. PRAC. ACT (1920) § 59.

10. Hulbert v. Clark, 128 N. Y. 295, 28 N. E. 638 (1891).

It has been suggested that behind the statement that the statute bars the remedy and not the debt may lurk the idea that the privilege is similar to a lien which is not destroyed by the running of the Statute of Limitations. ATKINSON, WILLS (1937) 738; see Holt v. Libby, 80 Me. 329, 330, 14 Atl. 201, 202 (1888); *cf.* Higgins v. Scott, 2 B. & Ald. 413, 109 Eng. Reprints 1196 (K. B. 1831).

11. Noble v. Tait, 14 Ala. 469, 37 So. 278 (1904); Holmes v. McPheeters, 149 Ind. 587, 49 N. E. 452 (1898) (in this state, a statute permitted the set off of a statute-barred debt); Lockerby v. Sawyer, 210 Mich. 147, 189 N. W. 989 (1922); *In re* Lindmeyer's Estate, 182 Minn. 607, 235 N. W. 377 (1931); Courtenay v. Williams, 3 Hare 539, 67 Eng. Reprints 494 (Ch. 1844). *Contra*: Holt v. Libby, 80 Me. 329, 14 Atl. 201 (1888) (the court reasoned that a testator is more likely to intend to remit than to collect such a debt, when he says nothing concerning it in the will); *In re* Light's Estate, 136 Pa. 211, 20 Atl. 536 (1890) (in this state the Statute of Limitations extinguishes the debt).

12. See Holt v. Libby, 80 Me. 329, 330, 14 Atl. 201, 202 (1888) *semble; In re* Gillingham's Estate, 220 Pa. 353, 355, 69 Atl. 809, 810 (1908).

13. See *In re* Gillingham's Estate, 220 Pa. 353, 355, 69 Atl. 809, 810 (1908).

14. 45 Hun. 30 (N. Y. 1887).

15. See *id.*, at 32.

16. Matter of Foster's Estate, 15 Misc. 175, 37 N. Y. Supp. 36 (Surr. Ct. 1895); Leask v. Hoagland, 64 Misc. 156, 118 N. Y. Supp. 1035 (Sup. Ct. 1909).

17. 120 Misc. 230, 198 N. Y. Supp. 190 (Surr. Ct. 1923).

case,[18] decided that there should be no distinction between the special proceeding and the action;[19] and it held that the statute-barred debt could not be set off against the legatee, even on the executor's accounting. This case is now the law in this state in situations where the testator has not directed a deduction of the debt.[20]

However, it would be more logical if the law were otherwise. This state holds that the Statute of Limitations bars the recovery of the debt, but does not discharge the debt.[21] It holds that the giving of a legacy to a debtor does not show an intention to release the debt unless such intention is clearly expressed.[22] Therefore, if the court will not deduct debts barred by the Statute of Limitations, it would imply an intent to release such debts, and that is contrary to law. Such a rule, it has been shown, would work as an injustice against the other legatees.[23] Happily, the present decision clarifies the rule to be applied in New York in the presence of a testamentary direction.

18. Kimball v. Scribner, 174 App. Div. 845, 161 N. Y. Supp. 511 (2d Dep't 1916). The case arose in an action by the legatee to recover his legacy, and the decision followed the ruling of Rogers v. Murdock.

19. There can be no doubt that the distinction between a special proceeding and an action is untenable. An executor will be prevented from setting off the debt in an action by the debtor to recover his legacy, not because the executor has no right to have it set off, but because of this arbitrary classification.

20. Matter of Farrell's Estate, 121 Misc. 536, 201 N. Y. Supp. 365 (Surr. Ct. 1923). See 2 JESSUP-REDFIELD, *op. cit. supra* note 3, § 961 for a criticism of this stand.

21. Hulbert v. Clark, 128 N. Y. 295, 28 N. E. 638 (1891).

22. Clark v. Bogardus, 2 Edw. Ch. 387 (N. Y. 1834).

23. The amount of the debt, if kept out, would deprive the other legatees of their full share under the will. See note 7, *supra*.