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DISCUSSION OF RECENT DECISIONS

CORPORATIONS—MEMBERS AND STOCKHOLDERS—FIDUCIARY DUTY OWED A CORPORATION BY MAJORITY STOCKHOLDERS.—It was held in *Insuranshares Corporation of Delaware* v. *Northern Fiscal Corporation*,[1] that shareholders having control of a corporation owe a duty to the corporation not to transfer that control to outsiders without first making an adequate investigation of the facts surrounding the sale. A bill in equity was brought by the corporation, a holding company, against certain banks which had come into possession of large blocks of stock amounting to a controlling interest, charging them with negligence in failing to make a reasonable investigation of the motives and financial backing of the prospective purchasers of their controlling interest in the company, as a result of which the plaintiff corporation was looted of its assets by such purchasers. The facts that the defendants were offered double the current market value for their stock and that they had come into possession of the stock through an earlier looting and wreckage of the corporation, were treated as being sufficient to put them on notice that a fraud was likely to be perpetrated. Defendants contended, however, that this, being a mere sale of stock and an incidental passing of con-

[1] 35 F. Supp. 22 (1940).

trol, they were under no duty to investigate the financial standing or the motives of the prospective purchasers and therefore could not be held liable for the loss to the corporation.

The ordinary rule is that a non-office holding stockholder in a corporation occupies no fiduciary relation to the corporation or his fellow stockholders,[2] and that such stockholder may dispose of his stock to whom he will without incurring liability to the corporation.[3] That the rule is different in the case of non-office holding stockholders who own a controlling interest is not supported by authorities, and the court in the instant opinion admits that no case is directly in point. In the cases cited to support the decision[4] the transferor of the controlling interest stood in a closer relationship to the corporation than that of mere shareholder, being either a director or manager, so that the usual fiduciary duty was incumbent upon him by reason of his office, for breach of which liability could attach.[5] In the instant case the shareholding defendant banks were corporations and, as such, could not hold office, although they could and did control through their elected representatives on the board of directors.[6] They were, nevertheless, mere stockholders, who, under the law ordinarily applicable to them, owed no fiduciary duty to the corporation either in voting[7] or in disposing of their holdings and therefore should not be denied the privilege of freely alienating their property rights to whomsoever they pleased.[8]

The duty imposed by the instant case upon owners of control of a corporation illustrates the tendency of some courts to hold that such persons stand in a fiduciary relation to minority stockholders with respect to the assets of the corporation and therefore cannot dishonestly exercise

[2] Bjorngard v. Goodhue County Bank, 49 Minn. 483, 52 N.W. 48 (1892).

[3] Roosevelt v. Hamblin, 199 Mass. 127, 85 N.E. 98 (1908); Chicago, Portage & Superior Ry. Co. v. Farmer's Loan and Trust Co., 163 U.S. 31, 31 S. Ct. 48, 41 L. Ed. 60 (1896).

[4] Field v. Western Life Indemnity Co., 166 F. 607 (1908); Oil Shares, Inc. v. Kahn, 94 F. (2d) 751 (1938); Oil Shares, Inc. v. Commercial Trust Co., 304 U.S. 551, 58 S. Ct. 1059, 82 L. Ed. 1522 (1938); Bosworth v. Allen, 168 N.Y. 157, 61 N.E. 163, 55 L.R.A. 751 (1901).

[5] In Mairs v. Madden, 30 N.E. (2d) 242 (Mass., 1940), the corporate secretary and the corporate treasurer had acquired exclusive knowledge of an advantageous offer of a third person to purchase stock of the corporation through holding office as directors and with such knowledge they purchased enough shares from other stockholders to give them a controlling interest, thus making it impossible for the minority to accept such offer. The court held that mere ownership of stock did not create a fiduciary relation between the minority and such corporate officials and that there was no liability for any loss to the minority.

[6] To hold the shareholder responsible for the acts or omissions of the director he elected is to treat him as a principal and his director-representative a mere agent. Such a concept is wholly foreign to the legal relationship of stockholder and director, though it may frequently be the case in fact.

[7] Pender v. Lushington, [1877] 6 Ch. Div. 70.

[8] There does not appear to have been any restriction in the by-laws limiting the transfer of shares to persons approved by the directors. Quare, whether such a by-law, if present, would have been valid? People ex rel. Malcolm v. Lake Sand Corporation, 251 Ill. App. 499 (1929).

their voting power to secure an advantage to themselves over the minority.[9] However, in those cases the right involved and the duty imposed is with respect to and directly affects the corporate assets while the duty imposed in the principal case affects the personal right of the stockholder to dispose of his property to his best advantage, and only, if at all, indirectly affects the assets of the corporation. Perhaps the position taken in the instant case can be justified on the equitable principle that one cannot do by indirection that which he could not do directly and since the defendants could not loot the corporation themselves without breaching the fiduciary duty, they could not allow it to be done through a negligent sale of their controlling interest without also breaching such duty.

The rule announced by this decision, if followed, would greatly restrict the freedom of alienation of his corporate holdings which the shareholder has heretofore enjoyed, by placing him under the duty of investigating his vendee's reputation and his motive for purchasing the stock. Such a restriction imposed on the sale of controlling shares is, however, a protection for the small investor who, in a situation as here, would otherwise be powerless to protect his interest in the corporation from the fraudulent acts of irresponsible directors. R. P. STUDEBAKER

COURTS—RULES OF COURT AND CONDUCT OF BUSINESS—WHETHER NONSUIT UNDER MUNICIPAL COURT RULE IS A MATTER OF SUBSTANTIVE RIGHT OR OF "PRACTICE."—*O'Brien* v. *McCarthy*[1] holds that the Municipal Court of Chicago may govern by rule of court the right of a plaintiff to take a nonsuit because the method of taking such nonsuit bears a relation to "practice" within the meaning of the Municipal Court Act.[2] The question arose in an action before that court to recover real estate broker's commissions. After the evidence on both sides had been heard and before the court had made any ruling on a motion for judgment by the defendant, the plaintiff moved for a nonsuit. The court, in the exercise of its discretion as authorized by court rule 122,[3] denied the plaintiff's

9 Bias v. Atkinson, 64 W. Va. 486, 63 S.E. 395 (1908); Chicago Hansom Cab Co. v. Yerkes, 141 Ill. 320, 30 N.E. 667 (1892); Guernsey v. Cook, 120 Mass. 501 (1876).

1 306 Ill. App. 151, 28 N.E. (2d) 334 (1940), Matchett J., dissenting.

2 Ill. Rev. Stat. 1939, Ch. 37, § 375, "That the judges of said municipal court shall have power to adopt, in addition to or in lieu of the provisions herein contained prescribing the practice in said municipal court . . . such rules regulating the practice in said court as they may deem necessary or expedient for the proper administration of justice in said court."

3 Civil Practice Rules of the Municipal Court of Chicago, published by the Municipal Court of Chicago, 1933, Page 90, Rule 122 "The plaintiff may at any time before the filing of the defendant's defense, or after the filing of such defense before taking any other proceeding in the action, by notice in writing or in open court, discontinue his action or any part of it, but after the filing of the pleadings if plaintiff take any further action he is not authorized to take a nonsuit as a matter of right, but only in the discretion of the court." Foregoing since superseded as of July 1, 1940, by the text of § 52 of the Illinois Civil Practice Act. See Municipal Court Manual of the Municipal Court of Chicago, compiled by Judge Oscar S. Caplan, Chicago, 1940, Page 30, Rule 46.

motion and entered judgment for the defendant. Despite the plaintiff's contention, on appeal, that the right to a nonsuit was a substantive right given by Section 30 of the Municipal Court Act,[4] hence could not be taken away by any rule of court, the Appellate Court of Illinois held that the Municipal Court was not limited by such provision but could, under Section 20 of the Act, adopt the present rule "in lieu of" the provision of the statute.

The majority of the court, in their endeavor to reach a just result on a question which has not, in recent years, been directly before an Illinois court, apparently ignored the case of *Daube* v. *Kuppenheimer*,[5] which held that the plaintiff had an absolute right to take a nonsuit before the jury retired, and instead chose to base their decision mainly on the case of *Ptacek* v. *Coleman*.[6] In that case the defendant objected to the plaintiff's motion for a nonsuit in the Municipal Court on the ground that the plaintiff had not complied with Section 52 of the Illinois Civil Practice Act.[7] The court there held that such section did not apply and that Rule 122 was not superceded because made under authority of a special law, authorized by an amendment to the constitution, hence was not repealed by the provisions of a subsequent general law. The actual validity of Rule 122 was not under consideration there. The minority opinion in the instant case, resting primarily on *Daube* v. *Kuppenheimer*,[8] held that the right to take a nonsuit was a substantive right and could not be whittled away by a mere rule of court intended to regulate procedure.

Under the early common law of England a plaintiff might enter a voluntary nonsuit even after verdict was rendered.[9] The injustice of such rule was said to have brought modifications by act of Parliament.[10] It should be noted that this common law right was limited by statute and not by rule of court and hence was treated as a substantive right rather than a rule of procedure. Two early cases in Illinois[11] indicated that the right to take a nonsuit was a substantial right and there was no injustice in allowing it to be taken at any time. This position was subsequently affirmed in *Daube* v. *Kuppenheimer*.[12] Today, as the majority point out in the instant case, in some jurisdictions the plaintiff's absolute right to a nonsuit ceases at an early stage of the trial. In most

[4] Ill. Rev. Stat. 1939, Ch. 37, § 385, "Every person desirous of suffering a nonsuit on trial shall be barred therefrom unless he do so before the jury retire from the bar, or before the court, in case the trial is by the court without a jury, states its findings."

[5] 272 Ill. 350, 112 N.E. 61 (1916).

[6] 364 Ill. 618, 5 N.E. (2d) 467 (1936).

[7] Ill. Rev. Stat. 1939, Ch. 110, § 176.

[8] 272 Ill. 350, 112 N.E. 61 (1916).

[9] Keat v. Barker, 5 Mod. 208, 87 Eng. Rep. 612 (K.B. 1696).

[10] Stat. 2 Hen. IV, Ch. 7 (A.D. 1400); Robinson v. Chadwick, L.R. 7 Ch. Div. 878 (1878); Stahlschmidt v. Walford, L.R. 4. Q.B. Div. 217 (1879). See also 89 A.L.R. 17.

[11] Berry v. Savage, 2 Scam. 261 (1840); Howe v. Harroun, 17 Ill. 494 (1856). See also Adams v. Shepard, 24 Ill. 464 (1860); Wilson Sewing Machine Co. v. Lewis, 10 Ill. App. 191 (1881); Turnock v. Walker, 54 Ill. App. 374 (1894).

[12] Note 5, supra.

instances the right has been limited by statute,[13] although some courts take it upon themselves to govern the right by rule, treating it as a matter of procedure.[14] When the time designated by the statute or rule is reached, the litigant is then deprived of any absolute right he may have had and thereafter it is within the discretion of the court to grant or deny the motion, which discretion is to be exercised with reference to the rights of both of the parties.[15]

The fundamental question before the court in this case was whether the mode of taking a nonsuit is substance or practice. The Illinois Supreme Court has declined to attempt to give by precise definition the meaning of the word "practice,"[16] but it is also clear that the legislature did not intend to give the Municipal Court power to make substantive rules of law. If we follow the decision of the Supreme Court up to the present date[17] it seems to be established that the common law rule still prevails in Illinois, subject, of course, to such limitations as the legislature has chosen to make. The legislature has given the owner of a cause of action absolute control of it until the jury retire or until the court states its findings.[18] If we apply the doctrine laid down by our highest court to the case under discussion, it would seem that there is no power in the Municipal Court to make conditional this right of control, because such right is declared to be one of substance. The dissenting opinion points out that the difference between the rule and the statute is deep and fundamental; that they are in sharp conflict and that the substantive law as enacted by the legislature should govern. Just how far the Illinois Supreme Court has gone in protecting substantive rights having procedural aspects is illustrated by the case of *Danoff* v. *Larson*,[19] which case might well have been the basis for decision in the instant case. In that case the Municipal Court, acting under the same authority as here, undertook to prescribe a method by which a defendant might be summoned to court. The court there said that the legislature had prescribed the manner in which a summons should be served and pointed out that power, under Section 20, did not extend so far as to give authority to prescribe the time or manner of serving initial process. It was further said there that it was clear that the means by which a person was summoned into court went deeply into

[13] Ill. Rev. Stat. 1939, Ch. 110, § 176; Wis. Stat. 1935, § 270.24; Code of Iowa, 1935, Ch. 496, § 11562; Ark. Stat. 1937, Ch. 22, § 1485; Mich. Stat. Annot., Title 27, § 27.1081; Rules of Procedure for the District Court of the United States, Rule 41a (1), made under authority of 28 U.S.C.A. §§ 723b., 723c.; see also 89 A.L.R. 50.

[14] Hanson v. Casco Loan & Building Ass'n, 132 Me. 397, 171 A. 627 (1934); In re Binney's Will, 241 Mass. 315, 135 N.E. 168 (1922); Nicolai v. Nicolai, 283 Mass. 241, 186 N.E. 240 (1933); Leonard v. Fahey, 87 N.H. 170, 175 A. 859 (1934).

[15] Washburn v. Allen, 77 Me. 344 (1885); Shaw v. Boland, 81 Mass. 571, 15 Gray 571 (1860); Watts v. Watts, 179 Ark. 367, 15 S.W. (2d) 997 (1929); Aetna Life Ins. Co. v. Board of County Com'rs of Hamilton County, 79 F. 575 (1897).

[16] Danhoff v. Larson, 368 Ill. 519, 15 N.E. (2d) 290 (1938). See also Cohen v. Bendix, 369 Ill. 507, 17 N.E. (2d) 12 (1938).

[17] Notes 5 and 11, supra. [18] Note 4, supra.

[19] 368 Ill. 519, 15 N.E. (2d) 290 (1938).

the substance of his rights and was more than a mere matter of form. It would seem that a plaintiff's right to control his own suit after the court has acquired jurisdiction is as much a part of his substantive right as is the manner in which notice shall be given to the defendant of a court proceeding. In contrast to this case we find the court in *Huber* v. *Van Schaack-Mutual, Inc.*,[20] holding that the Municipal Court has power, under Section 20, to prescribe a rule charging an additional fee for a twelve man jury trial. The charging of an additional fee was said to relate to "practice," although a condition precedent to the exercise of the right to a trial by jury. There, again, the Supreme Court said the question was settled by *Ptacek* v. *Coleman*,[21] "where we held that the Municipal Court had the power to adopt a different rule as to the taking of a nonsuit and this was not governed by Section 52 of the Civil Practice Act." Certainly, the court follows no hard and fast rule in determining what is substance and what is procedure.[22]

Perhaps the most that could be said for the decision in the instant case is that it permits the court to exercise its discretion in cases where a perversion of justice might otherwise result. As a nonsuit is no bar to a future action for the same cause,[23] the plaintiff might withdraw his case after the court is in possession of the means for a final determination and thus be able to harass the defendant with a new suit for the same cause at some subsequent time. Certainly, the maxim *Interest republicae ut sit finis lituim* is best served by such a decision.

R. P. STUDEBAKER

COURTS—TRIAL AND REFERENCE—POWER OF THE FEDERAL COURTS TO ORDER BLOOD TESTS IN DIVORCE ACTIONS TO DETERMINE NONPATERNITY.—Questions concerning the effect of a rule of the Supreme Court of the United States on prior adjudications of that court, and of the power of a federal court to order a blood test to be taken under the Supreme Court rule which authorizes the court to order physical examinations where physical condition is in issue, were decided by the Court of Appeals for the District of Columbia in the recent case of *Beach* v. *Beach*.[1] A wife brought suit for maintenance and support of herself and an unborn child. The

20 368 Ill. 142, 13 N.E. (2d) 179 (1938).

21 Note 6, supra.

22 In the more recent case of Universal Credit Co. v. Antonsen, 374 Ill. 194, 29 N.E. (2d) 96 (1940), the Illinois Supreme Court considered the validity of rule 238h of the Municipal Court of Chicago which purported to give the plaintiff in a replevin action the right to have the defendant punished for contempt for refusal to give the property up to the sheriff on a writ of replevin "in addition to" his right to proceed in trover under § 18 of the Replevin Act. In reversing the Appellate Court, the Supreme Court held that there was no power in the municipal court to create by rule new substantive rights. The contempt procedure attempted to be prescribed by such court was construed as creating a remedy in the plaintiff which could only be given by appropriate legislation, as such a right related to substance rather than to "practice." The court said that rules of practice are to administer statutes as they are and not to change them.

23 Ill. Rev. Stat. 1939, Ch. 83, § 24(a).

1 114 F. (2d) 479 (1940).

husband counterclaimed for divorce on the ground of adultery, alleging that the child was not his. The court, on petition by the husband, ordered that on the birth of the child blood tests be taken of all three persons.[2] The wife refused to submit and was ordered committed for contempt. On special appeal the circuit court affirmed the order, relying on Rule 35 (a) of the Rules of Civil Procedure[3] which provide: "Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician."[4]

Whether the requiring of a physical examination is merely a procedural device or whether it invades a substantive right is the first question to be considered. The United States Supreme Court's first expression on this subject came in 1891 in the case of *Union Pacific Ry. Co.* v. *Botsford*,[5] in which the court declared that subjection of a party to a physical examination invaded his substantive rights and could not be ordered in the absence of a statute.[6] In another leading case, *Camden & Suburban Ry. Co.* v. *Stetson*,[7] where a state statute authorized a court to order physical examination, which statute was applicable in the federal courts by reason of the Conformity Act, the court held that where a statute existed substantive rights were no longer involved. By these decisions the court indicated that a legislative enactment was necessary to require submission of a party to a physical examination. The question then presented is whether a simple rule of the Supreme Court should have the effect of a legislative enactment so as to overcome these prior decisions.

Having no common law background, the Federal Supreme Court possesses no inherent power to make rules. It has only a delegated power and is subject to the limitations of that type of a grant. Nevertheless, it would seem from the procedure, requiring the proposed rules to be submitted to Congress, that the rules are intended to have and to possess the vitality of a statute. An analogy will be found in the procedure

[2] For an analysis of the operation of the blood test and its evidentiary value, see: Blewett Lee, "Blood Tests for Paternity," A. B. A. J., XII, 461, July, 1926; Britt, "Blood Grouping Tests and the Law: The Problem of Cultural Lag," 21 Minn. L. Rev. 671; Galton, "Blood Grouping Tests and Their Relationship to the Law," 17 Ore. L. Rev. 177; Wigmore, Evidence, Supp. 1934, §§ 165a, 165b.

[3] 28 U.S.C.A. § 723c.

[4] The purported basis for the rule is found in 28 U.S.C.A. § 723b, which authorized the Supreme Court to prescribe by general rules " . . . the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." The rules became effective at the end of the Congressional session at which they were presented to Congress, without further legislation.

[5] 141 U.S. 250, 11 S. Ct. 1000, 35 L. ed. 734 (1891).

[6] Since the authorizing statute for the Supreme Court rules limits the power to prescribe rules to those relating to procedural matters, the drafters of Rule 35(a) had to adopt the attitude of tacitly reversing the court's statement in the Botsford case.

[7] 177 U.S. 172, 20 S. Ct. 617, 44 L. ed. 721 (1900).

set up by the English Judicature Act.[8] Under this act the rules committee of the Court of Appeals promulgates the rules covering practice and procedure in civil cases. The rules are then laid before the Parliament, which, by taking no positive action against them, tacitly approves them. It has been held that they then have the force and effect of statutes,[9] even to the point of repealing earlier inconsistent statutes.[10] In state courts in this country it is generally held that courts of record have the rule making power, subject to constitutional and legislative limitations, and that the effect of such rules, when promulgated, is that of law.[11] In Illinois it has been held that the Supreme Court has inherent power to make rules governing practice in inferior courts independent of statutory authority.[12] However, as these powers are largely derived from the common law, they do not bear directly on the importance to be assigned to rules made by the Supreme Court of the United States under a grant of Congress.

The real question then is whether the matter here concerned is really one of substance or procedure. If it is the former, it cannot be said that a rule of court, even having the effect of a statute, could change it into one of procedure, especially in view of the fact that the grant of rule making power extended only to procedural matters. If it is the latter, it is validly the subject of a Supreme Court rule, but we are left with the interesting result of the court overruling a prior decision by a rule of court. That this must be the result intended is indicated by the decision in the case of *Sibbach* v. *Wilson & Co., Inc.*,[13] wherein the Circuit Court of Appeals affirmed an order committing a plaintiff for contempt for refusing to submit to a physical examination. The court therein stated that the rule of the Botsford case was superseded by the Supreme Court rule, which had the effect of legislative enactment.

That a rule of court affecting procedure has the effect of legislative enactment may be conceded, but whether a rule for the making of which there exists no authority has the effect of statute is another matter. Here there was authority only if there is no substantive right to freedom from physical examination. That there should be no such privilege or right is clearly demonstrated by Professor Wigmore in his work on Evidence.[14] As a result, physical examination being a procedural

8 Judicature Act, 1925, § 98 (p. 2436 Annual Practice 1940).

9 Smythe v. Wiles, 2 K.B. 66 (1921).

10 Lewin v. Trimming, Trimming v. Lewin and Chadwick & Sons, 21 Q.B.D. 230 (1888).

11 Gyure v. Sloan Valve Co., 367 Ill. 489, 11 N.E. (2d) 963 (1937); Wilson v. Gill, 279 Ill. App. 487 (1935); People v. Callopy, 358 Ill. 11, 192 N.E. 634 (1934).

12 People v. Cowdrey, 360 Ill. 633, 196 N.E. 838 (1935), reversing and remanding 278 Ill. App. 65; as in 290 Ill. App. 605, 8 N.E. (2d) 714 (1937). See also Ill. Rev. Stat. 1939, Ch. 110, § 259.28 (Supreme Court Rule 28).

13 108 Fed. (2d) 415 (1939), certiorari granted, 309 U.S. 650, 60 S. Ct. 809, 84 L. ed. 1001 (1940).

14 §§ 165a, 165b, "Testimonial Privilege—Corporal Exhibition," in which he points out that the common law duty to bear witness to the truth includes the

matter, the subject comes properly within the rule making power of the court.

What is apt to be one of the most far-reaching results of this decision is that it inferentially indicates that the courts of the several states, having inherent power to make rules governing procedural matters, could require the making of physical examinations even in absence of statute. Some states have refused to order physical examinations or blood tests in absence of statute, indicating that to do so would be invasion of a privilege or substantive right.[15] That the Federal Supreme Court is merely joining the majority, however, is indicated by the numerous decisions which have held that a state court has inherent power to order physical examinations.[16] These courts find their authority in the old writs, in statutes doing away with privilege as to testimony, and in the absence of privilege at common law as to corporal exhibition.[17]

In addition to broadening the base of legal authority for requiring physical examinations, the court in the case at hand has also definitely brought the blood test within the meaning of ordinary physical examination statutes, and by bringing the infant within the meaning of the term, "parties to the suit," the court has extended the effective use of the blood test as a method of determining non-paternity to the broad civil field of divorce and allied actions. Few cases to date have taken the blood test into the field of civil law, especially into actions for divorce, although there is much English authority for the use of the physical examination in such actions, many of them arising in suits for divorce on the ground of impotency,[18] and physical examination has been employed in similar actions in this country.[19] Few cases are reported,

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duty to exhibit the body and that the civil opponent's privilege as to documents and oral testimony was not extended by the common law to corporal exhibition. He sets out the following cases in which corporal exhibition was required: (1) writ de ventre inspiciendo, (2) appeal of mayhem, (3) bill for divorce alleging impotency, (4) restraint for insanity, (5) for identification, (6) for corporal injuries.

15 Howland v. Beck, 56 F. (2d) 35 (1932); Beuschel v. Manowitz, 241 App. Div. 888, 272 N.Y.S. 165 (1934), leave to appeal denied, 265 N.Y. 509, 193 N.E. 295 (1934); Commonwealth v. Morris, 22 Pa. Dist. & Co. 111 (1934). All of these states now have statutes authorizing the court to require blood tests.

16 *Physical Examinations:* Cook v. Miller, 103 Conn., 267, 130 A. 571 (1925); Atkinson v. United Rys. Co., 286 Mo. 634, 228 S.W. 483 (1921); O'Brien v. Sullivan, 107 Neb. 512, 186 N.W. 532 (1922); Louisiana & A.R. Co. v. Woodson, 127 Ark. 323, 192 S.W. 174 (1917). *Blood Tests:* State, ex rel Verda Van Camp, v. Welling, 6 Ohio O. 371 (1936); State v. Damm. 62 S.D. 123, 252 N.W. 7 (1933), where the motion by the defendant was denied but the power of the court to order it was affirmed on rehearing, 64 S.D. 309, 266 N.W. 667 (1936).

17 Many states have found it necessary to adopt statutes authorizing the taking of physical examinations, and New York, Pennsylvania, Washington, New Jersey, Louisiana, Montana, Wisconsin, and California now have laws authorizing and regulating the taking of blood tests. Some states did so as much for the purpose of giving probative value to this kind of evidence as for the purpose of enabling the courts to exercise the power.

18 Countess of Essex' Case, 2 How. St. Tr. 785 (1738).

19 Le Barron v. Le Barron, 35 Vt. 365 (1862); Devanbagh v. Devanbagh, 5 Paige

however, in which blood tests have been ordered in divorce actions. In the case of *McDonald* v. *McDonald*,[20] a motion for a blood test under the statute was denied where a specific act of adultery was charged by a husband in a divorce suit, where legitimacy was in issue, on the ground that in view of the presumption of legitimacy insufficient foundation had been laid. Even a novice in the field of genetics will question the wisdom of this holding. In the case of *Modell* v. *Modell*,[21] heard in Illinois where no statute exists, the same question was in issue. The wife refused to submit to a blood test, but no order was entered on the husband's petition for the test, the case being heard under stipulation as a default matter with the decree finding that the child was born of the union.

The case of *Beach* v. *Beach* should be remembered as a big advance toward a more enlightened judicial view of one of the newer types of scientific evidence. The decision has placed the power to order a physical examination in the sphere of procedure where it would seem to be limited only by judicial and not legislative restraints. It has further made the blood test an incident of a physical examination, bringing it within the terms of existing statutes in some states. And it has ratified the use of the blood test in the new field of divorce actions, furnishing important authority for that use. D. G. MACDONALD

HUSBAND AND WIFE—TORTS—WHETHER HUSBAND IS LIABLE FOR TORT OF WIFE COMMITTED WHILE ON FAMILY ERRAND.—A married woman, accompanied by her minor daughter, drove her husband's car downtown to purchase a dress for the child. While en route she collided with the car of the plaintiff. In the subsequent action, the plaintiff joined the husband and wife as defendants and obtained judgment against them. The husband alone appealed to the circuit court, which likewise entered judgment for the plaintiff. On appeal to the Appellate Court, in the cause entitled *O'Haran* v. *Leiner*,[1] the husband, conceding his wife's negligence, denied that he was in possession and control of the automobile at the time of the accident, and denied further that his wife was acting at the time under any express or implied authority from him. These contentions failed, and the plaintiff's judgment was affirmed. The controlling element, concluded the Appellate Court, was the family errand for which the car was being used, creating between the defendant and his wife the legal relationship of principal and agent. Such relationship was deemed to exist because, had the wife purchased the dress for the child, the defendant would have been liable for the price thereof under the Illinois Family Expense Statute.[2] This conclusion rested on an analogy drawn

554 (N.Y., 1836); Newell v. Newell, 9 Paige 25 (N.Y., 1841); Bolmer v. Edsall, 90 N.J. Eq. 299, 106 A. 646 (1919).

20 N.Y.L.J., Sept. 29, 1936, p. 907, affmd., N.Y.L.J., Nov. 7, 1936, p. 1572. See 37 Col. L. Rev. 156, 158.

21 No. 430849, Sup. Ct. of Cook County, 1925-6.

1 306 Ill. App. 230, 28 N.E. (2d) 315 (1940).

2 Ill. Rev. Stat. 1939, Ch. 68, § 15.

from the earlier Illinois case of *Graham* v. *Page*,[3] wherein a father was held liable for an injury to the plaintiff, caused by the negligent operation of the father's car by the latter's minor daughter while returning from the cobbler's with a pair of her shoes which had been previously left there for repairs. The court based its decision on the proposition that the daughter was acting as her father's agent, inasmuch as it was the duty of the father to provide his daughter with the necessary shoes and to keep them in repair.

The result attained in the O'Haran case closely approximates a result obtainable under an application of the so-called "family purpose" or "family car" doctrine. This precept is most simply stated as follows: The head of a family who purchases an automobile for the general use, pleasure, or convenience of his family is liable for injury to persons or property caused by the negligent operation of such automobile while under the control of any member of his family for any of the aforesaid purposes.[4] The courts, in applying this doctrine, recognize that the liability of the owner cannot flow from the mere relation of husband and wife[5] or parent and child,[6] but that such liability must be founded on the relation of principal and agent, and so resort to an extension of the doctrine of *respondeat superior* and consider the family as a "business" subject to the direction, control, and maintenance of the father. The courts find little difficulty in interpreting a general permission to members of the family to drive the family car as a general authority to further the purposes and functions of the family. The application of the doctrine necessarily excludes those cases in which the owner of the car accompanies the driver or expressly authorizes the use of the car in some recognized business, or in which the owner intrusts the vehicle to an incompetent or reckless operator, or where the operation of the car occurs in spite of directions to the contrary.

[3] 300 Ill. 40, 132 N.E. 817 (1921).

[4] Birch v. Abercrombie, 74 Wash. 486, 133 P. 1020, 50 L.R.A. (N.S.) 59 (1913), re-examined and approved in Allison v. Bartelt, 121 Wash. 418, 209 P. 863 (1922). The cases accepting, rejecting, or modifying the doctrine are collected in 64 A. L. R. 844, 88 A. L. R. 601 and 100 A. L. R. 1021, superseding numerous earlier annotations. The underlying considerations of policy responsible for the doctrine are perhaps obvious. Although it has been judicially determined that an automobile is not a dangerous instrumentality, it is difficult to exclude altogether the psychological response to daily statistics to the contrary. Added to this is the growing appreciation of absolute owner-liability, which in most instances can be adequately covered by insurance. In a number of states (e.g., Michigan, Idaho, Connecticut), statutory provisions declare the owner liable in any instance for injuries arising from the negligent operation of a vehicle which he has expressly or impliedly permitted another to use, regardless of the relation between the lender and borrower. No similar statutory provisions exist in Illinois.

[5] "For all civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor, except in cases where he would be jointly responsible with her, if the marriage did not exist." Ill. Rev. Stat., 1939, ch. 68, § 4. This statute is typical of those enacted in almost all states, and removes the common-law rule by which a husband was absolutely liable for his wife's torts. Martin v. Robson, 65 Ill. 129 (1872).

[6] Reynolds v. Ferree, 86 Ill. 570 (1877).

"The doctrine known as the 'family purpose' doctrine . . . is not the law in Illinois."[7] This statement, in substance, was repeated in the O'Haran case but, as has been seen, the opinion in that case seeks to support its decision on a basis different from that on which the usual "family purpose" decisions are founded. There is thus presented the question of the distinction, if any, between "family purpose" and "family errand," and the further question as to whether there exists in the O'Haran case an agency relation sufficient to sustain the liability of the defendant for his wife's tort.

The Illinois law on this subject dates back to the case of *Arkin* v. *Page*,[8] decided by the Illinois Supreme Court in 1919. In that case the existing law of other states was reviewed and rejected, although without an express commitment against the "family purpose" doctrine by name. Justice Dunn, writing the opinion, stated rather tersely: "This argument [owner-liability under the "family purpose" doctrine] may be sound enough, but it has no application to the doctrine of master and servant." The opinion in the Graham case, the facts of which appear above, approved and apparently adopted the conclusions of a Tennessee court which had earlier submitted to the doctrine under discussion.[9] Four years later, in *Gates* v. *Mader*[10] the Supreme Court sustained a recovery by the plaintiff for injuries resulting from the negligent operation of the defendant's car by the defendant's son who was driving his mother and sisters to a luncheon engagement. The fact that the son was not a minor, and that he did not reside at home were held to be immaterial.

The impression left by this decision, following as it did on the heels of the Graham case, was that *Arkin* v. *Page* was no longer law in Illinois, and that a successful application of the "family purpose" doctrine in this state was a mere matter of locating, in any future case, an operative element capable of bearing the label "family errand."[11] Sub-

7 Andersen v. Byrnes, 344 Ill. 240, 245, 176 N. E. 374 (1931).

8 287 Ill. 420, 123 N. E. 30 (1919). An earlier, though perhaps less important case is that of Smith v. Tappen, 208 Ill. App. 433 (1917), suggesting approval of the "family purpose" doctrine. However, the Supreme Court, in the Arkin case, ignored, intentionally or otherwise, this earlier case.

9 Graham v. Page, note 3, supra, at p. 44. "The weight of authority supports the liability of the owner of a car which is kept for family use and pleasure where an injury is negligently caused by it while driven by one of his children by his permission, and the reasoning of those cases seems sound and more in harmony with the principles of justice. We agree with the Supreme Court of Tennessee that where a father provides his family with an automobile for their pleasure, comfort and entertainment, 'the dictates of natural justice should require that the owner should be responsible for its negligent operation, because only by doing so, as a general rule, can substantial justice be attained.' *(King* v. *Smythe*, 140 Tenn. 217.)."

10 316 Ill. 313, 147 N.E. 241 (1925). Justice Dunn, who wrote the Arkin opinion, and Justices Thompson and De Young, dissented.

11 "And the court there [in Graham v. Page] expressly approved the rule announced by the Supreme Court of Tennessee, which case the court has [sic] refused to follow in the Arkin case." Cloyes v. Plaatje, 231 Ill. App. 183 (1923). "We think the language used [in the Graham case] is not susceptible of any con-

sequently, in *White* v. *Seitz*,[12] the Appellate Court affirmed a judgment for a plaintiff for injuries sustained while riding as a guest with defendant's minor son in the family car. The defendant appealed, and affirmance seemed inevitable upon a simple application of the doctrine of *stare decisis*, especially in view of the pregnant language in the Graham case.[13] The judgment was reversed,[14] however, and the Arkin case reinforced.[15] To dispel any further doubts, the "family purpose" doctrine was expressly rejected shortly thereafter in *Andersen* v. *Byrnes*.[16]

The foregoing indicates generally the principles of law governing the liability of an Illinois automobile owner for the negligence of family-member drivers. It is not intended to suggest that *Graham* v. *Page* has been even impliedly overruled, although it must be conceded that the decision has been deprived of its original vitality and has therefore lost its capacity for extension, by analogy or otherwise, to cases of the type presented in *O'Haran* v. *Leiner*.

There remains for consideration, then, the only other ground upon which the decision in the case was thought to be justified: viz., the principal and agent relationship said to arise between husband and wife when either acts in a situation where the Family Expense Statute[17] might apply. This statute altered the common-law rule by which the husband alone was charged with the cost of necessaries for his wife and children and under which there was created an "implied-in-law authority"[18] by

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struction other than a clear expression of intention that the Arkin case, *supra*, would not be followed in the future." Toms v. Ketterer, 237 Ill. App. 135 (1925). In Williams v. Stearns, 256 Ill. App. 425 (1930), the defendant had relied upon an earlier case decided by this same court. In answer, the court said, "While that case was decided in accordance with what we then understood to be the law . . . yet it is out of harmony with the law at the present time."

12 258 Ill. App. 318 (1930). 13 Graham v. Page, note 3, supra.

14 342 Ill. 266, 174 N.E. 371 (1930).

15 Ibid., at 273: "There is a conflict among the decisions . . . The arguments have been stated, the conclusion heretofore announced by this court is clear, and no new reason appears which should induce a change of view. . . . There is a greater volume of decided cases than when the *Arkin* case was decided but the conflict of opinion is no less. We considered in that case all the arguments presented and we have reconsidered them in the light of the cases since decided. We adhere to the views there expressed. . . . " Justice Dunn wrote the majority opinion in the Arkin case.

16 344 Ill. 240, 176 N.E. 374 (1931).

17 "The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately." Ill. Rev. Stat., ch. 68, § 15.

18 The expression "implied-in-law authority" is here used guardedly and only as a matter of convenience. It is clear that no real authority or agency exists in the strict sense. The continued use of the phrase by courts and writers as descriptive of the ground of a husband's or father's liability for necessaries purchased by the wife or child, has apparently led some courts to ignore the fundamentals of the doctrine of principal and agent, and to respond to the underlying fallacy by such extensions as found in Graham v. Page (supra, note 3). And therein lies one obstacle to the attempted analogy in the instant case.

However, the question of agency is relatively immaterial under the "Family Ex-

virtue of which the wife or children could pledge his credit for such necessaries.[19] This implied authority was limited, and could have no scope greater than that dictated by a particular exigency. Family expenses and necessaries are not synonomous;[20] and, since the husband and wife are jointly and severally liable for the purchase of family items under the statute, such expenses may be incurred by either spouse in his or her own right without the sanction or authority of the other.[21] On this basis, a shopping tour by the wife, since it can legally result in individual liability for the purchases made, is as much an individual as a family errand. And such has been intimated in at least one jurisdiction where a wife, while so occupied, caused injury with her husband's car.[22]

It is clear, in the instant case, that the defendant had not expressly authorized the purchase of the dress for the child. He had no knowledge of his wife's intention in that respect, for the request for the dress was not made by the child until the afternoon of the accident, at which time defendant was absent from home. The defendant was not, therefore, called upon, by the request of his wife or by operation of law, to authorize or permit the use of his car for the particular purpose. The dress was but a whim of the child; it was not a necessary. It does not appear that the dress was ever worn by the child, or, as a matter of fact, that it was ever actually purchased.[23] It cannot be seriously contended that the minor daughter could constitute her mother the agent of her father.

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pense" Statute. In Gaffield v. Scott, 40 Ill. App. 380 (1890), it was said: "The old law, as to the agency of the wife binding the husband in ordinary domestic matters . . . has become unimportant by the statute making both husband and wife responsible for family expenses. § 15, Chap. 68, R.S." Yet, it is undoubtedly true that a creditor can recover from a husband or father on the theory that necessaries have been supplied. The important point is that whatever "authority" is deemed to exist is limited, by the common law, to a pledging of credit.

19 Gaffield v. Scott, supra, note 18.

20 Mandel Bros. v. Ringstrom, 189 Ill. App. 564 (1914).

21 Northwestern Military & Naval Academy v. Wadleigh, 267 Ill. App. 1 (1932).

22 In Novak v. Zastrow, 200 Wis. 394, 228 N. W. 473 (1930), the court found that no agency relation existed between a husband and his wife in the mere operation of the husband's automobile by the wife for the purpose of bringing her mother to their home for a visit. On the argument, plaintiff's counsel insisted that the requisite relationship was established by virtue of the fact that the wife did some shopping en route. This fact was not proved, but the court considered it: "Granting that the shopping was for the necessaries of the wife, granting that the husband is liable to pay therefor, and granting that she had authority to pledge his credit—that does not mean that, while the wife is doing her own shopping, she is acting as her husband's agent. To say that it is the business of the husband to select his wife's gowns and bonnets, and that it is her duty to wear apparel of his choosing, is to suggest a bondage which the temerity of man has not suggested and to which the spirit of woman has not submitted within the memory of the living. Such thralldom has not had practical existence in modern time, if it were ever painted in legal fiction."

23 In order that an item purchased constitute a family expense within the meaning of the statute, it must be used in the family. Robertson v. Warden, 197 Ill. App. 478 (1916); Whitney, Inc. v. Mandel, 218 Ill. App. 316 (1920); Blackstone Shop v. Ashman, 250 Ill. App. 401 (1928). See also Northwestern Military & Naval Academy v. Wadleigh, supra, note 21.

Hence, there was no relationship of principal and agent existing between the defendant and his wife at the time of and in respect to the particular transaction out of which the tort arose.[24] The decision in the case plainly requires the support of the "family purpose" doctrine. That this doctrine is not law in Illinois is admitted in the opinion.[25] Since neither ground for the decision is valid, the case must rest without apparent foundation. H. M. KNOTH

SALES—DELIVERY AND ACCEPTANCE OF GOODS—EFFECT OF PARTIAL DELIVERY AND ACCEPTANCE AS TO RIGHT TO REJECT SUBSEQUENT DELIVERIES.—In the case of *Interstate Grocer Company* v. *Colorado Milling and Elevator Company*,[1] the defendant entered into a written contract to purchase from the plaintiff 420 barrels of flour of specified grade in two equal carload shipments, the contract containing a warranty of quality. The buyer expressly waived any claim or defense based on quality unless notice of defects was sent to seller in a specified manner and within a specified time. Liquidated damages were provided for failure to order out the requisite shipments and the contract contained the following clause: ". . . this contract shall be construed to be severable as to each installment . . . and breach or default of either buyer or seller as to any installment or installments shall not give the other party a right to cancel this contract. . . ."

The first carload was shipped and paid for on delivery in accordance with the terms of the contract but the defendant failed to order out the second shipment and did not give the requisite notice of defects in the first shipment. Eight months after the expiration of the original time for performance, the defendant advised that it would not order out the second carload and claimed defects in the previous shipment. The plaintiff denied the existence of any defects and brought suit for liquidated damages for the failure to complete the contract. The defendant denied liability for failure to order out the second shipment on the ground that the first shipment was defective in quality, and sought, by means of cross-complaint, to recover damages for such defective shipment.

The court was unanimous in refusing to allow the cross-complaint, holding that any defects which existed had been waived by failure to perform the contractual conditions precedent to recovery therefor — namely, the giving of notice of defects within the time and in the manner prescribed by contract. The issue then remains: Is the defendant purchaser liable for failure to order out the second car?

With regard thereto it is claimed that the trial court erred in refusing to permit the defendant to go to the jury with the evidence presented as to the quality of the first shipment, contending that, inasmuch as the seller contended this shipment did comply with the contractual

[24] See Mosby v. Kimball, 345 Ill. 420, 178 N. E. 66 (1931), and Johanson v. Johnston Printing Co., 263 Ill. 236, 104 N. E. 1046 (1914).

[25] 306 Ill. App. 230, at 232, 28 N. E. (2d) 315, at 317 (1940).

[1] 199 Ark. 645, 135 S. W. (2d) 661 (1940).

requirements, it evidenced an intent to ship the same goods, and if in fact the shipment was defective, the purchaser should not be forced to order out a second defective shipment and then be relegated to an action for breach of warranty. While a strong dissent so holds, the majority of the court affirms the ruling of the trial judge on this matter. It is this divergence of opinion within the court which presents the ultimate problem of the decision—and much can be said for each holding. Indeed, it seems questionable if the result would have been the same had the defendant been somewhat less dilatory in its actions. And if the instant case is to be considered as authority on the problem, it is entirely possible that this authority will be short-lived if a case presenting the problem in connection with a more kindly factual situation should arise.

The majority of the court rather summarily dismisses the question of going to the jury with the evidence which the defendant presented of the defective quality of the initial shipment on the ground that the contractual provision governs the matter in that it provides, first, that the contract is to be severable as to each installment and breach of one installment shall not give the other party a right to cancel the contract, and, second, that failure to give proper notice of defects waived such defects as a basis of claim or defense. While this is all very true, one must query whether the first clause actually has the unequivocal meaning ascribed to it by the court, and, as to the second clause, whether the defective quality of the initial shipment is in fact being used as a ground of defense by the purchaser.

What is the meaning of the language that "breach or default of either buyer or seller as to any installment or installments shall not give the other party a right to cancel this contract. . ."? Does it mean that no breach can be treated as total so as to entitle the innocent party to refuse to perform further under the contract? Or does it mean merely that no breach by deviation from exact performance of one installment shall be treated as a breach of the whole contract? It seems that the latter explanation would be more logical, and the result would then be that failure to perform exactly as to the first installment would not of itself be sufficient cause to cancel the contract. But acceptance of one defective installment would not bind the purchaser to accept defective performance of succeeding installments. Numerous authorities may be found advancing the proposition that, in an installment contract, the fact of one defective installment does not give any right to refuse subsequent installments which are not defective.[2] But equally numerous are the authorities holding that, in the same situation, there is no duty to order out other defective installments.[3] Thus it may well be said in

[2] H. H. King Flour Mills Co. v. Bay City Baking Co., 240 Mich. 79, 214 N. W. 973 (1927); Yerxa, Andrews & Thurston, Inc., v. Randazzo Macaroni Mfg. Co., 315 Mo. 927, 288 S. W. 20 (1926).

[3] C. A. Wooten & Co. v. Bain-Adams Co., 146 Ark. 462, 226 S. W. 134, 136 (1920); Nye & Nisson v. Weed Lumber Co., 92 Cal. App. 598, 268 P. 659 (1928); 29 A. L. R. 1517, note, 1521, 1522. For an interesting analysis of this problem, see 38 L. R. A. (N. S.) 539.

this case that the purchaser desires to cancel the contract for defects in future installments rather than in past installments.

Of course, it cannot be denied that the purchaser, by failing to object to the quality of the initial shipment within the specified time, has waived such defect as a ground of claim or defense. The contract expressly so provides. And authorities support this result.[4] But when evidence of the defective shipment is presented to show the seller's avowed understanding of his duties under the contract and as merely a factor indicating an intent to make similar future performance, it may well be said that it is not being used as a defense. By way of example, let us consider a very clear case of anticipatory breach. Let us assume that after an initial installment has been delivered, defective in quality, the seller states, "That is the merchandise ordered and that is exactly what I am going to ship." Assuming the same contractual provision as exists in the principal case, would the purchaser be unable to show what was shipped in the first instance to justify a refusal to continue under the contract? Clearly not, even though he was making no claim for damages.[5]

This example does not differ materially from the principal case, save that the factual situation in the hypothetical case presents a more apparent issue. For in the case under discussion there was no such clearly avowed intent on the part of the seller. Instead it would have to be shown inferrentially from the quality of the shipment already made and the seller's avowal that no defects existed. To permit this to go to the jury would be no great hardship on the seller. If in fact he would ship only defective goods, he has no right to recovery. And if the initial shipment or the material the seller had available to ship were of the contractual quality, he could readily overcome the purchaser's case by evidence thereof. At any rate, while we might question whether the express stand of the seller that the prior shipment was of good quality would be such evidence of intent to ship goods of similar quality in the future as would justify the purchaser's refusal to order out subsequent installments, that problem was not raised in the decision.

The majority opinion places much emphasis upon the Yerxa case heretofore cited.[6] And it must be admitted that that case does correctly state the effect of the pertinent clauses of this contract and of acceptance of prior installments. But it must be noted that no issue was there raised as to the quality of the shipments to be subsequently made. The case most nearly in point is one which was not cited in the principal

[4] In the case of Yerxa, Andrews & Thurston, Inc. v. Randazzo Macaroni Mfg. Co., 315 Mo. 927, 288 S. W. 20, 37 (1926), the court states, "It has been repeatedly ruled that similar contractual obligations are conditions precedent to be observed and performed by the buyer, and he must show a compliance therewith on his part, or a waiver thereof by the seller, before he can recover damages from the seller upon a warranty, express or implied, as to the quality or fitness of the goods delivered by seller."

[5] See 38 L. R. A. (N. S.) 539, 541-4, and cases therein cited.

[6] Notes 2 and 4, supra.

case and which, curiously enough, arose some fourteen years previous in the same jurisdiction,[7] but which contained no clause as to severability of the installments as exists in the instant case. The result there reached was virtually identical with that reached in the principal case, even to the extent of a similar dissenting opinion. However, in that earlier case, the court stated that the evidence was kept from the jury because "— the testimony does not warrant an inference that appellee's attitude was one of refusal to comply with the requirements of the contract with respect to future shipments."[8] It is highly possible that the court in the principal case might have found that the evidence adduced would warrant such an inference and it is in its failure to consider this issue that the weakness of the instant decision lies. M. J. SCHRAM

SALES — MAKING AND REQUISITES OF EXPRESS WARRANTY — WHETHER DISPLAYING MANUFACTURER'S LABEL ATTACHED TO GOODS IN SEALED CONTAINER IS EXPRESS WARRANTY BY DEALER.— *Beckett* v. *F. W. Woolworth Company*[1] involved an action against a retailer for the breach of an express warranty that mascara, sold to the plaintiff under a trade name, was harmless and runproof. The plaintiff testified that she entered a Woolworth store, picked up a card, attached to which was a tube containing the type of mascara she had been using for several years, handed the sales girl a dime, and said to the girl, "This mascara is safe isn't it?" The clerk replied, "It's on the tube — it says harmless." The card furnished by the manufacturer contained the words "Runproof" and "Harmless." In applying the mascara to her eyelashes some of it fell into her eye causing the eye to itch and eventually causing the loss of sight in that eye.

The plaintiff abandoned any claim on the theory of an implied warranty and based her claim solely on the theory of an express warranty. The trial court permitted the jury to find a verdict for the plaintiff and entered judgment thereon. On appeal the decision was affirmed, with one judge dissenting. The majority gave no consideration to the defense that the warranty was made after the sale and therefore constituted no part of the inducement.[2]

It has long been settled in this state that there are four essential elements to an express warranty. There must be (1) an affirmation as to the quality or condition of the thing sold (2) made by the seller at the time of the sale (3) for the purpose of inducing the buyer to make the purchase, and (4) it must be relied upon by the buyer in making the purchase.[3] It is not necessary that the word "warrant" or any

7 Westbrook v. Mente & Co., Inc., 170 Ark. 1131, 282 S. W. 961 (1926).

8 Ibid at p. 962.

1 306 Ill. App. 384, 28 N.E. (2d) 804 (1940).

2 Anderson v. Eastman, 168 Ill. App. 172 (1912). If a complete contract of sale is made, with or without warranty, then any subsequent representations, made after the property is delivered and accepted but before the last of the money is paid, do not constitute a warranty where there is no new or additional consideration.

3 Hawkins v. Berry, 5 Gilm. 36 (1848); Ender v. Scott, 11 Ill. 35 (1849); Thorne v. McVeagh, 75 Ill. 81 (1874); Robinson v. Harvey, 82 Ill. 58 (1876).

other particular words be used.[4] The essential elements of an express warranty as stated above are now embodied in the sales act.[5]

The plaintiff contended and the court held that a retailer, by merely displaying on his counter cards furnished by a manufacturer, upon which are fastened sealed tubes of mascara, and which contain the words "Runproof-Harmless," adopts as his own the statements contained on the card, assumes the responsiblity, and expressly warrants that the product is harmless.[6]

The Sales Act states: "In the case of a contract to sell or a sale of a specified article under its patent or trade name, there is no implied warranty as to its fitness of any particular purpose."[7] This has frequently been read as though the word "particular" were not present, that is, as though it said that there is no implied warranty of fitness for *any* purpose,[8] and apparently counsel in this case conceded that there was no implied warranty; hence the claim was grounded on the theory of an express warranty.

It is true, as pointed out by the court, that where the contract is oral, it is the province of the jury to decide whether or not what was said was a warranty. But before the jury is allowed to decide, it should be given the proper instructions as to the ingredients of an express warranty. While the jury might have found that the sales girl's state-

[4] Whether or not a warranty has been made has been said to be a matter of intention; Wheeler v. Reed, 36 Ill. 81 (1864); Adams v. Johnson, 15 Ill. 345 (1854); Hanson v. Busse, 45 Ill. 496 (1867), but this may not now be true.

[5] Ill. Rev. Stat. 1939, Ch. 121½, § 12.

[6] At this point in the discussion it is interesting to compare with the instant case, the recent case of Bel v. Adler, 11 S.E. (2d) 495 (Ga., 1940). A customer of a department store purchased a jar of cold cream in its original unbroken package, after being assured by the clerk that the store was recommending this cream to its customers, that it was wonderful, pure, beneficial, harmless, and that it would not harm the most tender skin. The court held that these statements were not sufficient to show an "express warranty" and amounted to no more than a recommendation of the cold cream, and further that a dealer does not impliedly warrant than an article in a perfect appearing original package, manufactured by a reputable manufacturer and in practical use in the retail trade so as not to be examinable for imperfections, is suitable for the purposes intended, and the only warranty by the dealer is that the goods are manufactured by a reputable manufacturer.

[7] Ill. Rev. Stat. 1939, Ch. 121½, § 15 (4).

[8] See Santa Rosa-Vallejo Tanning Co. v. C. Kronauer & Co., 228 Ill. App. 236 (1923), and Niegenfind v. Singer, 227 Ill. App. 493 (1923). In Fuchs & Lang Co. v. Kittredge & Co., 242 Ill. 88, 89 N.E. 723 (1909), the court held that an implied warranty of merchantable quality existed although the article was sold under its trade name, but the court was not required to, and did not, give to the expression "merchantable quality" the meaning of fitness for the general purpose for which it was designed by the seller. Usually § 15 (4) is treated as a qualification of § 15 (1) only, so that a recovery may nevertheless be warranted under § 15 (2). Giant Mfg. Co. v. Yates American Machine Co., 111 F. (2d) 360 (1940); Kaull v. Blacker, 107 Kan. 578, 193 P. 182 (1920); Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931). And see note in 80 U. of Pa. L. Rev. 281 (1931), and comments on the Ryan case in 26 Ill. L. Rev. 594 (1932). Sec. 1 Williston, Sales, § 236 a n. 63.

ment, "It is on the tube — it says harmless," constituted an express warranty, the court in its language seems to assume that the warranty grew out of the seller's permitting the sale of the article with the representation on the container and on the card to which the container was attached. This language might establish an unfortunate precedent in cases when, like this, the words do not purport to be the words of the vendor but the words of the manufacturer. Furthermore, it is not clear that the jury were instructed to find evidence of an adoption by the seller of the manufacturer's representation beyond the mere fact of selling the article with that statement on it.

It is conceivable that a situation might arise where cards or streamers, furnished by the manufacturer for advertising purposes, but not containing the manufacturer's name, displayed by the retailer, could be construed as an express warranty if the statements contained thereon were relied on by the buyer and induced the sale. However, such facts are not present in the instant case, and it has been held that the act of displaying to a prospective buyer a circular letter of a manufacturer, which the buyer knows to be that of the manufacturer, does not constitute a warranty by the dealer[9] unless he expressly adopts it as his own.[10]

If it is the law of Illinois that there is no implied warranty of any kind where an article is sold under its patent or trade name, the court here seems to find a means of escaping that interpretation by finding an express warranty where most courts would have found only an implied one. J. R. SCOTT

SEARCHES AND SEIZURES — WITNESSES AND PERSONS COMPELLED TO PRODUCE EVIDENCE — RIGHT OF ADMINISTRATOR OF FAIR LABOR STANDARDS ACT TO COMPEL PRODUCTION OF BOOKS AND RECORDS IN THE ABSENCE OF REASONABLE CAUSE TO BELIEVE AN EMPLOYER IS VIOLATING THE PROVISIONS OF THE ACT. — The Administrator of the Wage and Hour Division of the United States Department of Labor, acting pursuant to the provisions of the Fair Labor Standards Act of 1938,[1] undertook an investigation of the acts and practices of a general merchandising corporation with regard to wages and hours and classification of employees engaged in interstate commerce.[2] In the course of the investigation, the Administrator issued a subpoena duces tecum requiring the corporation to furnish for inspection the employees' wage and hour records covering a period of six months. Upon refusal of the corporation to comply, the Administrator obtained an enforcement order from the Federal District Court.[3]

9 Cool v. Fighter, 239 Mich. 42, 214 N.W. 162 (1927); Pemberton v. Dean, 88 Minn. 60, 92 N.W. 478 (1902).

10 Morris v. Trinkle, 91 Ind. App. 657, 170 N.E. 101 (1930).

1 29 U.S.C.A. §§ 201-219.

2 Section 2 of the Act sets out a legislative finding and declaration of policy which constitutes the legislative justification of the Act as a regulation of interstate commerce.

3 Andrews v. Montgomery Ward & Co., 30 F. Supp. 380 (1939). The procedure of the Administrator in securing the enforcement order is that usually followed in

The respondent appealed to the Circuit Court of Appeals, insisting that the requirements of the subpoena were unreasonable and as such constituted an unreasonable search and seizure within the Fourth Amendment to the Federal Constitution,[4] on the grounds that no specific investigation on complaint was pending, and that the Administrator had made no showing in the District Court of probable cause to suspect violations of the Act, pointing out that no previous case had upheld a search and seizure in the absence of probable cause except when directed against a public utility or the like. The Circuit Court of Appeals affirmed the order.[5]

The case presents again the ever recurring problem of the investigatory power of an administrative agency in the course of a purely administrative function.[6] Controversies of this type date as far back as

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like cases, and for the purpose of the present Act, Section 9 of the Federal Trade Commission Act, 15 U.S.C.A. § 49, has been adopted as Section 9. This section provides in part: "And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence." Such authorization is required in view of the settled rule that an administrative agency has no power of its own in this respect. See Interstate Commerce Commission v. Brimson, 154 U. S. 447, 14 S. Ct. 1125, 38 L. Ed. 1047 (1894).

[4] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . "

The concept of unreasonable searches and seizures in the United States was born of the deep resentment against the familiar general writs of assistance used by officials of the Crown to detect violations of smuggling laws. Fraenkel, Concerning Searches and Seizures (1921) 34 Harv. L. Rev. 361. In Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886), a subpoena duces tecum was held to fall into the class of unreasonable searches and seizures under certain circumstances where the object of its use was to compel the production of documents by a person to be used against that person in a criminal proceeding. See also Hale v. Henkel, 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652 (1906). Although a corporation is not protected against self-incrimination under the Fifth Amendment (Hale v. Henkel, supra), it is settled that like a natural person a corporation may invoke the guarantees of the Fourth Amendment. Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920). As to natural persons, statutory provisions granting immunity against the use of evidence produced removes the prohibition of the Fifth Amendment. Brown v. Walker, 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819 (1896).

[5] Fleming v. Montgomery Ward & Co., 114 F. (2d) 384 (1940).

[6] That an administrative commission acting in a quasi-judicial capacity has the power to resort to the use of subpoenas for the purpose of testimonial compulsion and the production of documents is well settled. Interstate Commerce Commission v. Brimson, 154 U. S. 447, 14 S. Ct. 1125, 38 L. Ed. 1047 (1894); Interstate Commerce Commission v. Baird, 194 U. S. 25, 24 S. Ct. 563, 48 L. Ed. 860 (1904). Where the commission is acting in a quasi-judicial capacity, its subpoenas, if reasonably definite, no more operate as unlawful searches and seizures than those of an ordinary court of law. See Essgee Co. of China v. United States, 262 U. S. 151, 43 S. Ct. 514, 67 L. Ed. 917 (1923). The federal courts have not interfered with investigations pending before the Federal Trade Commission to determine whether any person or corporation is engaging in unfair methods of competition in violation of Section 5 of the Act, where the investigations have been made upon complaint lodged with the Commission charging the violations. Federal Trade

1908 to the case of *Harriman* v. *Interstate Commerce Commission.*[7] In that case, the United States Supreme Court denied the power of the commission, in the absence of an investigation upon complaint, to compel an officer of a carrier under scrutiny to disclose his individual stock holdings in another carrier. Subsequently, in *Smith* v. *Interstate Commerce Commission,*[8] the principles of the Harriman case were considered inapplicable to an investigation by the commission of amounts which certain common carriers had contributed to political campaign funds, the court recognizing, *inter alia,* the public interest in the relation between the rates of a carrier and its expenditures. The Harriman case was not expressly overruled, and although the two cases may be technically distinguished,[9] a concession by the court to the cause of efficient law enforcement is clearly recognizable.[10]

The question as to whether the comparative liberality of the decision would have universal application was answered in the negative by Mr. Justice Holmes in *Federal Trade Commission* v. *American Tobacco Co.*[11]

Commission v. Nulomoline Co. 254 F. 988 (1918); T. C. Hurst & Son v. Federal Trade Commission, 268 F. 874 (1920); Chamber of Commerce of Minneapolis v. Federal Trade Commission, 280 F. 45 (1922); Royal Baking Powder Co. v. Federal Trade Commission, 32 F. (2d) 966 (1929). Also, Federal statutes authorizing administrative agencies to require periodic records and reports have been sustained. Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 31 S. Ct. 621, 55 L. Ed. 878 (1911); Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 32 S. Ct. 436, 56 L. Ed. 729 (1912).

7 211 U. S. 407, 29 S. Ct. 115, 53 L. Ed. 253 (1908), wherein Mr. Justice Holmes remarked: " . . . the power to require testimony is limited, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law." 211 U. S. 407, at 419-420.

8 245 U. S. 33, 38 S. Ct. 30, 62 L. Ed. 135 (1917).

9 One feature in particular may be noted: The Interstate Commerce Commission Act was amended after the decision in the Harriman case. Prior to the decision, the Act, sec. 13, read: "Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or the railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though the complaint had been made."

After the decision, sec. 13 read: " . . . and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act."

10 That the Smith case overruled the Harriman case has been the conclusion of some writers. Cf. Investigatory Powers of the Securities and Exchange Commission, Anonymous (1935) 44 Yale L. J. 819, and Handler, "The Constitutionality of Investigations by the Federal Trade Commission." (1928) 28 Col. L. Rev. 708 and 905. A number of decisions intervening between the Smith and Harriman cases have had attributed to them the effect of severely limiting the scope of the latter case. Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 407, 31 S. Ct. 621, 55 L. Ed. 878 (1911); Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 32 S. Ct. 436, 56 L. Ed. 729 (1912).

11 264 U. S. 298, 44 S. Ct. 336, 68 L. Ed. 696 (1924), wherein Mr. Justice Holmes,

There, the Federal Trade Commission, purporting to act under the authority of a Senate resolution and the Federal Trade Commission Act,[12] undertook a general investigation of the trade practices of the defendant and other companies, and in the course of the proceedings demanded from the company its correspondence and telegrams with

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again speaking for the Court, said: "The mere facts of carrying on a commerce not confined within state lines, and of being organized as a corporation, do not make men's affairs public, as those of a railroad company now may be. . . Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all out traditions into the fire . . . and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime." 264 U. S. 298, at 305-306. "The investigations and complaints seem to have been only on hearsay or suspicion: but even if they were induced by substantial evidence under oath, the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress an intent to defy the 4th Amendment, or even to come so near to doing so as raise a serious question of constitutional law." 264 U. S. 298, at 307.

[12] 15 U. S. C. A. §§ 41-51, § 46 provides in part: "The commission shall also have power—

Investigation of corporations. (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

Reports by corporations. (b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

Investigations of violations of antitrust statutes. (d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation." § 49 provides, in part:

"For the purposes of this subdivision of this chapter the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testi-

jobbers and wholesalers over a period of one year. The refusal of defendant to comply was upheld on the grounds that the Act did not authorize the inquiry in the absence of a pending investigation on complaint, and that the demand was too broad and sweeping and without foundation. This decision continued as an expression of the governing doctrine until 1933 when the case of *Bartlett Frazier Company* v. *Hyde*,[13] created an exception in cases involving businesses "affected with a public interest." In that case, the Circuit Court of Appeals sustained the power of the Department of Agriculture, under the Grain Futures Act,[14] to require access to books and records of grain brokers on the Chicago Board of Trade.

In the instant case, the respondent relied upon the state of the law as outlined above, insisting that the situation was controlled by the decision in the American Tobacco Company case. On this argument, the Court distinguished the cases on the ground that the Federal Trade Commission claimed an unlimited right of access to the company's papers, while here the Administrator's demand was expressed in lawful process and confined to specific documents easily distinguished and clearly described. This appears to be a distinction without substance. In both cases the documents demanded were the only ones by which the respective agencies could determine whether violations had occurred; in both cases the documents were specified as exactly as the names thereof would permit, the difference in the periods covered by the papers in the two cases being merely one of degree; and in neither case had a complaint been filed or a specific investigation undertaken. A more material, although not necessarily controlling, distinction may be found in the provisions of the Act, as recognized by the Court, on the basis that the provisions authorize the Administrator to investigate any industry "to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act," and, further, that other provisions authorize the Administrator to make any regulations and to require the keeping of records "as necessary or appropriate for the enforcement of the provisions of the Act or the regulations or orders thereunder."[15] The Federal Trade Com-

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mony of witnesses and the production of documentary evidence.

Upon application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this subdivision of this chapter or any order of the commission made in pursuance thereof."

The Senate Resolution was put aside as not based on any alleged violations of the Anti-Trust Act as required by § 6(d), supra, and the case was considered on the basis of the authority claimed under § 9.

[13] 65 F. (2d) 350, (1933), cert. den. 290 U. S. 654, 54 S. Ct. 70, 78 L. Ed. 567 (1933).

[14] 7 U. S. C. A. §§ 1-17a. Now the "Commodity Exchange Act."

[15] Fair Labor Standards Act, § 11.

"INVESTIGATIONS, INSPECTIONS, AND RECORDS

Sec. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and prac-

mission Act, in section 6,[16] although authorizing investigations and the requiring of reports, does not expressly give that authority for the purposes of enforcement of that Act. On the basis that the Fair Labor Standards Act authorizes investigations to determine the existence of violations while the Federal Trade Commission Act authorizes investigations in proof of violations after a complaint has been filed, the decision in the instant case is sound even in view of the decisions before it. However, significance must be attached to the fact that the instant decision appears to sustain broad investigatory powers of the Administrator, a question which has received no consideration in the American Tobacco Company case and in cases before it. The Court in the instant case made no reference to the Federal Trade Commission Act and did not expressly refer to any distinction between general and specific investigatory powers, other than to attribute the Administrator's power to a definite intent on the part of Congress to promote the interests of employees engaged in interstate commerce. It seems obvious, of course, that Congress, in enacting the Federal Trade Commission Act, similarly intended to promote the best interests of trade and commerce, and in that light it may be taken that section 6 of that Act authorizes investigations to determine the existence of violations, for there appears to be no distinction between the two Acts justifying different rules for similar cases. Since the American Tobacco Company case was decided sixteen years ago, it may be concluded that the instant decision tacitly declares the principles there evolved inapplicable to the functioning of modern administrative agencies.

In reaching its decision, the Court in the instant case observed that the tests for lawful inspection of records were applicable alike to non-

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tices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate *to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act.* Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act."

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as *necessary or appropriate for the enforcement* of the provisions of this Act or the regulations or orders thereunder.

[16] Supra, note 11.

public as well as public utility corporations, and this respect justified its position on its understanding of the phrase "affected with a public interest" as defining a business subject to regulation in the interests of the public under the commerce clause. Following the decision in *Munn* v. *Illinois*,[17] sustaining the power of the state of Illinois to regulate grain elevator charges on the ground that the business was affected with a public interest, and until *Nebbia* v. *New York*,[18] the phrase had a restrictive application to businesses and occupation of only certain types, and the magic formula was that state or federal regulation of a business depended first upon the determination that the business was of the required type. The Nebbia case, sustaining state regulation of the milk industry over the objection that the industry was not affected with a public interest, disposed of the phrase as definitive of a closed concept and determined that any business, which under the circumstances furnished an adequate reason for regulation, was subject to governmental control for the public good.

In the instant case, as adequate reason for regulation was found to exist because of the circumstance that respondent was engaged in interstate commerce and the labor relations of a corporation engaged in interstate commerce substantially affect that commerce,[19] and since Congress, in legislating with respect to interstate commerce is acting in the public interest, it may authorize an administrative agency to inspect books and records of and to require the disclosure of information by a particular business, regardless of whether there is any pre-existing probable cause to suspect violations of law and regardless of whether the business is a public or private corporation. This broad language, without qualification, suggests that any business engaged in interstate commerce is "affected with a public interest" to the extent that it is subject to mandate of Congress under the commerce clause, intimating a reversion to the closed-concept theory existing prior to the decision in the Nebbia case, and further intimating that the fact of interstate commerce being present, there is no limit on what aspect of the business may be controlled "for the public good." Only meager qualification can be found in later portions of the opinion, wherein the Court recognizes that the affairs of a private corporation may be less public than those of a public utility corporation and that the scope of the regulation of the former is correspondingly more limited. However, it may be assumed that these observations by the Court are by way of dicta, attributable to the zeal of the Court is asserting a definite position with regard to upholding the investigatory powers of administrative commission under proper authorization by Congress.

Conceding the decision in the instant case as authorizing administrative investigations for the purpose of disclosing violations of an act of

[17] 94 U. S. 113, 24 L. Ed. 77 (1877).

[18] 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934).

[19] N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

Congress, without regard to whether the business under scrutiny is public or private, it must be remembered that this power is limited by the requirement that the exercise thereof must not be unreasonable. Accordingly, the concession to efficient law enforcement appears to be properly granted in view of the present day conditions.

H. M. KNOTH

TRUSTS — MANAGEMENT AND DISPOSAL OF TRUST PROPERTY — WHAT LAW GOVERNS THE ADMINISTRATION OF A TESTAMENTARY TRUST OF MOVABLES AS TO THE LEGALITY OF TRUST INVESTMENTS. — The question of what law should govern the administration of a trust of movables where the settlor dies domiciled in one state, and the designated corporate trustee and other operative factors are located in another state, the settlor's intention being unexpressed, has received novel treatment by the Prerogative Court of New Jersey in the recent case of *In re Johnston's Estate*.[1] In this case, the settlor died domiciled in New Jersey after having lived most of his life in Pennsylvania where he had business connections with and where his son was still an officer of the corporation he named trustee in his will. The trustee invested part of the trust property in certain real estate mortgages which were non-legal trust investments according to New Jersey law but legal according to Pennsylvania law. In a bill brought by the trustee to approve his account in the New Jersey court, the beneficiaries sought to have the account surcharged by the amount of the loss incurred through these investments. The court allowed the surcharge, holding that there was an inference of intention to be gained from the will that administration was to be governed by New Jersey law. The court found this inference from three factors: first, the New Jersey decisions indicated the local rule to be that administration was to be according to the law of the domicile of the testator, and this testator was presumed to have made his will in light of this law; second, the Restatement of Conflict of Laws was not published at the time of the execution of the will and so its rule establishing a contrary presumption where a foreign corporation is named trustee could not have influenced the testator; third, under Pennsylvania law the trust res would have been subject to a personal property tax, whereas it escaped this particular tax in New Jersey. The court took the position that in the absence of expressed intention to the contrary, the law of the domicile of the testator would be applied.

Express directions by a testator as to what law shall govern administration are generally controlling, but no uniformity of decision has been found on the question of what law shall govern the administration of a testamentary trust in conflict of laws situations where no intention can reasonably be found.[2] Several rules have been suggested. Section

1 127 N.J. Eq. 576, 14 A. (2d) 469 (1940).

2 Questions of validity are uniformly held to be governed by the law of the state of the domicile of the testator, except in the case of charitable trusts. See Cross v. United States Trust Co., 131 N.Y. 330, 30 N.E. 125, 15 L.R.A. 606, 27 Am. St. Rep. 597 (1892). And in the case of trusts inter vivos, the courts have shown a willing-

298 of the Restatement of Conflict of Laws,[3] provides that in the absence of a contrary intention to be gained from the will, the law of the testator's domicile will govern. Comment C to this section declares that where a foreign corporation is named trustee a presumption is raised that the law of the trustee's domicile will control.[4] No cases have been found in which the existence of a foreign corporate trustee, without other factors, has been held sufficient to require administration according to the law of the state in which the trustee does business. Many courts have refused to follow Comment C even where other operative factors were present in the state of the trustee's domicile.[5] In cases where the law of the trustee's domicile was held to apply, other important factors were also present in that state.[6]

Another solution, favored by Professor Cook, is that the law of "the jurisdiction with which, on the whole, the trust seems to have the most substantial connection" should govern the administration of the trust.[7] Under this view the common operative factors, (1) testator's domicile at time of death, (2) trustee's domicile at that time, (3) beneficiaries' domiciles at time of testator's death, (4) place where trust is to be administered, and (5) situs of the property, would be eliminated as single decisive factors, and all of the logically relevant elements would be considered together. This seems to be the process which most courts have followed, although with great variance as to what factors should be considered and as to the relative importance to be assigned to each.

Walter W. Land, in his new work,[8] has given an able analysis of the factors which courts consider on this question. He lists the following thirteen factors: (1) domicile of the testator at time of execution; (2) place of execution; (3) domicile of the trustee at time of execution; (4)

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ness to look to all the operative facts in determining which situs the settlor intended the trust to have. Greenough v. Osgood, 235 Mass. 235, 126 N.E. 461 (1920); Mercer v. Buchanan, 132 F. 501, (Pa., 1904). And see Beale, "Living Trusts of Movables in the Conflict of Laws," 45 Harv. L. Rev. 969 (1932).

3 Restatement, Conflict of Laws, § 298.

4 "*Foreign trust company appointed trustee.* If the testator appoints as trustee a trust company of another state, presumptively his intention is that the trust should be administered in the latter state; the trust will, therefore, be administered according to the law of the latter state."

5 Farnum v. Pennsylvania Co. for Insurance on Lives, 87 N.J. Eq. 108, 99 A. 145 (1916), affmd. 87 N.J. Eq. 652, 101 A. 1053 (1917); In re Avery's Estate, 45 Misc. 529, 92 N.Y.S. 974 (1904); In re Davis' Estate, 127 Misc. 701, 217 N.Y.S. 605 (1926); Estate of Henry Bunn, 95 N.J.L.J. 2808 (1936); In re Cronin, 326 Pa. 343, 192 A. 397 (1937).

6 Cadbury v. Parrish, 89 N.H. 464, 200 A. 791 (1938); Keeney v. Morse, 71 App. Div. 104, 75 N.Y.S. 728 (1902); In re Vanneck's Will, 158 Misc. 704, 286 N.Y.S. 489 (1936); Estate of Cornelia v. N. Bedford, 96 N.Y.L.J. (1879), Nov. 27, 1936; In re Bates' Will, 168 Misc. 526, 5 N.Y.S. (2d) 628 (1938); In re McAuliffe's Estate, 167 Misc. 783, 4 N.Y.S. (2d) 605 (1938); In re Risher's Will, 227 Wis. 104, 277 N.W. 160 (1938).

7 19 Col. L. R. 486 (1919), and see Swabenland, "The Conflict of Laws in Administration of Express Trusts of Personal Property," 45 Yale L. J. 438 (1936).

8 Trusts in the Conflict of Laws, 1940, § 36.1.

location of the trust res at time of execution; (5) domicile of beneficiaries at time of execution; (6) language of the will (indicative of intent); (7) implied intention of the testator; (8) domicile of the testator at time of death; (9) place of probate; (10) location of trust property at time of death and thereafter; (11) domicile of trustee at time of death and thereafter; (12) domicile of beneficiaries at time of death and thereafter; (13) place in which the business of the trust is carried on. The first six, the writer says, are factors properly going to the question of intention since they are the only factors in existence at the time of execution. The seventh, implied intention, he identifies as a catch-all which some courts use to express the court's own conclusion as to the law to govern in phraseology of intention of the testator.[9] Such use of implied intention as an operative factor is open to question even in jurisdictions where the "implied intent" technique is followed, since "implied intent" is the ultimate conclusion and not properly a factor leading to it.

It is in regard to the last six factors that most of the differences of opinion will be found to exist. Section 298 of the Restatement is an expression of the widely-held feeling that the domicile of the testator at the time of his death is so important a factor as to be decisive even standing alone. Thus we find the court in the instant case declaring that it would apply the law of the domicile of the testator in absence of express intention to the contrary, despite the existence of potent factors in another jurisdiction. And in the earlier case of *Lozier* v. *Lozier*,[10] relied on by the New Jersey court, the Ohio court applied Ohio law because of domicile of the testator and probate of the will in Ohio, although execution, domicile of the trustees, and the trust property were all in New York. Courts following this rule also place strong emphasis on the place of probate, even to the extent of finding from the supposed power to take jurisdiction the justification for making the local law determinative of questions of administration.[11] However, many courts which have applied the law of the trustee's domicile and of the place where the trust is carried on, have minimized the relationship between trustee and the probate court, even going so far as to hold that there is no duty to qualify in the domiciliary state and no duty to account.[12] It would seem that the

9 Rosenbaum v. Garrett, 57 N.J. Eq. 186, 41 A. 252 (1898); Lozier v. Lozier, 99 Ohio St. 254, 124 N.E. 167 (1919); In re Estate of Beckwith v. Cooper, 258 Ill. App. 411 (1930); In re Cronin, 326 Pa. 343, 192 A. 397 (1937); In re McAuliffe's Estate, 167 Misc. 783, 4 N.Y. S. (2d) 605 (1938); In re Risher's Will, 227 Wis. 104, 277 N.W. 160 (1938). And note how the court in the instant case used an "inference of intention" to buttress its choice of the law of the domicile of the testator.

10 99 Ohio St. 254, 124 N.E. 167 (1919).

11 Lozier v. Lozier, 99 Ohio St. 254, 124 N.E. 167 (1919); McCullough's Ex'rs. v. McCullough, 44 N.J. Eq. 313, 14 A. 642 (1888); In re Cronin, 326 Pa. 343, 192 A. 397 (1937); Rosenbaum v. Garrett, 57 N.J. Eq. 186, 41 A. 252 (1898); Marsh v. Marsh's Ex'rs., 73 N.J. Eq. 99, 67 A. 706 (1907); In re Bradford's Estate, 165 Misc. 736, 1 N.Y. S. (2d) 539 (1937).

12 In re Risher's Will, 227 Wis. 104, 277 N.W. 160 (1938); In re McAuliffe's Estate, 167 Misc. 783, 4 N.Y.S. (2d) 605 (1938); In re Bates' Will, 168 Misc. 526,

trustee in the instant case might have been better advised to bring the suit in Pennsylvania and urge this doctrine.

Most courts which have considered the location of the trust property as an operative factor have treated it as being at the domicile of the testator.[13] Others have resisted the doctrine of ambulatory situs of personalty and have treated location of trust property as one of the important operative elements.[14] Domicile of the trustee, as we have shown, is of great importance, though not singly determinative even where trustee is a trust company. Domicile of the beneficiaries is not usually considered important,[15] although it is often considered with testator's domicile or trustee's domicile to add weight to the reasons for selecting one or the other of these more determinative factors.[16] The place in which the business of the trust is to be carried on is another of the make-weight factors.[17]

In light of the foregoing it does not seem unreasonable to criticize the court for its approach to this problem. As to the inference of intention which the court claimed to find, it need only be said that if an intention could be found it should have been controlling. And the decision to make the domicle of the testator determinative, although in line with earlier decisions of the New Jersey courts, fails to recognize the modern trend toward a consideration of all the operative factors involved. In applying this set rule of decision, regardless of the placing of the other operative factors, the court has placed a substantial burden on the foreign corporate trustee, both in requiring him to determine which law should govern and in requiring administration according to the law of a foreign state. And the inflexibility of this holding raises the possibility of an irreconcilable conflict with jurisdictions following a more liberal rule where different causes arise independently in both states.

DAVID G. MACDONALD

WILLS—CONSTRUCTION—WHETHER EXTRINSIC EVIDENCE IS ADMISSIBLE WHERE THE WILL MISDESCRIBES LAND DEVISED.—The Supreme Court of Illinois, in deciding *Koelmel* v. *Kaelin*,[1] upheld the admission of extrinsic evidence to explain a devise of real estate which was erroneously described in the will. The particular language of the will was as follows: "I give and bequeath to my son Rudolph Koelmel the fol. tracts of land . . . The South West quarter of the South West quarter of Section No. Eleven (11).

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5 N.Y. S. (2d) 628 (1938). And see Farmers' Loan & Trust Co. v. Ferris, 67 App. Div. 1, 73 N.Y.S. 475 (1901); Keeney v. Morse, 71 App. Div. 104, 75 N.Y.S. 728 (1902).

13 In re Avery's Estate, 45 Misc. 529, 92 N.Y.S. 974 (1904); In re Cronin, 326 Pa. 343, 192 A. 397 (1937); Lozier v. Lozier, 99 Ohio St. 254, 124 N.E. 167 (1919).

14 Keeney v. Morse, 71 App. Div. 104, 75 N.Y.S. 728 (1902); In re Vanneck's Will, 158 Misc. 704, 286 N.Y.S. 489 (1936); Allen v. Tate, 6 F. (2d) 139 (1925).

15 Lozier v. Lozier, 99 Ohio St. 254, 124 N.E. 167 (1919).

16 Mercer v. Buchanan, 132 F. 501 (1904); Keeney v. Morse, 71 App. Div. 104, 75 N.Y. S. 728 (1902).

17 Mercer v. Buchanan, 132 F. 501 (1904).

1 374 Ill. 204, 29 N.E. (2d) 106 (1940).

Except one half acre in S.E. corner of said tract." The will contained no residuary clause. The proof *aliunde* was that the only tract of land owned by the testator and containing thirty-nine and one-half acres was located not in section 11 but in section 1. The only question raised in the case was whether this extrinsic evidence was admissible for consideration with the testamentary description for the purpose of identifying the tract of land devised. The court deleted the words and numerals "of Section No. Eleven (11)" and read the will as disposing of the thirty-nine and one-half acres that the testator owned, the court being apparently satisfied that the language remaining after the false words were cancelled was sufficient, when considered in the light of the circumstances surrounding the testator at the time he made his will, to disclose the testator's intent to devise the land in question.[2] The fact that the land described, after the deletion, and the land actually owned by the testator contained exactly the same acreage and that each had excepted therefrom one-half acre in the same corner, was deemed important. It is to be noted, however, that nothing but the extrinsic evidence located the property. In reaching this result, the court did not indicate that it was aware of the confusion existing among the earlier Illinois cases involving inaccurate testamentary description of real estate.

Although the problem of inaccurate description arises also in deeds, contracts, and other writings, a special phase of the problem is presented in cases involving wills, principally because equity has no power to reform a will.[3] But it is generally accepted that the deletion of false portions of a devise or bequest is not reformation but interpretation.[4] The discussion below is therefore limited to Illinois cases concerning wills, and especially wills devising real estate.

The instant case represents but one of a number of classes of cases of this type, belonging to that class where the devise is incorrect as to section, township, or range. Other classes of cases involve devises correctly placing the land as to section, township, and range, but misplacing the tract as to quarter-section; and devises which are correct as to township, range, section, and quarter-section but which incorrectly locate the property within the quarter-section. Each class of cases may be further subdivided as to cases of the type in which the devise contains additional description of the property by metes and bounds, or acreage by some other name, by reference in the will to the property in terms of other property owned by the testator or some other person, or by express or implied reference to the property as belonging to the testator. In all cases, there is room for the application of the maxim *falsa demonstratio non nocet,* so that description determined according to extrinsic evidence to be false can be stricken as surplusage. The maxim has received

2 Page, Wills, §§ 487, 819; Wigmore, Evidence (3rd ed. 1940), § 2476; Patch v. White, 117 U. S. 210, 29 L. Ed. 860 (1885); Cochran v. Cochran, 277 Ill. 244, 115 N.E. 142 (1917).

3 Wigmore, *op. cit.*, § 2476.

4 For a review of this phase of equity jurisdiction see, Henry Schofield, "So-Called Equity Jurisdiction to Construe and Reform Wills," 6 Ill. L. Rev. 485.

varying treatment in application, in some instances being rejected *in toto*.[5] The implication in the later Illinois cases is that the Illinois Supreme Court will apply the maxim, subject to the rule that the words remaining after the deletion of the false description are sufficient to identify the property.[6] It follows, therefore, that all cases present simply questions of the sufficiency of the additional description and of the nature and amount of the extrinsic evidence required.[7]

For the purpose of this note, only those cases will be considered in which the devise describes the land merely by township, range, section, quarter-section, and portion of the quarter-section, for it cannot be agreed that the language referring to the excepted half-acre in the instant case, standing alone, as it does, is sufficient to identify the tract in question. Not in all cases has the Illinois Supreme Court deemed acreage or fractions thereof sufficient additional description.[8]

Considering the instant case on this basis, the factual situation presented does not differ materially from that presented in *Kurtz* v. *Hibner*,[9] decided in Illinois in 1870. In that case, it was said: "There is no ambiguity in this case, as is urged. When we look at the will it is all plain and clear. It is only the proof, *aliunde*, which creates any doubt, and such

[5] The failure of the courts to accept the maxim uniformly is due to the presence of three well established, albeit somewhat superficial, rules of construction; (1) the rule against disturbing a plain meaning; (2) the rule against alteration because of a mere mistake; and (3) the rule requiring that the remaining words be sufficiently definite in order that the devise be not void for uncertainty. The first and second rules operate in lieu of the maxim; the third rule merely qualifies the maxim in those jurisdictions not accepting the maxim unreservedly.

[6] Page, *op. cit.*, §§ 487, 819.

[7] It is possible here to eliminate a discussion of those cases where the will expressly or impliedly refers to the property as the testator's, by the use of such words as "my property" or their equivalent, for in those cases such reference constitutes sufficient additional description. Patch v. White, 117 U. S. 210, 29 L. Ed. 860 (1885); Emmert v. Hays, 89 Ill. 11 (1878); Higgins v. Dwen, 100 Ill. 554 (1881); Allen v. Bowen, 105 Ill. 361 (1883); Johnson v. Gastman, 291 Ill. 516, 126 N.E. 172 (1920); Leininger v. Reichle, 317 Ill. 625, 148 N.E. 384 (1925); Armstrong v. Armstrong, 327 Ill. 85, 158 N.E. 356 (1927).

Likewise to be eliminated are those cases where the additional description is fairly detailed and would serve as an adequate description in the absence of any other. Stevenson v. Stevenson, 297 Ill. 338, 130 N.E. 771 (1921); Bimslager v. Bimslager, 323 Ill. 303, 154 N.E. 135 (1926).

[8] Acreage ignored: Kurtz v. Hibner, 55 Ill. 514 (1880); Bishop v. Morgan, 82 Ill. 35 (1876); Williams v. Williams, 189 Ill. 500, 59 N.E. 966 (1901); Lomax v. Lomax, 218 Ill. 629, 75 N.E. 1076 (1905). Acreage of some importance: Whitcomb v. Rodman, 156 Ill. 116, 40 N.E. 553 (1895); Huffman v. Young, 170 Ill. 290, 49 N.E. 570 (1897); Vestal v. Garrett, 197 Ill. 398, 64 N.E. 345 (1902).

[9] 55 Ill. 514 (1870). In this case, the devises were as follows: "I give and bequeath to my daughter . . . all that tract . . . of land . . . in Joliet . . . and described as follows: the west half of the south-west quarter of section 32, township 35, range 10, containing 80 acres, more or less, together with all the appurtenances thereunto belonging. . . . " And: "I give and bequeath to my grand-son . . . all that . . . land described as the south half of the east half of the south quarter of section 31, in township 35, range 10, containing 40 acres, more or less." An offer of proof that the testator owned but one 80 acre tract in township 35 and that it was located in section 31 instead of section 32 was rejected. As to the other devise, a

proof we hold to be inadmissible."[10] The decision has been attacked and defended,[11] and has by some authorities been considered overruled by later cases.[12] That the case has not been expressly overruled is certain. The decisions in *Lomax* v. *Lomax*,[13] and in *Graves* v. *Rose*,[14] on almost identical facts, would not support a conclusion that the decision has been tacitly overruled. In *Stevenson* v. *Stevenson*,[15] the devise was incorrect as to township and range, and extrinsic evidence was excluded on the authority of the Kurtz case.[16]

Although it is true that extrinsic evidence has been admitted in some Illinois cases where the additional description does not take the form of a reference by ownership or some other generally accepted designation, it will be seen that these cases are principally those of the class in which the devise is correct in all respects but simply misplaces the property in the quarter-section.[17] In still other cases, where the quarter-section is incorrectly specified, and the devise contains no adequate additional

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similar offer of proof was rejected. The evidence as to both devises also included proof that the respective devisees had resided on the lands as tenants, and this was likewise rejected. It was held that the case presented nothing more than a mistake, which could not be corrected.

10 Ibid. at p. 529.

11 Kales, "Considerations Preliminary to the Practice of the Art of Interpreting Writings—More Especially Wills," 28 Yale L.J. 33; Joseph Warren, "The Progress of the Law, 1918-1919," 33 Harv. L. Rev. 556.

12 Wigmore, *op. cit.*, p. 429 *et seq.*, suggests that Kurtz v. Hibner is tacitly overruled by Collins v. Capps, 235 Ill. 560, 85 N.E. 934 (1908).

13 218 Ill. 629, 75 N.E. 1076 (1905).

14 246 Ill. 76, 92 N.E. 601 (1910).

15 285 Ill. 486, 121 N.E. 202 (1918).

16 The opinion in the Kurtz case did not refer to possibilities under *falsa demonstratio non nocet*. The decision is explained by Wigmore, *op. cit.*, as the result of a hidebound adherence to the rule against overthrowing a document because of a mere mistake. The case thus illustrates the effect of the second obstacle to a clear appreciation of the maxim. See note 3, supra. The case is also an example of bad practice in offering the extrinsic proof, counsel insisting that "31" should be "32" instead of asking for interpretation "from without" by a request that the devise be read as if the incorrect description did not appear. See Wigmore, *op. cit.*, § 2476.

The only Illinois cases sustaining devises incorrect as to section are those in which the respective wills expressly or impliedly referred to the property as that of the testator. Emmert v. Hays, 89 Ill. 11 (1878); Allen v. Bowen, 105 Ill. 361 (1883), incorrect lot number; Daniel v. Crusenbury, 279 Ill. 367, 116 N.E. 833 (1917); Johnson v. Gastman, 291 Ill. 516, 126 N.E. 172 (1920); Leininger v. Reichle, 317 Ill. 625, 148 N.E. 384 (1925), incorrect range number.

In one other case, an incorrect reference to township and range was deleted in view of additional description of the property with reference to its location as adjoining that already owned by the devisee. Stevenson v. Stevenson, 297 Ill. 338, 130 N.E. 771 (1921). See also Bimslager v. Bimslager, 323 Ill. 303, 154 N.E. 135 (1926).

17 Douglas v. Bolinger, 228 Ill. 23, 81 N.E. 787 (1907). This case, typical of this class, concerned a will in which the testator devised the north half of the northwest quarter of a section whereas he actually owned the west half of that quarter. The word north was cancelled. See also, Huffman v. Young, 170 Ill. 290, 49 N.E. 570 (1897); Felkel v. O'Brien, 231 Ill. 329, 83 N.E. 170 (1907); Collins v. Capps, 235 Ill. 560, 85 N.E. 934 (1908).

description, the decisions are about equally divided between refusing and admitting extrinsic evidence.[18] It seems clear that cases of either of the classes last referred to are somewhat different from those of the type represented by *Kurtz* v. *Hibner* and the instant case. In the former cases, the problem of locating the property is at least confined to one section and in some cases to a quarter-section; consequently a lesser amount of extrinsic proof is required. Yet, the difference does not seem to be of sufficient magnitude to justify two governing doctrines. In both classes of cases, the defect is a mistake in the description; in either case, the extrinsic evidence must ultimately locate the property; and in either case the nature of the proof *aliunde* is of substantially the same nature.

In cases where the property is referred to in the will as belonging to the testator, the problem, as stated previously, presents no difficulty. But, as stated in *Stevenson* v. *Stevenson*, "It is never permissible to strike from a will false words of a description of real estate and to put or read into a will the words 'my property' . . . or their equivalent, when not authorized to do so by the very language . . . in the will."[19] On the other hand, it is stated in *Collins* v. *Capps*, an earlier Illinois case, "The presumption is that the testator intended to dispose of property which he owned."[20] And in *Brown* v. *Ray*, a comparatively recent case, it was said: ". . . we have gone to the utmost limit in searching the provisions of a will to find words that will identify the object of the testator's bounty and the property devised by him and give effect to the same as he expressed it, if that can be done without the addition to or subtraction of words that will change the plain meaning of his will as he has expressed it, and whenever parol evidence, under proper rules of law announced, will put the court in a better position to understand the will such evidence will be permitted."[21] There is much to be said in favor of the presumption that a testator intends to devise only property which he owns. As a practical matter, there is little reason for supposing that a testator would devise property that he did not own. Although it was common according to Roman custom for a testator to devise property owned by another person,[22] no such precedent exists in the common law. Adopting the view that it must be presumed that the testator intends to devise only his own property, each will would include, as a matter of law, adequate general

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18 Refused: Bishop v. Morgan, 82 Ill. 35 (1876); Bingel v. Volz, 142 Ill. 214, 31 N.E. 13 (1893); Graves v. Rose, 246 Ill. 76, 92 N.E. 601 (1910). Admitted: Whitcomb v. Rodman, 156 Ill. 116, 40 N.E. (1895), said by Page, *op. cit.*, § 487, to have "tacitly overruled" Bingle v. Volz, supra. Gano v. Gano, 239 Ill. 539, 88 N.E. 146 (1909). See Schofield, *op. cit.*, p. 493, n. 28, for what appears to be a proper ground for the decision in Gano v. Gano, supra.

19 285 Ill. 486, 494, 121 N.E. 202 (1918).

20 235 Ill. 560, 564, 85 N.E. 934 (1908). See also three-judge dissenting opinion in Stevenson v. Stevenson, 285 Ill. 486, 121 N.E. 202 (1918), and the dissent in Graves v. Rose, 246 Ill. 76, 92 N.E. 60 (1910). In the Collins case, the residuary clause gave "all the balance of my property"; hence, there was no impelling reason to imply the testator's intent.

21 314 Ill. 570, 580, 145 N.E. 676 (1924).

22 Radin on Roman Law (1927), § 162.

description of the subject-matter devised, and there would be involved merely the process of determining by extrinsic proof just what property the testator did own.

The instant opinion makes no express reference to an adoption of this presumption as part of the Illinois law on this subject. On the other hand, the opinion contains no reference to the Kurtz or Lomax cases as stating the ruling doctrine in this state. The tendency of the recent Illinois cases seems to be toward a view opposite to that expressed in those cases last referred to. In view of the fact that the Kurtz case was not referred to by the court in the instant opinion, along with the fact that the two cases are very similar, it may be concluded that the Kurtz case is no longer law in Illinois. This conclusion does not lose sight of the fact that the instant case relied on two other aspects of the situation for its decision, namely, the absence of a residuary clause as strengthening the presumption against intestacy,[23] and the fact that the total value of the testators' property was $2,500, the devise being conditioned upon the paying of $500 to four other heirs, which limited the plaintiff to a net value of $500. This latter circumstance demonstrating the testator's intent to distribute his property equally. However, nothing appeared in *Kurtz* v. *Hibner* to indicate the presence of a residuary clause. At the same time, the proof in that case of the devisees' occupancy as tenants of the lands in question was clearly indicative of the testator's intent to make the expected distribution of his property. Looking at the two cases in this light, the decision in the instant case is either the end of, or a continuation of, the confusion existing among the Illinois cases. The conclusion that the decision indicates the former is not without support. H. M. KNOTH

WILLS—PERSONS WHO MAY OPPOSE PROBATE—RIGHT OF JUDGMENT CREDITORS OF HEIR TO CONTEST WILL. — The question of whether a judgment creditor of an heir at law can attack a will which prevents property from passing to his debtor arose in the case of *In re Duffy's Estate.*[1] The testator left a will and codicil, by which he bequeathed and devised his property equally among his thirteen children with provisions for creating a spendthrift trust to cover share of his son George, the debtor. The estate consisted of both personal and real property. The day before proof of the will was to be made, the Fairbank State Bank, the creditor of George, filed objections to the will and codicil. The executor filed a demurrer stating that the contestant was not such a party in interest as could contest the will and the probate court sustained the demurrer.

The contestant appealed and the Iowa Supreme Court held that a judgment creditor had a sufficient interest so as to maintain a contest against the will and codicil.

The requirements are substantially the same in most states; that any person who would be an interested party can contest a will. Generally an interested party is defined as any person who would be interested in

[23] See Felkel v. O'Brien, 231 Ill. 329, 83 N.E. 170 (1907).
[1] 292 N.W. 165 (Iowa, 1940).

the property if the will were set aside, or any person whose financial interest would be directly advanced in case the will were set aside.

The majority of states that have decided the issue agree that a general creditor has no such interest as to bring him under the statute as an interested party.[2]

However, there is a general conflict as to whether or not a judgment creditor, who has a lien on the property of the debtor, would be so directly benefited as to entitle him to contest the will. In some jurisdictions it has been held that the lien of a judgment gives the creditor an interest in any land his debtor owns and that this interest is sufficiently direct to make him an interested party within the meaning of the statute.[3]

Those states which take the contrary view do so on the basis that the judgment creditor's lien is in the nature of a mere remedy and not a direct interest in the property itself.[4]

The difference in views seems to turn about the conflicting notions of the nature of the interest required. It was pointed out in *Lee* v. *Keech*,[5] one of the cases denying a judgment creditor's right to contest a will, that a lien is no property or right in the land itself but a mere right to have it sold for the payment of the judgment. This seems to set up a requirement of a tangible interest in land. The cases favoring the judgment creditor consider a lien to be a sufficient interest even though it does not constitute an estate in itself. In *Watson* v. *Alderson*[6] the Missouri court said, "It is not interest in the estate of the deceased that authorized any person to contest a will under the statute, but an interest in its devolution,—in the probate of will that determines that devolution." And in Iowa where the statute requires notice of probate to be given to "any person interested" and where a previous case[7] had interpreted that to mean "beneficial interest" the court in the instant case said, "The words 'beneficial interest' were not used in any narrow or technical

2 Lockard v. Stephenson, 120 Ala. 641, 24 So. 996, 74 Am. St. Rep. 63 (1899); Keeler v. Lauer, 73 Kan. 338, 85 P. 541 (1906); Bank of Tennessee v. Nelson, 3 Head 634, 40 Tenn. 436 (1859); Ross' Estate v. Abrams, 239 S.W. 705 (Tex. Civ. App., 1922).

3 Smith v. Bradstreet, 16 Pick., (33 Mass.) 264 (1833); In re Langevin's Will, 45 Minn. 429, 47 N.W. 1133 (1891); Watson v. Alderson, 146 Mo. 333, 48 S.W. 478, 69 Am. St. Rep. 615 (1898); Bloor v. Platt, 78 Ohio St. 46, 84 N.E. 604 (1908); In re Coryell's Will, 4 App. Div. 429, 39 N.Y. S. 508 (1896); In re Van Doren's Estate, 119 N.J. Eq. 80, 180 A. 841 (1935). There are numerous other opinions in which by way of dicta, courts have approved this view. However, the cases cited are those only in which the same precise question was in issue.

4 Lee v. Keech, 151 Md. 34, 133 A. 835, 46 A.L.R. 1488 (1926); In re Shepard's Estate, 170 Pa. 323, 32 A. 1040 (1895); Lockard v. Stephenson, 120 Ala. 641, 24 So. 996, 74 Am. St. Rep. 63 (1899); Keeler v. Lauer, 73 Kan. 338, 85 P. 541 (1906). Here also, only those cases which were exactly in point are cited. Many courts have supported the view taken in these cases by the way of dicta.

5 Lee v. Keech, 151 Md. 34, 133 A. 835, 46 A.L.R. 1488 (1926).

6 Watson v. Alderson, 146 Mo. 333, 48 S.W. 478, 69 Am. St. Rep. 615 (1898).

7 In re Stewart's Estate, 107 Iowa 117, 77 N.W. 574 (1898).

sense. . . A 'beneficial interest' is one of value, worth, advantage, or use to a person. One having such a thing of value is a 'person interested'. . . ."

Conflicting policies bear on the determination of the problem. It is not good policy to adopt a position which would enable one to avoid payment of his debts when he has means at hand to acquire assets with which to pay if he will but take the necessary steps, and which would permit the debtor to connive at the probate of a void or voidable will in the expectation that he will receive indirectly the benefits of his inheritance. On the other hand it may be said that the legatees under the will ought not to be harrassed and delayed by suits at the instance of a multitude of disappointed creditors who may have but a slim support for their charges and are merely stretching for a straw.

Neither the Illinois Supreme nor the Appellate court has passed on the right of a lien creditor of an heir to contest a will which makes no provision for the heir. The language of the Illinois Statute[8] is comparable to that in other states, and "any person interested" has been explained to mean "those interested in the settlement of the estate—that is, those who will be directly affected, in a pecuniary sense, by its settlement."[9] This still leaves the question unanswered, because it is capable of being said either way that a judgment creditor of an heir is or is not directly affected in a pecuniary sense. And the commentators on the Probate Act offer no solution.[10]

A. HIRSH

[8] Ill. Rev. Stat., 1939, Ch. 3, § 242.

[9] McDonald v. White, 130 Ill. 493, 22 N.E. 599 (1889); Selden v. Illinois Trust and Savings Bank, 239 Ill. 67, 87 N.E. 860 (1909).

[10] Illinois Probate Act Annotated (Chicago: Foundation Press, Inc., 1940), p. 95.