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Discussion of Recent Decisions

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NUMBER 1

DISCUSSION OF RECENT DECISIONS

DESCENT AND DISTRIBUTION—RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES—WHETHER REVOCABLE TRUST OF PERSONALTY CREATED BY HUSBAND DEFEATS WIDOW'S STATUTORY RIGHT TO SHARE IN HIS ESTATE OR IS A CONVEYANCE IN FRAUD OF SUCH RIGHT—The case of *Smith v. Northern Trust Company*¹ involved a suit by the widow of the settlor of a revocable trust of personal property to have the trust subjected to her statutory interest in the decedent's estate. The facts indicate that the settlor, subsequent to his marriage to the plaintiff, placed practically all of his estate, consisting of personalty, in trust for himself for life with remainder to his children by a prior marriage and to the plaintiff. He reserved the right to revoke, alter, or amend the agreement in whole or in part. In 1940, while temporarily estranged from plaintiff, he exercised such right and eliminated the plaintiff as beneficiary without her knowledge of that fact. Although reconciliation occurred, the terms of the trust agreement were not revised. Upon settlor's death, the

¹ 322 Ill. App. 168, 54 N. E. (2d) 75 (1944).

assets of his estate, except for the property in trust, proved to be negligible in amount, hence the widow's action. The trial court sustained objections to the master's report, which had deemed the amendment of the trust agreement to be a fraud on the widow's rights, and dismissed the suit. Upon appeal, that decision was reversed and the cause remanded upon the ground that the transfer of title to the trustee, although absolute in form, was colorable and illusory because of the power of the settlor to revoke, and as a consequence the same could not operate to defeat the widow's statutory interest in her deceased husband's estate.

The holding in the instant case, although upon a set of facts novel to this state, is in keeping with earlier Illinois decisions involving slightly different factual situations but similar issues,² as well as with the general rule followed by other American courts. Such rule may be stated to be that a husband may make a gift *inter vivos* of his entire property if he wishes, provided the same be absolute and bona fide, and such gift will not be a fraud on the rights of the wife to share in her husband's property after his death. But if the gift is merely colorable, i.e. is apparently a gift but in reality amounts to a device by which he attempts to use and enjoy his property during his lifetime while, at the same time, seeking to deprive his wife of her property rights after his death, then such transfer is deemed to be a legal fraud on the wife's rights, hence voidable at her election.³

When concluding to approve and adopt such rule as applied to transfers in trust, the Illinois court first examined the findings of courts of other jurisdictions and then buttressed its decision by reference to a New York case which involved the same factual situation and in which the question was resolved in favor of the widow.⁴ No attempt was made, however, to rationalize the failure to agree with the holding of the Pennsylvania court in the case of *Beirne v. Continental-Equitable Trust Company*,⁵ which decision is directly contrary to the New York case as well as the instant one. The court there held that a widow could not share in a trust estate created by her husband even though the trust agreement provided that he

² *Geiger v. Merle*, 360 Ill. 497, 196 N. E. 497 (1935); *Blankenship v. Hall*, 233 Ill. 116, 84 N. E. 192, 122 Am. St. Rep. 149 (1908); *Padfield v. Padfield*, 78 Ill. 16 (1875); *Blodgett v. Blodgett*, 266 Ill. App. 517 (1932); *Delta & Pine Land Co. v. Benton*, 171 Ill. App. 635 (1912).

³ *West v. Miller*, 78 F. (2d) 479 (1935); *Burton v. Burton*, 100 Colo. 567, 69 P. (2d) 307 (1937); *Trader v. Trader*, 48 Ida. 722, 285 P. 678 (1930); *Geiger v. Merle*, 360 Ill. 497, 196 N. E. 497 (1935); *Kratli v. Booth*, 99 Ind. App. 178, 191 N. E. 180 (1934); *Payne v. Tatem*, 236 Ky. 306, 33 S. W. (2d) 2 (1930); *Levin v. Levin*, 166 Md. 451, 171 A. 77 (1934); *In re Side's Estate*, 119 Neb. 314, 228 N. W. 619 (1930); *LeStrange v. LeStrange*, 273 N. Y. S. 21, 242 App. Div. 74 (1934); *Armstrong v. Connelly*, 299 Pa. 51, 149 A. 87 (1930). See also 26 Am. Jur., *Husband and Wife*, §198, p. 816; 13 R. C. L. *Husband and Wife*, §§110-2, pp. 1085-9; 30 C. J., *Husband and Wife*, p. 523; 112 A. L. R. 649; 64 A. L. R. 467.

⁴ *Newman v. Dore*, 275 N. Y. 371, 9 N. E. (2d) 966 (1937).

⁵ 307 Pa. 570, 161 A. 721 (1932).

was to have the income for life and could revoke, alter or amend the trust agreement at will. Evidence which tended to prove that the trust there concerned had been created for the express purpose of defeating the wife's right to share in the husband's estate after his death was nullified when the court found that the plaintiff had failed to prove an intention on the part of the husband to commit an actual fraud. The majority view, therefore, seems to be satisfied by a presumption of fraud rather than to require actual proof thereof.

Whether such a presumption should be sufficient in cases of this nature is essentially a question of public policy. That policy would seem to be indicated in statutory provisions for the wife's participation in the personal property belonging to her deceased husband's estate,⁶ which, like those concerning her dower right in his realty, have been enacted to provide for her support after his death. As the same reason no doubt underlies the existence of similar statutory provisions in other states, it would seem that the view of the instant case and those like it is more in keeping with legislative intent than is the narrower view of the Pennsylvania court.

The right of the legally competent owner of property to dispose of the same as he pleases, even to the point of impoverishing himself and his family if such is his wish, cannot, however, be denied. As a consequence, it has been generally held that an absolute bona fide gift of personalty by a husband during his lifetime is not a fraud on the right of the wife to share in his estate at his death, even though made with the intention and purpose of depriving her of that right.⁷ Even the reservation of a life interest to the husband and some degree of control over the property will not defeat the transfer if it is otherwise absolute in nature.⁸ So, where the husband created an irrevocable trust reserving the income for life, a federal court has held that his widow has no interest in the trust estate.⁹ But when the facts indicate that the husband has it within his power to revest the property in himself, the general rule is applied and the widow can assert her statutory rights in the property involved.¹⁰ Attempts to defeat the widow's claim to a share in her husband's estate through the medium of testamentary devises have uniformly been held ineffectual for courts will not permit that to be done by indirection which cannot be done directly. Statutory provisions per-

⁶ Ill. Rev. Stat. 1943, Ch. 3, §§162, 163, and 170.

⁷ *Sturges v. Citizens' Nat. Bank*, 152 Md. 654, 137 A. 378 (1927); *Redman v. Churchill*, 230 Mass. 415, 119 N. E. 953 (1918); *Potter Title & Trust Co. v. Braum*, 294 Pa. 482, 144 A. 401, 64 A. L. R. 463 (1928).

⁸ *Jones v. Somerville*, 78 Miss. 269, 28 So. 940, 84 Am. St. Rep. 627 (1900); *Gentry v. Bailey*, 6 Gratt. (Va.) 594 (1850).

⁹ *West v. Miller*, 78 F. (2d) 479 (1935).

¹⁰ *Blodgett v. Blodgett*, 266 Ill. App. 517 (1932); *Brownell v. Briggs*, 173 Mass. 529, 54 N. E. 251 (1899).

mitting renunciation¹¹ provide adequate protection against limiting the widow's share except with her consent.¹²

Moreover, courts confronted with the question of the effect to be given to gifts *causa mortis* have consistently held that such gifts are void insofar as the widow's claim is concerned.¹³ A somewhat similar problem is presented where the husband makes a gift to a third person in order to avoid the payment of alimony or maintenance which might be ordered against him in a suit commenced, or about to be commenced, by the wife. Such transfers have likewise been generally held to be a fraud on the wife and revocable at her insistence.¹⁴

In the light thereof, the decision in the instant case would seem commendable, not only because consistent with prevailing legal reasoning and in conformity with cases presenting analogous issues, but also because it effectuates a clearly evidenced public policy favoring the support of the widow from her deceased husband's estate. If he desires to make that support a matter of public charge, he can do so only at the risk of making himself a pauper also.

C. F. MARQUIS

DIVORCE—OPERATION AND EFFECT OF DIVORCE—WHETHER ONE STATE MAY REFUSE FULL FAITH AND CREDIT TO THE FOREIGN DIVORCE DECREE OF A SISTER STATE WHERE IT CAN BE SHOWN THAT THE DOMICILE OF THE PLAINTIFF SECURING SUCH DIVORCE WAS NOT BONA FIDE—The question as to how far a foreign divorce decree is binding upon a sister state under the full faith and credit clause of the federal constitution,¹ has received attention through the recent Illinois Supreme Court decision in the case of *Atkins v. Atkins*.² The facts therein show that the parties were residents of Illinois prior to and after their marriage; that the husband left his wife in 1940; that the wife started suit for separate maintenance, in Illinois, site of

¹¹ Ill. Rev. Stat. 1943, Ch. 3, §§168-9.

¹² *Smith v. Smith*, 22 Colo. 480, 46 P. 128, 34 L. R. A. 49, 55 Am. St. Rep. 142 (1896); *Blankenship v. Hall*, 233 Ill. 116, 84 N. E. 192, 122 Am. St. Rep. 149 (1908); *Dyer v. Smith*, 62 Mo. App. 606 (1895).

¹³ *Hatcher v. Buford*, 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507 (1895); *Delta & Pine Land Co. v. Benton*, 171 Ill. App 635 (1912); *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 100 N. E. 1049, rehearing denied 102 N. E. 232 (1913); *Manihee v. Beard*, 85 Ky. 20, 2 S. W. 545 (1887); *Smith v. Corey*, 125 Minn. 190, 145 N. W. 1067 (1914); *Dunn v. German-American Bank*, 109 Mo. 90, 18 S. W. 1139 (1892); *Huber's Estate*, 25 Pa. Co. Ct. 373 (1901).

¹⁴ *Turner v. Turner*, 44 Ala. 437 (1870); *Murray v. Murray*, 115 Cal. 266, 47 P. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97 (1896); *Ruffenach v. Ruffenach*, 13 Colo. App. 102, 56 P. 812 (1899); *Tyler v. Tyler*, 126 Ill. 525, 21 N. E. 616; 9 Am. St. Rep. 642 (1888); *Small v. Small*, 56 Kan. 1, 42 P. 323, 30 L. R. A. 243, 54 Am. St. Rep. 581 (1895); *Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375 (1855); *Doane v. Doane*, 238 Mass. 106, 130 N. E. 484 (1921); *Hayes v. Lindquist*, 22 Ohio App. 58, 153 N. E. 269 (1926); *Griffith v. Griffith*, 74 Or. 225, 145 P. 270 (1915); *Bouslough v. Bouslough*, 68 Pa. St. 495 (1871); *Green v. Seaver*, 59 Vt. 602, 10 A. 742 (1887).

¹ U. S. Const., Art. IV, §1.

² 386 Ill. 345, 54 N. E. (2d) 488 (1944).

the matrimonial domicile, in 1941; that five days afterward the husband commenced a suit for divorce in Nevada, and that he obtained a decree there on substituted service in late 1941. In the meantime, the husband had entered a special appearance in his wife's action in Illinois limited to contesting the award for support as he had not been personally served, so the wife amended her complaint to an action in rem against his real property. The husband, having received his Nevada decree by this time, defended such amended suit on the ground that his obligation to furnish support had been terminated by a valid divorce decree which was entitled to full faith and credit in Illinois. The trial court sustained the wife's motion to strike such defense after hearing evidence on the question as to the husband's domicile in Nevada and granted a decree of separate maintenance. When taking jurisdiction on direct appeal,³ the Illinois Supreme Court came to the conclusion that the case did not coincide with the problem in *Williams v. North Carolina*,⁴ and it affirmed the trial court decision by deciding that a decree of divorce entered in a sister state upon constructive service is not valid if the spouse obtaining the divorce was not possessed of a bona fide domicile within the jurisdiction of the court granting the decree.

That same problem had been presented only recently to an Illinois Appellate Court in the case of *Stephens v. Stephens*,⁵ but it had been there held that a divorce decree granted by a sister state possessing prima facie evidence of validity had to be given full faith and credit in Illinois so that further inquiry was precluded. A dissenting opinion therein, however, had reasoned that if one spouse sets up a domicile in a sister state which is "fictitious, fraudulent and falsely alleged for the purpose of securing a divorce,"⁶ the validity of the decree of divorce might be challenged in the courts of other states who would be free to conduct an independent investigation into the jurisdictional facts alleged to support such decree. The majority of that court seemingly fell into the error of concluding that the decision in the *Williams* case made it obligatory upon them to give full faith and credit to the foreign decree. The Illinois Supreme Court fell into no such error, and the weight of decided cases in other states is to the same effect.⁷

The rule has often been stated that "the residence of a plaintiff in a state or country that will confer jurisdiction to render a decree of divorce which will be recognized elsewhere must be actual, bona

³ Permitted, under Ill. Rev. Stat. 1943, Ch. 110, §199, because a question involving a construction of the constitution was deemed properly presented.

⁴ 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273 (1942), noted in 7 Md. L. Rev. 29, 31 Cal. L. Rev. 167, 18 Ind. L. J. 165, 41 Mich. L. Rev. 1013, 15 Miss. L. J. 165, 17 St. John's Rev. 87, and 52 Yale L. J. 341.

⁵ 319 Ill. App. 292, 49 N. E. (2d) 560 (1943), noted in 22 CHICAGO-KENT LAW REVIEW 77, 32 Ill. B. J. 275.

⁶ 319 Ill. App. 292 at 298, 49 N. E. (2d) 560 at 562.

⁷ See cases noted in 22 CHICAGO-KENT LAW REVIEW 77, particularly notes 4 and 5.

fide, and intended to be permanent or indefinite; and, according to the weight of authority, it must be continued for the length of time required by law."⁸ There are, however, very few United States Supreme Court decisions touching upon the validity of foreign divorce decrees, so it may be worthwhile to examine the most important ones. In *Cheever v. Wilson*,⁹ it was held that a divorce decree based upon the domicile of the plaintiff plus *in personam* jurisdiction over the defendant must be given full faith and credit in all the other states. *Bell v. Bell*¹⁰ held that no state could give a divorce decree the right to extrastate recognition under the full faith and credit clause if it were not the state of domicile of at least one of the spouses. In two other cases,¹¹ it was held that a divorce decree rendered in the state of the last matrimonial domicile, in favor of a spouse still domiciled there, was entitled to full faith and credit even though the other spouse was served by publication. But the decision in *Haddock v. Haddock*,¹² to the effect that one state cannot sever marital ties where only one spouse is domiciled there if such state was not the state of the matrimonial domicile, left the question open to each individual state to decide whether such a foreign decree was valid as to its own residents. In the latest case, that of *Williams v. North Carolina*,¹³ it was decided that where a court of one state, acting in accord with the requirements of procedural due process, granted a decree of divorce to a plaintiff domiciled within its jurisdiction, even though the defendant was not subject to the personal jurisdiction of that court but was merely served constructively, such decree was entitled to full faith and credit in all the states. Although that case overruled the effect of the rule in the *Haddock* case, the question as to whether the domicile was bona fide or not was not raised therein nor was any answer made as to that point. The question of vital concern in the instant case was definitely left undecided.

It would, therefore, seem that if one state wishes to reject a divorce decree of a sister state, such action may rest on one of two grounds, to-wit: lack of procedural due process, or lack of a bona fide domicile by the party initiating the divorce action. On the latter point, it has been held in Nevada, whose divorce decrees have most often been denied full faith and credit, that a mere corporeal presence in the county in which the divorce proceeding is brought is not sufficient to establish either residence or domicile.¹⁴ In much the

⁸ 27 C. J. S. Divorce, §332, and cases there noted.

⁹ 76 U. S. (9 Wall.) 108, 19 L. Ed. 604 (1870).

¹⁰ 181 U. S. 175, 21 S. Ct. 551, 45 L. Ed. 804 (1901).

¹¹ *Atherton v. Atherton*, 181 U. S. 155, 21 S. Ct. 544, 45 L. Ed. 794 (1901); *Thompson v. Thompson*, 226 U. S. 551, 33 S. Ct. 129, 57 L. Ed. 347 (1913).

¹² 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1 (1906).

¹³ 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273 (1942).

¹⁴ *Latterner v. Latterner*, 51 Nev. 285, 274 P. 194 (1929). See also *Walker v. Walker*, 45 Nev. 105, 198 P. 433 (1921), and *Fleming v. Fleming*, 36 Nev. 135, 134 P. 445 (1913).

same way, the act of leaving one's domicile and going into another state for the sole purpose of obtaining a divorce with the intention of immediately returning is insufficient to effect a change of domicile.¹⁵ For that matter Pennsylvania has declared that its residents cannot set up domicile in one state solely for the purpose of getting a divorce, even though intending to remarry immediately and thereafter set up a genuine domicile in some other state, and expect to have such divorce decree recognized in Pennsylvania under the full faith and credit clause.¹⁶ So too, in New York, either party to the foreign divorce decree may attack it as void in an action to settle matrimonial status¹⁷ unless estopped by laches,¹⁸ even though it is no part of the public policy of that state to refuse recognition to foreign decrees if rendered on the appearance of both parties despite the fact that they have gone out of the state to obtain a decree on grounds which would not be regarded as sufficient in New York.¹⁹ A brief sojourn in another state, leading to a default divorce decree, will not suffice though for slight additional evidence that there was no intention of remaining indefinitely will result in disregard of such decree.²⁰ Want of jurisdiction over the person or subject matter being always open to inquiry,²¹ the recital of jurisdictional facts in the foreign decree may be questioned collaterally as is also the case where fraud was perpetrated on the foreign court.²²

It appears rather certain, then, in the light of these established decisions, that no state will be compelled to give full faith and credit to the divorce decree of a sister state obtained by a spouse who is not a bona fide resident thereof when that question is raised by the other spouse, provided the court rendering the decree did not have personal jurisdiction over both parties. The question as to what should constitute a bona fide domicile for purpose of divorce jurisdiction may some day be settled by the United States Supreme Court, but in the meantime it would seem as though the state courts have arrived at a logical answer.

H. H. FLENTYE

¹⁵ *State v. Williams*, 224 N. Car. 183, 29 S. E. (2d) 744 (1944). See also *Wilkes v. Wilkes*, 16 So. (2d) 15 (Ala.) (1943).

¹⁶ *Melnick v. Melnick*, 154 Pa. Super. 481, 36 A. (2d) 235 (1944).

¹⁷ *Querze v. Querze*, 290 N. Y. 13, 47 N. E. (2d) 423 (1943).

¹⁸ *In re Adam's Estate*, 45 N. Y. S. (2d) 494 (1943); *Finan v. Finan*, 47 N. Y. S. (2d) 429 (1944).

¹⁹ *Graham v. Hunter*, 42 N. Y. S. (2d) 717, 266 App. Div. 576 (1943).

²⁰ *Forster v. Forster*, 46 N. Y. S. (2d) 320 (1944).

²¹ *Milliken v. Meyer*, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278, 132 A. L. R. 1357 (1941).

²² *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129 (1878). The court, in the *Atkins* case, found further ground for denying full faith and credit to the Nevada decree in the fact that the husband had practiced fraud on the Nevada court by withholding information relative to the earlier proceeding for separate maintenance in the court of Illinois.

EXECUTORS AND ADMINISTRATORS—ALLOWANCE AND PAYMENT OF CLAIMS—WHETHER HEIR AT LAW WHO IS GIVEN SMALL LEGACY UNDER WILL IS AN “AGGRIEVED PERSON” WITHIN MEANING OF STATUTE PERMITTING APPEAL FROM ALLOWANCE OF CLAIM AGAINST ESTATE—The facts in the recent case of *In re Everly's Estate*¹ disclosed that the testatrix left a substantial estate consisting of real and personal property. Before the will was admitted to probate, the executor therein named filed a claim against the estate for legal services performed for the testatrix before her death, which claim was allowed subsequent to probate. At the hearing on such claim, the estate was represented by a guardian ad litem appointed by the court. A legatee under the will, who was also an heir at law, thereafter appealed from the allowance of such claim but was met by a motion to dismiss the appeal on the theory that he was not an “aggrieved person” within the meaning of the statute permitting appeal.² Such contention was upheld by the circuit court, but the Appellate Court for the Third District reversed on the theory that as appellant was an heir at law, still had the right to bring proceedings to contest the will,³ and had not evidenced any election not to file such contest, he was to be regarded as an aggrieved person within the meaning of the statute in question.⁴

The statute involved grants the right of appeal to “any person who considers himself aggrieved” and does not limit that right to one who is a party to the record.⁵ If literal application were given to such language, the doors of the appellate tribunal would be wide open for anyone might consider himself aggrieved no matter how foreign his concern to the matter at hand. An appeal by a party who has no actual grievance, however, will be dismissed,⁶ so it is necessary to define the word “aggrieved” in order to determine when an appealable interest exists.

That word has been defined to refer to a substantial grievance such as the denial of some personal or property right, either legal

¹ 322 Ill. App. 363, 54 N. E. (2d) 627 (1944).

² Ill. Rev. Stat. 1943, Ch. 3, §484. The motion alleged that as his legacy amounted to only \$166.67 and the gross personal estate was more than ample to cover all legacies, expenses, claims, and taxes, he could in no way be injured by the allowance of the claim, particularly since he had filed no action to contest the will and had no right to renounce its provisions.

³ Ill. Rev. Stat. 1943, Ch. 3, §242, provides that suit to contest a will may be filed within nine months after probate. That period had not elapsed, in the instant case, when the appeal was taken. Appellant's right to bring such proceeding, as an heir at law, was unquestioned: *Pfirshing v. Falsh*, 87 Ill. 260 (1877).

⁴ The court found it unnecessary to discuss or pass upon the question of whether or not appellant, as a beneficiary under the will, would have had the right to appeal.

⁵ *Weer v. Gand*, 88 Ill. 490 (1878); *Pfirshing v. Falsh*, 87 Ill. 260 (1877); *Mundy v. Mundy*, 230 Ill. App. 266 (1923); *Collins v. Kinnare*, 89 Ill. App. 236 (1899); *Wood v. Johnson*, 13 Ill. App. 548 (1883); *Schneider v. Eldredge*, 125 F. 638 (1903).

⁶ *Wallace v. Chicago & Erie Stove Co.*, 46 Ill. App. 571 (1892).

or equitable, or the imposition upon the party of a burden or obligation. It follows, therefore, that a person may consider himself aggrieved within the meaning of the statute only when the judgment, order, or decree operates prejudicially and directly upon his property, his pecuniary interests, or upon his personal rights.⁷ He need not be a party to the record, for it is enough that his interests are affected and that he would derive some substantial benefit from the modification or reversal of the judgment in question.⁸ On motion to dismiss his appeal, therefore, the question is not whether the appellant is entitled to a reversal on the merits but rather whether the record discloses that some substantial right of his appears to have been affected by the order.

There does not appear to be any other case, either in Illinois or elsewhere, directly in point but appealable interests have been found to exist, for example, in case two wills of different dates are presented for probate and the earlier will is denied probate because of the existence of the later one. The chief beneficiary of the earlier will has such a substantial interest as would enable him to maintain proceedings to set aside the later will,⁹ hence it would seem that he should be in a position to appeal from the order of probate. Likewise, on appeal from the admission of a disputed will to probate, a brother of the testator and one of his heirs at law has been held to be an interested person within contemplation of the statute.¹⁰ But no such appealable interest has been found in favor of a nephew of the testator who was not the next of kin nor mentioned in the will as he was treated as having no existing pecuniary interest such as would entitle him to appeal from the probate thereof.¹¹ In much the same way, a creditor was denied the right to appeal when he had not yet filed any claim as such creditor, for it did not appear that he would be a party aggrieved.¹² For that matter, a beneficiary named in the will has been deemed not injuriously affected by a decree confirming a devise to another person and as a consequence has been barred from complaining of such decree.¹³

When, however, it is remembered that it has been frequently held that an heir may appeal from allowance of a claim against an

⁷ *Weer v. Gand*, 88 Ill. 490 (1878); *In re Estate of Hills*, 305 Ill. App. 193, 27 N. E. (2d) 324 (1940); *Wood v. Johnson*, 13 Ill. App. 548 (1883); *In re Michigan-Ohio Bldg. Corp.*, 117 F. (2d) 191 (1941); *Greene v. Willis*, 47 R. I. 251, 132 A. 545 (1926), rehearing denied 47 R. I. 375, 133 A. 651 (1926). See also 4 C. J. S., Appeal and Error, §183.

⁸ See cases in note 5 ante, and *Words and Phrases*, Perm. Ed., "Aggrieved Party," Vol. 1, p. 273 et seq.

⁹ *Adams v. First M. E. Church*, 251 Ill. 268, 96 N. E. 253 (1911).

¹⁰ *Barber v. Barber*, 368 Ill. 215, 13 N. E. (2d) 257 (1938).

¹¹ *Glos v. Glos*, 341 Ill. 447, 173 N. E. 604, 72 A. L. R. 1328 (1930), affirming 255 Ill. App. 567 (1929).

¹² *Wallace v. Chicago & Erie Stove Co.*, 46 Ill. App. 571 (1892).

¹³ *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750 (1887).

intestate estate,¹⁴ it would seem that the instant case follows in the path of established law. As heir at law, appellant had a statutory right to file a complaint to contest the will. Since such right had not been waived or barred, he might eventually succeed in overthrowing the will. If that occurred, he would have a clear right to contest any claim filed and allowed against the estate provided he exercised such right in apt time. His rights ought not to be prejudiced by premature action by executor and creditor, but if denied the opportunity to appeal, such would be the result.

RUTH MARKMAN

LANDLORD AND TENANT—RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD—WHETHER OR NOT TENANT, TO DEFEAT ACTION FOR POSSESSION, MAY SHOW THAT HIS LANDLORD HAS BEEN DIVESTED OF TITLE BY TAX DEED—A case of first impression, involving an attempt to assert an estoppel by lease where the subsequent conveyance of the lessor's title was by a tax deed, has reached the Illinois Appellate Court in the recent case of *Beach v. Boettcher*.¹ The facts therein show that the defendant-lessee entered into a lease with the plaintiff-lessor for a term of nine months. At the expiration of the term, defendant continued to occupy the premises on a month to month basis. No duty was imposed on defendant by the lease to pay the taxes assessed against the premises, but the lessor failed in that regard and the property was sold for delinquent taxes. The purchaser eventually received a tax deed inasmuch as no redemption was made from the tax sale. Thereafter, the lessor brought an action of forcible entry and detainer and secured judgment for possession in the trial court when that tribunal decided that defendant's claim that the lessor's title had been divested by virtue of the issuance of the tax deed was not a good defense. The Appellate Court reversed such judgment on appeal on the ground that the tenant was not estopped to show that his lessor's title had been divested by the tax deed.²

To support the judgment in his favor, plaintiff relied mainly upon the rule of law that a tenant is estopped to deny the title of his landlord. Such rule, though given wider application today, possessed a much more limited meaning under the common law for the

¹⁴ *Motsinger v. Coleman*, 16 Ill. 71 (1854); *Blood v. Harvey*, 81 Ill. App. 187 (1898); *In re Osbon's Estate*, 179 Minn. 133, 223 N. W. 551 (1930).

¹ 323 Ill. App. 79, 55 N. E. (2d) 104 (1944). The judgment was reversed and remanded with directions to permit the lessee to deposit the rent reserved with the clerk of the court so as to protect himself from double liability. Presumably, distribution of the fund was to await the outcome of proceedings between lessor and holder of tax title to settle the right thereto.

² The court intimated that the cause of action, if one existed, would be vested in the grantee under the tax deed, or his transferees, by reason of Ill. Rev. Stat. 1943, Ch. 80, §14, which provides that the grantees of demised lands "shall have the same remedies . . . as their grantor or lessor might have had if such reversion had remained in such lessor or grantor."

tenant there was not estopped to deny his landlord's title unless the lease took the form of an indenture under seal signed by both parties. For that reason, neither a lease in the form of a deed poll signed only by the landlord, nor enjoyment of the estate under it, would operate to prevent the tenant from disputing the lessor's title.³ Any estoppel which there arose was not due to any general rule of law but because the tenant, by his own deed under seal, had conclusively admitted the lessor's title. It was the effect of the seal rather than the lease or the relation of landlord and tenant which gave rise to the doctrine and, as a consequence, the estoppel lasted only during the term stated in the indenture. After the expiration of the lease, even though the tenant still continued to occupy, he could set up a pre-existing title even in himself.⁴

In more modern times, the doctrine of estoppel has been extended until it is now recognized as existing independently of the form or nature of the lease and whether the same be sealed or unsealed, written or oral. It now takes the form of an estoppel *in pais* rather than by deed and is based on permissive possession. Such estoppel will endure so long as the permissive possession continues, whether the original term of hiring has or has not expired. For that reason, it is the tenant's duty to surrender possession to his landlord and, until he discharges that duty or is legally excused from it, he will not be permitted to claim title in himself. That doctrine, however, does not prevent the tenant from showing that the lessor's title has expired since the possession commenced, either by its own limitation,⁵ by the act of the lessor,⁶ or through eviction by title paramount,⁷ for the theory underlying such claim does not deny the landlord's title but admits it for the purpose of proving that it now no longer exists.⁸

No Illinois case to date, prior to the instant one, has considered whether a fully completed tax sale of the lessor's title will operate as a subsequent destruction of the landlord's interest so as to permit the tenant to raise that question. The two cases cited by the Appellate Court, tending to support its decision and the holding that a tenant may show that his landlord's title has been divested in that

³ See Co. Litt. 47b and also *Palmer v. Ekins*, 2 Ld. Raym. 1550, 92 Eng. Rep. 505 (1725).

⁴ *Page v. Kinsman*, 43 N. H. 328 (1861).

⁵ *Tilghman & West v. Little*, 13 Ill. 240 (1851); *Franklin v. Palmer*, 50 Ill. 202 (1869).

⁶ *St. John v. Quitzow*, 72 Ill. 334 (1874).

⁷ *Corrigan v. City of Chicago*, 144 Ill. 537, 33 N. E. 746 (1893); *Franklin v. Palmer*, 50 Ill. 202 (1869).

⁸ *Wells v. Mason*, 5 Ill. (4 Scam.) 84 (1842); *Tilghman & West v. Little*, 13 Ill. 239 (1851); *Lowe v. Emerson*, 48 Ill. 160 (1868); *Franklin v. Palmer*, 50 Ill. 202 (1869); *St. John v. Quitzow*, 72 Ill. 334 (1874); *Hardin v. Forsythe*, 99 Ill. 312 (1880); *Gable v. Wetherholt*, 116 Ill. 313, 6 N. E. 453 (1886); *Corrigan v. City of Chicago*, 144 Ill. 537, 33 N. E. 746 (1893); *Spafford v. Hedges*, 231 Ill. 140, 83 N. E. 129 (1907); *Mitzlaff v. Midland Lumber Co.*, 338 Ill. 575, 170 N. E. 695 (1930).

fashion, arose in Michigan⁹ and Maryland.¹⁰ Under the Michigan statute relating to the sale of land for non-payment of taxes, the tax deed conveys an absolute title and the holder may commence suit to quiet title without taking possession of the premises.¹¹ By judicial decision in that state, it has been held that the effect of a tax sale is to divest the former owner of his title thereto,¹² and the tax sale, if legal, takes precedence over all other titles.¹³ The Maryland statute possesses a similar import.¹⁴

A comparison between the provisions of the Michigan and Maryland statutes on the one hand with that of Illinois on the other¹⁵ demonstrates that a tax deed issued by either of the former possesses far greater importance than one issued here. It has been aptly remarked that the vulnerable nature of titles arising in Illinois from tax lien, sale, and deed has been "solely the handiwork of the courts. In order to favor the 'owners' of property the doctrine of *caveat emptor* has been carried to such severe extremes that a tax title is little more than a nullity as against such 'owner.' Theoretically the tax deed purports to be a conveyance of the fee title to the land. But at an early date the Illinois Court put the tax deed in a special class."¹⁶ In this state it is given more nearly the force and effect of a lien upon the land for money advanced rather than that of a valid conveyance of the property for the numerous and complex provisions of our statute authorizing tax sales have been classed as jurisdictional requirements and owners have been allowed a wide attack upon such proceedings.¹⁷ The existence of a statute making a tax deed prima facie evidence of certain facts has not changed it from providing only color of title and it is not sufficient to actually pass title unless accompanied by the notice required by statute.¹⁸

⁹ *Sherman v. Spalding*, 126 Mich. 561, 85 N. W. 1129 (1901).

¹⁰ *Keys v. Forrest*, 90 Md. 132, 45 A. 22 (1899).

¹¹ *Henderson*, Mich. Stat. Anno. 1936, Vol. 6, §7.117.

¹² *Littlefield v. Petrisk*, 250 Mich. 437, 230 N. W. 507 (1930).

¹³ *Sinclair v. Learned*, 51 Mich. 335, 16 N. W. 672 (1883); *Westbrook v. Miller*, 64 Mich. 129, 30 N. W. 916 (1887).

¹⁴ *Flack*, Anno. Code of Md. 1939, Art. 81, §§ 72-90.

¹⁵ Ill. Rev. Stat. 1943, Ch. 120, §§719-52.

¹⁶ See note in 32 Ill. L. Rev. 953 at 957. In *Garrett v. Wiggins*, 2 Ill. (1 Scam.) 335 at 337 (1837), the court said: "It is a settled principle of the common law, that a party, claiming title under a summary and extraordinary proceeding, must show all the indispensable preliminaries to a valid sale, which the law has prescribed, in order to give notice to those interested, and to guard against fraud, have been complied with, or the conveyance will pass no title." In *Altes v. Hinckler*, 36 Ill. 265 at 267 (1864), the court said the tax buyer "has no standing in a court of equity—not because he has done anything at all censurable in purchasing at a tax sale, but because, in making the purchase, he has paid what the court, when asked to decree the title out of the former owner, can hardly regard as a valuable consideration." A tax title, then, is a purely technical as contra-distinguished from a meritorious title, and depends for its validity upon a strict compliance with the statute.

¹⁷ See *Hacklander*, *Validity of Tax Titles in Illinois*, 17 CHICAGO-KENT LAW REVIEW 119 (1939).

¹⁸ Ill. Rev. Stat. 1943, Ch. 120, §751. See also *Glos v. Mulcahy*, 210 Ill. 639, 71 N. E. 629 (1904).

The holder of a tax deed cannot perfect his title without at least paying all taxes levied for seven years after the issuance of the deed and, if he permits the land to be forfeited or sold for taxes legally assessed during that period, the original owner may obtain a reconveyance by tendering the amount expended by the tax title holder.¹⁹

As the tax buyer in the instant case had not yet perfected an absolute title but held one which was subject to redemption, it would appear on the surface that the Appellate Court erred in allowing the defendant to show that his landlord's title had been divested. Certainly, had the case been tried on the merits and proof adduced as to the question of the destruction of the lessor's title, an entirely different result would seem inevitable. As the question arose on admitted pleadings, however, the actual outcome of the instant case would appear correct,²⁰ but too great reliance should not be placed on the decision as precedent.²¹

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TRUSTS—ESTABLISHMENT AND ENFORCEMENT OF TRUST—WHETHER BROKER WHO GUARANTEED SIGNATURE OF TRUSTEE ON TRANSFER OF STOCK BELONGING TO TRUST IS LIABLE TO BENEFICIARIES FOR TRUSTEE'S CONVERSION THEREOF IN ABSENCE OF NOTICE OF TRUSTEE'S INTENTION TO CONVERT—In the recent case of *Mudge v. Mitchell Hutchins & Company, Inc.*,¹ certain residuary legatees under a will filed a bill for an accounting against the defendant brokerage firm claiming an alleged conversion of certain shares of stock, endorsement of which had been guaranteed by defendant. These shares at one time belonged to the testatrix but had been transferred under a trust agreement to her son as trustee and had been registered in his name in that capacity. One condition of that agreement was that, if the trust had not been revoked before the settlor's death, it should then terminate. Soon after making this trust, the settlor executed a second agreement with her son identical to the first except that she named a different successor trustee, and all the property under the first trust was included therein.² Upon the death of the testatrix-settlor, one of the beneficiaries named in the will raised the question as to whether the trust res passed under the agreement or under the will, so a suit for construction of the will was begun. Before the court had an opportunity to pass thereon, the trustee, who was

¹⁹ Ill. Rev. Stat. 1943, Ch. 120, §736.

²⁰ It appears that no evidence was offered in the trial court, but that judgment was pronounced as if on motion for summary judgment: 323 Ill. App. 79 at 83, 55 N. E. (2d) 104 at 106.

²¹ As a general proposition, an action for forcible entry and detainer is a civil remedy for possession and matters of title may not be inquired into: see *Fortier v. Ballance*, 10 Ill. 41 (1848); *Shulman v. Moser*, 284 Ill. 134, 119 N. E. 936 (1918).

¹ 322 Ill. App. 409, 54 N. E. (2d) 708 (1944). Leave to appeal has been denied.

² The trustee did not change the registration of the stock certificates but retained them in his name as trustee under the earlier trust.

also executor, transferred the shares to himself as an individual and misappropriated the same. After the beneficiaries learned of the misappropriation, this suit was begun on the theory that as the defendant brokerage firm had assisted therein it was liable as a converter.³ The "assistance rendered" was said to consist in guaranteeing the trustee's signature on the endorsement and forwarding the stock certificate, together with a copy of the first trust agreement certified by the trustee's attorneys, to the corporation upon its demand for proof of a right to make the transfer⁴ thereby deceiving the corporation into believing that the trust was still in existence. On a showing by defendant that it lacked knowledge of either the death of the settlor, of the execution of the second trust agreement, or of trustee's wrongful intent, the trial court dismissed the bill of complaint. That decision was affirmed when the Appellate Court for the First District declared that the guarantee by the defendant was only that the signature of the trustee was a genuine one and that the defendant's acts were not the cause of the loss.

Actions by a cestui or by a successor trustee against the corporation itself, for permitting the transfer and sale of stock held in the name of a trustee, particularly following a misappropriation of the proceeds by the latter, are not uncommon. The instant case, however, is the first of its kind in Illinois involving the particular question of the liability of the participating broker. The reason for the paucity of precedent may well lie in the fact that, if the stock has any value, the corporation is solvent and able to pay for the damage caused while the financial status of the brokerage firm may be unsound.⁵ Regardless of the practical aspects, however, a nice legal question is presented for the practice of guaranteeing the signature in case of stock transfers has become so common that little thought may be given to the legal effect thereof, yet it forms one of the major points for consideration in the instant case.

Corporate stock transfer agents, unable to know the parties involved in the many transactions they are required to handle and aware of the consequences of accepting a forged transfer,⁶ have come to insist upon evidence of the genuineness of the signature to the assignment either by requiring attestation before a notary public or the furnishing of a guarantee from some bank or brokerage firm with whom such transfer agents customarily deal. Reliance by the transfer agent on such guarantee is considered sufficient to protect it in the transfer of stock provided the certificates are

³ Suit in equity was necessary as the plaintiffs lacked the necessary legal title to support an action as for trover: *Ridge v. Giffrow*, 220 Ill. App. 590 (1921).

⁴ Although the language quoted from the trust instrument did not expressly authorize the trustee to hold shares in his own name, the court found a probable acquiescence in that practice by the settlor as part of the plan of administration: 322 Ill. App. 409 at 413, 54 N. E. (2d) 708 at 709.

⁵ A similar suggestion as to transfer agents was made by Behrends and Elliott in "Responsibilities and Liabilities of the Transfer Agent and Registrar," 4 So. Cal. L. Rev. 203 at 218-19 (1931).

⁶ *Lake Superior Corp. v. Rebre*, 65 Pa. Super. 379 (1917).

otherwise properly endorsed and stamped.⁷ It is also well established that the broker who guarantees such signature may be held liable if the signature is a forgery,⁸ but not if the signature is genuine even though the transfer instruments are otherwise forged.⁹

Such decisions would limit the guarantee to one of genuineness only, but the case of *Jennie Clarkson Home for Children v. Missouri, Kansas & Texas Railway Company*,¹⁰ suggests it possesses a broader scope by adding the idea that it also covers a guarantee of capacity to act. In that case, the broker had guaranteed the signature of a corporate officer who had proved his authority to sign in such representative capacity by offering forged instruments. When holding the broker liable,¹¹ the court said that "if the witnessing of the signature of the corporation is only that of the signature of a person who signs for the corporation, then the guaranty is of no value."¹² In the light of that decision, there would seem to be a duty placed on the broker making the guarantee to ascertain that the person signing had authority to do so, which raises the question as to whether or not the same rule should apply in cases of stock held in trust, such as in the instant case, where the trustee desires to transfer the stock into his individual name.

The trust agreement, in the instant case, gave no power to the trustee to hold trust property in his own name and, without such express authority, the law looks with disfavor upon that practice,¹³ particularly since the trustee is bound to "comply strictly with the directions contained in the trust instrument, defining the extent and limits of his authority, and the nature of his powers and duties."¹⁴

⁷ 4 So. Cal. L. Rev. 203 at 217.

⁸ *Rosler v. General Gas & Electric Corporation*, 255 N. Y. S. 342, 142 Misc. 596 (1932).

⁹ *Appenzellar v. McCall*, 270 N. Y. S. 748, 150 Misc. 897 (1934).

¹⁰ 182 N. Y. 47, 74 N. E. 571, 70 L. R. A. 787 (1905).

¹¹ The facts indicate that the broker knew of the forgery so made a false guarantee. Liability on such proof would not be difficult to establish. See, for example, *Wilson v. Jones*, (Tex. Civ. App.) 29 S. W. (2d) 845 (1930), reversed (Tex. Comm'n of Appeals) 45 S. W. (2d) 572 (1932), where banker stated he knew genuineness of signature and would guarantee same when in fact it was a forgery. Held: banker's statement was more than a mere opinion, so liable regardless of knowledge of truth or falsity thereof.

¹² 182 N. Y. 47 at 65, 74 N. E. 571 at 576.

¹³ *White v. Sherman*, 168 Ill. 589, 48 N. E. 128 (1897); In re Union Trust Co. of New York, 149 N. Y. S. 324, 86 Misc. 392 (1914); *Morris v. Wallace*, 3 Pa. 319, 45 Am. Dec. 642 (1846); *Norris's Appeal*, 71 Pa. 106 (1872); In re *Yost's Estate*, 316 Pa. 463, 175 A. 383 (1934). In *Christy and McLean, Jr., The Transfer of Stock (Baker, Voorhis & Co., New York, 1940)*, 2d Ed., §72, p. 130, the explanation is given that "if stock belonging to the trust estate is registered in the individual name of the trustee it destroys notice of the trust . . ."

¹⁴ See 26 R. C. L. p. 1372, §232. Restatement, Trusts, §179, states: "The trustee is under a duty to the beneficiary to keep the trust property separate from his individual property, and, so far as it is reasonable that he should do so, to keep it separate from other property not subject to the trust and to see that the property is designated as property of the trust." Subsection (e) of §179 also states: "In the case of a formal trust, such as a trust created by will or deed of trust, mingling by the trustee of trust property with his own property is improper, unless it is clearly permitted by the terms of the instrument."

For that reason, it has been held that when a trustee takes stock in his own name he becomes the insurer of the investment and commits a technical breach of trust¹⁵ which has been classed as a legal fraud "without regard to the intention, or integrity of the trustee, or the honesty and good faith of the particular transaction."¹⁶ To prevent such practice, statutory provisions exist which forbid the taking of trust property in the individual name of the trustee,¹⁷ although Illinois has no such enactment. The import of these principles, absent express authority in the trust instrument, would seem to indicate that the trustee in the instant case lacked the capacity to make the transfer he did and the defendant, if it guaranteed more than the genuineness of the signature,¹⁸ must have been certifying that the trustee possessed broader powers than he actually had.

Undoubtedly, a bank or corporation which does any act to assist the trustee in misappropriating trust property with knowledge that it is property of that character can be held liable for the loss,¹⁹ and knowledge of circumstances which point to the necessity of making further inquiry, but which inquiry is not made, will lead to liability for any loss accruing from such negligence.²⁰ Although courts are not in agreement as to whether inquiry is necessary when one holding securities in the style of "trustee" requests their transfer,²¹ yet, if one is put on inquiry as to the powers of a trustee, sees the trust agreement, and thereafter participates in the trustee's acts thinking such acts are within his powers when in fact they are not, the person so acting cannot protect himself merely by the fact that he has inquired as to the terms of the instrument. The improper construing of a testamentary trust instrument should not protect the one who improperly construes it. As was said in *Manion v. Peoples Bank of Johnstown*,²² there "need not have been intentional wrongdoing or collusion . . . One has notice of a breach of trust, not only when he knows of the breach, but also when he should know it."²³

¹⁵ *White v. Sherman*, 168 Ill. 589, 48 N. E. 123 (1897).

¹⁶ *Morris v. Wallace*, 3 Pa. 319 at 323, 45 Am. Dec. 642 at 643 (1846).

¹⁷ See, for example, *Thompson's Laws of New York*, 1939, Vol. II, p. 2015, being §231 of the Surrogate's Court Act.

¹⁸ The typical legend placed on the endorsement of a stock certificate reads merely "Signature Guaranteed."

¹⁹ *Duncan v. Jaudon and National City Bank v. Jaudon*, 82 U. S. (15 Wall.) 165, 21 L. Ed. 142 (1872); *Safe Deposit & Trust Co. v. Cahn*, 102 Md. 530, 62 A. 819 (1906); *English v. McIntyre*, 51 N. Y. S. 697 (1898); *Baile v. Sheldon*, 189 N. Y. S. 749, 115 Misc. 441 (1921).

²⁰ *Geyser-Marion Gold Min. Co. v. Stark*, 106 F. 558, 53 L. R. A. 684 (1901); *Leake v. Watson*, 58 Conn. 332, 20 A. 343, 8 L. R. A. 666 (1890); *Loring v. Salisbury Mills*, 125 Mass. 138 (1878).

²¹ That inquiry is necessary, see *Geyser-Marion Gold Min. Co. v. Stark*, 106 F. 558, 53 L. R. A. 684 (1901). Cases holding inquiry is not necessary are *Brewster v. Sime*, 42 Cal. 139 (1871); *Titcomb v. Richter*, 89 Conn. 226, 93 A. 526 (1915); *Albert v. Savings Bank*, 2 Md. 159 (1852); *Graffin v. Robb*, 84 Md. 451, 35 A. 971 (1896).

²² 38 N. Y. S. (2d) 484 (1942).

²³ 38 N. Y. S. (2d) 484 at 489.

In this light, the defendant's failure to inquire as to the existence of a possible second trust agreement or of the death of the settlor, factors made important by reason of language in the original agreement which passed through its hands, should hardly be excused even though it received nothing for the service rendered. The existence of a different rule as to executors,²⁴ can hardly justify change in the law as to trusts and trustees for entirely different considerations are involved in the two situations.

Perhaps the Uniform Fiduciaries Act, which has been adopted in Illinois,²⁵ was designed to overrule many of the decisions regarding the duty to predetermine the authority of a trustee to sell or transfer stock belonging to a trust. It does, at least, declare that the corporation or its transfer agent "is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in making the transfer . . . and is liable . . . only where . . . the transfer is made with actual knowledge that the fiduciary is committing a breach of his obligation. . . ." ²⁶ But that statute would appear to be designed to protect the corporation whose shares are the subject of the transfer ²⁷ rather than to affect the obligation of one who assumes to guarantee the genuineness of an endorsement or transfer thereof. At any rate, such statute could not very well affect the outcome of the instant case for it was not adopted until after the bringing of this suit and is not retroactive in operation.²⁸ It might, however, prove of indirect significance in the event a similar situation to the instant case should arise in the future for if the corporation concerned cannot be held for a conversion of shares belonging to a trust it is unlikely that it will bother to proceed against the person who gives such guarantee. The beneficiaries suffering the loss may have difficulty basing any action thereon,²⁹ but probably will have no need to do so if they can show a conscious participation in the conversion by the guarantor.

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²⁴ Bayard v. Farmers' & Mechanics' Bank, 52 Pa. St. 232 (1866).

²⁵ Ill. Rev. Stat. 1943, Ch. 98, §234 et seq. Section 240 deals with the deposit of funds by the fiduciary, while Section 236 concerns itself with the registration of securities. It should be noted that Section 2 of the Uniform Stock Transfer Act, Ill. Rev. Stat. 1943, Ch. 32, §417, does not enlarge the powers of a trustee who holds stock belonging to a trust.

²⁶ Ill. Rev. Stat. 1943, Ch. 98, §236.

²⁷ According to the court in Stark v. National City Bank, 278 N. Y. 388 at 401, 16 N. E. (2d) 376 at 381, 123 A. L. R. 99 at 106 (1938), the purpose of the statute was "to expedite the transfer of securities . . . relieving trust estates from delay . . ."

²⁸ In 322 Ill. App. 409 at 426, 54 N. E. (2d) 708 at 715, the court noted that the New York version of the statute was expressly declared not to apply to transactions occurring prior to its adoption.

²⁹ The third-party creditor beneficiary rule might not apply to such guarantees on the theory that there was no intention to benefit such third person: Federal Surety Co. v. Minneapolis Steel & Machinery Co., 17 F. (2d) 242 (1927).