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NOTES

Constitutional Law

RIGHT TO TRIAL BY JURY UNDER THE HOUSING AND RENT ACT

Over one hundred and thirty years ago Justice Story voiced the convictions of a young nation when he stated, in *Parsons v. Bedford*:¹

The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.

The subsequent history of American jurisprudence gives ample evidence to attest to the truth of this statement. The present discussion deals with but one situation in which this right to jury trial has been under observance in the courts, namely, the circumstances which entitle a landlord as of right to a trial by jury under the Housing and Rent Act of 1947.²

In the relatively short span since the advent of rent control, a mass of litigation has developed. This has resulted in crowded dockets, added expense to the parties, and a corresponding increase in the time required for a final determination of the case.³ The Housing and Rent Act of 1947 and its forerunner, the Emergency Price Control Act of 1942,⁴ have been fruitful sources of this litigation. This is not surprising when one considers the scope of the rent control law. Its impact upon the nation has been tremendous for it regulates a 60 billion dollar industry directly affecting 35 million people in areas having a population of 80 million persons.⁵

Since the historical development of the rent control acts has been adequately noted elsewhere,⁶ no digression for that purpose need be made at this time. For purposes of arrangement, a brief discussion of the means provided for the enforcement of the existing law will be given, followed by an analysis of each in relation to the principal question in issue, whether there is a right to jury trial.⁷

¹ 3 Pet. 433, 7 L. Ed. 732, 736 (U. S. 1830).

² 61 STAT. 196 (1947), 50 U.S.C. APP. § 1881 *et seq.* (Supp. 1951), as amended and extended. Under the present extension the law is to expire June 30, 1952. Defense Production Act Amendments, Pub. L. No. 96, 82d Cong., 1st Sess. § 201 (July 31, 1951).

³ Neuberger, *Justice Comes Too Late*, Readers Digest, Sept. 1951, p. 26.

⁴ 56 STAT. 23 (1942).

⁵ Woods, *The Administration of a Law: Federal Rent Control*, 25 NOTRE DAME LAW. 409, 416 (1950). Statistics dated as of March 23, 1950.

⁶ See Note, *Delegation and Separability Aspects of the Housing and Rent Act of 1949*, 25 NOTRE DAME LAW. 79, 81 *et seq.* (1950).

⁷ For a chronological analysis of enforcement features of the acts see: Rodney, *History of Rent Control Laws with Respect to Damages Allowable Thereunder*, 9 F. R. D. 501 (1950).

The questions involved in this discussion arise in actions brought pursuant to two sections of the Housing and Rent Act of 1947.⁸ In substance, the first, Section 1895, provides that any person who demands, accepts, or receives any payment of rent in excess of the prescribed maximum shall be liable to the person from whom it is demanded, accepted or received in the amount of \$50 or three times the amount of the overcharge, whichever is greater. However, if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the violation, then the recovery is limited to the amount of the overcharge.⁹ Should the tenant fail to bring suit within thirty days, the United States may institute the action within one year and bar subsequent recovery by the tenant. In Section 1896 the statute recites that whenever, in the judgment of the Housing Expediter,¹⁰ any person has engaged or is about to engage in any acts which will constitute a violation of the Act, the United States may make application to any court of competent jurisdiction and after a showing of the violation or threat of violation, the court may grant a permanent or temporary injunction, restraining order, or other such order.

The remedies may be summarized as follows: In actions instituted by the United States, permanent or temporary injunction, restraining order, or other such order; in actions by either the United States or the tenant, a minimum of \$50 or triple the amount of the overcharge, whichever is greater.

Injunction and Restitution

If the landlord is to be entitled *as of right* to a trial by jury, the right must be one which is cognizable under the Seventh Amendment to the Constitution.¹¹ This provides in part:

In suits at *common law* where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . . [Emphasis supplied.]

Thus the right has been held to apply only to common law suits and not to actions in equity¹² or to demands equitable in nature.¹³ As a test, the Court in *Parsons v. Bedford*,¹⁴ stated:

⁸ 61 STAT. 193 (1947), as amended, 50 U.S.C. APP. § 1881 *et seq.* (Supp. 1951).

⁹ This defense was not available to the landlord under the Emergency Price Control Act as originally passed. 56 STAT. 23 (1942).

¹⁰ The office of Housing Expediter has been terminated and the authority under this section has been vested in the Economic Stabilization Administrator. Exec. Order No. 10276, 16 FED. REG. 7535 (1951), as amended, Exec. Order No. 10293, 16 FED. REG. 9927 (1951).

¹¹ *United States v. Friedland*, 94 F. Supp. 721 (D. Conn. 1950).

¹² *Walling v. Richmond Screw Anchor Co.*, 52 F. Supp. 670, 671 (E.D. N.Y. 1943).

¹³ *Hawkins v. Rellim Investment Co.*, 92 Fla. 784, 110 So. 350 (1926).

¹⁴ 3 Pet. 433, 7 L. Ed. 732, 737 (U.S. 1830).

By common law they [the framers] meant what the Constitution denominated in the third article "law;" not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . .

Thus, in determining whether a civil case is to be tried to the court or to a jury, it becomes necessary to categorize the claim as either legal or equitable.

In suits by the Expediter for an injunction or a restraining order¹⁵ no conflict exists on the question of right to a trial by jury. It is well settled that injunctive relief is peculiar to a court of equity¹⁶ and does not fall within the meaning of the Seventh Amendment.¹⁷ Various arguments have been advanced in attempts to have such cases coming under the Housing and Rent Act moved to the jury calendar. For example, in *Woods v. Blake*,¹⁸ the contention was that under the merger of law and equity¹⁹ the right to a jury trial attaches to issues of fact, not to suits of a certain character. In denying the demand, the court cited *Ettelson v. Metropolitan Life Insurance Co.*²⁰ which stated that this merger under the Federal Rules has neither enlarged nor diminished the right to a jury trial.²¹ Since the restraining order is by its nature merely a part of a motion for injunction,²² it would follow that demand for jury trial in such suit would meet with a similar lack of success.

Though restitution is not specifically listed in either section of the Emergency Price Control Act, it was held in *Porter v. Warner Holding Co.*²³ that where the equitable jurisdiction has been properly invoked, restitution may be granted as being an "other order" within the meaning of Section 1896 which provides that ". . . a permanent or temporary injunction, restraining order, or *other order* shall be granted. . . . [Emphasis supplied.] In modern legal usage, restitution has as its object the prevention of unjust enrichment of the defendant by securing to the plaintiff that to which he is justly entitled.²⁴ It is not a punitive

¹⁵ Only the Housing Expediter may obtain an injunction under § 1896. *Luftman v. Ross*, 75 F. Supp. 627, 628 (S. D. N. Y. 1948).

¹⁶ 2 STORY, EQUITY JURISPRUDENCE § 1184 (14th ed. 1918).

¹⁷ *McCoy v. Woods*, 177 F. (2d) 354, 355 (4th Cir. 1949).

¹⁸ 84 F. Supp. 570, 571 (D. N. J. 1949).

¹⁹ FED. R. CIV. P. 2.

²⁰ 137 F. (2d) 62, 65 (3d Cir. 1943).

²¹ *Also see McCoy v. Woods*, 177 F. (2d) 354 (4th Cir. 1949); *Bellavance v. Plastic-Craft Novelty Co.*, 30 F. Supp. 37, 39 (D. Mass. 1939).

²² *Smith v. Coleman*, 127 S. W. (2d) 928 (Tex. Civ. App. 1939).

²³ 328 U. S. 395, 400-3, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946). This decision was given under the Emergency Price Control Act which contained materially the same language as § 1896 of the Housing and Rent Act.

²⁴ *Lauffer v. Vial*, 153 Pa. Super. 342, 33 A. (2d) 777 (1943).

measure though, by its nature, it may sometimes appear to be.²⁵ However, where the transaction involves only the exchange of money (such as excessive rent) the measure of recovery is the amount of money received. The recipient is charged with that sum and no more.²⁶ In granting restitution, the Supreme Court in the *Porter* case distinguished an action for restitution from an action for triple damages by stating:²⁷

. . . a court giving relief under . . . [the triple damage section] acts as a court of law rather than as a court of equity. . . .

Restitution . . . differs greatly from the damages and penalties which may be awarded under [the triple damage section]. . . . When the Administrator seeks restitution. . . he asks the court to act in the public interest by restoring the status quo. . . . Such action is within the recognized power and within the highest tradition of a court of equity.

Hence, *Porter v. Warner Holding Co.* did not merely establish that restitution is a proper "other order," but also reemphasized that this remedy is within the equitable jurisdiction of the court. Courts following this decision deny demands for jury trials on one of two theories; either that an order for restitution is an equitable adjunct to injunction,²⁸ or, that where injunctive relief may be denied, restitution may be granted as an equitable remedy in itself, independent of injunction.²⁹ In either event, it is clear that the cause of action is equitable in nature and that no constitutional right to a jury trial exists.³⁰

Triple Damages

Where the action is clearly equitable little difficulty is presented. The major problem arises when the party bringing the action invokes Section 1895 and seeks triple damages for the overcharge. In deciding whether a trial by jury in a triple damage suit is the defendant's constitutional right, it becomes necessary to determine the nature of the action — whether civil or criminal, legal or equitable — and to ascertain whether actions of this nature were cognizable under common law in 1791.

A triple damage clause, and its problem of jurisdiction, is neither peculiar to the Housing and Rent Act nor is it an innovation which has arisen since the adoption of the Seventh Amendment. Moreover, the courts before which triple damage issues have been presented have

²⁵ RESTATEMENT, RESTITUTION, INTRODUCTORY NOTES §§ 150-59 (1937).

²⁶ RESTATEMENT, RESTITUTION § 150 (1937).

²⁷ 328 U. S. 395, 402, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946).

²⁸ *McCoy v. Woods*, 177 F. (2d) 354 (4th Cir. 1949).

²⁹ *United States v. Moore*, 182 F. (2d) 332 (5th Cir. 1950); *United States v. Cowen's Estate*, 91 F. Supp. 331 (D. Mass. 1950); *United States v. Mashburn*, 85 F. Supp. 968 (W. D. Ark. 1949).

³⁰ *Orenstein v. United States*, 191 F. (2d) 184 (1st Cir. 1951). *But see* *Cobleigh v. Woods*, 172 F. (2d) 167 (1st Cir. 1949), in which the court regretted that it was compelled to follow the *Warner Holding Co.* case.

held that actions for penalties under statutes are civil suits as distinguished from criminal suits.³¹ Criminal suits must be commenced by an indictment or information, but triple damage suits are instituted by a complaint duly served on the defendant.³² Thus, the right to a trial by jury is not dependent upon Article III³³ or the Sixth Amendment to the Constitution.³⁴ If it exists it is by virtue of the Seventh Amendment.³⁵

Though a suit for triple damages was not present in *Porter v. Warner Holding Co.*, the Court went beyond the facts and stated that this type action would be one for the enforcement of a penalty and a court before which such a suit was brought would act as a court of law and not as a court of equity.³⁶ Though this may have been dictum, courts have adopted it in deference to the Supreme Court.³⁷

The principal source of controversy lies in determining the second question, whether a civil suit for a statutory penalty would have given rise to a cause of action "at common law" prior to 1791. The common interpretation of the Seventh Amendment is that it must be construed in the light of the practice of the courts of law and chancery in England at the time the Constitution and the Amendment were adopted.³⁸ Consequently, though the common law is flexible, the meaning of the Seventh Amendment of the Constitution is fixed as of that date.³⁹ Therefore, the solution of this question becomes of prime importance.

The cases denying the right to a trial by jury are often based on the premise that the triple damage feature is the creature of a statute and did not exist at common law.⁴⁰ To the extent that triple damages

31 *Hepner v. United States*, 213 U. S. 103, 29 S. Ct. 474, 53 L. Ed. 720 (1909); *Stockwell v. United States*, 13 Wall. 531, 20 L. Ed. 491 (U.S. 1871).

32 *Hepner v. United States*, 213 U. S. 103, 29 S. Ct. 474, 53 L. Ed. 720 (1909).

33 U. S. CONST. Art. III, § 2 provides, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."

34 U. S. CONST. AMEND. VI provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

35 *United States v. Regan*, 232 U. S. 37, 47, 34 S. Ct. 213, 58 L. Ed. 494 (1914).

36 328 U. S. 395, 402, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946).

37 *Orenstein v. United States*, 191 F. (2d) 184 (1st Cir. 1951); *United States v. Friedland*, 94 F. Supp. 721 (D. Conn. 1950); *United States v. Jepson*, 90 F. Supp. 983 (D. N.J. 1950); *United States v. Hart*, 86 F. Supp. 787 (E.D. Va. 1949). *But see* *United States v. Harris*, 89 F. Supp. 537 (E. D. Pa. 1950), in which the court held that such an action was not penal in nature so as to expire on the death of the landlord.

38 *Liberty Oil Co. v. Condon Nat. Bank*, 260 U. S. 235, 243, 43 S. Ct. 118, 67 L. Ed. 232 (1923).

39 *Dimick v. Schiedt*, 293 U. S. 474, 487, 55 S. Ct. 296, 301, 79 L. Ed. 603 (1935); 1 COOLEY, CONSTITUTIONAL LIMITATIONS 124 (8th ed. 1927).

40 *United States v. Friedman*, 89 F. Supp. 957 (S. D. Iowa 1950); *Creedon v. Arielly*, 8 F.R.D. 265 (W. D. N. Y. 1948).

are authorized by statute this statement is true, but to deny a jury trial on this basis is to overlook the test of the Seventh Amendment evidenced in *Parsons v. Bedford*.⁴¹ Thus, if this test is applied, the controlling feature should not be the type of damages that may be inflicted, the mode through which the damages originated, or a combination of the two. Rather, it should be the manner in which the right would have been asserted under the rules of the common law prior to 1791.

Even before our independence there had grown up under the original writs certain well-defined actions at common law. Among them was the action of debt, which included suits for penalties imposed by statute where no mode of recovery was prescribed. One penalty was measured by triple the amount of tithes not paid; another was triple the damages incurred by extortion.⁴² In speaking of similar actions of debt upon statutory penalties, Blackstone held the underlying theory to be a contract between the individual and society and that "Whatever, therefore the laws order anyone to pay, that becomes instantly a debt, which he hath before-hand contracted to discharge."⁴³ In *Hepner v. United States*,⁴⁴ the Court denied that there need be a fictitious contract and held that an action of debt would lie whenever a sum certain was due the plaintiff, or a sum which could be readily reduced to a certainty — a sum requiring no future valuation to settle its amount. The attitude of the American courts was well stated as early as 1795 in *United States v. Mundell*,⁴⁵ in which the court stated:

A distinction is sometimes taken between a suit at common law and a suit upon a statute, where the latter is grounded upon different principles from the former, in which case perhaps it may properly be said that the one is a trial at common law, the other upon statute. . . . Thus, in this case, though it be an action on the statute, it is an action of debt, which is a common law action, and will be tried in a common law manner. . . .

The court further pointed out that a distinction between an action of debt and a suit under a statute may be necessary to establish a cause of action, "But when the cause of action is shown, the principles of common law pervade the whole of the trial."⁴⁶

One notable case,⁴⁷ later cited as authority,⁴⁸ espoused a materially contrary view. While conceding that suit brought pursuant to the damage clause in the Housing and Rent Act has as its object the

⁴¹ 3 Pet. 433, 7 L. Ed. 732, 737 (U.S. 1830).

⁴² 1 CHITTY, PLEADING 111 (15th ed. 1874).

⁴³ 3 BL. COMM. *161.

⁴⁴ 213 U. S. 103, 29 S. Ct. 474, 53 L. Ed. 720 (1909).

⁴⁵ 27 Fed. Cas. 23, 28, No. 15,834 (C. C. Vir. 1795).

⁴⁶ 27 Fed. Cas. at 28.

⁴⁷ *United States v. Shaughnessy*, 86 F. Supp. 175 (D. Mass. 1949).

⁴⁸ *United States v. Firman*, 98 F. Supp. 945 (W. D. Pa. 1951).

imposition of a penalty, the court denied the *defendant's* right to a trial by jury on the theory that this was essentially an "old action in equity"⁴⁹ and as such, triable before a court without a jury. To substantiate its position, the court cited *Pallant v. Sinatra*⁵⁰ and *Arnstein v. Twentieth Century Fox Film Corp.*,⁵¹ both decided under the copyright law. The distinction is elementary. In each of these cases the *plaintiff's* demand for a jury trial was denied for two reasons: first, because the plaintiff by instituting an action in equity waived the right to a jury trial; and secondly, because the principal relief sought was for infringement of the copyright and the damages asked were merely for incidental relief, those flowing naturally from the wrong.⁵² To this extent equity may grant damages, or as succinctly stated in *United States v. Bernard*:⁵³

. . . the function of a court of equity goes no farther than to award as incidental to other relief, or in lieu thereof, compensatory damages. It has no authority to assess exemplary damages. By applying to a court of equity for relief, the complainant waives all claim to vindictive damages.

The view that a defendant in a statutory damage suit is entitled as of right to a trial by jury prevails in suits initiated under statutes analogous to the Housing and Rent Act. In *Hepner v. United States*,⁵⁴ a case involving the Alien Immigration Law,⁵⁵ the Court held such a suit, whether regarded as one for a penalty or for liquidated damages, to be a civil suit for which debt would lie. A more emphatic position was taken in *Fleitmann v. Welsbach Street Lighting Co.*⁵⁶ where the Court was of the opinion:⁵⁷

. . . that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law.

⁴⁹ *United States v. Shaughnessy*, 86 F. Supp. 175 (D. Mass. 1949).

⁵⁰ 59 F. Supp. 684 (S. D. N. Y. 1945).

⁵¹ 3 F. R. D. 58 (S. D. N. Y. 1943).

⁵² *Winthrop Chemical Co. v. Blackman*, 159 Misc. 451, 288 N. Y. Supp. 389 (Sup. Ct. 1936). In an attempt by the plaintiff to secure triple damages for patent infringement, the court held that such damages are exemplary damages and no action of the defendant, no matter how fraudulent or wrong, can give equity the right to grant such damages.

⁵³ 202 Fed. 728, 732 (9th Cir. 1913).

⁵⁴ 213 U. S. 103, 29 S. Ct. 474, 53 L. Ed. 720 (1909).

⁵⁵ 32 STAT. 1213 (1903), as amended, 8 U. S. C. § 1 *et seq.* (1946).

⁵⁶ 240 U. S. 27, 36 S. Ct. 233, 60 L. Ed. 505 (1916). This case was decided under the Sherman Act, 26 STAT. 209 (1890), as amended, 15 U. S. C. § 1 *et seq.* (1946). *Also see* *Ring v. Spina*, 166 F. (2d) 546 (2d Cir. 1948), decided under the Sherman Act; *Olearchick v. American Steel Foundries*, 73 F. Supp. 273, 279 (W. D. Pa. 1947), decided under the Fair Labor Standards Act, 52 STAT. 1060 (1938), as amended, 29 U. S. C. § 201 *et seq.* (1946).

⁵⁷ *Id.*, 240 U. S. at 29.

What nature such an action would take in a common law court was not discussed, although it would not be material if the test in *Parsons v. Bedford* controlled.⁵⁸

A second question arises in those instances where the defendant avails himself of the defense provided by Section 1895 and attempts to prove that the overcharges were neither willful nor the result of failure to take practicable precautions against the violation. The burden of proof is upon the landlord⁵⁹ and he must be given the opportunity to present this defense.⁶⁰ The principle underlying the question is that where facts are in dispute and reasonable minds might differ, the question is one of fact for the jury.⁶¹ More specifically, where the question of willfulness is in issue, it is a proper function of a jury to assess and treble the damages.⁶² It is to be noted that this aspect is one of practicability and is not in itself determinative of the right to trial by jury under the Constitution. However, the principle has been held applicable to actions brought pursuant to statutes authorizing multiple damages for willful torts. For example, in an action for double or triple damages for willful destruction of trees, if willfulness is put in issue, it is a proper function of the jury to determine the fact.⁶³ Similarly, this principle has been applied to actions brought under the rent control laws. Thus, it has generally been held reversible error for a judge to direct a verdict in an action for unlawful detainer when a defense of good faith is interposed and reasonable minds might reach different conclusions.⁶⁴ In a direct application to the triple damage clause in the Housing and Rent Act, the Iowa court in *Smith v. Scobee*⁶⁵ held that the question of the willfulness of the landlord's overcharge was a question of fact which was for a jury to determine. Thus, on principle and precedent, the nature of the landlord's conduct clearly becomes another factor in determining whether the case shall be tried with or without a jury.

⁵⁸ 3 Pet. 433, 7 L. Ed. 732, 737 (U. S. 1830). In *Garrett v. Kennedy*, 193 Okla. 605, 145 P. (2d) 407 (1943), the court held that exemplary damages are restricted to actions where the parties are entitled to a jury trial as a matter of right.

⁵⁹ *United States v. Earl Holding Co.*, 88 F. Supp. 1000 (D. Minn. 1950).

⁶⁰ *West v. Winston*, 8 F. R. D. 311 (E. D. Pa. 1948).

⁶¹ *Banks v. Watrous*, 134 Conn. 592, 59 A. (2d) 723 (1948).

⁶² *Falt v. Krug*, 239 Iowa 766, 32 N. W. (2d) 781 (1948).

⁶³ *Gibson v. Thisius*, 16 Wash. (2d) 693, 134 P. (2d) 713 (1943); *Boneck v. Herman*, 247 Wis. 592, 20 N. W. (2d) 664 (1945).

⁶⁴ *Sviggum v. Phillips*, 217 Minn. 586, 15 N. W. (2d) 109 (1944); *Cielinski v. Clark*, 223 S. W. (2d) 139 (St. Louis, Mo. Ct. App. 1949); *Cosgrove v. Jones*, 194 Okla. 641, 154 P. (2d) 55 (1944).

⁶⁵ 241 Iowa 723, 42 N. W. (2d) 589 (1950).

Conclusion

The Federal Housing and Rent Act of 1947 is silent on the question of trial by jury and little assistance can be gleaned from an analysis of the congressional intent. In commenting upon the silence of the Constitution as far as trial by jury in civil actions was concerned, prior to the adoption of the Seventh Amendment, Hamilton pointed out that *silence is not abolition*.⁶⁶ Even were the Act to expressly deny the right, that alone would not determine whether a denial is constitutional. The court in a recent case⁶⁷ pointed out that:

. . . when a federal statute embraces a common-law form of action, that action does not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in an action for debt still prevails whatever modern name may be applied to the action.

Granting that more expedient determinations can be made by a court without a jury, does it necessarily follow that the proper remedy for crowded dockets is to jeopardize the constitutional guarantees? That this solution could be dangerous has been noted:⁶⁸

To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments. It is by such methods that courts lose their power to enforce the Bill of Rights.

It has been held that the right to a jury trial is a basic and fundamental feature of our system of jurisprudence. It is the duty of the courts to guard this right even to the extent of indulging in presumptions against its waiver.⁶⁹ The right was not easily acquired and the interest of the American people in its integrity has not diminished since Justice Story first voiced definite convictions concerning it.

Luke R. Morin

Torts

THE EFFECT OF A PLEA OF GUILTY OR A CONVICTION ON A SUBSEQUENT ACTION FOR FALSE ARREST AND IMPRISONMENT

The present-day tort action for false arrest and imprisonment is a development from the ancient action of trespass, first receiving recognition in Bracton's Note Book.¹ The strict conception limiting the action to cases of actual, physical confinement was at an early date broadened

⁶⁶ THE FEDERALIST, No. 83 at 539 (Modern Library ed. 1937).

⁶⁷ United States v. Jepson, 90 F. Supp. 983, 986 (D. N. J. 1950).

⁶⁸ *Ibid.*

⁶⁹ Olearchick v. American Steel Foundries, 73 F. Supp. 273, 279 (W. D. Pa. 1947).

¹ Woodbine, *The Origins of the Action of Trespass*, 34 YALE L. J. 343, 369 n.116 (1925).

to encompass other instances of restraint.² Gradual evolution of these basic concepts has resulted in a modern interpretation which finds expression in the words of a Missouri court where it pointed out that:³

False imprisonment may be committed by words alone, or by acts alone, or by both and by merely operating the will of the individual. . . .

It is not necessary that the individual be confined within a prison or assaulted or touched.

A distinction between the actions of false arrest and false imprisonment exists in that false arrest necessarily includes false imprisonment based on asserted legal authority, while false imprisonment itself is purely a matter between private persons.⁴ The present treatment is concerned with false imprisonment following an actual arrest. The precise question to be considered here is whether a person who has pleaded guilty of the offense for which he was arrested is barred by the plea from recovering in a subsequent false arrest and imprisonment action.

Investigation of the problem reveals an almost equal quantitative division of authority. The leading cases expounding the two views are *Erie R.R. v. Reigherd*,⁵ and *McCullough v. Greenfield*.⁶ In the *Reigherd* case, the court held that the plea of guilty⁷ "destroyed the very foundation of any action for illegal arrest. . . ." and that "Sound principles of public policy are opposed to sustaining a suit which is inconsistent with the voluntary action of the plaintiff. . . ." The *Greenfield* case held that⁸ ". . . the weight of authority does not favor the conclusion that the liability for the illegal arrest is waived by pleading guilty to the offense charged in the warrant." Of interest is the fact that both opinions purport to state the majority view. And as late as 1933, the Supreme Court of Oregon recognized this split of authority as being an actual one.⁹ Therefore, the purpose of the following discussion is to attempt to reconcile the two views and to show that both opinions, though mutually exclusive on their face, do in fact state the "majority view." To effect this purpose, it must be pointed out that the crux of the problem lies in the circumstances, i.e., the legality or the illegality of the arrest as determined by the facts of each case.

I.

Where the arrest which gave rise to the subsequent false imprisonment action was illegal, by reason of some defect which the existence

² PROSSER, TORTS § 12 (1941).

³ *Gust v. Montgomery Ward & Co.*, 234 Mo. App. 611, 136 S. W. (2d) 94, 97 (1940).

⁴ *Alsup v. Skaggs Drug Center*, 203 Okla. 525, 223 P. (2d) 530, 533 (1949).

⁵ 166 Fed. 247 (6th Cir. 1909).

⁶ 133 Mich. 463, 95 N. W. 532 (1903).

⁷ 166 Fed. at 251.

⁸ 95 N. W. at 534.

⁹ *McLean v. Sanders*, 143 Ore. 524, 23 P. (2d) 321, 322 (1933).

of probable cause would not remedy, the plea of guilty, or the conviction, is not a bar to the action.¹⁰ Thus a plea of guilty is not conclusive against a plaintiff where the misdemeanor for which he was arrested had not in fact been committed, and the plea of guilty entered solely in preference to remaining in jail.¹¹

In *McCullough v. Greenfield*,¹² the court considered a case involving two arrests followed by a plea of guilty to the offense charged in the warrant. The first arrest was illegal because the arresting officer had no warrant to arrest for the past misdemeanor; the second was legal because another officer who had a warrant made the arrest. The court reasoned that the plea of guilty or the conviction can be considered in the false imprisonment action only as showing probable cause for the arrest, and that since probable cause could not affect the illegal arrest, it held that the plea did not constitute a waiver of the illegal arrest.

Later cases offer additional expositions of this rule. Where the offense, a misdemeanor, was not committed in the presence of the arresting officer, the plea of guilty was held to be immaterial, having no bearing on the false imprisonment action.¹³ An arrest for a misdemeanor which in fact was not committed by the person arrested caused the plea of guilty to be treated only as evidence of an admission contrary to the present contention of the plaintiff,¹⁴ and not as a waiver of any rights arising by reason of the arrest.¹⁵ Evidence of a conviction following an arrest made without a warrant for a past misdemeanor was ruled inadmissible in the false arrest action since damages were sought solely for injuries suffered at the time of the arrest.¹⁶ Where the plea of guilty was obtained by fear, duress, or intimidation, it did not constitute a defense to the false imprisonment action.¹⁷ In the most recent case on this section of the topic,¹⁸ where the misdemeanor was

¹⁰ *E.g.*, *Larson v. Feeney*, 196 Mich. 1, 162 N. W. 275, 277 (1917). In a similar vein, the fact that the plaintiff had knowledge of a prevalent custom of arresting in the illegal manner, or that he posted bail, appeared at the trial, and consented to a termination of the proceedings by an entry of "Neither Party," was held not to constitute a waiver of the illegal arrest, when the illegality arose by reason of a failure to comply with the statutory requirements. *Buzzell v. Emerton*, 161 Mass. 176, 36 N. E. 796 (1894); *Williams v. Shillaber*, 153 Mass. 541, 27 N. E. 767 (1891).

¹¹ *Texas & P. Ry. v. Parker*, 29 Tex. Civ. App. 264, 68 S. W. 831 (1902).

¹² 133 Mich. 463, 95 N. W. 532 (1903).

¹³ *Knickerbocker Steamboat Co. v. Cusack*, 172 Fed. 358 (2d Cir. 1905).

¹⁴ *Spain v. Oregon-Washington R. & Nav. Co.*, 78 Ore. 355, 153 Pac. 470, 473-4 (1915).

¹⁵ *Larson v. Feeney*, 196 Mich. 1, 162 N. W. 275, 277 (1917).

¹⁶ *Crosswhite v. Barnes*, 139 Va. 471, 124 S. E. 242, 246 (1924).

¹⁷ *Dailey v. State*, 190 Misc. 542, 75 N. Y. S. (2d) 40 (Ct. Cl. 1947). Here, the commission of the misdemeanor, intoxication, was in issue, and the arresting officers were guilty of assault and battery in performing the arrest.

¹⁸ *Hotzel v. Simmons*, 258 Wis. 234, 45 N. W. (2d) 683 (1951).

committed on a train in one state, an arrest by the conductor at that time was valid, but the subsequent arrest by the police of another state, at the instance of the conductor, was invalid. The plea of guilty there entered, together with the subsequent conviction, had no effect on the false imprisonment action since the latter state had no jurisdiction to try the crime charged. In *Collins v. Owens*,¹⁹ the court tersely defended the law on this point:

The reason for the rule is obvious. A person may be guilty of an offense and may plead guilty thereto, but the arrest without a warrant may still be illegal.

Stated simply, the rule is that, given an illegal arrest, a plea of guilty or a conviction in the criminal proceedings will not have conclusive effect on the right of the person arrested to recover for the false or illegal arrest and imprisonment.

II.

The following cases will demonstrate that when the arrest is legal, or when probable cause will validate the arrest, the plea of guilty or the conviction will function as a bar or defense in a later false imprisonment action. Although neither this formula nor its essential ingredients were examined by the court in *Jones v. Foster*,²⁰ an early New York case, that decision contains the ruling that a plea of guilty effectually bars the action for false imprisonment. In that case a peddler was arrested by a local police chief while selling goods without a license in violation of a village ordinance. In the hearing before a police justice the peddler changed his original plea of not guilty to guilty when he was faced with the prospect of securing bail or spending the night in confinement. When he later sued for false imprisonment, the plea of guilty barred the action. Since there was no dispute as to the lawfulness of the arrest, the actual legality concluded the rights of the peddler in the subsequent action.²¹

When a person was arrested by an officer for being intoxicated in a public place, the court, in *Erie R. R. v. Reigherd*,²² held that a plea of guilty destroyed the basis for a false imprisonment action. An examination of the circumstances in the *Reigherd* case reveals that the

¹⁹ 77 Cal. App. (2d) 713, 176 P. (2d) 372, 375 (1947).

²⁰ 43 App. Div. 33, 59 N. Y. Supp. 738, 739 (4th Dep't 1899). Two previous New York decisions held that a conviction would bar the false imprisonment action. *Cuniff v. Beecher*, 84 Hun 137, 32 N. Y. Supp. 1067 (Sup. Ct. 1895) (valid arrest for disorderly conduct); *Oppenheimer v. Manhattan Ry.*, 63 Hun 634, 18 N. Y. Supp. 411 (Sup. Ct. 1892) (lawful arrest).

²¹ Similarly, a waiver of formal writ, *Williamson v. Wilcox*, 63 Miss. 335 (1885), barred recovery. This case involved legal arrests. The court indicated, 63 Miss. at 337-8, that the problem presented an apt situation for application of the maxim "volenti non fit injuria."

²² 166 Fed. 247 (6th Cir. 1909).

misdemeanor was committed in the presence of the officer, therefore the arrest and reasonable imprisonment were lawful. Two cases, *Louisville Ry. v. Hutti*,²³ and *Holder v. St. Louis & S. F. R. R.*,²⁴ involving disorderly conduct on a train, support the rule that a plea of guilty is conclusive proof of probable cause for an arrest and is a complete defense. In both cases the arrests were legal. Where the person bringing the action for false imprisonment was arrested for disturbing the peace by chasing, annoying and frightening girls in the presence of the arresting officer, a plea of guilty before a magistrate barred the action.²⁵ The same conclusion was reached where a sportsman was caught in the act of hunting in a posted area;²⁶ where a person was charged with vagrancy and conceded that the arrest was legal;²⁷ and where a passenger on a street car was arrested by the police because of his drunken condition.²⁸ A plea of guilty to a traffic violation, which offense was committed in the presence of the arresting officer, established probable cause for the arrest and therefore precluded recovery for wrongful detention in *Ryan v. Conover*.²⁹

When misdemeanors are committed in the presence of a peace officer, he may properly arrest without a warrant. Clearly, a plea or a conviction tends to establish that the officer had cause to believe a misdemeanor was being committed. When the existence of this causal element validates the arrest, the plea or conviction is a defense. The issue, therefore, is not merely whether a plea of guilty or a conviction is or is not a bar, but rather whether the legality of the arrest is established, either in fact, or by the existence of probable cause. The Supreme Court of Michigan indorsed this theory in 1938.³⁰ The court was of the opinion that a justice court conviction furnished conclusive proof of probable cause for the arrest. This decision is an implied repudiation of the earlier Michigan case of *McCullough v. Greenfield*.³¹ In a recent treatment of this aspect of the problem, a Kansas court in *Hill v. Day*,³² applying the state laws governing arrest, held that a police court conviction was conclusive as to probable cause for the arrest. This perfected the arrest and recovery for false imprisonment was denied.

²³ 141 Ky. 511, 133 S. W. 200 (1911). This case is followed in *Waddle v. Wilson*, 164 Ky. 228, 175 S. W. 382 (1915) (conviction).

²⁴ 155 Mo. App. 664, 135 S. W. 507 (1911).

²⁵ *Hushaw v. Dunn*, 62 Colo. 109, 160 Pac. 1037 (1916).

²⁶ *Williams v. Brooks*, 95 Wash. 410, 163 Pac. 925 (1917) (plea of guilty).

²⁷ *Crowley v. Rummel*, 22 Ariz. 179, 195 Pac. 986 (1921) (trial and conviction).

²⁸ *Alter v. Arkansas Power & Light Co.*, 188 Ark. 681, 67 S. W. (2d) 177 (1934) (trial and conviction); *accord*, *Smoker v. Ohl*, 335 Pa. 270, 6 A. (2d) 810 (1939).

²⁹ 59 Ohio App. 361, 18 N. E. (2d) 277 (1938).

³⁰ *Doak v. Springstead*, 284 Mich. 459, 279 N. W. 898 (1938); *accord*, *Lowry v. Standard Oil Co. of California*, 54 Cal. App. (2d) 782, 130 P. (2d) 1 (1942).

³¹ 133 Mich. 463, 95 N. W. 532 (1903).

³² 168 Kan. 604, 215 P. (2d) 219 (1950).

From the earliest times courts have been liberal in admitting various factors which tend to mitigate damages sought in a false imprisonment action.³³ Although a cause-of action for false imprisonment is established, the plea of guilty, or the conviction, since it tends to show probable cause and reasonableness, rebuts the claim for punitive damages.³⁴ However, when only actual damages are sought, the plea of guilty is inadmissible to mitigate the damages.³⁵

It is evident that the split of authority is apparent and not actual. The case law examined *in toto* conclusively demonstrates that the plea of guilty, or its equivalent, the conviction, has value in the false imprisonment action only for the purpose of establishing probable cause for the arrest. If the existence of probable cause will not validate the arrest, that is, if the arrest is defective in a sense on which probable cause has no bearing, then the plea of guilty, or the conviction, is not a bar to the false imprisonment action. Conversely, if the legality of the arrest can be established, either by supplying the element of probable cause, or by applying the arrest laws of the particular state, then the plea of guilty, or the conviction, is utilized as a positive bar to the action.

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Wills

THE RESIDUARY CLAUSE AND POWERS OF APPOINTMENT

Testamentary execution of a power of appointment by an express provision in the will is a common and well-settled practice. However, where the execution of a power is allowed to depend upon the often vague wording of the residuary clause, problems of construction arise. Collateral is the difficulty in determining proper disposition of the appointive property if the attempted execution is ineffective.

Because of the attention focused upon this phase of law by the Powers of Appointment Act of 1951,¹ a discussion of the principles relating to the execution of powers by a residuary clause is in order.

³³ *Beckwith v. Bean*, 98 U. S. 266, 25 L. Ed. 124 (1879); *Rogers v. Toliver*, 139 Ga. 281, 77 S. E. 28 (1913); *Palmer v. Maine Cent. R. R.*, 92 Me. 399, 42 Atl. 800 (1899).

³⁴ *Collins v. Owens*, 77 Cal. App. (2d) 713, 176 P. (2d) 372 (1947)

³⁵ *Crosswhite v. Barnes*, 139 Va. 471, 124 S. E. 242 (1924). The court noted that the rule is otherwise on the issue of punitive damages.

¹ Pub. L. No. 58, 82d Cong., 1st Sess. (June 28, 1951).

I.

The Residuary Clause as a Means of Executing Powers of Appointment

At common law a will which did not refer to a power of appointment was not presumed to exercise it.² This rule and its statutory modifications have an important effect upon the interpretation of residuary clauses.

The federal court in *Old Colony Trust Co. v. Commissioner*³ pointed up the problem. The testator had a general power of appointment over two trust funds and in one paragraph of the will, he bequeathed one-half of all his property of whatever kind to his wife. He also provided that if his total personal and real property amounted to at least \$100,000, certain bequests would go to named persons. Lastly, he devised and bequeathed all the rest, residue and remainder of his property of whatever kind and wherever situated, owned by him at the time of his death, to one Katherine Tingley. The court ruled that the residuary clause effectively executed the powers of appointment, since under the rule in Massachusetts, where the trusts were established, a general residuary devise operates as an execution of a power to appoint by will, unless a contrary intent is manifested in the will. In so ruling, the court deemed the testator's repetition of the phrase "all my property of whatever kind and wherever situated owned by me at the time of my death" to create a presumption, under the Massachusetts rule, that he intended to exercise the powers.⁴

This Massachusetts rule, though firmly established there,⁵ is generally not accepted elsewhere. Other views have been taken in the absence of statute and the prevailing rule is that a power of appointment is not executed by the residuary clause of the donee's will unless an intent to do so clearly appears in the will.⁶ However, additional prestige is enjoyed by the Massachusetts rule because it has been codified in many states to eliminate the possibility that a power might be defeated by mere failure to refer to it in the will.⁷ Without these

² SIMES, FUTURE INTERESTS § 63 (1951).

³ 73 F. (2d) 970 (1st Cir. 1934).

⁴ *Id.* at 971.

⁵ *Old Colony Trust Co. v. Commissioner*, 73 F. (2d) 970 (1st Cir. 1934); *Pitman v. Pitman*, 314 Mass. 465, 50 N. E. (2d) 69 (1943); *Slayton v. Fitch Home, Inc.*, 293 Mass. 574, 200 N. E. 357 (1936); *Boston Safe Deposit & Trust Co. v. Prindle*, 290 Mass. 577, 195 N. E. 793 (1935); *Worcester Bank & Trust Co. v. Sibley*, 287 Mass. 594, 192 N. E. 31 (1934).

⁶ *Harrison v. Lee*, 3 F. (2d) 796 (5th Cir. 1925); *Johnson v. Shriver*, 121 Colo. 397, 216 P. (2d) 653 (1950); *Emery v. Emery*, 325 Ill. 212, 156 N. E. 364 (1927); *Thomson v. Ehrlich*, 148 S. C. 330, 146 S. E. 149 (1928).

⁷ The following statutes are illustrative: CAL. PROB. CODE ANN. § 125 (1944); MICH. STAT. ANN. tit. 26, § 26.143 (1937); N. Y. PERS. PROP. LAW § 18; N. Y. REAL PROP. LAW § 176.

statutes, the donee of a power who neglected to refer specifically to the power he was attempting to exercise, perhaps because he had a life estate in the property and customarily thought of it as his own, was denied a full and complete testamentary disposition. Under these statutes, a residuary gift by the testator will pass the property over which he has a power of appointment unless a contrary intention is clearly shown.⁸

These rules raise the question of how the intent to exercise or refrain from exercising a power may be manifested. Of course, it may be shown by an express reference to the power in the will, which purports to have been drawn with the exercise of the power in mind.⁹ However, express reference to the power is by no means essential to its exercise.¹⁰ Three other methods have long been recognized:¹¹ (1) by some reference to the power in the will or other instrument; (2) by reference to the property which is the subject of the power; or (3) by a provision which would be inoperative except as an exercise of the power.¹² Although one of the three is usually required, some courts have found an intent to exercise a power from indicia not strictly within these categories.¹³ This is true where the intent to execute a power has been gathered simply from the apparent purpose of gifts and directions, or from the general tone of the will.¹⁴ Since the intent of the testator is controlling, these outlying decisions, in which the courts earnestly seek to carry out the testator's intent, are patently sound in principle.

Under the second method listed above, there is some question as to whether a gift in a residuary clause of "all my property" is a sufficient reference to the appointive property to be effective as an exercise of the power.¹⁵ Many courts have refused to honor it as such, reasoning either that the appointive property is not the property of the testator,

⁸ *Greenway v. Irvine*, 235 Ky. 363, 31 S. W. (2d) 606 (1930); *Low v. Bankers Trust Co.*, 270 N. Y. 143, 200 N. E. 674 (1936); *Guaranty Trust Co. v. Halsted*, 245 N. Y. 447, 157 N. E. 739 (1927); *In re Biddle's Estate*, 333 Pa. 316, 5 A. (2d) 158 (1939).

⁹ *Campbell v. Fowler*, 226 Ky. 548, 11 S. W. (2d) 423 (1928); *Reeside et ux. v. Annex Bldg. Ass'n*, 165 Md. 200, 167 Atl. 72 (1933); *Adger v. Kirk*, 116 S. C. 298, 108 S. E. 97 (1921).

¹⁰ See note 2 *supra*.

¹¹ *Blagge v. Miles*, 3 Fed. Cas. 559, No. 1, 479 (D. Mass. 1841).

¹² See 3 PAGE, *WILLS* § 1331 (3d ed. 1941).

¹³ *Rice v. Park*, 223 Ala. 317, 135 So. 472 (1931); *Rettig v. Zander*, 364 Ill. 112, 4 N. E. (2d) 30 (1936); *Funk v. Eggleston*, 92 Ill. 515 (1879); *Paul v. Paul*, 99 N. J. Eq. 498, 133 Atl. 868 (Ch. 1926); *Munson v. Berdan*, 35 N. J. Eq. 376, 378 (Ch. 1882); ". . . it is sufficient if the act shows that the donee had in view the subject of the power."

¹⁴ *Blake v. Hawkins*, 98 U. S. 315, 25 L. Ed. 139 (1879).

¹⁵ This was a collateral problem discussed in *Old Colony Trust Co. v. Commissioner*, 73 F. (2d) 970 (1st Cir. 1934).

or that a power is not property.¹⁶ Others have upheld the reference on the ground that words of absolute ownership indicate an execution of the power.¹⁷ Another question that arises is whether a power is effectively exercised by reference to the appointive property, if the testator owns an interest in it. In this situation, a clause in the testator's will devising the property might be construed as merely a devise of his own interest rather than as an exercise of the power. The statutes embodying the Massachusetts rule solve these questions, for they declare that a will purporting to pass all of the *testator's* property shall exercise a power of appointment in the absence of a contrary intent appearing in the instrument.¹⁸

The third method of showing an intent to exercise a power has also given rise to considerable litigation. Until the departure by the Massachusetts courts,¹⁹ it was generally insisted that this third method could only be applied as evidence indicating merely an intent to exercise a power; and then only if the provision in the will would otherwise be totally inoperative. If the testator had any individual property upon which the provision could operate, extrinsic evidence as to its inadequacy was inadmissible to show an intent to exercise a power.²⁰ This narrow holding has been repudiated in most American jurisdictions, and extrinsic evidence of the complete absence or inadequacy of property with which to carry out the provision in question has been consistently admitted.²¹ This is within the spirit of the prevailing rule which provides that when a will is clearly worded, extrinsic evidence is not admissible to alter the meaning of the ordinary terms used,²² but that if it is ambiguous, such evidence may be admitted to show whether or not he intended to exercise a power.²³

¹⁶ *Hollister v. Shaw*, 46 Conn. 248, 255 (1878); *Emery v. Emery*, 325 Ill. 212, 156 N. E. 364, 368-9 (1927); *Patterson v. Wilson*, 64 Md. 193, 1 Atl. 68, 70-1 (1885).

¹⁷ *Lee v. Simpson*, 134 U. S. 572, 10 S. Ct. 631, 638, 33 L. Ed. 1038 (1890); *Buller v. Wright*, 148 Ind. 477, 47 N. E. 931, 933 (1897).

¹⁸ See note 8 *supra*. See also RESTATEMENT, PROPERTY § 343, comment *d* (Supp. 1948).

¹⁹ *Amory v. Meredith*, 89 Mass. (7 Allen) 397 (1863).

²⁰ *Patterson v. Wilson*, 64 Md. 193, 1 Atl. 68 (1885); *Nannock v. Horton*, 7 Ves. 391, 32 Eng. Rep. 158 (1802).

²¹ *E.g.*, *Hartford-Connecticut Trust Co. v. Thayer*, 105 Conn. 57, 134 Atl. 155 (1926).

²² *Harvard Trust Co. v. Frost*, 258 Mass. 319, 154 N. E. 863 (1927).

²³ *Wyeth v. Safe Deposit & Trust Co. of Baltimore*, 176 Md. 369, 4 A. (2d) 753 (1939); *Camden Safe Deposit & Trust Co. v. Fitler*, 123 N. J. Eq. 245, 197 Atl. 249 (Ch. 1938); *In re Jackson's Estate*, 337 Pa. 561, 12 A. (2d) 338 (1940). Declarations of the testator's intent not found in the will are ordinarily not admissible, but evidence as to his knowledge concerning the power and the nature and extent of the property subject to it is admissible. 3 PAGE, *op. cit. supra* note 12, § 1331.

It appears, then, that the above three methods of manifesting an intent to exercise a power of appointment are reliable, but that some tendency is noticeable in the courts to effect this intent by reliance upon extrinsic evidence, especially where there is some ambiguity in the will.

In the states which have passed statutes providing that a will purporting to pass all of the testator's property will execute a power of appointment, the question of what evidence of a contrary intent will negate this execution is a troublesome one. These statutes vary widely in detail, but their general provisions and effect are similar. Although not all are explicitly restricted to situations where there appears no contrary intent, this qualification generally seems implicit.²⁴

A contrary intention is sometimes manifested by an inconsistency between the instrument exercising the power and an instrument executed previously which reserved the power.²⁵ If the will purporting to exercise the power of appointment was executed before the instrument reserving the power, that fact will constitute a contrary intention apparent on the face of the will.²⁶

Under the statute in Pennsylvania,²⁷ the statutory presumption that the testator intended to exercise a power of appointment²⁸

. . . may be overcome, moreover, only by the presence in the will of language clearly indicative of a contrary dispositive intent, or of a form or method of disposition inconsistent with an exercise of the power. The contrary intent must appear from the will itself, not from extraneous circumstances.

²⁴ RESTATEMENT, PROPERTY § 343, comment *d* (Supp. 1948).

²⁵ Guaranty Trust Co. v. Halsted, 245 N. Y. 447, 157 N. E. 739 (1927).

²⁶ Gassinger v. Thillman, 160 Md. 194, 153 Atl. 19 (1930). Reference here to the date of publication of the will would indicate the contrary intent to be apparent on the face of the will. However, in Lederer v. Safe Deposit & Trust Co. of Baltimore, 182 Md. 422, 35 A. (2d) 166 (1943), a case similar on the facts, a codicil enacted after the deed of trust which had created the power of appointment in the testator and which had been drafted after the will, effectively exercised the power, since the deed, will and codicil became in law one instrument.

An unusual result from a somewhat similar set of facts is found in a contemporaneous decision. H and W set up a trust, the property to go to whomever H appointed in his will, after the death of both H and W. H's will had been executed previously with, of course, no reference to the power. Nevertheless, the court held that the general residuary clause which named W as beneficiary was an effective exercise of the power, even though it had been drafted prior to the trust instrument and though W was deceased at the date of exercise. The court relied on CAL. PROB. CODE ANN. § 125 (1944), which provides that the power shall be effectively exercised by a will regardless of the date of execution of the will, if it is otherwise an effective appointment. California Trust Co. v. Ott, 59 Cal. App. (2d) 715, 140 P. (2d) 79 (1943).

²⁷ PA. STAT. ANN. tit. 20, § 223 (1950).

²⁸ Provident Trust Co. of Philadelphia v. Scott, 333 Pa. 231, 6 A. (2d) 814, 816 (1939).

The court in this case held that since the testator, who was the donee of two powers of appointment, mentioned one of the powers in one clause of her will, but mentioned neither in the residuary clause, there was insufficient indication of an intent not to exercise the power which she failed to mention.

Another manifestation of intent not to exercise a power of appointment is found in a Kentucky case²⁹ which applied a statute similar in effect to those previously mentioned. The testator was held to have manifested an intent not to exercise the power reserved to him by his wife's will, by explicitly directing in his will that it be delivered back to his wife at his death. The court pointed out that any indication of an intent not to exercise the power must be "gleaned from the four corners of the husband's will. . . ." ³⁰

That the exercise of the power, though aided by the statutory presumption and unhindered by a contrary intent, may nevertheless be ineffective is clearly indicated in a New York case.³¹ There it was held that property passed in default of appointment because the residuary clause exercised the power in a manner that illegally suspended the power of alienation. By the residuary clause the testator bequeathed the property to his two children, neither of whom was living at the time the power was reserved. This violated the New York Rule against Perpetuities³² which prohibited the suspension of the absolute ownership of personal property for more than two lives in being. However, the point of significance to the present discussion was that the power was in fact exercised by the residuary clause, although no reference was made to it and though there was no expression of intent to exercise it. The controlling New York statute supplies the intent to exercise the power, so long as it is not overcome by a manifestation of contrary intent.³³

Turning to a different problem, some question exists as to whether the typical statute is applicable to both general and special powers. In Massachusetts, where a presumption in favor of the exercise of a power exists even without legislative promulgation, there is respectable dictum that special powers should be construed by the rules governing general powers.³⁴ Pennsylvania has held that special powers can be

²⁹ *United States Trust Co. v. Winchester*, 277 Ky. 434, 126 S. W. (2d) 814 (1939).

³⁰ *Id.*, 126 S. W. (2d) at 816.

³¹ *Low v. Bankers Trust Co.*, 270 N. Y. 143, 200 N. E. 674 (1936).

³² N. Y. PERS. PROP. LAW § 11.

³³ N. Y. PERS. PROP. LAW § 18 provides: "Personal property embraced in a power to bequeath, passes by a will or testament purporting to pass all the personal property of the testator; unless the intent, that the will or testament shall not operate as an execution of the power, appears therein either expressly or by necessary implication."

³⁴ *Stone v. Forbes*, 189 Mass. 163, 75 N. E. 141, 143 (1905).

exercised without a direct reference, if all the members of the permitted class are named as beneficiaries of the power.³⁵

A decision representative of the modern trend, because it strongly favored the exercise of a power of appointment, despite rather persuasive arguments to the contrary, was recently handed down in Michigan.³⁶ The donor of the power had specifically provided that a general residuary clause in the donee's will would not be effective as an exercise of the power. Nevertheless, the court upheld the donee's residuary clause as an effective exercise of the power, reasoning that it was probably the donor's intent, by the restriction against residuary clause exercise, to prevent a thoughtless and unintentional exercise of the power. Since the donee had taken great pains to draw a carefully phrased will, the court apparently thought that the danger of a rash exercise, which the donor had sought to preclude, was alleviated and the donor's intent was given effect. This is an extreme example of the strength of the statutory presumption in favor of the exercise of a power of appointment, although the case ostensibly seems correctly decided.

Summarizing, in the states which have legislated a presumption in favor of the exercise of a power, it appears that there is a slight tendency toward a liberal interpretation of these statutes. An intent not to exercise the power cannot be proved by evidence without the "four corners" of the will. In contrast with this view are the common law states where some courts have exhibited a tendency to admit extrinsic evidence to prove an intent to execute the power, especially if the will is ambiguous.

Furthermore, special as well as general powers may be exercised by this statutory presumption in several states. This liberal tendency proves to be a salutary influence in the accomplishment of the ultimate purpose of the law of wills — to effect the testator's intent.

II.

The Residuary Clause and Blending

Blending is a procedure whereby the donee of a general power of appointment fuses the appointive property and his own estate into one homogeneous mass. Thereafter, further dispositions of the appointive property are considered gifts of the donee's own property. Blending will often be of legal significance in the attempted execution of a power of appointment by means of a general residuary clause. If the appointment lapses, for instance, because of the death of the appointee,

³⁵ *In re Biddle's Estate*, 333 Pa. 316, 5 A. (2d) 158 (1939); *In re Lafferty's Estate*, 311 Pa. 455, 167 Atl. 44 (1933).

³⁶ *In re Kilpatrick's Estate*, 318 Mich. 445, 28 N. W. (2d) 286 (1947).

as in *Old Colony Trust Co. v. Allen*,³⁷ the appointive property will go to the donee or his estate, if blending is established. If the exercise of a general power is effective, blending may allow the donee's creditors to reach the appointive property because in effect, the property becomes that of the donee.³⁸

The relation of the blending to execution of powers by a residuary clause was illustrated by the *Allen* case. The donee of a general testamentary power of appointment left the residue of her estate, after providing for payments of debts and legacies, to her two sisters. One of these sisters predeceased the donee. The residuary clause effectively exercised the power, under the previously-discussed Massachusetts rule favoring such exercise. However, since one of the appointees predeceased the donee, the court ruled that the lapsed share of the appointive property should go back to the estate of the donee, because she had by employing the residuary clause to dispose of both her own and the appointive property, indicated an intent to blend the property with her own before devising it to her sisters.

It appears, then, that appointive property will be blended with that of the donee if the donee manifests an intent to do so.³⁹ While blending apparently occurs more readily where an attempted exercise of the power is invalid or ineffective,⁴⁰ an invalid or ineffective exercise is by no means a prerequisite to blending. Under a general power of appointment, the donee may exercise the power so as to blend the appointive property with his own, even though there was no other attempted exercise.⁴¹

The use of the residuary clause to exercise a power is itself considered by some authorities to be strongly indicative of an intent to blend the appointive property with the testator's own estate.⁴² This is undoubtedly true under statutes providing for the presumptive exercise

³⁷ 307 Mass. 40, 29 N. E. (2d) 310 (1940).

³⁸ *E.g.*, *Stratton v. United States*, 50 F. (2d) 48 (1st Cir. 1931).

³⁹ *In re Stannert's Estate*, 339 Pa. 439, 15 A. (2d) 360 (1940); *In re Pennsylvania Co. for Insurances*, 264 Pa. 433, 107 Atl. 840 (1919); *Rhode Island Hospital Trust Co. v. Anthony*, 49 R. I. 339, 142 Atl. 531 (1928). See RESTATEMENT, PROPERTY §§ 329, 330 (1940).

⁴⁰ *E.g.*, *Bradford v. Andrew*, 308 Ill. 458, 139 N. E. 922 (1923).

⁴¹ *Old Colony Trust Co. v. Allen*, 307 Mass. 40, 29 N. E. (2d) 310 (1940); *Hammond v. Hammond*, 234 Mass. 554, 125 N. E. 686 (1920). See GRAY, RULE AGAINST PERPETUITIES § 540.1 (4th ed. 1942). A Pennsylvania court pointed out that: "The mere fact that the appointed estate is given to the same persons who take the residue of a testator's individual estate is not the test to be applied in determining whether there has been a blending of the two estates, but the real test . . . is whether the testator has treated the two estates as one for all purposes and manifested an intent to commingle them generally." *In re Hagen's Estate*, 285 Pa. 326, 132 Atl. 175, 176 (1926).

⁴² *E.g.*, *Old Colony Trust Co. v. Allen*, 307 Mass. 40, 29 N. E. (2d) 310, 312 (1940).

of the power by a residuary clause, in the absence of a contrary intent. Of course, if the residuary clause is worded so as to specifically include appointive property, even stronger evidence of an intent to blend arises.⁴³ Also, language of absolute ownership, employed in a residuary clause, is evidence of an intent to blend the appointive property with the property of the donee.⁴⁴ If the donee makes the appointive property specifically chargeable with the payment of his debts, it is almost conclusive evidence of an intent to blend.⁴⁵

A general power of appointment can be executed in a twofold sense. First, the donee may act to make the property his own for all purposes of devolution; for instance, by appointing it to a trustee or an executor for payment of his debts. Second, the donee may appoint the property to particular objects of his bounty. In the latter situation, by so appointing the property, the donee is regarded as taking the property out of the instrument creating the power and blending it with his own. Therefore, upon failure of the beneficiaries particularly designated to take the property, it passes as the donee's property.⁴⁶ The English courts hold that the property will devolve as though it belonged to the donee regardless of any provision for such contingencies in the instrument creating the power.⁴⁷

The American courts, as already noted, have viewed blending in the light of the apparent intent of the donee, as evidenced by the operation of the instrument conferring the power of appointment.⁴⁸ The English courts, however, have often interpreted the problem as being controlled by a criterion which is more arbitrary, yet more consistently applicable, than the somewhat obscure test of intent. They often find blending on the basis of a resulting trust.⁴⁹ This occurs, for instance, when the donee appoints the property upon trust for designated beneficiaries, or when he appoints to his executors.⁵⁰

⁴³ *Bradford v. Andrew*, 308 Ill. 458, 139 N. E. 922 (1923); *Osborne v. Holyoake*, L. R. 22 Ch. D. 238 (1882).

⁴⁴ *In re Forney's Estate*, 280 Pa. 282, 124 Atl. 424 (1924): "All the rest, residue and remainder of my estate . . . including such property . . . as was given to me by my father . . . in . . . his . . . will . . . and in the exercise of the power of appointment therein conferred . . . I give . . . as follows. . . ."

⁴⁵ *In re McCord's Estate*, 276 Pa. 459, 120 Atl. 413 (1923); *In re Ickerin-gill's Estate*, L. R. 17 Ch. D. 151 (1881).

⁴⁶ *In re De Lusi's Trusts*, L. R. Ir. 3 Eq. 232 (1879).

⁴⁷ *E.g.*, *Brickenden v. Williams*, L. R. 7 Eq. 310 (1869).

⁴⁸ *Talbot v. Riggs*, 287 Mass. 144, 191 N. E. 360 (1934); *Hammond v. Hammond*, 234 Mass. 554, 125 N. E. 686 (1920); *Lincoln Trust Co. v. Adams*, 107 Misc. 639, 177 N. Y. Supp. 889 (Sup. Ct. 1919).

⁴⁹ *E.g.*, *Wilkinson v. Schneider*, L. R. 9 Eq. 423 (1870).

⁵⁰ *In re De Lusi's Trusts*, L. R. Ir. 3 Eq. 232 (1879); *In re Pinede's Settlement*, 12 Ch. D. 667 (1879); *Brickenden v. Williams*, L. R. 7 Eq. 310 (1869); *Goodere v. Lloyd*, 3 Sim. 538, 57 Eng. Rep. 1100 (1830).