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Recent Decisions

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restraint.¹³ Likewise, in *Greene v. Kirkwood*¹⁴ a condition that the devisee should not marry below her social standing was held not to be a general restraint. In *Onderdonk v. Onderdonk*¹⁵ a condition restraining the devisee from marrying without consent of those interested in her welfare was held valid.

The distinction between a *condition subsequent* and a *limitation* is arbitrary and may seem an undue interpretive assumption by the courts; yet it is wise. The courts have employed somewhat specious reasoning to get around an unpopular rule. In determining the intention of the testator, which is always of primary importance in construing a will, the courts have been harassed by precedent. While precedent indicates that an unreasonable condition in restraint of marriage is void, the testator says in substance that he wants his property to go to the devisee only until she remarries. Whenever the testator has not first devised a definite estate, the courts say he does not intend to give a specific estate subject to a condition subsequent, but merely a qualified or determinable estate. There is no condition subsequent. However, when a definite estate is given, the restraint of marriage is a condition subsequent and the precedent must prevail over the intention of the testator.

Whenever possible, therefore, the courts have given expression to the testator's intention: To provide for the devisee only so long as she does not marry or remarry. And that is wise.

Martin P. Torborg.

RECENT DECISIONS

AUCTIONS AND AUCTIONEERS—STATUTORY REGULATIONS—CONSTITUTIONAL LAW—REGULATION OF TRADE OR BUSINESS IN GENERAL.—In Wisconsin a statute provides that "No person, firm or corporation shall sell or dispose of or offer for sale at public auction, between the hours of six o'clock in the evening and eight o'clock the following morning, any gold, silver, plated ware, precious or semi-precious stones, watches, clocks or jewelry of any nature whatsoever." Section 130.07 (1), 1933 Stats. An ordinance of the city of Racine provides that "Sales, by public auction, of the stock of any person, firm or corporation, shall be held on successive days, Sundays and legal holidays excluded, and shall continue not more than thirty days in all within the period of one year. And no such auction shall be held between the hours of six P. M. and eight A. M. of the following day." Section 10.05 (15). The Plaintiff, a jeweler of the city of Racine, paid all the necessary fees precedent to the holding of an auction sale of jewelry, and on the seventh day of October, 1933, began such sale. In spite of advice

¹³ *Shackleford v. Hall*, 19 Ill. 212 (1857).

¹⁴ 1 Ir. 130 (1895).

¹⁵ 127 N. Y. 196, 27 N. E. 839 (1891).

and warnings, the plaintiff continued his sales until about 10 or 11 o'clock each evening for thirty days thereafter. The plaintiff, by this suit, sought to restrain the mayor of Racine, the chief of police of that city, and the other officers thereof from interfering with the plaintiff's asserted right to so conduct his sale. The trial court overruled the defendants' demurrer, but the Supreme Court of Wisconsin reversed this ruling with directions to sustain the demurrer. *Doering v. Swoboda*, 253 N. W. 657 (Wis. 1934).

In reaching its decision the supreme court was at the outset confronted with the case of *Hayes v. City of Appleton*, 24 Wis. 542, decided by the same court in 1869. In that case it was held that the city of Appleton had no authority under its charter to pass an ordinance prohibiting a licensed auctioneer's selling any goods, wares, or merchandise after sundown. The court there was of the opinion that such ordinances should be for the government and good order of the city, for the suppression of vice, the prevention of crime, and for the benefit of the health, trade, and commerce thereof, in order to avoid contravention of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Apparently the counsel representing the city failed to make such showing for the court was of the opinion that the prohibition was general in its character, and restrained the transaction of such business at particular hours during each day when it is customary to transact it, without any sufficient cause shown, and that therefore the ordinance was unreasonable and unlawfully interfered with the freedom of trade.

The *Hayes* case was followed in Wisconsin by *State v. Redmon*, 134 Wis. 89, 114 N. W. 137 (1908). Justice Marshall, giving the opinion of the court, said: "The general declaration in the Constitution of the purposes of civil government is a limitation on legislative powers, designed, in part at least, to prevent clearly unreasonable enactments restricting natural private rights." Both the *Hayes* and *Redmon* cases were cited favorably in Michigan in *People v. Gibbs*, 186 Mich. 127, 152 N. W. 1053, Ann. Cas. 1917 B, 830 (1915). Here the statute in question was very similar to that in the main case, with the additional clause permitting a buyer within five days from the date of the sale to return the article purchased, if not of the quality represented, and to recover the price paid. The only violation thereof was the conducting of the sale after six o'clock in the evening. No other misconduct appeared and presumably the business was run honestly. There was no showing as to how business so conducted did, or could, at that particular time of day, annoy or disturb the public, or menace the peace, good order, health, or welfare of the community more than before six o'clock, or more than other lines of business carried on at the same time. The decision was that the attempted prohibition was a discrimination in restraint of trade, and an unreasonable regulation, beyond the limits of the police power conferred upon the municipality to license and regulate trade or business.

But the court here, in the *Doering* case, discounts the prior Wisconsin cases and the case from Michigan, saying, as to the latter, that the provision for the return of the goods within five days probably influenced the court in holding such ordinance unreasonable. In overruling its own former decisions, the court relies on the passage of years and the great changes having taken place since 1869. Quoting from the opinion of Nelson, J.: "New evils have arisen to prevent which new laws are required. What was not considered against public policy in 1869 may obviously be considered so today in the light of the knowledge acquired and the experiences had during later years. . . . We conclude that the section 130.07 is a deliberate declaration of the present public policy of this State, is not an unreasonable interference with the freedom of trade, does not go beyond the legitimate field of reasonable regulation, and is a proper exercise of the police power."

The courts of New York went through a similar process of evolution. In *Rochester v. Close*, 35 Hun 208 (1885), it was held that the city under the power to regulate "ringing of bells and the crying of goods for sale at auction or otherwise, and to prevent disturbing noises in the streets," could not prohibit the auction sale of jewelry after sunset. The statute was interpreted as not giving the authority to regulate or prohibit, but as relating solely to the manner of advertising sale by public outcry, and authorizing regulation of that manner of advertising, allowing no interference in any manner with sales, whether at auction or otherwise. Then in *Buffalo v. Marion*, 34 N. Y. S. 945 (1895), and in *Biddles, Inc., v. Enright*, 203 N. Y. S. 920, 208 App. Div. 790 (1925), the court decided that ordinances providing that sales of certain goods at public auction shall be made in the daytime, are not so arbitrary nor such an unlawful interference with the sale of jewelry at public auction as to be unconstitutional; that such regulation was necessary to prevent fraud, protect the safety and welfare of the community. A limitation on the New York holdings is found in *Robinson v. Wood*, 196 N. Y. S. 209 (1922), holding that an ordinance prohibiting auctions in the evenings is not a proper exercise of the power delegated to the city to license and regulate auctions and auctioneers if adopted for the purpose of stifling competition.

The basic reason for this modern tendency toward the sustaining of such prohibitions is concisely stated in *Ex parte West*, 243 Pac. 55 (Cal. 1925). The court there said: "Jewelry auctions are often mere schemes for trapping and defrauding the unwary; that the people, in general, are unskilled in the art of determining the purity of gold and silver, or the genuineness of diamonds, particularly at a glance under artificial light." As a result it is quite possible for certain evil disposed persons to conduct mock auctions, whereby worthless jewelry is sold to innocent persons, causing them many times great pecuniary loss. This danger to the buying public has in the recent cases been generally recognized, and courts have read into statutes, limiting the hours at which there may be an auction sale of jewelry, an intent to prevent fraud and deception in such sale. The reasonableness of the prohibition against evening auctions has been upheld in the following cases, in addition to those cited above: *Davidson v. Phelps*, 214 Ala. 236, 107 So. 86 (1926); *Ex parte West*, 75 Cal. App. 591, 243 Pac. 55 (1925); *Levy v. Stone*, 97 Fla. 458, 121 So. 565 (1929); *Clein & Ellman v. City of Atlanta*, 159 Ga. 121, 124 S. E. 882 (1927); *Mogul v. Gaither*, 142 Md. 380, 121 Atl. 32 (1923); *State ex rel. Cook v. Bates*, 101 Minn. 301, 112 N. W. 67 (1907); *Matheny v. Simmons*, 139 So. 172 (Miss. 1932); *Wagman v. City of Trenton*, 102 N. J. L. 492, 134 Atl. 115 (1926); *City of Roanoke v. Fisher*, 137 Va. 75, 119 S. E. 259 (1924).

Robert R. Waterson.

CONSTITUTIONAL LAW—CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS—OPERATION AS TO LAWS PREVIOUSLY IN FORCE—CRIMINAL LAW—NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL—STATUTORY PROVISIONS—REPEAL.—One of the most important effects of the ratification of the Twenty-First Amendment to the Federal Constitution is pointed out in the recent case of *United States v. Chambers*, 54 S. Ct. 434, decided February 5, 1934. Claude Chambers and Byrum Gibson were indicted in the District Court for the Middle District of North Carolina for conspiring to violate the National Prohibition Act, and for possessing and transporting intoxicating liquors, contrary to that Act, in Rockingham county in that State. The indictment was filed on June 5, 1933. Chambers pleaded guilty, but his prayer for judgment was continued until the December term. On December 6, 1933, the case was called for trial as to Gibson. Chambers then filed a plea in abatement, and Gibson filed a demurrer

to the indictment, each upon the ground that the repeal of the Eighteenth Amendment to the Federal Constitution deprived the court of jurisdiction to entertain further proceedings under the indictment. The District judge sustained the contention of the defendants and dismissed the indictment. The government appealed to the Supreme Court. In affirming the decision of the District Judge, Chief Justice Hughes delivered the opinion of the court. The first question involved in the Supreme Court's decision was the exact date of the ratification of the Twenty-First Amendment. In the case of *Dillon v. Gloss*, 256 U. S. 368, 41 S. Ct. 510, 65 L. Ed. 994, this question was decided, the court taking judicial notice of the fact that the repeal of the Eighteenth Amendment was consummated on December 5, 1933. Due to the fact that the ratification of the Twenty-First Amendment rendered the Eighteenth Amendment completely inoperative from that date on, all prosecutions pending which were based upon violations of the National Prohibition Act were shorn of their justification. The continued prosecution of Chambers and Gibson necessarily depended upon the continued life of the statute which the prosecution sought to apply.

In illustration of the principle that in case a statute is repealed or rendered inoperative no further proceedings can be had to enforce it in pending prosecutions, unless competent authority has kept the statute alive for that purpose, Chief Justice Hughes cited the ruling of Chief Justice Marshall in the case of *Yeaton v. United States*, 5 Cranch 281, 283, 3 L. Ed. 101, 102 (1809): ". . . it has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." In *The State of Maryland v. The Baltimore & Ohio R. R. Co.*, 3 How. 534, 552, 11 L. Ed. 714, 722 (1845), Chief Justice Taney observed that "The repeal of the law imposing the penalty is of itself a remission."

Technically speaking, the "will" of the American people, expressed in the Eighteenth Amendment, gave the Federal government the power to enforce the National Prohibition Act, and in not only a technical but also in an absolute way the Twenty-First Amendment expressed the will of the people. That will was to the effect that no further criminal proceedings be had under the act which had been automatically repealed.

In appealing this case, the government sought to avoid the implication pointed out in the preceding paragraph by invoking the general saving provision enacted by Congress in relation to the repeal of statutes in general. That provision is to the effect that penalties and liabilities theretofore incurred are not to be extinguished by the repeal of a statute "unless the repealing Act shall so expressly provide" and to support the prosecutions in such cases the statute is to be treated as remaining in force. *Rev. St.* § 13, 1 *USCA* § 29. This argument having been raised, the issue in the case was whether this provision was applicable to amendments to the Constitution or only to Federal statutes. To justify the continuance of this prosecution against Chambers and Gibson the Supreme Court would be forced to rule that Congress had the power to vary the terms or the effect of a ratified amendment. This would be giving to Congress the power to expand its constitutional authority. The Twenty-First Amendment contained no saving clause similar to that provision which applies to the repeal of Federal statutes. Congress might have proposed such a clause in drafting the proposals of the Amendment, but it did not. Congress exercised its powers to their fullest extent in making the proposals, and having once submitted the Amendment to the convention of each state for ratification, it was powerless to act further. In the words of Chief Justice Hughes: "The creator of Congress has denied to it the authority it formerly possessed, and this denial, being unqualified, necessarily defeats any legislative attempt to extend that authority."

Hugh E. Wall.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—REGULATION OF CHARGES OR PRICES.—In *Nebbia v. People of State of New York*, 54 S. Ct. 505, a five to four decision rendered March 5, 1934, the Supreme Court of the United States declared constitutional a New York statute fixing a minimum price for the sale of milk. The statute established a milk Control Board with general power to regulate the entire milk industry of New York state, including the production, transportation, manufacture, storage, delivery and sale. This Board prescribed nine cents per quart as the minimum at which a store might sell. The appellant, Nebbia, a storekeeper, sold two quarts and a five-cent loaf of bread for eighteen cents. An information charged that by so doing he committed a misdemeanor. In defense he pleaded that the order of the Board deprived him of the equal protection of the laws and of the due process guaranteed him by the Fourteenth Amendment to the Federal constitution. The controlling opinion, written by Justice Roberts, after denying that the appellant is deprived of equality of the laws, supports the statute on the grounds that "an emergency" existed. Justice Roberts reasons from the premise that in emergencies the police power of a state is virtually unlimited in regard to industries of public interest. Quoting from *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77 (1877), he says: ". . . it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but *not under all.*" (Italics are mine.) The Justice encounters two difficulties of major importance in this assumption: (1) By what is the existence of an emergency to be judged?; and (2) What is meant by an industry of public interest?

Justice McReynolds, in his dissenting opinion, asks: "What circumstances give force to an 'emergency' statute? In how much of the state must they obtain? Everywhere, or will a single county suffice? How many farmers must have been impoverished or threatened violence to create a crisis of sufficient gravity? . . . If prices for agricultural products become high can consumers claim a crisis exists and demand that the Legislature fix less ones? Or are producers alone to be considered, consumers neglected?" A usual test of an emergency is that the situation be temporary. But this is faulty in that it is "possible to conceive of a sudden combination of events which would require prompt drastic action and yet might well be expected to be permanent." *Mott, Due Process of Law*, 352. To call this an "emergency" would be to stretch the concept of the term. Yet it would require emergency action. Merely because the public at large will be benefited by certain legislation, that legislation is not justified unless the situation be one of "great impending danger," or calls for immediate action.

For the sake of argument, we will concede that the milk situation was an emergency. May the legislature have a free hand under such circumstances? The authorities hold otherwise. In his dissenting opinion in *Wilson v. New*, 243 U. S. 332, at 377 (1917), Justice Pitney said: "An emergency can neither create a power nor excuse a defiance of limitations upon the powers of the government." "The mere existence of an emergency will not justify arbitrary and oppressive action unless that action has a real prospect of meeting the exigencies of the situation." *Mott, supra*, at pp. 354, 355. In meeting the danger which has arisen, the legislature is limited to only those means which "may reasonably be expected to cope with the situation." *Mott, supra*, at p. 355. In this case, the New York legislature deprived a milk dealer of his right to contract as he saw fit. The excuse was the existence of an "emergency." We have already seen that an emergency empowers the legislature to deprive a man of his most sacred rights only in extreme cases. It was argued that this was not such a case. In answer, the court declared the dairy industry to be one "affected with a public interest."

And here is the second difficulty Justice Roberts encountered. In *Williams v. Standard Oil Co.*, 278 U. S. 235, 49 S. Ct. (1929), the court said, in reference to such industries: "Affirmatively, it [The test by which the legislative power to fix prices of commodities, use of property, or services must be measured, namely, the phrase "affected with a public interest."] means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. . . . Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance." But Justice Roberts, in the principal case, says that when one devotes his property to a use "in which the public has an interest," he in effect "grants to the public an interest in that use" and must submit to be controlled for the common good, this result to follow whether or not the dedication to the public was voluntary. But all enterprises have something of a public interest. If Justice Robert's contention were followed, there could be no private industries, for where could we draw the line of demarcation?

In many previous cases the Supreme Court follows *Williams v. Standard Oil Co.* In *Wolff Packing Co. v. Court of Industrial Relations*, 43 S. Ct. 630, 633, 262 U. S. 522, 536 (1923), in an opinion rendered by Chief Justice Taft, the court said: "The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest,' as applied to a business, means more than that the public welfare is affected by the continuity or by the price at which a commodity is sold or a service rendered." In the same case Chief Justice Taft continued: ". . . one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public. . . ." And in *Fairmont Creamery Co. v. Minnesota*, 47 S. Ct. 506, 508, 274 U. S. 1, 9 (1927), Justice McReynolds said: "'Because abuses may, and probably do, grow up in connection with this business [dairying], is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's rights to follow a distinctly useful calling in an upright way. Certainly there is no profession, no business, which does not offer peculiar opportunities for reprehensible practices; and as to everyone of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest.'"

It is evident that in the principal case the Supreme Court has overruled its former decisions. In *United States v. L. Cohen Grocery Company*, 41 S. Ct. 298, 225 U. S. 81 (1921), it was held that an act of Congress forbidding anyone to make any unjust or unreasonable rate or charge in handling or dealing with necessities was unconstitutional. In *Wolff Packing Co. v. Court of Industrial Relations*, *supra*, it was said that "never has regulation of food preparation been extended to fixing wages or the prices to the public." The holding in *Fairmont Creamery Co. v. Minnesota*, *supra*, was that a Minnesota statute prohibiting dairy products buyers from discriminating between localities was an "interference with freedom of contract," irrespective of motive. This last case is directly in point with *Nebbia v. People of State of New York*. The appellant, *Nebbia*, pleaded that the New York statute was an interference with his freedom of contract. The court answered that even if it were, the existence of an "emergency" excused such interference. Thus, it made an about-face to what it said in *Fairmont Creamery Co. v. Minnesota* by holding that a sufficient motive legalizes the deprivation of freedom of contract.

That the court has reversed itself is not *per se* important. Certainly it has a right to do that. What is important are the consequences such reversal has on state powers through a more narrow construction of the Fourteenth Amendment.

For many years the "due process clause" of the Fourteenth Amendment was a serious obstacle to social legislation. As early as 1890, the thinking minds of the country realized the fearsome consequences of the "laissez-faire" policy that has so greatly influenced our legislation. But the realization of those consequences was one thing; to eliminate them was quite another. When, in 1903, a New York law prohibited the night work of women in industrial establishments, it was promptly declared unconstitutional, because, as the court said: "She [an adult female] is no more a ward of the state than is a man. She is entitled to enjoy, unmolested, her liberty of person, and her freedom to work for whom she pleases, where she pleases, and as long as she pleases, within the general limits operative upon all persons alike, and shall we say that this is valid legislation, which closes the doors of a factory to her before and after certain hours? I think not." Quoted by Mangold in "Social Pathology" from *U. S. Bureau of Labor Statistics*, No. 321. "Labor Laws That Have Been Declared Unconstitutional," p. 4. Following immediately came the abuses which this decision made possible. One establishment in New York City employed women on Thursday nights until midnight. These same women began work the next morning, toiled all day, and continued into the night, working sometimes until late Saturday morning. See *Mangold's Social Pathology*, pp. 683, 684.

The decisions of the court show us the constant struggle of fair-minded men against judges ruled by precedent instead of by public policy. Gradually the thinkers made progress. This latest achievement will, no doubt, clinch the battle for them.

The attitude assumed by the court in *Nebbia v. People of State of New York* has narrowed the interpretation of the "due process clause" and of the guaranty of "equality of laws" by widening the number of activities which may be subjected to state legislation which will restrict individual freedom. No longer may a man cry out "Unconstitutional!" against every law that seems to restrict his freedom of contract or to deprive him of his property. The reasoning of the court has finally come to rest on the sound ethical principle that the good of the greater number is more important than that of the individual or of a small group of individuals. When the rights of the individual contravene the good of the whole, those rights should be curtailed.

The gateway to social legislation has at last been opened. Labor laws, health laws and other legislation that is sorely needed and which has been frustrated by men who failed to realize that the constitution should be flexible if it is to endure, now stand a good chance of being enacted. The court has responded to the American sentiment that judicial veto of the will of the people, where that will is reasonable, should not become tyrannical. If the constitution is to remain an instrument "of the people, by the people, and for the people," re-interpretation of its fundamental concepts must be made. And the first big step in that direction has been taken.

One may say that this conclusion is too optimistic because it is drawn from a *five to four* decision. But it must be remembered that previous cases in which the public good was at stake were usually defeated by a *five to four* vote of the Supreme Court. The conversion of even one judge is signal. There is now a precedent set to guide the four conservatives. In the usual decisions handed down, they argued, and, alas!, with conviction, that there was no precedent for other than the traditional interpretation of the "due process clause." This exit is blocked! These conservative judges may now adhere to their principle of following precedent because a new precedent has been set. In doing this they will be legislating for the good of the majority, the aim of true democracy.

Francis W. Matthys.

FRAUD—DAMAGES—DIFFERENCE BETWEEN VALUE AND PRICE PAID.—The court in considering the measure of damages in the recent case of *Federal-American Nat. Bank & Trust Co. v. McReynolds*, 67 Fed. (2d) 251 (1933), which was an action for fraud practiced in an exchange of properties agreement, said that whether the defrauded party sued on the contract or sued for fraud the relief to which he would be entitled, if he proved his case, would be the difference between the value of the property which he received and the value of the property which he parted with under the contract, and the measure of damages would be the same *at law* and in *equity*. Also, that if the property received by the defrauded party had been disposed of by him before he became aware of the fraud, or if the property with which he parted with had been disposed of by the other party making the fraudulent representations, the measure of damages would be the difference between the values of the two properties.

There is great disagreement in this field as to the method of arriving at substantial damages. The question involved is whether the plaintiff should be given the difference between the value of the property he received and that with which he parted with or the value of the property if it had been as represented. Professor Bauer says that "The weight of authority gives the plaintiff the value of his bargain, thus causing the action to savor of contract rather than of tort, so far as the measure of damages is concerned." *Bauer on Damages* 388.

In *Peek v. Derry* [1887] L. R. 27 Ch. Div. 541 an action of deceit was brought for damages sustained by the plaintiff by reason of reliance upon false statements made by the defendant in the sale of shares of stock in a tramway company. The court took the view that the plaintiff was only entitled to recover for the loss he had actually sustained; that is, the difference between the value of the shares in his hands and what he had actually paid for them, the contract having been completely performed by the plaintiff. This represents the minority view. Yet the principle is logically correct because in *tort* actions generally the plaintiff recovers only for the loss actually produced by defendant's tort. The leading Federal case of *Smith v. Bolles*, 132 U. S. 125, 33 L. Ed. 279 (1889), supports this doctrine. That was an action for damages for false and fraudulent representations in the sale of shares of mining stock, and it was held that the measure of damages was not the difference between the contract price and the market value if the property had been as represented but rather the difference between the actual values of the two properties. Judge Fuller, speaking for the court, said: "What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract." Accord: *Cross v. Bouck*, 175 Cal. 253, 165 Pac. 702 (1917); *Walker v. MacMillan*, 62 Colo. 136, 160 Pac. 1062 (1916); *Browning v. Rodman*, 268 Pa. 575, 111 Atl. 877 (1920).

But the weight of authority in the state courts allows a plaintiff, suing in *tort* for deceit in the sale or exchange of properties, to recover the same amount as he would have recovered if he had sued in contract. Thus in *Stiles v. White*, 11 Met. 356, 45 Am. Dec. 214 (1846), plaintiff sued in case for deceit in the sale of a horse. The defendant contended that if the horse at the time of sale was worth all the plaintiff paid for him then plaintiff suffered no damages and the action would not lie. But the court held that the measure of damages was the difference between the actual value of the horse sold and the value of such a horse as that was represented to be by the defendant, thus giving the plaintiff, in a tort action, where the defendant falsely represented the article sold, the *value of his bargain*.

In *Whitney v. Allaire*, 1 N. Y. 305, 312 (1848), the court said: "The measure of damages in an action upon a warranty, and for fraud in the sale of personal

property, are the same. In either case they are determined by the difference in value between the article sold and what it should be according to the warranty or representation."

In the *McReynolds* case it seems that the court erred in saying that whether the plaintiff sued in contract or in tort the measure of damages under the doctrine of *Smith v. Bolles* would give the plaintiff the difference between the value of the property which he received and the value of the property with which he parted under the contract. In *Smith v. Bolles* the court specifically states that the action was not brought on contract, so the damages awarded were according to *tort* liability.

Two leading state cases supporting the doctrine of *Smith v. Bolles* are *Cross v. Bouch*, *supra*, and *Browning v. Rodman*, *supra*. The first was an action for *deceit*, and the court said: "The measure of damages suffered by one who is fraudulently induced to exchange property is the difference between the actual value of that which he parted with and of that which he receives under the contract." In *Browning v. Rodman* the defendant had fraudulently sold to plaintiff a garden to be used in growing ginseng. The court, in awarding damages, said: "The measures of damages suffered by one fraudulently induced to exchange properties, is the difference between the actual value of that which he parted with and the actual value of that which he received."

Granville P. Ziegler.

JUDGES—COMPENSATION AND FEES—CHANGE IN AMOUNT DURING TERM OF OFFICE—CONSTITUTIONAL LAW.—"By section 13 of the Independent Offices Appropriation Act of June 16, 1933 (Public No. 78), it was provided that: 'for the period of the fiscal year ending June 30, 1933, remaining after the date of the enactment of this Act, and during the fiscal year ending June 30, 1934, the retired pay of judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished) is reduced by 15 per centum.'" *Booth v. United States* and *Amidon v. United States*, 54 S. Ct. 379 (1934).

By reason of this Act the pay of many "retired" federal judges was reduced. The question as to whether or not this reduction of pay was a violation of the Constitutional provision that "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office," § 1, Art. 3 Fed. const., was raised in the cases of *Booth v. United States* and *Amidon v. United States*, *supra*. Due to a parallel set of facts the two cases were tried jointly on appeal to the Supreme Court.

Stated briefly, the facts are: Both judges, Booth and Amidon, had had increases in salary during their tenure of office. Both had retired at the age of seventy years, pursuant to the statute authorizing the retirement of federal judges. Judicial Code, § 260, as amended by the Act of Feb. 25, 1919, c. 29, § 6, 40 Stat. 1157, U. S. C. title 28, § 375, and the Act of March 1, 1929, c. 419, 45 Stat. 1422 (Supp. III, title 28, § 375 [28 U. S. C. A. § 275]). Upon a reduction in pay based upon the provision in the Independent Offices Appropriation Act, each judge brought suit in the Court of Claims, asserting that the Act violates the provision of the Constitution, which forbids diminution of the compensation of federal judges during their continuance in office. The government demurred to each petition. In ruling on the demurrer the Supreme Court had to answer two questions: (1) Does a United States Judge, upon retirement relinquish or retain his office? (2) Does the Constitution prohibit reduction of the compensation to which the judge was entitled at the date of retirement? In other words, would such diminu-

tion of salary be disallowed even if the compensation after reduction exceeded the amount which the judge was receiving when he first took office?

The decision of the Supreme Court hinged upon its interpretation of the phrase "continuance in office." Does a United States judge, upon retirement, relinquish or retain his office? The Act of Congress, cited in the preceding paragraph, clearly sets forth the answer to this question in providing that ". . . instead of resigning, any judge . . . who is qualified to resign . . . may retire, upon the salary of which he is then in receipt, from regular active service on the bench. . . ." In delivering the opinion of the court, Chief Justice Hughes points out that the retirement is from active service and not from office, for the retiring judge may be called upon by the senior circuit judge to perform judicial duties in his own circuit, or by the Chief Justice to perform them in another circuit, and may be authorized to perform such as he may be *willing to undertake*. Hence, by retiring pursuant to the Statute, a federal judge does not relinquish his office.

Returning then to the first consideration, as to whether or not a retired federal judge is protected by the constitutional provision prohibiting the diminution of his compensation, the evidence shows that the decision must be in favor of the petitioners. The argument of the government was to the effect that the holding of an office involves the performance of duties, and since no duties are obligatory on one who has retired under the Act, he can not be said to hold any office. In support of this contention the government pointed out that, under the Act, a successor to the retiring judge is to be appointed; and that this provision is in open contradiction to the idea of the retiring judge retaining his office. In answering this worthy objection, Chief Justice Hughes characteristically pointed out that the evident purpose of the Act was that the judges should render valuable judicial service after retirement, as had been proved in the instant case, and that such a worthy end should not be allowed to be defeated by the mere fact that the phraseology of the Act had not been well chosen.

Even the Solicitor General, with "commendable candor," admitted that the answer to the second question raised by the government's demurrer must be in the affirmative. In support of its decision on this second question, the Court made reference to *Commonwealth ex rel. Hepburn v. Mann*, 5 Watts & S. (Pa.) 403 (1843), *City of New Orleans v. Lea*, 14 La. Ann. 197 (1859), *Long v. Watts*, 183 N. C. 99, 110 S. E. 765, 22 A. L. R. 277 (1922), cases wherein the facts were closely analogous and the decisions were based upon provisions of the state constitutions similar to Article 3, § 1, of the Federal constitution.

Hugh E. Wall.

TRUSTS—INDEFINITE BENEFICIARIES—PRECATORY WORDS.—The recent decision in *In re Hayes' Will*, 263 N. Y. 219, 188 N. E. 717 (1934), considers the question of precatory words and their effect. For a long time this has been one of the parts of the law of Trusts and Wills open to discussion with the result that no definite rule has been established.

Precatory words are ". . . expressions in a will praying or requesting that a thing shall be done. A trust created by such words which are more like words of entreaty and permission than of command or certainty." 2 *Bouvier* 718. Examples of precatory words are: "wish," "desire," "my further request is." Not all of these words create trusts nor will any particular word create a trust, the meaning being derived from the entire document.

As nearly as can be ascertained, the controversy started back in 1712 with an anonymous case reported in 2 Eq. Cas. Abr. 291, 8 Vin. 72, 22 Eng.

Rep. 244. In that case a baron gave all his estate to his wife, and said: "I *desire* and *request* my said wife to give all her estate which she shall have at the time of her death to her and my nearest relations equally amongst them." It was held: "The words being so general both in respect of the money and of the persons to take it, it does not amount to a devise but it is only a recommendation to the wife to make such a disposition; but if he had desired she would have given it to a particular person it would have been a good devise." This was a statement of the old theory which favored the creation of a trust when property was given absolutely to any person and the same person was entreated or wished to dispose of that property in favor of another, if the words were so used that upon the whole they ought to be construed as imperative and if the subject matter and the objects of the recommendation were certain.

An interesting insight into the theory of wills and their construction is given in *Bland v. Bland*, 9 Mod. 478, 88 Eng. Rep. 586 (1745), where it was insisted by the plaintiff that any desire in a will is equal to a devise because a will is no more than a declaration of the testator what he will have done after his death; and if this be sufficiently declared it must take place; but the court held that a person in his will must *velle* not only *petere et rogare*. So the court, through the subtleties of latin, expressed its conception of the requirements of a good devise.

The recent decision in *In re Hayes Will* follows the modern construction which does not favor the establishment of trusts from precatory words unless the intention is very clearly shown. On October 27, 1930, the testatrix died leaving a will which she had dictated three days before her death. The residuary clause was as follows: "Any remainder after these bequests have been made, I leave to Arthur Garfield Hays to use at his discretion in promoting the ends of justice." The question was whether this devise gave full title to Hays or whether there was a trust established. It was held that this clause gave full title to Hays. The words following a conveyance of full title must express a clear intention of cutting it down and impose an obligation on the legatee to carry out an expressed purpose. The discretion given the devisee kept the gift from being a trust or an attempt to create a trust but merely imposed a moral obligation on him to carry out the wishes of the testator.

Whenever the objects of the supposed recommendatory trust are not certain or definite, whenever the property to which it is attached is not certain or definite, whenever a clear discretion or choice to act or not to act is given, words of recommendation or request will not create a trust. *Smullin v. Wharton*, 73 Neb. 667, 103 N. W. 288 (1905).

The test of precatory trusts is the clear intent of the testator to imperatively control the conduct of the party to whom the language of the will is addressed by the expression of the desire and not to commit to his discretion the exercise of the option to comply or refuse to comply with the suggestion made. *Gotch v. Burnes*, 132 Fed. 485 (1904).

And so the law has artfully shifted the duty of discovering what the testator really meant from its own conscience to that of the legatee. Perhaps this is desirable since legatee, with his more intimate knowledge of the facts, is usually in a better position to make the decision.

Thomas H. Nelson.

USURY—EFFECT OF USURY—VALIDITY OF CONTRACT OR INDEBTEDNESS—CONTRACTS—CONTRAVENTION OF LAW IN GENERAL.—From the earliest times no people who had any considerable commercial or financial structure existed without having laws against usury. This has been true because of the very obvious reason that in

the power of the lender to alleviate the needs of the borrower lies the potential power to oppress. This view was for a time carried to an extreme and an abolition of all interest resulted. In this country, however, the doctrine that any interest is usurious has never been accepted. The common law, as adopted in the United States, has been that no rate of interest is illegal. Consequently, in the absence of statutory enactment there is no rate of interest which is considered illegal. Usury in this country rests wholly on the statutes of the various states. "Usury," 27 R. C. L. p. 203, and cases cited. It logically follows, then, that usury in the United States has taken on this general broad definition, namely, taking more than the statute allows upon a loan or forbearance of a debt. In some states the contract in which usury is charged is declared void. In some, the contract is not void, but the entire interest is declared forfeited. In other states only the excess of interest charged is declared forfeited while interest at the legal rate is held to be recoverable. *Clark on Contracts* (4th Ed.) 364.

Indiana, by statute, has protected borrowers of money from the charging of excessive rates by unconscionable money lenders. Consequently, when usury is raised as a defense to an action to recover money, loaned with interest, at the contractual rate it becomes necessary for the courts to interpret the statutes. This is what the Appellate Court of Indiana did in the recent case of *Geyer v. Spencer*, 189 N. E. 429 (Ind. 1934). In this case Mina E. Spencer filed a claim against the estate of Durward M. Luse, deceased, as follows:

"May 14, 1927, for money had and received by Durward M. Luse, deceased, of Mina E. Spencer, with interest thereon at 6% per annum from May 14, 1927, until paid. . . .

"Exhibit A.

"Indianapolis, Indiana, May 14, 1927, for value received, I promise to pay to the Order of Mina E. Spencer, two hundred fifty dollars, together with interest at 3½% per month, from date until paid. I give my note.

"D. M. Luse."

The lower court allowed the claim for \$250 with \$51.23 interest. On appeal one of the appellant's assignments of error was that the decision was not sustained by sufficient evidence and was contrary to law. It is apparent from the claim that the appellant attempted to proceed on the theory of *money had and received*. The court said; however, that since the only evidence which the plaintiff offered to support her theory was the note and since this note was invalid the judgment of the lower court should be reversed.

As to whether or not an invalid promissory note can be introduced in evidence to prove *money had and received* by the defendant, it seems to be the general rule that any writing relied on as establishing by its terms a claim or right will be excluded from the jury if it is so defective, either in substance or in form, that the court is able to say as a matter of law that it is an invalid instrument. "Void or Defective Instruments," 22 C. J. 859; *Westerman v. Foster*, 57 Ind. 408 (1877). Therefore, although the court did not decide as to whether or not the plaintiff had sufficiently pleaded a cause on the theory of money had and received, the court did decide that the plaintiff could not prove such a count by an invalid promissory note. It will be noted that the court, in making its decision, had to determine the status of a contract made in violation of the Indiana usury statutes.

The contention of the appellant was that "section 9777 et seq. Burns' Ann. St. 1926" controls this case. That statute is an act of 1917 and provides in part that "No person, copartnership or corporation shall make any loan of money, credit, goods or things in action in the amount or to the value of three hundred dollars or less, whether secured or unsecured, and charge, contract for, or receive therefor a greater rate of interest than eight per centum per annum, without first

obtaining a license from the auditor of the State of Indiana." The statute further provides that upon failure to comply with it a penalty shall be imposed, thus making noncompliance a criminal offense.

The appellee contends that the loan as such is not *void*, but that only the *interest in excess of the legal rate* cannot be recovered as provided in "section 9331 Burns' Ann. St. 1926": "When a greater rate of interest than is hereby allowed shall be contracted for, the contract shall be void as to the usurious interest contracted for." This statute did not make it a criminal offense to contract for a greater rate of interest than eight per cent. The appellee also cited "chapter 220, Acts of 1929," in support of his contention. But the court said that neither of these laws controlled since the question of the validity of a usurious note depends upon the statutes existing at the date of the note, which, in this case, is May 14, 1927. At the time of the making of the note in question the Act of 1917 was in effect and not the Act of 1929. The court said that section 9331 Burns' Ann. St. 1926 is section 4 of an act of 1679 (apparently this is an error in the report because section 9331 Burns' Ann. St. 1926 is identical with Section 4 of the usury act of 1879) and is clearly one intended to govern the general law in Indiana on interest and usury, while the act of 1917 specifically regulates the law on interest on loans for \$300 or less. This Act is generally referred to as the "Petty Loan Act." It is apparent, therefore, that the Act of 1917 is the one under which the court had to decide this case. The court said that this Act was one defining public policy and contracts in violation of it were void as against public policy.

In determining whether or not an agreement is illegal as being in violation of a statute the question must first be answered as to whether or not the acts contemplated are prohibited by statute and the answer, in turn, to this question depends upon the construction of the statute. In every case the intention of the legislature must govern. *People v. Marx*, 2 N. E. 29 (N. Y. 1885); *De Kam v. City of Streator*, 146 N. E. 550 (Ill. 1925). A statute may render an agreement illegal by expressly prohibiting it or by imposing a penalty without an express prohibition. It has been held that where a statute expressly provides that a violation of it shall constitute a misdemeanor, a contract in violation of it is illegal, although the statute does not expressly prohibit the contract nor declare it void. *Beecher v. Peru Trust Company*, 49 Ind. App. 184 (1912); *Mulliken v. Davis*, 53 Ind. 206 (1876); *Shelton v. Bliss*, 7 Ind. 77 (1855); *The Winchester Electric Light Co. v. Veal*, 145 Ind. 506 (1896). Some cases hold that where a statute imposes a penalty for an act or omission it impliedly prohibits it. *Sandage v. The Studebaker Brothers Manufacturing Company*, 142 Ind. 148 (1895). The weight of authority seems to be that the imposition of a penalty is only *prima facie* evidence of the intention to prohibit. *Springfield Bank v. Merrick*, 14 Mass. 322 (1817).

Thus it can be seen that Indiana follows the rule of construction that where a statute provides a penalty for doing an act, although it does not expressly prohibit it in terms, an agreement to do such an act is illegal. Consequently, in this case the Appellate Court reversed the decision of the lower court and allowed no recovery on the count for money had and received because the plaintiff's only evidence to prove his cause of action was the note which the court held to be illegal since made in violation of the Indiana "Petty Loan Act" of 1917 and, therefore, not admissible in evidence under the general rule that invalid instruments will be excluded from the jury.

Stanley A. Rosenstein.

WILLS—LETTERS AS—TESTAMENTARY INTENT.—In an action brought by Thomas A. Henry for the probate of an instrument offered as a codicil to the last will of Maggie Henry, deceased, and contested by Archibald Drew and another, the court found as a matter of fact that Maggie Henry died September 30, 1929, and was survived by Thomas A. Henry, her husband, Archibald Drew and Myrtle Irwin, two children by a former marriage. On September 8, 1923, she executed her will in which she gave all of her estate to her two children. The will was drawn up by Robert A. Speed, an attorney in Detroit. On September 20, 1929, six days before her death, she sent the following letter to Mr. Speed:

"Sometime ago I had you make my will, I wish to change it as follows:

"All of my property, estate, and holdings to be equally divided between my son Archie, my daughter Myrtle, and my husband Thomas A. Henry, each to receive one-third of my entire estate, real and personal.

"Maggie Henry

X

(Her cross)

"Bessie Yeager.

"Signed in presence of:

"Mrs. Bessie Yeager,

"Clara M. Whiting."

The letter was mailed to Mr. Speed and he acknowledged its receipt on September 23, 1929. The former will was offered for probate on her death, and Thomas A. Henry offered the letter as a codicil thereto.

The court *held* that since the only question was whether or not the instrument was a codicil and testamentary in character and that since she intended to change her original will and the instrument names the beneficiaries, states what portion of her estate each shall take, and is executed with all the formalities required by the statute, then it is manifest that it was her intent that it should operate as a will. *In re Henry's Estate*, 244 N. W. 141, 259 Mich. 499 (1932). The same court, no later than nine months afterwards, on an appeal of the case, completely reversed their former decision, holding that the paper signed by the testatrix and two witnesses was intended merely as a letter instructing her attorney to prepare a modification of her will and was not as a codicil thereto. *In re Henry's Estate*, 263 Mich. 410, 248 N. W. 853 (1933). The reader perceives that the court in the first decision held that this informal document was executed *animo testandi*.

In determining whether the *animus testandi* was present when the testator signed or wrote an instrument, the courts have more and more leaned to the strict view and gathered the intention from the face of the instrument.

If the courts were to permit parol testimony to show that the time of the execution of an instrument proposed as the last will and testament of a testator he did not know or suppose he was executing a will, where the *animus testandi* appears on the face of the instrument, there would be manifested a tendency to place all wills at the mercy of extrinsic evidence, thus outweighing the sanction of a solemn act. This would violate the policy and spirit of the various wills acts and would open the door for the perpetration of frauds upon deceased persons.

In *In re Kennedy's Estate*, 159 Mich. 548, 124 N. W. 516 (1910), where the testator, while of sound mind and laboring under no mistake of fact, executed a paper in the form of a will, disposing of his estate, with knowledge that he could revoke it at any time, and the paper was properly signed and attested by witnesses, the court held that the evidence of declarations made by the testator of a collateral purpose in executing the paper, that he did not intend it to

operate as a will, was inadmissible in proceedings to contest the will, as a presumption of testamentary intention arises from the deliberate execution by a competent person of a paper in the form of a will in strict pursuance of the statute, and the will could have been revoked at any time.

In *Ellison v. Clayton*, 163 Atl. 695 (Md. 1933), a letter was written by the decedent to a trust company, signed by decedent and two witnesses, and stated, in substance, that the decedent had four accounts in trust company's bank, specifying them, and that he desired that to each of such accounts be added the name of his daughter, and that he was to sign all checks so long as he was physically able, and that the change in accounts was made with express intent of balances becoming automatically the property of his daughter on his decease. This was properly signed and attested according to the statute. The court held that it was testamentary in character and could be read as a codicil to the will. The court's liberal view could be explained in the light of extrinsic evidence that was introduced to show that the intention of the deceased was testamentary.

It would seem from the foregoing that the courts are very careful when it is a question of interpreting the intention of a testator, because of the chances of perpetrating a fraud on a deceased person are increased by a liberal view. In *re Richardson*, 94 Cal. 63, 29 Pac. 484, 15 L. R. A. 635 (1892), it was held that a letter does not constitute a will or codicil thereto when not written *in extremis* or in contemplation of very near death, although the writer, in addressing his sister, says: "My health is probably ruined and I want to anticipate possibilities. You and your children get everything." The letter also expressed a wish for the education of her boy and his desire as to his profession and training. The court held that since the writer was not *in extremis*, or even in his last illness, such instrument could not be interpreted as being testamentary.

Again in *In re Jensen's Estate*, 37 Utah 428, 108 Pac. 927 (1910), the decedent wrote a letter to petitioner, discussing in a general way their plans after they were married, and stating therein that he would make the petitioner his sole heir, whether they were married or not, and if he died before they were married, he would make her his legal heir, "but I hope I will enjoy your company and association before that, now this is only talk, I don't expect to die, but I am just telling you what I mean." The court properly held that the letter was not intended as a present disposition of decedent's property, but merely expressed an intention to dispose of it at some future time, and was not admissible to probate as a will.

In *Succession of Monvant*, 12 So. 549 (1893), the declarations of the testator are admissible to prove that the document is in his handwriting, but not to prove his intention.

In the case of *Lungren v. Swartzwelder*, 44 Md. 482 (1876), it was held that where a paper was found among various other articles at the store of the deceased, containing a list of what deceased owned, of sums to be paid certain people out of the sale of certain property, and named the defendants as executors, was not a will. The court found that it was incomplete and unfinished because it did not dispose of his whole property, and left out the name of his residuary legatee, saying: "We must look to the entire paper, treating it as a whole, and to all the acts and declarations of the writer relating to it." In this case the court undoubtedly would have, if they were following the more liberal view, come to an exactly opposite decision and held that his intention was clearly expressed.

The courts have shown that where there is expressed on the face of the instrument a present testamentary intention they will construe it as such. In *Barney v. Hayes*, 29 Pac. 282 (Mont. 1892), where a letter written by a testator to his attorney saying: "What I want is for you to change my will so that she