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ABSTRACTS

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CHARITIES—PURPOSE TO PERPETUATE DONOR'S NAME DOES NOT PREVENT GIFT FROM BEING CHARITABLE—APPLICATION OF CY PRES DOCTRINE—This action was begun by the next of kin of the testator to obtain a construction of the will of William Hayes Ackland. The will provided for the erection of a memorial building in the form of an art gallery to house, on the campus of Duke University, certain art treasures which testator then owned; and it provided for the perpetual maintenance and upkeep of that building and for acquisition of new art objects. This will was made after negotiations with the President of Duke to replace a will which named Duke University, University of North Carolina, and Rollins College, the two latter being appellants here, to become the cite for this museum in that order, in the event that permission could not be obtained from the institution preceding each on the list. During the negotiations with President Few of Duke University testator repeatedly expressed his desire to benefit the cause of art in the south and in his will he urged his trustees "to carry out as nearly as possible the spirit of my intentions as expressed herein and as may be expressed to them by other means." [1] Duke University refused all the "benefits, burdens and responsibilities" under the will and the court below on petition of the next of kin held that the trust was valid but that it had become impossible of performance because of the action on the part of Duke University, and ordered distribution accordingly. It denied the motion of the University of North Carolina to intervene, without prejudice to renew in case of reversal. *Held*, reversed. The trial court was correct in finding that a valid trust had been created; "Where a trust is created for educational, re-

[1] Principal case at 588.

ligious or other charitable purposes, the mere fact that it is to serve as a memorial to the testator or another does not prevent it from being a charitable trust." [2] But the trust validly created did not, as the trial court thought, become impossible of performance by the failure of Duke University to accept it. The doctrine of judicial cy pres is in force in the District of Columbia, the decision in *Graff v. Wallace* [3] notwithstanding, and it is applicable in this case. Testator's expression of intention in his earlier will plus the circumstances under which he changed it, and the entreaty to his trustees in his last will, quoted above, make clear that his intention was not to benefit Duke University but to benefit the cause of art in the south. The cause is remanded with instructions to proceed in accordance with this opinion. *Noel v. Olds.*, (App. D.C. 1943), 138 F. (2d) 581.[4]

CONSTITUTIONAL LAW—VALIDITY OF RENT FIXING PROVISIONS OF THE EMERGENCY PRICE CONTROL ACT—The Emergency Price Control Act [1] authorizes the Administrator of the Office of Price Administration, "whenever he finds it necessary to effectuate the purposes of the Act," [2] to issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reductions of rents for any defense-rental area. If his recommendations have not been carried out within sixty days he may himself establish such maximum rents "as in his judgment will be generally fair and equitable." [3] In so fixing maximum rents he is to be guided, so far as practicable, by the prevailing rents on April 1, 1941, or such prior or subsequent date on which rents have not in the judgment of the administrator been affected by defense activities, and he shall make adjustments "for such relevant factors as he may determine and deem to be of general applicability in respect of such accomodation and including increases or decreases in property taxes and other costs." [4] A defense rental area is the District of Columbia or any area where "defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of the act." The purpose of the act is to protect price structures from "speculative, unwarranted, and abnormal increases in prices and rents." [5] The act further provides that the ren director may on his own initiative decrease rents where they were higher than those generally prevailing in the area, but to take such a step he must notify the landlord concerned of the proposed action with the grounds therefor and the landlord may then within sixty days obtain a review by the regional board and/or by the administrator, and this machinery is the basis for review by the Emergency Court of Appeals and the Supreme Court.

In this case the rent director issued orders, in accordance with the provi-

[2] Principal case at 586, quoted from 3 SCOTT, TRUSTS § 374.9 (1939).

[3] (Ct. App. D.C. 1929) 32 F. (2d) 960.

[4] For other applications of funds cy pres, see cases noted in 20 CAN. B. REV. 165 (1942) and 17 AUST. L. J. 176 (1943).

[1] Emergency Price Control Act of 1942, 50 U.S.C.A. (Supp. 1940), Appendix, § 901 et seq.

[2] Id. § 902(b).

[3] Ibid.

[4] Ibid.

[5] 50 U.S.C.A. (Supp. 1940) Appendix, § 942(d).

sions of the act, requiring Mrs. Willingham, defendant here, to decrease rent on three apartments owned by her. Mrs. Willingham got a temporary injunction in the state court restraining the issuance of the orders on the ground that the act under which they were made was unconstitutional. The administrator then brought this suit in the district court for an order to restrain Mrs. Willingham from further prosecuting suit in the state court and to restrain the county sheriff from carrying out the court's orders. The district court held that the act was unconstitutional and dismissed the administrator's suit.[6] On appeal, *held* reversed. The act is not unconstitutional because of an illegal delegation of legislative power to an administrative agency; Congress has set forth the purposes of the act which the administrator is to carry out, it has set up standards to be followed in carrying out the act, and has specified when the provisions of the act are applicable. It would be impossible for Congress to look into the facts in every area and determine what should be done, and, since the Constitution does not require the impossible, it is enough to satisfy peacetime requirements that Congress describes "what job must be done, who must do it, and what is the scope of his authority." [7] Nor is the act unconstitutional as a violation of the due process clause of the Fifth Amendment for want of a requirement that the rents fixed be fair and equitable to each landlord. The court has previously sanctioned Congress' exercise of its police power to regulate property without regard to the individual owner's loss.[8] The court does not decide how far Congress may go in this respect but it was within its constitutional limits here in "dealing with conditions created by activities resulting from a great war effort." [9] Nor was it unconstitutional as a violation of the due process clause of the Fifth Amendment because it made no provision for a hearing for landlords before the order or regulation of rents became effective. The act here provides for a hearing after the regulation has become effective, and although this court has previously held that review of the type provided does not satisfy the requirement of due process,[10] and although war power does not revoke constitutional limitations safeguarding essential liberties, where Congress has provided for judicial review after the regulations or orders have become effective it has done all that due process requires. Justices Rutledge, Roberts and Murphy voted for reversal but on other grounds. *Bowles v. Willingham*,[11] 321 U.S. 503, 64 S. Ct. 641 (1941).

[6] (D.C. Ga. 1943) 51 F. Supp. 597.

[7] Principal case at 647.

[8] Munn v. Illinois, 94 U.S. 113, 24 L. Ed. 72 (1876). Yakus v. United States, 321 U.S. 414, 64 S. Ct. 660 (1944).

[9] Principal case at 649.

[10] Morgan v. United States, 304 U.S. 1, 58 S. Ct. 535 (1938). Opp. Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 61 S. Ct. 524 (1940). The court distinguished these and cases like them on the grounds that (1) they were based on a statute which required another proceeding, and (2) Congress in those cases was not dealing with war time exigencies.

[11] See "Constitutionality and Construction of Emergency Price Control Act as Relating to Rent," 147 A.L.R. 1446 at 1448 (1943), 148 A.L.R. 1403 (1944), 149 A.L.R. 1467 (1944), 41 MICH L. REV. 109 (1942); Sprecher, "Price Control in the Courts," 44 COL. L. REV. 34 (1944); "Some Aspects of OPA in the Courts," 12 GEO. WASH. L. REV. 414 at 414-423 (1944); Sprecher, "Administrative Law—Price Control Act—Recent Amendments," infra at 188.

COURTS—EFFECT OF DISSOLUTION OF CORPORATION WHICH IS SOLE DEFENDANT PENDING APPEAL—Petitioners obtained an injunction in the district court restraining James V. Reuter, Inc., "its agents, servants, employees and attorneys, and all persons acting or claiming to act in its behalf or interest," [1] from violating the Fair Labor Standards Act. The circuit court reversed on appeal and remanded the cause for further proceedings. This court granted certiorari and the attorney who represented respondent corporation moves to have the writ recalled on the ground that since certiorari was granted respondent corporation had been dissolved under Louisiana law without prolongation of life for the purpose of continuing pending litigation and the case is therefore moot. *Held,* the case on the showing of respondent is not moot, nor does it abate. The district court determined, subject only to resort to prescribed appellate review, that petitioner had a right to an injunction restraining not only respondent but also, under proper circumstances, the transferees of respondent's business. Whether or not these circumstances were present here is a question for the district court. This court cannot render an effective judgment on the merits because it does not have anyone before it against whom a judgment could be enforced; but it may dispose of the whole case as justice may require. Here petitioner was entitled to the benefit of his judgment in the district court subject only to the full review contemplated by statute. By reason of the fact that a full review was frustrated by dissolution of respondent, the judgment of the circuit court, which is not final, "cannot rightly be made the implement for depriving petitioner of the benefit of his judgment of the District Court." [2] The judgment of the circuit court is therefore reversed and the judgment of the district court restored as though respondent had taken no appeal. *Walling v. James Reuter, Inc.,* (U.S. 1944) 64 S. Ct. 826.

CORPORATIONS—STOCKHOLDERS—RIGHT TO DECLARATION OF DIVIDENDS—Plaintiff, minority stockholder of defendant company, filed this bill in equity for a decree establishing the obligation of the company's directors under the agreement of association to declare and pay dividends on the class A common stock and declare and pay or accumulate dividends on the six per cent preferred stock for the years 1939, 1940 and 1941, and whenever, in the future the operations of the company result in annual earnings. The company was organized to purchase the assets and assume the liabilities of a company of the same name which had exhausted its credit and was operating at a loss. The agreement of association provided that the directors ascertain the annual net earnings of the preceding year after all obligations have been paid and "shall forthwith declare and pay to the holders of the common stock, class A, a dividend equal to one-fifth of such net annual earnings"; [1] but, if the company's capital will be impaired by such payment, the directors "shall forthwith" declare and pay so much of the one-fifth as will not impair the company's capital. The agreement further provided that if a dividend in any year be paid to the holders of class A common stock, then a dividend of four times that amount shall be paid or accumulated

[1] Principal case at 827.
[2] Principal case at 829.

[1] Principal case at 232.

for the holders of six per cent preferred stock. The plaintiff alleged that the operations of the company did result in annual earnings in 1939, 1940 and 1941. The parties have agreed that the issue raised is whether or not it is within the discretion of the directors to decide whether dividends should be declared on common stock class A and on six percent preferred stock when there are an earned surplus and net earnings available from the previous year, or whether, as plaintiff contends, it is mandatory on the directors to declare dividends. From a decree of the lower court dismissing the bill, plaintiff appeals. *Held*, reversed and decree rendered for plaintiff. Although as a general rule courts in this jurisdiction and elsewhere do not construe an agreement as making it mandatory on directors to declare dividends under any circumstances, yet it is within the power of the parties to contract if they so choose and to have their contract enforced by the court. Here, the language "shall forthwith" is imperative language which makes it apparent that the incorporators meant to dedicate a certain amount of the net earnings to the payment of dividends on class A common and six percent preferred stock. This conclusion is supported by the contrast of the language here with that used in relation to dividends on class B stock where the agreement read, "any earnings . . . may be applied"; and by the history of the origin of defendant's company, which makes it appear doubtful that stockholders would agree to take the risk of having the immediate earnings of this new company go back into the business. *Crocker v. Waltham Watch Co.*, (Mass. 1944) 53 N.E. (2d) 230.

COURTS—TEST TO DETERMINE WHICH OF TWO COURTS SHALL RETAIN JURISDICTION OF A CASE PENDING IN EACH—Mrs. Martinez filed suit against Mr. Martinez in Polk County May 19, 1943 charging misconduct on his part and asking custody of their children and an award for their support. The court ordered Mr. Martinez to produce the children and show cause why their mother should not have custody of them. On June 10, 1943, the children not having been produced, the court ordered him to bring them into court the next day and show cause why he should not be punished for contempt. Defendant then appeared with the children and filed an answer alleging that he had commenced suit for divorce in the Pinellas County court the day after this suit was filed, that he had received no service or notice of this suit until a copy of the June 10th order was given him during the Pinellas County trial, and that Mrs. Martinez had been awarded custody of the children and twelve dollars per week for their support by that court. The Polk County court entered an order awarding the plaintiff custody of the children, ten dollars additional allowance per week for their support and attorney fees. Defendant brings certiorari for the review of this order. The question raised is which court acquired jurisdiction first so that the other must yield to it. *Held*, that where two courts have concurrent jurisdiction the one first exercising it acquires jurisdiction to the exclusion of the other; but there is a conflict of authority as to whether the jurisdiction is acquired when the suit is commenced or when summons is served, the more generally applied rule being the latter, although there are exceptions to it. Here, the court said it was influenced to follow the latter rule by the fact that plaintiff had sought and obtained relief in the Pinellas Court. *Martinez v. Martinez*, (Fla. 1943) 15 So. (2d) 842.

CRIMINAL LAW—RIGHTS OF ACCUSED WHO HAS PLEADED OR BEEN FOUND GUILTY, IN RESPECT TO MATTERS TO BE CONSIDERED BY THE JUDGE IN FIXING SENTENCE.—Harry Johnson pleaded guilty to the murder of a fellow convict in the prison where he was confined and, after a hearing at which the degree of his guilt was not determined, he was recommitted for a period of about two months and then brought forth, adjudged guilty of murder in the first degree and sentenced to death. The record shows that before rendering a verdict the court had received information, both documentary and oral, disclosing Johnson's previous criminal record, and one of the judges had stated that he understood it to be the duty of the court to consider such matters in the imposition of sentence. On appeal, *held*, reversed. It is to the benefit of both society and the prisoner that a judge imposing sentence on a convicted criminal consider facts other than those adduced at the trial; but the choice between death and life imprisonment is so serious that a conscientious judge will so far as practicable permit the defendant to be confronted by the witnesses. This procedure is made manifest by a statute of this state which provides that a jury finding a defendant guilty of murder in the first degree is given "the discretion" to "fix the penalty by its verdict," and in case of pleas of guilty the court is given "the discretion" to "impose sentence of death or imprisonment for life."[1] This act has been interpreted to require both guilt and punishment to be covered by one verdict and not to provide for a separate inquiry.[2] It is not so obviously error for the court as for the jury to disperse after finding the defendant guilty and reassemble to hear ex parte evidence on which to decide the appropriate penalty to be imposed, but the proper practice is for the court to hear all the testimony, including that relating to fixing the penalty, in the presence of defendant and counsel so that he can present evidence on his own behalf, before it determines either the degree of guilt or the penalty. *Commonwealth v. Johnson*, (Pa. 1944) 35 A. (2d) 312.[3]

EVIDENCE—IT IS COMMON KNOWLEDGE THAT ONE CONDUCTING BUSINESS UNDER A TRADE NAME MAY BE DOING SO EITHER AS MANAGER OR PROPRIETOR—*P* began this action to collect bills for milk delivered to the Breakwater Court hotel in 1942. By agreement of the parties, the facts were that the defendant had arranged with plaintiff to deliver milk during the summers of 1941 and 1942 and plaintiff had billed Breakwater Court for it. Defendant did not own the hotel during this period but only managed it for his mother who did own it. Plaintiff contends that, since defendant did not disclose his agency, he is liable for the bills while defendant contends that his use of the name "Breakwater Court" in the purchase of supplies in itself amounted to a disclosure of principal. The finder of fact in the court below found that the agency had not been disclosed. *Held*, affirmed. It is common knowledge that it is equally consistent with the use of the name "Breakwater Court" that defendant was pro-

[1] Pa. Stat. Ann. (Purdon, 1930) tit. 18, § 2222 as amended by id. (Supp. 1943) § 4701.

[2] Commonwealth v. Parker, 294 Pa. 144, 143 A. 904 (1928).

[3] See generally, McGuire and Holtzoff, "The Problem of Sentence in Criminal Law," 20 BOST. UNIV. L. REV. 423 (1940).

prietor as that he was manager. It was then the duty of the trier of fact to say whether defendant disclosed that he was the one rather than the other. *Saco Dairy Co. v. Norton*, (Me. 1944) 35 A. (2d) 857.

EVIDENCE—PAROL EVIDENCE RULE—APPLICABILITY WHERE PARTIES AGREE AT TIME OF EXECUTION OF WRITING THAT ORAL AGREEMENT IS THEIR CONTRACT—Plaintiff sues, alleging that defendant owes him for earned but unpaid commissions due him under a contract "partly oral and partly written" which arose under the following circumstances:

Plaintiff offered to make every effort to procure war contracts for defendant in consideration of a fixed salary plus a commission based on the purchase price of the contracts. Defendants accepted the offer as made, but, when the contract was reduced to writing, the only reference to commissions was in the clause "the company may, if it desires, pay you something in the nature of a bonus." The parties, however, agreed at the time that their previous oral arrangement was the contract and that the commission provision was left unwritten in order "to avoid any possible stigma which might result."

The trial court dismissed the action on defendant's motion for a summary judgment. On appeal, *held*, reversed and remanded. Since in New York, where the suit was brought, the parol evidence rule is a rule of substantive law, the law of Michigan, where the contract was made, applies to this case. The law is that, where it appears from extrinsic evidence that the parties did not intend the writing to be an "exclusive authoritative memorial of their agreement," the oral agreement controls and no obligation flows from the writing.

This case might have been brought within the parol evidence rule by holding that, since the plaintiff alleged that the contract was partly oral and partly written, and since the writing covered commissions, the plaintiff is trying to use parol evidence to contradict the writing. But the court does not think, as does defendant, that the rule is so beneficent, so promotive of the administration of justice, and so necessary to business stability, that it should be given the widest possible application. "The truth is that the rule does but little to achieve the ends it supposedly serves." [1] *Zell v. American Seating Co.*, (C.C.A. 2d, 1943) 138 F. (2d) 641.[2]

EVIDENCE—RELEVANCY OF PRESUMPTION OF DEATH AFTER SEVEN YEARS' ABSENCE TO ISSUE OF TIME OF DEATH WITHIN THE SEVEN YEARS—Plaintiff brought this suit as beneficiary of a group policy of life insurance issued by defendant to insure plaintiff's husband. By its terms the insurance was collectible only if insured died while employed by the Frank Chevrolet Company or within thirty-one days after he ceased to be so employed. To prove death within the specified period plaintiff introduced evidence to show that the insured had disappeared from home more than seven years ago under circumstances that make it likely that he would communicate with his family if he were alive, showing that his home life was not an unhappy one, that he was not in debt, and that

[1] Principal case at p. 644.

[2] Petition for certiorari granted February 28, 1944. American Seating Co. v. Zell, 64 S. Ct. 618.

he had made no preparation to desert his family. Plaintiff asked the assistance of the police in seeking her husband but they were unable to locate him. The court submitted this evidence to the jury with instructions that plaintiff need not prove the death of insured by direct evidence, but that she might prove it by circumstantial evidence and reliance upon the presumption of death from seven years' absence. The jury found for the plaintiff and defendant assigns this instruction as error. *Held*, affirmed. The presumption of death after seven years' absence establishes only the fact and not the time of death; nevertheless it is relevant to the issue raised as to the time of death. The goal of the plaintiff is to prove such facts and circumstances as will convince the jury that death occurred during the life of the policy. Were there no presumption, the jury might properly infer death from seven years' unexplained absence. The fact that these circumstances have been crystallized into a presumption does not take them from the jury. The presumption is also effective in that, notwithstanding a clause in the policy limiting the time within which proof of death could be made, in a disappearance case it is enough that proof be presented within a reasonable time after the presumption has arisen. The court also held that the insured need not have been proved to be in specific peril at the time of his disappearance in order for the jury to find death at the beginning of the period; and that, although it is necessary for the one seeking to establish the death of a party long absent to show that a search has been made with reasonable diligence, the jury may take into consideration the financial condition of the claimant in determining what is reasonable diligence. *Hefford v. Metropolitan Life Ins. Co.*, (Ore. 1944) 144 P. (2d) 695.

EXECUTORS AND ADMINISTRATORS—POWER TO ASSIGN A STATUTORY RIGHT TO SET ASIDE FRAUDULENT CONVEYANCES—One Hutton, now deceased, entered into a contract with plaintiff whereby, in consideration of the conveyance by her of certain real estate, he promised to pay her $1,000 per month and provide in his will for a legacy of $100,000 in lieu of the monthly payments in case he predeceased her, and if he should fail to so provide, the contract gave her a direct charge of $100,000 against the estate. Plaintiff conveyed the named real estate, but Hutton was insolvent at the time of his death and made no provision for her in his will. This complaint alleges that seven months before his death Hutton conveyed certain property to defendant bank in trust for himself and defendant Pillsbury and the survivor of them, for inadequate consideration; that she was the only creditor who filed with Hutton's administrator within the statutory period; that her claim was compromised by the administrator, with the approval of the probate court, to the effect that she receive $23,500 from the estate and all the right, title and interest of the estate and the administrator to recover the property from the defendants here. The Probate Code [1] provides that if decedent in his lifetime has made a conveyance void against creditors, and the assets of his estate in the hands of the administrator do not meet the claims of creditors, the administrator must, on the application of any creditor, begin an action to recover the same for the benefit of creditors. Plaintiff sues as assignee of the administrator's right to recover from defendant

[1] Cal. Prob. Code (Deering, 1941) § 579.

and the question is whether that right can be assigned. The lower court sustained defendants' demurrer to the complaint and dismissed the action. *Held*, reversed. "An administrator of an insolvent estate may assign his statutory right to set aside fraudulent conveyances of his intestate if authorized to do so by the probate court where no possible harm can result to creditors." [2] The statute makes no express provision concerning assignability but, generally, assignability is the rule rather than the exception, the exception covering only wrongs done to person, reputation or feeling. To permit assignability here does not defeat the purpose of the act, i.e., to enable the administrator to take possession of the asset and administer it under the supervision of the probate court for the benefit of creditors. Ordinarily a creditor cannot bring the action without first exhausting all means of getting the administrator to bring it, otherwise complications would arise where several creditors attempt to bring it; but here plaintiff is the sole creditor, the administrator has agreed to assign, and the probate court has approved. The fact that the administrator has no statutory authority to assign is unimportant since the probate court authorized the assignment. *Webb. v. Pillsbury*, (Cal. 1943) 144 P. (2d) 1.

FEDERAL COURTS—PRACTICE AND PROCEDURE—VOLUNTARY APPEARANCE AS WAIVER OF RIGHT TO ASSERT WANT OF JURISDICTION OVER PERSON—Five individual defendants were served in New York with process issuing out of the District Court for the District of New Jersey to answer a complaint filed in that court by plaintiffs for triple damage and equitable relief under the Sherman Anti-Trust and Clayton Acts.[1] The district court granted an extension of time within which to answer or otherwise move [2] and within that time, the individual defendants moved to quash the summons because service had not been made as required by the general venue statute. The district court granted the motion. On plaintiff's appeal this court found that the real basis for the motion was the extraterritorial character of the service and that the question to be considered on appeal was whether defendants, by signing the stipulation for the extension of time, and thereby making a general appearance, had forfeited their right to assert the court's want of jurisdiction over them. *Held*, affirmed.[3] Prior to the adoption of the Rules of Civil Procedure, a voluntary appearance ordinarily had the effect of extinguishing defendant's right to assert the original lack of jurisdiction although defendant, under the common-law practice followed by the federal courts, might have appeared specially for the sole purpose of attacking the jurisdiction of the court. In such case the court has jurisdiction, but as a matter of public policy exercises judicial restraint in permitting defendant to raise

[2] Principal case at 4.

[1] 15 U.S.C. (1940) § 1 et seq.

[2] Under authority conferred by Civil Procedure Rule 6(b), 28 U.S.C.A. (1941) following § 723c.

[3] The parties had previously entered into a stipulation to extend the time, a motion to quash the summons had been made and granted by the district court, and the court of appeals had reversed on the ground that the objection was to improper venue and had not been timely raised. Upon remand, the district court granted a similar motion and this ruling is on an appeal from the district court's decision.

such question. Rule 12 of the Rules of Civil Procedure [4] has abolished the distinction between general and special appearance by giving defendant the right to assert a jurisdictional defense either by motion before answer, or in the answer itself and, although the power of the court to adjudicate on the merits has been called into being, the court is required to rule on the jurisdictional question without reference to that power. *Orange Theatre Corporation v. Rayhertz Amusement Corporation*, (C.C.A. 3d, 1944) 139 F. (2d) 871.

HABEAS CORPUS—AVAILABILITY FOR COLLATERAL ATTACK ON VALID JUDGMENT—Appellant was convicted of incest in the district court and that judgment of conviction was sustained in the court of appeals. In the trial court and on appeal he was represented by competent counsel appointed by the court. He has sought to reopen the case by petitioning for a writ of habeas corpus, alleging in the petition that his conviction was due solely to perjured testimony, and that vital, important evidence, not available to him at the trial had since come into his possession. The district court denied the writ, without appointing counsel, on the basis of the applicable statute which provides that a judge to whom such petition is made must grant the writ, "unless it appears from the petition itself that the party is not entitled thereto." [1] On appeal, *held* affirmed. It is not the proper function of a writ of habeas corpus to bring about a redetermination of the competency, weight and sufficiency of the evidence; collateral attacks may be sustained only when the objection to the judgment is such as to render it void.

The testimony on which appellant was convicted was that of his daughter, the complaining witness, and that of a person who saw the crime. Appellant's only attack on this latter testimony was the allegation in his petition of a conclusion—that it was perjured. This was not enough to support a petition for habeas corpus. Furthermore, perjury does not ordinarily render a judgment void unless it is "so entwined with other circumstances as to deprive the proceeding of its character as due process of law." Such was not the case here. The appellant had the benefit of experienced counsel, the opportunity to cross-examine prosecution's witnesses, the opportunity to testify in his own behalf and to introduce evidence to contradict prosecution's witnesses, and the judge had full opportunity to observe the witnesses for and against him.

There was no error in the district court's failure to appoint counsel in the habeas corpus proceeding. The constitutional guarantee [2] extends only to criminal proceedings and not to a proceeding that is no part of the criminal prosecution. *Hodge v. Huff*, (Ct. App. D.C. 1944) 140 F. (2d) 686.[3]

[4] 28 U.S.C.A. (1941) following § 723, p. 422.

"No defense or objection is waived by being joined by one or more defenses or objections in a responsive pleading or motion."

[1] 28 U.S.C. (1940) § 455.

[2] U.S. Const. Art. VI.

[3] See "Habeas Corpus: Scope of Review: Jurisdiction of Trial Court," 28 CORN. L. Q. 215 (1943).

INSURANCE—MEANING OF NO LIABILITY CLAUSE WHERE INSURED IS ENROLLED IN MILITARY SERVICE AT TIME OF DEATH—Plaintiff sues to recover double indemnity allegedly due him as beneficiary of the policy issued by defendant company insuring the life of Ernest Colvin, who was killed in an automobile accident in December 1942. The defendant claims that it is liable only for the net reserve on the policy, by reason of the fact that Colvin was at the time of his death "enrolled" in the Army of the United States, although then on furlough, and the policy provided that for the insured to serve in the Navy or Army in time of war, he must obtain a written permit from the company and pay an extra premium; and if he should die "while enrolled" in such service in wartime without a permit, "the Company's liability will be restricted to the net reserve on this policy." The trial court found for the plaintiff. *Held*, on appeal, affirmed. Although the parties used the word "enroll" rather than engaged, it was intended by them that the failure of insured to obtain a permit and to pay the extra premium would reduce the company's liability only in case his death should result from a risk peculiar to military service. This is made clearer by the fact that, in contemplation of a greater hazard, an extra premium is required. The parties might have made the insured's *status* as one enrolled in the U.S. Army the basis for limiting defendant's liability but they did not do so here. The assumption is, unless clearly expressed to be otherwise, that the insurance company did not intend to include a mere arbitrary provision, but that it meant to relieve itself of liability only where the death was caused by the excluded condition. *Young v. Life Casualty Insurance Company of Tennessee*, (S.C. 1944) 29 S. E. (2d) 482.[1]

LABOR LAW—FAIR LABOR STANDARDS ACT—PORTAL TO PORTAL PAY—Three iron ore mining companies filed petitions in the district court for declaratory judgments against the local unions representing their employees to determine whether travel time spent underground in the mines getting to and from the "working face" is work for which compensation must be paid within the meaning of the act.[1] If such travel time is work within the meaning of the act, then petitioners' employees have worked more than a statutory maximum work week and are entitled to be paid at a rate one and one half times the regular rate for the excess [2] for the period between the effective date of the act and the time the petitions were filed. The district court found that travel time had all the indicia of work and ruled that it was included in the work week.[3] The circuit court affirmed [4] and this court granted certiorari. *Held*, affirmed. The determination

[1] See generally O. P. Ozwent, "War Risks Exclusion Clauses in Private Insurance Policies," 10 GEO. WASH. L. REV. 857 (1942); "Validity, Construction and Effect of Provisions in Life or Accident Policy in Relation to Military Service," 147 A.L.R. 1295 (1943), 145 A.L.R. 1464 (1943), 137 A.L.R. 1263 (1942).

[1] Fair Labor Standards Act, 53 Stat. L. 1060 (1938), 29 U.S.C. (1940) § 201 et seq.

[2] Id. at § 7(a).

[3] (D.C.N.D. Ala. 1941) 40 F. Supp. 4.

[4] (C.C.A. 5th, 1943) 135 F. (2d) 320, rehearing denied (C.C.A. 5th, 1943) 137 F. (2d) 176.

of the issue presented is not on the basis of any statutory definition. The provisions of the act are "remedial and humanitarian in purpose" and "must not be interpreted or applied in a narrow grudging manner." [5] The congressional intent was to guarantee compensation for all actual work or employment and those words, in the absence of statutory definition have their usual meaning of "physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." [6] The journey underground in the mine to the working face was found by the district court to be within this definition. The claim of petitioners that the practice of figuring working time from "face to face" is based upon custom and arrangements arrived at by collective bargaining, and therefore was not meant to be changed by Congress without more affirmative language, cannot be supported by the facts. The district court found no such established custom, and no contract made through collective bargaining. But had such contract or custom been found, unless it was in regard to a borderline case, or governed methods of computation where accurate computation is impossible, it would not stand in the way of the operation of the act. The act was designed to achieve a national policy of guaranteeing compensation for all work done by employees covered by the act, not to codify existing customs. Mr. Justice Murphy spoke for the court. Mr. Justice Roberts wrote a dissenting opinion concurred in by the Chief Justice in which he said that the Fair Labor Standards Act was intended only to require a fair day's pay for a fair day's work and nothing more; that "work" as used in "work week" in the light of this interpretation was meant to indicate the number of hours of service rendered to the employer for which he pays wages in conformity to custom or agreement. The act gives no power to the courts nor to the administrator of it to determine what a work week is. The basis of pay, contrary to the findings of the district court, has always been a "face to face" calculation of time and the district court having found no agreement to the contrary the judgment should have been reversed. *Tennessee Coal Iron & R. Co. v. Muscoda Local No. 123.*, 321 U.S. 590, 64 S. Ct. 698.

LABOR LAW — INJUNCTION — PEACEFUL PICKETING FOR UNLAWFUL PURPOSE—Plaintiffs, common carriers of freight, employ drivers who are members of defendant labor union. The union instructed its members not to handle merchandise of John Blaul's Sons Company, wholesale grocers who did not employ union truck drivers, and plaintiff filed a bill to restrain defendant union from requiring its drivers to refrain from handling Blaul merchandise. A permanent injunction to that effect was granted by the lower court. On appeal, *held*, affirmed. The action of the union in blackballing Blaul through plaintiff's truck drivers had as its object an act prohibited by law; it being unlawful both by statute [1] and at common law for a common carrier to refuse to carry goods

[5] Principal case at 703.

[1] Iowa Code (Reichmann, 1939), § 8044. "It shall be unlawful for any common carrier to . . . entail any prejudice or disadvantage upon any particular person, company, firm, corporation . . . by any . . . practice whatsoever . . . ."

tendered to it for transportation by the public. The fact that its drivers refuse to carry such goods does not excuse performance on the part of the carrier. The action had an unlawful object even though the ultimate object of coercing the Blaul Company into a labor agreement is conceded to be lawful, for the question is what was the object of defendant's action in relation to the plaintiff and what can plaintiff do to terminate it. The plaintiff here was forced by the action to perform illegal acts and in such case the defendant may be enjoined though his means were peaceful.[2] *Burlington Transp. Co. v. Hathaway,* (Iowa 1943) 12 N. W. (2d) 167.

LABOR LAW — NORRIS-LAGUARDIA ACT — MEANING OF "EVERY REASONABLE EFFORT" — On a finding that the strike instituted by appellants was carried out with substantial violence, and that protection supplied by public officials was inadequate, an injunction was issued in the district court at the instance of respondent railroad company to restrain its employees from interfering by "violence or threats of violence with its property and interstate railroad operations." [1] Respondent had previously negotiated with the duly elected representatives of its employees and had submitted to mediation with the aid of the National Mediation Board, but both courses had been unsuccessful in averting the strike. Respondent had refused, however, to submit to arbitration pursuant to the Railway Labor Act and this refusal, appellants contend, renders the injunctive remedy unavailable to them under the Norris-LaGuardia Act. The Norris-LaGuardia Act, section eight, provides that no injunction shall be granted to anyone who has "failed to make every reasonable effort to settle disputes either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." [2] Respondent contends that use of any one of the three methods mentioned—negotiation, mediation, or arbitration—will meet the requirement of the act; that if section eight includes arbitration under the Railway Labor Act, then arbitration becomes involuntary contrary to the terms of that act; [3] and that section eight does not apply where there has been violence. On certiorari, *held,* reversed. The refusal of respondent to agree to arbitration under the Railway Labor Act made section eight of the Norris-LaGuardia Act operative and deprived the federal court of power to issue an injunction. The machinery for voluntary arbitration was "available" to respondent and resort to it would have been a "reasonable effort to settle." The language "*every* reasonable effort" plus the legislative history and the basic common policy of the Norris-LaGuardia Act and the Railway Labor Act, i.e., to encourage the use of nonjudicial process in the adjustment of labor disputes, put it beyond question that it was the policy of Congress to make negotiation, mediation and arbitration all conditions precedent to the availability of injunction.

[2] See 149 A.L.R. 1243 (1944).

[1] Principal case at 51.

[2] 29 U.S.C. (1940) § 108, 47 Stat. L. 72 (1932).

[3] The act provides that machinery be put into operation by agreement of the parties, and "that a failure or refusal of either party to submit a controversy to arbitration shall be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise." 45 U.S.C. (1940) § 157.

Arbitration under the Railway Labor Act does not cease to be voluntary, as is claimed by respondent, because it is required under section eight of the Norris-LaGuardia Act as a prerequisite for the granting of an injunction. The Railway Labor Act provides only that failure to arbitrate shall not be construed as a violation of any legal obligation.[4] The Norris-LaGuardia Act does not make it a legal obligation to arbitrate nor does it take away the right to any remedy save injunction for that failure. There is no basis for the claim that section eight does not apply where there was violence. The statutory purpose is to head off strikes by requiring statutory steps to be taken before the aid of the federal court of equity is sought. The purpose of the act would be defeated if this assistance were denied only where there has been no violence. "It sought to make injunction a last line of defense, available not only after other legally required methods, but after all reasonable methods as well, have been tried and found wanting."[5] *Brotherhood of Railroad Trainmen v. Toledo P. & W. R.R.*, 321 U.S. 50, 64 S. Ct. 413 (1944).[6]

MANDAMUS — IS IT A SUFFICIENT GROUND FOR DENYING MANDAMUS THAT THERE IS AN ADEQUATE REMEDY IN EQUITY? — Plaintiff was the highest bidder at an auction conducted for the city of Chelsea by defendant McCarthy, custodian of property acquired by foreclosure of tax titles. A statute[1] empowered the custodian to sell property in his custody under certain circumstances, and orders the treasurer, the other defendant here, to execute and deliver the "necessary instrument to pass title" when the amount bid has been accepted by the custodian. The statute was complied with by both McCarthy and plaintiff, but the "necessary instrument to pass title" was neither executed nor delivered. Plaintiff brought this action for specific performance and it was so decreed in the court below. Defendant claimed that a bill in equity could not be maintained because there was an adequate remedy at law, viz., mandamus to compel the treasurer to execute the deed in accordance with his statutory duty. *Held*, that plaintiff's claim sprang from a contract with the city, and a contract did not create the kind of public duty performance of which could be enforced by mandamus. But the court added that it did not want to be understood as accepting the general proposition that a bill in equity cannot be entertained if mandamus is available at law. It was suggested that the true rule was the converse, namely, that mandamus could not be maintained if an adequate remedy in equity is available. The court said it had frequently been held that mandamus is not available to a plaintiff who has a statutory remedy in equity, including cases where the statute provides for a general extension of equity jurisdiction. It stated that there was no case in Massachusetts supporting defendant's proposition, but that there were some in other jurisdictions. "With this word of cau-

[4] See note 3.

[5] Principal case at 58-59.

[6] Case noted in 32 GEORGETOWN L. J. 316 (1944).

[1] Mass. Stat. Ann. (Michie, 1933) c. 60 § 80, as amended by Mass. Laws, 1938, c. 358, §§ 1-2, id., 1939, c. 123 and id., 1941, c. 296, § 2.

tion," said the court, "we leave this subject where we find it." [2] *Parrotta v. Henderson*, (Mass. 1944) 53 N.E. (2d) 97.[3]

PATENTS — VALIDITY OF AGREEMENT OF LICENSEE NOT TO CONTEST A PATENT — Nachman Spring-Filled Corporation brought this action against the Kay Manufacturing Company for infringement of *X* patent, and for breach of an agreement not to infringe that patent. Plaintiff had previously been awarded a judgment against this defendant in a suit for infringement of *Y* patents and the parties entered into an agreement by which defendant acknowledged the validity of the *X* patent and agreed "not to manufacture or sell" any devices which would infringe it, in consideration of plaintiff's releasing defendant of claims against it for infringement of *Y* patents. The court entered an interlocutory decree in favor of the plaintiff and defendant appeals, arguing that the agreement is void in restraint of trade. *Held*, reversed and remanded. Although defendant's contention was not made in the court below, it must be considered here because of the public policy involved in safeguarding the patent statutes. The agreement not to contest the patent cannot bar an inquiry into the validity of the patent. Under the doctrine of *Sola Electric Co. v. Jefferson Electric Company* [1] in which it was held that "the so-called implied estoppel of a patent licensee, to question the validity of the patent under which he is licensed, is inoperative . . . when the license agreement contains a provision fixing prices, since such a provision, should the patent be not valid, will violate the Sherman Act." [2] This doctrine was applied in *American Cutting Alloys, Inc. v. General Electric Co.*[3] where the license agreement contained both a price fixing clause and the express covenant not to question the validity of the patent. In view of the statement made in the *Sola* case that "rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enjoyment of such unlawful agreements." [4] A price fixing clause in the agreement is unnecessary to invoke the Sola doctrine; any conflict with the antitrust laws or with the common law of the state regarding restraint on competition will be sufficient. The case is remanded for a hearing on the validity of the patent and on the validity of the agreement under the Sherman Act and the state common law. *Nachman Spring-Filled Corporation v. Kay Manufacturing Company*, (C.C.A. 2d, 1943) 139 F. (2d) 781.[5]

[2] Principal case at 100.

[3] See 131 A.L.R. 335 (1941).

[1] 317 U.S. 173, 63 S. Ct. 172 (1942).

[2] 15 U.S.C. (1940) §§ 1-7 at note 15. Quoted from principal case at 783.

[3] (C.C.A. 2d, 1943) 135 F. (2d) 502.

[4] Principal case at 784.

[5] For a discussion of this case and the cases on which its decision is based see Robert Gottschalk, "Further Comments on Recent Patent Decisions and Current Trends." 26 J. PAT. OFF. SOC. 151 (1942).

VENUE — MEANING OF STATUTE PROVIDING THAT "ACTIONS UPON CONTRACTS MAY BE TRIED IN THE COUNTY IN WHICH THE CONTRACT WAS TO BE PERFORMED" — The Montana venue statute provides: "In all other cases [except those specifically provided for in the statute] the action shall be tried in the county in which defendants or any of them, may reside at the commencement of the action, or where the plaintiff resides and defendants or any of them may be found. . . . Actions upon contracts may be tried in the county in which the contract was to be performed. . . ."[1] Plaintiffs and defendant were engaged in an outdoor advertising business in and around Missoula and all were residents of that town when they entered into a contract by which plaintiffs agreed to sell their share in the business. Plaintiffs promised in the contract to deliver to defendant a bill of sale to their share, which was then held in escrow in the First National Bank of the City of Missoula, and to instruct the bank to deliver the said bill of sale and certain other papers held by it; defendant promised to pay to plaintiffs $100 per month so long as they or either of them should live, and reasonable attorney fees. Plaintiffs sued in the Richland county court for breach of the contract, alleging that both of them have been, "at all times material to this cause of action," residents of that county and that the contract sued upon was to be performed in that county. Defendant moved for a transfer of the action to Missoula county, alleging that he is a resident of Missoula county, that the contract was to be performed there, and that summons was served there. The case is here on defendant's appeal from an order denying his motion for a change of venue. *Held*, reversed. The defendant has an ancient right, protected by the first sentence of section 9096 of the Montana venue statute[2] to have actions against him brought in the county of his residence. To bring an action elsewhere, plaintiffs must show that it falls within a statutory exception to the rule. The second sentence of section 9096 permits but does not require the parties to agree in the contract upon a place for performance and that place becomes "a," but not "the" proper place for an action to be brought upon it. To come within this exception the contract must "plainly show" by its express terms, or by necessary implication therefrom that it was intended to be performed at a place other than defendant's residence and it must specifically designate that place. "It is not the fact that the action is founded upon a contract but the fact that the contract sued upon indicates the particular county in which, at the time of contracting the parties mutually intended it was to be performed that brings the action within the performance exception. . . ."[3] The contract involved here did not, under general rules of construction, plainly show an intent on the part of the parties that it be performed elsewhere than in Missoula county; therefore the general rule applies. One justice concurred in the opinion, one in the result, and two dissented, on the ground that for fifty years the statute had been interpreted to mean that all contract actions must be tried at the place where the contract was to be performed, the place for performance to be determined, in case the contract is silent in respect to it, by interpretation of the language according to the usual statutory provisions. *Hardenburgh v. Hardenburgh*, (Mont. 1944) 146 P. (2d) 15.

[1] Mont. Rev. Code Ann. (Anderson & McFarland, 1935) § 9096.
[2] Ibid.
[3] Principal case at 154.

WILLS — CONSTRUCTION — PREFERENCE FOR VESTED INTEREST OVER "DIVIDE-AND-PAY-OVER" RULE — Testator devised his property to trustees with provision that they pay the income to his mother, sister, wife and children in designated shares, and that on the death of the last surviving child they "make over and convey all my estate equally among my grandchildren." Eight grandchildren were living at the time of the death of testator's last surviving child, eight had died previously, and of the total, twelve had survived their parents. The eight living grandchildren claimed that testator's use of the words "make over and convey" invoked the operation of the "divide-and-pay-over" rule to the effect that the remainders vested, consequently, in the eight grandchildren living at that time. The probate court ordered distribution in accordance with this claim. The question raised on appeal is whether the estate should have been divided into eight, twelve, or sixteen shares. *Held*, reversed. The estate should have been divided into sixteen shares, to be distributed among the sixteen grandchildren or their legal representatives. The "divide-and-pay-over" rule is that "the use of such words or of those of similar portent is some indication of an intention on the part of the testator that vesting is to take place at the time fixed for ultimate distribution." [1] But the rule is given little weight in deciding cases, and is not decisive in this case. The law favors the early vesting of remainders, especially where, as here, the remaindermen are descendants of the testator. On this basis, the remainders are to be construed as vesting in the grandchildren of the testator at birth subject to admit to the class thereafter born grandchildren. *Barker v. Monks*, (Mass. 1944) 53 N.E. (2d) 696.[2]

WILLS — POWER OF LEGATEE OF ANNUITY TO BE PURCHASED TO ELECT PURCHASE PRICE IN LIEU THEREOF WHERE OTHER LEGATEES HAVE AN INTEREST IN THE ANNUITY — Testator directed in her will that the residue of her estate be converted into cash and used to buy insurance policies, one-fifth for one of her two children and four-fifths for the other, the income to be paid to the children for life, and on the death of either the balance of the proceeds to her surviving children, or if there are none to the survivor of testator's children or her issue, or, issue failing in both cases, to a Catholic charity. The executor petitioned the probate court for an order directing the sale of the personal property which consisted of stocks and bonds. Appellant here, beneficiary of the four-fifths share, objected, and filed notice of election to take securities in lieu of annuity. The other beneficiary did not appear and appellant claims to represent her, since the income which she would get from the securities would be greater than that from the policies, as would the amount held in trust for contingent beneficiaries. The probate court directed a sale. *Held*, affirmed. The reason for the rule that a beneficiary may elect to take the purchase price in lieu of the annuity is that ordinarily, if the annuity were purchased, it would be immediately resold by the annuitant and the law does not require a nugatory act. But here the beneficiary could not sell without the consent of all concerned; the reason being gone, the rule no longer applies. Nor is there any representation

[1] Principal case at 699.

[2] See annotation on the "divide-and-pay-over" rule in 144 A.L.R. 1155 (1943); 3 PROPERTY RESTATEMENT § 260 (1940).

here, for the interests of the appellant and the contingent remaindermen are conflicting. *In re Benzinger's Estate*, (D. Ct. App. Calif. 1943) 143 P (2d) 717.

ZONING—VALIDITY OF ORDINANCE REQUIRING A PRESCRIBED USABLE FLOOR AREA IN HOUSES—The city of Huntington Woods had a zoning ordinance providing that all dwelling houses erected in the Bronx subdivision should have a usable floor space of not less than 1,300 square feet. The city claimed authority to enact such an ordinance under an act of the legislature which provided that "the legislative body of cities and villages may regulate the height and bulk of buildings hereafter erected . . ." and that such regulations, for the promotion of the public health, safety and general welfare are to be made "with reasonable consideration, among other things . . . [to] the conservation of property values and the general trend and character of building and population development." [1] There are now 378 houses in the subdivision of which a substantial number have not met the zoning requirement as to floor space and there are 465 vacant lots, some of which, the evidence tended to show, would have been utilized if their owners could have built smaller houses. The plaintiff applied for permission to build a house with a usable floor area of 980 square feet and defendant, Superintendent of Public Works of the City of Huntington, refused the permit. Plaintiff petitioned for a writ of mandamus alleging that the pertinent provision of the ordinance was an unreasonable, discriminatory, and an unwarranted exercise of the police power and that the ordinance was not based "upon a plan fairly designed to accomplish the statutory purpose of public health, safety and general welfare." The circuit court denied the writ and plaintiff appeals, in the nature of certiorari. *Held*, reversed. "Each zoning case must be determined upon its own facts and circumstances." [2] This provision regarding usable floor space was arbitrary in that there are a substantial number of dwelling houses already in the district which do not conform, and a substantial number of lots left vacant because of the ordinance, and because a house with usable floor space as contemplated by the plaintiff can be erected as consistently with reasonable standards of public health, safety and welfare as the house required. Furthermore, the testimony indicated that this ordinance was enacted to aid persons who had already built in the restricted section to protect their investment. This does not fall within the statutory purpose of public health, safety and general welfare. Justice Bushnell dissents on the ground that the statute authorized such a limitation, and, since it was not clearly unreasonable, the legislative body, not the courts, should be the judge. *Senefsky v. Lawler*, (Mich. 1943) 12 N. W. (2d) 287.

[1] 1 Mich. Comp. Laws (1929) § 2633 et seq.

[2] The court quoted from Moreland v. Armstrong, 297 Mich. 32 at 36, 297 N.W. 60 at 62 (1944).