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ABSTRACTS

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APPEARANCE — AUTHORITY OF A CONSUL OF A FOREIGN NATION TO ELECT ON BEHALF OF HIS ABSENT NATIONAL TO TAKE AGAINST THE WILL OF HER DECEASED HUSBAND — A treaty between Poland and the United States provides that "a consular officer . . . shall . . . have the right to appear in all matters concerning the administration and distribution of the estate of a deceased person . . . for all such heirs or legatees of the said estate . . . as may be non-residents and nationals of the country represented by the said consular officer with the same effect as if he held their power of attorney . . ." [1] Under authority of this treaty the Consul General of Poland filed an instrument in which he purported to exercise on behalf of an absent Polish national, Felicja Zalewski, the right given her by statute [2] to take her intestate share of her husband's estate in lieu of his bequest to her under the will. The will's only provision for Mrs. Zalewski was a legacy of one hundred dollars, and since the net amount of the estate was $8,500, consul's election was to the pecuniary advantage of testator's spouse. The executor of the will rejected Mrs. Zalewski's claim and the consul filed objections in a proceeding by the executor for a final accounting. The objections were dismissed in the surrogate court [3] and the dismissal affirmed in the appellate division.[4] The question to be determined on appeal is "can the Consul-General of the Republic of Poland, under the existing treaty . . . without direct authorization by, or communication from, his national who resides in Poland, validly exercise on her behalf the right accorded her by [the New York Statute] to 'take against the will' of her late husband?" [5] *Held*, the order of the appellate division and the decree of the surrogate court, so far as appealed from should be reversed. Though the right to elect is personal, it is personal only in the sense that the election must, in each case, be a conscious, individually made choice between the statutory provision and the testamentary provision, and not in the sense that it may not be made by a duly authorized agent. The consul-general is the duly authorized agent of his absent national by virtue of the power given him by the treaty to "appear" for her. This interpretation is in harmony with the common law on the nature and extent of consular authority to represent nationals in our courts. Although there is no case in which the precise question here involved has been directly passed upon, it has been held that consuls may come into court to collect property of their nationals, to collect liquidated debts, or to file objections in the surrogate court. Any of these actions amounts to the making of an election; in making it, however, the court will not permit the elector to sacrifice a right of his national. Lehman, Chief Judge, dissented on the ground that the consul was not authorized by treaty, or at common law, to make the election. The only right conferred by the treaty is that to "appear," and there is no indication that

[1] 48 Stat. L. 1507 at 1530 (1931).
[2] N.Y., Decedent's Estate Law (McKinney, 1939) c. 13, § 18.
[3] 177 Misc. 384, N.Y.S. (2d) 658 (1941).
[4] 256 App. Div. 878, 38 N.Y.S. (2d) 37 (1942).
[5] Principal case at 185.

anything other than that was meant. Authority to "appear" is not authority to "elect." At common law, the power of consular officers to act for their nationals was limited to actions for the protection of the rights granted their nationals by law. He acts not as a personal agent, but in his official capacity as representative of his government, and his acts are provisional and for the purpose of preserving the property of his nationals and securing for them an opportunity to assert and maintain their right to do so. *In re Zalewski's Estate*, (N.Y. 1944) 55 N.E. 184.

CORPORATIONS — RIGHT OF MINORITY STOCKHOLDER TO RELIEF AGAINST TRANSFER OF CORPORATION ASSETS TO NEW CORPORATION IN RETURN FOR STOCK — The Newman Company, defendant corporation, is a manufacturer and seller of corsets. Having in the process of development a new surgical garment not suitable to be marketed in the usual way, its directors proposed that, in order to facilitate marketing, the business, property, and goods connected with the manufacture and sale of the new garment be transferred to a separate corporation, the Miles Company, organized for that purpose. The plan adopted provided that 9349 shares of the common stock—the number of shares of Newman Company common stock outstanding—out of the 10,000 shares of Miles Company stock to be issued, were to be purchased by the Newman Company and distributed among its common stockholders as a dividend, and that the property transferred be paid for in preferred stock in the new company. The certificate of incorporation of the Miles Company provides that no stockholder shall have a right to purchase or subscribe for unissued or additional stock or bonds or other securities convertible into stock, but that they may be issued and disposed of by vote of the directors to such persons and upon such terms as they shall determine. It provides also that any act or contract may be submitted by the directors for approval to a lawful quorum of the stockholders, and if a majority of those represented approve, it is binding on the corporation. Plaintiff is a minority stockholder in the Newman Corporation and a director on its board. His was the only stock voted against the plan. He brought this action for an injunction restraining the defendant corporation and its directors from transferring any of its assets to the Miles Corporation, or in the alternative, a judgment that plaintiff is entitled to be paid the value of his stock in the Newman Company. On appeal from a judgment in defendant's favor, *held*, there was error in the proceeding below; the judgment was set aside and a new trial ordered. The provisions of the certificate of incorporation set forth above make the plan inequitable as regards plaintiff. A stockholder is in general entitled to a pre-emptive right to subscribe for or purchase additional stock in proportion to his holdings so that he can preserve his proportionate part in the assets and management of the corporation. So long as the Newman Company carried on the business of manufacturing and selling the Miles garment, plaintiff could retain his proportionate share; but, after the business is transferred to the Miles Company, whether he will continue to have the same share will depend upon the will of the directors of that company. This, added to the fact that three of the defendants, directors of the Newman Company, are a majority of the directors of the Miles Company and own a majority of its common stock,

and any act they do may be validated by their votes as stockholders, makes apparent "the extent to which the interest of the plaintiff in the portion of the business to be transferred to the Miles Company will be subject to the control of defendant." [1] *Klopot v. Northrop*, (Conn. 1944) 37 A. (2d) 700.

EVIDENCE — HEARSAY — WHAT CONSTITUTE STATEMENTS MADE IN EXECUTION OF AGENCY FOR PURPOSES OF EXCEPTING THEM FROM HEARSAY RULE? — In an action to recover damages for injuries sustained in defendant theatre by plaintiff when he sat on a seat wet with a liquid that burned his body, plaintiff had a verdict in the county court, but on appeal it was reversed on the ground that plaintiff's only evidence of defendant's responsibility for the wetness of the seat was incompetent and illegally admitted as part of the res gestae. The evidence consisted of the testimony of the usherette who showed plaintiff to his seat, of the conversation between herself and the manager in plaintiff's presence, in which, on being asked to explain the condition of the seat, she told the manager that a fluid had been used to get gum off the seat. On appeal, *held*, the judgment of the supreme court was reversed, that of the county court affirmed. The supreme court was correct in not admitting the evidence as part of the res gestae, but the evidence was admissible as statements mad by defendant's agents in the execution of their agency. The manager, here, in asking questions of the usherette was carrying out his duty to see that the employees were not negligent; the usherette's answers form part of the inquiry which was being conducted for the benefit of the principal. *Arenson v. Skouras Theatres Corporation*, (N.J. 1944) 36 A. (2d) 761.[1]

EVIDENCE — RULE AGAINST COMPULSORY SELF-INCRIMINATION — USE IN FEDERAL CRIMINAL PROCEEDINGS OF TESTIMONY GIVEN UNDER COMPULSION IN STATE PROCEEDINGS — The case of *United States v. Feldman*,[1] which was abstracted in the February issue,[2] was reviewed on a writ of certiorari by the Supreme Court and the conviction affirmed. *Feldman v. United States*, (U.S. 1944) 64 S. Ct. 1082.

EVIDENCE — TESTIMONY OF PARTY CALLED AS WITNESS BY OPPOSING PARTY AS EXPERT TESTIMONY — In an action to recover for the wrongful death of his son through the negligence of defendant doctors, plaintiff was nonsuited in the court below because there was no expert testimony on the question of negligence. He contends that if such testimony is necessary it was present in the testimony of the defendant, Dr. Costello, whom plaintiff had called as a witness. Costello had answered questions of fact concerning the actual treatment of the patient but when plaintiff asked questions intended to elicit information

[1] Principal case at 706, 707.

[1] See "Agency—Admissibility against the Principal of Statements made against his Interest by Agent," 3 MONT. L. REV. 81 (1942).

[1] (C.C.A. 2d, 1943) 136 F. (2d) 394.
[2] 42 MICH. L. REV. 718 (1944).

as to hypothetical methods of treatment and defendant's opinion concerning them, objections were made and sustained. *Held*, affirmed. The statute provides that, "except as otherwise provided by law, when any party is called as a witness by the adverse party he shall be subject to the same rules as to examination and cross-examination as other witnesses." [1] It is an established rule as to examination and cross-examination of witnesses that one cannot be compelled to give expert testimony unless he has contracted to do so; this rule applies as well to an adverse party called as a witness. *Hull v. Plume*, (N.J. 1944) 37 A. (2d) 53.

FEDERAL COURTS — STATUS OF STATE WATER CONSERVATION BOARD AS CORPORATE CITIZEN OR AS STATE AGENCY, FOR PURPOSES OF JURISDICTION OF FEDERAL COURT ON DIVERSITY OF CITIZENSHIP BASIS — The State Water Conservation Board was a defendant in an action by the Montana Power Company, a New Jersey Corporation engaged in the business of generating and distributing electric power in Montana, for an order enjoining appropriation by the water board of water rights claimed by complainant by prior appropriation, and a quieting of complainant's title to the use thereof. One of the questions raised was whether defendant water board is the "alter ego" of the state of Montana as it claims, and therefore not suable in the federal courts, or whether, as claimed by plaintiff, it is a corporate citizen of the state of Montana and suable in the federal district court by a New Jersey corporation on the basis of diversity of citizenship. The act setting up the water board [1] provides that it be made up of the governor and the state engineer as ex officio members, and three other members appointed by the governor, who are required to take the oath of state officers and whose compensation is payable from the funds provided by legislative appropriation. The object declared in th act is the construction of a system of works "for the development, storage, distribution and utilization of water," and the board, in carrying it out, is to be "regarded as performing a governmental function." The board is given control over all water in the state not already appropriated, or under the control of the United States, and is empowered to take such steps as are necessary to appropriate and conserve it; it is empowered to issue bonds on which the state is not liable, to exercise the state's police power, to take title to property purchased or condemned in its name, to sue and be sued in the state or federal court for certain purposes, and to exercise its powers in adjoining states or countries. The water board moved for a dismissal on the jurisdictional ground that the suit was in effect against the state and there was no diverse citizenship, and the court below denied the motion. On appeal, *held*, reversed. The terms of the statute, and its prior interpretation by the Montana court [2] leave little doubt that the board is a "mere arm of the sovereign." Its officers are state officers and it is empowered to perform governmental functions. Denman, Circuit Judge, dissents on the ground that the majority view is in conflict with the already established view that "where a state

[1] N.J. Rev. Stat. (1937) § 2:97-12.

[1] Mont. Rev. Code Ann. (Anderson & McFarland, 1935) §§ 349.1-349.38.
[2] State ex rel. Normile v. Cooney, 100 Mont. 391, 47 P. (2d) 637 (1935).

creates separate corporate entities as its agents to perform governmental functions and gives such corporate entities the right to sue and be sued and the state's Supreme Court, construing the laws creating such corporation, determines that the Legislature has created the corporations to be such separate entities, they are citizens of the creating state subject to be sued in the federal courts by a citizen of another state. The Water Conservation Corporation is such a separate entity." [3] *Broadwater-Mo. Water Users' Assn. v. Montana Power Co.*, (C.C.A. 9th, 1944) 139 F. (2d) 998.

FRAUDULENT CONVEYANCES — ANNUITY CONTRACT AS CONSIDERATION FOR TRANSFER OF PROPERTY BY INSOLVENT — In a bill to set aside as a fraud on creditors an annuity contract issued by defendant to plaintiff's decedents, plaintiff alleged that decedents, while insolvent, transferred to defendant $5,500 in exchange for an annuity contract by the terms of which defendant undertook to pay to Edward Webster a monthly income for the rest of his life, and after his death to continue the payments to his wife if she should survive him; and that the money was transferred to defendants without consideration and was fraudulent as to the Websters' creditors. Defendants demurred and the court below sustained the demurrer. *Held*, affirmed. When a conveyance is made by one who is insolvent and, as here, it is not alleged that defendant knew of or participated in the fraudulent purpose, the law of Massachusetts is that the conveyance is fraudulent as to creditors, without regard to the intent of the one making it, if made "without a fair consideration." [1] Fair consideration is given "when in exchange for such property or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied."[2] Defendant's policy delivered in exchange for decedent's $5,500 was a "non-negotiable chose in action" and was "property" within the meaning of the statute. Such a contract has previously been held in this state to be "fair consideration." *Osgood v. Massachusetts Mutual Life Ins. Co.*, (N.H. 1944) 37 A. (2d) 12.

LABOR LAW — NATIONAL LABOR RELATIONS ACT — DUTY OF EMPLOYER TO BARGAIN WITH UNION CERTIFIED BY N.L.R.B. AFTER MAJORITY OF EMPLOYEES HAVE REPUDIATED IT AS THEIR BARGAINING AGENT — Ten weeks after the National Labor Relations Board had certified a local of the International Brotherhood of Electrical Workers as the exclusive bargaining agent of defendant's employees, a majority of the employees signed a petition expressing their desire to cease to be so represented. The company thereafter refused to bargain with the union. The board found that defendant had violated section 8 (1) and (5) of the act [1] by refusing to bargain with the union after

[3] Principal case at 1002. Judge Denman cited as authority Louisiana Highway Commission v. Farnsworth, 74 F. (2d) 910 (1935) and Port of Seattle v. Oregon & W. R. Co., 255 U.S. 56, 41 S. Ct. 237 (1921).

[1] Mass. Ann. Laws (Michie, 1943) c. 419, § 4.
[2] Id. at § 3.

[1] 29 U.S.C.A. (1940) § 158.

its designation as exclusive bargaining agent, and in certain other respects, and it petitions this court to enforce its order based on this finding. *Held*, the board's finding that defendant was guilty of unfair labor practices other than its refusal to bargain with the union was not supported by the evidence, but it properly found that the company was not justified in its refusal to so bargain. "To assume that the Board's certification speaks with certainty only for the day of issuance and that a Company may, with impunity, at any time thereafter refuse to bargain collectively on the ground that a change of sentiment has divested the duly certified representative of its majority status would lead to litigious bedlam and judicial chaos . . . . Since the Act does not prescribe the length of time for which any given certification shall remain valid, the court accepts the legal conclusion of the Board that the Company must recognize the certified representative for a reasonable period of time after issuance of the certification, or until the certification is either set aside or replaced by the appropriate action of the Board in accord with the Act." [2] The board properly found that a reasonable time had not elapsed. It is directed that the sections of the order which require the company to bargain collectively with the union be enforced.[3] *National Labor Relations Board v. Appalachian Electric Power Co.*, (C.C.A. 4th, 1944) 140 F. (2d) 217.[4]

LABOR LAW — NATIONAL LABOR RELATIONS ACT — EFFECT OF DELAY BY BOARD ON VALIDITY OF BACK PAY ORDER — LUMP SUM METHOD OF COMPUTING BACK PAY — On the basis of a finding that respondent had been guilty of unfair labor practices, the result of which was a strike in its plants, the N.L.R.B. ordered respondent to reinstate all employees named in schedule "A" and to contribute back pay from the time of its discrimination against union men to the time of reinstatement, or offer of reinstatement, to their former status as employees, without regard to whether they would have been employed for that period had there been no discrimination. Respondent contends first that it was unconscionable to require it to contribute back pay up to the time of compliance with the board's order for the reason that the hearing before the board did not take place for four years after the strike, and the board's decision was not delivered until a year after the hearing. Secondly, it contends that, since the evidence shows a reduced employment in respondent's plant after the strike, due to the lack of work and the installation of labor saving devices, the board should have adopted the trial examiner's recommendation, which provided that all employees named in schedule "A" be reinstated or placed on a preferential list and that a lump sum should be computed consisting of all wages paid to each such employee prior to the strike, less his net earnings during the period. *Held*, order amended by substituting the examiner's recommendation with regard to computing back pay for employees listed in schedule "A" and enforcement of

[2] Principal case at 221, 222.

[3] Judge Soper dissented on the ground that in such a proceeding it was within the power of the court to look into the determination of the bargaining agent, and that the unit here had been designated on inadequate grounds.

[4] Principal case noted in 30 VA. L. REV. 344 (1944). See Boudin, "The Authority of the National War Labor Board Over Labor Disputes," supra 329 at 352 et seq.

amended order decreed. The back pay order was not invalid because of the long delay in proceedings before the board. Since the statute contains no time limit mandate for the rendering of a decision by the board, this court can grant no relief from the hardships caused by delay. But with respect to the board's order for the compution of back pay, it was "clearly punitive rather than compensatory, and beyond the power of the board to make since its functions are preventative and remedial only. It has no power to exact retribution." [1] Although the examiner's formula does not achieve mathematical precision in the restoration of lost compensation in that it fails to distinguish between men with greater and those with lesser seniority, in view of the fact situation, it fairly achieves equitable distribution. *National Labor Relations Board v. American Creosoting Co., Inc.*, (C.C.A. 6th, 1943) 139 F. (2d) 193.[2]

NEW TRIAL — APPEAL AND ERROR — EXISTENCE AND EXTENT OF INHERENT OR CONSTITUTIONAL POWER OF COURTS TO GRANT A NEW TRIAL OR ALLOW AN APPEAL — In a suit by appellee on an insurance contract, the judgment was adverse to appellant, his motion for a new trial was overruled, and leave was granted him to file a bill of exceptions. When it was discovered on the last day of the term that the court stenographer's notes had been lost, the judge, in order that further search might be made for the notes, vacated his order overruling appellant's motion for a new trial and instructed the clerk to make an entry to that effect. After the time for filing a bill of exceptions had gone by, appellant discovered that the entry had not been made by the clerk, and he thereupon requested the clerk to make the entry, which the clerk did. Appellee moved to have the entry expunged from the record and appellant, in response, petitioned to have the motion denied or, in the alternative, to be granted a new trial "under such circumstances that its right of appeal will be protected and safeguarded." The court granted appellee's motion and found against appellant on his petition. Appellant moved for a new trial on its petition and here assigns as error the overruling of that motion. *Held*, reversed with instructions to deny appellee's motion to expunge from the record the order setting aside the ruling on the motion for a new trial; and to grant appellant a reasonable time to file a bill of exceptions from the reporter's notes if available, or if not available, to submit one agreed upon by the parties, or if a suitable bill is not available by either method, to grant a new trial. In so holding the court said that it was clearly committed to the doctrine "that courts have jurisdiction to grant new trials beyond the statute and that the right to an appeal does not depend upon a statute." [1] For authority the court relied upon cases where courts had exercised general equity jurisdiction to grant new trials because of inability to perfect the record for appeal, and upon a provision in the Indiana Constitution that "All courts shall be open; and every man, for injury done to him in his

[1] Principal case at 196.

[2] On the question of delay in the proceedings, see 28 GEORGETOWN L. J. 1102 (1940). On question of computation of back pay, see 29 GEORGETOWN L. J. 580 (1941). On both questions, see 37 ILL. L. REV. 441 (1943).

[1] Principal case at 342.

person, property, or reputation, shall have remedy by due course of law." [2] *Indianapolis Life Ins. Co. v. Lundquist*, (Ind. 1944) 53 N.E. (2d) 338.[3]

RECEIVERS — ACTIVE DUTY OF RECEIVER APPOINTED TO COLLECT RENTS AND PROFITS TO GET BEST PRICE FOR PROPERTY AT FORECLOSURE SALE — EFFECT OF FEE-SPLITTING AGREEMENT BETWEEN ATTORNEY AND RECEIVER — One Simkins was appointed co-receiver by the federal district court, at the request of mortgagor's creditors, to operate and receive the rents and profits from eleven farms on which mortgages aggregating $192,000 were being foreclosed by The Prudential Insurance Company of America. Shortly before the foreclosure sale he learned that there was a buyer who was willing to purchase the farms as a unit and agreed with the prospective buyer's agent to assist in procuring the title after Prudential bought it at public sale, his compensation to depend upon his success in making the deal. Simkins told the court only that "there might be some parties" interested in the farms as a unit but was told that they could not be sold that way. Before the sale Simkins knew the terms of the offer and that the prospective buyer was Col. Proctor of Cincinnati, but he did not disclose to the court these facts nor the fact of his employment. Prudential bought the farms at the foreclosure sale for $163,900 and resold them two days later to Col. Proctor for $249,106, Simkins receiving $2,797 from Proctor's agent for his services. Petitioner, a corporation formed by mortgagor's creditors, contends that this conduct on Simkins' part constituted a breach of his duty as receiver and rendered him accountable for (a) the profit which he received from the agent, (b) the commission or profit received by the agent, and (c) the amount received by Prudential in excess of the decree indebtedness or, in the alternative, the amount by which the appraised value of the farms exceeded the decree indebtedness. In answer, respondents claim that Simkins was appointed only to collect rents and profits and that he had no fiduciary duty with respect to the foreclosure sale. Petitioner also contends that Simkins should be surcharged with all his receivership fees because of a fee-splitting agreement between himself and the attorneys representing Prudential and the co-receivers, by which the fees of the three were to be pooled and divided equally among them. The district court found against petitioner and the circuit court of appeals affirmed.[1] Certiorari was granted "to determine certain important questions concerning the proper administration of federal receiverships." [2] *Held*, reversed and remanded. Although Simkins' duty as co-receiver was limited to managing the property, he was nevertheless an arm of the court. The court's authority and duties extended to the conservation and liquidation of the farm properties and all the court officers were "bound to act fairly and openly

[2] Ind. Const., Art. 1, § 12.

[3] For collection of cases involving power of court of equity to grant a new trial because of inability to perfect the record see 13 A.L.R. 102 (1921), 16 A.L.R. 1158 (1922), 10 A.L.R. 603 (1921).

On denial of appeal for want of statutory authorization see 148 A.L.R. 1208 (1944).

[1] (C.C.A. 6th, 1943) 134 F. (2d) 925.

[2] Principal case at 1077.

with respect to every aspect of the proceedings before the court." [3] Since the course taken by Simkins was inconsistent with his position as officer of the court in that it tended to dampen the foreclosure sale, and resulted in profits to himself, he is accountable for those profits, consisting of the amount paid him by Col. Proctor's agent. He is not, however, accountable for the profit of the agent. Simkins should also be surcharged with the receiver's fees. Normally, whether parties to a fee-splitting contract should be allowed any fees is within the discretion of the court, but here, "the fact that Simkins entered into a fee-splitting contract so patently illegal, plus the fact that he engaged in other misconduct and indiscretions incompatible with his position as an officer of the court, compel the conclusion that all fees and compensation as co-receiver should have been denied him." [4] *Crites Inc. v. Prudential Insurance Co. of America*, (U.S. 1944) 64 S. Ct. 1075.[5]

TORTS—NEGLIGENCE—LIABILITY OF STOREKEEPER FOR INJURY TO CHILD WHO PUTS FINGER IN COFFEE GRINDER — In an action for damages incurred when three-year old Janice Crane stuck her finger into defendant's coffee grinder, the trial court found that the coffee grinder was particularly dangerous and attractive to a child of three, that such child was too young to appreciate the danger, which fact was known or should have been known to defendant, and that in the light of such circumstances defendant was negligent in placing the coffee grinder in the aisle of a "self serve" market and as a proximate result of such negligence, Janice Crane sustained the injury complained of. The court also found that defendant was negligent in not providing proper safeguards for the coffee grinder. Defendant contends, on appeal from judgment in plaintiff's favor, that Janice was a mere licensee or trespasser and defendant's duty was only to refrain from actively injuring her, or even if she was an invitee, defendant's negligence has not been established, or if established was not the proximate cause of the injury. *Held*, affirmed. A possessor of land, when he knows of a condition on his land which will expose business visitors to an unreasonable risk which they are not likely to discover, is under a duty to exercise reasonable care to warn them of the danger, or make the condition reasonably safe for their use. Since children have less ability to recognize and capacity to avoid danger than adults, the possessor of land owes them a higher degree of care than he owes to adults, and in determining that degree of care one of the circumstances to be taken into consideration is their "childish propensities to intermeddle." Janice was an invitee because she accompanied one who came on business, and she did not lose that status by putting her fingers into the coffee grinder, for the act should reasonably have been anticipated. The trial court's finding that the coffee mill was dangerous and attractive to children is supported by the evidence. The invitee was subjected to an unreasonable risk, for the defendant might have accomplished his purpose equally well by placing his mill behind the counter. The intervening act of Janice, putting her finger in

[3] Id. at 1079.

[4] Id. at 1081.

[5] On the rights, powers and duties of a receiver, see "Mortgage Receiverships in Iowa," 27 IOWA L. REV. 626 at 636 (1942).

the machine, does not relieve appellant of liability because it is an act which should have been anticipated; nor would he have been relieved by contributory negligence on the part of Mrs. Crane. *Crane v. Smith*, (Cal. 1944) 144 P. (2d) 356.

TRUSTS—LIABILITY FOR PARTICIPATION IN A BREACH OF TRUST—Plaintiffs, beneficiaries of the estate of Arwilda Mudge, brought this action against defendant stockbrokers for an accounting for the alleged conversion of certain stock certificates, representing stock of the Liberty National Bank, belonging to the estate. The certificates, with other securities, had been conveyed by Mrs. Mudge to her son Burton under a trust agreement of March 4, 1920, the trust to come to an end at the death of the settlor and the trust property to be conveyed at that time to settlor's executor to be distributed as part of her estate. Subsequently, this agreement was superseded by a second one substantially the same. The Liberty National Bank having merged, in the meantime with the New York Trust Company, the latter sent a certificate in the name of Burton Mudge, trustee under the March 4 agreement, for sixty-eight shares of stock in the New York Trust Company. After settlor's death, the trustee indorsed the certificate to himself individually and delivered it to defendants with the request that they guarantee the signature and send it to the New York Trust Company, which defendants did. At the request of the trust company, a copy of the trust agreement was then sent to defendant, accompanied by a letter stating that the transfer was desired in order to simplify the handling of the securities. The new certificates were issued and delivered to the trustee except for twenty-seven shares which defendants sold at the trustee's request and deposited the proceeds therefrom to the account of Mudge, trustee. The unsold certificates were pledged by the trustee to secure the indebtedness of a corporation which he controlled. The ground on which plaintiffs seek recovery is that when defendants assisted the trustee in having the certificate transferred to himself by guaranteeing the signature of the certificate, and forwarding it to New York for transfer, with notice that the stock had been issued in the name of the trustee, they participated in the transfer, conversion, and breach of trust and became just as liable as the person who made the transfer and as the trustee who converted the money. For authority, they rely on the bank cases where trust funds were deposited and credited to the individual account of the trustee and used by him for his own purposes under such circumstances that the bank, with full knowledge of the breach of trust, facilitated the conversion of trust funds, and thereby became a participator in the conversion. The lower court dismissed the petition. *Held*, affirmed. This case does not fall within the rule of the bank cases in that here there is nothing comparable to knowledge of or notice to the bank that the trustee intends to misapply the funds. Further, the acts of defendant were not, as plaintiff claims, instrumental in bringing about loss to the plaintiffs. Defendants guaranteed only the genuineness of the signature, not that the agreement was still in force. *Mudge v. Mitchell Hutchins & Co.*, (Ill. 1944) 54 N. E. (2d) 708.[1]

[1] For liability of banks for participation in breaches of trust see 42 MICH. L. REV. 694 (1944); 89 UNIV. PA. L. REV. 254 (1940); 148 A.L.R. 926 at 936 (1944), 145 A.L.R. 445 (1943).

TRUSTS—POWER OF COURT OF EQUITY TO SELL LAND AND SET UP A TRUST OF PROCEEDS WHERE FUTURE INTERESTS INVOLVED—By the terms of the will of her husband, defendant Josephine Beliveau took a life estate in all his property, coupled with the right of sale and disposition and the right to use the proceeds of any sale for her comfort and support, with remainder over to his brothers and sisters, plaintiffs here. The will contained the provision that in case the profits, rents, and income from his property should be "sufficient to properly care for, support and maintain my said wife, then I prefer that my real estate be kept intact." The husband's estate, on his death, consisted of 320 acres of farm land, eighty acres of which constituted decedent's homestead, and certain cash and personalty. The land other than the homestead was mortgaged by decedent's executor under authority of the probate court. Defendant has permitted the buildings and fences to fall into disrepair, has failed to keep the buildings insured, and has permitted quack grass, thistle, and other weeds to infest and depreciate the farm. The farm other than the homestead was sold under execution and defendant has made no attempt to redeem; nor has she taken any steps to redeem from a foreclosure sale for her default in failing to pay interest on the mortgage debt and taxes. In an action by the remaindermen the court below, on these facts, appointed a trustee to preserve the property for the life tenant and remaindermen in accordance with the express wish of the testator, and empowered him to sell the property at the earliest possible date, to mortgage it pending the sale to raise funds to redeem from the execution and mortgage, to rent the property and collect the rents pending the sale, to deposit the proceeds of the sale and disburse them according to the order of the court, holding that part remaining after payment of taxes, mortgage debt, judgment debt, and fees for the support of Josephine Beliveau during her lifetime, and paying, at her death, any remaining portion to plaintiffs. Under this order, the land including the homestead was mortgaged and disbursement made according to the order of the court. She appeals from the part of the order under which the homestead was sold, and the proceeds held and administered by a trustee, on the ground that under her power to sell and encroach upon the corpus, she has an absolute right of disposition of the land or proceeds of sale, and as an incident thereto the entire management of the estate, including discretion to decide if there should be a sale in whole or in part of the lands and to what extent she should use the proceeds. *Held*, affirmed. Under the Minnesota statute,[1] in a case where, as here, there is no trust but plaintiff is given a life estate coupled with a power to sell and use so much of the proceeds as may be necessary for her support, as between tenant and remaindermen, the tenant has a conventional life estate coupled with a power of disposition with a remainder over. She has the power of disposition for ordinary comfort and support but by implication she is quasi trustee for the remainderman in the sense that she cannot injure or dispose of the property to the injury of the remainderman. "Where, because of an exigency endangering the rights of the owners of property given in present and future interests, it is necessary to preserve the property and to protect such interests, courts have inherent equitable jurisdiction to order a judicial sale of the entire fee, and to appoint a trustee to conduct the sale and to reinvest the proceeds of the sale for the benefit of the holders of the respective interests in the

property sold . . . . Neither the absence of an express trust in the instrument creating the present and future interests nor of statutory authorization for the judicial creation of a trust in such cases is any obstacle to such relief." [2] *Beliveau v. Beliveau*, (Minn. 1944) 14 N. W. (2d) 360.

WILLS—WHETHER INSTRUMENT DESIGNATED AS "AFFIRMATION OF GIFT" MAY BE PROBATED AS A WILL—In an instrument entitled "Affirmation of Gift" testator, a childless widow, purported to give all her property to her four brothers; one to receive five dollars, "in addition to gifts already made to him in the past" and the other three to have equal shares in the remainder. There were two witnesses to testator's signature and, though the instrument was nowhere called a will and did not contain a testamentary clause, it was admitted to probate by the trial court. Contestants claim that the instrument is not testamentary in character and was not legally executed because the decedent is not shown to have known its contents or to have asked attesting witnesses to act as witnesses to a will. They seek to have established, rather, another will of the testator made at a prior date and providing for the division of the property equally among the brothers who should survive her. *Held*, affirmed. Since the facts are agreed upon, the question before the court is whether as a matter of law the trial court's conclusion is justified. The court determines whether or not a document is testamentary in character by looking to the language and to circumstances, if necessary. Here, although the language does not establish it, the circumstances do. It could not have been a gift or conveyance for want of delivery. It was properly witnessed and remained in the possession of the testatrix; it disposed of all her property and amended the terms of her former will by cutting down the share of a brother who had, in the meantime, received his.

As to the formalities, testator, having formally executed, cannot be assumed to have been ignorant of the terms of the instrument. It wasn't necessary that witnesses knew that it was a will they were attesting. *In re Mathew's Estate*, (Iowa 1943) 12 N.W. (2d) 162.

[1] Minn. Stat. (1941) § 502.09.
[2] Principal case at 365.