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ABSTRACTS

Katharine Loomis
National Labor Relations Board

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ABSTRACTS

Katharine Loomis *

ADMINISTRATIVE LAW—RAILWAY LABOR ACT—REFUSAL OF BARGAINING REPRESENTATIVE TO REPRESENT MINORITY GROUPS—Petitioner, a negro,

* Attorney, National Labor Relations Board. Formerly Managing Editor, MICHIGAN LAW REVIEW, 1943-1945.

is a locomotive fireman employed by respondent railroad. The respondent Brotherhood of Locomotive Firemen and Engineers is the exclusive bargaining representative, under section 2, Fourth of the Railway Labor Act,[1] for all members of the craft employed by the railroad. Negroes, who are a substantial minority of those employed as firemen, are excluded from membership in the brotherhood. The brotherhood, purporting to act as the representative of all the members of the craft, entered into agreements with the railroad whereby negro firemen were not to be promoted to engineers, only "promotable," i.e., white men were to be employed as firemen or assigned to new runs or vacancies in established runs and negroes were to lose seniority rights. The negroes were given no notice or opportunity to be heard in regard to the making of these agreements. Petitioner was a member of a "pool" of one white and five negro firemen. Following a reduction in the mileage covered by the pool, all jobs in the pool were declared vacant, the negro firemen were replaced by white men and petitioner was assigned to harder and less remunerative work. He sued in the Alabama Circuit Court alleging in his bill of complaint substantially the facts as described and asked for injunctive relief and damages. A demurrer to the complaint was sustained by that court and affirmed by the Supreme Court of Alabama. On writ of certiorari, *held*, reversed. If the Railway Labor Act confers on the bargaining representative plenary power to make agreements without regard to the rights of a minority in the craft, then a constitutional question arises. The authority of the bargaining representative to act for the minority is given, not by the consent of the minority, who in this case, are not even eligible for membership in the brotherhood, but by the act itself. The majority of the craft chooses the bargaining representative, but when chosen, it represents all the members of the craft and not just the majority.[2] The act does not give the bargaining representative plenary power but imposes on it "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts without hostile discrimination against them." [3] A representative may make contracts which affect some members of the craft unfavorably but such discriminations must be based on relevant differences among the members such as differences in the type of work performed, competence or seniority of service. "Here the discriminations based on race alone are obviously irrelevant and invidious." [4] Since there is no adequate

[1] 48 Stat. L. 1185 at 1187 (1934), 45 U.S.C. (1940) § 152.

[2] Section 2, Fourth provides: ". . . The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. . . ."

Sections 2, Sixth and Seventh refer to the representative's bargaining for the working conditions of the employees "as a class."

Section 1, Sixth defines representative as "any person or . . . labor union . . . designated either by a carrier or a group of carriers or by its or their employees to act for it or them."

[3] Principal case at 332.

[4] Id. at 332.

administrative remedy[5] available to petitioner, the case is reviewable here.[6] *Steele v. Louisville & Nashville Ry. Co.*, (U. S. 1944) 65 S. Ct. 226.[7]

ATTORNEY AND CLIENT—FINDING OF MISCONDUCT IN CIVIL ACTION AS BASIS FOR DISBARMENT OF ATTORNEY—The right of respondent, a licensed attorney, to continue the practice of law is brought into question in a disciplinary action instituted by a complaint of the relator, the state bar association, charging that the respondent misrepresented the value of an estate for which he was an attorney; that, while representing the estate and the heirs, he failed to disclose to the latter that he was also representing one Manning for whom he obtained, at a price much below its actual value, the interest of most of the heirs in the estate. The charges against respondent in this complaint are the same as were made in eleven actions in a county court of this state in which transfers of the interests of the heirs were set aside as fraudulent. On appeal to this court, the decrees of the lower court in those actions were affirmed. A hearing on the present complaint was heard by a referee. To the report of the referee recommending disciplinary action short of disbarment, both relator and respondent have filed exceptions. *Held*, judgment of disbarment. The relator contends that the findings and judgment of this court in the actions setting aside the transfers to Manning, the records of which are in evidence in this proceeding, are conclusive on the conduct of respondent. "Conviction of a criminal offense involving moral turpitude is conclusive in a later disciplinary action."[1] It is doubtful whether this rule should be applied with regard to civil actions since findings in a civil action need only be supported by a preponderance of the evidence whereas in a criminal action they must be sustained by evidence beyond a reasonable doubt. In disbarment proceedings the findings should be sustained by a higher degree of proof than in civil actions, but falling short of the degree of proof required for a criminal conviction. The culpability of the person charged "must be established by at least a clear preponderance of the evidence."[2] *State ex. rel. Nebraska State Bar Assn. v. Gudmundsen*, (Neb. 1944) 16 N. W. (2d) 473.[3]

[5] Section 3, First (i) provides for an adjustment board for disputes between employees and employer but not between employees and their representative. Section 3, First (c) and § 3, Second provide for the selection of members of such an adjustment board or regional adjustment board by the national organization chosen by a majority of the crafts which here would be the same organization which has discriminated against petitioner. 45 U.S.C. (1940) § 153, 1 (c. i.) and 2.

[6] Under § 237 (b) of the Judicial Code.

[7] Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, (U. S. 1944) 65 S. Ct. 235, was decided on substantially the same facts as the principal case. The Court there took up the added question of federal jurisdiction and stated that the right of petitioner was derived from the Railway Labor Act and that the case was "therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction by 28 U.S.C. (1940) § 41 (8), Judicial Code § 24 (8)."

[1] Principal case at 474, citing State ex rel. Wright v. Sowards, 134 Neb. 159, 278 N. W. 148 (1938).

[2] Principal case at 475 citing, State ex rel. Nebraska Bar Assn. v. Price, (Neb. 1944), 13 N. W. (2d) 714 at 715 (1944).

[3] See "Degree or Quantum of Proof Necessary to Justify Disbarment or Suspension of Attorney," 105 A.L.R. 984 (1936).

BILLS AND NOTES—WORDS OF ASSIGNMENT AS AMOUNTING TO AN INDORSEMENT—An agent for a company that sells refrigerated display cases attempted to make a sale of such a case at the store of defendant's wife. Defendant, who was keeping the store, explained that he could not consumate the transaction, but, at the agent's request, he signed a note on the understanding that the agent would go to defendant's house and there obtain the signature of the wife. At the house he obtained, instead of the signature of the wife, that of their sixteen-year old daughter. Defendant, on learning what had happened, wired the company to cancel the transaction. He heard nothing further about the note until he was notified that judgment had been taken against him by the payee, a Columbus bank. Later the note was transferred to plaintiff by the words: "All right . . . of the undersigned . . . is hereby assigned . . . to the Federal Housing Administrator," followed by the signature of the payee. Plaintiff sues, claiming to be a holder in due course against whom the defenses of fraud and failure of consideration cannot be set up. *Held*, complaint dismissed. The plaintiff cannot be a holder in due course in its own right, first, because it took the note when it was overdue [1] and, second, because it took, not by endorsement but by assignment. "It is the law of Ohio that a transfer by assignment is different from a contract of endorsement." [2] "A writing on the back of a series of promissory notes, which purports to be an indorsement, but reads, 'for valuable consideration we assign the notes and the mortgage securing the same,' is a mere assignment." [3] and where the maker has a defense against the payee, he cannot set up the same defense against the assignee. Plaintiff has no more right to enforce the note than the bank, the original payee. Since the original payee cannot be holder in due course,[4] plaintiff cannot be a holder in due course on the theory that he derived title from such a holder. *United States v. Hill*, (*D. C. Ohio* 1944) 57 F. Supp. 934.

CONTRACTS—FRUSTRATION OF ADVENTURE AS DEFENSE TO ACTION ON A LEASE—Plaintiff leased to defendant, for a five-year term beginning September 15, 1941, certain premises which were to be used for the sale of new automobiles, their servicing and repair and the sale of gasoline. Defendant agreed not to sublease without plaintiff's written consent. On January 1, 1942 the government ordered discontinuance of the sale of new cars, this order being modified on January 8 to provide for sales to certain persons having preferential ratings. Although plaintiff waived these restrictions in the lease, granting defendant the right to use the premises for any legitimate purpose and to sublease to any responsible party and even offered to reduce the rent, the defendant repudiated the lease and vacated the premises on March 15. Plaintiff sued in the lower court

[1] Ohio Gen. Code (Page, 1938) § 8157.

[2] 29 OHIO JURIS., § 185, p. 958. In this connection the article by Dean Arant in 34 YALE L. J. 144 (1924) will be found helpful and illuminating. An assignment of "right, title and interest" has been found to lead to results not effected by an assignment "of the within note." See Aniba v. Yeomans 39 Mich. 171 (1878), and Markey v. Corey, 108 Mich. 184, 66 N.W. 443 (1895).

[3] Carius v. Ohio Contract Purchase Co., 30 Ohio App. 57, 164 N.E. 234 (1928), quoting from syllabus.

[4] This question had not previously been settled in Ohio.

for a declaration of his rights under the lease and for unpaid rent. Judgment was given for plaintiff and defendant appeals, contending that the purpose for which the premises were leased was frustrated, thereby terminating his duties under the lease. *Held*, affirmed. The doctrine of frustration has been applied to leases but "even more clearly with respect to leases than in regard to ordinary contracts the applicability of the doctrine of frustration depends on the total or nearly total destruction of the purpose for which, in the contemplation of both parties, the transaction was entered into." [1] A promisor seeking to excuse performance must prove that "the risk of the frustrating event was not reasonably foreseeable and that the value of counterperformance is totally or nearly totally destroyed." [2] That performance is made more difficult or less profitable is no excuse. At the time this lease was entered into the National Defense Act [3] had been law for more than a year and the automobile industry was in the process of conversion to meet the needs of the army. Defendant could reasonably have foreseen the risk of war and that the production and sale of automobiles might be restricted. Government restrictions have not destroyed the value of the lease. New automobiles and gasoline are still sold and, furthermore, the restrictions having been waived by the plaintiff, the defendant could have subleased or used the premises for other purposes himself. That the lease is valuable is shown by the fact that plaintiff was able to rent the premises soon after defendant vacated them. *Lloyd v. Murphy*, (Cal. 1944) 153 P. (2d) 47.[4]

CORPORATIONS—WHETHER SHAREHOLDER CAN VOTE ON FRACTIONAL SHARES OF STOCK—At the annual meeting of the Clawson Chemical Company five directors were to be elected. The shareholders voted their shares cumulatively and two of the shareholders who owned fractional shares were permitted to use them as a basis for cumulative voting. This proceeding in quo warranto was brought to oust those directors, the respondents here, who were elected by the voting of the fractional shares. The relator is also a director and shareholder in the company. The respondents filed a motion in the lower court to quash the writ and, from an order so decreeing, the relator appeals. *Held*, reversed and relator's demand for ouster sustained. At common law each shareholder had only one vote no matter how many shares of stock he owned and any change from this manner of voting must be prescribed by the state. Pennsylvania law provides that each shareholder may have "one vote for every share standing in his name on the

[1] Principal case at 50.

[2] Ibid.

[3] 54 Stat. L. 676 (1940), 50 U.S.C. (1944) App. § 1152(a).

[4] See Mitchell v. Ceazan Tires, Ltd., (Cal. 1944) 153 P. (2d) 53 where the same court reached a similar conclusion on substantially the same facts. The lease was less restricted as it provided for the conduct of an automobile tire business "and other related businesses such as automobile supplies." For prior opinions reaching contrary conclusions in the principal case and the Mitchell case, see (Cal. App. 1943) 142 P. (2d) 939 and (Cal. App. 1944) 146 P. (2d) 49.

See also Donald E. Frey, "Contract Defaults and Cancellations in Wartime," 38 ILL. L. REV. 167 at 170 et seq. (1943); Werner L. Schroeder, "The Impact of the War on Private Contracts," 42 MICH. L. REV. 603 (1944); 43 MICH. L. REV. 598 (1944).

books of the corporation."[1] Cumulative voting is also permitted.[2] Another Pennsylvania statute authorizes in one section the issuance of a certificate for a fractional share and, in another section, issuance of scrip or evidence of ownership which "unless otherwise provided" shall not entitle the holder to any voting rights.[3] The contention of respondents is that the legislature, by authorizing a fractional share, indicates an intent that such share shall have a fractional vote which interpretation is strengthened by the limitation of the voting rights of scrip. Another interpretation is that the legislature believed that voting based on ownership of fractional shares was already interdicted by law and it wished to make it clear that voting based on scrip was likewise interdicted. The meaning of a statute must be determined primarily from the language of the statute itself. When the legislature authorized the issuance of fractional shares, it did not authorize voting based on such shares. "It *could* have done so, and it may even have *intended* to do so, but the fact is *it did not* do so."[4] The respondents' interpretation of the statute involves a grant of power by implicatoin in a statute and such power is never granted unless it is necessary for the exercise of a power expressly granted. "The power in a stockholder to *vote* fractional shares of stock is not required for the exercise of the corporation's power to *issue* such shares of stock."[5] The contention that a stockholder's voting rights should be coextensive with his pecuniary interest is an argument that might better be addressed to the legislature than to a court. *Commonwealth ex rel. Cartwright v. Cartwright*, (Pa. 1944) 40 A. (2d) 30.

DAMAGES—MEASURE OF DAMAGE FOR BREACH OF CONTRACT WHERE COST OF PERFORMANCE EXCEEDS VALUE OF RESULTS WHICH WOULD HAVE BEEN ATTAINED BY PERFORMANCE—Plaintiff agreed in writing with defendant that the latter could enter on his six acre tract of land and remove sand, paying the plaintiff $25 per acre for the acres used in the performance of the contract. Payment of $150 was made at the signing of the contract. The contract further stipulated that defendants would strip one foot of top soil from the land used before removing the sand and would level off the land and replace this soil after removal. Defendant removed sand from three and a half acres but did not level off the land or replace the top soil and plaintiff sued in the lower court for $10,400, the reasonable cost of such levelling and replacing of soil. The value of the land is only $25 per acre and that court entered judgment in the amount of $87.50, the value of the three and a half acres, holding that damages in an amount greater than the total value of the land would be excessive and unreasonable. On appeal, *held*, affirmed. The measure of damages is fixed by the Civil Code which provides that damages by breach of contract shall be "the amount which will compensate the party aggrieved for all the detriment proximately caused thereby," that "no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full per-

[1] Pa. Stat. Ann. (Purdon, 1938) tit. 15, §§ 2852-504.

[2] Pa. Const., art. xvi, § 4 and Pa. Stat. Ann. (Purdon, 1938) tit. 15, §§ 2852-505.

[3] Pa. Stat. Ann. (Purdon, 1938) tit. 15, §§ 2852-608.

[4] Principal case at 33.

[5] Id. at 34.

formance thereof," and that "where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." [1] Plaintiff's land if restored to its original condition would have no greater value than the amount awarded as damages. It is a settled rule that, if a person has been injured by breach of contract "the law will not put him in a better position than he would be in had the wrong not been done or the contract not broken." [2] Plaintiff's argument that the defendant's levelling of the land and replacing of top soil was part of the price they were willing to pay for the sand assumes that the value of the sand to defendants should be the measure of damages. This contention is not valid as it is the detriment suffered by plaintiff, not the value to defendant, that is the proper measure. The plaintiff still has the land, the market value of which has not been depreciated, and if he were allowed the $10,400, he undoubtedly would not spend it to level off land the value of which would not be enhanced thereby. *Avery v. Fredericksen and Westbrook,* (Cal. App. 1944) 154 P. (2d) 41.[3]

FEDERAL COURTS—REVIEW OF ORDERS DENYING MOTION FOR NEW TRIAL—Plaintiff sued the United States in a federal district court on a policy of war risk insurance. Plaintiff is the guardian of the insured who has been adjudged incompetent. The plaintiff introduced evidence showing that his ward had become insane prior to the lapse of his policy. This evidence was disputed by the Government. Plaintiff made no motion for a directed verdict, but when the jury returned a verdict for the United States, he moved for a judgment n. o. v. and a new trial on the grounds that the verdict was contrary to the law and the evidence and that a new trial was required in the interests of justice. Plaintiff appeals contending that the court's denial of his motion for a new trial was an abuse of discretion. *Held,* affirmed. It is the duty of the trial judge to grant a new trial if he is of the opinion that the verdict is against the clear weight of the evidence or will result in a miscarriage of justice. But "the granting or refusing of a new trial is a matter resting in the sound discretion of the trial judge, and . . . his action thereon is not reviewable upon appeal, save in the most exceptional circumstances." [1] Here both parties introduced evidence which was in conflict and the jury might have found for either party. *Daffinrud v. United States,* (C.C.A. 7th, 1944) 145 F. (2d) 724.[2]

HUSBAND AND WIFE—WIFE'S LIABILITY IN TORT TO HER HUSBAND AS AFFECTING INSURANCE COMPANY'S LIABILITY—Plaintiff, the husband of the insured, sued defendant insurance company in the trial court to recover for

[1] Cal. Civ. Code (Deering, 1941) §§ 3300, 3358, 3359.

[2] Principal case at 43.

[3] On measure of damages for breach of building contract or other contract to change condition of real property see 123 A.L.R. 515 (1939).

[1] Principal case at 724. The court states that it is in complete accord with the conclusions reached by Judge Parker in Aetna Casualty & Surety Co., v. Yeatts, (C.C.A. 4th. 19) 122 F. (2d) 350.

[2] 25 J. AM. JUD. SOC. 109 (1941).

personal injuries caused by the negligent operation of an automobile by the insured. On appeal from a judgment for defendant, *held*, affirmed. At common law husband and wife cannot enter into contracts with each other nor are they liable for torts committed by one against the other so that whether plaintiff could have sued insured depends on statute. The Wisconsin statute provides that a married woman may be sued in respect to her separate property or business and that "any married woman may bring and maintain an action in her own name for any injury to person or character the same as if she were sole."[1] This does not give the husband the same right. If the legislature had meant to grant him such a right, it would have clearly expressed its intent to do so. Nor can plaintiff recover from defendant insurer on the theory that a cause of action exists against his wife which he is unable to enforce because of his disability to sue at law. The contract of plaintiff's wife and defendant is one of indemnity only, providing that the insurer shall "pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law."[2] Since plaintiff could have maintained no action against his wife there is no liability on her part and therefore none on the part of the defendant. *Fehr v. General Accident Fire and Life Assurance Corp.*, (Wis. 1944) 16 N. W. (2d) 787.[3]

LABOR LAW—MAY PETITION FOR REVIEW BY PETITIONER WHO HAS BEEN REFUSED CONTINUANCE BE TREATED AS INCLUDING APPLICATION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE UNDER N. L. R. A.?—Petitioner, who had been charged with unfair labor practices under the National Labor Relations Act,[1] sought a continuance at a hearing set for February 17. The motion, together with supporting affidavits, set forth that petitioner's attorney, who was familiar with the matter pending before respondent board, was absent from the city because of ill health but would be back and prepared for the hearing by the middle of March. The trial examiner of the board denied the motion and recommended an order that petitioner cease its unfair labor practices. When petitioner filed exceptions with the board to the report of the trial examiner and asked that the case be reopened for the taking of additional testimony, the board found that the ruling of the trial examiner on petitioner's motion did not constitute an abuse of discretion, denied petitioner's motion to reopen the case and entered the order recommended by the examiner. This petition is for a review of that order. *Held*, the board is directed to afford petitioner an opportunity to adduce additional evidence relevant to the issues raised by the complaint. Whether a case should be heard at the time it is noticed for hearing or whether a continuance should be granted is peculiarly a question for the tribunal before which the case is pending. Although there is nothing to indicate that the short

[1] Wis. Stat. (1943) § 246.07.

[2] Principal case at 789.

[3] On Automobile insurance—"Omnibus Clause" see 72 A.L.R. 1375 at 1383 (1931). On right of one spouse to maintain action against other see 29 A.L.R. 1482 (1924); 33 A.L.R. 1406 (1924); 44 A.L.R. 794 (1926); 48 A.L.R. 393 (1927); 89 A.L.R. 118 (1934).

[1] 29 U.S.C. (1940) § 150 et seq.

postponement asked for would have prejudiced any of the parties, it is doubtful whether the denial of the motion of petitioner amounted to a denial of due process. However, the National Labor Relations Act affords the petitioner a remedy by its provision that either party may apply to the court "for leave to adduce additional evidence" and, if it can be shown that such evidence is material and that there were reasonable grounds for failure to adduce it at the hearing, the court may order that such evidence be taken before the board and that the board may modify its findings and orders to comply with it.[2] This court is justified in treating the petition for review as including an application for leave to adduce additional evidence. *Mississippi Valley Structural Steel Co. v. National Labor Relations Board*, (C.C.A. 8th, 1944) 145 F. (2d) 664.

NEGLIGENCE—PAYMENT OF COMPENSATION FOR INJURY AS PRIMA FACIE EVIDENCE OF NEGLIGENCE—Plaintiff was a conductor for the New York Central Railroad on a train which was being operated over defendant's tracks when it collided with a train of defendant. At the time of the accident both trains were travelling on a permissive block where the movement of more than one train in the same direction is allowed, it being the duty of the engineer of any train entering the block to keep his train in such control that he can stop within his range of vision. The engineer of the New York Central train gave the proper signals to indicate that his train was going upon a siding, but the defendant's train did not stop. The engineer of the defendant's train testified that he saw the signals and attempted to stop but was unable to. Plaintiff, who suffered serious injuries, released the New York Central from any liability for a consideration of $4500. In the lower court the jury found that the defendant was solely responsible for the accident and gave judgment for the plaintiff, but that court later entered judgment n. o. v. and plaintiff appeals. *Held*, reversed. The sole ground for the entry of the judgment n. o. v. was the giving of the release. If the two railroads had been joint tort-feasors, then the release of one would have released the other as there can be but one satisfaction for the same injury. Here the testimony is clear that the New York Central was in no way responsible for the injury and, since there was no community of fault, there was no joint tort and the release of one not shown to be liable does not release a proven tort-feasor. *Dissent*. Here the issue of the negligence of the New York Central was eliminated by the release and formed no part of the case. The statement that that railroad was in no way responsible for the accident is unwarranted. "To the contrary, the release in question established a prima facie case of joint negligence and the burden was upon plaintiff to show, if he could, that the party released did not contribute to the accident."[1] The plaintiff was not required to sustain this burden. Had he undertaken to do so, he would have had to show that he had collected $4500 from a party involved in the accident in satisfaction for injuries sustained and then to deny that there was any justification for such payment. *Koller v. Pennsylvania Ry. Co.*, (Pa. 1944) 40 A. (2d) 89.

[2] Id. at § 160 (e).

[1] Principal case at 91.

PARTIES—INTERPRETATION OF STATUTE AUTHORIZING INTERVENTION—In a suit in which an employer sought indemnity on an employee's fidelity bond against defendant company for losses allegedly caused by misappropriation of plaintiff's funds by said employee, a bookkeeper for plaintiff, the employee sought to intervene. He alleged that he agreed to indemnify the defendant for any losses it might incur under the bond; that, in accordance with this indemnity agreement, when he was notified of the claim made under the bond, he demanded of defendant that no settlement be made under the bond without litigation and deposited collateral security with defendant satisfactory to it; that he is financially responsible and would be directly liable to defendant if judgment were recovered against defendant. The right of intervention, if any, is given by statute to any person "who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both." The statute further states that intervention takes place when a third person is permitted to become a party in one of several ways, one of which is "by uniting with the defendant in resisting the claims of the plaintiff." [1] The lower court dismissed the petition and petitioner appeals to this court. *Held*, reversed. Prior to the adoption of the statute petitioner would have had no right to intervene so his right depends on the interpretation of the statute. The "interest" of the petitioner lies in a denial of the breach by defendant of the contractual right of the plaintiff. If he can show that he did not misappropriate plaintiff's funds then plaintiff cannot recover on the bond and petitioner will be relieved both of his liability to defendant under the indemnity agreement and of his direct liability to the plaintiff. This gives him such an interest in the success of the defendant that he should have the right to join with it in resisting the claims of the plaintiff. In construing a statute similar to this one the Minnesota court, where the principal debtor sought to intervene in a suit against a guarantor, said, "Indeed, we can hardly conceive a case more within the spirit and intent of the statute than one in which the intervenor stands in relation of indemnitor to one of the parties." [2] *Franklin v. Dorsey-Jackson Chevrolet Co.*, (Ala. 1944) 20 S. (2d) 220.

PRACTICE AND PROCEDURE—VENUE OF PROSECUTION UNDER FEDERAL DENTURE ACT—The Federal Denture Act of 1942 [1] provides that it shall be unlawful in the conduct of a business of supplying dentures from casts or impressions sent through the mails "to use the mails for the purpose of sending or bringing into" a state any denture the cast of which was taken by a person not licensed to practice dentistry in the state into which the denture is sent. The government filed an information in the federal district court of Delaware against defendants who had deposited such dentures in the mails in Chicago for delivery in Delaware. That court quashed the information and the government appeals. *Held*, affirmed. In construing the Federal Denture Act consideration should be given to constitutional policy as expressed in Article II, section 2 of the Constitution which provides that the trial of crimes shall be held in the state where the crimes

[1] Ala. Code (1940) tit. 7, § 247.

[2] Principal case at 223, citing Becker v. Northway, 44 Minn. 61 at 64, 46 N. W. 210 (1890).

[1] 56 Stat. L. 1087, 18 U.S.C. (Supp. 1943) § 420 (f) (g) (h).

shall have been committed and the Sixth Amendment which requires trial by an impartial jury of the state and district wherein the crime shall have been committed. However, by utilizing the doctrine of continuing offense Congress may provide that the locality of the crime shall extend over the whole area through which the process of wrong-doing moves so that here the crime could be triable in any federal district through which the offending denture was transported if such is the congressional intent. In the Elkins Act,[2] making the transportation of goods at illegal freight rates a federal offense, Congress provided for prosecution in any district "through which the transportation may have been conducted." The absence of such a provision in the statute under discussion is significant. This significance is enhanced by the fact that the desirability of such a provision was discussed, at the suggestion of the Postmaster General, before the act was passed.[3] In the Elkins Act the offense was defined as the "transportation" of the offending goods, which is obviously a continuing process; in the act under consideration the use of the mails was proscribed for "the purpose of sending or bringing into any State" unlawful dentures. A reasonable construction of the statute, taking into consideration the constitutional policy showing concern for the hardship to which trial in an environment alien to the accused places him, is that the crime of a sender is committed in the state in which he uses the mails; that the crime of an unlicensed dentist who orders dentures is committed in the state into which he brings the dentures. *Dissent.* The statute condemns the "use" of the mails for the purpose of sending or bringing into a state a prohibited denture. The majority of the Court have given the term "use" too narrow a construction. The language of the statute leads to the conclusion that the use occurs at whatever place the prohibited denture is handled. The constitutional provisions merely assure a trial in the place where the crime is committed and are not concerned with the domicile of the criminal nor his familiarity with the environment of the place of trial. *United States v. Margaret M. Johnson and Mary E. Layton, Doing Business as United States Dental Co.*, (U. S. 1944) 65 S. Ct. 249.

TRUSTS—EFFECT OF AGREEMENT BY BENEFICIARY OF SPENDTHRIFT TRUST WITH TRUSTEE AS TO FUTURE USE OF INCOME—By the will of George A. Heyl a trust was set up for the benefit of his two daughters, Kate Heyl Peace and Mathilde Heyl Jackson, who were to share equally in the net income of his residuary estate. The will provided that payments be made directly to the beneficiaries who were to be "without the power of anticipation or assignment" [1] of such payments. In addition, the payments were not to be subject to the claims of creditors and were to become the property of the beneficiaries only when actually received by them. Kate persuaded the trustee to build a house for her at the cost of the corpus of the trust, which amount was carried on the books of the trustee as an investment in real estate. She agreed with the trustee in writing that six per cent interest on the amount paid for the property, together with all taxes, insurance

[2] 32 Stat. L. 847, as amended, 49 U.S.C. (1940) § 41 (1).

[3] H. Hearings on H. R. 5674, 77th Cong., 2d sess., p. 3 (1942). (Committee on Interstate and Foreign Commerce).

[1] Principal case at 150.

and repairs, should be charged against her share of the income. This agreement was carried out for twelve years at the end of which time she vacated the premises, revoked the agreement and demanded an equal share of the income. The issue was raised in the lower court by her petition asking, in effect, for a declaratory judgment as to her status in relation to the trust and the validity of the charges against her share of the income for interest, taxes and insurance accruing after her revocation of the agreement. From a decree charging the estate with the total cost of maintenance of the property and directing an equal devision of the income, Mathilde appeals. *Held*, affirmed. Mathilde, at the time the property was purchased, might have questioned the propriety of the investment. However, she never objected to it and accepted her share of the income from it as paid into the estate by her sister. Kate was within her rights in terminating the agreement, as this was clearly a spendthrift trust. "Her agreement in effect was a present assignment of future income and as such was enforceable as to each installment of income as it accrued, but only so long as her direction as to the application of income remained unrescinded." [2] Although Kate may not question the investment made at her request, she cannot be estopped from repudiating her agreement as this would bring about a result contrary to the expressed intention of the testator. *In re Heyl's Estate*, (Pa. Super. 1944) 40 A. (2d) 149.[3]

TRUSTS—PROVISION IN TRUST AGREEMENT AS TO WILLS TO BE MADE BY BENEFICIARIES—DID IT CREATE POWER OF APPOINTMENT OR CONDITION SUBSEQUENT?—Thomas and his four children signed a trust agreement whereby Thomas transferred to his children as trustees certain property, the agreement including a provision that the children were to "make wills" by which, after providing for their respective husbands or wives by a life interest under the trust, the balance of the property was to be given their children or, if they had none, then to the brothers and sisters of the testator or testatrix; with the further provision that, if at the time of his death any child had not made such a will, his share was to vest in his children or the descedents of deceased children or, if there were none, then in Thomas' surviving children or the descendants of any who had died. Plaintiffs, who are the three surviving children of Thomas, brought suit in the trial court as trustees for a declaratory judgment determining their rights and the rights of defendants, who are the plaintiffs as individuals and the widow of a deceased brother, James, who had made a will leaving all his property to his widow. The trial court found that she had no right to share in the property included in the agreement and she appeals from this judgment. *Held*, no error. The trust was a valid one. James did not comply with the stipulation in the agreement that the children make wills containing certain provisions so, by the terms of the agreement, the property should go to the surviving children or the descendants of those who may have died. These provisions are not made nugatory because they create a condition subsequent, failure to comply with which will divest any child of the interest which, it had been stated earlier in the agreement would rest in him on execution. "A gift expressed to be absolute may be cut down to a lesser estate by subsequent provisions couched in 'language

[2] Id. at 151.
[3] See 119 A.L.R. 78 (1939).

clearly indicating intent, and equivalent to a positive provision.' " [1] The defendant's contention that the provision gave the children a power of appointment and that when James bequeathed his property to his wife it was a valid exercise of such power, is erroneous. The ultimate beneficiary of a power actually takes from the one who created the power, the donee of the power acting as a mere conduit. Here the children became vested with rights to the interest and principal of the trust subject to the provision that they make wills as directed; when they had done this, the condition was removed and anyone receiving property under such a will received it, not from the father, but from the child who made the will. *Linahan v. Linahan,* (Conn. 1944) 39 A. (2d) 895.

UNFAIR COMPETITION—WHETHER PRODUCT MAY BE MARKETED IN INTER-STATE COMMERCE BY MEANS OF A DEVICE WHICH ENCOURAGES GAMBLING—Petitioners market chewing gum by means of a "Ballgum" board, which is a punch board with pockets for balls of gum. Most of the balls of gum obtained by punching the board for a penny are white, but there is an occasional red ball. The evidence shows that the merchants who used this device gave a small prize such as a stick of candy to the lucky customer who punched out a red ball. The petitioners ask for a review of a cease and desist order issued by the Federal Trade Commission in proceedings instituted by the commission pursuant to section 5 (a) of the Federal Trade Commission Act.[1] *Held,* petition denied. It is clear that the Federal Trade Commission has the power to eradicate merchandising by gambling in interstate commerce. In *Federal Trade Commission v. R. F. Keppel & Brothers* [2] the condemned device and the merchandise to be used with it were sold together as a unit. No prizes are provided with the "Ballgum" board. However, the purpose of the device is apparent, i.e., to encourage gambling, and it is particularly designed to appeal to children's trade. The commission has power to prohibit the distribution in interstate commerce of such devices. *Modernistic Candies, Inc. v. Federal Trade Commission,* (C.C.A. 7th, 1944) 145 F. (2d) 454.

WILLS—DOES ADEMPTION BY EXTINCTION APPLY WHEN STATUS OF PROPERTY GIVEN BY WILL CHANGES FROM PERSONALTY TO REALTY BEFORE DEATH OF TESTATOR?—Plaintiffs claim under clause of testator's will providing as follows: "Whatever is realized out of the three foot vein of coal for which I gave a lease some years ago, I direct my executors to collect and divide the same among my eight children share and share alike." [1] The lease mentioned therein expired twenty days before testator's death. Defendants are devisees under another clause of the will by which they were to receive all the real estate owned in fee simple by the testator. Plaintiffs brought a bill in equity in the court below for an accounting of rents, issues and profits received by defendants from the leasing, mining and sales of the coal bequeathed to plaintiffs and the

[1] Principal case at 902.

[1] 15 U.S.C. (1940) § 45 (a).
[2] 291 U. S. 304, 54 S. Ct. 423 (1933).

[1] Principal case at 564.

relief sought was denied. On appeal, *held*, affirmed. When the lease expired the testator then repossessed this coal in fee simple and since his will spoke as of the day of his death, the coal was devised to defendants. The clause on which paintiffs rely refers to a legacy of personal property since a testator would not direct the "collection" of real estate. The specific legacy made to plaintiffs "had been adeemed by the extinction before the testator's death of the personal property bequeathed." [2] *Dissent.* That the coal was realty at the time of testator's death is immaterial to the decision of the case. "The description [of the property] may be so broad that it fits equally the right as it existed when the will was made and the right as it exists when testator dies." [3] Here testator's language described and identified the thing bequeathed or devised which was the proceeds of the vein of coal. The theory of ademption, meaning the loss of a legacy by destruction of the subject matter or the termination of the testator's interest in it before his death, has no application to this case. "All that appellants [plaintiffs] were entitled to receive had testator died prior to the termination of the lease were the proceeds of the coal. What they are now entitled to receive are the proceeds of the coal." [4] *Blair v. Shannon*, (Pa. 1944) 37 A. (2d) 563.

WILLS—JURISDICTION OF FEDERAL COURT IN PROBATE MATTER INVOLVING DIVERSE CITIZENSHIP—Plaintiff, the sister of a testator who had made a holographic will, brought an action in the federal district court of Montana for the construction of his will. The will contained only one paragraph in which property was disposed of and the sole legatee was named in the first sentence of the paragraph as one to whom certain personal property was given, followed by a new, incomplete sentence stating: "All the rest . . . of my estate . . . ." [1] Plaintiff claims that testator died intestate except as to the specific items bequeathed. The defendants, the executor and the legatee, moved for a dismissal of the suit on the ground that the estate was already in the process of administration in the proper Montana court. The district court held that the suit was within its jurisdiction since diversity of citizenship existed and the amount involved was over $3,000. Judgment was given for the plaintiff from which defendants appeal, raising both the question of jurisdiction and the proper construction of the will. *Held*, reversed as to the construction of the will, but the court had proper jurisdiction. The federal courts, the proper diversity of citizenship existing, have authority in suits involving the construction of wills even though a state has provided for courts of general jurisdiction with a comprehensive system of probate, which must necessarily include the construction of wills, and administration proceedings have already been started in that court. The general rule, as stated by the Supreme Court, is that when a controversy is between citizens of different states and within the established equity jurisdiction of the federal courts "the jurisdiction may be exercised, and is not subject to limitations or restraint by state legislation establishing courts of probate, and giving them jurisdiction over

[2] Id at 566.
[3] Id at 567.
[4] Ibid.

[1] Principal case at 259.

similar matters." [2] Nor have the federal courts, on principles of comity, any discretion to exercise in respect of the entertainment of suits of this nature. If a controversy arises "respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties." [3] *Blacker v. Thatcher*, (C.C.A. 9th, 1944) 145 F. (2d) 255.

WILLS—VALIDITY OF DEVISE TO "ESTATE" OF A PERSON—Plaintiff individually and as executrix of the will of David Walton, brought a bill in equity for the construction of the will of his mother, Annie Walton, under which she claims his estate is entitled to share. By the will, Annie Walton devised her estate in trust to her children who were alive at the time of the execution of the will, the income to be divided equally; and at such time as there was only one trustee living he should distribute the proceeds to the devisees and to "their estate, and to himself equally." David Walton, her son, was alive at the time of the execution of the will as were two other sons, defendants here. The defendants claimed that the income should be distributed to them as surviving children, since David left no widow or children, who, by another clause in the will, were to take the share of a child who predeceased the testatrix. The case came to this court on will, answer, and agreed statement. *Held*, case remanded for decree in accordance with opinion. There are cases that appear to lay down the doctrine that a legacy to the estate of a deceased person is void because an estate as such is incapable of receiving property.[1] Such a doctrine should not be followed, and there are cases which sustain this view,[2] where the testator's intent is plain. Here the intent of the testatrix was perfectly clear. Each son should have an equal interest in the trust fund which would pass as his property under his will or as intestate property if he left no will; and, at the termination of the trust, the corpus should be distributed equally to the surviving sons, and the personal representatives of the sons who had died. *Rogers v. Walton*, (Me. 1943) 39 A. (2d) 409.[3]

WILLS—WHAT WORDS ARE CONSTRUED TO CREATE A FEE SIMPLE RATHER THAN A LIFE ESTATE?—Complainant is the widow of testator and defendants are his heirs at law. The testator's will provided that, after payment of debts, his wife should take the remainder of his property and use it as her own for her support "in any way that her needs require until her death." [1] Complain-

[2] Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33, 30 S. Ct. 10 at 43 (1909).

[3] Gaines v. Fuentes, 92 U. S. 10 at 22 (1875).

[1] In re estate of Glass, 164 Cal. 765, 130 P. 868 (1913); Gardner v. Anderson, 116 Kan. 431, 227 P. 743 (1924); Martin v. Hale, 167 Tenn. 438, 71 S.W. (2d) 211 (1934).

[2] Leary v. Liberty Trust Co., 272 Mass. 1, 171 N.E. 828 (1930); Bottomley v. Bottomley, 134 N.J. Eq. 279, 35 A. (2d) 475 (1944).

[3] See annotation on disposition of bequest or devise to one's estate, or, in alternative, to one or his estate, 69 A.L.R. 1243 (1930).

[1] Principal case at 35.

ant filed a bill to obtain a judicial construction of the will claiming that she is vested with a fee simple title to his farm while the defendants contend that she takes only a life estate. The lower court held for the plaintiff and the defendants appeal. *Held*, affirmed. The fact that the testator was an uneducated person, and other surrounding circumstances may be taken into consideration in arriving at the testator's intention. The instrument, which was written by the testator, shows that his wife's welfare was uppermost in his mind. There is nothing to indicate that he had any thought of providing for the defendants, all of whom are collateral kin. The farm was practically his only asset and he must have realized that it would take all the proceeds of the sale of it to provide for his widow's support. By the use of the words "until her death" he did not mean to restrict the title to a life estate, but merely to make a final disposition of his property. The will does not dispose of the property after his wife's death and Tennessee law provides that a devise shall convey the entire estate of the testator unless the will shows a contrary intent.[2] *Cannon v. Cannon*, (Tenn. 1944) 184 S.W. (2d) 35.[3]

WILLS—WHEN WIDOW MAY TAKE INTESTATE SHARE AND ALSO UNDER THE WILL—George T. Fisher died testate leaving his widow, who was his second wife and is the plaintiff here, and five heirs at law, the defendants, two of whom are infant children of plaintiff, two adult children by a former marriage, and one a grandchild. His will devised the house in which they had lived to the plaintiff and her two infant children. The second clause of the will directed that the remainder of his property be "disposed of to and among those persons legally entitled thereto in accordance with the laws of the State of Kentucky in such cases made and provided." [1] Plaintiff, without relinquishing the specific devise made to her jointly with her two children, sought to recover dower in the remainder of her husband's real estate. The lower court, on proof that the real estate was not susceptible of a fair division, adjudged that it be sold and the proceeds paid to the widow and the five defendants as their interests appeared. The defendants appeal, contending that if plaintiff is to share in the remainder of the real estate she should be charged with the value of the specific devise to her. *Held*, affirmed. Under Kentucky law a widow is entitled to dower in her husband's real estate [2] and, although the general rule is that a specific devise to the widow is presumed to be made in lieu of dower,[3] she is not precluded from receiving both dower and a devise under the will "if such is the intention of the testator, plainly expressed in the will or necessarily inferable from the will." [4] By the second clause of the testator's will he clearly intended to give his widow a

[2] Tenn. Code Ann. (Michie, 1938) §§ 7597, 8091.

[3] On construction of a will to determine the character or quantity of estate or interest see 94 A.L.R. 26 at 167 (1935).

[1] Principal case at 105.

[2] Ky. Rev. Stat. (1942) §§ 392.020, 392.021.

[3] Id. at § 392.080 (1).

[4] Id. at § 392.080 (2).

dower interest in his remaining property in addition to the specific devise made in the first clause. *Wilson v. Fisher*, (Ky. App. 1944) 184 S.W. (2d) 104.[5]

ZONING—WHETHER MAINTAINING HIGH POLES AND WIRES FOR RADIOS IS A USE OF PROPERTY CUSTOMARILY INCIDENT TO RESIDENTIAL USE UNDER ZONING REGULATION AND WHETHER IT IS REASONABLE FOR SUCH REGULATION TO LIMIT SUCH USE TO SAME LOT AS USER'S DWELLING—Defendant is a radio enthusiast and operates radio equipment at his residence on lot 3 of a certain block of plaintiff village. Defendant also owns lot 22 which abuts on lot 3 and which he uses as his back yard. On lot 22 he has erected two poles, one of them sixty feet high and both provided with guy wires and anchor posts, for better reception for his radios. Plaintiff sued in the lower court to enjoin defendant from maintaining these poles and wires alleging that such use of the property was in contravention of a zoning regulation providing that no structures should be erected except for private dwellings or for "uses customarily incident to any of the above uses when located on the same lot. . . ."[1] That court granted the injunction and defendant appeals. *Held*, reversed. The use of separate poles for aerials provides the best radio reception and "such equipment is certainly customarily incident to a residential establishment."[2] Plaintiff cannot rely on the words of the regulation "located on the same lot." The two lots comprise but a single residential establishment and "the restriction to a single platted lot of customary use incidental to a residential establishment is arbitrary and unreasonable and consequently void."[3] Two judges dissented on the ground that the maintenance of such unusually high poles was not ordinarily incident to a residential use and that, the trial court having so found, a court of review should not reverse the trial court on a question on which reasonable men might differ. *Village of St. Louis Park v. Casey*, (Minn. 1944) 16 N. W. (2d) 459.[4]

[5] See collection of cases in 93 A.L.R. 1384 (1934). See also 42 MICH. L. REV. 952 (1944).

[1] Principal case at 460.

[2] Ibid.

[3] Id. at 461.

[4] See 150 A.L.R. 494 (1944).