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ABSTRACTS

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ADMINISTRATIVE LAW — WHAT CONSTITUTES BEING "ADVERSELY AFFECTED" SO AS TO GIVE RIGHT TO APPEAL — Pursuant to provisions of the Federal Food, Drug, and Cosmetic Act [1] hearings were held by the administrator relating to proposed changes of definitions and standards of certain canned fruits, as a result of which, amended regulations were promulgated and issued. These new regulations provided, inter alia, that canners could use, in part, less expensive sweetening ingredients (dextrose and corn syrup) without disclosing on the label, as previously required, that a sugar substitute had been used. Petitioner (sugar refiners' association) seeks a review of the administrator's order promulgating these regulations under section 701 (f) (1) of the act, which provides that any person "adversely affected" by such an order may petition the proper United States Circuit Court of Appeals for a judicial review of the order. *Held*, petition dismissed. The only interest which petitioner here alleges is as a competitor supplier of ingredients used in the regulated products, and the only adverse effect which it alleges is that its competitors (suppliers of dextrose and corn syrup) are not still hampered by continuance of supposed detrimental requirement of label disclosure, which petitioner contends removes a sales resistance on the part of the public to products using such ingredients. Such an adverse effect, if any, is of not sufficient immediacy and reality to give

[3] It seems that it is capability of use for floating rather than actual use therefor that counts. Use, though many years ago, obviously is powerful, if not conclusive, evidence of such capability.

[4] Evidently in the principal case it was urged that the Collins case was an "orphan," hence should be overruled. To this Butzel, J., replied at p. 196: "Even if it is, such status will cease to exist if it is reaffirmed and adopted by this court in the cases at bar." The court thus accepts parenthood, but the child still is lonely!

[5] Principal case at p. 197.

[1] 52 Stat. L. 1040 (1938).

petitioner a right to have the administrator's order reviewed. If such a tenuous likelihood of injury were enough to cause petitioner to be "adversely affected," the opportunity for maintaining petitions to review would be so numerous as to seriously threaten the practical administration of the statute. *United States Cane Sugar Refiners' Ass'n. v. McNutt,* (C.C.A. 2d. 1943) 138 F. (2d) 116.[2]

APPEAL—ORDER QUASHING SERVICE OF SUMMONS IS "FINAL" ORDER—Plaintiff's action is brought to recover the amount of compensation and expenses paid to and for an injured employee of plaintiff, which injury was sustained by such employee as a result of the negligence of defendant's employee in the act of unloading defendant's truck. Jurisdiction over defendant, a foreign corporation not licensed to do business in Illinois, is based upon service of summons upon the secretary of state, and notice thereof duly given as required by section 20(a) of Motor Vehicle Act.[1] Defendant made a special appearance and filed a motion to quash the service of summons on the ground that the said provision was not applicable in as much as the cause of action occurred on plaintiff's premises and not on a public highway. The trial court sustained the motion and quashed the service of summons. Plaintiff appeals; defendant opposes the appeal on the ground that an order quashing service of summons is not such a final order from which an appeal may be prosecuted. *Held,* affirmed. In respect to the defendant's contentions the court stated: the right to appeal is statutory and is limited to "final judgments, orders or decrees." In order to be a final, appealable order it is not necessary that it be a final determination of the rights of the parties, but merely of the particular suit. The order here in question was a final determination that defendant was not amenable to the process of the court served on the secretary of state, and that upon such service this suit could not proceed further—to all intents and purposes the cause was finally disposed of; the order quashing service of summons was, therefore, a final order, and under the statute was appealable. *Brauer Machine & Supply Co. v. Parkhill Truck Co.,* (Ill. 1943) 50 N.E. (2d) 836.

APPEARANCE — IS APPEARANCE AND DEFENSE ON MERITS IN ATTACHMENT SUIT A GENERAL APPEARANCE SO THAT PLAINTIFF MAY HAVE A PERSONAL JUDGMENT AGAINST DEFENDANT? — An action for breach of contract was instituted in the New York state court, jurisdiction being obtained over defendant by levying a warrant of attachment against defendant's bank deposit in New York. Subsequently, defendant removed to the federal district court on grounds of diversity of citizenship. Defendant has not yet answered plaintiff's complaint, but now moves for an order permitting it to appear specially for the sole purpose of protecting its interest in the attached funds without subjecting itself to the full in personam jurisdiction of the court. *Held,* motion denied. Rule 64, Federal Rules of Civil Procedure, indicates that state laws relating to the remedy of attachment are to be applied in the federal district courts within the respective states, except that in cases of removal from

[2] See generally 42 MICH. L. REV. 157 (1943).

[1] Ill. Stats. Ann. (Smith-Hurd, 1935), c. 95½, § 23.
[2] Id., c. 110, § 201.

state courts the Federal Rules are to control if any provisions thereof are applicable. There are, however, no provisions in the Federal Rules controlling the present question. The law of New York is to the effect that a person participating in the merits of a suit submits to the jurisdiction of the court. In the present action of attachment any defense on the merits will necessarily involve more than the mere right to the property involved; it will include also the merits of the underlying personal claims, so that such defense on the merits should determine the entire personal rights of the parties. *Grant v. Kellogg Co.*, (D.C. N.Y. 1943) 3 F.R.D. 229.[1]

ATTORNEYS — WHAT SHOWING NECESSARY FOR REINSTATEMENT AFTER DISBARMENT FOR BRIBING A JUROR — Petitioner was disbarred from the practice of law in the state of Massachusetts in 1934 following hearings upon charges of bribing jurors. In 1939 petitioner sought readmission to practice as an attorney and his reinstatement was allowed in 1941 by the superior court. The Attorney General and the Boston and Massachusetts Bar Associations oppose this reinstatement, and have requested this court to review the order of the superior court. *Held*, order reinstating petitioner annulled. In considering reinstatement of a disbarred attorney the question is not whether he has been "punished" enough, but whether there has been such a change in moral character as to make him worthy of a position of trust, confidence and public service. If there are any offences so serious that an attorney committing them can never again satisfy the court of his trustworthiness, the offence of bribing jurors must be one of them. The evidence on petitioner's behalf as to his moral character, business reputation and financial credit was brought in by sixty witnesses, including petitioner's personal friends, business associates, lawyers, et al.; but, although the record is creditable as far as it goes, it does not demonstrate any fundamental change of character or of repentance or reform which would constitute a guaranty against repetition of the previous offence. *In Re Keenan*, (Mass. 1943) 50 N.E. (2d) 785.[1]

AUTOMOBILES — WHO IS A NON-RESIDENT UNDER MOTOR VEHICLE REGISTRATION LAW? — Plaintiffs, husband and wife, bring this action for damages to automobile and injuries to plaintiff as a result of collision with defendant's car. Defendant concedes that there was evidence of negligence, but sets up a defense that plaintiff's car was being operated without legal registration (i.e. that the vehicle was registered in Pennsylvania when, in fact, plaintiffs were Massachusetts residents). The testimony showed that plaintiff husband had come to Massachusetts as a student, had part time teaching jobs there, and with his wife maintained an apartment in Boston; it further showed that plaintiff husband owned real estate and furniture in Pennsylvania, whence he returned with his wife during vacation periods, and where he was a full time member of the summer faculty of a college. The trial judge found that plaintiffs were

[1] See "Attack by defendant upon attachment or garnishment as an appearance subjecting him personally to jurisdiction," 55 A.L.R. 1121 (1928); 129 A.L.R. 1240 (1940).

[1] See "Reinstatement of disbarred or suspended attorney," 48 A.L.R. 1236 (1927).

residents of Pennsylvania. Defendant appeals from a judgment in favor of plaintiffs. *Held*, affirmed. By statute it is provided [1] that non-residents may operate their automobiles in Massachusetts, if they maintain liability insurance (the plaintiffs had such insurance), for such length of time as found by the registrar to be reciprocally permitted by their state of registration. It was found by the registrar that Pennsylvania grants residents of Massachusetts unlimited privilege of operation, and, therefore, if plaintiffs are non-residents, the operation of their vehicle in Massachusetts was proper. By definition, a non-resident is any person whose "legal residence" is not within Massachusetts.[2] "Legal residence" as used in the statute is something more than residence in the ordinary sense; the legislature conceived of "legal residence" as something of which a person must have only one—it has been used in the sense of a domicil. Within that definition plaintiffs could be found to be non-residents, and the trial judge so found. *Rummel v. Peters*, (Mass. 1943) 51 N.E. (2d) 57.[3]

COURTS — ACTION NOT REMOVABLE TO FEDERAL COURT FROM STATE COURT UNDER STATUTE PROVIDING THAT SUCH ACTIONS MAY BE "MAINTAINED" IN ANY COURT OF COMPETENT JURISDICTION — Plaintiff instituted this action in Kentucky circuit court to recover unpaid wages under the Fair Labor Standards Act, whereupon defendant removed the action to the United States district court. Plaintiff has moved to remand the case to the state court. *Held*, plaintiff's motion to remand sustained. The language of section 16 of the Fair Labor Standards Act [1] (i.e. an employee's action for recovery of wages "may be maintained in any court of competent jurisdiction") prevents a removal of this action from a state court, in that the word "maintained" means more than commenced, and if the defendant is permitted to remove the action to the United States district court it will not have been "maintained" in the court of competent jurisdiction where originally filed. This decision is in accord with the rule of the federal courts that where the queston of remand is doubtful the doubt should be resolved in favor of remanding the action to the state court. *Garner v. Mengel Co.*, (D.C. Ky. 1943) 50 F. Supp. 794.[2]

COURTS — MOTION FOR NEW TRIAL NOT A WAIVER OF A SIMULTANEOUS MOTION FOR JUDGMENT N.O.V. — SUCCESSOR JUDGE MAY PASS UPON MOTIONS FOR NEW TRIAL AND FOR JUDGMENT N.O.V. LEFT UNDECIDED BY DEATH OF PREDECESSOR — Plaintiff brought action upon cognovit note executed by defendant; defendant interposed the defense of no consideration. On a jury trial a verdict was rendered for defendant, who the following day filed motions for order granting plaintiff judgment n.o.v., and for order for a new trial. The trial judge died before passing on these motions; they were heard by his successor, the motion for judgment n.o.v. being overruled and the motion for new trial being sustained. Plaintiff appeals. *Held*, reversed; judgment

[1] Mass. Gen. Laws (Ter. Ed., 1932), c. 90, § 3.
[2] Id., c. 90, 1.
[3] Cf. 28 VA. L. REV. 284 (1941); 27 IOWA L. REV. 464 (1942).

[1] 52 Stat. L. 1060 at 1069 (1938).
[2] Cf. 10 UNIV. CHI. L. REV. 742 (1942).

rendered for plaintiff. A review of the evidence contained in the record indicates clearly that reasonable minds could arrive at no other conclusion than that there was consideration for the note, and that the motion for judgment for plaintiff n.o.v. should have been sustained. Although the questions were not argued, the court felt constrained to hold: (1) A successor judge, having before him all of the pleadings and a complete transcript of the evidence, has jurisdiction to pass upon motions for judgment n.o.v. and for a new trial which have been left undecided by his deceased predecessor (2) The filing of a motion for new trial by a party to the action does not waive the right of that party to insist upon a decision on his motion for a judgment n.o.v. filed simultaneously. *Massachusetts Mut. Life Ins. Co. v. Hauk*, (Ohio App. 1943) 51 N.E. (2d) 30.[1]

EVIDENCE — ADMISSIBILITY OF STATEMENTS OBTAINED FROM PERSON HELD IN CUSTODY BUT NOT THERETOFORE TAKEN BEFORE A COMMITTING OFFICER — Defendants were indicted on charges of treason. Numerous written statements or confessions were obtained from defendants by agents of the F.B.I. during period defendants were held in custody, the statements having been obtained several weeks before defendants were taken before a committing officer as required by statute.[1] Defendants contend that these extra-judicial admissions were improperly admitted [2] because there had been no "commitment" before a proper federal officer. The government takes the position that such a requirement of commitment had been voluntarily waived by defendants, and that there was therefore no bar to admissibility of the confessions. All the defendants were convicted of treason, and they appeal. *Held*, reversed and remanded. The said statements of defendants should have been excluded. A statutory duty to "commit" arrested persons has been placed upon federal officers which aims to avoid the evils of secret interrogation of persons accused of crime; to admit evidence obtained in violation thereof would vitiate the effect of the statute. Assuming, though the evidence is incomplete, that defendants voluntarily consented to remain in custody "without immediate arraignment," thus waiving the statutory requirement, the court finds that the requirement of "commitment," unlike the right to trial by jury, advice of counsel, and speedy trial (which may be voluntarily waived with the approval of court), is not an individual right but rather a mandatory duty on arresting officers which cannot be waived by the person arrested. To so permit would mean that the duties of an arresting officer were dependent upon the action of the arrested person, rather than upon the action of Congress. *United States v. Haupt*, (C.C.A. 7th, 1943) 136 F. (2d) 661.

[1] Cf. CHI.-KENT L. REV. 275 (1941); 14 So. CAL. L. REV. 198 (1941); 54 A.L.R. 961 (1928).

[1] 28 Stat. L. 372 at 416 (1894) as amended by 29 Stat. L. 140 at 184 (1896) as amended by 31 Stat. L. 956 (1901); 18 U.S.C.A. § 595 (1927).

[2] Defendants base their contentions upon holdings in: McNabb v. United States, 318 U.S. 332, 63 S. Ct. 608 (1943); Anderson v. United States, 318 U.S. 350, 63 S. Ct. 599 (1943). Discussed in "The Federal Rule of Admissibility of Confessions," 27 MARQ. L. REV. 212 (1943). Cf. "Admissibility of confession as affected by illegal delay in arraignment of prisoner," 94 A.L.R. 1036 (1935). See Professor Waite's comment on "Evidence—Police Regulation by Rules of Evidence," infra p. 679.

EVIDENCE — RULE AGAINST COMPULSORY SELF-INCRIMINATION — USE IN FEDERAL CRIMINAL PROCEEDING OF TESTIMONY GIVEN UNDER COMPULSION IN STATE PROCEEDINGS — Defendant was indicted under federal statute [1] for using the mails to defraud, the particular charge being the "kiting" of checks (i.e. drawing and mailing checks which were known to have no prospect of being paid). Defendant's fraudulent intent in drawing and mailing such checks was proved by the introduction of testimony in the nature of admissions made by him in supplementary proceedings conducted by judgment creditors in the New York State courts. (Under New York Statute [2] defendant could not have refused to give such testimony on ground that it was self-incriminating, since it could not be used against him in a subsequent state prosecution.) Defendant objected to the admission of this testimony in this proceeding as a violation of his constitutional privilege under the Fifth Amendment not to be compelled to be a witness against himself. Defendant was convicted on the basis of the charges brought, and now appeals. *Held*, affirmed. The rule against compulsory self-incrimination as laid down in the Fifth Amendment is satisfied if immunity is given against prosecution by the government compelling the witness to answer, and does not require that the federal government be prohibited from using testimony given under compulsion in the state courts. Furthermore, the statute of limitations had run on the offenses of "kiting" in respect to which the testimony from the supplementary proceedings in the state court was admitted, and that fact, in effect, gave defendant an immunity against prosecution which is the equivalent of the constitutional privilege. The testimony which defendant gave at said supplementary proceeding was therefore competent evidence in this proceeding. *United States v. Feldman*, (C.C.A. 2d, 1943) 136 F. (2d) 394.[3]

FEDERAL COURTS — THIRD-PARTY PROCEDURE UNDER FEDERAL RULES —Plaintiff seeks to recover for wrongful death of her husband. Prior to expiration of period of statute of limitations defendant served *A* company with a third-party complaint [1] alleging that *A* company was solely liable on plaintiff's claim. After expiration of statutory period plaintiff filed motion pursuant to Rule 14 for leave to amend the complaint in order to charge *A* company with liability; *A* company opposes motion on ground that claim is barred by statute of limitations. *Held*, motion denied. The defendant by instituting third-party proceedings cannot put in issue the question of liability as between the plaintiff and such third party. Such issue must be raised by amendment of plaintiff's complaint, in which plaintiff, in effect, attempts to state a new cause of action against such third-party defendant. Therefore, if plaintiff seeks to amend after expiration of period of statute of limitations his claim is barred. *Lommer v. Scranton Brook Water Co.*, et al., (D.C. Pa. 1943) 3 F.R.D. 27.[2]

[1] 35 Stat. L. 1130, § 215 (1909).
[2] New York Civil Practice Act (Cahill, 1937), § 789.
[3] See, "Privilege against self-incrimination as extending to danger of prosecution in another jurisdiction," 82 A.L.R. 1380 (1933). See also "Privilege Against Self-Incrimination in Michigan—Crime Subject to Prosecution in Another Jurisdiction," 4 UNIV. DETROIT L. REV. 161 (1941).

[1] Federal Rules of Civil Procedure, rule 14(b), 28 U.S.C.A. § 723 c (1941).
[2] See "Five Years of Federal Third-Party Practice," 29 VA. L. REV. 981 (1943); also 129 A.L.R. 919 (1940).

LABOR LAW — PENNSYLVANIA LABOR RELATIONS BOARD HAS NO DISCRETION TO DENY EMPLOYER'S REQUEST FOR A SECRET ELECTION — Employer filed petitions for review of orders of Pennsylvania Labor Relations Board (1) finding employer guilty of unfair labor practices, and (2) certifying, without election (although both union and employer had requested an election pursuant to statute [1]), that appellee union was the bargaining agent for employees. The trial court entered an order affirming both the board's orders. On appeal by employer, it was *held*: (1) Affirmed as to order affirming board's order finding employer guilty of unfair labor practices. (2) Reversed as to order certifying appellee as employers' bargaining agent; record remitted to board for further proceedings. Under the statute the discretion of the board is limited in respect to certifying representatives without election. The statute provides that the board *may*, and upon request of a labor organization, or of an employer who has not committed unfair labor practices, the board *shall*, investigate controversies in respect to representatives; the board shall then provide for a hearing upon such controversy, except that if either party to the controversy requests a secret ballot it shall be held within twenty days. The board is given no discretion to deny the request for secret ballot, and although an "unfair" employer has no right to initiate an investigation concerning representation, he may, as "a party to the controversy" after it has been properly instituted, demand, as of right, a secret ballot. *Petition of Shafer*, (Pa. 1943) 31 A. (2d) 537.

MASTER AND SERVANT — LIABILITY OF GENERAL EMPLOYER AND SPECIFIC EMPLOYER FOR NEGLIGENCE OF EMPLOYEE — Defendant county owned an eight ton road grader which it used for county road repairs, and in the operation thereof employed defendant Burton. At the time involved in the present suit, county had rented the road grader to borough for municipal purposes and had furnished Burton as the operator thereof. Burton was paid on an hourly basis by the borough and during the course of such work was under the supervision of the borough's foreman in charge of the operation. Plaintiff was employed as a laborer on this job and sustained serious injuries when struck by the road grader operated by Burton. Plaintiff brought suit against county and Burton for damages; at the trial of the case defendant county's motions for nonsuit and for directed verdict in its favor were denied. Judgment entered against both defendants, but only defendant county appeals. *Held*, affirmed. The liability of the county must be based upon a relationship of master and servant, and whether the general employer (county) or the specific employer (borough) is the master depends upon who had the right to exercise control over the servant. Here the borough's foreman exercised immediate supervision over Burton and the borough paid his wages, but the borough had no voice in the selection of Burton, and the county retained the sole right to discharge from its general employment. From these facts an inference arises that Burton remained in the general employment of the county so long as he was performing the business entrusted to him by the county. The mere fact that a division of control is permitted does not give rise to an inference that the general employer has surrendered control. The court concluded that there were conflicting inferences to be drawn from the evidence and sustained the action of the trial court in

[1] Pa. Stat. (Purdon, 1941), tit. 43, § 211.7(c).

submitting the case to the jury. *Yonkers v. Ocean County*, (N.J. 1943) 33 A. (2d) 898.[1]

MORTGAGES — REVIVOR OF MORTGAGE DEBT BARRED BY STATUTE OF LIMITATIONS — PRIORITY OF MORTGAGE IN RESPECT TO SUBSEQUENT LIENORS — Note for $2,500 and mortgage securing one-fifth interest in certain lands were executed, delivered and recorded, April 16, 1925, due two years from date. Judgments against mortgagor were obtained of record March 2, 1936 (judgment *A*) and October 5, 1937 (judgment *B*). Iowa statute [1] limits time for bringing of action on written contract to ten years after the cause accrues. On March 7, 1942, the mortgagor signed a written admission of, and promise to pay, the indebtedness on said note and mortgage; such a written admission whether made before or after the statute of limitations has run revives the original cause of action.[2] This is a proceeding in a partition suit to determine priority of liens as between the revived mortgage and the judgments entered subsequent to the mortgage and prior to the revivor. The trial court established the judgment liens as prior and superior to the mortgage. The mortgage holder appeals. *Held*, modified and affirmed. The result obtained by the court is based upon an application of the equitable principle that a junior lienholder, having notice, actual or constructive, of a valid and *enforceable* prior lien at the time he acquired his rights, takes subject to the possible enlargement of the prior lien by an extension of the time of payment. In this case the statute of limitations expired April 16, 1937; therefore, at the time of the entry of judgment *A* (March 2, 1936) the mortgage lien was, as yet, valid and enforceable; however, when judgment *B* was entered (October 5, 1937) the mortgage lien was no longer enforceable, being at that time barred by the statute of limitations. On those findings the court reaches the following result: the mortgage lien is superior to the lien of judgment *A*, judgment *A* is superior to judgment *B*, and the lien of judgment *B* is superior to the mortgage lien. The mortgage holder cannot complain if he is made junior to the full amount of judgment *B*; however, the superiority of judgment *B* is partially relinquished to the amount of judgment *A* (so that, in effect, judgment *A* shares judgment *B's* superiority to the mortgage lien) and, as to the amount of such reduction of judgment *B's* superior position, judgment *B* is given a lien junior to the mortgage lien. *Burns v. Burns*, (Iowa 1943) 11 N.W. (2d) 461.[3]

MUNICIPAL CORPORATIONS — LEGALITY OF AGREEMENT OF FIREMEN TO ACCEPT LESS THAN STATUTORY SALARY — Firemen's Minimum Wage Act of 1937 provided minimum monthly salary of $175. Being financially unable to pay these wages, defendant proposed to reduce the personnel of its fire department; however, in order to induce defendant not to do so, plaintiffs agreed to accept a lesser salary and not thereafter to claim for the statutory wages if the number of employees was not reduced. Plaintiffs now sue to re-

[1] Cf. 102 A.L.R. 514 (1936).

[1] Iowa Code (1939), § 11007.
[2] Iowa Code (1939), § 11018.
[3] Cf. 33 A.L.R. 162 (1924), 98 A.L.R. 850 (1935).

cover difference between amounts actually paid since 1937 and the statutory minimum salary of $175 per month. Defendant appeals from a judgment of the appellate court directing judgment in favor of plaintiffs for the full amount claimed. *Held,* affirmed. The agreements entered into between plaintiffs and defendant were invalid as being against the public policy of the state as defined in the Firemen's Minimum Wage Act of 1937. The plaintiff, therefore, may not be denied recovery on the basis of promissory estoppel because the promises upon which the estoppel is predicated were void. Compensation for the performance of the duties required of the plaintiffs in this case may not be made a matter of bargaining, and any contract to accept a different compensation than that provided by statute is contrary to public policy and void. *Dissent:* This case falls within an exception to the rule that courts will not enforce a contract which is contrary to public policy. In reliance on the agreement defendant has continued in its employ many persons whom it planned to discharge and had a right to discharge at any time, and to allow plaintiffs to recover places a great burden upon defendant and its taxpayers and does greater harm to the public welfare than would refusal to enforce the agreement. *George v. City of Danville,* (Ill. 1943) 50 N.E. (2d) 467.[1]

MUNICIPAL CORPORATIONS — QUASI-CONTRACT LIABILITY IS SUBJECT TO CONSTITUTIONAL DEBT LIMITATION — Plaintiff, an engineer, rendered services to defendant in connection with a proposed new sewerage system. It was understood by the parties that pursuant to statute,[1] payment for any such improvement must come from revenue bonds payable from income derived from the improvement itself, and that the issuance of such bonds was subject to approval or rejection by a vote duly taken. Such vote was taken, and the proposal rejected; the project was therefore abandoned. Plaintiff now sues for the reasonable value of services rendered by him. The financial situation of defendant is such that if it is liable for amount of plaintiff's claim its total indebtedness will exceed the constitutional limitation. Plaintiff contends that the proposal having been abandoned he is now entitled to payment from the general fund in an action in quantum meruit, and that such liability is one imposed by law, not voluntarily assumed, and not within the constitutional limitation on indebtedness. From a judgment for defendant, plaintiff appeals. *Held,* affirmed. Provisions as to debt limits apply only to indebtednesses which arise ex contractu and do not apply to liability involuntarily incurred. However, the liability of defendant in this case, if any, was not involuntarily incurred; both parties were aware of the contingent nature of payment. Plaintiff's claim is essentially based upon a contract implied in fact, therefore ex contractu, rather than upon a quasi-contract obligation involuntarily imposed by law for the wrongful avoidance of a contract. *Hancock v. Village of Hazel Crest,* (Ill. App. 1943) 47 N.E. (2d) 557.

RES JUDICATA — CLASS SUIT — EFFECT OF JUDGMENT ON PERSONS REPRESENTED — Plaintiff brought an action for a declaratory judgment deter-

[1] See "Validity of agreement by public officer to accept less than compensation or fees fixed by law," 70 A.L.R. 972 (1931), 118 A.L.R. 1458 (1939).

[1] Ill. Stat. Ann. (Smith-Hurd, 1942), c. 24, § 62-1 through § 62-12.

mining drainage bonds of defendant county held by plaintiff to be valid, and for a mandatory injunction requiring county officials to levy assessments and to advance money from the general fund to drainage fund for the payment of the bonds. Defendant filed motion to dismiss plaintiff's bill on the ground that the matter was res judicata, all the bonds of this issue having been held to be null and void in a suit in the federal court [1] to which the present defendants were all parties. In that action the federal court determined the controversy to be a class suit, and, as such, was binding on all bondholders, including plaintiff. Plaintiff now claims that it is not bound by the previous decision of the federal court, it being not a true class suit, the judgment therein rendered being in personam and therefore binding only on the parties thereto. The trial court entered decree granting defendant's motion; plaintiff appeals. *Held*, affirmed. The relief sought in the federal court suit and in the instant one is a declaration of validity of the bonds, a tax assessment, a levy on lands in the district, and a distribution of the fund thereby made available; it was the purpose of the federal court suit to place a lien upon the real estate of the taxpayers, not to obtain a personal judgment against them. The proceedings in both cases are in rem, therefore plaintiff is bound by the federal court adjudication as a member of the class of bondholders properly and adequately represented therein. *International Typographical Union v. Macomb County*, (Mich. 1943) 11 N.W. (2d) 242.[2]

SALES — RIGHT OF SELLER TO REFUSE FUTURE DELIVERIES WHERE BUYER HAS REFUSED TO MAKE INSTALLMENT PAYMENT BECAUSE OF ALLEGED BREACH OF WARRANTY — Under a certain sales contract seller undertook to deliver leather to buyer in installments, payment therefor to be made on the fifteenth day of each month for all goods delivered the preceding month. Buyer alleges that the leather delivered in June, 1941, was of inferior quality; thereupon buyer refused to make payment for the June deliveries, demanded replacement thereof, and asked for delivery of entire balance of leather under the contract within three days. Seller declined to recognize any claim for breach of warranty, requested payment for June deliveries, and notified buyer that it would send no more leather under the contract. Buyer brought an action for damages for breach of warranty and for non-delivery of balance of the leather. Seller then brought a cross-action to recover contract price of June, 1941, shipments, and in his answer buyer set up a claim in recoupment for inferior quality of leather in the June shipment. The actions were tried together; in the seller's action judgment was rendered for seller, less an amount allowed in reduction of contract price for the breach of warranty; in the buyer's action the lower court found for the seller (thus recognizing that recovery for breach of warranty had been allowed in judgment in seller's suit, and denying recovery for non-delivery of balance of the goods)—buyer appeals. *Held*, reversed; further proceedings ordered. Whether or not failure to make payment when due for successive shipments under a divisible contract is a material and substantial breach so as to entitle

[1] Bloomfield Drain Dist. v. Keefe, 119 F. (2d) 157 (1941); certiorari denied, 314 U.S. 649, 650, 62 S. Ct. 95 (1942).

[2] See "Contemporary Function of the Class Suit," 8 UNIV. CHI. L. REV. 684 (1942); "Identity or community of interests essential to class or representative suit," 132 A.L.R. 749 (1941); cf. 128 A.L.R. 392 (1940).

seller to consider the entire contract broken and to refuse further deliveries thereunder, is usually a question of fact. The record in this case shows a general finding for the seller, and, therefore, it must have been found that buyer's failure to pay was a material breach—however, if the buyer was justified in refusing payment for the June deliveries, this finding was erroneous. By common law and by statute [1] a buyer may set up against the seller a claim for breach of warranty by way of recoupment in reduction of the purchase price of goods, and in as much as here the extent of damages for the breach required litigation, buyer's refusal to make payment for June shipments when due was not such a breach as gave seller the right to refuse further performance. This breach by the seller would entitle the buyer to recover for non-delivery of the balance of the leather. *Lander v. Samuel Heller Leather Co., Inc.*, (Mass. 1943) 50 N.E. (2d) 962.[2]

WILLS — DOCTRINE OF ELECTION APPLIED TO ACTION FOR BREACH OF CONTRACT TO MAKE A WILL — In consideration for testator's promise that he would execute a will devising to complainants a share of his estate equal in value to the share given to his brothers and sisters, complainants conveyed to testator two houses and lots which had descended to complainants as heirs of testator's late wife. Testator died in July, 1942, and left will devising to complainants the two properties which they had conveyed to him, and bequeathed to each one hundred dollars in cash. The greater part of his estate went to his own brothers and sisters. Complainants bring this action against testator's executor and brothers and sisters seeking to recover on breach of contract to make a will in their favor the difference between value of the property received by them under the will and the share to which they were entitled under the alleged agreement. Defendants answered by denying all material allegations. Complainants filed an amended bill alleging, inter alia, that they do not release what was devised and bequeathed to them under the said will. Defendants thereupon filed a motion that complainants be required to elect whether they will prosecute for damages for breach of contract, or will seek to recover the specific property devised by will. The motion was sustained; complainants appeal therefrom alleging in their assignments of error, inter alia, that they should not be required to make an election because the testator did not give to others anything that belonged to complainants. *Held*, affirmed. The doctrine of election is not limited to instances where the testator gives away property belonging to a legatee or devisee, but has application wherever a person is claiming inconsistent rights in regard to the same subject matter, as here where complainants are seeking to retain benefits under the will, and at the same time claiming against the will by suing defendants because the value of these devises and bequests is not as great as what they had hoped to receive. One who accepts a benefit under a will must accept the whole will and ratify every portion of it. *Elmore v. Covington*, (Tenn. 1943) 172 S. W. (2d) 809.[1]

[1] Mass. Gen. Laws (Ter. Ed., 1932), c. 106, § 58 (1) (a) (b).

[2] See "Right of seller to rescind or refuse further deliveries on buyer's failure to pay for installments," 14 A.L.R. 1209 (1921); 15 A.L.R. 609 (1922). Cf. 19 CHI-KENT L. REV. 207 (1941); 29 A.L.R. 1517 (1924).

[1] See 69 A.L.R. 102 (1930), 106 A.L.R. 754 (1937).

WILLS — RIGHT UNDER LAPSE STATUTE OF ILLEGITIMATE CHILDREN TO TAKE PARENT'S LEGACY IN GRANDFATHER'S WILL — RIGHT OF ADOPTED CHILD TO INHERIT THROUGH NATURAL PARENT — Testator by the terms of his will left all of his estate to his son, who predeceased him. The son had two illegitimate children, but they became legitimate upon adoption by the father according to statute,[1] although the parents did not intermarry; one of the children was later adopted by strangers. The state intervened contending that testator left no surviving heirs and that his estate escheated to the state (i.e. that under the "lapse" statute [2] the legatee dying before the testator left no lineal descendants). The children stood together in opposing the state, but as between themselves it is contended that the child adopted by strangers lost her legal status as the child of her natural father, and therefore cannot claim as a lineal descendant under the "lapse" statute. The trial court held that the two children share the estate equally. On appeal it was *held*, affirmed. The statute which provides that an illegitimate child, in the absence of intermarriage of its parents, does not represent its parent by inheriting estate of parent's kindred [3] has no application to prevent an illegitimate child from taking as lineal descendant under provisions of the lapse statute, where such child has been statutorily adopted. Such statute is controlling only where the illegitimate child is claiming as his parent's representative; here the children are claiming in their own right as lineal descendants—there was, therefore, no escheat of property to the state. As regards the claim between the two children, the court held that although the child adopted by strangers severed her legal relationship toward her natural parent, her status as a blood relative of the kindred of her natural parent was not altered; and the right of the child to inherit as lineal descendant of her natural parent continued notwithstanding a newly acquired right of inheritance from adopting parents. Both children, therefore, inherit equally their grandfather's estate. *In re Esposito's Estate*, (Cal. App. 1943) 135 P. (2d) 167.[4]

WILLS — HOLOGRAPHIC WILLS STATUTE REQUIREMENT OF A "DATE" SATISFIED BY MONTH AND YEAR WITHOUT DAY OF MONTH — Montana statute [1] requires that holographic wills be "entirely written, dated, and signed" by the testator. Decedent's will was written entirely in testator's hand and signed by her, and was dated "this day of May, 1938." The executor named in the document attempted to have the writing probated as a holographic will. An order was entered refusing to admit to probate the writing offered, and from that order the executor appeals. *Held*, probate allowed. Tracing the English word "date" back to the Latin "datum," the court finds that the word is more properly used to designate that part of a document giving the place and/or time the instrument was made, rather than figures or words designating the actual time when the execution took place. In as much as the legislature has required, inter-

[1] Cal. Civ. Code (Deering, 1941), § 230.
[2] Cal. Prob. Code (Deering, 1941), § 92.
[3] Id. § 255.
[4] 31 CAL. L. REV. 439 (1943). See also "Descent and Distribution: Effect of Illegitimacy and Legitimation in California," 29 CAL. L. REV. 185 (1941). Cf. generally 115 A.L.R. 444 (1938) and 80 A.L.R. 1403 (1932).

[1] Montana Rev. Codes (1935), § 6981.

alia, that holographic wills be "dated" and has made no specific requirements of day, month and year, the court would be invading the field reserved for the legislature if it should alter and amend the simple and clear definition of a holographic will as contained in the statute. This decision is in line with rules contained in Montana Statutes [2] requiring liberality of interpretation, and conforms with the general concept of holographic wills that they need not be full and complete as to form, writing, signature, or date, so long as the minimum statutory requirements are met. *Concurring:* Unless more than one will is presented for probate or the question of testator's mental capacity is raised, the day of the month month of execution of the will is unimportant. *In re Irvine's Estate*, (Mont. 1943) 139 P. (2d) 489.[3]

WILLS — VALIDITY OF WILLS ON SEPARATE SHEETS OF PAPER — The order of the orphans' court directed the register of wills to refuse probate of three folded but unattached holographic papers found in a sealed envelope. The papers were admittedly testamentary in nature, were identical in form, and were entirely in handwriting of one of the testators; but each sheet set forth separate provisions for distribution of property of decedents, there were no unfinished sentences on any page which connected it with the following page, and signatures of testators appeared only on the third sheet. On appeal to the supreme court the decree was reversed and the papers ordered admitted to probate by a four to three decision. The Pennsylvania courts have adopted the rule that a will made on separate sheets of paper is sufficient if the pages "are connected by their internal sense, by coherence or adaptation of parts." The entire court is in agreement that this is a proper test, but they differ in the construction of the words; the majority maintains that the pages may be coherent and legally integrated into a will if they "contain nothing incongruous or out of harmony . . . or if the several parts suit, fit in and are adaptable as a will," while the minority finds no integration unless the connection is apparent on its face, as by continuance from one page to another of an unfinished sentence or paragraph. It is further suggested in a concurring opinion that in as much as the papers were found in a sealed envelope they were as effectually fastened together as with a metal fastener. The court rejects the suggested "possibility of fraud" test as impractical because thereunder any will made so that a fraud *might* have been perpetrated could be denied probate, and, furthermore, there was no charge of tampering or fraud in the present case. *In re Covington's Estate*, (Pa. 1943) 33 A. (2d) 235.[1]

[2] Montana Rev. Codes (1935), §§ 8757, 8761, 8762, 8770, 8771.
[3] Cf. annotation on dating of wills in L. R. A., 1916 E, 498.

[1] Rehearing denied Aug. 12, 1943. Cf. annotation on validity of will written on disconnected sheets, 30 A. L. R. 424 (1924), 71 A. L. R. 530 (1931).