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ABSTRACTS

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APPEAL AND ERROR—REVERSIBLE ERROR TO INSTRUCT JURY THAT MATERIAL FACTS MUST BE PROVED WITHOUT TELLING THEM WHICH FACTS ARE MATERIAL—Appellants were indicted for robbery and found guilty in the trial court. They appealed, contending that the jury was improperly instructed, the objectionable instructions being that the jury might find the appellant guilty if it believed from the evidence that every material allegation had been proved beyond a reasonable doubt; and that the reasonable doubt sufficient for an acquittal must be as to the whole evidence and not as to any particular fact not necessary to constitute the crime. There was no instruction, however, as to what constituted material facts. Appellee contended that, because a definition of the crime of robbery was included, the instructions were adequate. *Held,* reversed and remanded. It has been previously held in this jurisdiction [1] to be reversible error to instruct the jury that it need find beyond a reasonable doubt the truth of only those allegations which are material, without instructing them also as to what constitutes material allegations. The definition of robbery was a mere abstract proposition of law [2] and was not sufficient to point out what allegations were material. The jury was, therefore, left with the determination of questions of law. *People v. Berne,* (Ill. 1943) 51 N.E. (2d) 578.

ARREST—ARE THE SURETIES ON A SHERIFF'S BOND LIABLE FOR ACTS DONE UNDER COLOR OF OFFICE BUT BEYOND THE SCOPE OF THE POWERS WHICH THE OFFICE CONFERS ON SHERIFF?—Plaintiff sued *F* as sheriff of Wells county and *I* as surety on his official bond, alleging that he had been unlawfully arrested by *F*'s deputy beyond the borders of Wells county and afterwards imprisoned unlawfully in Wells county where *F*, "while acting by virtue of his office," had permitted the jail to become so damp and cold that he had suffered injuries. The trial court, sustaining the demurrers of *F* and *I*, stated that a sufficient cause of action had not been shown against either defendant and gave judgment accordingly. Plaintiff appeals. *Held,* affirmed as to *F* but reversed as to *I*. *F* cannot be sued in his capacity of sheriff as principal on the bond because there he obligated himself as an individual for the faithful performance of his official duties. Even if the action lay in tort, rather than on the bond, for any official wrong doing he could be sued only as an individual; otherwise the judgment would be one against the office and the funds of the office. *I* argues that *F* was not acting in his official capacity when the arrest was made and cites a

[1] People v. Wells, 380 Ill. 347, 44 N.E. (2d) 32 (1942).
[2] On authority of People v. Cramer, 298 Ill. 509, 131 N.E. 657 (1921).

Kentucky case [1] involving an unlawful arrest that upholds this view. The court reasons that if an official "is acting only as an individual and not as a sheriff whenever he exceeds his authority in making an arrest, there could never be liability on his bond for a false arrest." [2] The test should be whether the act was done under color of office rather than by virtue of office. If he assumed to act as an officer, then bondsmen should be liable for they sponsored his integrity while acting as an officer and bound themselves that he would not "under color of his office exceed the powers which the office confers upon him." [3] The test of whether he is acting in his official capacity should be whether he "acts within the general scope of the powers and duties of his position." [4] Because the unlawful arrest was made beyond the borders of Wells county does not, under Indiana law, necessarily prevent it from being made under color of office.[5] Even if it could be considered that the original arrest was the wrongful act of an individual, the arrest continued unlawfully in Wells county and under color of *F*'s office. *State v. French*, (Ind. 1943) 51 N. E. (2d) 858.

CONTRACTS—THIRD-PARTY BENEFICIARIES—RIGHT OF BENEFICIARY OF UNITED STATES SAVINGS BONDS AS AGAINST ESTATE OF DECEASED OWNER—In the safe deposit box of *D*, who died intestate, were found United States discount savings bonds, series E, issued under the Second Liberty Bond Act,[1] and which were registered in *D*'s name as owner. One of these was payable on his death to his widow and the others to named children. On an exception made by one of the heirs to the inventory filed in *D*'s estate, the probate court directed the administratrix to exclude these bonds from the inventory. The judgment was affirmed by the court of appeals and the case came to this court on allowance of motion to certify the record. *Held*, affirmed, on the ground that the bonds belonged to the beneficiaries rather than to D's estate. *Rhorbacker, Exr. v. Citizens Building Ass'n Co.*[2] was cited as supporting the principle that "the proceeds of a contract made for the benefit of a third party are not subject to administration in the estate of the donor but belong to the person for whose benefit the contract was made." [3] It was argued that since *D* could have cashed the bonds during his lifetime the proceeds should belong to his estate, but the court observed that *D* had no power to change the beneficiary.[4] The court in rendering its decision relied principally on a regulation by the Secretary of the Treasury which stated that "If the registered owner dies without having presented . . . the bond

[1] Jones v. Van Bever, 164 Ky. 80, 174 S.W. 80 (1915).

[2] Principal case at p. 862.

[3] Ibid.

[4] Id. at 864.

[5] Under Ind. Stat. (Burns, 1933) §§ 9-1008, 9-1011, a sheriff may make arrests in certain cases beyond the limits of his own county.

[1] The bonds were issued after the Second Liberty Bond Act had been amended by the addition of § 22 which was added by act of February 4, 1935, 49 Stat. L. 21 and c. 7, § 3 of act of February 19, 1941, 55 Stat. L. 7, 31 U.S.C.A. (Supp. 1943) § 757c.

[2] 138 Ohio St. 273, 34 N. E. (2d) 751 (1942).

[3] Principal case at 641.

[4] 6 FED. REG., § 315.12(b), p. 2197 (1942).

for payment . . . the beneficiary will be recognized by the Treasury Department as the sole and absolute owner of the bond, and payment will be made only to him. . . ." [5] The appellant contended that this provision was merely for the convenience of the Treasury in facilitating payment of the bonds. Although the court agreed that this motive was undoubtedly present, it stated that this provision was made a part of the contract between the Government and the bondholder by section 22(a) of the Second Liberty Bond Act [6] and was sufficiently definite in its terms to pass title to the beneficiaries.[7] *In re Di Santo's Estate*, (Ohio 1943) 51 N. E. (2d) 639.

CRIMINAL LAW AND PROCEDURE—PROSECUTION AFTER REVOCATION OF OPA REGULATION FOR PREVIOUS VIOLATION—Appellees were indicted for selling beef in violation of an OPA regulation made pursuant to the Emergency Price Control Act of 1942. Their motion to quash was granted in the district court on the ground that the pertinent provisions of the regulations had been revoked prior to the return of the indictment. *Held*, on appeal under the Criminal Appeals Act,[2] reversed. The common law rule that the repeal of a statute ends the power to prosecute under it for previous violations does not apply in the case of revoked regulations where the statute under which the regulation was made is still in force. The reason for this difference is that in the present case, the policy of the statute still continues and it is the violation of the statute that is punished. *United States v. Hark*, (U.S. 1943) 64 S. Ct. 359.

EQUITY—JURISDICTION—SUIT BY PROPERTY OWNER AGAINST SEVERAL INSURERS OF THE SAME PROPERTY WHERE POLICIES CONTAIN PRORATING CLAUSES—The plaintiff, owner of the Gulfmore Hotel which had been destroyed by fire, brought this action in equity against twenty-two insurance companies on forty-five fire insurance policies covering the building and the personal property therein. Each policy contained a clause providing for the prorating of the loss in proportion to the amounts of insurance named in the several policies. The county court entered a decree in favor of the plaintiff and the defendant appealed, claiming that equity had no jurisdiction due to the fact that the Civil Practice Act now permits an action at law against all defendants to recover the amount due from each. *Held*, equity properly took jurisdiction of this case, on the basis of avoidance of a multiplicity of suits, and a common interest arising

[5] Treasury Department Circular 530, fifth revision, dated June 1, 1942, found in 6 FED. REG., § 315.12, p. 2191.

[6] Section 22(a) of the Second Liberty Bond Act, cited supra, note 1, states that bonds "shall be issued . . . subject to such terms . . . and including any restriction on their transfer, as the Secretary of the Treasury may from time to time prescribe."

[7] See annotations on rights of beneficiary under obligation or deposit payable to him at death of holder or depositor if not previously paid to latter, in 144 A.L.R. 1523 (1943); 146 A.L.R. 1498 (1943); 131 A.L.R. 967 (1941). For a case contra to principal case, see 27 MINN. L. REV. 401 (1943).

[1] 56 Stat. L. 23, 50 U.S.C.A. (Supp. 1943) App. § 901.

[2] 18 U.S.C.A. (1926) § 682. The problem of whether the appeal was properly taken under the act is also discussed in the opinion.

out of the clause in each policy providing for prorating the loss. Giving the plaintiff a single action at law against all defendants does not affect the situation, for equity is not deprived of jurisdiction by extending it to courts of law unless the legislature has clearly so manifested its intention. Equity has another ground for jurisdiction in that an accounting in this case would be far too complicated for an ordinary jury and could therefore be done more satisfactorily by a chancery master. *Jay-Bee Realty Corporation v. Agricultural Ins. Co.*, (Ill. App. 1943) 50 N.E. (2d) 973.

FEDERAL COURTS—JURISDICTION OF CASES SOUGHT TO BE REMOVED FROM A STATE COURT WHICH HAS NO JURISDICTION.—Plaintiff brought an action against Southern Bell Telephone and Telegraph Co. in Civil Court of Record to recover $3000 damages for breach of contract and $3000 damages for conversion of plaintiff's copper wire. Defendant petitioned for removal to a federal court under the Federal Removal Statute [1] on the ground of diversity of citizenship. The county court judge dismissed the action for want of jurisdiction, that court having no jurisdiction of matters in controversy the value of which exceeds $3000.[2] *Held*, dismissed. In the removal of causes depending for jurisdiction on diversity of citizenship, the federal court acquires no jurisdiction if the state had none, even though the federal court might have had jurisdiction if the case had originally been brought there. *Neel v. Southern Bell Telephone and Telegraph Co.*, (D.C. Fla. 1943) 52 F. Supp. 415.

FEDERAL COURTS—JURISDICTION—CROSS-CLAIM BY ONE DEFENDANT AGAINST ANOTHER AS A SEPARABLE CONTROVERSY—Plaintiff instituted a personal injury action in a county court of South Carolina against defendants Piatt and the Atlantic Coastline Railroad for injuries sustained when he was struck by portions of a truck belonging to Piatt, thrown in his direction as a result of the collision between the truck and a train of Atlantic Coastline Railroad. The railroad filed a cross-claim against Piatt charging negligence and petitioned for removal to a federal court, under the Federal Removal Statute,[1] on two grounds; first that there was diversity of citizenship among the original parties, the plaintiff being a citizen of South Carolina, while the railroad was a Virginia corporation and Piatt a citizen of Missouri, and second that there was a separable controversy between citizens of different states arising out of the cross-claim. *Held*, federal jurisdiction denied. The diversity of citizenship required for removal is not present, since as a matter of fact Piatt was not a citizen of Missouri but of South Carolina. No separable controversy, within the meaning of the statute, arises out of the cross-claim because it is an independant claim brought by one who, though a defendant in name, is a plaintiff in interest, and is therefore unable to remove. Cases cited by the railroad are distinguishable in that in one the cross-claim presented a federal question, and in the others, the petition for removal was made by one impleaded by a defendant. *Barwick v. Piatt*, (D.C.S.C. 1943) 52 F. Supp. 262.

[1] 28 U.S.C.A. (1926) § 71.
[2] Fla. Acts, 1921, c. 8521, p. 312.

[1] 28 U.S.C.A. (1926) § 71.

INSURANCE—EFFECT OF INACCURACIES IN DESCRIPTION OF AN AUTOMOBILE IN A PUBLIC LIABILITY POLICY—Wilber Soden, being the owner of a 1937 model, four-door Plymouth sedan, was issued a public liability insurance policy by the garnishee in this case, Utilities Insurance Company, in which the company's promise to the insured was to pay, up to certain specified limits, all sums which the insured should become legally liable to pay to persons sustaining damage through the insured's ownership, maintenance or use of the automobile. The policy called for a description of the automobile which was filled in with the year model of one car and the motor and serial numbers and type of body of another, all taken from a policy formerly issued to Soden by this company to cover a different car for a different period. Soden owned only one car during the period of the policy and the premium rates were the same for it as for the model in the description. The appellants, as administratrices for two persons killed while riding with Soden in his car, having brought suit and obtained judgments against the administrator of Soden's estate for damages on account of the wrongful death of their intestates, filed a writ of garnishment against the insurance company, relying on the public liability policy. The trial court gave judgments for the plaintiffs to the extent of the company's liability on the policy, and the appellate court reversed [1] on the ground that, because of the inaccuracies in the description, the policy did not cover the automobile driven by Soden at the time of the accident. *Held*, appellate court reversed, trial court affirmed. The purpose of the description is to set forth the type of coverage and the limits of liability, and to give enough facts so that the insurance company can tell who is to be insured and what automobile to be covered. The insurance company knew or reasonably could have known from the declarations in the policy who was to be insured, and, on the basis of decisions in other jurisdictions,[2] when the insured owns only one car at the time the policy is issued, and that car is involved in an accident, the insurance company is deemed to know that that is the car covered, notwithstanding inaccuracies in the motor and serial numbers. This doctrine is limited to accident policies, as distinguished from fire and theft policies, and to automobiles owned by the insured at the time the policy was issued. *Kostecki v. Zaffina*, (Ill. 1943) 51 N.E. (2d) 152.

MUNICIPAL CORPORATIONS — CHANGE OF MANUFACTURING BUILDING PURPOSE TO A HIGHER NON-CONFORMING USE WHERE ZONING ORDINANCE RESTRICTS AREA TO RESIDENTIAL PURPOSES—Plaintiff owned property which was used as a garage from 1918 until 1936; from 1936 until February, 1942, it was used for the manufacturing of metal products on a twenty-four hour a day work schedule. In December, 1941, a zoning ordinance of the city of Detroit became effective which restricted the area in which plaintiff's property was located to "two and a half story—two family dwellings," and further provided that where a non-conforming building presently existed, "any such non-conforming building or structure may be continued and maintained provided there is no physical change." When plaintiff's petition to increase the size of its building

[1] 316 Ill. App. 509, 45 N.E. (2d) 562 (1942).

[2] Fucaloro v. Standard Surety & Casualty Co., 225 Iowa 437, 280 N.W. 605 (1938); Reimers v. International Indemnity Co., 143 Wash. 193, 254 P. 852 (1927).

was thereafter denied by the zoning appeal board, the business operations were moved to larger quarters. Plaintiff has now leased the vacated premises to a cartage company, which has agreed to occupy the premises solely as a sorting and distributing point, and not to use the building after 7 P.M. Plaintiff applied for permission to change building purpose from manufacturing to cartage; the application being denied, plaintiff filed petition for writ of mandamus in the circuit court, and on denial thereof leave to appeal was granted. *Held*, reversed and remanded. The sole test of legality of a zoning ordinance is its reasonableness, and to construe this ordinance as preventing a change of purpose to a higher non-conforming order (i.e. one not as objectionable as the former one) is so unreasonable in this particular case as to invoke the aid of the court. The court apparently adopts plaintiff's suggested construction of the words "any such non-conforming use may be continued" to refer generally to any non-conforming use and not to be limited to the identical, and, in this case, more objectionable, non-conforming use at the time the ordinance went into effect. *Palmer v. City of Detroit*, (Mich. 1943) 11 N.W. (2d) 199.

PROCESS — STATUTE CONSTITUTING SECRETARY OF WORKMEN'S COMPENSATION BUREAU AGENT OF NONRESIDENT EMPLOYER FOR ACCEPTANCE OF SERVICE — Plaintiff was employed by defendants as a domestic servant in their New Jersey home, and now alleges that she sustained injuries during the course of such employment. After defendants moved their residence to New York, plaintiff filed a petition with the workmen's compensation bureau (copy of which was mailed to defendants), jurisdiction being taken by the bureau under the authority of a New Jersey Statute [1] which provides that any non-resident employer is deemed by accepting the privilege of such services to have appointed the secretary of the bureau as his agent for acceptance of process in any proceeding instituted by an employee. Defendants appeared before the bureau specially and moved to dismiss and quash the process on ground of want of jurisdiction. The bureau denied defendant's motion to quash, and a writ of certiorari to review was denied by the supreme court. Defendants appeal. *Held*, reversed. The statute in question applies to non-residents who employ persons within the state—defendants were not non-residents at the time of the employment, and the fact that after accrual of the cause of action they moved from the jurisdiction did not bring them within the operation of the statute. In the absence of specific statutory provision, process served upon non-resident defendants in an action in personam is invalid. This case does not fall within any legislative exception to the general rule, and, therefore, the bureau acquired no jurisdiction over the defendants. *Yardborough v. Slokum*, (N.J. 1943) 33 A. (2d) 905.

PROXIMATE CAUSE—CAN NEGLIGENCE OF DEFENDANT BE PROXIMATE CAUSE DESPITE INTERVENING ACT OF THIRD PARTY?—Appellee's agent, in violation of a traffic ordinance of the District of Columbia, left appellee's truck standing in a public alley with ignition unlocked and key in the switch. An unknown person drove the car away and negligently ran over appellant. In an action against appellee for damages, the trial court, on an agreed set of facts, directed a verdict for appellant on the theory that, a third party having inter-

[1] N. J. Rev. Stat. (1937), §§ 34:15-55:1.

vened, leaving the car unlocked was not the proximate cause of appellee's injury. *Held,* overruling previous decisions in this jurisdiction, reversed. If the negligence of the defendant, by creating the hazard which the ordinance was intended to avoid, brings about the harm which the ordinance was intended to prevent, it is a legal cause of the harm. Violation of a safety ordinance is negligence; fairly interpreted, the ordinance was designed to prevent injury to the public through meddling by children, thieves or others, with unlocked motors. The appellant, having been guilty of such negligence causing such harm, is legally liable in damages to appellee. *Ross v. Hartman,* (Ct. App. D. C. 1943) 139 F. (2d) 14.

RES JUDICATA—JUDGMENT OF ACQUITTAL IN CRIMINAL CASE UNDER SHERMAN ANTI-TRUST ACT NOT A BAR TO CIVIL ACTION ARISING OUT OF SAME FACTS—The Government instituted this action in equity under sections 1, 2 and 3 of the Sherman Anti-Trust Act [1] in the district court for the District of Columbia in order to enjoin the defendant companies from monopolistic practices in connection with trade and commerce in gypsum products. The Government had previously brought a criminal action against the defendants in that court under sections 1 and 2 of the same act, alleging a conspiracy to monopolize trade in their products. The trial judge sustained the motion of defendants for a directed verdict of not guilty and judgment was given accordingly. The defendants, in the present case, move for a summary judgment, arguing that the previous judgment is res judicata of the issues here presented. *Held,* motion denied. The majority of the court based its decision almost entirely on the fact that the statute contemplated both types of action and stated that "a full adjudication in a criminal action between the same parties and involving the same conspiracy would not be a bar in a subsequent civil action for injunctive relief." [2]

Justice Stephens, while agreeing with the result reached by the majority, thought that the statement quoted was too sweeping in its terms according to the following reasoning. Had the criminal case been submitted to a jury, a judgment of acquittal would not be a bar to a subsequent civil action since criminal cases require a higher standard of proof. A motion for a directed verdict may be ruled upon by the court in defendant's favor on either of two theories: (a) although substantial evidence has been introduced of the elements of the charge and defendant's connection with it, yet such facts do not show the existence of any legal wrong; (b) although the indictment charges an offense, the evidence is not sufficient to show that the offense was committed or, if committed, that defendant was the wrong-doer. Under the first theory the motion is in the nature of a demurrer to the evidence and, in effect, a demurrer to the indictment. A favorable judgment for defendant on this theory should, therefore, be a bar to a subsequent civil action. Under the second theory, the judgment is that the evidence is not substantial enough to support the charge. Since the meaning of "substantial" differs in criminal and civil cases (in a criminal case the evidence must convince beyond a reasonable doubt), when the judge upholds the motion in a criminal case on the latter theory such a judgment should not be a bar to

[1] 15 U.S.C.A. (1941) §§ 1-3.
[2] Principal case, p. 615.

a subsequent civil action. The defendants' motion was made and decided on the second theory and therefore the motion for summary judgment was correctly denied. Since the majority did not take this distinction into consideration, the defendants are entitled to a ruling on whether the doctrine of res judicata applies where the decision of the criminal case has been favorable to a defendant on motion for a directed verdict. *United States v. United States Gypsum Co.*, (D.C.D.C. 1943) 51 F. Supp. 613.[3]

RES JUDICATA—WHAT IS THE SAME "CAUSE OF ACTION" FOR THE PURPOSE OF APPLYING THE DOCTRINE?—James Norwood, the plaintiff, brought this action in ejectment against the administrator of the estate of Ada L. McDannold and against Thomas A. McDonald, an alleged heir at law of the deceased, to establish his right by inheritance to land owned in fee simple by the deceased at the time of her death. The plaintiff claimed to be sole heir by virtue of his being the common-law husband of the deceased. The defense raised was that the plaintiff had previously brought an action in equity against the same defendants to establish his right to the same land on the ground that he had paid the consideration for the land and thereby had become during the lifetime of the deceased the beneficiary of a resulting trust, by reason of which the beneficial interest had vested in him at her death; that the court found that the plaintiff had not established his case by the required degree of proof (but it did not pass on the rights of defendant McDonald as heir) and that this judgment is res judicata to all claims made in this action. The trial court gave judgment for the defendants, notwithstanding a jury verdict to the contrary on the facts, and the appellate court affirmed on the ground that the plantiff should have set up in the first action all the claims he had to the land. *Held*, trial and appellate courts reversed and cause remanded for further proceedings. A prior judgment can be pleaded as res judicata to a cause of action only if it was rendered on the same cause of action. Two causes of action are the same if the same facts will sustain both; but if, as here, each arises out of a different right (i.e., in the first action, the right to land as the beneficiary of a trust, and, in the second, the right to land as an heir) and each must be sustained by proof of a different set of facts, they are not the same cause of action for the purpose of applying the doctrine of res judicata. The court also discusses the possibility of, and finds no grounds for, these being treated as inconsistant proceedings between which the plaintiff must choose, and having chosen one, be forever barred from instituting the other. *Norwood v. McDonald*, (Ohio 1943) 52 N.E. (2d) 67.[1]

TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION IN THE USE OF THE WORD "SCOUT" AS LABEL FOR POCKET KNIVES—Adolph Kastor & Brothers, Inc., cutlery manufacturers, petitioned the court to review an order

[3] Forest Revere Black, "Res Judicata and Conspiracy Cases Under the Sherman Act," 30 KY. L. J. 255 at 281 (1942).

[1] "Judgment—Bar of Causes of Action—Res Judicata," 14 UNIV. CINN. L. REV. 454 (1940); "Pleading and Procedure—Judgment in Action on Express Contract as Res Judicata for Action on Implied Contract—Alternative Pleading," 6 OHIO ST. L. J. 340 (1940).

of the Federal Trade Commission directing them to cease and desist from using "scout," "scouting," or "boy scout" in connection with their cutlery. The petitioner, since 1910, had manufactured and sold for fifty cents a "Scout Set" consisting of a three-bladed pocket knife marked "Scout Knife" and a hunting knife. The Boy Scouts of America, incorporated in 1910, now consent to and license the sale of a two-bladed pocket knife costing one dollar and fifty cents, marked "Official Knife," and bearing the name, insignia, and motto of the organization. The commission found that the words "scout" and "scouting" had acquired a secondary meaning as applied to the scouting movement even before incorporation of the organization. *Held*,[1] order affirmed. The commission's finding as to the Boy Scouts' superior interest in the word is supported by the evidence; the facts also support the conclusion that the word "Scout," when applied to a boy's pocket knife, suggests that the knife is sponsored by the Boy Scouts of America. To test the propriety of the order a comparison must be made of the damage which the infringer would suffer if the order were granted with the damage which owner would suffer if it were refused. Kastor has shown no right to the word except as a word of common speech nor any special benefit to himself from its use, while the Boy Scouts have a cognizable legal interest in preventing the public from accepting a product as sponsored by them which they do not, in truth, sponsor. *Adolph Kastor & Bros., Inc. v. Federal Trade Commission*, (C.A.A. 2d, 1943) 138 F. (2d) 824.[2]

TRUSTS—RESULTING TRUST DOCTRINE APPLIED DESPITE ILLEGALITY—In 1927 the plaintiff, an alien, gave consideration for a one-sixteenth interest in a fishing schooner then being built, but, on being advised by the builder that it was illegal for her, as an alien, to take title in her own name, she took it in the name of her American-born minor son, who is the defendant in this action. On completion of the vessel the builder had it licensed and enrolled under federal statutes [1] which provide for the licensing and enrolling of such vessels as a prerequisite to their having the privileges of vessels of the United States and which also provide for the forfeiture of such vessel if the registry, enrollment, or license was obtained or used "knowingly or fraudulently," [2] or if any interest in a licensed vessel be transferred to an alien or nonresident.[3] The builder made oath as to the ownership of the vessel as required by the statute,[4] in the face of a provision that a ship owned by a noncitizen could not be enrolled,[5] but he gave the son as owner of the one-sixteenth interest. The defendant, being now of age, has claimed ownership of one-sixteenth of the vessel and the right to collect a pro-

[1] The court points out that in making this decision it has not relied upon the clause "words or phrases . . . used by the Boy Scouts of America in carrying out its program" found in 36 U.S.C.A. (1942) § 27.

[2] A similar case is noted in "Tradenames—Unfair Competition," 3 GA. B. J. 78 (1940). The problem is also discussed in 27 CORN. L. Q. 144 (1941).

[1] 46 U.S.C.A. (1926) § 221.
[2] Id. § 60.
[3] Id. § 325.
[4] Id. §§ 254, 259.
[5] Id. §§ 255, 11.

portionate share of the earnings. The plaintiff, having become a citizen, filed a bill in equity asking a decree that the defendant hold title in trust for her. The decree was granted in the trial court, from which decision the defendant appealed. *Held,* decree affirmed. On the authority of *Cooley v. Cooley* [6] a resulting trust vested in the plaintiff at the time she paid consideration for an interest in the vessel; the vessel was not then under federal statutes since she was not yet afloat on navigable waters. The plaintiff has not since then been divested of her interest for there is no evidence of anyone obtaining or using the license or enrollment "knowingly or fraudulently," and no interest in a *licensed* vessel was ever transferred to an alien. The court could deny relief on the ground of illegal conduct on the part of the plaintiff but in this case public policy does not require it. The court does not decide whether in an action for an accounting against the other partner, which action he chose to defend, the plaintiff could still prevail. *Braga v. Braga,* (Mass. 1943) 51 N.E. (2d) 429.

TRUSTS—POWER OF COURT TO ORDER SUPPORT OF WIFE OR CHILDREN OF BENEFICIARY UNDER DISCRETIONARY TRUST—The will of John T. Sullivan provided for a trust fund in the hands of his executors, the income to be used for the support and maintenance of his invalid son, "as it is received or as his needs may require," and any part of the res to be applied to the same use if, in the judgment of the executors, it is necessary. The executors were given "full and uncontrolled discretion as to the application of the said income and trust estate for the uses aforesaid." The beneficiary's wife instituted this action to compel trustees to pay sufficient sums for the support of herself and her invalid son. The district court found that the plaintiff was in need of such support and ordered defendant trustees to pay her fifty dollars per month. *Held,* reversed and remanded. Deciding the point for the first time in this jurisdiction, a discretionary trust for the support of a named beneficiary can be reached to satisfy his wife's or child's claim for support. "Uncontrolled discretion" has the effect merely of dispensing with reasonableness as a test of the trustee's conduct, but does not deprive the court of the power to interfere when the trustee fails to carry out duties under the trust as contemplated by the settlor. In such case, the court may direct him to act or refrain from acting, set aside a transaction in which he has acted, hold him liable for the results of his action or inaction, or remove him, but it may not substitute its discretion for that of the trustee as was done by the district court. *In re Sullivan's Will,* (Neb. 1943) 12 N.W. (2d) 148.[1]

WILLS — DEVOLUTION OF INTESTATE PROPERTY WHERE WIDOW ELECTS TO TAKE BEQUEST UNDER WILL GIVEN IN LIEU OF DOWER AND ALL OTHER CLAIMS — Testator directed his executor to assign certain shares of stock in trust for his wife to pay the income therefrom to her for life; said provision to be "in lieu and bar of dower and any and all claims my wife may

[6] 172 Mass. 476, 52 N.E. 631 (1899).

[1] A note discussing the power of the court to interfere in a discretionary trust may be found in 16 TULANE L. REV. 299 (1942).

have against my estate and in fulfillment of a certain antenuptial agreement." On death of the wife the principal of the trust was to be divided equally among surviving sons and daughters, and the issue of any then deceased to take by representation. The residue of testator's estate was likewise to be assigned in trust to pay income to his sons and daughters for a term of ten years, at the end of which time the surviving sons were to get their equal share of the said residuary estate, plus accumulated interest, issue of any deceased son to take an equal share by right of representation, and to continue to pay interest on their respective shares to each of testator's surviving daughters for life; on the death of any of said daughters to convey her share to any surviving husband, or, if none, to any surviving issue. The entire estate has been distributed according to the terms of the will, except the one-fifth share of testator's daughter Rebecca, who recently died without leaving a husband surviving her and without lineal descendants. This suit in equity is brought by Rebecca's executrix, and others, to compel trustee under testator's will to distribute the balance of the trust fund to testator's heirs at law and next of kin. *Held*, the property remaining in the trust is intestate property belonging to testator's estate, and as such is distributable to testator's heirs and next of kin determined as of the date of his death. The bequest to testator's widow was, in effect, a gift conditioned upon waiver of her statutory rights to her husband's property, and, having made her election to take under the will, the widow (and her administrator) is barred from thereafter asserting a claim to any of testator's property passing by intestacy. The court, therefore, directs distribution of the fund to the heirs or legal representatives of testator's five children, all of whom are now deceased, but who were testator's sole heirs-at-law and next of kin at the time of his death. *Huxley, et al. v. Security Trust Co.*, (Del. 1943) 33 A. (2d) 697.[1]

[1] Cf. generally 68 A.L.R. 507 (1930), 93 A.L.R. 1384 (1934).