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ABSTRACTS

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ADMINISTRATIVE LAW—NECESSITY OF "FINDING" BY ADMINISTRATIVE AGENCY ON "JURISDICTIONAL" QUESTION—The Interstate Commerce Act confers upon the Interstate Commerce Commission authority to issue certificates of public convenience and necessity allowing any carrier subject to the act to

abandon "all or any portion" of its line of railroad.[1] But the act also provides that authority "shall not extend" to the abandonment "of street, suburban, or interurban electric railways, which are not operated as part or parts of a general steam railroad system of transportation." [2] After a hearing, the Interstate Commerce Commission granted a certificate to the New York Central Railroad Company authorizing it to abandon an electric branch line running between Van Cortlandt Park Junction, New York City, and Getty Square, Yonkers, New York, because the operation of the line is an "undue and unnecessary" burden on interstate commerce. The commission failed, however, to make any findings concerning the issue of whether or not this electric branch line "operated as a part or parts of a general steam railroad system of transportation" within the meaning of § 1 (22) of the act. The question of jurisdiction was not raised at the hearing but it was presented in petitions for reconsideration, which the commission denied. The district court reviewed the evidence and, relying on the fact that passengers commuting between New York and Yonkers had to be transferred to other lines in order to get them into Grand Central Station, concluded that the operation of the electric branch line was "intertwined with the operation of the system as a whole," and sustained the commission.[3] *Held*, reversed. The court, speaking through Mr. Justice Douglas, said, "Congress has withheld from the Commission any power to authorize the abandonment of certain types of railroad lines. It is hardly enough to say that the Commission's orders may be set aside by the courts where the Commission extends its authority. The Commission has a special competence to deal with the transportation problems which are reflected in these questions. The Congress has entrusted to the Commission the initial responsibility for determining through application of the statutory standards the appropriate line between the federal and state domains. . . . The sacrifice of these legitimate local interests may be as readily achieved through the Commission's oversight or neglect . . . as by improper findings. The insistence that the Commission make these jurisdictional findings before it undertakes to act not only gives added assurance that the local interest for which Congress expresses solicitude will be safeguarded. It also gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject." [4] Frankfurter, Reed and Jackson dissented.[5] *City of Yonkers v. United States*, (U.S. 1944) 64 S. Ct. 327.[6]

APPEARANCE—WHETHER DEPOSITION INTENDED TO BE USED ONLY AT HEARING ON PLEA IN ABATEMENT MAY CONSTITUTE GENERAL APPEARANCE—In an action by plaintiff to recover on a loan, defendant appeared specially, filing a plea in abatement in which he claimed residence in California.

[1] 49 U.S.C. (1940) § 1(18), (19), (20), 24 Stat. L. 379 (1887), 41 Stat. L. 477-478 (1920).

[2] 49 U.S.C. (1940) § 1(22).

[3] Public Service Commission of N.Y. v. United States, 50 F. Supp. 497 (1943).

[4] Principal case at 331.

[5] Mr. Justice Frankfurter wrote a dissenting opinion based on the theory that a formal finding by the commission on the jurisdictional point was necessary, but, if the commission failed to make such finding, it was in order for the court to do so.

[6] See 55 HARV. L. REV. 279 (1941) and annotation in 146 A.L.R. 209 (1943).

The trial court rendered judgment that the action abate. From this judgment plaintiff appeals, contending that defendant entered a general appearance because he served notice to take a deposition "to be used in evidence on the trial of said cause," [1] and the record shows that the deposition was published on his motion. *Held*, judgment affirmed. Had the defendant intended to use the deposition in a trial on the merits, then the motion to publish it might have constituted a general appearance. Whether a defendant may make a general appearance by notice of taking a deposition and the publication thereof depends on the purpose for which he intends to use it. At the time defendant's notice to take deposition was given and the motion for publication was made, a plea in abatement was pending and the contents of the deposition show that it was "usable only and could have been intended to be used only" [2] at the hearing on the plea in abatement. This did not constitute a general appearance. *Donnelley v. Thorne*, (Ind. App. 1943) 51 N. E. (2d) 873.

CONFLICT OF LAWS—WILLS—APPLICABILITY OF LAW OF TESTATOR'S DOMICILE TO SHOW HIS INTENT IN REGARD TO LAND SITUATED ELSEWHERE —Humphrey R. Wagar, a resident of Michigan, died in 1916, leaving his property in trust, the income to go to his wife, his children and his four grandchildren, and the principal after the death of the survivor of his children, to be divided equally among his grandchildren and "in case of the death of any of said grandchildren, prior to the time of the decease of the survivor of my children, then and in such case, the share or shares of the said deceased grandchild shall be divided among the legal heirs of said grandchild share and share alike." The survivor of the children died in 1939, and one grandchild died in 1915, leaving as survivors a full sister, plaintiff here, and a half brother, not a descendant of testator, who is the defendant. Part of the property was in Michigan, part in the District of Columbia. The question before this court is who, within the meaning of the will, are the heirs of the deceased grandchild. The will was probated in Michigan and the courts, after a series of trials and appeals,[1] decided that the legal heirs of the deceased grandchild are to be determined as of the time of the death of the survivor of testator's children; and that the legal heirs as of that date are the half brother and the full sister of the deceased grandchild.

This suit was filed in the District of Columbia to secure distribution of the part of the residue located there, and the court came to the same result as to District of Columbia property as the Michigan court reached as to Michigan property. An appeal was taken by plaintiff who contends that the controlling law as to the devolution of title and the determination of heirship is that of the place where the land lies, at the time of the testator's death, and that that law excludes half bloods from inheritance if a full blood is living unless the property is from a common ancestor. *Held*, affirmed. The decision of the Michigan court was not res judicata, for the rule is that the law of the situs of real property governs its descent, alienation, transfer, and the effect and construction of

[1] Principal case, p. 874.

[2] Id., p. 875.

[1] In re Wagar's Estate, 292 Mich. 452, 290 N.W. 865 (1940); In re Wagar's Estate, 295 Mich. 463, 295 N.W. 227 (1940); In re Wagar's Estate, 302 Mich. 243, 4 N.W. (2d) 535 (1942).

wills and other conveyances. But the intent of the testator is paramount in all interpretations of wills, and "in discovering his intent, from the words used by him in his will, the controlling meaning of such words are, generally those declared by the law of testator's domicile." [2] The law of Michigan, with regard to the facts here involved, has defined the word heirs to include half bloods. The word heirs as used in the testator's will describes the class of beneficiaries which is to take and is a word of purchase, as distinguished from one of technical meaning which must be determined by the law of the situs. Consequently, the Michigan interpretation prevails. *Greenwood v. Page*, (D.C. App. 1943) 138 F. (2d) 921.[3]

CONTRACTS—CHARITABLE SUBSCRIPTIONS—REQUIREMENT OF CONSIDERATION—Henry A. and Nannie H. Floyd were solicited to make a contribution for Transylvania University, and when the Floyds professed an interest in other charitable institutions supported by the Christian Church, the solicitor drew up three documents in which the signer promised to pay a certain sum to each of the three institutions, one the university, who are plaintiff-appellees here. The notes were to come due sixty days after the death of the survivor of the Floyds, who signed the notes. The consideration recited is the signer's interest in Christian benevolence in one case and in Christian education in the other two cases, and "the gifts and pledges of others" in all three cases. The Floyds are now dead and appellees brought three actions, heard together here, against Henry Floyd's executor on their promissory notes, and obtained a judgment in the lower court from which defendant-appellant appeals. The evidence failed to show either that the Floyds induced others or were induced by others to subscribe, or that the three institutions were induced to act or incur obligations on the strength of the pledges in question but the chancellor held that the documents were not testamentary and that they were supported by a valuable consideration. Appellant claims that the documents are testamentary and therefore unenforceable for want of the formalities required for wills; or if they are promissory notes, they are unenforceable for want of consideration. *Held*, reversed and remanded. Mutual subscription is not valuable consideration, although the promise may be binding when the agreement is between two contributors and the project is one that depends on contributions for existence, or when it has been relied upon. This court and others have, as a matter of public policy, gone out of their way to hold such charitable subscriptions good, but to hold this one good, without consideration, would amount to giving effect to a testamentary instrument without requiring the requisite formalities, and would be against public policy. *Floyd v. Christian Church Widows and Orphans Home of Kentucky*, (Ky. App. 1943) 176 S.W. (2d) 125.[1]

[2] Principal case at 923-924.

[3] On subject of law governing intent of testator, see note in 19 N.Y.Univ.L.Q. 216 (1942).

[1] See "Contracts—Charitable Subscriptions—Consideration," 29 GEO. L. J. 245 (1940), 4 UNIV. NEWARK L. REV. 407 (1941); "Charitable Subscriptions—Adequacy of Consideration and Definiteness of Promise," 27 MICH. L. REV. 88 (1928); "Charitable Subscriptions—Promissory Estoppel," 22 MICH. L. REV. 260 (1923), 23 MICH. L. REV. 910 (1925).

CRIMINAL LAW—INTERPRETATION OF THE FEDERAL PROBATION ACT—One Roberts pleaded guilty to a federal crime and the district court entered judgment against him and sentenced him to serve two years in a federal penitentiary and to pay a $250 fine. The execution of sentence was suspended under authority of the Probation Act,[1] conditioned upon payment of the fine. The fine was paid and Roberts was released on probation for a five-year period but, after four years, the court held a hearing, revoked probation, set aside the original sentence of two years and imposed a new three-year sentence. The circuit court of appeals affirmed [2] and certiorari was granted. The question raised is whether, under proper interpretation of the Probation Act, a judgment, the execution of which has been postponed, may be set aside and a new judgment for a longer period entered upon revocation of probation. *Held*, in the negative. Section one of the act gives the court power "to suspend the *imposition* or *execution* of sentence and to place the defendant upon probation . . . ." [3] This was intended to give the trial judge a choice between imposing sentence before probation is granted and imposing it after probation is revoked. Section two says that the court "may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." To read this, as did the government, as authorizing the trial court to impose any sentence which might originally have been imposed, thereby implying power to revoke the old sentence, is to eliminate one of the methods of imposing sentence defined in section one and render part of that section meaningless. Effect may be given to all sections of the statute by construing it as not permitting an increase of a definite term of imprisonment fixed by a prior valid sentence. Further, such construction is in accord with the legislative intent as shown by the history of the act, and enables the courts to carry out the purpose of the act. Frankfurter, Stone and Reed dissented. *Roberts v. United States*, (U.S. 1943) 64 S. Ct. 113.

CRIMINAL LAW AND PROCEDURE—EVIDENCE—ADMISSIBILITY IN EVIDENCE OF NONCONTRABAND GOODS ILLEGALLY OBTAINED—The defendants, Richter Jewelers, Inc., the president and manager of the corporation, and a clerk in the store, were charged with having published a misleading advertisement in violation of section 421 of the Penal Law.[1] They were found guilty by the trial court and the decision was affirmed by the appellate division. This appeal was brought to challenge the admissability in evidence of merchandise consisting of a ring and price tag which the defendants claimed had been unlawfully procured by an inspector of weights and measures of the department of markets of the City of New York. The defendants' claim is that the admissibility of such evidence is a violation of the rights, guaranteed by the Constitution of New York, "to be secure . . . against unreasonable searches and seizures" [2] and not to be compelled to testify against themselves.[3] They distinguish their case from *Peo-*

[1] 43 Stat. L. 1259-1261 (1925); 18 U.S.C. (1940) §§ 724-728.
[2] 131 F. (2d) 392 (1942).
[3] 43 Stat. L. 1259 (1925; 18 U.S.C. (1940) § 724. (Italics the Court's).

[1] 39 N. Y. Consol. Laws (McKinney, 1938) art. 40, § 421.
[2] 2 id., art. 1, § 12.
[3] Id., art. 1, § 6.

ple v. Defore,[4] already decided on this point in New York, on the ground that there the goods seized were contraband, while here they were articles lawfully possessed by the defendant. *Held*, decision of the appellate division affirmed. For the purpose of applying the rule that a court will not look into the manner in which evidence has been obtained in considering its admissibility in a criminal trial, there is "no adequate basis in reason or authority" [5] for a distinction between evidence which is contraband and that which is property lawfully in the possession of the defendant.[6] *People v. Richter's Jewelers, Inc.*, (N.Y. 1943) 51 N.E. (2d) 690.

EVIDENCE—ADMISSIBILITY OF WRITING EXPRESSIVE OF PAST KNOWLEDGE—In a contract action for money allegedly lent defendant's intestate, plaintiff, while testifying, "refreshed his memory" from a "little red diary" in which he kept informal accounts, including one with the defendant's intestate. After cross examination, plaintiff's attorney offered the book in evidence and it was admitted over the exception of the defendant. *Held*, exception overruled, but only because the defendant was unable to show that he was harmed, the evidence being merely cumulative. On the merits of the ruling the supreme court refused to agree with the decision below. The rule in this jurisdiction is that, unless admissible on other grounds, a writing which revives the witness's recollection may not even be shown to the jury, but the testimony must be to the fact as the witness remembers it; and a writing which is a record of past knowledge may be read or shown to the jury, at the judge's discretion, and may be adopted by the witness as his testimony, but it may not be admitted in evidence. Here the evidence was clearly not admissible on any other ground. *Bendett v. Bendett*, (Mass. 1943) 52 N.E. (2d) 2.

FEDERAL COURTS—REMOVAL OF CAUSES—FAIR LABOR STANDARDS ACT—PROVISION THAT SUIT MAY BE MAINTAINED IN ANY COURT DOES NOT AFFECT RIGHT TO REMOVAL UNDER REMOVAL STATUTE—The plaintiff's action to recover wages, overtime compensation and liquidated damages under the Fair Labor Standards Act was brought in a state court and removed to the federal district court at the instance of the defendant. Plaintiff moved to remand the case to a state court, raising the question whether the right of removal under section 28 of the Judicial Code [1] is preluded by the provision of section 16(b) of the Fair Labor Standards Act [2] which authorizes an action of this character to be "maintained in any court of competent jurisdiction." The plaintiff argues that (1) there being a divergence of judicial opinion on the subject, the rule should be applied that substantial doubt as to jurisdiction of a removed case should be resolved in favor of remand; and that (2) since state and federal courts are

[4] 242 N. Y. 13, 150 N. E. 585 (1926).
[5] Principal case at p. 693.
[6] The court deals also with the problem of the effect of previous interpretation of a statute after the statute has been made a part of the constitution.

[1] 28 U.S.C. (1940) § 71.
[2] 29 U.S.C. (1940) § 216(b).

vested with concurrent jurisdiction of suits of a civil nature arising under the laws of the United States except where Congress has expressly limited jurisdiction to the federal courts, the provision of the act authorizing actions thereunder to be "maintained in any court of competent jurisdiction" is superfluous and without significance unless it be interpreted as intended to amend or repeal pro tanto the Removal Statute.

Held, motion to remand denied. The rule that substantial doubt as to jurisdiction should be abrogated in favor of remand is not applicable, where the decision on the motion, as here, requires interpretation of an Act of Congress. It is necessary to say that section 16(b) of the Fair Labor Standards Act abrogates the right of removal in order to give it effect, for that section makes an employer liable to his employee for unpaid wages, for an "additional equal amount" and for "a reasonable attorney's fee," and section 256 of the Judicial Code [3] vests exclusive jurisdiction in the courts of the United States "of all suits for penalties and forfeitures incurred under the laws of the United States." "By explicitly providing for concurrent jurisdiction of state courts it was obviously the purpose of Congress to dissipate any doubt as to the right and duty of state courts to entertain jurisdiction of suits arising under the Act, even though the extra recovery authorized should be judicially determined to be in the nature of a penalty within the meaning of Section 256 of the Judicial Code." [4] *Cox v. Gatliff Coal Co.*, (U.S.D.C. 1943) 52 F. Supp. 432.[5]

GRAND JURY—SYSTEMATIC EXCLUSION OF WOMEN FROM GRAND JURY AS GROUND FOR QUASHING INDICTMENT—Defendant was indicted by a grand jury selected by the clerk, his deputies and the several jury commissioners of the Federal District Court of Iowa. He moved to quash the indictment on the ground that women had been "arbitrarily, purposefully, intentionally, systematically and entirely excluded" from the jury. *Held,* motion sustained.[1] Jurors in federal district courts are to be selected according to the law of the state where each is located.[2] Persons eligible for selection in Iowa are those qualified to vote,[3] including women, by decision of the Iowa courts since adoption of the Nineteenth Amendment to the Federal Constitution. Though there is no constitutional provision prohibiting one sex from being excluded, and little authority on the point,

[3] 28 U.S.C. (1940) § 511.

[4] Principal case at p. 484.

[5] See "Removal of Employer Suits under the Fair Labor Standards Act," 36 ILL. L. REV. 787-791 (1942), and "Removal of Employer Suits under the Fair Labor Standards Act," 26 MINN. L. REV. 134-135 (1941).

[1] The court first decided that where, as here, the defendant had not had an opportunity to challenge the regulation of the selection earlier, a motion to quash the indictment was timely.

[2] "Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, subject to the provisions, hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the court of the United States are summoned." 28 U.S.C.A. (1928) §§ 411, 412, 419. Jud. Code § 275.

[3] Iowa Code (Reichmann, 1939) § 10842.

this court will follow the dictum in *Glasser v. United States* [4] where it was said that the proper function of the jury requires that it be a body representative of the community, and, though the selecting body may exercise its discretion to select competent jurors, it cannot do so to the exclusion of a whole class or group in the community. To exclude women from jury service is exclusion of half of the population and amounts to discrimination sufficient to sustain a motion to quash the indictment. *United States v. Roeming*, (U.S.D.C. 1943) 52 F. Supp. 857.

LABOR—NATIONAL LABOR RELATIONS ACT—EFFECT OF FRAUD IN PROCURING VOTE OF EMPLOYEE FOR UNION BARGAINING AGENT—The N.L.R.B. petitioned this court for an order enforcing its own "cease and desist" order which directed respondent to bargain with a local union of the C.I.O. Respondent objects that the C.I.O. local was never duly elected as bargaining agent since, in the election held under the auspices of the board, four votes needed for the union's majority were obtained by fraud, and the consent of the four voters is thereby vitiated. Four employees testified that one Capra, an employee organizing for the union, obtained their votes by telling them, in effect, that if they did not join the union, they could not work there any more. The board decided that though this was the fact it was irrelevant to the issue of the union's right to act as a bargaining representative. *Held*, petition denied and order to cease and desist set aside. If the consequences threatened were not a truthful statement of what might follow if the employee refused to join the union, they amounted to fraud. "Fraud . . . will vitiate consent as well as violence, and the Board itself implies that a vote procured by violence should not be counted . . . Section seven [1] confers the right on all employees freely to choose their bargaining representatives and the invasion of that right is as much a wrong when committed by a union organizer as by an employer." [2] To be truthful the consequences stated by Capra should have been stated as conditioned upon the union's getting control; being unconditional, however, they amounted to fraud and, under the act, invalidated the votes.

It is immaterial that there was no proof of Capra's authority to act for the union since, whether authorized or not, the effect on the rights of employees was the same. *National Labor Relations Board v. Dadourian Export Corp.*, (C.C.A. 2d, 1943) 138 F. (2d) 891.[3]

LABOR—NATIONAL LABOR RELATIONS ACT—JURISDICTION OF FEDERAL COURT TO INQUIRE INTO CONSENT ELECTION IN ABSENCE OF ALLEGATION OF USUAL GROUNDS FOR JURISDICTION—The Sun Ship Employees Association, Inc., an independent union, Local No. 2, C.I.O., and the employer entered into an agreement to hold a consent election to determine the appropriate bargaining agent for employees of the company. The agreement provided that the election "be held in accordance with the Act, the Rules and Regulation, and the customary procedures and policies of the Board," that "the determination of the Re-

[4] 315 U.S. 60, 62 S. Ct. 457 (1942).

[1] 49 Stat. L. 452 (1935), 29 U.S.C. (1940) § 157.

[2] Principal case at p. 892.

[3] Principal case noted in 57 HARV. L. REV. 386 (1944).

gional Director shall be final and binding upon any question . . . relating . . . to the election and not specifically covered in this agreement," and that the election be conducted under the direction and supervision of the regional director.

The election was held under this agreement, and after ruling on several disputes arising out of it, the regional director decided that Local No. 2, C.I.O. was the duly elected bargaining agent. The N.L.R.B. refused to hear objections to this ruling in the petition of the association, and thereupon, the association brought this action against it complaining of the conduct of the election. It alleged that the federal court has jurisdiction on the basis of the statute providing for suits and proceedings arising under any law regulating commerce, here the National Labor Relations Act.[1] The district court dismissed for want of jurisdiction and an appeal was taken. *Held*, affirmed. The contract providing for the election was an ordinary private agreement. Although it was executed on a form provided by the board, it was neither imposed by a public body, statute or regulation, nor did it derive its vitality from these sources. The fact that the regional director was to conduct the election is not significant for the agreement might as well have provided that some other reputable citizen act in that capacity. Since this is then a suit for the breach of a private contract, it must be subjected to the usual test for federal jurisdiction. *Sun Ship Employees Association, Inc. v. National Labor Relations Board*, (C.C.A. 3rd, 1943) 139 F. (2d) 744.[2]

MUNICIPAL CORPORATIONS—WHETHER STATUTE AFFECTING MUNICIPAL AFFAIRS OF STATE-WIDE CONCERN TAKES PRECEDENCE OVER HOME RULE CHARTER PROVISION—The city of Grand Island brought a condemnation proceeding under a state statute [1] to acquire certain property within the city for park purposes. Sally Nagle, owner of part of the property, appealed from the award of the appraisers to the district court, and the city appeals from the order of the district court dismissing the action. The question is whether the proceeding should have been brought under the charter provisions [2] in the city's home rule charter, or whether condemnation is a matter of such state-wide concern that the state legislation takes precedence over the provisions of the home rule charter. *Held*, reversed. The Constitution of Nebraska provides that a home rule charter must be consistent with and subject to the constitution and laws of the state.[3] Home rule cities may exercise all the powers connected with a proper and efficient government but subject to the general laws of the state in all but matters of strictly local concern. Condemnation, by reason of the fact that it may affect everyone in the matter of ownership of property and the compensation he is to receive, is a matter of state-wide importance. The provision in the city

[1] 28 U.S.C.A. (1927) § 41(1).

[2] See 91 UNIV. PA. L. REV. 265 (1942) for a case in which the New York Supreme Court in 36 N.Y.S. (2d) 156 (1942) denied a petition to enforce a voluntary arbitration agreement for arbitration by the New York Board of Mediation on the ground that such procedure conflicts with the war policy of the federal government.

[1] Neb. Comp. Stat. (1929) § 16-602.

[2] Neb. Comp. Stat. (1929) § 74-301.

[3] Neb. Const., art. 11, § 2 (1875).

charter, therefore, must yield to the statute. *Nagle v. City of Grand Island*, (Neb. 1943) 12 N.W. (2d) 540.[4]

PRACTICE AND PROCEDURE—WHETHER ERROR IN BRINGING SUIT TO ANNUL INFANT'S MARRIAGE IN NAME OF NEXT FRIEND IS FATAL—Maude Kirby brought an action "in her own right and as next friend of Lois May Kirby Gilliam, an infant" to procure the annullment of the "marriage or purported marriage" of her infant daughter with defendant. Defendant demurred and the circuit court sustained the demurrer. On appeal, *held*, affirmed, without prejudice to the right of the next friend to file in the name of the infant. Under the Virginia statute [1] "an infant wife cannot bring suit in her own name to annul her marriage" but must sue by her next friend. A suit on her behalf must be brought in her name by her next friend, and if it is not so brought, the plaintiff may not amend but is nonsuited because a suit must be brought by one whose interests are involved and the next friend has no interest as a litigant. One justice dissented on the ground that, since the infant was clearly the real party in interest, the defect was purely formal and should have been corrected by amendment. *Kirby v. Gilliam*, (Va. 1943) 28 S.E. (2d) 40.

PROCESS—CAN PLAINTIFF'S ATTORNEY ACT AS PROCESS SERVER UNDER WASHINGTON STATUTE?—Appellants had a default judgment rendered against them in a suit on two promissory notes, and petitioned to have it set aside on the ground that the service was void. The Washington statute provides that "In all cases except when service is made by publication . . . the summons shall be served by the sheriff of the county wherein the service is made or by his deputy, or by any person over twenty-one years of age, who is competent to be a witness in the action, other than the plaintiff." [1] Appellants contend that "other than the plaintiff" was intended to include all persons interested in the outcome of the case, thereby excluding the appellee's attorney. The trial court denied appellant's petition to vacate the judgment. *Held*, affirmed. Following a Minnesota decision [2] summons is not process but only notice to the defendant that proceedings have been instituted and judgment will be rendered against him unless he defends. Such summons may be made by a private person unless the statute otherwise provides. Appellee's attorney is not excluded from eligibility to serve by the Washington statute. *Roth v. Nash*, (Wash. 1943) 144 P. (2d) 271.

TAXATION—EXEMPTION OF CHARITABLE RESIDUE WHEN TRUSTEE HAS POWER TO INVADE IT FOR LIFE-TENANT—Testator provided in his will for the residue of his estate to be held in trust, the income to go to his wife for life and the principal, except $100,000, to go to certain charities. Trustee was given

[4] On municipal powers in general see "Construction of Municipal Powers," 28 IOWA L. REV. 109 (1942).

[1] Va. Code (1942) § 5331. "Any minor entitled to sue may do so by his next friend."

[1] Wash. Rev. Stat. (Remington, 1931) § 225.

[2] First Natl. Bank of Whitewater v. Estenson, 68 Minn. 28, 70 N.W. 775 (1897).

the power, under the will, to invade the principal if it shall "in its sole discretion deem wise and proper for the comfort, support, maintenance and for happiness of my said wife," and the testator expressed the wish in the will that the discretion be exercised "with liberality." The trustee, petitioner here in filing estate and income tax returns, attempted to deduct the estimated amount which would ultimately go to charity from the gross estate, under § 303 (a) (3) of the Revenue Act of 1926; [1] and the gains received from a sale of securities from the 1937 income under § 162 (a) of the Revenue Act of 1936.[2] The commissioner of Internal Revenue disallowed the deductions; on petition for review, the Board of Tax Appeals allowed them, and the Court of Appeals reversed the Board of Tax Appeals. On certiorari this court *held*, affirmed. Implementing § 303 (a)(3), the Treasury Regulations provide that where a trust is created for both charitable and private purposes the charitable bequest, to be deductible, must have, at the testator's death, a value "presently ascertainable, and hence severable from the interest in favor of private use," and where the trustee has a power to divert the property from the charity, "deduction will be limited to that portion, if any of the property or fund which is exempt from the exercise of such power." [3] Congress and the Treasury require a highly reliable appraisal of the amount that the charity will receive, and the burden is on the taxpayer to show that "the extent of the invasion of the corpus depends upon some readily ascertainable and reliably predictable facts" [4] and are thus accurately calculable. The showing of petitioner that testator's widow was sixty-seven years of age, had a substantial independent income, and no dependent children, and that the laws of Massachusetts, where the will was made and property existed, might restrict the trustee's discretion, did not sustain this burden of proof. The case is distinguished from *Ithaca Trust Co. v. United States* [5] in that there the extent to which the principal might be withdrawn was limited to the maintenance of the widow's prior way of life. The income deductions were also not permissible since section 162 permits deductions of only that part of the gross income which is "permanently set aside for charity." *Merchants' National Bank v. Commissioner of Internal Revenue*, (U.S. 1943) 64 S. Ct. 108.

TAXATION—WHETHER ATTORNEY'S FEES INCURRED IN UNSUCCESSFULLY CONTESTING POSTMASTER'S FRAUD ORDER ARE "ORDINARY AND NECESSARY" BUSINESS EXPENSES—Respondent was a dentist engaged in the business of selling false teeth by mail. In filing income tax returns for 1937 and 1938 he sought to deduct from his gross income attorney's fees and other legal expenses incurred in unsuccessfully contesting the Postmaster General's fraud order which forbade the Postmaster of Chicago to pay money orders drawn to respondent, and directed that all letters addressed to him be marked "Fraudulent" and returned to the sender. Respondent claimed these deductions on the theory that under section 23(a) of the Revenue Acts of 1936 and 1938, such

[1] 44 Stat. L. 72 (1926).
[2] 49 Stat. L. 1706 (1936).
[3] 80 Treasury Regulations (1937) art. 44 (U.S. Office of the Department of Internal Revenue).
[4] Principal case at 58.
[5] 279 U.S. 151, 49 S. Ct. 291 (1929).

expenses were "ordinary and necessary" expenses incurred in carrying on his business.[1] The Tax Commissioner denied the deductions on the ground that the expenses were not ordinary and necessary to respondent's business. The Board of Tax Appeals affirmed,[2] and the circuit court reversed and remanded.[3] On certiorari, *held*, affirmed. Given their commonly accepted meaning, "ordinary and necessary" cover these expenses. "For respondent to employ a lawyer to defend his business from threatened destruction was 'normal'; it was the response ordinarily to be expected. . . . Since the record contains no suggestion that the defense was in bad faith or that the attorney's fees were unreasonable, the expense incurred in defending the business can also be assumed appropriate and helpful, and therefore 'necessary'." [4]

The argument that dentists in the mail order business do not ordinarily and necessarily attempt to sell false teeth by fraudulent representations, and that, this dentist having done so, he cannot claim his litigation expenses as "ordinary and necessary" is not controlling. The fraud order threatened not only respondent's selling methods, but also the existence of his lawful business; under our system of jurisprudence he was not bound to believe that "a fraud order destroying his business was justified by the facts or the law."

It is not necessary here, as in some cases, to narrow the meaning of section 23(a) "in order that tax deduction consequences might not frustrate sharply defined national or state policies proscribing particular types of conduct." The single policy of the act under which the order was issued [5] is to protect the public from fraudulent practices committed through the mails, not to punish the individual offender, nor to discourage him from employing counsel. *Commissioner of Internal Revenue v. Heininger*, 320 U.S. 467, 64 S. Ct. 249 (1943).[6]

TORTS—NEGLIGENCE—LIABILITY OF HOCKEY RINK OPERATOR FOR INJURY TO SPECTATOR BY FLYING PUCK—A spectator at a hockey game, having voluntarily seated herself in an unscreened box at the side of the rink, was struck by a flying puck and injured thereby. She brought action to recover damages from the operator of the rink on the ground that it was negligent in failing to screen the box, and in not warning the spectators of the danger of flying pucks. The jury in the district court, under instructions from the court, brought in a verdict for the plaintiff and the operator appeals, contending that: (1) a verdict

[1] Revenue Act of 1936, c. 690, 49 Stat. L. 1658.

"Section 23. Deduction from Gross Income.

"In computing net income there shall be allowed as deductions:

"(a) Expenses.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ."

Section 23(a) of the Revenue Act of 1938, c. 289, 52 Stat. L. 460, is identical with Section 23(a) of the Revenue Act of 1936.

[2] 47 B.T.A. 95 (1942).

[3] 133 F. (2d) 567 (1943).

[4] Principal case at p. 252.

[5] 39 U.S.C. (1940) §§ 259, 732.

[6] Principal case noted in 57 HARV. L. REV. 109 (1943). See also "Deduction of Business Expenses: Illegality and Public Policy," 54 HARV. L. REV. 852 (1941) and "Deductibility of Attorney's Fees From Gross Income," 28 IOWA L. REV. 97 (1942).

should have been directed in its favor on the evidence that it had acted in conformity with the custom and approved methods of prudent ice rink operators, and in so acting, was not negligent; (2) a verdict should have been directed in its favor on the ground that, as in baseball, knowledge of the risks of danger incident to the game is imputable to all spectators and, as a matter of law, they assume those risks; and (3) the jury was improperly instructed that the appellee assumed only those risks of which she was aware, and was not instructed, as it should have been, as to the duties of the appellee under the defense of contributory negligence. *Held*, reversed. The operator of a hockey rink is not an insurer, but owes to its patrons the duty of reasonable care to protect them from dangers of which they are unaware, and of which they have not assumed the risk. The customs of the business are not an absolute test of what constitutes reasonable care, but were properly submitted to the jury as evidence of reasonable care. The spectators assume the risks incident to the game when they know or reasonably should know of them, and the jury should have been so instructed, but knowledge of such risks is not imputable to spectators in hockey as in baseball, for the reason that the risks incident to hockey cannot be said to be so much a matter of common knowledge. The jury should have been further instructed that it was the duty of the spectator to use reasonable care to protect herself from known dangers and dangers of which a reasonable person would have been aware. *Tite v. Omaha Coliseum Corporation*, (Neb. 1943) 12 N.W. (2d) 90.

WILLS—EFFECT OF A SALE OF DEVISED LAND BY TESTATOR WHO TAKES BACK A PURCHASE MONEY MORTGAGE—This action was brought by the administrator against the residuary legatee and others for the construction of the will of Frances Foulk. Testatrix, in her will, devised equal shares in an undivided one-half interest in certain land to three of the defendants. She made Mayrell Mary Thompson residuary legatee. Shortly thereafter she executed a conveyance of the interest devised in the will and received therefor cash in the amount of $439.88 and a note with a mortgage to secure it. The trial court awarded the cash plus the note and mortgage to the devisees and the court of appeals reversed this decision. On appeal to the supreme court, *held*, affirmed. It is provided by statute that when a testator makes a conveyance of land already bequeathed or devised, it shall not be deemed a revocation of the bequest, but the bequest shall pass the actual estate or interest of the testator which might have gone to his heirs at law. But if the provisions of the instrument by which the alteration is accomplished are wholly inconsistent with the previous devise, so long as it is not conditional then the devise is revoked.[1] Thus if a partial interest of the subject of the devise is subsequently disposed of, the will is effective as to the remaining interest; but where the whole title is conveyed away, as here, the devise is wholly nullified. The mortgage executed by the grants was a mere security for the note given for the balance of the purchase price. *Lewis v. Thompson*, (Ohio 1943) 52 N.E. (2d) 331.[2]

[1] Ohio Gen. Code (Page 1938) §§ 10504-51, 10504-52.

[2] See 17 TENN. L. REV. 960 (1943) for a case when stock was bequeathed by will and testator later sold the stock to the devisee, who gave promissory notes for it. In a suit to cancel the unpaid notes after the death of testator, court held for plaintiff.