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NOTES

CONFESSION IN CRIMINAL LAW — VOLUNTARY OR INVOLUNTARY.— This paper is primarly concerned with the general rules followed to determine whether a confession being used by the state in a criminal trial is voluntary. As a general rule which we will see later is to the effect that a confession that is not voluntary will not be admissible in a criminal trial.

It may be well, at the outset to define the word confession so as there will be no confusion as to its meaning. A Tennessee court defined confession as follows: "A confession is a voluntary statement made by a person charged with the commission of a crime, wherein he acknowledges himself to be guilty of the offense charged." [1] Thus we see there are three elements in a confession: First, it is a voluntary statement; second, it is made by the person who is guilty of the crime; and thirdly, it is an acknowledgment of guilt. This paper is concerned with the first element of the confession, that is, as to its voluntary character.

Many times confession and admissions are confused and thought to be one and the same thing. The distinction between the two is best stated in the words of Corpus Juris Secundum: "The difference between a confession and an admission is that the former, as has been said, is an acknowledgment of guilt while the latter is but an acknowledgment of some circumstance in itself insufficient to constitute guilt, and tending only toward the proof of the ultimate fact of guilt." [2]

1 Collins v. State, 169 Tenn. 393, 88 S. W. (2d) 452 (1935).
2 22 C. J. S. § 816, page 1422.

In the United States as distinguished from many countries a confession can only be used if it is voluntary. In many places this rule is found one of which is the "Encyclopaedia of Evidence" which states: "One of the prime requisites of a confession competent to be proved against the party making it is that it be voluntary and without restraint, coercion or influence of any kind, but if so made it is competent evidence.[3]

The best method for determining the courts' rulings concerning this general rule is to look at a few cases in which the general question has been in issue. In a 1937 Iowa case [4] the court upon the question of voluntary confessions stated that the question was one for the jury to decide and that it should be submitted to them, and also quoting from the decision; "It (the confession) must not be induced by promised benefit or fear of threatened injury or by inquesitorial methods which directly or indirectly menace the life or safety of the prisoner." In this case the treatment complained of was an oral examination that lasted twelve hours, through a complete night, during which the prisoner was not allowed to sleep. As was said the question as to the confession being voluntary was submitted to the jury. The jury found that the confession was voluntary. Thus we see that the court let the jury decide the question about the confession after telling the jury that this was their duty; i.e. to decide the effect to be given to the confession.

In another case where the "water cure" was used to induce the prisoner to sign a confession the supreme court held that this confession so obtained would be inadmissible.[5] In connection with this same question a New York court held that where defendant offered to prove the confession was obtained by beating and mistreatment of said defendant, and the trial court refused to admit this offered testimony, the trial judge had committed error as this testimony was vital in determining the voluntary character of the confession.[6]

Thus it can be said, with authority, that confessions obtained by injuring the prisoner physically in order to induce him to confess will be inadmissible in the trial of the prisoner for the crime to which he so confessed.

In an Alabama case where the defendant was transported from one jail to another, put on a bread and water diet at times and finally after all this a confession was obtained, held that this confession was not admissible because it was clearily involuntary.[7] Thus we see that

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3 The Encyclopaedia of Evidence by Camp and Crowe, Vol. 3, page 301.

4 State v. Hienz, 223 Iowa 1241, 275 N. W. 10 (1937).

5 Joslin v. State, 129 Miss. 181, 91 So. 903 (1922).

6 People v. Alex, 260 N. Y. 425, 183 N. E. 906 (1933).

7 Palmore v. State, 244 Ala. 227, 12 So. (2d) 854 (1943).

physical injury need not be present in order to make a confession involuntary; in other words a confession may be held involuntary even though not obtained through the use of beating and that sort of procedure. Coercion alone, at times, is enough to render a confession involuntary.

In a 1942 Mississippi case where the defendant, after being questioned several times in the course of a few days concerning the murder of his wife, finally confessed and this confession was admitted upon the trial and defendant objected to the admission. From a conviction the defendant appealed assigning as error the admission of this confession, because he alleged that it was obtained forceably and that it was involuntary. The supreme court in affirming the decision of the trial court said, "The confession in the instant case is found to have been properly submitted to the jury, and, being consistent with all the physical facts and circumstances, is found worthy of acceptance by the trial jury.[8] Here the court held that where the questioning was of a reasonable character, and no promises or threats were made to the prisoner to induce said confession, to allow said confession to be used at the trial was not error.

In a Nevada case we see that a promise to release the prisoner is enough to make the confession involuntary if the confession is made because of said promise. In the Nevada case the trial court was upheld by the supreme court when it, the trial court, refused to admit a confession made because of a promise such as the one above stated.[9] From this case it can be said that a confession obtained on a promise of lenience is inadmissible at the trial of the prisoner because such a confession is held by the courts to be involuntary.

Many times the objection to the admission of a confession has been based upon the fact that the arresting officers and the questioning officers did not warn the prisoner that anything that he might say in their presence could and would be used against him in any trial for the crime with which he is charged. To answer this objection a New Mexico court said; "It is not necessary that warning be given the accused, when under arrest, that his extra judicial confession may be used against him, in order to render the same admissible." [10] From this came the rule that any voluntary statement made before arresting officers can be used against the party making said statement even though the prisoner did not know of this fact.

Again the point of physical injury was raised in a Missouri case. Here the defendant was subjected to 18 hours of continuous questioning; stripped and forced to look into two bright lights while being

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8 Cooper v. State, 11 So. (2d) 207, 194 Miss. 592 (1942).
9 State v. Gee Jon, 46 Nevada 418, 211 P. 676 (1933).
10 State v. Archuleta, 29 N. Mex. 25, 217 P. 619 (1923).

questioned. The supreme court held that this confession was not voluntary and because of this not admissible. The conviction was reversed and a new trial was granted.[11]

From the preceeding cases it is seen that a confession is held to be involuntary if the prisoner or accused is physically beaten or abused, or if he is coerced by promises of leniency or freedom. We also see where a confession is obtained by the use of fear it will not be admitted, and that if a prisoner attempts to prove his confession was involuntary such proof must be heard for at least what it is worth.

The final question to be noted here is: Who must decide the question as to whether the confession is voluntary — court or jury?

There are two general rules, as might be expected, that are followed by the states. The first is that the duty to decide this question is upon the court.

Alabama is the leading state taking this view and in an 1894 case the supreme court in passing on the question said; "It is the court's duty to determine the admissibility of confessions, — whether they are voluntary or not, — and it is the jury's province and duty to weigh and consider them." [12] The court went on to say in effect that a confession is merely evidence upon which the court has to pass as to admitting and that the jury could judge said confession after its admission in any light they wished to just as they do any other piece of evidence.

The second theory is that the jury must pass upon the voluntary character of the confession and was settled for Arkansas by the supreme court in the following words; "We are of the opinion that appellant was . . . entitled to an instruction submitting to the jury the question whether or not the confession was freely and voluntarily given without coercion or promises of leniency." [13] This rule seems to be based upon the theory that the jury can in considering the evidence place any weight upon it they feel it deserves and if they feel the confession was not voluntary they will disregard it not withstanding the fact the court admitted it so there is little use in having the court pass upon the question of it being voluntary or not as the jury takes this into consideration anyway.

L. E. Merman.

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11 State v. Ellis, 294 Mo. 269, 242 S. W. 952 (1922).
12 Stone v. State, 105 Ala. 60, 17 So. 114 (1894).
13 Henery v. State, 151 Ark. 620, 237 S. W. 454 (1922).

EQUITY.—*May a Taxpayer Enjoin the Collection of an Unlawful Tax in Illinois?*—The question confronting us in this particular instance is whether a single taxpayer may enjoin the collection or exaction of an unlawful tax, and so we must clarify first the question whether a taxpayer has a sufficient interest to test the validity of tax legislation either at law or in equity. First of all it has been decided by the Supreme Court of the United States that neither a State or a taxpayer has a sufficient interest to contest the validity of Federal expenditures,[1] yet one must distinguish between the right to test the validity of the tax itself, and the right to test the validity of the expenditures for which the tax funds are used. However, by congressional legislation in 1867, a bill was enacted reading that:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." [2]

Nevertheless there has been a growing tendency of late to use the injunction to contest the validity of a tax, especially so in State courts with respect to the contest of the validity of State laws. A New Mexico court, for example, as early as 1926, denied the right of a taxpayer in such an action, but said "there is an apparently increasing tendency to admit the right." [3] The arrival and recognition of declaratory judgments in procedure has added another means of presenting a constitutional issue of this sort, for in this manner the party need not await a law suit, thus allowing penalties to accumulate in the meantime. The original solution to this problem followed this pattern, whereby the taxpayer did not pay the tax, thus forcing the Federal Government to sue, and then alleged the unconstitutionality of the tax Act as a defense. In the meantime penalties accrued. Under modern law however, it appears that if the party who invokes the aid of the court in an action at law can prove the statute is invalid, and as a result that he is in immediate danger of some direct injury as the result of its enforcement, the court will entertain the action.

This problem has been handled in various ways, namely by Declaratory Judgments, by forcing the taxing body to sue the taxpayer thereby testing the validity of the tax as a defense, and by the joinder of several taxpayers in order to enjoin the assessment of an illegal tax on the theory that a multiplicity of suits will render equitable intervention proper thereby persuading the court of equity to overlook the fact that there exists an adequate remedy at law to pay the tax and sue for a refund.[4]

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1 Mass. v. Mellon, 262 U. S. 447, 67 N. E. 1078 (1923).

2 26 U. S. C. A. § 154.

3 Asplund v. Hannett, 31 N. M. 641, 249 Pac. 1074 (1926).

4 Sherman v. Benford, 10 R. I. 559, 26 R. C. L. § 416 (1873).

Therefore by the great weight of authority several taxpayers affected in a similiar manner by an illegal tax or license fee may join in a proceeding in equity to restrain the enforcement of the tax.[5]

As to whether Illinois courts of Equity will enjoin the exaction of an unlawful tax, there is a diversity of opinion which seems to have changed with the years and the progress of taxation. An action by a single taxpayer, it is true, eliminates in many instances the possibility of a multiplicity of suits, thereby necessitating other grounds for equitable intervention. Therefore in a period from 1898 to 1914 Illinois courts held that (a) the collection of an excessive tax will not be enjoined because the complainant's legal remedy for correction does not stay the proceedings, and collection might be attempted before determination of the controversy,[6] and (b) that because a board of review failed to afford the taxpayer the opportunity to show that his property had been overvalued by the assessor, was not a ground for enjoining the collection of said tax, due to the fact that the taxpayer had an adequate legal remedy in a *writ of mandamus*,[7] and (c) the rule that the existence of an adequate remedy at law is a sufficient objection to the jurisdiction of a court of equity was applicable to a bill to enjoin the collection of a tax.[8]

Yet in direct opposition to these theories, it was also decided that courts of equity have jurisdiction to enjoin the collection of taxes assessed on exempt property, even though the owner made no effort or endeavor to avoid the tax either before municipal authorities or in the County Court on an application for judgment for delinquent taxes,[9] and this early decision was again reaffirmed in 1911 when an Illinois court held that equity could and would enjoin the collection of a tax on property exempt from taxation.[10] The distinguishing feature in this type of action is that while no single taxpayer has a sufficient interest to contest the validity of a Congressional Act merely for the purpose of avoiding the tax, they, nevertheless, have the right to enjoin the collection of a tax if by the Congressional Act they were not intended to pay taxes under the Act. Hence in such an action they are not denying the validity of the Act, but only denying that it applies to them, and as a result are enjoining the collection of an unauthorized tax. The general rule that courts of equity will not take jurisdiction to grant relief if redress for the wrong may be had in a proceeding at

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5 Drainage Commrs. v. Kinney, 233 Ill. 67, 84 N. E. 34 (1908); Clark Teachers Agency v. Chicago, 220 Ill. App. 319 (1920).

6 New Haven Clock Co. v. Kochersperger, 175 Ill. 383, 51 N. E. 629 (1898).

7 White v. Raymond, 188 Ill. 298, 58 N. E. 976 (1900).

8 Herschbach v. Kaskaskia Sanitary District, 265 Ill. 388, 106 N. E. 942 (1914).

9 Rosehill Cemetery Co. v. Kern, 147 Ill. 483, 35 N. E. 240 (1893); Siegfried v. Raymond, 190 Ill. 424, 60 N. E. 868 (1901).

10 Moline Power Co. v. Cox, 252 Ill. 348, 96 N. E. 1044 (1911).

law prevails in Illinois, but the instant case (relief from the collection of unauthorized taxes) is deemed an exception and equity assumes jurisdiction. This principle was first applied in the case of *The Chicago, Baltimore & Quincy RR v. Frary* [11] and later upheld in *Viely v. Thompson* [12] as an exception to the general rule that equity will not assume jurisdiction when there is an adequate remedy at law.

In 1883 the case of *Searing v. Heavysides* [13] followed the trend of its predecessors and asserted that despite the fact that the remedy at law was adequate, and the plaintiff might pay the tax and sue for a refund, equity as an exception to the general rule, would enjoin the collection of an unauthorized, unlawful, and improper tax which had been assessed on property and charged to the plaintiff, though in fact the plaintiff did not own said property. "The plaintiff was not bound to anticipate that the assessor would assess to him, property owned by another person. Such assessment made without the plaintiff's knowledge was void, and he is not limited to a remedy before a board of review," but rather is entitled to an injunction to restrain the collection of said tax by the assessor.[14] As recently as 1937 the Supreme Court of the State of Illinois held that equity would take jurisdiction to restrain the collection of a tax assessed against property which the taxpayer did not own at the time of the assessment, or where the property is assessed at an amount grossly in excess of its true value for in either case such a levy would be without authority of law.[15] Again in 1943 the court appeared to follow the old doctrine of *stare decisis* by stating that even though a revenue statute provided means by which the decision of the taxing body could be reviewed, it still was only a cumulative remedy and the taxpayer could proceed in equity unless the party accepts the remedy provided by the statute. Hence, when remedies are provided by statute they are considered as cumulative remedies, and are exclusive only when they have first been invoked by the taxpayer. The court again pointed out that the exception to the general rule by which equity acquires jurisdiction applies only to the illegal and unauthorized imposition of a tax, and not to irregularities in levying a lawful tax. As a result of these findings the court held that equity would enjoin the collection of a tax not authorized by law, or levied on property exempt from taxation, even though there is an adequate remedy at law and no special circumstances authorizing the issuance of an injunction exist.[16]

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11 Supra, 22 Ill. Rep. 34 (1859).

12 Supra, 44 Ill. Rep. 9 (1867).

13 Supra, 106 Ill. Rep. 85 (1883).

14 Moline Power Co. v. Cox, 252 Ill. 348, 96 N. E. 1044 (1911).

15 Pekin Loan Co. v. Soltermann, 365 Ill. 460, 6 N. E. (2d) 857 (1937).

16 Owen Illinois Glass Co. v. McKibbin, Director of Finance, 385 Ill. 245, 52 N. E. (2d) 177 (1943).

In the dictum of the recent case of *Ames v. Schlager, County Collector* [17] the court clarified the situation of a taxpayer seeking an injunction by pointing out that a court of equity has jurisdiction to enjoin a levy, extension, or collection of a tax not authorized by law, or assessed on property either exempt or not subject to the tax imposed, or levied by persons without right or color of authority, or where fraud intervenes in the assessment or levy, or where a tax is imposed on an occupation not subject thereto, but that such an unauthorized and void tax must be distinguished from an irregular or erroneous but lawful tax which a court of equity will not enjoin. The court did appear to reverse itself in one respect, perhaps unconsciously, when it held that the illegality of a tax will not alone justify interposition of a court of equity to restrain its collection, and before such relief can be granted there must exist special circumstances which will bring the case under some acknowledged head of equity jurisprudence.

John F. Power.

JOINT VENTURES.—The law of joint ventures has yet to reach its maturity for the association that is called the joint venture, is still in its infancy. The joint venture was not created or recognized by the courts until around the first of the 19th century. The first case where the court referred to the joint venture as a separate business association was in the case of *Ross v. Willett.*[1] Ever since then the joint venture has grown although in the last 10 years it has experienced the most rapid period of its growth. The joint venture has been defined as an association of two or more persons to carry out a single business enterprise for profit.[2] The partnership and the joint venture are so close *akin* that many of the courts applied the partnership law to the joint venture; however, there are a few fundamental differences in the two associations. The outstanding difference between a partnership and the joint venture is that the joint venture relates to a specific line of transactions.[3] In contrast, a partnership relates to a more general and a continuing business.[4] It is also noted that the associations of a partnership are of a more formal, while the joint venture is of a more informal nature. Because of the aforestated reason many associations have not desired to take upon themselves that distinction which follows the partnership distinction. There are various other differences which will be discussed further on in the paper.

To solve a specific *problem* we might assume this set of facts: A an experienced stock market speculator at B's request agrees to invest and

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17 Supra, 386 Ill. 160, 53 N. E. (2d) 937 (1944).

1 Ross v. Willett, 27 N. Y. S. 785 (1894).

2 Tompkins v. Commissioner of Internal Revenue, 97 F. (2d) 398 (1938).

3 Clark v. Sidway, 142 U. S. 682 (1890).

4 McSherry v. Market Corp., 129 Cal. App. 330, 18 P. (2d) 776 (1933).

reinvest 10,000 dollars of B's money which B tendered to A for that purpose, and they agree to split the profits 50% to A. and 50% to B. In the course of the next year A pays to B 6,500 dollars and subsequently B dies and his administrator sues A for an accounting. What was the relationship between A and B? What difference would it make in the accounting proceeding? A careful study of the facts and the intentions of the parties is required. B in tendering the $,1000 to A did not stipulate that she was to retain title over the money, or dominion, over the sum tendered to A for investment; or, that the sum tendered would be the amount of her equity in the profits. The tendering of the $1,000 to A amounted only to a contribution to the association that would be formed with A when A contributed his time and services. It was not the intention that the principal, who was B, would retain control over the speculator, who was A. This would take the association that would be formed out of the class of a principal and an agent for in an association the principal has control over the agent. This was not the association's intention: A and B merely made contributions into the venture and did not intend for one to act as principal and the other as agent. B tendered the sum to A to form a venture which was the purpose of investing and reinvesting and dividing the profits. This limited the business which the association intended to carry on. If the intention had been to establish a speculation partnership it would have been stated in the agreement. To do this, the parties would have had to create an association with more broad powers for the investing and reinvesting of other persons sums tendered to it to fall in with the above generally accepted definition of a partnership that a partnership carries on a more general business while the joint venture carries on a more specific line of business or transactions. All the parties intended to do was to invest the sum that B tendered in to the association. This did not intend to carry on the general business of speculation. Next we come to the division of the profits. B in her agreement with A did not refer or intend for the division of the profits to act as a compensation to A as an agent for his skill and time rendered in the association. B agreed that the profits should be divided equally between the parties inferring that A was to receive his profits because of his equitable ownership in the business. From this it can be plainly seen that A and B agreed and intended to unite their efforts and contributions to secure profits from their venture and divide them equally.

In summarizing the conclusion drawn from the reasoning above, let us set out the fundamental results reached. 1. B in contributing the sum of money to A acted as a contribution and not a tendering over of the sum to be invested. 2. That it was the intention of the parties to enter into a special or limited business. 3. That the share of the profits that A was to receive was not to act as a compensation but an equitable share in the profits as was his equitable share in the business.

In view of these conclusions reached, the court in *Lesser v. Smith* ruled that the association formed was that of a joint venture.[5] In the case, the plaintiff together with another person combined with another person, who was a speculator who resided in another city, to invest the funds contributed by the two parties and continue to reinvest the funds and to divide the profits between the three parties. Of the three parties to the association, two contributed funds to the third party who was a speculator to invest and reinvest and divide the profits between them. This case is identical to the set of facts given for the term paper. In his opinion Judge Haines said "The underfeature of the relationship of a customer and his broker is that of agency. If that were the relation of the parties, it would be necessary to hold the plaintiff as the principal and the defendant his agent in carrying out the purposes of the 'pool.' The defendant would have been subject to the orders of the plaintiff, and the latter would ordinarily have become obligated to him for commissions for the services performed as the broker. Upon the facts which have been outlined, such was obviously not the case. The defendant was jointly interested in the undertaking, supplying the judgment, knowledge and discretion necessary to carry on the venture, and the other members furnished the cash as their part of their contribution to the enterprise. Under such circumstances, this was clearly a joint adventure." This decision has been backed by many previous decisions. The argument presented by Judge Haines in this opinion relates directly to the problem presented for the term paper and clearly sets out that the association formed between A and B was that of a joint venture.

When the joint adventure is terminated by the death of a co-adventurer the co-adventurer is held to be accountable for the profits earned prior to the death of the co-adventurer.[6] The remaining co-adventurer is under a duty to render the accounting of the profits to the administrator of the deceased. The best remedy for the accounting by the remaining member of the joint venture has been considered in equity even though there be a right to sue in the court of law.[7] In the joint venture of A and B, B's administrator will sue in the court of Equity for an accounting of the profits of the dissolved joint venture by the death of B. Therefor B's administrator will receive one-half of the profits of the joint venture earned after the payment of the $6,500 as B's share in the last profits distributed to the time of B's death.

Arthur May.

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5 Lesser v. Smith, 115 Conn. 86, 160 A. 302 (1932); Brudvik v. Frosaker Blaisdell Co., 56 N. D. 215, 216 N. W. 891 (1927); Magnet v. Carlton, 34 Ga. App. 556, 130 S. E. 604 (1925); Curtis v. Le Moyne, 49 Sup. Ct. Rep. 728 (1928).

6 Senneff v. Healy, 155 Iowa 82, 135 N. W. 27 (1912).

7 Dickson v. Patterson, 40 Led. 543 (1895).

LAW OF WILLS

INCORPORATION BY REFERENCE IN A WILL.—The general rule, which has been adopted in England and in most of the American states, is that a valid bequest or devise may be made by reference to objects and documents not incorporated in or annexed to the will. This general rule, as well as the requirements that are necessary in order to have the rule take effect, are very aptly stated by Chief Justice Gray in an early Massachusetts case: [1] "If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be probated as such."

We should note that three things are necessary in order to incorporate by reference: The will itself must refer to such paper to be incorporated (1) as being in existence at the time of the execution of the will, (2) in such a way as to reasonably identify such paper in a will, and (3) in such a way as to show the testator's intention to incorporate such instrument in his will and to make it a part thereof. The importance of the third requirement has been stressed in an Illinois case: [2] The court said that a mere reference in a will to a writing, where it does not otherwise clearly appear from the will itself that it is the intention of the testator that such writing be incorporated as a part of the will, is insufficient to warrant such incorporation.

In the state of New York the legislature has passed a statute which requires that all wills be executed in the manner prescribed by law. The statute reads: [3] "Every last will and testament of real or personal property, or both, shall be executed in the following manner:

1. It shall be subscribed by the testator at the end of the will.

2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses.

3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament.

4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator."

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1 Newton v. Seaman's Friend Society, 130 Mass. 91, 39 Am. Dec. 433, (1881).
2 Bottrall v. Spengler, 343 Ill. 476, 175 N. E. 781 (1931).
3 New York Decedent Estate Law, Sect. 21.

Chief Justice Denio [4] has refused to allow incorporation by reference in the state of New York. He assigns as a reason that such allowance would permit a testator to alter his will otherwise than by an attested instrument as required by statute. This view of the Chief Justice has been substantiated by other decisions of the court of appeals in New York. The court has held that it is the law of the state that an unattested paper, which is of a testamentary nature, cannot be taken as a part of the will, even though referred to by that instrument.[5]

It is important to recognize that this is not a rule that has been defined by statute, a prohibition that is direct and express, but is a product of judicial construction, and its form and limits are malleable and uncertain. Realizing this distinction, Cardozo, also taking into consideration the purpose of the rule — to safeguard against fraud and mistake — has stated: [6] that we are not to press the rule to "a dryly logical extreme." In that case the will directed disposition of the property as the wife's will might direct. The wills of both husband and wife were drawn at the same time — in contemplation of a voyage across the Atlantic. Both were lost on the Lusitania. The court gave effect to the provision in the will of the husband that incorporated by reference the will of his wife. There was no question which will of the wife was meant and also the wife's will disposed of the property in the same manner as the other provisions of the husband's will.

This somewhat liberal viewpoint towards incorporation by reference has been followed in other New York cases. The court in *In Re Rausch's Estate* [7] has adopted this view and stated that to insist upon a will so self contained and self sufficient as to make resort to things extrinsic needless in every possible contingency is to lose sight of the significance of language, its functions and capacities. Therefore, if the particular case presented is one in which opportunity for fraud or mistake is completely eliminated, the reason for the application of the rule failed and consequently the rule also fails.

Thus we have seen that if there is no possibility of fraud, incorporation by reference is permitted in New York. However, even though permitted in some instances it should be remembered that the requisites required before incorporation is allowed in other states are also required in the state of New York. Of these requirements the New York courts [8] levy most stress upon the requirement that such in-

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4 Langdon v. Astor's Executors, 16 N. Y. 9 (1857).

5 In Re Will of O'Neil, 91 N. Y. 523 (1883); Matter of Emmons, 110 App. Div. 701, 96 N. Y. S. 506 (1900).

6 Booth v. Baptist Church, 126 N. Y. 215, 28 N. E. 238 (1891); In Re Fowles Will, 222 N. Y. 222, 118 N. E. 611 (1918).

7 258 N. Y. 327, 179 N. E. 755 (1932).

8 In Re Martindale's Estate, 127 N. Y. S. 887, 69 Misc. 522 (1909).

corporation be the intention of the testator. Stress is laid upon this rule for the reason that incorporation by reference — to guard against fraud and mistake and the foisting upon the testator of a will which he did not make or did not intend to make.[9]

Eugene C. Wohlhorn.

MERETRICIOUS RELATIONSHIP AS UNDUE INFLUENCE IN MAKING A WILL.—Of the many types of written instruments the law seeks to protect, none is more zealously guarded than a man's last will and testament. Not only does the law set standards, falling below which the paper becomes a legal nullity, for the execution of a will but it looks with a cautious and suspicious eye toward any will when the principal beneficiary under the instrument has occupied an unusual or unnatural relation to the testator. In this paper we shall consider the effect of a meretricious relation between the testator and the beneficiary upon the validity of the bequest.

Historically, it has been the office of the heirs of a testator to assail the will in which the paramour is the beneficiary upon the grounds of undue influence. That the contestants should base their action upon this ground for invalidating the instrument seems obvious for their contention runs to the testamentary capacity rather than to the lack of *animus testandi* and while fraud enters occasionally as a collateral grounds for overthrowing the will, the contest has usually been based on undue influence. The question then, put quite simply, is whether a beneficiary who has sustained an illegal or immoral relationship with the testator has *per se* exerted undue influence over the testator and thereby invalidated the will.

In *Corpus Juris* we find what is the general rule stated succinctly to be: "The mere existence of illicit relations does not constitute undue influence. . . . And the mere fact that some influence is exercised by a person sustaining an improper or adulterous relation to the testator does not invalidate a will, unless it is further shown that the influence destroys the testator's free will." [1] In another section of the same work we find: "The fact that a testator or testatrix had maintained an illicit and adulterous relation with a person receiving a legacy or with a relative of such person, has been held not to authorize a presumption of undue influence by such person." [2]

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9 In Re Rausch's Will, supra, note 7.

1 43 Corpus Juris Sec. 68.

2 68 Corpus Juris Sec. 452.

Perhaps one of the leading cases holding that such unlawful relationship does *per se* raise a presumption of undue influence is *Dean v. Negley*.[3] In this case the court made a distinction between influence that is exerted by lawful members of a testator's family and that exerted by his *particeps criminis*. It called that of the former lawful and that of the latter unlawful. The court said: "The ordinary influence of a lawful relation must be lawful, even where it affects testamentary dispositions; for this is the natural tendency. The natural and ordinary influence of an unlawful relation must be unlawful, in so far as it affects testamentary dispositions favorably to the unlawful relation and unfavorably to the lawful heirs. Ordinary influence may be inferred in both cases, where the nature of the will seems to imply it; but in the former it is right, because the relation is lawful; and in the latter it may be condemned, together with its effects, because the relation is unlawful." In the case it was shown also that the testator had for many years been suffering from a severe cancerous disease. This fact, together with the facts showing a meretricious relationship with the beneficiary, was held to constitute undue influence.

The Supreme Court of Pennsylvania in *Snyder v. Erwin*,[4] a later case, reaffirmed the view taken in the Dean case and held that evidence of a meretricious relation was sufficient in itself to carry the case to the jury on an issue *devisavit vel non* for undue influence.

The rule as set forth in the Dean case was not long to remain unassailed. A Maryland court in *Saxton v. Krumm* [5] not only stated it to be out of harmony with the general current of authority but expressly abrogated the rule. The court said: "There appears to be a general concurrence in the authorities that neither an illicit relation nor an unjust and unnatural disposition of the property is sufficient *per se* to warrant a conclusion of undue influence." It further stated "While undue influence is more readily imputed where the beneficiary under a will is a mistress of the testator than where she is his wife, and while such illegitimate relation is a circumstance proper for the jury to consider, particularly where there is evidence that the testator's capacity is impaired, still there is generally held to be no presumption of undue influence arising from such relation merely. . . ."

In 1917 in *Re Watmough's Estate* [6] the Pennsylvania Court abrogated the rule it had formulated in the Dean case and held that the illicit relation existing between the beneficiary and the testator was not of itself sufficient to invalidate the will because of undue influence. The court said: "Granting the improper relation charged, such circumstance in itself would not make the will illegal. A testator, so

3 41 Pa. 312 (1862).
4 79 Atl. 124, 229 Pa. 644 (1911).
5 68 Atl. 1056, 17 Md. 393 (1908).
6 101 Atl. 957, 258 Pa. 22 (1917).

long as he is a free agent, has a right to give his property to whom he pleases; nor does the fact that the chief beneficiary in the will with whom he sustained improper relations raise any presumption that the will was made under a constraining influence exerted by the paramour." Such language sounded the death knell to the rule set down in *Dean v. Negley*, supra.

In *Kustus v. Hager*[7] the same court again followed its new rule which conformed to the general American rule, when it affirmed a lower court's decision allowing probate of a will in which the beneficiary was the testator's mistress and excluded the heirs. The court said: "Whatever may be said in condemnation of the relation sustained by the testator to the plaintiff on the ground of its immorality and the likelihood of such relation resulting in family estrangement, with impairment of individual character, none of these things of themselves can operate to defeat a will, giving to the partner in guilt a share of the estate be it large or small, where the testator at the time of making the will was master of himself."

A Maryland court in *Griffith v. Benzinger*[8] found that the relationship, though of itself could not be said to raise a presumption of undue influence, coupled with the testator's degenerated mental and physical condition, was sufficient to invalidate the will. In this case the court laid down the general rule to be: "The mere fact that a person maintained illicit relations with another in whose favor a testamentary disposition was made by such person does not in itself raise a presumption of law or of fact that such disposition was obtained by fraud or undue influence. But the fact that such relations existed between the decedent and the sole beneficiary under the proposed will is a fact to be considered in connection with other facts bearing upon the question in determining the weight and sufficiency of evidence adduced to show that a will was made as a result of undue influence or fraud."

In *Re Gaddis' Will*[9] the court followed the general rule and said: "The fact that the relations between the testator and Miss Cox existed in violation of law, or that such relations were immoral is not sufficient ground for invalidating the will."

The Alabama Supreme Court adheres to the general rule for in *Hobson v. Morgan*[10] we find the court saying: "There appears to be a general concurrence in the authorities that an illicit relation is not sufficient *per se* to warrant a conclusion of undue influence, and that no presumption of undue influence arises merely from the fact that a

7 112 Atl. 45, 269 Pa. 103 (1920).

8 125 Atl. 512, 144 Md. 575 (1924).

9 126 Atl. 287, 96 N. J. Eq. 668 (1924).

10 110 So. 406, 215 Ala. 274 (1926).

man, who is of sound mind, makes a will in favor of his mistress, or of one with whom his relations have been meretricious." The court went on to conclude that such evidence was to be considered in connection with any evidence tending to establish undue influence but is not of itself sufficient.

Not directly in point but of general interest as concerning undue influence and immoral surroundings is in *Re Swartz*,[11] in which the beneficiaries were inmates of a brothel. The will was attacked on the grounds of undue influence because the beneficiaries were in the room at the time of the making and also because they stood in immoral relations to the testatrix since they worked for the testratrix in her brothel. The will was held to be valid and the beneficiaries took to the exclusion of the heirs.

One of the most recent cases on point is *In Re Kelly's Estate*[12] in which the court, although sustaining the general doctrine found evidence of undue influence exerted by the mistress of the testator and decreed the will invalid. The court said in adjudication: "The mere existence of such a relationship does not render invalid a bequest made to the paramour, because one possessed on an estate may settle his bounty upon an immoral person if he chooses; nor does such a relationship create a presumption that the beneficiary exerted undue influence in obtaining the testamentary recognition. But, since the relationship which arises out of illegal amours may provide favorable opportunities for the exertion of undue influence, proof of the relationship is admissible when undue influence is charged."

That a man, possessed of a mental and physical capacity, has a right to confer his worldly goods upon whomsoever it pleases him, be it an arbitrary or capricious choice, cannot be seriously doubted. Any attempt by the courts to limit his field of testamentary recognition would be challenging practically every will for it would in effect be substituting the conscience of the court or jury for that of the testator. That a man's relation with a beneficiary has been reprehensible as judged from current moral standards or that he excludes his natural objects of his bounty are indeed appalling situations but as long as he executed his will consistent with the law, to limit his scope of testamentary disposition would not only be against the might of current judicial opinion, but would abrogate one of the most fundamental rights of man — the right to bestow his property on the beneficiary of his choice, irrespective of the relation that the beneficiary sustained to the testator.

Francis J. Paulson.

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11 192 Pac. 203, 79 Okla. 191, 16 A. L. R. 450.
12 46 Pac. (2d) 84, 150 Ore. 598 (1935).

REVOCATION OF A WILL.—There are several statutes in Indiana regarding the revocation of wills. As to the manner of revocation the following statute applies: "No will in writing, nor any part thereof, except as in this act provided, shall be revoked, unless the testator, or some other person in his presence and by his direction, with intent to revoke, shall destroy or mutilate the same; or such testator shall execute other writing for that purpose, signed, subscribed and attested as required in the preceding section. And, if, after the making of any will, the testator shall execute a second, a revocation of the second shall not revive the first will, unless it shall appear by the terms of such revocation to have been his intent to revive it, or, unless, after such revocation, he shall duly republish the previous will." [1] It has been held that the requirements of the statute touching the revocation of wills must be strictly followed. In *Runkle v. Gates,* the court said: "an intention to revoke a will is utterly inoperative unless there be some act done in pursuance of that intention, and such act be one of revocation, within the requirements of the statute." [2]

The mere intention or desire on the part of a testator that his will shall be revoked, or a belief on his part that it has been destroyed, when it has not, will not amount to a revocation of the will.[3] There must actually be an act as well as the intention. Nor is a mere declaration of an intent to revoke a will, by the testator, sufficient to constitute a revocation if the declaration is never carried into effect.[4] What then is sufficient action to revoke a will? In *Woodfill v. Patton,* the court said: "In order that there should be a valid revocation of a will there must be the concurrence of two things, the intention to revoke, and the act manifesting the intention . . . There must not only be an act of revocation, but the act must be such as the statute recognizes as a proper manifestation of the intention to revoke. The act will not operate as a revocation, no matter how strongly and unequivocally it may show an intention to revoke, unless it be such an act as the statute prescribes." [5] The court went on to say that the erasure by a testator of his signature to a will, designedly and deliberately made, accompanied by the intention to revoke, must be deemed a destruction of the will, and purposely drawing a pencil, or other implement which erases, cancels or obliterates, over the signature to a will by the maker, must be deemed to constitute such a mutilation as takes from the instrument an element essential to its validity, and is therefore a revocation thereof.

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1 Burns Section 7-301.

2 11 Ind. 95 (1858).

3 Woodfill v. Patton, 76 Ind. 575, 40 Am. Rep. 269 (1881). Also 2 Supra.

4 Belshaw v. Chitwood, 141 Ind. 377, 40 N. E. 908 (1895).

5 3 Supra.

Nor will a destruction of the will during a temporary fit of insanity be sufficient to revoke the will.[6] Such a will may be established as a valid will if sufficient proof is presented.

The execution of a will sometimes revokes a prior one. The court said in *Burns, Executor, et al v. Travis,*[7] "The execution of a new will making another and inconsistent disposition of the testator's property operates as a revocation of a former will disposing of the same property, and this is so whether the former will is expressly revoked by the later one or not." In *Pfaffenberger v. Pfaffenberger,* the court said that the statutes require the same formality and the same competency of attesting witnesses in the execution of a revocation as is required in the execution of a will.[8]

In a recent case it was held that a valid will may be revoked by the testator by his drawing lines across the face of the will and his signature and the attesting clause, and writing on the face of the will the word "void," attested by his initials, even though the will is left intact and legible.[9] Another recent case defines the word "mutilate," as something less than total destruction and further held that the manner of mutilation is not of controlling importance.[10]

The next statute we will look at has to do with the subsequent marriage of the testator. The statute says: "If any male or female who now under the law is qualified to execute a will and who, being unmarried, shall execute a will disposing of his or her property or any portion of the same, and who, after the execution of such will shall become married, then such will executed prior to such marriage shall be null and void." [11] Before the above statute was passed the rule was that the marriage of a man who had previously executed a will did not revoke it;[12] on the other hand an unmarried woman who made a will and later married found her will revoked.[13]

As to the birth of a child the statute says: "If, after the making of a will, the testator shall have born to him legitimate issue, who shall survive him, or shall have posthumous issue, then such will shall be deemed revoked, unless provision shall have been made in such will for such issue." [14] In construing this statute the court said, in *Hughes v. Hughes,* "Under our statute, the birth of a child, after the execution

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6 Forbing v. Weber, 99 Ind. 588 (1884).

7 117 Ind. 44, 18 N. E. 766 (1888). Also see: Kern v. Kern, 154 Ind. 29, 55 N. E. 179 (1899).

8 189 Ind. 507, 127 N. E. 766 (1920).

9 Tinsley v. Carvile, 212 Ind. 675, 10 N. E. (2d) 597 (1937).

10 9 Supra.

11 Burns Section 7-302.

12 Bowers v. Bowers, 53 Ind. 430 (1876).

13 Vail v. Lindsay, 67 Ind. 528 (1879).

14 Burns Section 7-303.

of a will, works an entire revocation of the will, unless provision shall have been made in such will for such issue. Such is the plain, express, and undoubted requirement of the statute and it is our imperative duty to carry into execution the legislative intention." [15]

As to the adoption of a child after the making of a will, the court said in *Davis v. Fogle* that such action does not act to revoke the will.[16] Nor does the birth and acknowledgment of an illegitimate child by the testator subsequent to the making of a will revoke it.[17]

The statute further provides: "But in case such child dies without issue, and the wife of such testator be living, the estate of the testator, except the wife's interest therein, shall descend according to the terms of the will; and in case of the death of the wife, and also of the child, without issue, the whole of such estate shall descend as directed in the will, unless such child have a wife living at his death, in which case, such wife shall hold such estate to her use so long as she remains unmarried." [18]

The last problem that we will look at is conveying land so as to revoke a will. It has been held that the conveyance by a testator of all his lands operates as a revocation.[19] The conveyance must be valid, however, an invalid conveyance will not revoke a will.[20]

Thus we have seen that a will may be revoked in many ways, and that to accomplish revocation both intention and an appropriate act must be present. We have further seen that the subject of revocation of a will in Indiana is covered by several statutes. These statutes it seems have been enacted to prevent validly executed wills from being set aside too easily by scheming heirs. Statutes regarding revocation are construed strictly and they should be.

Arthur M. Diamond.

WHAT AN ATTORNEY SHOULD HAVE A WITNESS OF A WILL SAY REGARDING THE TESTAMENTARY CAPACITY OF THE TESTATOR.—In attacking a problem of this nature it is basic that the first point to be made is that in most jurisdictions, by statute, attestation and subscription of a will by witnesses is essential to the validity of the will whether

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15 37 Ind. 183 (1871). Also see Morse v. Morse, 42 Ind. 365 (1873).

16 124 Ind. 41, 23 N. E. 860 (1890).

17 Eckart v. Eckart, 95 Ind. App. 148, 163 N. E. 288 (1932).

18 Burns Section 7-304.

19 Bowen v. Johnson, 6 Ind. 110, 61 Am. Dec. 110 (1854).

20 Bennett v. Gaddis, 79 Ind. 347 (1881).

the property passed therein is real or personal.[1] The reason for the presence of such statutes requiring that a will be attested and subscribed by witnesses is to remove uncertainty as to the execution of wills and to safeguard testators against frauds. Before going on to this point it is necessary to point out that this paper has for its purpose the discussion of the topic named and will not deviate to bring in such facts as the proper method for the witness to sign the will, the publication of the will to him and so forth.

The next point that must be discussed is a consideration of the facts which the witnesses attest. As a general rule the attestation required of the witnesses consists in their seeing that those things exist and are done which the statutes require to exist and be done in order to make the instrument in law the will of the testator.[2] Another general rule of wide application is that witnesses attest not only the due execution of the will by the testator, but also his mental capacity to make a valid will, at the time of the execution of the same.[3] Furthermore one who signs the will as a witness of the instrument declares that the testator is mentally capable of making the will.[4] This rule has been held by a minority of courts though a large number of states imply the same view. These courts proceed on the theory that if the witness knew that the testator did not have the mental capacity to make a will he would not, if he were a credible person of normal intelligence, subscribe to the will in the first place. As a matter of fact several courts have been bold enough to come out and make the ruling that if the witnesses think that the testator lacks in capacity to make their will they should refuse to attest and subscribe the same.[5] Other courts have held that notwithstanding the fact that it is the duty of the parties called on to witness a will to give attestation to the testator's testamentary capacity, failure on their part to testify to the testamentary capacity of the testator will not invalidate the will.[6] This case, however, appears to be in the absolute minority in view of the fact that this point of law has never been followed in later South Carolina decisions, and furthermore, no other states seem to have

1 Cunningham v. Hallyburton, 342 Ill. 442, 174 N. E. 550 (1930); Merkle v. Merkle, 85 Cal. App. 87, 258 Pac. 969 (1927); Hooks v. Stamper, 18 Ga. 471 (1855); Orth v. Orth, 145 Ind. 184, 42 N. E. 277, 44 N. E. 17 (1895); In Re Boynes Will, 23 Iowa 354 (1867); Burch v. Burget, 130 Kan. 243, 285 Pac. 574 (1930); Birch v. Jefferson County Court, 244 Ky. 425, 51 S. W. (2d) 258 (1932); Murdock v. Bridges, 91 Me. 124 (1897); Simpkins v. Old Colony Trust Co., 254 Mass. 576, 151 N. E. 87 (1926); In Re Judge's Will, 252 N. Y. S. 500 (1931).

2 Nunn v. Ehlert, 218 Mass. 471, 106 N. E. 163 (1914).

3 Beck v. Last, 303 Ill. 549, 136 N. E. 475 (1922); Hill v. Kehr, 228 Ill. 204, 81 N. E. 848 (1907).

4 Egbert v. Egbert, 78 Pa. 326 (1875).

5 Hawes v. Humphrey, 9 Pick. Mass. 350, 20 Am. D. 481 (1830); Bruce v. Shuler, 108 Va. 670, 62 S. E. 973 (1908).

6 Mordecai v. Canty, 86 S. C. 470, 68 S. E. 1049 (1910).

taken the same view as South Carolina on this point. A special search was made as to Illinois decisions and none holding along the lines of the South Carolina court could be found, therefore, we might be able to infer from this that Illinois has either not passed on the point involved in the principal case or it rejects the rule of the South Carolina court.

The next step to set up, it is apparent, is should an attorney have witnesses make statements regarding the testamentary capacity of the testator, and just what weight would be afforded to such testimony by the court if it were brought in as evidence in a contest proceeding? On this point the Illinois court has been rather firm. There are only three possibilities that exist, namely: (1) That they afford such testimony more weight than that of other witnesses, (2) that they afford such testimony on the part of witnesses the same amount of weight as that of third parties, or (3) that they afford the testimony of witnesses less weight than that of third parties. Of these three possibilities the Illinois courts have chosen to follow the second, namely that they will afford the same amount of weight to the testimony of witnesses of a will regarding the testamentary capacity of the testator as afforded to the testimony on the same topic of third parties, i.e. qualified third parties, such as close friends, business associates, etc. Probably the latest case on this point is that of *Brown v. Riggin,* in which the court although not stating that the testimony of the attesting witnesses was not entitled to greater weight than the testimony of other, held that an instruction which assigned more weight to the testimony of nurses and others, such as attendants, than to the opinions of the subscribing witnesses as to the testamentary capacity of the testator was erroneous.[7] It is evident from this case that the Illinois court was invoking the equal weight rule even though it did the same in a somewhat haphazard round about way. In an earlier case, *Nieman v. Schnitker,*[8] the court held that an instruction that the mere fact that a person is a subscribing witness to a will does not entitle his opinion as to the competency of the testator to execute the same to any more weight than the opinion of any equally credible and intelligent witness, who has the same opportunity of judging, and that his testimony may not be entitled to as much weight as that of some other witness who had better opportunity of observing the decedent at or about the time of the execution of the wills was held to be erroneous. The court said: "There is nothing in the record showing that any other witness than the subscribing witnesses was present at the time of the execution of the will, nor is there any evidence showing there were other witnesses who had better opportunities of observing the deceased at the time. The question of the weight of the testimony of the witnesses is a ques-

7 94 Ill. 560 (1880).
8 181 Ill. 400, 55 N. E. 151 (1899).

tion to be determined by the jury and their province should not be invaded by the court as it is done by this instruction, where it is stated that the testimony of the subscribing witnesses is not entitled to as much weight as that of some of the other witnesses who had better opportunity of observing the deceased. Whether there were any other witnesses who had better opportunities of observing the deceased, and the weight of the testimony, were both questions for the jury and not for the court, and this instruction impliedly suggests to the jury that some other witness or witnesses had better opportunity of observing the deceased than the subscribing witnesses." This last statement by the court would lead one to infer that the court of Illinois had at an early date favored the rule of the court of South Carolina which said that the testimony of the witnesses as to the testamentary capacity of the testator goes to their credibility. This, however, upon close examination can be distinguished from the South Carolina case because here the court says that the juror shall listen to both sides of the story, that of the witness as of the third parties and determine for themselves what weight they will give to their respective testimony. They agree that some weight must be given to both, but just what that weight shall be is for the jury to determine. This view, it appears, is no longer prevalent when we refer to the case cited just before the principal case.

From the facts presented in the first part of the paper and also from the cases cited it is possible to draw the following conclusions: In Illinois, first if you are going to have the witnesses to the will say anything whatsoever about the testamentary capacity of the testator, then too much confidence should not be placed in such evidence because we have seen that it is afforded only as much weight as is afforded to testimony of outside parties who have had opportunity to observe the testator. But even in view of the fact that their testimony is afforded only this amount of weight the situation may arise where there are no outside parties who have watched the testator and then the testimony of the witnesses will be regarded highly. Such being the case it might be best that in every case of this type as a matter of fact in every will you draft, it might be well to have the witnesses say something, no matter how little which would be indicative of the testator's testamentary capacity. If possible have him make a written statement which should be signed by the witness and have the same notarized and the original appended to the will itself.

Joseph Brady.

RIGHTS AND LIABILITIES OF A DECEDENT'S ESTATE IN HIS LEASES.—Let us assume that X leased the Black Building from C for $5,000 per year for fifteen years and then subleases to various tenants for $15,000 per year. He then leases the White Building from D in 1932 for $8,000 per year and subleases to various tenants for $7,500 per year. In 1933 he buys the Gray Building from F and leases it to G for 15 years at $6,000 per year payable monthly in advance. On June 30th, 1935 X dies and G goes bankrupt on the same day with the rent due June 1st unpaid.

This leaves the heirs with many problems and the attorney for the heirs or estate with many headaches. The first question to be answered is that if X's heir, X Jr. desires to keep the lease on the Black Building and repudiate the lease and subleases on the White Building, may he do so?

The lease by which X is entitled to the possession and enjoyment of the Black Building and the White Building constitute tenancies for years since the term is for 15 years and one year respectively. A tenancy for years is one which is created by a contract for the use of lands and tenements for a determinate period, with the recompense of rent in kind or money. It is denominated a term, because its duration is absolutely defined.[1]

As a general rule a lease for a term of years is not terminated by the death of the lessee before the expiration of the term. And usually in such a case the leasehold as personal estate passes to the personal representative of the lessee, and the lessee's estate remains liable on the covenants in the lease for the payment of rent just as on the other contracts of the decedent for the payment of money.

In *Miller v. Ready* [2] the leading Indiana case on the subject, where the question arose on the death of the lessee of an unexpired tenancy for years, the court held that "an ordinary lease of real estate is not such a personal contract as is annulled or extinguished by the death of either of the parties thereto (thus applying to sub-lessees as well). In the case of the death of the lessee, the term or the unexpired portion thereof becomes a part of the personal assets of the estate, to be inventoried, appraised, and sold as other personal property. Until in some manner the lease is released or discharged, it devolved upon the administrator to perform the covenants of the lease, and he is liable for the payment of the rent reserved, to the extent that he has assets in his hands." California courts are in complete accord with Indiana on this point and hold that the estate's liability arises out of privity of contract based on the lease from the lessor to the lessee.[3]

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1 McAdam, Landlord and Tenant, pp. 47-48.

2 59 Ind. App. 195, 108 N. E. 605 (1915).

3 Southern Pacific Co. v. Swanson, 73 Cal. App. 229, 238 Pac. 736 (1925).

Even though the lease restricts the use to the lessees, a Massachusetts court held there was no implied condition that the lease was terminable on the death of the parties.[4]

A Kentucky court stated just what the executor of an estate may do with regard to property which the decedent had leased and which term was unexpired when it said that (a) he may keep the property, thereby charging the estate with the performance of the terms and conditions of the lease; (b) he may, if the lease does not prevent it, sublease the premises, but this would not, of course release the estate of its obligation to satisfy the terms and conditions of the lease as between it and the landlord; (c) he may surrender the leased property to the landlord, and refuse to have anything further to do with it, thereby working a cancellation of the lease; but the doing of this would subject the estate to a suit for damages by the landlord for the breach of the contract.[5]

It is well settled by the authorities that a contract of this character is not terminated by the death of the lessee, and that his estate continues liable for the performance of the conditions of the lease until it expires, and the obligations of a lessee under the contract passes on his death to his personal representative, who assumes in his fiduciary capacity, the performance of the contract in the same manner that its performance could have been demanded of the lessee.[6]

Illinois has held that while a landlord may covenant in a lease that it may be terminated by the death of the lessee, still if he intended that the lessee should have a limited time in which to cancel the lease, he should have plainly stated such in the lease.[7]

Though there is no case on the termination of a lease by the death of the lessee in Illinois, it may be presumed that the courts would tend toward the reasoning that the lease would not be terminated unless expressly provided for in the lease in view of the above case.

Assuming that X, Jr. is the personal representative of his father, X, as well as his heir, we hold that he must carry out the terms and conditions of the leases on the Black and on the White Buildings, or surrender the lease and suffer a suit for damages on breach of contract brought by the landlord. So, too, if he takes as an heir under the will and accepts, he must assume his father's obligations under the lease.

The second question that must be disposed of is what interest, if any, does X Senior's surviving wife have in the property? The Illinois statute on the subject of dower reads as follows: "A surviving spouse,

4 Israel v. Beale, 270 Mass. 61, 169 N. E. 777 (1930).

5 Brown v. U. S. Trust Co., 185 Ky. 747, 215 S. W. 815 (1919).

6 16 R. C. L. p. 855.

7 Storey's Estate v. 199 Lake Shore Drive, Inc., 317 Ill. App. 380, 45 N. E. (2d) 984 (1942).

whether husband or wife, is endowed of a third part of all real estate of which the decedent was seized of an estate of inheritance at any time during the marriage unless the dower has been released or is barred. Real estate contracted for by the deceased spouse in his lifetime, the title to which may be completed after his death, and equitable estates are subject to dower. There is no estate of curtesy." [8]

As a result the surviving spouse has a third interest in the rents from the sublessees of the Black Building and the White Building, since rent is a chattel real, and passes to heirs rather than the personal representative of the deceased subject to the dower interest of the widow plus whatever is acquired from the bankrupt estate of G, plus her 1/3 dower interest of the Gray Building of which X was the owner in fee.

A lease is an estate of inheritance in so far as the grantee of the lessees have the same rights in the property as the grantor[9] and as such the wife's claim of dower is valid.

The third and last question is how much, if anything may X, Jr. claim from the bankrupt estate of G and what is the status of G's lease?

Under the Bankruptcy Act of 1898 an adjudication in bankruptcy did not dissolve or terminate the contractual relations of the bankrupt,[10] and the tenants' liability for future rent remained enforceable as installments of rent fell due. Under such a provision the landlord was helpless as his right to collect rent from a bankrupt tenant was valueless to overcome these difficulties the Congress amended the Bankruptcy Act in 1934 by adding to the group of provable claims against the bankrupt estate, claims for damages respecting executory contracts including future rents, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date.[11] As a result of the amendment it can now be said that bankruptcy now terminates the relation of landlord and tenant.[12]

Upon the rejection of the lease by the trustee in bankruptcy the landlord's claim for injury is limited to an amount not exceeding the rent reserved "for the three years next succeeding the date of surrender of the premises to the landlord or the date of reentry of the

8 Jones Illinois Statutes sec. 110.266.

9 Ibid. 72:15.

10 Watson v. Merrill, 136 Fed. 359 (1905).

11 In Re Owl Drug Company, 12 Fed. Supp. 447 (1935).

12 Remington on Bankruptcy sec. 795.

landlord whichever occurs first. The subsequent repossession and control of the landlord did not destroy the provability of a claim under Section 77B and he could recover the difference between the present rental value and the rent which the bankrupt had agreed to pay.

In 1938 the Chandler Act was passed by the Congress which again modified the Act by providing: "that the claim of a landlord for damages for injury resulting from the rejection of an unexpired lease of real estate shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after bankruptcy, plus an amount equal to the unpaid rent accrued without acceleration, up to such date." [13]

Provision of this section making one year's rent following re-entry or surrender the maximum recoverable by the landlord governs the ascertainment of how much the landlord is entitled to, less the credit to the tenant on rent derived by a release.[14]

Thus assuming the lease to be rejected on the adjudication of bankruptcy on June 30th, 1935, X, Jr. will have a provable claim against the bankrupt estate for the rent due the first day of June, 1935, plus the rent due up to June 30th, 1936. Under this settlement the bankrupt estate may either occupy the Gray Building for that time or surrender the premises, in which case X, Jr. may re-enter and release and credit the bankrupt estate by deducting the amount of rent he receives from such release from the year's rent for which the estate is liable.

John F. Power.

RIGHTS IN LAND.—At the common law the maxim *cujus est solum ejus est usque ad coelum,* he who owns the surface owns up to the sky, was used to describe what the ownership of property prescribed. However this maxim proved to be inadequate as far as aviation rights were concerned. The court in the Johnson case decided the question as to the applicability of the maxim was concerned when applied to air rights in the aviation field. The court said: "This rule like many aphorisms of the law, is a generality, and does not have its origin in legislation, but was adopted in an age of primitive industrial development, by the courts of England, long prior to the American Revolution, as a comprehensive statement of the land-

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13 Title 11 U. S. C. A. sec. 103.

14 In Re B. Westermann Co., 51 Fed. Supp. 776 (1943).

owners' rights at a time when any practical use of the upper air was not considered or thought practical, and when such aerial trespasses as did occur were relatively near to the surface of the land, and were such as to exercise some direct harmful influence upon the owner's use and enjoyment of the land. A wholly different situation is now presented. The upper air is a heritage common to all of the people, and its reasonable use ought not to be hampered by an ancient artificial maxim of the law as is here involved." [1]

Thus from the previous case we find that the land owner does not own up to the sky and that the mere flying of a plane over his land is not enough to constitute a trespass. We immediately begin to wonder if an airplane can commit a trespass to the land and if so what would constitute a trespass. The answer is suggested by a Pennsylvania case [2] that held that invasions of airspace are trespasses only when they interfere with a proper enjoyment of reasonable use of the surface.

Therefore we note that an unreasonable use of the airspace above land will be a trespass. From this it would seem that the owner of land has, conversely, the right to make a reasonable use of his land or as stated by the court in the Swetland case [3] the surface owner has a right to the use of which he may reasonably expect to use but as to what he may not reasonably expect to use he has no right except to prevent an unreasonable use by others. Of course it is apparent that this reasonable or unreasonable use of land has reference to the height of the structures on the land and also to the height of the particular flight in question. The Department of Commerce and the legislatures have passed laws regulating the height at which airplanes may be flown. However it is important to recognize that these laws were passed for the public welfare and not for the protection of the individual landowner, for the height at which an airplane operator may pass above the surface without trespassing depends on particular facts and is unaffected by Department of Commerce regulations.[4] So far we have seen that traversing the airspace above the land is not of itself a trespass and that to constitute a trespass the flight must cause injury to the possession of the land, therefore it seems that injury to the land will be enough for a suit for damages, but recognizing the fact that mere damages are not always adequate relief and that the land owner would rather stop this unreasonable use by another of his property we next turn to injunctive relief. The courts have been uniform in holding that in addition to the above there must be proof of actual damage

1 Johnson v. Curtiss N. W. Airplane Co., Minn. 235 CCH 322, US Av R 42, (1928).

2 Gay & Rush Hospital v. Taylor, Pa. 235 CCH 1754, US Av R 146 (1934).

3 Swetland v. Curtiss Airports Corporation, 55 Fed. (2d) 201, (1930).

4 Cory v. Physical Culture Hotel, 14 Fed. Supp. 977, (1936).

before an injunction will be granted on the trespass theory.[5] In fact it has even been established [6] that although there might be flights at such low altitudes as to constitute a trespass this will not be sufficient for the awarding of an injunction where the trespass does not do any actual damage to the property or its use.

From the foregoing discussion we can realize that it is very difficult to obtain an injunction on the trespass theory, and that if the land-owner had to depend upon this remedy his rights would often be infringed. However, there is still another theory by which a land owner may secure adequate relief in the form of an injunction and that is upon the nuisance theory.

At the outset it is important to recognize that an airport is a lawful business and is not a nuisance *per se* but may become one because of unsuitable location, improper construction, or unreasonable operation.[7]

The first point to be considered is the location of an airport when contemplating bringing an action upon the nuisance theory because the courts [8] have held that such noises and dusts that are created by the necessary and proper operation of a properly located airport are not sufficient to constitute a nuisance, although they result in injury and inconvenience to the adjoining land owners. Of course the same court, in another case,[9] has held that if the airport were improperly located then injury to the comfort and use of a house would constitute a nuisance affording ground for the recovery of damages and also for the granting of an injunction. This same viewpoint has been accepted by other courts and it has been held [10] that airplanes may be flown at proper heights over the land below and even though there may be noises and annoyances caused thereby they will be considered as *"damnum absque injuria."* However they (the aircraft) may not land or take off at low altitudes and in such proximity of others so as to cause a nuisance or a continuing trespass.

From the foregoing we cannot help but think that if the airport is properly located then regardless of the manner of operation an airport will not constitute a nuisance, but this is not the fact for it has been held that an airport whether or not properly located or whether its operation constitutes only a reasonable use of the property in question is not controlling. The question is whether or not, no

5 Hinman v. Pacific Air Transport, 84 Fed. (2d) 755, (1936).

6 Smith v. New England Aircraft Co., 270 Mass. 511, 69 A. L. R. 300, 170 N. E. 385, (1930).

7 Vanderslice v. Shawn, Del. Ch., 66 CCH 2305, US Av R 11, 27 Atl. (2d) 87 (1942).

8 Delta Air Co. v. Kernsey, 193 Ga. 863, 20 S. E. (2d) 245 (1942).

9 Thraser v. Atlanta, 178 Ga. 514, 173 S. E. 817 (1934).

10 Warren Tp. v. Detroit, 308 Mich. 460, 14 N. W. (2d) 134 (1944).

matter how it is operated or how reasonable such use may be, it does constitute a nuisance to the plaintiffs.[11]

From this discussion it is apparent that the question as to whether or not an airport is a nuisance depends upon the facts of a particular case. But how about the airport that is only being contemplated and has not been built as yet? It would seem that it would be easier to get an injunction before the airport was built and large sums of money expended, but such is not the case, for in a recent Michigan case,[12] the court held that an injunction could not be granted before the erection of the airport because an airport is not a nuisance *per se* and whether or not it would become a nuisance in fact could not be determined until after the proposed airport was in operation.

The whole matter of the rights of a landowner as opposed to those of an airport have been briefly summarized by the Federal District Court for the Eastern District of Michigan in a recent case [13] where the court stated that: "Any use of the airspace over land which is injurious to the land or impairs or interferes with the possession or enjoyment thereof is unlawful. The coming of the airplane has not taken away any of the rights of the landowner to the use and enjoyment of his land and the airspace above it. The privilege or right of airplanes to fly through the airspace recognized by the common law . . . is limited to that portion of the airspace which the landowner does not need or want and the use of which does not interfere with the use, occupation, or enjoyment of the land or the airspace above it by the landowner."

Eugene C. Wohlhorn.

SALES—*Bulk Sales Laws.*—Bulk sales statutes have now been passed in all of the forty-eight states. The movement was put in action by the National Association of Credit Men for the protection of jobbers and wholesalers.[1] The common-law rule was much less strict on the matter than the new statutes are. The old common-law allowed the creditor to follow the goods and subject them to his claims as if no sale had occurred so long as they have not reached the hands of a purchaser for value without notice.[2]

Most of the statutes hold that if such a conveyance is made and all the requirements of the statute are not fulfilled, the transaction is void

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11 Gay & Rush Hospital v. Taylor, supra.

12 Warren Tp. v. Detroit, supra.

13 Guith v. Consumers Power Co., 36 Fed. Supp. 21 (1940).

1 Billig, Bulk Sales Laws, A Study in Economic Adjustment, 77 U. of Pa. Law Rev. 72.

2 Vold on Sales, P. 404.

as to the creditors. If the parties to the sale comply with all the requirements of the statute, the creditors will be given ample opportunity to take whatever action they deem necessary.[3]

Typical of most Bulk Sales Laws, is the Minnesota act [4] which contains in general, the following: On any bulk sale made in Minnesota, at least five days notice must be given on the following; i.e. the notice must be given to the seller's creditors. The seller and purchaser must make an inventory of the material and the cost of such material, and of each article sold. The purchaser must, in good faith, make an inquiry as to the creditors of the seller and the amount owed to each. The purchaser must also inform the creditors of the proposed sale. There is, naturally, a variation between the various state statutes, but on a whole, they are intended for the same purpose, and their construction is highly correlated.

The term "bulk" is usually interpreted to mean a stock of merchandise. It is difficult to understand just what this means.[5] The term has been held not to apply to fixtures in a store;[6] nor equipment; appliances;[7] a stock of raw materials;[8] or a restaurant's stock of provisions.[9] The exact determination of just what the term applies to would require a close study of all the material on the subject for each individual state, and how each state wants the term interpreted.

In Van Genderen v. Arrow Bus Lines,[10] the court held that it did not apply to the sale of a fleet of busses. Here, D purchased a fleet of busses which had been used for the transportation of passengers. There had been no notice given by the vendor nor the purchaser to the creditor P. P filed a complaint to have the conveyance set aside as fraudulent under the bulk sales act of that state. A motion made to have the bill stricken was denied, but this was reversed on appeal, where it was held that the bulk sales law does not apply to the sale of a fleet of busses for passenger use.

Where, in most cases, it is necessary for the purchaser to give notice to the creditors of the proposed sale, it has been held that the purchaser cannot be held liable if the vendor used fraud in not divulging all the names of his creditors to the purchaser.[11] In another case, however,

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3 Escalle v. Mark, 43 Nev. Rep. 172, 183 P. 387, 5 A. L. R. 1512 (1919).

4 Mason's Minnesota Statutes, 8473.

5 Swift and Co. v. Tempelos, 178 N. C. 487, 101 S. E. 8 (1919).

6 Johnson v. Kelly, 32 N. Dak. 116, 155 N. W. 683 (1915).

7 Bowen v. Quigley, 165 Mich. 337, 130 N. W. 690 (1911).

8 Lee v. Gillen and Boney, 90 Neb. 730, 134 N. W. 278 (1912).

9 See footnote 5.

10 Van Genderen v. Arrow Bus Lines, 107 N. J. Eq. 217, 151 Atl. 605 (1930).

11 McKelvey v. John Schnapp and Sons Drug Co., 143 Ark. 477, 220 S. W. 827 (1920).

the court was more liberal and allowed the sale to be considered void only as to the creditor who did not receive notice.[12]

The question as to whether or not creditors shall have the right to follow the goods down thru subpurchasers is in dispute. This is a most liberal attitude and the weight of authority feels that the creditor has his rights only against the original purchaser, even though the original sale was void.[13] The reasoning behind this is that the courts feel that if the subpurchasers were open to attack, it would be a restraint on trade and also, an undue hardship upon innocent purchasers, which, of course, the legislature did not intend.[14]

The courts have generally been quite liberal in their interpretatio' of the various acts for the benefit of the creditors. This is done for the protection of property and to protect business. Attachment or Execution is usually used by the creditors and has been held to be a good method.[15] It has also been held that the creditor may sue in trover proceedings considering the buyer a converter.[16] If, as mentioned in a prior paragraph, the purchaser has already disposed of the goods, the purchaser can be subjected to garnishment for the value.[17]

Some courts have given a much stricter interpretation to the bulk sales laws, but these are in the minority. It has been held that the creditor must proceed in equity to have the sale set aside.[18]

Roger D. Gustafson.

SALES—THE BULK SALES LAW AND UNLIQUIDATED AND CONTINGENT CLAIMS.—Nearly all the states have, since the turn of the century, enacted bulk sales laws designed to prevent the passing of an unqualified title to a stock of goods sold in bulk without payment of the seller's creditors. In general, the statutes provide that the sale of all or any portion of a stock of merchandise, otherwise than in the ordinary course of trade, shall be void and fraudulent as against creditors of the seller unless the seller delivers to the purchaser a list of his creditors and the purchaser in turn notifies such creditors of the proposed sale a stipulated time, usually five days, in advance.

The bulk sales law, it was observed by Judge Mack, "defines one among the several categories of fraudulent conveyances," conferring

12 Lindstrom v. Spicher, 53 N. Dak. 195, 205 N. W. 231 (1925).
13 See footnote 11.
14 Kasper v. Spokane Merchant's Assn., 87 Wash. Rep. 447, 151 P. 800 (1915).
15 Mutz v. Sanderson, 94 Neb. 293, 143 N. W. 302. (1913).
16 Conquest v. Atkins, 123 Me. 327, 122 Atl. 858. (1923).
17 Apple Mercantile Co. v. Barker, 92 Neb. 669, 138 N. W. 1133 (1912).
18 Newman v. Garfield, 93 Vt. 16, 104 Atl. 881 (1918).

"a substantive right in kind identical with the ancient right of a creditor to attack a transfer made with intent to hinder, delay, or defraud creditors." [1] The essential point of the statute is that a creditor need not prove an intent to defraud. That "it does not differentiate between sales that are honestly made and sales that are made with intent to defraud" was emphatically pointed out in a New York case in which a bulk sales law was held unconstitutional.[2]

Though enacted primarily to protect the wholesaler,[3] the bulk sales acts, it is generally held, are intended to protect all creditors of the seller. It sometimes becomes necessary, however, to determine who are creditors, or to put it differently, what kind of claim makes one a creditor within the meaning of the statute. As was remarked by Mr. Justice Martin, "every chose in action is not necessarily a 'debt' so as to give its owner a standing as a 'creditor' under the Sales in Bulk Act." [4]

In a case recently decided in Oregon,[5] a corporation operating a chain of drug stores had sold its stock of goods early in 1931. It had entered into a contract in 1929 whereby certain neon electric signs were leased to it at a monthly rental of $17.50 each. This contract was cancelled by the lessor because of the drug store company's default in payment of the monthly rental at a time when the sum of $472 had accrued as such rental for the months of November and December, 1930, and January, 1931. The lessor recovered a judgment against the drug store company in 1933 for $9,034.32 and then invoking the provisions of the bulk sales law, brought a garnishment proceeding against Witty, who had purchased the company's stock of goods in 1931. The trial court gave the plaintiff judgment against the garnishee for the accrued rental in the sum of $472, but not for the amount of the damages. The plaintiff appealed.

"The crucial question," said the Supreme Court of Oregon, "is whether a party holding an unliquidated claim is a 'creditor' within the meaning of the Bulk Sales Law . . . . The trial court held that plaintiff was a creditor within the meaning of said law only to the extent that plaintiff's claim against defendant was liquidated when the transfer of said stock of goods was made by defendant to said Garnishee." The court concurred in the conclusion of the trial court and affirmed the judgment.

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1 Braun v. American Laundry Machinery Co., 56 F. (2d) 197, 198, 199 (1932).

2 Wright v. Hart, 182 N. Y. 330, 338, 75 N. E. 404 (1905); affirmed, 219 N. Y. 383, 114 N. E. 809 (1916).

3 Escalle v. Mark, 43 Nev. 172, 183 P. 387, 5 A. L. R. 1512 (1919).

4 Silberstein & Sons, Inc. v. Cohen, 225 N. Y. 549 (1927).

5 Electrical Products Corp. of Oregon v. Ziegler Drug Stores, Inc., 157 Ore. 267, 71 P. (2d) 583 (1937).

An Indiana case, cited by the plaintiff, in which a landlord's claim for rent accruing after the transfer was held to be within the bulk sales law, was thus distinguished by the Oregon Court: "The obvious distinction is that in the Indiana case the lessor had not terminated and cancelled the lease and prosecuted his claim for damages of its breach. The terms of the lease rendered certain the amount of the landlord's claim. In the case at bar, as to the portion of the claim in dispute, the amount thereof did not become certain until final judgment had been rendered.

In the Indiana case,[6] the plaintiff, Haley, leased to Trees for a period of five years beginning March 1, 1929, a building which Trees occupied as a hardware store. In April, 1931, Trees sold his stock of goods to Wright and Todd. Haley asked for a judgment declaring them receivers, as provided by the bulk sales law. The statute had not been complied with, but there was no evidence that there were other creditors and it was contended that Haley was not a creditor when the sale was made, for the reason that the rent had been paid to and including the last day of April. No rent was due or past due on the date of the sale, and, it was argued, the obligation to pay rent for the remainder of the term of the lease did not make Trees a debtor or Haley his creditor.

Quoting from one of its earlier opinions, the court said: "The statute refers in general terms to the creditors of the seller without any exceptions or reservations. The statute does not except from its operation claims which are secured, nor does it except dispute claims which are in litigation. The language being clear, the court has no power to ingraft on the statute exceptions which the Legislature did not see fit to make." [7]

The court continued: "It is clear that Trees was obligated under the lease to pay appellee the rent for the building for the full term. The premises had been delivered to and accepted by Trees who was in possession. Appellee was not required to accept a surrender of the premises, nor is it shown that they had been surrendered, or that he did accept a surrender. Nor is there any effort to show, or rely upon, any breach of the covenants of the lease by the appellee. The lessor's obligation to pay the installments for the full term is no different than the obligation to pay partial payments for merchandise delivered, and accepted, and in possession. It is no different than the obligation to pay for merchandise sold, to be paid for at a future date, which has not arrived, or to pay a promissory note which was not matured and which was given for merchandise.

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[6] Wright v. Haley, 208 Ind. 46, 194 N. E. 637 (1919).

[7] George Kraft Co. v. Heller, 188 Ind. 612, 125 N. E. 209, 211 (1935).

It is well settled that a creditor may maintain an action to set aside a fraudulent conveyance, although his debt is not due . . .

No reason is suggested, or do we find a reason, why a creditor who might maintain an action to set aside a fraudulent conveyance might not also maintain an action under the Bulk Sales Law."

A Rhode Island case involving a landlord's claim for rent did not really require an interpretation of the statute.[8] The tenant executed a bill of sale February 1, 1932, the very day that the rent for February was payable. So far as appears from the opinion, the claim was only for the one month's rent. "To that extent," said the court, "the lessor became a creditor of the lessee at the beginning of that day, even though the lessee, under ordinary circumstances had that entire day within which to pay."

A landlord's claim for damages, arising under the terms of the lease after the tenant had made a sale in bulk, was held in a New York case not to make the landlord a creditor at the time of the sale. Litke had a store on Sixth avenue, which he rented from the plaintiff, and had also a store on Grand street. On December third he sold his Grand street business and stock of goods to a corporation which thereafter conducted business there. It was afterwards agreed that moneys deposited for security should be applied to the December rent. By the terms of the lease Litke was liable for any loss that the plaintiff might incur by being obliged to relet the premises at a less rental than that reserved in the lease. The plaintiff being unable to relet premises in January, recovered a judgment for damages measured by one month's rental and then brought an action to hold the corporation accountable which had bought the Grand street store.

The court said: ". . . as we view this action the plaintiff has not proven itself to be a creditor within the meaning of the Bulk Sales Act. The transfer was made early in December. At that time Litke was owing for the December rent. If this judgment had been upon that liability the plaintiff would clearly come within the provisions of the act. That liability, however, was satisfied by the application of the deposit money, which Litke had made upon entering upon the lease, and the present recovery upon which this action is based is for damages for failing to rent the store in the month of January. At the time of this transfer that was only a contingent liability under the lease, and it was not such a liability as is protected by the Bulk Sales Act . . . The Bulk Sales Act being in derogation of the common law must be strictly construed. The transfers therein specified are made void as against the creditors of the seller, unless such creditors of such sale. The provisions of the statute, therefor, could hardly be applicable

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8 Empire Radio Co., Inc. v. Bates, 56 R. I. 116, 183 A. 882 (1936).

to parties who were not creditors at the time of the transfer, and who might only become creditors upon the happening of some contingency." [9]

A holder of a promissory note which is not yet due was held by the same court not to be, within the meaning of the bulk sales act, a creditor of an accommodation indorser, the liability of the indorser being contingent on the dishonoring of the note and the giving of notice of protest.[10]

The obligee in an appeal bond was held in a Michigan case to be a creditor of the surety, within the meaning of the bulk sales law, although the condition of the bond had not become absolute on an affirmance on appeal.[11] The effect of the decision should perhaps be regarded as limited by the facts of the case, the court having held that the evidence fully warranted the finding of the trial court that the surety's sale of his stock of goods was made for the express purpose of avoiding liability on the appeal bond. The bill of sale was made within a few days after the surety signed the appeal bond and after he had been advised by counsel to pay the judgment, and the bill of sale was kept from record until after judgment had been entered upon him on the bond. The court, however, spoke in broader terms than the facts required: "It is urged by appellant (the purchaser under the bill of sale, who replevined the goods from the sheriff after execution had been levied on them) that George D. Hanna's liability upon the bond could not be fixed until judgment upon appeal, and therefore that the obligee in the bond was not, at the time of the sale, one of his creditors. A creditor is "one who has a right to require of another the fulfillment of a contract or obligation." . . . It cannot be said that George Hanna's liability was not fixed at the moment he signed the bond. It was fixed in amount, though contingent upon the failure of his principal to prosecute his appeal, and reverse or pay the judgment . . . George D. Hanna was accepted as surety upon the appeal bond solely on account of his ownership of the goods in question. To permit him to dispose of his stock immediately thereafter, without notice to the obligee in the bond thus rendering the bond worthless, would result in encouraging the very fraud which the statute was designed to prevent. The statute is remedial in character, and should be given such a construction as will effect the plain legislative intent."

In *Griffin v. Allis-Chalmers Manufacturing Co.*[12] the plaintiff had purchased a tractor from the Advance-Rumely Thresher Co. in 1929,

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[9] Apex Leasing Co., Inc. v. Litke, 159 N. Y. Supp. 707 (1916); Affirmed 225 N. Y. 625, 121 N. E. 853 (1918).

[10] Adam-Flanigan Co. v. DiDonato, 167 N. Y. Supp. 948 (1917); affirmed, 288 N. Y. 542, 126 N. E. 898 (1920).

[11] Hanna v. Hurley, 162 Mich. 601, 127 N. W. 710 (1910).

[12] 65 N. D. 379, 259 N. W. 89 (1934).

giving his note for the unpaid balance of the price. The tractor not being as guaranteed, he rescinded the purchase, but thereafter made three payments to the company in reliance on its successive promises to put the tractor in first class order or return all that he had paid. The company failed to make good its promises and he demanded the return of all his payments. He brought an action in November, 1932, and recovered a judgment in February, 1934. Meanwhile, on June 1, 1931 — it does not appear from the opinion whether this was before or after the plaintiff made his final rescission, — the company had sold its entire stock of goods to another corporation, and the plaintiff, having recovered his judgment against the thresher company, had not brought an action against that corporation. The court held that he was not a creditor at the time of the transfer and therefore had not cause of action against the corporation to which the transfer was made.

Referring to the definition of the term "creditor" contained in another statutory provision the court said: "Our statute, section 7216 of the Compiled Laws, defines the term "Creditor" thus: 'A Creditor within the meaning of this chapter is one in whose favor an obligation exists by reason of which he is or may become entitled to the payment of money.' "

A disputed claim, on which a judgment was subsequently recovered, was held in Indiana to be within the bulk sales law.[13] The nature of the claim is not stated in the opinion, but from a later opinion, delivered on an affirmance of the judgment on the claim, it appears that the defendant, the lessee of the first floor of a building, made changes in a partition or party wall, with the result that the wall gave way and damage was caused to the goods of the upper floor.[14] After recovering his judgment, and while an appeal was pending the plaintiff brought an action in which he asked that a corporation, which had purchased the stock of goods of the defendant in the earlier section, be declared a receiver.

In *Harrison v. Riddell*,[15] an unliquidated tort claim was held not to be within the bulk sales law. The effect of the decision is, however, limited by the fact that the statute was, in the court's words, "intended only to protect creditors incident to the business." Generally the statutes are not thus limited.[16]

The claim was for personal injuries suffered by the plaintiff, when he was struck by an automobile. The owner of the car, shortly after the accident, made a long-contemplated transfer of his business to a corporation. The plaintiff made no demand until more than eight

13 George Kraft Co. v. Heller, Supra.

14 Independent Five & Ten Cent Stores of New York v. Heller, 189 Ind. 554, 127 N. E. 439 (1920).

15 64 Mont. 466, 210 P. 460 (1920).

16 Annotation 84 A. L. R. 1406.

months later, when he brought an action in which he later recovered a judgment. He relied on an earlier Montana decision in which it was held that one personally injured by the tort of another becomes a creditor of the latter the day on which the former's cause of action arises.

In a Georgia case, where the plaintiff in a death action levied an attachment on property which the defendant had sold some eight months after the cause of action arose, it was held that the sale was not void under the bulk sales act as to the plaintiff; the decision was not, however, on the ground that the cause of action was in tort.[17]

Where a transfer is attacked, not under the bulk sales laws, but on the ground that it is fraudulent, it is generally held that tort claimants are within the protection afforded by the statutes and the doctrines established by the courts.[18]

An attorney's claim for services rendered in connection with the sale has been held not to be within the bulk sales act.[19]

Richard G. Miller.

WHAT IS DEFAMATION OF A GROUP OR CLASS?—Defamation is a false publication by which it is intended to bring one to disrepute; if it is communicated through the sense of hearing it is called slander; and if it is communicated through the sense of sight it is libel.[1] In order that such defamation be actionable, it must have been communicated to a third person. This is known as a "publication." [2]

In *Kenny v. Illinois State Journal Company*,[3] libel is defined as, "Everything printed which reflects on character of another by imputing moral turpitude, fraud, dishonesty or dishonorable conduct, or which tends to bring such other into public contempt, hatred, scorn or ridicule." Justice Edwards, in *Wright v. Woolworth Company*,[4] explains that under common law, which is still in force in Illinois even though modified by statutes, there are five classes of spoken words which "give rise to a cause of action for their false utterance concerning a person, in the presence and hearing of others. They are: first, words imputing to the party the commission of a criminal offense;

17 Foremost Daries Ind. v. Kelly, 51 Ga. App. 722, 181 S. E. 204 (1935).
18 Annotation 39 A. L. R. 175.
19 Fidelity & Deposit Co. v. Tonas, 133 Md. 270, 105 A. 174 (1918).

1 Chapin on Torts, Hornbook series, p. 293.
2 Chapin on Torts, Hornbook series, p. 296.
3 Kenny v. Illinois State Journal Co., 64 Ill. App. 39 (1895).
4 Wright v. Woolworth Co., 281 Ill. App. 495 (1935).

second, words which impute that the party is infected with some contageous disease, where, if the accusation be true, it would exlude the party from society; third, defamatory words which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such office or employment; fourth, defamatory words which prejudice such party in his or her profession or trade; and fifth, defamatory words which, though not in themselves actionable, occasion the party special damage."

"Class" refers to a large number of persons that can be collectively designated under one name; while "group" is used to designate a particular or limited collection of persons of a general class, usually a small group of persons.[5]

It is generally held that defamation of a class of persons wherein no individual of that class is affected, such member of the class of persons cannot maintain an action to recover damages for an alleged libel or slander.[6] In RULING CASE LAW, it is generally expressed that, "where the class or group in question is a very large one and there is little or nothing said or written which applies to the particular person who brings his action, the right of recovery will be denied." [7]

In the case of *Louisville Times v. Stivers*,[8] it is pointed out that in order to hold an action, the plaintiff must show that the defaming publication did him harm. The article in question referred to a feud between two families within Kentucky from which plaintiff said it could be imputed that "The crime of engaging in vindictive strife and guerilla warfare for the last fifty years, no part of which is true, but is wholly false." The court further showed that in order to defame a group such article must apply to every member, and that as the size of the group becomes greater, it will become all the more difficult for the plaintiff to show that such article applied to him, since such article cannot be directed toward the one. The supreme court of Kentucky said the plaintiff's case cannot hold since no names were mentioned in the publication, it refering to family name in question which did not tend to defame the plaintiff. That the fact that a person's name is Stivers does not prove that he was defamed because of a publication which relates to the "Stivers Clan."

But in similar cases, where only a relatively small group of persons, belonging to a particular or limited collection of persons, to whom can be imputed a defamation aimed against all members of that

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5 Annotation, 97 A. L. R. 281.

6 Annotation, 97 A. L. R. 281.

7 17 Ruling Case Law 375.

8 Louisville Times v. Stivers, 252 Ky. 843, 68 S. W. (2d) 411 (1934).

group, or family, any member of that group may bring suit.[9] RULING CASE LAW points this out to be an exception: "if the language employed is directed toward a comparatively small group of persons, or a general class, and is so framed as to make defamatory imputations against all members of the small or restricted group it seems that any member thereof may sue." [10]

In an early Illinois case,[11] the court held that the plaintiff bringing action need not be mentioned by name in the defamatory matter, so long as the words can be shown to be describing the person and so understood by others.

Consequently it may be concluded that if defamatory language is used, either libelously or slanderously, against a whole group (a small number of persons), which includes everyone of that group, such a defamation refers to each party of the group, and each member of that group may bring suit;[12] but, if the defamation is broad, involving a general class of persons (a large number of persons), and such defamation cannot be imputed to any particular member of the general class of members, then no particular member of such class has a right of action to recover for damages arising out of such publication.[13]

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9 Constitution Publishing Co. v. Leathers, 48 Ga. App. 429, 172 S. E. 923 (1934).

10 17 Ruling Case Law 376.

11 Mothersill v. Voliva, 158 Ill. App. 16 (1910).

12 Annotation, 97 A. L. R. 284.

13 Annotation, 97 A. L. R. 281.