



5-1-1938

Contributors to the May Issue/Notes

David Gelber

James E. Boyle

James E. Bales

William Langley

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

David Gelber, James E. Boyle, James E. Bales & William Langley, *Contributors to the May Issue/Notes*, 13 Notre Dame L. Rev. 289 (1938).

Available at: <http://scholarship.law.nd.edu/ndlr/vol13/iss4/4>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

CONTRIBUTORS TO THE MAY ISSUE

HECTOR DAVID CASTRO, Degree of Doctor of Laws and Politica and Social Sciences, National University of El Salvador, 1915. District Attorney of San Salvador, 1917; Judge, District of Neuva, San Salvador, 1917-1918; Judge, San Salvador City, 1918-1919. Consul from San Salvador to Liverpool, England, from May to November, 1920; Secretary to Legation of San Salvador, in Washington, 1920-1922; Charge d'Affairs, 1922-1927; Undersecretary for Foreign Relations, 1927-1928; Delegate to the Sixth American International Conference, 1928. Professor of Law, National University of El Salvador, 1928-1933; Envoy Extraordinary and Minister Plenipotentiary to Uruguay at one time. Official delegate from San Salvador to the Seventh American International Conference in 1933 at Montivideo. Envoy Extraordinary and Minister Plenipotentiary to Washington since 1934.

JAMES D. HAYES, LL.B., 1917, University of Notre Dame. Assistant Solicitor, Veterans' Administration. Detailed as Assistant Director, Bureau of Old-Age Insurance, Social Security Board, 1936-1938.

FRANCIS ALOYSIUS McCULLOUGH, A.B., 1925, University of Dallas; Knight of Columbus Graduate Scholar at the Catholic University of America, 1925-1926, receiving the A.M. degree; J.D., University of Notre Dame, 1929. Attorney, Dallas Regional Office of the Home Owners' Loan Corporation.

NOTES

ATTORNEY AND CLIENT—UNAUTHORIZED PRACTICE OF LAW.—The general rule that a corporation cannot practice law seems to be well settled in the United States today.¹ The New York Court of Appeals in

¹ Re Miller, 5 Cal. (2d) 588, 55 Pac. (2d) 491 (1936); People ex rel. Committee on Grievances v. Denver Clearing House Banks, 99 Colo. 50, 59 Pac. (2d) 468 (1936); Boykin v. Hopkins, 174 Ga. 511, 162 S. E. 796 (1932); People ex rel. C. B. A. v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941 (1937); Depew v. Wichita Asso. C. M., 142 Kan. 403, 49 Pac. 1041 (1935); Re Shoe Mfrs. Protective Ass'n, 3 N. E. (2d) 746 (Mass. 1936); Unger v. Landlords' Management Corp., 114 N. J. Eq. 68, 168 Atl. 229 (1933); Re Wellington, 154 Misc. 271, 276 N. Y. S. 946 (1935); Land Title Abstract & T. Co. v. Dworken, 129 Ohio St. 23, 193 N. E. 650 (1934); Re Umble, 117 Pa. Super. Ct. 15, 177 Atl. 340 (1935); State v. James Sanford Agency, 167 Tenn. 339, 69 S. W. (2d) 895 (1934).

*In Re Co-Operative Law Co.*² enumerated and discussed the reasons which preclude a corporation from practicing law: "The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. The right to practice law is in the nature of a franchise from the state, conferred only for merit. It cannot be assigned or inherited, but must be earned by hard study and good conduct." The essential element underlying the relation of attorney and client is that of trust and confidence of the highest degree growing out of the employment and entering into the performance of every duty which the attorney owes to his client in the course of such employment. With a corporation, this confidence is merely incidental, as the employee-lawyer's first and primary obligation is to his employer, and when a conflict of interests arises, personal gain and favor will dominate at the expense of justice.³ The original common law prohibition of the practice of law by a corporation has in recent years been embodied in statute by many states. Most of these statutes make it a *crime* for a corporation to engage in the practice of law,⁴ while others merely forbid it for professional purposes.

The question to be taken into consideration is, What constitutes the "practice of law"? In the effort to avoid punishment, attempts have been made to try to exclude the drafting of legal instruments from within the boundaries of the general meaning of "practice of law." The

² 198 N. Y. 479, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 92 N. E. 15, 19 Ann. Cas. 879 (1910).

³ *People v. Merchants Protective Corp.*, 189 Cal. 531, 209 Pac. 363 (1922).

⁴ Ala. Gen. Acts (1931), p. 606, § 3; ARIZ. REV. CODE (1928) § 4568; Ark. Acts (1929) Vol. 2, Act 182, § 3; CAL. PENAL CODE (1931) § 161 (a); COLO. COMP. LAWS (1921) § 6015; CONN. GEN. STAT. (SUPP. 1933) § 5345 (§ 1129b); DEL. REV. CODE (1935) § 195; FLA. COMP. GEN. LAWS (1927) § 8133; Ga. Laws (1931) No. 36, p. 191, § 1; IDAHO CODE ANN. (1932) § 3-420; ILL. REV. STAT. (Smith-Hurd, 1933) c. 32, § 413; IND. STAT. ANN. (Burns, 1926) § 1030; IOWA CODE (1935) § 12551; KY. STAT. (Carroll, 1930) § 98-6; LA. GEN. STAT. (Dart, 1932) (Supp. 1937) § 449.45; Me. Laws (1931) c. 176, § 31; MD. ANN. CODE (Bagby, 1924) Art. 10, § 19; MASS. ANN. LAWS (1933) c. 221, § 46; MICH. COMP. LAWS (1929) § 10175 (1); MINN. LAWS (1931) c. 114, § 1 (a); MISS. CODE (1930) § 3710; MO. STAT. ANN. (1932) § 11693; NEV. COMP. LAWS (1929) § 622; N. J. LAWS (1927) c. 270, p. 498; N. M. STAT. ANN. (1929) § 9-212; N. Y. CONSOL. LAWS (Cahill, 1930) c. 41, § 272; N. C. PUBLIC LAWS (1931) c. 157, § 5; N. D. LAWS (1933) c. 143, § 811; OHIO ANN. GEN. CODE (Page, 1926) § 1698-1; OKLA. STAT. (1931) § 4257; Ore. Laws (1935) c. 28, § 195; PA. STAT. ANN. (Purdon, 1930) (Supp. 1936) § 1610; R. I. GEN. LAWS (1923) c. 401, (6238) § 46; Tenn. Pub. Acts (1935) c. 30, § 2; TEX. GEN. LAWS (1933) c. 238, p. 835, § 6; UTAH REV. STAT. (1933) § 6-0-39; VA. ANN. CODE (1930) § 3426a; WASH. REV. STAT. (Remington) § 3231; W. VA. CODE (1931) c. 30, § 5; WIS. STAT. (1931) § 256.30.

The following states do not have a general criminal statute: Kansas, Montana, Nebraska, New Hampshire, South Carolina, South Dakota, Vermont and Wyoming.

proposition, that the drawing of legal papers does not amount to the practice of law, finds little support in the cases. Although now overruled, a Georgia case⁵ held that the drawing of legal instruments *for others* is not practicing law, and another court inferred that if legal advice was not given in conjunction with the drafting of the document, it would not be held to be practicing law.⁶ Most of the decisions have maintained that the preparation and drawing up of legal instruments such as wills, deeds, leases, and mortgages, was practicing law.⁷ There is a great deal more judicial support in setting up a distinction between the mere filling in of blank forms, or so-called simple instruments, and complex instruments, generally considering the latter as the practice of law. In *In re Eastern Idaho Loan & Trust Co.*⁸ the court said: "Such work as the mere clerical filling out of skeleton blanks or drawing instruments of generally recognized and stereotyped form effectuating the conveyance or incumbrance of property, such as a simple deed or mortgage not involving the determination of the legal effect of special facts and conditions, is generally regarded as the legitimate right of any layman."

Other courts maintain that the filling in, and drawing up of simple instruments, is as much the practice of law as complex documents. The judge went farther, in one case,⁹ in saying that even a single transaction may constitute the practice of law if there is an intent, as shown by the circumstances, to perform legal work. The American Bar Association Committee on Unauthorized Practice¹⁰ has said that "It is not against public interest for one not licensed to fill in the blanks of legal instruments appropriately, if they have been selected by one licensed to practice law, and are used for the particular purpose only within a reason-

⁵ *Atlanta Title & Trust Co. v. Boykin*, 172 Ga. 437, 157 S. E. 455 (1931), later overruled in *Boykin v. Hopkins*, *op. cit. supra* note 1.

⁶ Accord: *In re McCallum*, 186 Wash. 312, 57 Pac. (2d) 1259 (1936).

⁷ 7 C. J. S., p. 703, § 3; *Shroeder v. Wheeler*, 126 Cal. App. 367, 14 Pac. (2d) 903 (1932); *Boykin v. Hopkins*, *op. cit. supra* note 1; *People v. Peoples' Stock Yards State Bank*, 344 Ill. 462, 176 N. E. 901 (1931) (preparing documents and rendering other services involving the use of legal skill and knowledge and charging for such services, are within the term, "practice of law"); *In re Pace*, 156 N. Y. S. 641, 170 App. Div. 818 (1915); *Cain v. Merchants Nat. Bank & Trust Co. of Fargo*, 66 N. D. 746, 268 N. W. 719 (1936) (practice of law includes the drawing for others of complicated legal instruments requiring more legal knowledge than is possessed by the average layman); *State ex rel. McKittrick v. C. S. Dudley & Co.*, 102 S. W. (2d) 895 (Mo. 1937); *Wollitzer v. Nat. Title Guaranty Co.*, 148 Misc. 529, 266 N. Y. S. 184 (1933); *Paul v. Stanley*, 168 Wash. 371, 12 Pac. (2d) 401 (1932).

⁸ 49 Idaho 220, 288 Pac. 157 (1930). The courts in Pennsylvania and Massachusetts hold that the occasional drafting of wills, simple deeds, and other instruments, when not conducted as an occupation, is not the practice of law. *Childs v. Smeltzer*, 315 Pa. 9, 171 Atl. 883 (1934); *In re Opinion of the Justices*, 289 Mass. 607, 194 N. E. 313 (1935).

⁹ *In re Petition of Bay County Bar Assn. re Rathke* (1936 Mich. circ. ct.).

¹⁰ 5 LAW & CONTEMPORARY PROBLEMS 74; 61 AM. BAR ASS'N REP. 711.

able time after such advice and selection." The Nebraska courts hold that one is not engaged in the practice of law where he acts merely as an amanuensis in preparing an assignment of a judgment. However, this court maintained that the practice of law "includes not only the trial of causes in court and the preparation of pleadings, but also includes drawing, and advising as to the legal effect of petitions for the probate of wills, deeds, mortgages, and other instruments of like character";¹¹ and this seems to be the general rule in most jurisdictions. It has, moreover, been consistently held that a layman who insists on the privilege of representing himself in his own behalf may do so.¹²

Exceptions to the rule denying laymen the privilege of drawing up legal instruments, have been made in the Georgia, Maryland, Rhode Island, and Minnesota statutes favoring real estate brokers, and in Georgia and Texas in behalf of banks and trust companies.¹³

Another form of unlawful practice, is that indulged in by motor clubs. These agencies perform a variety of functions which are supposedly of material benefit to the general public; but, they are, in most cases, practicing law without authority. Pamphlets, circulars, and other advertising literature have been distributed by these organizations offering its members nearly every sort of legal assistance which could possibly arise from the operation of an automobile, not limited only to traffic violations, but also to include charges of manslaughter and the like. All the charges of unlawful practice have been upheld by the courts except in one case.¹⁴ Even though the automobile clubs have not, in most cases, attempted to perform these legal services themselves, but have employed duly licensed attorneys, the courts universally decree that in as much as the clubs could not perform these services on their own behalf, they cannot circumvent this by delegating the privilege to hired counsel, as it would defeat the purpose of the rule.

In maintaining the general doctrine that a corporation may not practice law, it has been irrelevant which form the club takes. In *Rhode Island Bar Association v. Automobile Service Association*¹⁵ the court held that the fact that the defendant was a voluntary association and not a corporation was immaterial; and the fact that the legal service was to be rendered not by the association itself, but by counsel designated by it, was held not to affect the same conclusion. Even a corpora-

11 State ex rel. Wright v. Barlow, 131 Neb. 294, 268 N. W. 95 (1936).

12 Copeland v. Dabbs, 88 Ala. 489, 129 So. 88 (1930); Ackerman v. Southern Arizona Bank & Trust Co., 7 Pac. (2d) 944 (Ariz. 1932).

13 Ga. Laws (1931) No. 36, p. 191, § 2; MD. ANN. CODE (Bagby, 1924) Art. 27, § 19; MINN. LAWS (1931) c. 114, § 1 (c); R. I. Acts and Resolves (1935) c. 2190, § 46; TEX. GEN. LAWS (1933) c. 238, § 3.

14 In re Thibodeau, 3 N. E. (2d) 749 (Mass. 1936).

15 55 R. I. 122, 179 Atl. 139 (1935). Accord: State ex rel. Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540 (1936).

tion organized not for pecuniary gain, but merely to promote the general interests and welfare of its members by offering free legal advice has been held guilty of the illegal practice of law.¹⁶ A similar case was later upheld by the same court.¹⁷ The mere giving of advice to its policy holders as to whether or not they have a good claim, or a good reason for resisting a claim by another, has been held in Ohio to be practicing law.¹⁸

Massachusetts set up a distinction in the decisions of two recent cases. In *In re Maclub of America*¹⁹ a corporation was engaged in selling "memberships," which were in reality contracts, to persons belonging to a certain fraternal order. This entitled them, besides other privileges, to benefit by the corporation's legal service in any proceeding arising out of the ownership or operation of automobiles. A list of attorneys was distributed and recommended for use, but the members were at liberty to employ their own lawyers. The court was not hesitant in holding that the corporation was engaged in the unauthorized practice of law. In *In re Thibodeau*²⁰ it was held, on similar facts, not to be illegal practice. However, the court distinguished these two cases on the ground that the defendant in the former case bound himself by contract to furnish legal services, and was the principal in the transaction. But in the *Maclub* case the client engaged his own attorney on his own account, and the automobile club had no interest in the case at all until it was through, at which time they paid the lawyer for his services. The *Maclub* contract was to *furnish legal defense*, and *not* one merely to *pay for legal defense* undertaken by its members. Even an incorporated automobile club which maintained a legal department, employing some attorneys on a retainer basis, and others on full time, was held to be engaged in the unauthorized practice of law.²¹

The Committee on Professional Ethics and Grievances of the American Bar Association disapproved of the furnishing of legal services by automobile clubs to its members, regardless of the type of association, and indifferent as to whether or not it was operated for profit.²²

Having already determined that a corporation may not practice law, the problem one is then confronted with is whether or not the operation of a collection agency constitutes the practice of law. As a general rule,

¹⁶ *People ex rel. Chicago Bar Asso. v. Motorists' Asso.*, 354 Ill. 595, 188 N. E. 827 (1933).

¹⁷ *People ex rel. Chicago Bar Asso. v. Chicago Motor Club*, 362 Ill. 50, 199 N. E. 1 (1935).

¹⁸ *Goodman v. Motorists' Alliance*, 29 Ohio N. P. (N. S.) 31 (1931).

¹⁹ 3 N. E. (2d) 272 (Mass. 1936).

²⁰ *Op. cit. supra* note. 14.

²¹ *Dworken v. Cleveland Automobile Club*, 29 Ohio N. P. (N. S.) 607 (1931).

²² 5 LAW AND CONTEMPORARY PROBLEMS 28; Opinions 8 (1925), Am. Bar Ass'n, Opinions of Committee on Professional Ethics and Grievances (1936) p. 53.

the collection of claims without resort to courts of law does not come within the scope of those considered as practicing law, if its services are merely limited to presenting the claims without rendering any application of law to the facts, or giving any professional legal skill.²³ The statutes of many states have been construed in the most cases to include collection agencies with those grouped as practicing law.²⁴ However, there are also certain states that exclude them.²⁵ In a recent Vermont case the court held that the defendant was engaged in the unlawful practice of law. "In the instant case the respondent contracted with the creditor for a fee to enforce, secure, settle, adjust, and compromise her claim against the debtor; he wrote the debtor and threatened him with suit unless payment was made within seventy-two hours; as a result of such suit, he collected the full amount of the claim and costs."²⁶ In *State ex rel. McKittrick v. C. S. Dudley & Co.*,²⁷ a Missouri case, the court held that a layman has a right to present a claim or note to the debtor for payment, and to receive payment of same for the creditor. The collection agency had the right to collect debts for others, provided that it did not employ an attorney, or threaten the debtor with suit if he failed to pay; and, if counsel was necessary, it should be at the discretion of the creditor to select his own attorney. The mere threat of suit on failure to pay, coupled with impressive letterheads, denominated with various legal phrases, has been held to be a usurping of the lawyers' privileges.²⁸

Neander v. Tillman,²⁹ a New York case, cites the rule in regard to collection agencies, which has been adapted by the great majority of the courts in this country: "No principle of law or public policy prohibits soliciting for collection, debts which are just and due and payable, or which may become so," if resort is not made to the courts in efforts to intimidate or wrongfully persuade the debtor into paying.

David Gelber.

²³ *Public Service Traffic Bureau v. Haworth Marble Co.*, 40 Ohio App. 255, 178 N. E. 703 (1931); *L. Meisel & Co. v. Nat'l Jewelers Bd. of Trade*, 90 Misc. 19, 152 N. Y. S. 913 (1915).

²⁴ The statutes of Alabama, Rhode Island, and Massachusetts expressly forbid the practice by collection agencies.

²⁵ The statutes of California, Georgia, Illinois, Maryland, Minnesota, and Texas specifically permit collection agencies to practice.

²⁶ *Re Ripley*, 191 Atl. 918 (Vt. 1937).

²⁷ 102 S. W. (2d) 895 (Mo. 1937).

²⁸ *State Bar v. Retail Credit Ass'n*, 170 Okla. 248, 37 Pac. (2d) 954 (1934); *Berk v. State*, 225 Ala. 324, 142 So. 832 (1932); *State ex rel. McKittrick v. C. S. Dudley & Co.*, *op. cit. supra* note 27.

²⁹ 232 App. Div. 189, 249 N. Y. S. 559 (1931).

DIVORCE—CONFLICT OF LAWS—RIGHT OF PARTIES TO CONTEST—RECOGNITION OF VOID DECREES.—In considering the efficacy of foreign divorces it is of first importance that we clarify the requisites of a valid decree. While a complete and exhaustive classification of the requisites of each jurisdiction is beyond the scope of this comment, it is a safe generalization to say that all states require that one of the parties be domiciled in the decree-granting state and that the adverse party have notice of some kind whether it be by publication, by service within the state of the forum, or by notice actually given or sent.¹ A complication arises from the much discussed *Haddock* case² wherein it was held that mere domicile of one party to the decree in the granting state does not, of necessity, entitle the divorce to *full faith and credit* under the Federal Constitution,³ but that states may accord recognition to such decree on the basis of *comity* if the results are in keeping with the policy of the state passing on the validity. Since only New York, South Carolina and North Carolina have tenaciously adhered to the right to invoke their public policies in their inquiries to determine recognition, the validity of foreign divorces in states other than the granting one is concerned in each instance upon whether the court had jurisdiction of the parties and of the *res* or marital status. Divorce being usually considered an action *in rem*, the latter question of jurisdiction over the subject matter is of even greater importance in divorce than jurisdiction over the parties.⁴ Notwithstanding the *Haddock* case the majority of the states recognize foreign divorces whether both parties were actually served or not, upon the basis of *comity*.⁵

Directing our attention to the question of giving recognition to foreign decree which except for special circumstances would not be entitled to recognition, it becomes apparent that the cases revolve largely on factual bases, and thus defy accurate classification beyond general principles. Broadly speaking, the classification can be made as follows: (1) Cases in which recognition is not offensive to the public policy of the state wherein recognition is sought; (2) Cases in which recognition was possible under the law of the marital domicile at time of decree; and (3) Cases in which the conduct of the parties precludes their contesting the divorce. In the first classification *Hubbard v. Hubbard*,⁶

¹ STUMBERG, CONFLICT OF LAWS 268; *Andrews v. Andrews*, 188 U. S. 14 (1903).

² *Haddock v. Haddock*, 201 U. S. 562 (1906).

³ Art. IV, § 1 (full faith and credit clause).

⁴ *Bell v. Bell*, 181 U. S. 175 (1901).

⁵ *Ex Parte Hilton*, 213 Ala. 573, 105 So. 647 (1925); *In Re Patterson's Estate*, 64 Cal. App. 643, 222 Pac. 374 (1924); *Gildersleeve v. Gildersleeve*, 88 Conn. 689, 92 Atl. 684 (1914); *Zentzie v. Zentzie*, 163 Wis. 342, 158 N. W. 284 (1916); *Joyner v. Joyner*, 62 S. E. 182 (1908); *Howard v. Strode*, 242 Mo. 210, 146 S. W. 792 (1912).

⁶ 228 N. Y. 81, 126 N. E. 508 (1920).

the leading case, involved a state of facts wherein the defendant and one Murphy were married in Pennsylvania and separated there. Sixteen years later the defendant went to Massachusetts and obtained a divorce upon grounds not available in New York which had become the residence of Murphy following the separation. Service was by publication only, and no appearance was made by the defendant. The defendant then married the plaintiff who sought an annulment alleging there was no valid marriage as the Massachusetts divorce was *ex parte* in a state other than that of matrimonial domicile, service was by publication only as to come within the scope of the *Haddock* case, and the decree was on grounds often held contrary to the public policy of New York. In overruling this position the New York Court of Appeals said: "Its [divorce decree's] invalidity rests ultimately on the public policy of this State. That policy does not require the establishment of this State as a forum or refuge to which parties to a marriage validly consummated may resort to have that marriage adjudged a nullity and adulterous. . . . The moral or legal principles adopted by the State will not be weakened or deteriorated by the refusal to declare unlawful and void the marriage between the parties." The court's theory was that public policy was better served in preserving the valid character of the second marriage than in overthrowing it.

The leading case of the second group is, likewise, a New York decision, *Ball v. Cross*,⁷ and its inception was also in anullment proceedings. In that case the defendant had been married in Missouri and while living in Texas her husband received a Nevada divorce in which only constructive service was had, and upon grounds not recognized in New York. The plaintiff, second husband, sought annulment and the application of the well-known New York policy⁸ of refusing recognition to such decrees. In denying this petition, the court found that since the defendant, wife, was domiciled in either Missouri or Texas at the time of the decree, and since one or both of those states recognized such a divorce, that New York had no interest in the case. This holding went on the theory that the state of the domicile of the wife at the time of rendering the divorce was the state by the law of which the validity of the decree was to be determined and if it is recognized in that state it would be recognized in New York and the other states. It will be noticed that both of the above cases were New York cases, arising under that State's policy of refusing to recognize *ex parte* decrees unless consistent with its public policy. Thus it is seen that the first two classes of cases are virtually law unto themselves by reason of the limited adoption of New York's position.

The third classification is the largest and most important because it depends for its existence upon broad general principles of law as con-

⁷ 231 N. Y. 329, 132 N. E. 106, 39 A. L. R. 600 (1921).

⁸ In *Re Ferry's Estate*, 279 N. Y. S. 919 (1935), and cases cited therein.

trusted to a restricted policy. On approaching the subject of whether or not one's conduct may estop one from contesting the validity of a divorce decree, it is necessary to distinguish between those cases in which it is held that one who invokes the jurisdiction of a court will not be heard to deny it, and those which go on the principle that one who has accepted the benefits of a judgment will not be heard to contest the validity of that judgment. Under the first rule the leading cases are *In re Ellis' Estate*⁹ and *Starbuck v. Starbuck*.¹⁰ In the *Ellis* case *M.* and *R.* were married and resided in Wisconsin. After many years they moved to Minnesota with the intention of there making their home. *R.* then sought a divorce in Wisconsin and falsely swore that she was a resident of that State. Personal service was had and an appearance filed. On *M.*'s death both *R.* and his second wife applied for letters of administration, *R.* basing her claim on the theory that the divorce was invalid because of her false statements. The court granted the letters to the second wife and held that since *R.* had, by her statements, invoked the Wisconsin court's jurisdiction, she could not now be heard to question it. In the *Starbuck* case there was an attempt by the plaintiff to establish a dower right in lands of the deceased husband. The plaintiff and deceased were married and lived in New York until the plaintiff left and received a Massachusetts divorce on grounds which were unrecognized in New York, in which suit no jurisdiction over the defendant was had. The plaintiff insisted that since this case fell within New York's policy of denying certain decrees recognition, that she was still the wife of deceased. The plaintiff was dismissed on the above grounds of having invoked a court's jurisdiction, one is estopped to question the validity of the court's judgments.¹¹ The other rule as to the acceptance of benefits has been widely and variously applied; but the most frequent case is concerned with the marriage of the contesting party in reliance on the decree of divorce. A typical case is that of *Parmelee v. Hutchins*¹² in which a husband left his wife in Massachusetts and obtained a divorce in Illinois by giving only constructive notice. On learning of the Illinois divorce, the wife re-married; but on the death of the first husband, she maintains the present suit for a widow's allowance. In denying the relief, the court admitted that the decree could have effect only in Illinois, if true adherence were had to the principles of recognizing foreign divorces, but held that the subsequent conduct of the plaintiff in reliance upon the divorce by which she accepted the benefits by remarrying and thus precluded herself from as-

⁹ 55 Minn. 401, 56 N. W. 1056 (1896).

¹⁰ 173 N. Y. 503, 66 N. E. 193 (1903).

¹¹ The following cases support this view: *Ellis v. White*, 61 Iowa 644, 17 N. W. 28, (1883); *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761 (1893); *Scheper v. Scheper*, 125 S. C. 89, 118 S. E. 178 (1923).

¹² 238 Mass. 561, 131 N. E. 443 (1921).

sailing the validity of the Illinois decree. The great weight of authority sustains this position.¹³ Likewise, the acceptance of alimony is such a benefit under the void decree as to prevent a wife from attacking the validity of that decree.¹⁴

James E. Boyle.

LOTTERIES—IS BANK NIGHT A LOTTERY?—Many definitions have been given of the term "lottery." By the great weight of authority, in order that a transaction may be a "lottery," three elements must be present; consideration, prize, and chance.¹ The word "lottery" has no technical legal meaning but must be construed in the popular sense. As stated in *Corpus Juris*:² "Where not otherwise defined by statute, the word 'lottery,' whether coming up for construction in a criminal prosecution or in a civil proceeding, cannot be regarded as having any technical legal signification different from the popular one, and it is, therefore, a species of gambling, which may be defined as a scheme for the distribution of prizes or things of value by lot or chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize; or as a game of hazard in which small sums of money are ventured for the chance of obtaining a larger value, in money or other articles."

The term "lottery," as popularly and generally used, refers to a gambling scheme in which chances are sold or disposed of for value and sums thus paid are hazarded in the hope of winning a much larger sum. The principle thus universally recognized establishes the proposition that prize, chance, and consideration must concur to constitute a lottery.

In order to properly understand and compare the decisions of the various state courts relative to the legality or illegality of the *Bank Night* plan, a brief statement of the plan and procedure is necessary:

The procedure of the *Bank Night* operation differs in different localities; but in the main, even with minor variances, is as follows: Distribution of prize money is generally accomplished by registration of the participants' names in a specially prepared registration book which auto-

¹³ Arthur v. Israel, 15 Colo. 147, 25 Pac. 81 (1890); Mohler v. Shank, 93 Iowa 273, 61 N. W. 981 (1895); Yorston v. Yorston, 32 N. J. Eq. 495 (1880); Bruguere v. Bruguere, 172 Cal. 199, 155 Pac. 988 (1916); Ricgardson's Estate, 132 Pa. 292, 19 Atl. 82 (1890).

¹⁴ Gilbert v. Gilbert, 83 Ohio St. 265, 94 N. E. 421 (1918).

¹ 17 R. C. L. p. 1222; 38 C. J. p. 286.

² 38 C. J. p. 286-288.

matically assigns to the names a numbered designation. The payment of an admission fee to the theater conducting the *Bank Night* program may be exacted as a condition precedent to the assignment of a number to participants, or the registration number may be bestowed gratuitously. Corresponding numbers thus assigned are placed in a receptacle from which one or more numbers are selected on the stage of the theater on the night selected as *Bank Night*, and the winner is identified by this number. Actual presence or immediate proximity to the theater is generally required of each participant, that he may appear and claim the money within a stipulated amount of time. In some instances, a person who is immediately outside the theater at the time the winning name is announced is admitted to the theater without charge to claim the money in the contingency that his name is called, but this practice is not of uniform application, as actual presence in the theater at the time of the drawing is sometimes mandatory to eligibility.

It is to be noted that all the cited cases dealing with the legality of *Bank Night*, pro and con, agree that to constitute a lottery the elements of prize, chance, and consideration must exist; and all these cases concede that in *Bank Night* prize and chance are present, but differ as to the element of consideration.

The *Bank Night* cases constitute the most recent announcements of our courts on the subject of lotteries. During the years from 1935 to date the legality of *Bank Night* has been the issue before the highest appellate courts in many jurisdictions and the *Bank Night* has been adjudged legal in some states, a lottery in others.

In an endeavor to reconcile these decisions and explain away the apparent conflict in the authorities on this subject let us first examine those cases adjudging the procedure as illegal and constituting a lottery and ascertain the facts or basis upon which a consideration was found to exist.

In *State v. Fox Kansas Theatre Co.*³ the Supreme Court of Kansas held that the *Bank Night* theater plan included the elements of prize, chance, and consideration sufficient to make it an illegal policy, or "scheme of drawing in nature of a lottery," and authorized the forfeiture of the license of the corporation conducting *Bank Night*. The court stated: "The indirect benefit derived by the defendant under the *Bank Night* plan . . . is sufficient consideration . . . to meet the requirements as to that necessary element in a policy or scheme of drawing in the nature of a lottery." It decided that the increased gross receipts from paid admissions was sufficient consideration coming directly or indirectly from those entitled to the chances generally to meet the requirements as to that necessary element in a policy or scheme of drawing in the nature of a lottery.

³ 62 Pac. (2d) 929 (Kan. 1936).

In *Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise*⁴ the court held that theatre operators were entitled to an injunction on the ground that the plan was a lottery for prizes of more or less value are to be distributed and will attract persons to the theatres who would not otherwise attend. In this manner those obtaining prizes pay consideration for them and the theaters reap a direct financial benefit.

Bank Night was held to be a lottery in the case of *Commonwealth v. Wall*,⁵ the court stating: "An important feature of the plan was the necessity that the person whose number was drawn should appear at once and claim the deposit. The time allowed for appearance was entirely within the control of the defendant. No definite time seems to have been fixed. A participant inside the theater would have the advantage of immediate presence in a place of comfort. He could hear the number and name read. He could identify himself at once. A participant outside the theater must wait in discomfort in the hope that if his name should be drawn within he would be notified and would hear the call soon enough to crowd through toward the front of the theater. The people paid their money in part for the better chance to win the prize and the scheme in actual operation was a lottery."

A recent Illinois case, *Iris Amusement Corporation v. Kelly*,⁶ involving the interests of one hundred and fifty theater owners in the City of Chicago, clearly defines its reasons for holding *Bank Night* illegal. According to the State statute⁷ and Constitution,⁸ a lottery is defined as a chance for a prize for a price. The court held that it was a lottery because the requirement that the sidewalk participant reach the stage in a short time made the cost of the ticket of admission to the theater the "price" for fair and reasonable chance to win. It was contended in the case that the element of price was lacking, as a person who had not paid admission could recover. However, the court said: "The game of chance creates cupidity, envy, jealousy, and temptation—the very things sought to be avoided by the public policy outlawing lotteries." Justice Shaw, in his opinion, said that the prize money came from the pockets of those who patronized the theater, and without patrons there would be no prizes. He contended, that in actual operation, those who paid to get in, paid for those on the outside in so far as those on the outside had a chance to win, and the giving of free chances to those who did not come in could not alter the basic and essential character of the transaction. "The price for a *fair and reasonable chance to win* is the cost of a ticket of admission which is the object of the plan and thus a lottery is completed." (Italics are mine.)

⁴ 267 N. W. 602 (Mich. 1936).

⁵ 3 N. E. (2d) 28, 30 (Mass. 1936).

⁶ 8 N. E. (2d) 648 (Ill. 1937).

⁷ ILL. REV. STAT. (1935) c. 38, § 406.

⁸ ILL. CONST. art. 4, § 27.

There are many other recent decisions in support of the states mentioned, holding the *Bank Night* plan to be a lottery.⁹ In some of these cases the consideration was found to exist in the requirement of the *Bank Night* procedure which necessitates the presence of participants at the drawing or within a "two or three minute distance" of the theater. Others predicated judgment upon a finding of fact that participants within the theater had a better chance to receive a prize than those who might await without the theater. Other courts found, in these cases, that "free participation is not a reality," is not advertised or publicized, and "largely existed only in the minds of the theater operators," and hence the element of free participation was purely a subterfuge.

Let us now consider a few of the opinions in adjudged cases holding that the *Bank Night* is not a lottery. In *State v. Eames*¹⁰ the New Hampshire court stated that "pay must be given for the opportunity to participate in chance to obtain property in order to constitute a lottery and the signing of a name in a book or appearance at the theater within five minutes of the time of drawing to receive the advertised amount is not 'pay' within the meaning of the statute. It is not a lottery where neither the registrants or the winners were required to purchase admission tickets."

The court in *State v. Hundling*¹¹ held that *Bank Night* was not a lottery, regardless of the benefit derived by a theater operator through increased attendance, where neither registrants nor the winners were required to purchase admission tickets, and an operator in advertising the scheme was not guilty of advertising a lottery because to constitute a lottery, according to the statute,¹² there must be a prize given upon a contingency determined by chance to a person who has paid some valuable consideration.

*Simmons v. Randforce Amusement Corporation*¹³ presents a most unusual case. The action was brought to recover the prize money awarded but not paid by a party whose name was selected at the *Bank Night* drawing. The unusual feature is that the theater conducting the plan presented the novel defense to the action that it could not be held liable because the award arose out of an illegal transaction, the theater contending that the *Bank Night* plan which it was operating was a lottery. Despite this unusual situation, the court held that *Bank Night* was not a lottery, stating: "A civil court is not a Victorian

⁹ *Shanchel v. Lewis Amusement Co.*, 171 So. 426 (La. 1936); *State v. Danz*, 250 Pac. 37 (Wash. 1926); *City of Wink v. Griffith Amusement Co.*, 100 S. W. (2d) 695 (Tenn. 1936); *General Theatres v. Metro-Goldwyn-Mayer D. Corp.*, 9 Fed. Supp. 546 (D. Colo. 1935).

¹⁰ 183 Atl. 590 (N. H. 1936).

¹¹ 264 N. W. 608 (Iowa, 1936).

¹² IOWA CODE (1931) § 13218.

¹³ 293 N. Y. S. 745 (1937).

Tribunal and should not scrutinize these pastimes with an eye to branding them illegal or vicious. It is clear that the acts of the plaintiff in signing the register and in attending the night of the drawing is something which the plaintiff was not legally bound to do and is adequate consideration to enforce the promise of the theater operator to award the prize money to the plaintiff."

After an examination and study of the cases we find that the states do not agree on the issue involved. It cannot be said that there is a distinct weight of authority because the states are practically divided in their holdings. The element of consideration constitutes the "turning point" in the opinions of the courts.

James E. Bales.

NEGOTIABLE INSTRUMENTS—RIGHT OF THE UNPAID PAYEE OR HOLDER TO SUE THE DRAWEE BANK WHEN IT REFUSES TO PAY.—This question has many ramifications but the simplest is when the drawee bank refuses to pay the check on presentment by the payee or the holder. The rule in this country to-day, and the rule in England is, that the payee or holder of a check has no right to sue the drawee bank on its refusal to pay, unless there has been an acceptance, which acceptance may be either expressed or implied by some act of the bank. The remedy of the payee or holder is against the drawer of the check. The theory seems to be that the check when given is a promise by the drawer that the drawee bank will pay the check, but if the drawee bank does not, then the drawer will pay.¹ The strongest argument there is for allowing a recovery in such a suit is that the law of Negotiable Instruments had its foundation in the facilitation and convenience of business, but that in itself is not such a strong reason that well established principles of law should be overthrown for it. This argument is the foundation of previous cases that held such a suit was maintainable by the payee or holder of the check.

One of the grounds on which early suits were brought into court was that the payee was in the position of a third party beneficiary to a contract. The case of *Lawrence v. Fox*² laid down the rule that a person for whose benefit a contract was made could recover on the contract even though he was a stranger to the contract. This rule was later restricted to the case where there was an existing pecuniary obligation, that is, it was such an obligation on the part of the promisee that it would be discharged in the fulfillment of the contract by the

¹ *Bank of Venice v. Clapp*, 17 Cal. App. 657, 121 Pac. 298 (1911).

² 20 N. Y. 268 (1859).

promisor. On principles of contract law, this, when investigated is wrong. True there is a pre-existing pecuniary obligation that would be discharged by the payment of the check, but the contract between the bank and the depositor has to be analyzed. The contract is personal and is that the bank will pay out of the deposit of the drawer the amount specified in the check; but the contract of deposit is not made for the benefit of any third party. The third party, when the contract is made, is not known; but the contract is made for the safety and convenience of the depositor. The general rule is that an unaccepted draft or check on a bank is not an assignment of the deposit therein to the drawer's credit. It gives no lien therein and creates no liability from the drawee bank to the payee or holder. Nor is there such a privity between the bank and the payee or holder that would allow the maintenance of the suit. The drawee owes no duty to the holder until the check is presented and accepted. Money deposited in a bank generally establishes the relation of debtor-creditor and becomes the property of the bank.³

The right to recover on this third party beneficiary contract is recognized in many states but the right of the payee or holder is not so recognized.⁴ The court in *Creveling v. Bloomsbury Nat'l Bank*⁵ said that the recourse of the payee or holder was against the drawer and not the drawee bank, even though the bank had sufficient funds of the drawer on deposit. The debt of the bank is only to the drawer of the check, on the theory of the debtor-creditor relationship that exists when the contract of deposit is entered into. The drawee bank has the right, on presentation of the check, to determine whether to make payment or refuse payment for any reason.⁶ In the case of *Saylor v. Bushong*⁷ the bank settled the account of the depositor with him and left just enough cash in the account in the bank to cover an outstanding check; the bank in that case was liable upon the basis of an implied acceptance.

There are many reasons why this kind of suit should not be allowed. In the first place, there is no privity of contract between the parties to the suit; the drawing of the check is not an assignment of the amount then on deposit. If it were such an assignment then there could be no such thing as a "stop order," but the payee or holder would have absolute title to the amount of the check. This is repugnant to the development and use of the check as a commercial instrument. The contract between the depositor and the bank is a personal one and not made for

³ *Chapman v. White*, 6 N. Y. 412, 57 Am. Dec. 464 (1852).

⁴ *Aetna Nat'l Bank v. Fourth Nat'l Bank*, 46 N. Y. 85 (1871); *Creveling v. Bloomsbury Nat'l Bank*, 46 N. J. Law 255 (1888).

⁵ *Op. cit. supra* note 4.

⁶ *South Carolina Nat'l Bank v. McCandless*, 44 Fed. (2d) 111 (C. C. A. 4th, 1930).

⁷ 100 Pa. St. 23 (1882).

the benefit of any third party who is unknown at the time of the making of the contract; the depositor has control over the account and to allow a third person to come in and say that he has control over part of the account would be contrary to all common sense. The bank would have to act at its peril to settle conflicting claims of checkholders.

The case of *Harrison, Receiver, v. Wright*⁸ gives a discussion of the line of cases on this subject which divides the cases at the time of the decision into three classes. This division is based upon the relationship of the parties and the effect that the giving of a check has on the relationship between the drawer and the payee or holder.

The first class is the one which follows and is the rule in the Negotiable Instruments Law in this country to-day. This view is that the drawing and giving of a check does not operate as an assignment in any sense of the drawer's rights against the drawee, nor of any of the funds upon which it is drawn, nor give the payee or holder any rights against the drawee, unless, in some way, the check has been accepted by the drawee; and that as between the payee or holder and the drawee, the check does not operate as an assignment of the fund drawn upon or the drawer's rights as against the drawee.

When a check is given by the drawer the bank does not enter into the transaction in any way. It is clearly seen that the giving of the check cannot operate as an assignment because it is a mere order to pay, the amount specified in the check, out of the drawer's funds then in the hands of the drawee bank. An assignment must have more formalities than this. It must show on the face an intention to give rights to the payee or holder. Checks are given in the ordinary course of business for convenience and safety and facilitation of transactions and are taken on the credit of the drawer and not that of the drawee bank. The depositor is the one who has control over the fund in the bank and if when he gave a check it would operate as an assignment then the "reason for being" of a check would disappear. The mere fact that the check is given and taken in the belief that the drawer had funds to meet it, or that the drawee bank would pay it, does not operate so as to form any contract between the payee and the bank so as to bring them into privity in order to enable the payee to maintain a suit against the bank if it refuses to pay on presentment.

There must be an acceptance by the bank before the bank is liable on the instrument to the payee or holder.⁹ The bank is not liable even though it had sufficient funds of the depositor to pay. When the bank settles the account of the depositor and retains enough cash to meet an

⁸ 100 Ind. 515 (1884).

⁹ *Nat'l Bank of Rockville v. The Second Nat'l Bank of Lafayette*, 69 Ind. 479, 35 Am. Rep. 236 (1880); *Griffin v. Kemp*, 46 Ind. 172 (1874).

outstanding check it is liable on the basis of an implied acceptance of the check.¹⁰ The recourse of the payee or holder is against the drawer for the failure of the drawee bank to pay on presentment.¹¹

In considering the three classes the *Harrison* case based the first classification upon four points: (1) There is no implied contract on the part of the bank that the payee or holder may take advantage of on a refusal to pay at presentment; (2) In the absence of evidence to the contrary, or a showing of an intention to assign a part of the fund in the hands of the drawee, it should be presumed that the payee or holder took the check on the credit of the drawer, of whom he may collect, if payment be refused by the drawee; (3) To hold to the contrary would be to disregard the implied and well understood right of the drawer to countermand the payment of checks; and (4) It would greatly embarrass banks to hold that they are liable to each check-holder, and hence must, at their peril, settle conflicting claims of check-holders.

The bank will only be liable when the law has raised an implied promise to accept.¹² In the case of *Seventh Nat'l Bank v. Cook*¹³ the bank charged the check on its books against the drawer, and settled on that basis, and the bank was considered as holding the money for the plaintiff's use. Even an agreement by the bank that it will pay all checks that the drawer may draw to the extent of the deposit will not give the payee or holder a right of action against the bank.¹⁴ The case of *Carr v. Nat'l Security Bank*¹⁵ held that the relationship was debtor-creditor and not that of principal and agent or trustee and *cestui que* trust; that the agreement could not be taken advantage of by the check holders as a promise for their benefit, because, when the promise was made it was not known who the check-holders would be or the amount of the checks they might hold.

The second class holds that the giving of a check operates as an equitable assignment, *pro tanta*, of the fund in the hands of the drawee, and gives the payee or holder the right to collect from the drawee by suit. Also, these cases hold that a check operates as an assignment as between the drawer and the payee.

The second class seems to hold the customs and convenience of commerce to be controlling factors and then finds reasons for supporting

¹⁰ *Saylor v. Bushong*, *op. cit. supra* note 7.

¹¹ *Creveling v. Bloomsbury Nat'l Bank*, *op. cit. supra* note 4; *The First Nat'l Bank v. Whitman*, 94 U. S. 229 (1876); *Bank of the Republic v. Millard*, 77 U. S. 152 (1869).

¹² *Saylor v. Bushong*, *op. cit. supra* note 7; *Bank of the Republic v. Millard*, *op. cit. supra* note 11.

¹³ 73 Pa. St. 483 (1873).

¹⁴ *Carr v. Nat'l Security Bank*, 107 Mass. 45, 9 Am. Rep. 6 (1871).

¹⁵ *Op. cit. supra*, note 14.

these customs. It is, however, to-day a nonexistent class, as the third one will be shown to be later on. The determining factor in the change of the states that held the second class has been due to the adoption of the Uniform Negotiable Instruments Law.

The leading case upholding the second class is that of *Munn v. Burch*.¹⁶ Chief Justice Caton said in the opinion of this case: "But the courts will not and should not ignore these customs long established, and well understood and acted upon in all contracts and transactions to which they apply." He made that statement to uphold the liability of the drawee bank for the refusal to pay a check-holder because of the important place checks hold in commerce. It was held that both the legal and equitable titles to the money of the drawer passed to the check-holder upon presentation of the check to the drawee bank for payment. The case holds that there is privity of contract between the bank and the holder of the check, created by the implied promise held out to the world by the bank on one side and the receiving of the check for value and presentation for payment on the other side. This would destroy the right of the drawer to countermand the order of payment.¹⁷ The check is an assignment of a portion of the deposit and when presented the bank is absolutely liable to pay if the funds are sufficient. If they are not sufficient, there is no liability to pay on presentment.¹⁸

The rule in Illinois has been changed by the adoption of the Negotiable Instruments Law.¹⁹ The statute provides that before there is such a thing as an assignment and the payee or holder has a right to sue the drawee bank there has to be an acceptance by the bank. The court in the case of *Cook, Adm'r v. Lewis* ²⁰ said that the evident intent of the legislature was to change the ruling in Illinois to conform to that of the other states and England and held that that was, and should be, the effect.

Other states following the Illinois rule were South Carolina,²¹ Iowa,²² Missouri,²³ and Kentucky.²⁴ The decisions in these states have been overruled since the adoption of the Negotiable Instruments Law in these states.

¹⁶ 25 Ill. 21 (1860).

¹⁷ *Union Nat'l Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185 (1875).

¹⁸ *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343, 36 N. E. 1029 (1894).

¹⁹ ILL. REV. STAT. (1937) c. 97, § 210.

²⁰ 172 Ill. App. 518 (1912).

²¹ *Fogarties & Stillman v. The State Bank*, 12 Rich. 518 (1860).

²² *Roberts v. Corbin & Co.*, 26 Iowa 315, 96 Am. Dec. 146 (1868).

²³ *McGrade v. The German Savings Institution*, 4 Mo. App. 330 (1877).

²⁴ *Lester v. Given, Jones & Co.*, 8 Bush. 357 (1871).

Even in some of the states that upheld the second class there was not a consistency of rulings. Kentucky, in the case of *Wieland v. State Nat'l Bank*²⁵ held that even though the check operated as an assignment, the death of the drawer and notice to the bank of that operated as a revocation of the check. This clearly cannot be reconciled with the assignment theory.

The third class seems to hold that whether a check has this effect or not, it operates as an equitable assignment as between the drawer and payee. This class does not seem to be much different than the second class. The cases under this class hold that the instrument is to be construed as the parties intend it should be construed. This would be right but it is a question of what did the parties intend and did they intend it to be an assignment. If they intended the instrument to operate as an assignment then there would be no question of the right to sue, but giving a check cannot be construed as being an assignment unless so intended and this must be shown on the face of the instrument to enable the instrument to operate as an assignment and not as a check. The cases that the court used to show this class are *Gardner v. Nat'l City Bank*²⁶ and *Matter of Brown, In Bankruptcy*.²⁷ In the *Gardner* case it was held that as between the drawer and the payee, it was the manifest intention of the parties to transfer the absolute right to receive the amount from the drawee, and that the check should operate as an equitable assignment of the funds in the hands of the drawee. This rule of equitable assignment was also announced in the case of *Dodge v. National Exchange Bank*.²⁸ The theory in this case was that the drawing and delivery of the check operates as an assignment, *pro tanto*. This doctrine was later repudiated in the case of *Covert v. Rhodes*;²⁹ which case said that it does not operate as an assignment. The rule in Ohio now is that the check must be accepted to give the holder a right of action against the drawee bank even though it has sufficient funds of the drawer to pay from. The *Gardner* case was one in which the instrument was for the whole fund and the court said that as the intention was that it should operate as an assignment it would be so construed by the courts.

In the *Brown* case the court said that the check is an instrument which is to be construed exactly as the parties intend it to operate. This last case is undoubtedly right, as is the *Gardner* case, if it can be shown that this was the intention. The general rule is that the giving

²⁵ 112 Ky. 310, 65 S. W. 617 (1901).

²⁶ 39 Oh. St. 600 (1883).

²⁷ Fed. Cas. No. 1985 (C. C. D. Mass. 1843).

²⁸ 20 Oh. St. 234, 5 Am. Rep. 648 (1870).

²⁹ 48 Oh. St. 66, 27 N. E. 94 (1891).

of a check in the ordinary course of business is not such an assignment and it is only taken on the credit of the drawer.

Due to the changes that have taken place the third class and the second class are to-day nonexistent. The Uniform Negotiable Instruments Law has been adopted by the states and even though there are some that have not adopted all of the sections the one relating to the checks as assignments has been adopted by all.

William Langley.

PERPETUITIES—EFFECT OF THE RULE ON GENERAL POWER OF TESTAMENTARY APPOINTMENT—DISPOSITION OF PROPERTY WHEN POWER FAILS.—A comparatively unexplored field of the law of real property is brought into the legal searchlight in the recent case of *Northern Trust Co. v. Porter*,¹ in which a phase of the *rule against perpetuities* is in issue. In this case the Illinois Supreme Court determines the relation of the rule to the computation of time of a general power of testamentary appointment.

The rule against perpetuities is that executory limitations are void unless they take effect *ex necessitate* and in all possible contingencies within the period of life or lives in being and twenty-one years thereafter.² Most of the states have incorporated this rule in their statutes, some of them, for example, Indiana,³ cutting off the twenty-one year period. "The rule against perpetuities does not apply to vested interests, but only to those which are contingent."⁴ "As applied to the exercise of the power of appointment, the words of the rule are satisfied if it appears that in light of the facts as to relationship and longevity existent when the appointment is exercised, the estates created in truth will vest and take effect within the period limited by the rule, although this may not have been certain at the death of the donor of the power."⁵ "A testator may give to another a power of appointment to be exercised by the latter's will. This would be perfectly valid if the appointee survived the testator."⁶

1 13 N. E. (2d) 487 (Ill. 1938).

2 *Minot v. Paine*, 230 Mass. 514, 120 N. E. 167 (1918).

3 IND. STAT. ANN. (Burns, 1933) § 56-142.

4 GRAY, *RULE AGAINST PERPETUITIES* (3d ed.) § 205.

5 GRAY, *op. cit. supra* note 4, at § 523.

6 ATKINSON ON WILLS 342; *In re McCurdy's Estate*, 197 Cal. 276, 240 Pac. 498 (1925); *Columbia Trust Co. v. Christopher*, 133 Ky. 335, 117 S. W. 943 (1909).

In the instant case the donor of the power bequeathed certain property to her daughter as trustee to receive the income therefrom during her life and to further have a general power to appoint the fund or property by her own will. The donee drew up a will in which she appointed the fund to certain parties according to a settlement agreement made with them. By a subsequent will, revoking all prior wills, the donee left the property in question to two different devisees in trust. The beneficiaries of the appointment asserted a claim for damages for failure of the donee to carry out the original appointment. The devisees under the last will contended that any contract to appoint the original donor's fund was invalid as violative of the *rule against perpetuities*, or suspension of alienation, as it is more familiarly called. The question, thus presented, is whether a general power of testamentary appointment is computable from the time of the creation of the power by the donor or from the time of the exercise of the power by the donee, where none of the children or heirs of the donee are in existence at the time of the death of the donor of the power? The Illinois court held that the present case was a clear violation of the rule against suspension of alienation, since the computation of time related back to the time of the creation of the power and the donee had no heirs "*in esse*" at that time.⁷

The court points out that a careful distinction should be made between the *general* power of appointment by will and the *special* power by deed or will. Professor Simes says: "General powers are those which the donor may exercise in favor of any person, including himself. Special powers are those which he may exercise only in favor of the members of a limited group of persons, not including himself . . . strictly speaking, of course, the donee cannot appoint to himself even though he has a general power of testamentary appointment."⁸ "Lord St. Leonards has explained the rule of saying that a general power is equivalent to a fee. . . . What he really meant is that for purposes of voluntary alienation a general power is like a fee. . . . For other purposes it is not a fee simple at all."⁹

The majority of the cases on the point support the decision of the Illinois court as to the computation of time and the rule against perpetuities.¹⁰ In a leading case, *Minot v. Paine*,¹¹ the Massachusetts court said: "In this country the current of authority is all in one direc-

⁷ Northern Trust Co. v. Porter, *op. cit. supra* note 1.

⁸ SIMES, LAW OF FUTURE INTERESTS § 246.

⁹ SIMES, *op. cit. supra* note 8, at § 258.

¹⁰ Equitable Trust Co. v. Snader, 17 Del. Ch. 203, 151 Atl. 712 (1930); Brown v. Columbia Finance Co., 123 Ky. 775, 97 S. W. 421 (1906); Stone v. Forbes, 189 Mass. 163, 75 N. E. 141 (1905); Gambrill v. Gambrill, 122 Md. 563, 89 Atl. 1094 (1914); Matter of Dows, 167 N. Y. 227, 60 N. E. 439, 52 L. R. A. 433 (1901); In re Lawrence's Estate, 136 Pa. 354, 20 Atl. 521 (1890).

¹¹ *Op. cit. supra* note 2.

tion, to the effect that the question whether the rule against perpetuities has been violated, is referable to the time of the creation of the power."

Leading textbook authorities sustain the view of the majority of the states at the common law. In a work on Perpetuities¹² Professor Gray asserts that the period of perpetuities begins to run from the date of the creation of the general testamentary power of appointment. The test as to the computation of time depends upon whether the donee was "practically the owner" of the fund appointed. Gray states that the donee is not such an owner "since he cannot appoint to himself — for he must die before the transfer of the property can take place."¹³ "So long as a man is alive the condition necessary for the exercise of the power is not fulfilled — and after he is dead, he cannot be an appointee."¹⁴ In the case of *Hooper v. Hooper*¹⁵ the court says: "It is to be noted that the donee of the power is not the owner of the estate. The interest of the appointee as finally determined is founded upon the instrument of the donor." Professor Simes says: "The weight of authority in the United States is in favor of the view that a general power to appoint by will should be treated as a special power in this respect, and the period should be computed from the time of the creation of the power. . . . From a practical standpoint, the position of the donee of a general power to appoint by will is very different from that of a donee of a power to appoint by deed. . . . The fact that a man has an unrestricted power to appoint property by will does not mean that he is likely to put property on the market and sell it. The very fact that he is limited to a disposition by will means that he will probably dispose of it to members of his family or to charities by way of gift. The property during the existence of this power, is, from a practical standpoint, removed from commerce. And it is proper in determining remoteness, to count the period from the creation and not from the exercise of the power."¹⁶

A muster of the authorities opposed to the prevailing view would not seem to be amiss. The leading authority is Professor Kales, who agrees with the view of Gray that the test as to when the period of perpetuities should start to run depended upon whether the donee was "practically the owner" of the appointive fund. Kales, however, says that the time for determining whether or not the donee was "practically the owner" was the moment of the exercising of the power. It is his view that the donee of a general power to appoint by will, is, at the moment when he may exercise the power, practically the owner.¹⁷ This is the view

¹² GRAY, *op. cit. supra* note 4, at § 526 (b).

¹³ GRAY, *op. cit. supra* note 4, at § 952.

¹⁴ Northern Trust Co. v. Porter, *op. cit. supra* note 1.

¹⁵ 203 Mass. 50, 89 N. E. 161 (1909).

¹⁶ SIMES, *op. cit. supra* note 8, at § 538.

¹⁷ KALES, *ESTATES AND FUTURE INTERESTS* (2d ed.) § 695.

of the recent English and Irish decisions, though the early English and Irish common law cases supported the modern and prevailing American view on the matter of computation of time in perpetuities affecting the general power of testamentary appointment. In *In re Powell's Trust*¹⁸ and in *Wollaston v. King*¹⁹ the English courts decided that the time of determination was at the creation of the power by the donor. In the later cases this view has been overruled.²⁰ The modern English and Irish decisions are given support in the United States by the Wisconsin common law cases, the leading case being *Miller v. Douglas*.²¹

We see, therefore, that under the majority view the Illinois court was correct in holding that, since there were no children or heirs of the donee in being at the death of the donor of the general power of testamentary appointment, the subsequent appointment by will of the fund involved was void as against the suspension of alienation. The death of the donor is synonymous with the creation of the power.

Several other points are discussed by the court in the *Northern Trust Co.* case, one of which will be considered. It arises in this way. Since the attempted exercise of the general power of testamentary appointment by the donee was held invalid, the fund which the donee had attempted to dispose of must therefore pass either to the heirs of the donee by intestacy, or under the will of the donor to his heirs, by default of appointment. It was held that "this becomes a question of the intention of the donee," and according to the facts this intention was construed to prefer to pass the fund by default of appointment rather than to the donee's heirs by intestacy. The court concluded in this manner since it was evident that the donee would prefer to die entirely stripped of the property or fund involved in the power than to have the appointment take effect with the void clause left out.

A review of decisions on the matter show that "intention" is the deciding factor,—intention as evidenced by physical acts and words of the donee of the power. This is the view in both the American²² and English²³ decisions. In *In re De Luisi*²⁴ the Irish court said: "The general rule is that the appointment is to be taken as an exercise of the power so far as is necessary to give effect to the particular disposition, but no

¹⁸ 39 L. J. Ch. 188 (1869).

¹⁹ L. R. 8 Eq. 165 (1868).

²⁰ *Rous v. Jackson*, 29 L. R. Ch. Div. 521 (1885) (case overruled in *In re Powell's Trust*); *In re Flower*, 55 L. J. Ch. 200 (1885); *Stuart v. Babington*, 27 L. R. Ir. 551 (1891).

²¹ 192 Wis. 486, 213 N. W. 320 (1927).

²² *Barrett v. Barrett*, 255 Ill. 332, 99 N. E. 625 (1912); *KALES, op. cit. supra* note 17, at § 708; *Reid v. Voorhees*, 216 Ill. 236, 74 N. E. 804 (1905); *Talbot v. Riggs*, 287 Mass. 144, 191 N. E. 360 (1934); Annotation, 93 A. L. R. 964.

²³ *In re de Luisi*, L. R. Ir. 3 Eq. 232 (1879); *In re Boyd* [1897] 2 Ch. Div. 232.

²⁴ *Op. cit. supra* note 23.

farther. It lies upon the party claiming the fund to show sufficient indication of the intention that, in event of the appointee being incapable of taking under the appointment, the fund was not left by the donee to go in default of appointment. This intention, may of course, be gathered from the whole instrument; and if it appears that the donee meant thereby, in the first place, to make the fund for all purposes his own, and in the next place, to dispose of it in a particular way which fails to take effect, the general intention will be carried out, and the fund will be held to go to those persons who take the property either by general disposition or as next of kin."

In the American decisions "intention" prevails. The leading case of *Talbot v. Riggs*²⁵ considered the appointment of a trustee for designated beneficiaries by the donee as a sufficient indication of intention to take the property out of the instrument creating the power, so that it devolved upon the heirs or kin of the donee when the power itself became invalid. In *Bradford v. Andrew*²⁶ the blending of the appointed property with the rest of the donee's property in express language was an act sufficient to give the donee ownership. So in *Dunbar v. Hammond*,²⁷ where a trust was created for designated beneficiaries, and in *Bundy v. The United States Trust Co.*,²⁸ where the property was held on a resulting trust for the heirs of the donee. These and similar cases passed the fund to the heirs of the donee in preference to the heirs of the donor of the power, since the donee showed an intent to prefer the lapsed fund, void as a general power of appointment, to pass in that manner.

But in the present case the court allowed the lapsed fund to go back to the heirs of the donor of the power, since the general power of testamentary appointment was void as violative of the *rule against perpetuities*, and since there was no evidence of intention on the part of the donee that the fund or property should not return to the creator of the power. "The fund, in default of a valid appointment, goes to the next of kin of the original testator and donor of the power, and not to the next of kin of the donee."²⁹ In the absence of the definite intention to take the fund out of the power, the court has no other alternative than to apply the *rule against perpetuities*, as it is to be used, for "The rule is a peremptory command of law, its object being to defeat intention."³⁰

Thomas G. Proctor.

²⁵ *Op. cit. supra* note 22.

²⁶ 308 Ill. 458, 139 N. E. 922 (1923).

²⁷ 234 Mass. 554, 125 N. E. 686 (1920).

²⁸ 257 Mass. 72, 153 N. E. 337 (1926).

²⁹ *Emmon v. Shaw*, 171 Mass. 410, 50 N. E. 1033 (1898). Accord: *Hill v. Treasurer*, 239 Mass. 474, 118 N. E. 891 (1918).

³⁰ *Taylor v. Crosson*, 11 Del. Ch. 145, 98 Atl. 375, 376 (1916).

WILLS—CONSTRUCTION—AMBIGUOUS DESCRIPTION OF BENEFICIARY.—In *Smith v. Livermore*¹ clause 195 of the will of Albert H. Whitin states: "I give to the Massachusetts Historical and Genealogical Society the sum of five thousand (5,000) dollars." No society bearing that precise title exists. The bequest was claimed by two Massachusetts corporations: The Massachusetts Historical Society and the New England Historic Genealogical Society. After much deliberation the court decided in favor of the Massachusetts Historical Society. In the stipulated facts it was not stated whether the will was read to or by the testator. Through parol evidence the court learned that the testator became an annual member of the New England Historic Genealogical Society in 1895 and a life member in 1919. At the time of his admission he submitted to the society a full statement of his own genealogy. Evidence also demonstrated that from "sometime in the '80's" until 1914 testator frequently visited the Massachusetts Historical Society where he became quite friendly with the librarian who, likewise, was a member of the New England Historic Genealogical Society. Testator often expressed his great admiration for the Massachusetts Historical Society and its distinguished members. In deciding in favor of the Massachusetts Historical Society the court concluded that the more probable error was the insertion of "and Genealogical" in the name of the Massachusetts Historical Society rather than the substitution of "Massachusetts" for "New England."

This case illustrates the difficulty which arises when a testator is not exact and precise in naming and describing the object of his benevolence. Courts have dealt peculiarly with these cases and only after reading several is one able to appreciate the attempts made to carry out the intent of the testator. Although the courts have been liberal they nevertheless have been hesitant to give and often have denied relief for mistakes in the language of the will where the testator either read or had the will read to him. The English courts, in particular, are strict. Thus in *Gregson v. Taylor*² the testatrix had given a legacy to Adelaide Maud Ashwin, the wife of F. M. B. Ashwin. Desiring to make various alterations, she employed an attorney to prepare a codicil. Among the instructions was a legacy to Maud Adelaide Ashwin. The scribner seeing in the will that Adelaide Maud Ashwin was the wife of F. M. B. Ashwin concluded that Maud Adelaide must be her daughter and made the legacy read, "To Maud Adelaide Ashwin (daughter of Francis Manley Bird Ashwin) the sum of £4,000 (four thousand pounds)." The scribner read the codicil to the testatrix twice and each time she requested further alterations. Finally, after the changes were made, the will was read to her a third time after which she signed. During all these readings no objection was made to the legacy to Maud Adelaide

¹ 10 N. E. (2d) 117 (Mass. 1937).

² [1917] P. 256.

Ashwin, the daughter of Francis Manley Bird Ashwin. The court in denying a motion to strike out the descriptive words said: ". . . when it is proved that a will has been read over to or by a capable testator, and he then executes it, these circumstances afford a very grave and strong presumption that he knew and approved all the contents, a presumption which can be rebutted only by the clearest evidence. The presumption is that the words which have been read over to, and then signed by, a capable testator as his will do represent his will, his whole will, and nothing but his will."

In America the courts have shown the same reluctance to alter the effect of a will read by the testator. This is seen in *Iddings v. Iddings*.³ Intending to benefit each child equally, testator made a legacy to each which added to advances made to him would all total the same amount. The scribner, ignorant of the meaning of the word, inserted a direction to the executors not to "cancel" the advances. This meant that each child was required to account to the estate for advances made to him. As a result the benefits were greatly disproportionate. The will, however, was read to the testator before execution. The court, in refusing to grant relief, remarked that if there had been fraud in obtaining the will by substituting a different one from the one read parol evidence would be admissible to show the intention, but where the will was read by the testator and executed by him in the form it now stands, the court would not allow parol evidence to change its legal effect.

By the same token, where the courts have found that the will has not been read by the testator they have readily admitted evidence as to the testator's intent. A Minnesota case, *Waite v. Frisbie*,⁴ offers a good example. The testatrix, nearing her death, expressed her will to a close friend, Mrs. Wiser, who in turn related it to the testatrix's husband. He prepared a will which made four minor bequests but left the remainder to him. The will was read to her but desiring the will to read that the residuary legatee should care for her brother if he be in want she refused to sign. To accomplish this purpose an attorney was called in. He did not phrase it in her words but in his own. As it stood the legal effect was no different than the will she refused to sign, for it did not impose any obligation upon anyone but merely requested the residuary legatee to care for her brother. The will was not read to the testatrix but being assured that it purported to be as desired, she signed it. The court granted a new trial and ordered the lower court to admit this evidence.

Where the courts are willing to grant relief we find ambiguities of various sorts. A frequent mistake is the misnomer or misdescription of beneficiaries such as exists in the principal case. The courts in such

³ 7 Serg. & R. 111, 10 Am. Dec. 450 (1821).

⁴ 45 Minn. 361, 47 N. W. 1069 (1891).

instances found various solutions to their problems. In some cases the testator accurately names and describes an existing claimant; yet another who fits the description but not the name seeks to claim the bequest because extrinsic evidence shows that the testator most probably intended him to be the recipient. The courts have been reluctant to admit such evidence. The most famous case involving the situation is an English case, *National Society For the Prevention of Cruelty to Children v. Scottish National Society For the Prevention of Cruelty to Children*.⁵ The bequest was made to the National Society For the Prevention of Cruelty to Children. A society bearing that precise name had its headquarters in London, whereas a society called "Scottish National Society For the Prevention of Cruelty to Children" existed in Scotland. The testator, a Scotsman, lived in Scotland. Apparently he had never heard of the English society, but evidence showed that he was greatly pleased with the work of the latter society, particularly in regard to the one case within the knowledge of the testator. All his other bequests were to Scottish institutions as well as all his other affairs. The House of Lords nevertheless held that the bequest should go to the claimant in London whose title and purpose accurately corresponds with the name and description in the will. Earl Loreburn declared that although a rule that would hold that the words are conclusive of the intention would be too broad, nevertheless it should be a strong presumption that the beneficiary named was the one intended. Quoting from his opinion we find, "That the accurate use of a name in a will creates a strong presumption against any rival who is not a possessor of the name mentioned in the will. It is a very strong presumption, and one which cannot be overcome except in exceptional circumstances." After reading the opinion, however, one wonders what the House of Lords calls "exceptional circumstances." The evidence of the testator's intent, and the equities all favored the Scottish society beyond reasonable doubt, but the House of Lords stubbornly refused to give proper weight to this clear-cut evidence. One might suspect a bit of partisanship toward the English society, and that it was only through fear that the tables might some day be turned that they were influenced not to lay down a steadfast rule which might force them to give a bequest made by an Englishman to a foreign society. Without a doubt, if the same case came up, but the facts were just the opposite, that is, the testator being an Englishman and the society named a Scottish one, the House of Lords would readily agree that the evidence was sufficient to overcome the presumption.

Some American courts seeking the same result take a more sensible attitude. Instead of holding that a strong presumption exists in favor of the named beneficiary answering the name and description, they exclude evidence which contradicts the terms of the instrument. *Mahoney*

⁵ [1916] A. C. 207.

*v. Grainger*⁶ bears out this point. The testatrix was a school teacher of sixty-four. She sent for her attorney asking him to draw up her will. In response to being asked to whom she desired to leave her remaining property, she stated that she had about twenty-five cousins and wanted the property to go to them equally. The scribe executed the clause to read "to my heirs at law living at the time of my decease, absolutely; to be divided among them equally, share and share alike." The will was read to the testatrix. Her only heir at law was an aunt to whom the court, despite the undisputed evidence as to the intent of the testatrix, awarded the bequest. The court said: "Proof that the legatee actually designated was not the particular person intended by the one executing the will, cannot be received to aid the interpretation of the will." The rule is perhaps harsh, but it avoids the hypocritical position taken by the English courts.

A situation somewhat the converse of the preceding cases frequently arises where the testator describes a claimant accurately, but fails to use the proper name. Thus, in *In re Reingiers*⁷ the bequest was to the French Orphans of France. The Fraternal Franco-Americaine, a French organization, claimed the bequest, under its American associates, the Fatherless Children of France, Inc., which was later succeeded by the French War Orphans Relief. Evidence showed that the testatrix, a Frenchwoman, was deeply interested in the orphans of that country. She expressed her amazement when her brother failed to leave something to them, and stated that she would bequeath a substantial sum to them. During her lifetime, she gave numerous gifts to the society through one Mr. Brunswig, who was an officer of the claimant. The court made some pointed remarks about the sacredness of names. "A name, at best, is but the handle upon which we seize in an effort to establish an identity. It cannot be said that, 'The Smith that works at the stone bridge,' a term of yesterday, is not as definite and certain as the more prosaic, 'John Smith' of today."

Again, a claimant's name may correspond directly to the beneficiary in the legacy, but the claimant cannot clothe himself suitably with the description. The testatrix in *In re Donnellan*⁸ left a bequest to "my niece, Mary, a resident of New York, said Mary being the daughter of my deceased sister, Mary." The sister had two daughters, Anne and Mary. Anne lived in New York, but Mary never left Ireland. The testatrix knew only of Anne, whom, at one time she sought to live with her in California. She knew that this daughter came to America and lived

⁶ 283 Mass. 189, 186 N. E. 86 (1933).

⁷ 11 Pac. (2d) 639 (Cal. App. 1932).

⁸ 164 Cal. 14, 127 Pac. 166 (1912).

somewhere in New York. The court admitting the evidence held that Anne was the intended beneficiary and not Mary, who was accurately named and partially described.

In other cases no person or corporation answers the name employed by the testator, but two or more conform to the description. In this situation it becomes difficult to determine which claimant is intended. Since this is a latent ambiguity, extrinsic evidence is generally admissible. Of course, no problem exists where the weight of the evidence is plainly in favor of one. Thus, where the testator gave a legacy to the Canandaigua Orphan Asylum, and no such corporation existed, the court gave the legacy to the Ontario Orphan Asylum in preference to the St. Mary's Orphan Asylum. Having heard the evidence, the court could not conscientiously do otherwise. The testator's sister-in-law was its manager; he had previously made contributions to it; his wife and her sisters, whom testator frequently visited, always referred to the Ontario Orphan Asylum by the name of Canandaigua Orphan Asylum, and it was under Protestant management. On the other hand, the testator, although born of Catholic parentage, greatly opposed the Church; married in the Episcopal Church; and apparently had never heard of the St. Mary's Orphan Asylum. The court properly ordered the legacy to be paid to the Ontario Orphan Asylum.⁹

The solution, however, is not always so simple. The evidence is often conflicting and confusing. Some courts dismiss the problem curtly by ruling that the legacy fails for uncertainty. The leading case is English, namely, *Drake v. Drake*.¹⁰ The testator left a residuary gift to "my niece, Mary Frances Tyrwhitt Drake." He had no niece by that name, but did have a sister-in-law. One of his nieces was called Frances Isabelle Tyrwhitt Drake. The court held that instead of clarifying the ambiguity it made it more confusing. Therefore it was futile to consider parol evidence. Some American courts have followed the English courts; but generally they have undergone great pains to determine which is the *bona fide* claimant. In trying to ascertain the rightful beneficiary the court takes into consideration two elements: the similarity of the names and the purpose of the society as conforming to the description of the legacy.

In *St. Luke's Home v. An Association for Indigent Females*¹¹ the legacy was directed to the "Society for the Relief of Indigent Aged Females." The court held that the defendant, An Association for the Relief of Respectable Aged Indigent Females in the City of New York,

⁹ *Bristol v. Ontario Orphan Asylum*, 60 Conn. 472, 22 Atl. 848 (1891).

¹⁰ 8 H. L. C. 172, 11 Eng. Rep. 392 (1880).

¹¹ 52 N. Y. 191, 11 Am. Rep. 697 (1873).

resembled more the name of the donee than St. Luke's Home for Indigent Christian Females. By substituting "Association" for "Society" and inserting "Respectable" before "Indigent" in the will, the court found the defendant's name would be correctly stated. Maintaining these errors to be natural and minor the court believed the defendant's name was substantially identified with the legacy. On the other hand, "St. Luke's Home" could hardly be said to be substantially the same as "A Society for the Relief." The court pointed out that the description purports that the relief be general whereas the plaintiff's charter shows that it was intended to be for Christians and then only those who were removed to the Home. These observations were held to outweigh evidence that showed that the testator was an Episcopalian which denomination instituted the plaintiff Home, that he had often contributed to the Home, and that one Dr. E. dissuaded him from starting a project for a new charity and recommended instead that he assist the plaintiff.

In *Walter v. Frank*¹² the court held that the name, "San Francisco Art Association" was in a greater degree more identical with the "Art Museum of the City of San Francisco" than the "Golden Gate Park Museum." Evidence showed that the testator was primarily interested in arts and not in odd specimens such as the Golden Gate Park Museum was engaged in collecting. They concluded, therefore, that the word "Art" predominated the intention rather than "Museum."

In *National Jewish Hospital for Consumptives v. Collins*¹³ the testator left a gift to the "Jewish Hospital for Consumptives in Denver." Two claimants petitioned for the legacy. The court decided in favor of the National Jewish Hospital for Consumptives in opposition to the Jewish Consumptives Relief Society. Their decision was based upon the grounds that the word, "hospital" indicated his intention more sharply than the fact that testator was affiliated with the orthodox religion which headed the Jewish Consumptive Relief Association. The purpose of the latter group was to assist consumptives but did not maintain a hospital for their care.

In the principal case, *Smith v. Livermore*, the court was perplexed with another clause, namely, 192. The testator left a legacy to the "National Portrait Gallery of Scotland." Petitioner stated that two societies answer that description, *viz.*, The National Gallery of Scotland and the Scottish National Portrait Gallery. Since the testator stated that the income be used to purchase portraits, the court held that the word "portrait" was dominant in the name of the legatee; thereby awarding the legacy to the Scottish National Portrait Gallery.

¹² 118 N. Y. S. 268 (1909).

¹³ 199 Ala. 150, 67 So. 699 (1914).

The perusal of these cases shows to what extent courts will go and in what manner, to uphold a legacy, particularly to a charitable institution. Very often courts demonstrate proficiency in mental gymnastics in deciphering the intent of the testator amid the confusion of evidence. Despite the fact that at times the methods used and results attained seem somewhat arbitrary, the practice is praiseworthy. Courts should exhaust all means to carry out the intent of the testator rather than allow it to be frustrated through innocent ambiguity.

Carl Doozan.

WILLS—ORDER OF SIGNING BY THE TESTATOR AND WITNESSES.—In the recent case of *Bloechle v. Davis*¹ it was held that a will subscribed by witnesses in the testator's presence, and then subscribed by the testator in their presence four days later, was deemed to have been attested by the witnesses at time of testator's subscription, and was therefore validly executed. In the instant case the testator went to the home of the witnesses and requested them to sign a document purported to be his will. They signed in his presence. At the time of the signing by the witnesses there was no signature by the testator. After the witnesses had signed, the testator took the document with him and left the house. Four days later he again called at the home of the witnesses, mentioned that he had not signed his will, and said that he would then sign it in their presence. So saying, the testator signed the will while the witnesses watched him.

Prior to this decision only two views prevailed with regard to the order of signing. The more strict English view holds that there can be no valid attestation and subscription by the witnesses until the testator has first signed the will. The more liberal view holds that, though it is preferable for the testator to sign before the witnesses, it is proper for the witnesses to sign first, if the testator signs shortly after, and as a part of the same transaction.

Corpus Juris speaks of the first view thus: "In England the rule is settled by a long line of decisions, among which is a decision by the House of Lords, that to give validity to the will the signing by the testator must precede in point of time the signing by the witnesses and that, if one or all of the witnesses sign before the testator affixes his signature, the will is void. This rule admits of no exceptions or qualifications whatever, and has been followed in Canada and also in many

¹ 132 Ohio St. 415, 8 N. E. (2d) 247 (1937).

American states, the view being taken that the attestation of witnesses is "of a past transaction" and that until the signature of the testator has been affixed to the will, there is nothing to attest, and for some period longer or shorter, as the case may be, they signify what is not true. In applying the rule it was held that it is of no consequence that the signing by the testator and the signing by the witnesses are a part of one and the same transaction."² It would seem by this reasoning that the attestation by the witnesses was attestation of the signature of the testator, and that the subscription was objective proof of past attestation.

Atkinson, in reasoning out the first view, distinguishes the purpose of attestation in the light of the *Statute of Frauds*, which does not specifically describe the order in which the parties shall sign: "As the witnesses attest the signature, they can scarcely do so until the testator has signed. Even in case that the legislation, like the *Statute of Frauds*, provides that it is the will which is to be attested, it seems sound to regard the subscription by the witnesses as the final act of attestation, thus precluding the witnesses from attesting to anything after the subscription. It can be urged under statutes of this type that the instrument is not a will until it has been signed by the testator, and hence cannot be attested until that time. However, a proper answer to the latter argument is that the instrument is not a valid will until both testator and witnesses have signed, thus rendering the attestation of the will a theoretical impossibility in any case."³ A question which naturally arises is whether or not it is proper to say that subscription is a final act of attestation. There is weighty authority for holding that attestation is a separate act of the perceptive senses, while subscription is an altogether different act of making identifying marks on the will attested. Atkinson would make subscription a part of attestation.

The attendant impossibility pointed out by the above author causes the courts to construe the purpose of attestation as did the Georgia court which said: ". . . the signature of the testator being the principal, if not only, matter to which the attestation contemplated by law applies. It is obvious that, if this be the true reason why the witnesses cannot subscribe their names until after the testator has signed his, it is of no consequence, when the form of attesting an unsigned will is gone through, whether on the same occasion of the testator's added signature or on a previous occasion. In either case, the attesting act would be performed when there was no signature in existence to be attested, and therefore no subject matter to which the act could apply. To witness a future event is equally impossible, whether it occur the next moment or the next week."⁴

² WILLS, 68 C. J. § 293.

³ ATKINSON ON WILLS § 128.

⁴ Brooks v. Woodson, 87 Ga. 379, 13 S. E. 712, 14 L. R. A. 160 (1891).

One of the leading cases for the strict view in this country is *Jackson v. Jackson*,⁵ in which the court said: "They [the witnesses] are, in and by this act of signing their names, to attest not only the signing or acknowledgment, but his *contemporaneous* declaration that it is his will. Their *signatures* do not attest the signing by the testator, if they are placed there before the will is signed by him. For some period, longer or shorter, as the case may be, those signatures attest no execution—they certify what is not true. When, and in what moment, do they begin to operate as a compliance with the statute? The only reply that can be given is, when the testator signs his name." By this last statement the court implies that the signatures will comply with the statute when the testator signs his name. If compliance with the statute will come about at that time, it would be well to remember that the will has no operation whatever till the death of the testator, and thus the order of signing might be minimized so long as the statute will be satisfied when the testator signs the will, and the will will have all statutory requirements prior to the time when it will operate. Another consideration is whether the signatures attest the signing of the will or whether it is not the witnesses themselves who attest. The court, however, goes ahead and gives the reason for a strict adherence to the rule, saying, "Once let it be settled that witnesses may sign before the testator, and all presumption of due execution, when witnesses are dead or beyond reach, ceases." This seems to be the best reason advanced in the case for an adherence to the strict rule.

Perhaps the stronger view in this country is the more liberal view which holds that " . . . in the absence of an express statutory requirement that the witnesses sign after the testator, the fact that part or all of them sign before the testator does so is immaterial when all are present at the same time and their acts are part of one continuous and complete transaction."⁶ It has been admitted by the courts that hold to this view that the better procedure is for the testator to sign first, but should he not do this, the signing by the witnesses first may be permitted, and the will will be held valid.

Rood states the reasons for the rule thus: "By attesting the witnesses learn that the testator executes the paper, by subscribing they so mark the paper that they may afterwards identify it as the one which they attested the execution of. It is not easy to see how the accomplishment of either of these purposes is in any way embarrassed by the fact that the identifying marks, the witnesses' signatures, are made before they attest the execution of the will, provided both acts are done at the same meeting or occasion."⁷ By properly distinguishing attestation

⁵ 39 N. Y. 153 (1868).

⁶ WILLS, 68 C. J. p. 660.

⁷ ROOD ON WILLS (2d. ed.) § 292.

from subscription and admitting that each is a separate office of the witnesses to the will, the way is cleared for the liberal rule. If the subscription is but an identifying mark put upon the paper, there is little reason to hold that the paper must first contain the signature of the testator. It is the paper as a whole that is to be identified, and not the signature alone. The signature is to be attested. This means that the witnesses must all together observe the execution. This may as well be done after identifying marks have been put upon the paper.

Apart from the above reasoning, courts have justified the signature by the witnesses ahead of the testator by bringing in the *de minimis* rule. This was set forth in the case of *Gordon v. Parker*,⁸ the court saying: "Where the execution of the will by the testator and the signing of the same by the subscribing witnesses constitutes one continuous transaction, the signing by each, taking place in the presence of the others, is sufficient and is to all intents and purposes an attestation by the subscribing witnesses to a fact which has already taken place. In other words, that under these circumstances the time intervening between the placing of the different signatures to the will is not to be considered; it is too short for the law to take notice of." This view is the same as that upheld in Ohio, where, in *Slemmons v. Toland*,⁹ the court said: "The chances for fraud or imposition in the execution of the will are not increased by reason of one of the witnesses signing before the testator, where the testator signs immediately thereafter, and in the presence of the witness, if the will is otherwise regularly executed." Or to put the rule into its briefest form, "In acts substantially contemporaneous it cannot be said that there is any substantial priority."¹⁰

Most of the states adhering to the liberal view reason as did the Michigan court, which said: "Where there is no explicit requirement of the statute as to the order of the signatures and when all who participate are present at the same time and their acts are a part of one continuous transaction, it requires no extended argument to determine that the order of such signing is immaterial under such a statute."¹¹ In other words, so long as the statute prescribes no specific order of signing, why should the court read this into the law? In view of the fact that the order of subscribing is not mentioned in any statute, it would seem that those states whose courts hold to the strict view are, in a way, legislating.

A final consideration of the liberal view is to note what has been deemed a continuous transaction. Ordinarily it means where the wit-

⁸ 139 Miss. 334, 104 So. 77, 39 A. L. R. 931 (1925).

⁹ 5 Ohio App. 201 (1916).

¹⁰ *Kaufman v. Caughman*, 49 S. C. 159, 166, 27 S. E. 16, 61 Am. St. Rep. 808 (1897).

¹¹ *In re Horn*, 161 Mich. 20, 26 L. R. A. (N. S.) 1126, 125 N. W. 696, 20 Ann. Cas. 1364 (1910).

nesses sign, and the execution of the testator follows immediately thereafter, so as to form an unbroken chain of acts by the parties. There have been cases, however, which have approached the liberality of *Bloechle v. Davis* in their construction of what amounts to a continuous transaction. The case of *Swift v. Wiley*¹² is in point. In this case *A* and *B* subscribed their names as witnesses to the will of *C*, who did not subscribe his name until some hours after, when it was attested by the attending physician *D*. *A* and *B* who still remained with *C* then acknowledged their respective signatures as subscribing witnesses. The court held that it was not necessary that *A* and *B* should subscribe their names to render the attestation valid.

It is interesting to note that the leading case for the strict view contains in its dicta the opening wedge for this recent case which presents the most liberal view. In *Jackson v. Jackson*¹³ the court, speaking of witnesses signing first, says: "This is a dangerous construction of the statute. May the testator keep these signatures in his possession one hour, one week or one year, and then add his signature? Certainly not, unless he summons the same persons to see him sign or hear his acknowledgment." The dicta presents the same facts dealt with in the instant case, and implies that such procedure, though it might be frowned upon, might yet be deemed correct.

The outstanding danger of too liberal a view might be pointed out. Since the strict English view requires that the testator first execute the will, and since the modified view holds that the execution by testator and signature by witnesses must be parts of the same transaction where the witnesses sign first, there is a natural and logical presumption, when the signatures of the witnesses appear on the will that the witnesses have also attested. Now should the recent decision gain favor, the witnesses will be able to sign the will at any time, and the testator may execute it at any future time—perhaps a year later. By this time the witnesses may be dead. Should the witnesses be beyond reach of the court, there would be no way of knowing whether or not they had really attested the will. Thus the recent ruling would threaten the important presumption that arises when the signatures of the witnesses appear on the will, and there would always be doubt as to whether or not the will had been attested at all.

Ernest L. Lanois.

¹² 40 Ky. (1 B. Mon.) 114 (1840).

¹³ *Op. cit. supra* note. 5.