Discussion of Recent Decisions

Chicago-Kent Law Review

September 1936

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DISCUSSION OF RECENT DECISIONS

APPEAL AND ERROR—APPELLATE PLEADINGS—ASSIGNMENT OF ERRORS NO LONGER NECESSARY. — Despite the fact that the Appellate Courts of both the Second\(^1\) and Third\(^2\) Districts have recently ruled to the contrary, the Appellate Court for the First District has now held that the specification of errors in the appellant's brief is not jurisdictional.\(^3\)

The suit was on a casualty insurance policy for the automobile of one Roach brought by an administrator who had obtained a judgment against the insured for the wrongful death of the intestate. The defendant relied on the express provision of the policy that no action thereon should be maintainable "unless the liability or loss shall have been actually sustained and paid in money by the assured." This Appellate Court, however, reversed the decision of the trial court, and decided that that provision was voided by the Act of May 11, 1933,\(^4\) which provides that all such indemnifying policies "shall be deemed and construed to

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\(^4\) Ill. State Bar Stats. 1935, Ch. 73, par. 466.
contain a provision that the [insurance] carrier shall be liable to the person entitled to recover for such death . . . when caused by the insured in the same manner and to the same extent that such carrier is liable to the insured. Such liability may be enforced by the person entitled to recover by an action against the carrier which may be commenced at any time after the rendition of final judgment in favor of such person against the insured.'"

The court remarked that if the former judgment had been paid, there would obviously be no basis for this plaintiff suing on the policy.

On petition for rehearing it was urged that the plaintiff had failed to assign any errors in its brief as required by the rules of both the Appellate and Supreme Courts. An examination of this brief discloses that under the heading of "Errors Relied on for Reversal" it simply states three general propositions of law, without indicating how they applied to the facts of the case nor wherein the lower court had committed error. In the aforementioned cases in the Second and Third Districts upon which the defendant relied, the briefs of the appellants apparently made no attempt whatever to make a statement of errors. Supreme Court rule 39 now says, "The concluding subdivision of the statement of the case shall be a brief statement of the errors or cross errors relied upon for a reversal . . . ."5 Rule 36, as amended, provides that "no assignment of errors or cross errors shall be necessary, except the statement in the brief. . . ."6 The court in the instant case is of opinion that the intention was to retain the previous practice as to showing and preserving errors in the brief, and that the prior opinions of the other districts of the court were in error in concluding that the place for setting out the assignment of error merely had been changed. It is asserted that the purpose of the Civil Practice Act was to provide for an appeal which would be a continuation of the proceeding below; so an assignment of error as a new pleading and a part of the record has been expressly abandoned.

This decision places most reliance upon section 76, subdivision 2, of the Civil Practice Act, which was disregarded in the other two cases. It states, "An appeal shall be deemed perfected when the notice of appeal shall be filed in the lower court. . . . and no step other than that by which the appeal is perfected shall be deemed jurisdictional." From this the court concludes that

5 Ill. State Bar Stats. (1935), Ch. 110, par. 263.
6 Ibid., par. 260.
"the method by which the brief sets out and argues the points at issue is not jurisdictional, and does not constitute a basis for dismissing a case on appeal." In City of Chicago v. Peterson the Supreme Court said that an inadequate statement in an effort to comply with rule 39 does not warrant dismissal of the appeal as long as certain errors are stated in appellant's brief. In that case the statement was held insufficient to confer jurisdiction upon the Supreme Court directly rather than upon the Appellate Court, but that did not mean that the statement of errors was jurisdictional in the sense of the right to a review. Thus, abolishing assignments of error as required under the former practice is not permitted to introduce new technical requirements. It is interesting to note that this opinion was signed by all the judges of the other two divisions of the Appellate Court of the First District to signify their concurrence with the views expressed therein.

J. M. HADSALL

APPEAL AND ERROR—CONSTRUCTION OF STATUTE—WHEN RECORD MUST SHOW EVIDENCE NOT PRESERVED.—The Illinois Appellate Court in the case of Prudence Company, Incorporated v. Illinois Women's Athletic Club, recently interpreted subsection 3 of section 64 of the Civil Practice Act of 1933, which provides, "No special findings of fact or certificate of evidence shall be necessary in any case in equity to support the decree," and held it to be applicable only where the record shows that evidence was heard but not preserved. The order in this case recited that "the court having read and examined the accounts and reports of the receiver . . . and the objections thereto . . . and having heard arguments of counsel, finds," etc.

In the case of First National Bank of Chicago v. 10 West Elm Street Building Corporation, the same court held that the effect of the statute is to place the burden of preserving evidence on the one who is attacking the order or decree and that where the order states that the court heard evidence and there is nothing in the record to show that any objection was made to the order, it cannot be disapproved by the Appellate Court. The principal case holds that this decision and the foregoing section of the statute do not apply to the facts of the case at hand, because the

7 360 Ill. 177, 195 N. E. 636 (1935).
1 284 Ill. App. 210, 1 N. E. (2d) 702 (1935).
2 Ill. State Bar Stats. (1935), Ch. 110, par. 192 (3).
3 277 Ill. App. 337 (1934).
record "shows that no evidence was heard" and that objections were made to the orders which were overruled without a hearing on the merits. Obviously, there can be no duty to preserve evidence when there was none, and it is apparent that the Appellate Court will not presume that there was evidence where the order does not so recite.

Milton H. Tuttle

Appeal and Error—Discretion of Lower Court—Order Granting New Trial Reviewable on Fact or Law.—Section 77 of the Illinois Civil Practice Act, which allows an appeal from an order granting a new trial upon leave granted by a reviewing court, found its first actual application in the Appellate Court in the late case of Wettaw v. Retail Hardware Mutual Fire Insurance Company.2

Under the former practice the award of a new trial was not a final order, and was not reviewable. Moreover, the granting of a new trial was regarded as "within the trial court's discretion which will not be disturbed unless abused..."3 Of course, the correctness of the ruling, where the discretion was exercised on a question of law as distinguished from that exercised on a question of fact, was reviewable "on appeal [from the final order], independently of the judgment of the trial court."4

The instant case typifies the use of the new section, and the court's opinion clearly states the scope of the change. The purpose of the enactment, said the court, is to "prevent a verdict, warranted by the record and justified by the evidence, from being set aside and lost to the party who was fairly entitled thereto, and such litigant forced to undergo the hazards of another trial with its further incidents of delay and expense...."5 The court further observed that "the exercise by the trial court of its discretion in granting a new trial, even as to matters of fact, is a matter subject to review."6

The decision allowed the defendants leave to appeal from an order of the trial court setting aside a verdict in their favor and granting the plaintiffs a new trial. The defendants' principal

1 Ill. State Bar Stats. (1935), Ch. 110, par. 205.
4 Ibid.
5 285 Ill. App. 396, 2 N. E. (2d) 163 (1936). The court cited Adamsen v. Magnelia, 280 Ill. App. 418 (1935), as having decided this. The opinion in that case discussed the section here considered, but did not apply it.
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argument was that "the evidence in the case was so preponderantly in their favor that no other verdict could properly have been rendered." Thus the actual holding in the case is that under section 77 an order by a trial court granting a new trial is reviewable on questions of fact as well as law.

C. E. Fox, JR.

**Appearance — Proceeding Constituting Appearance — Effect of Concurrent Filing of Motion to Dismiss for Lack of Jurisdiction and Motion in Nature of a Plea of Res Judicata Under Illinois Practice.** — Attention is called to a recent decision of the Illinois Appellate Court because of the use of language apparently inconsistent with the provisions of the Civil Practice Act. The action was on an insurance policy. By a special appearance and motion the defendant asked for a dismissal of the complaint for want of jurisdiction as to the person and the subject matter. With the motion (apparently in accordance with section 48 of the act) there was filed the equivalent of a plea of res judicata. The court decided the case on the plea of res judicata, dismissing from consideration the plea as to the jurisdiction, saying: "This action [filing both concurrently] by the defendant operated of itself to overrule the special appearance and to make the same the equivalent of a general appearance."

Section 48, paragraph 3 of the Civil Practice Act provides that "all defenses, whether to the jurisdiction or in abatement or in bar, may be pleaded together, but the court may order defenses to the jurisdiction or in abatement to be tried first." Section 48 of the act provides that the defendant may file a motion to dismiss the action in certain cases, among them a motion on the grounds that the court has not jurisdiction of the person, that it has not jurisdiction of the subject matter, or that the cause of action is barred by a prior judgment. In order to clarify this section, rule 21 was made, which provides that "where, after denial by the court of a motion under section 48 of the Civil Practice Act, the defendant pleads over, this shall not be deemed a waiver of any error in the decision denying such motion, and the defendant shall have the right to assign such error on appeal from the final

2 Ill. State Bar Stats. (1935), Ch. 110, par. 171 (3).
3 Ibid., par. 175.
4 Ibid., par. 244.
judgment. This rule shall extend to the case where the motion is one attacking the jurisdiction of the court over the person made under a special appearance, and the pleading over by the defendant has involved the entry on his part of a general appearance."

Under the Civil Practice Act, section 20, general or special appearances are made by filing a pleading or motion, no separate appearance being necessary. In his book on the Civil Practice Act, McCaskill, commenting on the effect of this section, says: "Under sec. 43 (3) of the Civil Practice Act, authorizing defenses in bar and to the jurisdiction to be pleaded together, the old practice that a plea in bar overrules a plea to the jurisdiction has been changed, and a defense to the jurisdiction of the court over the person of defendant, whether pleaded above or in conjunction with defenses in bar, is a special appearance. As the defense to the jurisdiction will be first passed on, the defenses in bar constitute only a qualified general appearance, to be effective if the defense to the jurisdiction does not prevail."6

If, by the statement quoted from the opinion, the court means that, where a motion is made which objects to the jurisdiction and at the same time sets forth a defense in bar, the court will not consider the defense to the jurisdiction, the decision apparently overlooks the express provisions of the practice act. If, on the other hand, the court merely means that after a defense to the jurisdiction is disposed of, no general appearance need be made, because of the fact that the defense automatically becomes a general appearance, then, while that is undoubtedly true, the language employed is misleading and might lead to a misapprehension that the court is expressly nullifying the provisions of the Civil Practice Act.

C. E. HACKLANDER

BETTING AND GAMING — LOTTERIES — SKILL OR CHANCE AS DETERMINATIVE OF ILLEGALITY OF LOTTERY.—The current popularity of games with pins and rolling marbles and of other contrivances said to appeal to our cupidity causes us to notice a recent English decision in the Chancery Division, Witty v. World Service, Limited.1 The case applies the English doctrine that the element of chance alone, not skill, must decide the result of a

5 Ibid., par. 148.
1 [1936] 1 Ch. Div. 303.
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prize game in order for the scheme to be called an illegal lottery. The English theory seems never to have been considered by an Illinois reviewing court.

The case concerned a competition in which the defendant newspaper company offered a cash prize to the reader sending in the best solution of a picture puzzle printed in the paper. The puzzle comprised nine sketches, each intended to depict a place in the United Kingdom. The court held that success in the contest depended upon the exercise of skill, and the competition was therefore not a lottery.

This theory has long been a rule of decision in England,\(^2\) where, as another court said, "the cases shew that to constitute a lottery it must be a matter depending entirely upon chance."\(^3\) There seems to be conflict in the American decisions on the question whether the fact that a contest affords opportunity to exercise skill removes it from the category of lotteries.\(^4\) It is clear, however, that most of the cases in this country hold a contest legal if the use of skill or judgment predominates in determining the result.\(^5\)

So far, although the numerous prosecutions under the Illinois Lotteries Act\(^6\) have elicited extensive newspaper comment, they have only rarely been carried beyond our nisi prius courts; and apparently the development of the point in the English cases has never been examined on appeal.\(^7\) In view of the similarity of the English and Illinois statutes, it seems that the English cases should be regarded as at least persuasive authority by our courts.

C. E. Fox, Jr.

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\(^2\) 38 C. J. 290-1, and cases there cited.
\(^3\) Hall v. Cox, 1 Q. B. 198 (1899).
\(^4\) 38 C. J. 290, and cases there cited.
\(^5\) Ibid.
\(^6\) Ill. State Bar Stats. (1935), Ch. 38, par. 401 et seq.
\(^7\) The element of chance has been discussed as an essential in Dunn v. The People, 40 Ill. 465 (1866) and Thomas v. The People, 59 Ill. 160 (1871). In neither case was the element of skill considered. In Gilbert et al. v. O. K. Houck Piano Co., 159 Ill. App. 347 (1911), a "word contest" advertising plan, whose details do not appear in the opinion, was upheld without comment. In The People v. Monroe, 349 Ill. 270, 182 N. E. 439 (1932), wherein the Horse Racing Act was held not to be violative of the constitutional clause which prohibits the general assembly from authorizing lotteries, because the distribution of stakes depends, not upon chance, but upon "the condition, speed, and endurance of the horse, aided by the skill and management of the rider or driver." This determination rested on careful definition of the word "lottery," rather than on precedent. However, it does indicate a leaning toward the English view.
Breach of Promise to Marry—Statutory Abolition—Enforceability of Action for Wages to Be Paid on Marriage of Parties.—It is well to remember in connection with the prohibition of breach of promise suits in our Criminal Code that when a contract to marry is broken the innocent party might still have a valid contract action on a separate obligation. In a late New Jersey case the defendant, an attorney, hired his fiancee as his secretary and retained $5 each week from her wages, agreeing to pay over to her the savings so accumulated when they married so that she could use it for purchases for their home. More than three years later the defendant expressed his intention of terminating their relationship, and the plaintiff sued to recover the balance so retained. On the defendant’s motion the complaint was stricken on the ground that actions for damages for breach of contract to marry had been abolished by statute. The Court of Errors and Appeals reversed that judgment saying, “The appellant seeks the recovery of accumulated earnings, not damages consequent upon a breach of respondent’s alleged undertaking to marry her.” As no definite time was provided for, it was presumed that their intention was that the contingency upon which payment depended would take place within a reasonable time. The employer could not deprive his employee of her right by arbitrarily postponing the time. Therefore, payment was conditioned, not upon the occurrence of the contemplated marriage, but upon the passage of what the jury would consider a reasonable period. The promise to marry evidently was not regarded as a consideration indivisible from the services; hence, the services, and not the promise of marriage, constituted the consideration for the promise to pay for them.

J. M. Hadsall

Charities—Construction of Charitable Bequest—Necessity for General Charitable Intent in Application of Cypres Doctrine.—A legal battle developed because of gifts to peace societies in the recent English case of In re Harwood, and in determining the case, the court followed two lines of decisions: first, cases where a gift to a specific charity fails, and the gift lapses and falls into the residuary, leaving no room

1 Ill. State Bar Stats. (1935), Ch. 38, par. 58.
4 [1936] 1 Ch. 285.
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for the application of the cy-pres doctrine;\(^2\) and second, those where a gift to a charity fails, but a general charitable intent is found in the will, and the application of the cy-pres doctrine is called for.\(^3\) The clear cut distinction made in this case, under one will, suggests a comment.

The testatrix in this case bequeathed 200 l. to the Wisbech Peace Society, Cambridge, 300 l. to the Peace Society of Belfast, 300 l. to the Peace Society of Dublin and the residue of her estate to a nephew. The Wisbech society ceased to exist before the death of the testatrix, the Belfast society never existed, and the Dublin society never existed, although a society of similar name had been extant at the time of the will but no longer existed. The first fund was claimed by the Peace Committee of the Society of Friends, the second by the Belfast Branch of the League of Nations Union, and the third by the League of Nations Society of Ireland, all working to advance the interests of peace.

The first gift was to a certain society, clearly identified with great particularity, and on that basis, the court held that there was no general charitable intent, that the gift failed by reason of the failure of the beneficiary, and that there was, accordingly, no room for the application of the cy-pres doctrine. The second gift was to a nonexistent organization and the testatrix had no clear idea of who the beneficiary was; because of this the court held a general charitable intent was shown and the cy-pres doctrine should be applied. The third gift was determined similarly. It is interesting to note in passing that the court, having found general charitable intent in two of three gifts, did not find this intent sufficient to permeate the entire will as a whole.\(^4\)

That the principles announced by the court are sound is born out in both English and American decisions, but the application in any specific factual situation is often difficult, and although acknowledging the law to be the same, courts sometimes arrive at diverse results on similar sets of facts. For example, in *Women's Christian Temperance Union* v. *Cooley*,\(^5\) the Texas court found that a gift to advance prohibition failed after the passage of the Eighteenth Amendment to the Constitution and

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\(^2\) Fisk v. Attorney General, L. R. 4 Eq. 521 (1867).
\(^3\) In re Davis, [1902] 1 Ch. 876.
\(^4\) For an English case, see Ironmongers’ Co. v. Attorney General, 10 Cl. & F. 908, 8 Eng. Rep. 983 (1844).
it would not apply the cy-pres doctrine, and in *Bowditch v. Attorney General*, the Massachusetts court in the same circumstances found a similar gift carried a general intent, that laws did not create temperance, and applied the cy-pres doctrine.

To find a general intent, the court must find the testator's secondary intent, which is not expressed in clear language within the will. It requires a fundamental assumption that the testator had charitable motives and was not solely interested in the particular object named. It has been called a rule of "construction and not administration." One thing seems clear: if a specific charity is named which ceases to exist before the will takes effect, the courts will not usually apply the cy-pres doctrine. On the other hand, if a specific charity takes the gift and then goes out of existence, the court may apply the cy-pres doctrine and transfer the fund to another similar charity. Some gifts are so general that an application of the cy-pres doctrine is merely a change in administration. In *Grimke v. Malone, Attorney General*, a bequest to "Orphans of the Poor" was considered of this nature.

Whatever conclusion the courts may reach on any particular set of facts, and no matter how they may differ in determining that a gift is specific or whether it discloses a general charitable intent, it appears to be well established that the cy-pres doctrine will be applied only when the court has found from the evidence and the will that a general charitable intent is present. A specific intent which is incapable of consummation causes the gift to lapse.

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7 Bruce v. Maxwell, 311 Ill. 479, 143 N. E. 82 (1924).
9 See footnote 2 and *Quimby v. Quimby*, 175 Ill. App. 367 (1912); 11 C. J. 363 and cases there cited.
10 *Mason v. Bloomington Library Assn.*, 237 Ill. 442, 86 N. E. 1044 (1908). After the gift had been made to an art gallery, the gallery ceased to exist and the court transferred the fund to another public gallery.
11 In *re Mills' Will*, 200 N. Y. S. 701 (1923).
13 A gift to a named hospital failed when the hospital did not exist. In *re Rappolt's Will*, 250 N. Y. S. 377 (1931). Cy-pres doctrine was applied when a gift was made to a hospital which had been organized but was unable to function. *Nichols v. Newark Hospital*, 71 N. J. Eq. 130, 63 A. 621 (1906).
14 See footnote 3, 7 and 8; 11 C. J. 360 et seq.
15 In *re Stanford*, [1924] 1 Ch. 73, a case of a gift to complete a dictionary which had been completed.
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The court in the principal case has thus expressed the English rule, and Illinois, among other American jurisdictions which adopt the cy-pres doctrine, is apparently in accord.

J. E. Brunswick

CONSTITUTIONAL LAW—PROHIBITION OF INVOLUNTARY SERVITUDE—CONSTITUTIONALITY OF CONTRACT TO REMAIN ON NARCOTIC FARM UNTIL CURE IS EFFECTED.—An interesting example of the generally accepted doctrine that one cannot contract away the constitutional provisions designed for his benefit is set forth in the case entitled Ex parte Lloyd,1 heard in the Federal district court of Kentucky. The petitioner, Emery Lloyd, had made application for admission to the Federal narcotic farm for treatment for his addiction to the use of narcotic drugs. He was admitted upon the condition that he obligate himself to submit to confinement at the farm for such period as was estimated by the surgeon general to be necessary to effect a complete cure, or until he ceased to be an addict. In consideration of his admission, he signed a writing agreeing to comply with such conditions and granting to those lawfully in charge to use any reasonable method of restraint until he was eligible for release. After receiving treatment for some time, he desired to leave the institution, but he was detained because the period estimated by the surgeon general had not expired, and because he was "still an 'addict' with extremely unstable personality, with inebriate impulses and emotional instability," and the opinion of the medical board was that he should not be dismissed or released. He, therefore, brought a habeas corpus proceeding, and the sufficiency of these facts as to the right to detain him is challenged by demurrer.

It appears that the narcotic farm was constructed by the Federal Government primarily for the confinement and treatment of prisoners convicted of offenses against the United States, who are addicted to the use of habit-forming narcotic drugs.2 The confinement and treatment of addicts who voluntarily submit themselves to the institution is expressly authorized but, according to the view of the court, is clearly a secondary consideration. After quoting several portions of the act pur-

16 See footnotes 2 and 3.
17 See footnotes 7 and 10.
suant to which the institution was constructed, the court ar-
rievd at the opinion that Congress could not have contem-
plated that an inmate entering voluntarily would subject him-
self to compulsory confinement, for it would be subjecting him
to involuntary servitude in violation of the Thirteenth Amend-
ment, and would be depriving him of liberty without due
process in violation of the Fifth Amendment. Referring to
this, the court said: “The fact that the petitioner at some time
previous had consented to submit himself to confinement does
not withdraw the present imprisonment, which is now enforced
against his will, from the condemnation of these provisions of
the Constitution. The full intent of the constitutional pro-
visions could be defeated with obvious facility if citizens could
be held to involuntary servitude or enforced imprisonment,
through the guise of such contracts. The contract exposes the
petitioner to liability for any damages suffered as the result
of the breach but not to involuntary servitude in any form nor
to the loss of his liberty or any of its essential attributes with-
out due process of law.” That there was no purpose or intent
to authorize compulsion to detain an inmate who entered volun-
tarily is shown by the proviso in the act which reads: “Any
person who voluntarily submits himself for treatment at a
United States narcotic farm shall not forfeit or abridge thereby
any of his rights as a citizen of the United States.”

C. E. HACKLANDER

CONTRACTS--ASSIGNMENT--EFFECT OF RELATIONSHIP OF PER-
SONAL CONFIDENCE UPON ASSIGNABILITY OF CONTRACT.—The re-
cent case of Pennsylvania Railroad Company v. Huston in
which the court held an executory contract unenforcible in the

4 Ibid., sec. 235.
5 Ibid., sec. 232.
1 81 F. (2d) 704 (1936).
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hands of an assignee because it involved a relationship of personal confidence, invites an inquiry as to what constitutes a relationship of such personal confidence as to prevent an effective assignment.

In the instant case the contract, made in 1904, was one in which the Buckeye Transfer & Storage Company, a Maine Corporation, undertook to call for unclaimed package freight of the C. A. & C. Ry. and the P. C. C. & St. L. Ry., to move it to its storage warehouse, to pay to the railroad all charges due, to hold it, to deliver to the consignee, shipper or owner, to sell it at auction according to law if uncalled for, and to hold the railroad free from liability for loss or injury to the property. In 1905, the Maine corporation sold all its assets to an Ohio corporation of the same name. In 1921, one Huston acquired all the stock of the Ohio corporation, dissolved it and operated the company individually. On March 26, 1921, the Pennsylvania Railroad leased the lines of the contracting railways and, presumably, assumed their liabilities. For a time it permitted Huston to continue operations, but in May, 1922, it made other arrangements without notice to Huston, who then sued for lost profits for six months beginning in June, 1922. Several defenses were raised which the court brushed aside, except the one "that the contracts here involved are executory and continuing contracts involving a relationship of personal confidence, couple rights with obligations, and are therefore not assignable."

Certain exceptions exist to the general doctrine that all contracts are assignable. Among these exceptions are contracts involving personal confidence or personal services. The case of Arkansas Valley Smelting Company v. Belden Mining Company is the most frequently cited case in the United States involving this exception. In that case, Mr. Justice Gray quoted from Pollock on Contracts: "Rights arising out of contracts cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." The decision was based on this principle.

The use of the disjunctive "or" by Pollock and the citing

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3 127 U. S. 379, 32 L. Ed. 246 (1888).
of the statement by Mr. Justice Gray has caused considerable confusion, for while liabilities may not be shifted by the obligor without the consent of the obligee, the rights arising from an executory contract are today recognized as assignable. But two years after the Arkansas Valley case, Justice Gray, in again passing on the point in *Delaware County v. Diebold*,\(^5\) repeats the statement of the law, citing his first decision as authority, but changes the disjunctive "or" to the conjunctive "and." Read with the "and," the rule is clearer, sounder, and more logical. As Pollock states the rule, no executory contract is assignable.

That the mere existence of liabilities under the contract does not prevent assignment is clearly seen by the decision in the case of *Tolhurst v. Associated Portland Cement Manufacturers, Ltd.*,\(^6\) where it was held that when a new company (assignee) took over the cement plant of the assignor the defendant was still bound to deliver chalk; and this, even though credit was to be extended to the assignee, and although the assignor company was being liquidated. A recent case following the same legal doctrine is *Meyer v. Washington Times*,\(^7\) although the assignee there did not insist on the credit provision in the contract, but offered to pay cash.

The instant case quotes from the Arkansas Valley case but sets forth the judge's introductory statements and does not state the rule founded on Pollock's statement. The Delaware County case is cited but no quotation is given. The only element of the instant case which involves the relationship of personal confidence is the provision to hold the railroad free from liability for loss or injury to the property. This is, in a sense, a provision for credit, and although the court did not point this out as the obstacle in the way of an effective assignment, it may be that it would be a sufficient one in the absence of a tender of adequate security, which apparently was not made.\(^8\)

**J. E. Brunswick**

**Contracts — Consideration — Mutual Obligation in Contracts to Purchase All Goods the Vendee Requires.** — In the recent Appellate Court decision in the case of *Match*

\(^5\) 133 U. S. 473, 33 L. Ed. 674 (1890).

\(^6\) [1903] A. C. 414.

\(^7\) 76 F. (2d) 988 (1934).

\(^8\) See also *In re Niagara Radiator Co.*, 164 F. 102 (1908), where extension of credit was held not to stand in the way of an assignment "provided the assignee is ready to pay cash."
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_Corporation of America v. Acme Match Corporation_,¹ the court held that a contract by which the vendor agreed to sell all of the book matches the vendee required was valid and did not lack mutuality.

_Briefly, the facts are these:_ The defendant contracted to sell to the plaintiff, a newly organized corporation, not yet engaged in business at the time of the contract, all the book matches the plaintiff required in its business, and which the plaintiff could resell. The plaintiff agreed to buy all the matches required by it from the defendant. The defendant further agreed to refrain from selling in competition with the plaintiff or from selling to anyone else, except jobbers for the purpose of resale. The plaintiff was also required to advance twenty-five hundred dollars as security from default by the plaintiff. After a default by the defendant, the plaintiff brought this action for damages and for an injunction against sale by defendant to others in violation of the contract. The defendant alleged that the contract lacked mutuality and was void as in restraint of trade.

The court upheld the contract, saying that where a word of a contract has a dual meaning, such interpretation will be given to the word at to make the contract operative. The word "requires" as used in such contracts is held to be equivalent to "needs."² The court held that the contract did not give the plaintiff the option to purchase if he desired or what he might or might not require, but that it bound the plaintiff to purchase such matches as he needed in his business. The contract was not an option but a mutually binding contract.³

Little space was devoted to a discussion of the problem of mutuality of obligation, and in view the extensive consideration given it by such decisions as _Nassau Supply Company, Inc. v. Ice Service Company, Inc._⁴ and _Schlegel Mfg. Co. v. Peter Cooper's Glue Factory_⁵ one might well have expected the court here to give the problem more consideration. In the Schlegel case, the Court of Appeals of New York held such a "requirement" contract void because there was no obligation on the

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¹ 285 Ill. App. 197, 1 N. E. (2d) 867 (1936).
² Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774 (1896); Torrence v. Shed, 156 Ill. 194, 41 N. E. 95, 42 N. E. 171 (1895).
⁴ 252 N. Y. 277, 169 N. E. 383 (1929).
buyer, a jobber, "to sell any of the defendant's glue, to make
any effort toward bringing about such a sale." In the Nassau
case, the same court held a contract to buy "all the ice used"
by the plaintiff to be unenforceable because the plaintiff "had no
use for ice and might never have any use for it."

Concerning such decisions, Professor Williston says that "the
promise of a seller not to manufacture except for the buyer,
or the promise of a buyer not to buy except from a particular
seller, is clearly a promise to do something detrimental," and
if a promise to buy all of one's requirements from a particular
seller is interpreted to mean the same thing as to refrain from
buying from anyone else, the buyer in a requirement contract
suffers the same detriment.

While, no doubt, the promise to buy all of one's requirements
from a particular seller carries with it the obligation not to buy
from anyone else, courts will frequently view such contracts in
the light of the presumed intention of the parties and treat them,
not as cases of promises purchasing the negative obligation,
which in most cases would be of little value to the promisor, but
rather as promises purchasing an obligation of the promisee to
have some requirements. Even if this interpretation should be
put on the promise, the contract should not be held to lack
mutuality of obligation; but if there is no standard by which
the quantity to be required by the promisee may be even ap-
proximated, the contract may be so indefinite as to be unen-
froicable.

In the instant case, if the court treated the promise as one
to have requirements, the buyer's promise might still be sug-
gested to have been too indefinite in view of the fact that the
buyer's requirements, being only for resale, could not be meas-
ured any better than those in the Schlegel case. Two differences
are to be noted in the instant case, however. The plaintiff agreed
to resell only at list prices; thus market fluctuations (even if
material fluctuations could be conceived for matches) would not

6 Williston on Contracts (Rev. ed., Baker, Voorhis & Co., New York,
1936), I, 355-6 and cases there cited.

7 Hawaiian Pineapple Co., Ltd. v. Saito, 270 F. 749 (1921); Rocky Mt.
Fuel Co. v. Consolidated Coal & Coke Co., 276 F. 661 (1921); Diamond
Alkali Co. v. P. C. Tomson & Co., Inc., 35 F. (2d) 117 (1929); Armstrong
Paint Works v. Continental Can Co., 301 Ill. 102, 133 N. E. 711 (1921);
Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142 (1891); Fayette-Kanawha
Coal Co. v. Lake & Export Coal Corp., 91 W. Va. 132, 112 S. E. 222 (1922).

8 Crane v. C. Crane & Co., 105 F. 869 (1901); Cohen v. Clayton Coal Co.,
86 Colo. 270, 281 P. 111 (1929); Willard, Sutherland & Co. v. United
States, 262 U. S. 489, 67 L. Ed. 1086 (1923).
cause the buyer to increase his "requirements" inordinately. Also the plaintiff was required to advance to the defendant $2,500, at least $1,500 of which might be rebated to the plaintiff in matches if the plaintiff's orders should not be enough. This would fix the minimum requirement that the buyer would be obliged to take.

While the Appellate Court did not point out these features, which definitely indicate that there was mutuality of obligation, the decision, on the facts, is in accord with other Illinois decisions and is undoubtedly correct.

Vernon A. Forsberg

Life Insurance—Right to Proceeds—Validity of Change of Beneficiary by Insured After He Has Been Adjudged Insane.—The Illinois Appellate Court, in the case of New York Life Insurance Company v. Schlieper, held that a person who had been adjudged insane, and had a conservator of his person and property appointed, was competent to change the beneficiaries of his life insurance policy. It was admitted by the pleadings that the deceased made the change from his two sons while he was of sound mind and memory, and fully capable of understanding the nature of his act and the natural objects of his bounty.

In so ruling the court had to decide that the statute making adjudged lunatics' contracts void did not apply, a conclusion that it reached by reasoning that the change of beneficiary is not a contractual act, but is rather testamentary in character. In support of this analogy the court cited its own earlier decision in the case of Mutual Life Insurance Company of New York v. Devine et al. wherein the identity of the persons to take as beneficiaries was determined by the intent shown by insured, which was in turn resolved by resort to testamentary rules concerning class gifts. In applying these rules the court in the earlier case observed, "... the disposition of life insurance funds... is in many respects strikingly akin to a testamentary disposition of property. The will of the insured, like the will of the testator, when ascertainable and not in conflict..."
with positive law, usually governs. The distribution does not take place until the death of the insured in the one case and the death of the testator in the other. The fund usually goes to persons bound to the insured in the one case and the testator in the other by ties of consanguinity or affinity. The disposition...is governed by the arbitrary wish of the party directing it. In case no lawful disposition of it is made, it usually goes to the estate of the insured in the one case and of the testator in the other as intestate property. It is usually a gratuity.

...Again, courts are usually called upon to construe life insurance contracts under the same circumstances under which they are called upon to construe wills, that is, after the death of the person whose intent is to be ascertained.4 From this comparison the court concluded that "what would be potent in determining what was the intent in the one case would be likewise potent in the other."

We observe that in the earlier case the court confined itself wholly to the analogy as a matter of construction of intent. In the present case the likeness is extended to a matter of capacity. The court's statement that the changing of a beneficiary is not a contractual act needs qualification, moreover; there is no question that the naming of the beneficiary cannot be changed without a strict compliance with the stipulations of the policy.5

Decisions of other jurisdictions seem to indicate that insanity removes the capacity to change the beneficiary.6 An inspection of the facts, however, usually reveals that the insanity was such as to deprive the insured of testamentary as well as contractual capacity. In view of the striking similarity in the act of selecting a beneficiary to that of choosing a legatee, the conclusion of the instant case seems logical, and seems to offer the more appropriate rules for the determination of the requisite capacity.

C. E. Fox, Jr.

LIMITATION OF ACTIONS—EFFECT AS TO REMEDY IN OTHER STATES—WHETHER FOREIGN STATUTE SHOULD BE APPLIED WITH OR WITHOUT TOLLING PROVISION.—An interesting and unusual proposition was recently presented to the Court of Appeals of

4 Ibid., p. 429.
Ohio in the case of Bowers v. Holabird. On May 24, 1915, one Holabird, a resident of Chicago, together with another, executed a note to the plaintiff, Bowers, who at that time was also a resident of Chicago, and who lived there continuously thereafter. Before the Illinois statute of limitations had run, Holabird left Illinois and took up his residence in Ohio, where he died. On September 15, 1933, an action on the note was brought in Ohio against Holabird’s estate, and the defense was based on the statutes of limitations of Illinois and Ohio. If a part payment had been made (the evidence was conflicting), the action would not have been barred in Ohio, where the limitations on actions of this kind is fifteen years. However, there is a provision in the Ohio act that “if the laws of any state or country where the cause of action arose limits the time for the commencement of the action to a less number of years than do the statutes of this state in like causes of action, then said cause of action shall be barred in this state at the expiration of said lesser number of years.”

The Illinois statute of limitations says that the action “shall be commenced within ten years next after the cause of action accrued,” but in a subsequent section the exception is made that “if, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the times herein limited, after his coming into or return to the state; and if, after the cause of action accrues, he departs from and resides out of the state, the time of his absence is no part of the time limited for the commencement of the action.” Thus, if the action had been brought in Illinois (jurisdiction of the defendant being conceded for the sake of argument), it would not have been barred by the statute.

The Ohio court lightly dismissed the argument of the plaintiff that since the action would not have been barred in Illinois, only the Ohio limitation of fifteen years would apply. In dismissing the argument, the court said that the purpose of the exception in the Illinois act was to prevent the defendant from availing himself of the ten year limitation in an action brought in Illinois and that the provision was not intended to have extraterritorial effect. The court apparently assumed that the Illinois act would have to apply, that the Ohio act could not be applied, and that if the exception in the Illinois act were given effect, there would never

1 1 N. E. (2d) 326 (1936).
3 Ill. State Bar Stats. (1935), Ch. 83, par. 17.
4 Ibid., par. 19.
be a bar to the action in Ohio. Whether the court's assumption was based on its understanding of conflict of laws or on an unstated interpretation of the Ohio statute of limitations is not plain. Certainly it is too well established to be doubted that as a matter of conflict of laws the statute of limitations of the forum would govern, in the absence of a statutory modification of this rule. Only the Ohio statute, therefore, would require the application of the Illinois act. If the section of the Ohio statute already quoted means that the law of the place where the cause of action arose will govern if the only definite number of years mentioned is smaller than that in the Ohio act, then the court here would be obliged to apply the Illinois ten-year limit. But if the purpose of the Ohio act was only to limit the action in Ohio if the plaintiff had already been deprived of his remedy in the place where the cause of action arose, regardless of the Ohio limitation, then the court erred in applying the Illinois ten-year limit instead of the Ohio fifteen-year limit, since the action in Illinois had not been barred. At any rate, it would appear that the court should first have interpreted its own statute before it gave an interpretation to the Illinois statute, especially one which would not have been given by the Illinois court.

C. E. HACKLANDER

VENUE—STATUTORY PROVISIONS—CONSTITUTIONALITY OF ACT FIXING VENUE IN COUNTY WHERE TRANSACTION OCCURRED.—In the recent case of Mapes v. Huicher, the Supreme Court of Illinois was presented with the question of the constitutionality of section 7 of the Illinois Civil Practice Act. This action arose out of an automobile accident which occurred in Macoupin County. The defendants resided in and were citizens of Madison County. The plaintiff under section 7 of the Civil Practice Act, which allows a suit on a transitory action to be brought in the county in which the transaction occurred, brought suit in Macoupin County and recovered a judgment. The defendants alleged that that section of the Civil Practice Act was unconsti-

6 Ibid., p. 1621, sec. 604.1.
7 This was the construction placed on the New York statute of limitations in Isenberg v. Ranier, 130 N. Y. S. 27 (1911), and in Dalrymple v. Schwartz, 164 N. Y. S. 196 (1917).
8 Wooley v. Yarnell, 142 Ill. 442, 32 N. E. 891 (1892).
1 363 Ill. 227, 2 N. E. (2d) 63 (1936).
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tutional as it violated the due process and equal protection clauses of the Federal Constitution.

The court, in holding the section valid, stated that at common law and under three constitutions of Illinois, the legislature had always had the power to lay the venue for actions. The only restricting section of the present Constitution is Art. 4, sec. 22, which prohibits the legislature from passing any special or local act changing the venue in civil and criminal cases. The court said this was the first time, as far as they could find, that this power of the legislature had ever been questioned in Illinois. An act laying the venue for actions may be held unconstitutional if it is too arbitrary, but the act in question was reasonable.

It is interesting to note the similarity between the reasoning of the court in this case and the basis for the old common law doctrine of venue. The court in this case said that by allowing the action to be brought where the transaction in question occurred the witnesses to the accident are readily and conveniently available; the local geographical and physical features are more easily proven and comprehended by the court and jury; and the peculiar local facts and customs are more easily conceived. At common law all actions were local, because the jurors, who then were also the witnesses, had to be drawn from the place where the action arose, since it was necessary that they be familiar with the facts in controversy at the trial. This section, then, when reduced to its practical operation, is nothing but the common law practice of suing at the place where the action arose, based on the same reasons as the old common law doctrine of venue.

The former Illinois practice was that, except in local actions, the defendant was privileged to be sued in the county where he resided or was found, except where there were two or more defendants, in which case suit could have been brought against all of the defendants in the county in which any one of them resided or was found. Under this provision a transitory action could not have been brought in the county where the cause arose, unless the defendant resided or was found there, but would have to be brought where the defendant resided or was found. This necessarily caused great difficulty in bringing witnesses to the place of trial and in the proof of certain local facts. Section 7 of the new Practice Act eliminates this difficulty. It is apparent the reasons for the common law rule have not ceased or changed,

3 Cahill's Ill. Rev. Stat. (1931), Ch. 110, par. 6.
except that today the jurors are no longer witnesses as they were at common law. The plaintiff now has his election, in transitory actions, to sue either where the defendant resides or where the transaction occurred.

Vernon A. Forsberg

Wills—Construction—Expression of Intention to Disinherit Heir as Preventing Lapsed Legacy From Passing as Intestate Property.—The Illinois Supreme Court in Strauss v. Strauss,\(^1\) has decided that where a will so emphasizes the intention of the testator to restrict the share of one heir in the estate to a stipulated amount as to leave no reason for doubt, the rule that both shares of a general legatee—who is also a residuary legatee, but who predeceases the testator—become intestate property should not be applied. Precedents for that rule had been established in this state,\(^2\) but the majority of the court were of opinion that they should be disregarded because the language and plan of the testator pointed so definitely toward a different result, and so the case was really one of first impression.

The will in question provided for all of the testator's eight children; but one of them, Albert, was placed in a preferred class by himself, while the other seven were all treated practically equally. Albert, first in sequence, was given $75,000, followed by the statement, "which is in full of all I intend to give him from my estate." This intention to limit his share to that amount was re-expressed four additional times in the will and codicils. The other children were provided for together in other clauses, and in the residuary clause they were named individually to take in equal parts. The latter was expressed "to my following named children," and there was no expression indicative of a class gift nor words of survivorship, except the statement that if any of those named should die before the testator leaving any children, such child or children should receive its or their parent's share. One of the children so named, E. J. Strauss, predeceased the testator. Albert claimed that by the rule adopted in this state his legacies as well as his one-seventh interest in the residue passed as intestate property under section 11 of the Statute of Descent. All the other beneficiaries contended that his legacies came within the residuary clause and

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1 363 Ill. 442, 2 N. E. (2d) 699 (1936).
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that his interest vested on his death in the six survivors named therein as a class.

The court held against Albert and decided that the share of E. J. Strauss should pass under the residuary clause. While the correctness of the principle that Albert relied on was not disputed to be correct in a proper case, the opinion applied several general rules of construction to the situation presented and found that they overcame what he claimed to be the universal rule. First there is the presumption against intestacy, either partial or total, and that is strengthened by the presence of a residuary clause. Furthermore, if the meaning of particular parts are to be determined, the whole will must be considered and due weight given to every provision. Then the most important and fundamental rule is that the chief purpose of construction is to ascertain and give effect to the true intention of the testator. When the court applied these principles to the residuary clause, it seemed evident to it that the other seven children were named only to make more certain that Albert would be excluded from receiving any portion of the residue. The will specifically provided for the contingency of one of the seven dying leaving issue, upon which event the share was not to go into the residue; so it could be fairly inferred that the testator believed that the share of one who died without children would be part of the residuary fund. This intention was especially probable in view of the consistent grouping throughout the will, of all his surviving children, except Albert, in a class apart. Thus, the general rule that a gift to persons named passes to them individually and not as a class was made to yield to the apparent intention, gathered from the other provisions, to give a right of survivorship.

Mr. Justice Farthing dissented, saying that there were no words of survivorship sufficient to make the residuary legatees a class within the legal meaning of the term. The definite intention to limit Albert to the amount named was not sufficient, in his opinion, to supply the omission to provide for the contingency that arose when E. J. Strauss died. He quoted the following language of Mr. Justice Cartwright in *Tea v. Millen*:

"It has been settled by several decisions of this court that heirs cannot be disinherited merely by a declaration that they shall not have anything or no more than a certain sum. No matter how strong the intention of the testator may be to disinherit an heir, the intention cannot be given any effect as to intestate
property, and the only method of disinherit him is to give the property to someone else."

The present case cannot be considered as overruling the doctrine so expressed, as the decision found that Albert was disinherit by giving the property to someone else. Its novelty lies in the liberality of the construction that this residuary clause constituted a gift to a class and that intestacy was impossible. Page makes the statement, "If the will shows that testator intended that lapsed residuary gifts should fall into the remainder of the residuum, and that they should pass to the surviving residuary legatees, full effect will be given to such provision." In each of the cited cases which support that assertion, however, the contingency of the beneficiary dying before the will took effect was expressly provided for therein. Nevertheless, this is not the first time that naming residuary legatees in this manner has been construed as not precluding their taking as a class. In Warner's Appeal, the Supreme Court of Connecticut decided that the following residuary clause established a division of four classes and was not to individuals: ". . . one fourth to be divided among the heirs of brother Eli Terry deceased, one fourth among the children of my brother Henry Terry, one fourth to the children of my brother Silas B. Terry, and one fourth to the sons of my two sisters deceased, Henry S. and Charles K. Warner."

Charles K. Warner died before the testatrix, and it was held that Henry S. Warner, the surviving nephew, took the whole of their one-fourth share.

Thus it appears that the present case has not changed any fundamental rule for this state in the law of wills. The court certainly seems to have given effect to the intention of the testator, and it should be a salutary precedent, preferable to a rigorous adherence to a rule as to lapse, which rule itself is based on a presumed intention.

J. M. HADSALL

3 257 Ill. 624, 101 N. E. 209 (1913).
6 39 Conn. 253 (1872).