## RECENT CASES

CONFLICT OF LAWS—JURISDICTION—POWER OF FEDERAL COURTS TO INTERPRET STATE LAWS—A preliminary law question was submitted to the Federal District Court as to whether the operation by the city of Galveston of street lights was a proprietary or a governmental function—a question of local law. The Texas Supreme Court had inclined toward the view that it was a proprietary function,[1] while the Supreme Court seemed to have held that it was a governmental function,[2] but neither court had decided the precise point involved. *Held*: A Federal District Court considering a local matter not precisely determined by any decision of the Supreme Court of the state or of the United States, is not bound to follow the views suggested by either court but may announce its own view. *Rowan v. City of Galveston*, 132 Fed. (2d) 257 (S. D. Tex. 1926).

Federal courts, in trials at common law, must administer the laws of the state when applicable, except as otherwise provided by the Constitution and statutes of the United States.[3] The Supreme Court early decided that the term "laws" referred only to statutes and "long established local customs having the force of laws."[4] In matters of commerce and general jurisprudence the courts of the United States administer a peculiar system of non-statutory law sometimes termed "a federal common law,"[5] and even in matters of local law, the jurisdiction of Federal courts is independent of and concurrent with that of state courts.[6] In addition, in matters of strictly local law,[7] the Supreme Court has gone so far as to hold that Federal courts are not bound to follow the decisions of the highest state courts, where such decisions have not been harmonious or where the latest decision of the state court was made after the cause of action then before the Federal court had accrued.[8] Whenever this doctrine has been applied—decisions which were not without strong dissenting opinions[9]—serious conflicts of law have

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[1] City of Greenville v. Branch, 152 S. W. 478 (Tex. 1912).

[2] Harris v. District of Columbia, 256 U. S. 650 (1921).

[3] U. S. Rev. Stats. § 721 (1874).

[4] Swift v. Tyson, 16 Peters, 1 (U. S. 1842).

[5] See von Moschzisker, *The Common Law and Our Federal Jurisprudence*, 74 U. OF PA. L. REV. 109 (1926).

[6] Burgess v. Seligman, 107 U. S. 20 (1882); Moore-Mansfield Construction Co. v. Electrical Installation Co., 234 U. S. 619 (1914).

[7] *E. g.* the law of real property, and construction of local legislation.

[8] Gelpcke v. City of Dubuque, 1 Wall. 175 (U. S. 1863); Kuhn v. Fairmount Coal Co., 215 U. S. 349 (1910). For a full discussion of problem see W. M. Meigs, *Decisions of the Federal Courts on Questions of State Law*, 45 AM. L. REV. 47 (1911), and *State Decisions as Precedents in Federal Courts*, 58 U. OF PA. L. REV. 222 (1910).

[9] See dissenting opinion of Miller, *J.*, in Gelpcke v. City of Dubuque, *supra*, note 8, at page 207, and that of Holmes, *J.*, in Kuhn v. Fairmount Coal Co., *supra*, note 8, at page 370.

resulted. Since *Kuhn v. Fairmount Coal Co.*,[10] this rule has been affirmed at least once,[11] but in several instances the Supreme Court has refused to apply it to the case in hand.[12] The Supreme Court believed that injustice would result were the decisions of the state courts followed, and yet a situation in which the highest court of a state is deemed incompetent to declare what is the law of that state is anomalous indeed. It will be interesting to observe whether the position taken by the Federal courts will be further strengthened or whether the reasoning of the dissenting opinions will some day cause a retrenchment.

CONSTITUTIONALITY OF FLEXIBLE TARIFF—The Tariff Act of 1922, Section 315, provides that the President of the United States shall have power, within limits, and upon investigation and recommendation by the Tariff Commission, to increase or decrease rates of duties upon imports. Accordingly, the President by proclamation advanced the rate of duty upon barium dioxide. As a result, a test case has been brought on the question of the constitutionality of the above mentioned section. This case, *J. W. Hampton, Jr. and Co. v. United States,* was argued before the United States Court of Customs Appeals on October 6, 1926, on appeal from the decision of the United States Board of General Appraisers, now known as the United States Customs Court, reported in U. S. Treas. Dec. for Apr. 15, 1926 (49 Treas. Dec. 595).

The constitutionality of the "flexible tariff" is as yet a moot point. In the United States, it is a constitutional maxim that legislative power cannot be delegated. However, on the ground of necessity, courts have upheld some such delegations as "not strictly" or "not in any real sense" legislative. The importers in the instant case argue that the flexible provisions of Section 315 are unconstitutional, contending: (1) that it is an illegal attempt to delegate legislative and taxing power to the Executive; (2) that the difference between costs of production at home and abroad is not "a fact" definitely ascertainable, and that therefore the Executive must depend on his judgment in fixing new rates of duty, thus vitiating the whole plan of the flexible provisions; and (3) that to levy an avowedly protective tax irrespective of revenue considerations, transcends the power of Congress. Should the importers succeed, the Tariff Commission will be relegated to its former position of adviser to Congress in the passage of tariff legislation, and Congress will not have solved the difficulty of enacting a new law every time some provision of the tariff requires revision. The importance of the instant case, which it is understood will be carried to the Supreme Court, on the development of executive power under our tri-partite system of government is obvious. Widespread interest is manifested in the outcome of the case, especially by importers and students of government.

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[10] *Supra,* note 8.

[11] Moore-Mansfield Construction Co. v. Electrical Installation Co., *supra,* note 6.

[12] Lankford v. Platte Iron Works, 235 U. S. 461 (1915); Edward Hines Trustees v. Martin, 268 U. S. 458 (1924).

COUNSEL FEES—LIABILITY OF TRUST FUND—The majority trustees of a theological school voted to remove it from the present location in Pennsylvania to Illinois. It was admitted that the proposed removal was *bona fide,* and would probably prove advantageous to the school. The minority trustees were successful in restraining any transfer of the property or assets of the school, and in so doing established the legal rights of the parties. The court below allowed them counsel fees out of the funds of the school. *Held:* The funds of the school are not liable for counsel fees. *Hempstead v. Theological School,* 286 Pa. 493 (1926).

As a general rule, each party to adversary litigation must pay his own counsel fees.[1] An exception to the general rule is recognized, when services of counsel protect or preserve a common fund or common property which is before the court for administration or distribution.[2] The situation presented by the facts of this case is a novel one in Pennsylvania, for in all the cases bearing on the point in that jurisdiction, a benefit accrued to the parties interested, who were either creditors or beneficiaries of a fund designed to reach certain persons.[3] In this case, since the fund was not designed to reach certain persons, no benefit accrued to the interested parties. Counsel attempted to bring the case under the aforementioned exception, but the court refused to allow counsel fees from the funds of the school, on the grounds that no fund was before the court for administration or distribution, and that, as the proposed removal was *bona fide* and would have been beneficial, this action was not to protect or preserve a fund. This decision apparently denotes a decided unwillingness on the part of the Pennsylvania Supreme Court to extend the liability of a fund for the payment of counsel fees. It would seem that the point has not been treated extensively in other jurisdictions, and whether they will follow the Pennsylvania decision is problematical. It has been recognized, however, that the bringing of a fund into court is not the controlling feature in deciding the liability of a fund for counsel fees.[4] Further, it is not unlikely that should similar facts arise, other courts will interpret "protect or preserve" in a less restricted sense. From holding the erection of valuable improvements on land, under some circumstances, to be legal waste,[5] to holding a successful action, brought to enjoin removal of the property and assets of a trust fund into another jurisdiction, one to "protect or preserve" the fund, is not a long step.

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[1] N. Y. Cent. R. R. v. Bank, 195 Fed. 456 (C. C. A. 5th, 1912); Kelly v. Benev. Ass'n., 2 Calif. App. 460, 84 Pac. 321 (1905); Winton's Appeal, 87 Pa. 77 (1878); Alonso v. Miami, 19 Porto Rico, 32 (1913).

[2] Trustees v. Greenough, 105 U. S. 527 (1881); Georgia Cent. R. R. v. Pettus, 113 U. S. 116 (1885); Davis v. Gemmell, 73 Md. 530, 21 Atl. 712 (1891); *In re* Weed, 163 Pa. 595, 30 Atl. 278 (1894).

[3] Freeman v. Shreve, 86 Pa. 135 (1878); *In re* Perkin's Appeal, 108 Pa. 314 (1885); Manderson's Appeal, 113 Pa. 631, 6 Atl. 893 (1886); *In re* Weed, *supra,* note 2.

[4] Forrester v. B. & M. Co., 29 Mont. 397, 76 Pac. 211 (1904). *Cf.* Colley v. Sapp, 44 Okla. 16, 142 Pac. 989 (1914); Grant v. Lookout Mountain Co. 93 Tenn. 691, 28 S. W. 90 (1894).

[5] London v. Greyme, Cro. Jac. 181 (Eng. 1607); Klie v. Van Brock, 56 N. J. Eq. 18, 37 Atl. 469 (1897). See Melms v. Brewing Co. 104 Wis. 7, 10, 79 N. W. 738, 739 (1899).

DAMAGES—COSTS OF PRIOR LITIGATION—ATTORNEY'S FEES—The plaintiff sold short weight cans of salad oil, which he had purchased from a wholesaler, who in turn had purchased them from the defendant.[1] The plaintiff, in reaching a settlement for an alleged violation of the statute regulating weights in the sale of foodstuffs, incurred certain expenses, including attorney's fees, for which he now sues the defendant. *Held:* The plaintiff could recover his attorney's fees. *Abounader v. Strothmeyer*, 217 App. Div. 43, 215 N. Y. Supp. 702 (4th Dept. 1926).[1]

The general rule is that where the wrongful acts of the defendant have involved the plaintiff in litigation with others, or placed him in such relation with others as makes it necessary to incur expenses to protect his interests, such costs and expenses are recoverable if they are the natural and necessary consequences of the defendant's act.[2] In the principal case since the defendant prepared for sale and distribution an article which was short weight, the natural consequence of his act would be that it would ultimately be offered for sale by a retailer, and if the latter were detected selling the product, he would be accused of statutory violation. To that extent the principal case falls within the rule allowing recovery. The cases, however, in applying the general rule indicate a still further requirement. The plaintiff must prove that the attorney's fees were incurred in defending what was in fact a breach of contract by the defendant, or a wrongful act of the defendant, but because of a rule of law the plaintiff was subjected to suit therefor.[3] He must prove that the expenses incurred were reasonable and that he notified the defendant of the prior suit and thus gave him an opportunity to enter and conduct the suit.[4] To illustrate: The Town of W contracted to have the defendant do certain construction work, and because of the defendant's negligence was injured. Though W was guilty of no misfeasance, yet by reason of a rule of law it was liable as a municipality to pedestrians injured by reason of defective or obstructed streets and so X recovered of W. W later recovered from the defendant damages which included attorney's fes expended in the prior suit.[5] But in the case where the A. R. R. wrongfully sold a ticket to M. over the P. R. R. and on presenting the ticket on board a P. R. R. train was refused and ejected, the court held that the P. R. R. could not recover from the A. R. R. the costs of litigation in a suit by M. against the P. R. R. The reason was that the ejection of M. was upon the sole responsibility of the P. R. R. and not made legally necessary by A. R. R.'s wrongful act.[6] Where then does the principal case stand? The costs incurred by the plaintiff did not accrue because of the defendant's act of selling the goods to the wholesaler, but because of the plaintiff's own act of later offering these goods for sale. There is no evidence showing

[1] For a discussion of the right to recover anything at all in the principal case, see note in 75 U. OF PA. L. REV. 164 (1926).

[2] International State Bank v. Trinidad Elevator Co., 245 Pac. 489 (Colo. 1926); Philpot v. Taylor, 75 Ill. 309 (1874); Bergquist v. Kreidler, 158 Minn. 127, 196 N. W. 964 (1924).

[3] Pa. R. R. v. Wabash R. R., 157 U. S. 225 (1894); McGraw v. Acker, 111 Md. 153, 73 Atl. 731 (1909); Myers v. Adler, 188 Mo. App. 607, 176 S. W. 538 (1915).

[4] Chase v. Bennett, 59 N. H. 394 (1879).

[5] Westfield v. Mayo, 122 Mass. 100 (1877).

[6] Pa. R. R. v. Wabash R. R., *supra*, note 3.

that he notified the defendant of the charges against him, and even though he had, it is not the type of suit that the defendant could take over and defend. The statute involved in the prior litigation was aimed at the particular act of the individual accused, and that party's guilt or innocence could not affect the liability of the manufacturer were he accused. It would seem to follow that the plaintiff incurred expenses in defending an alleged wrongful act of his own and hence did not meet the requirement which is established by decided cases. It is therefore suggested that the plaintiff should not have been allowed to recover the attorney's fees which he had expended in the prior litigation.

DIVORCE—ALIMONY—EFFECT OF REMARRIAGE—The petitioner, by reason of his former wife's remarriage asks to be relieved of further payment of alimony to her under a decree granting her a divorce. *Held:* Order for alimony suspended. *Dietrick v. Dietrick,* 134 Atl. 338 (N. J. 1926).

While the question of the effect of a woman's remarriage upon her right to alimony from her former husband arises for the first time in New Jersey, it has already been passed upon in a number of other jurisdictions. It has been held that the subsequent marriage has no effect whatever.[1] In another jurisdiction the remarriage, *per se,* precludes further payment.[2] The majority of courts, however, place the burden of proof on the wife to show that the support afforded by her second husband is inadequate, in order that the alimony be continued.[3] The point is advanced that a woman who is receiving alimony voluntarily abandons, by her remarriage, the support awarded by the court for that of her second husband, and for this reason the decree granting the alimony should be vacated.[4] By the rationale of the majority of courts, however, the answer would be this: If the only support a prospective second husband can provide is inadequate a great many possible marriages would never materialize. In order to remove so pregnant an obstruction to remarriage the court requires the first husband to continue the alimony.[5]

The court in the principal case holds that the wife is entitled to alimony if she proves that her second husband cannot support her *in the same station of life* in which she was maintained by her first husband. The court makes this provision despite the fact that the second husband may well be able to afford her what is in general adequate support. Certainly in the average case this provision of the New Jersey court does not remove any existing obstacle in the path of remarriage. For this reason the court in the principal case is not in accord with the position taken by the great majority of courts in this country.

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[1] Miller v. Clark, 23 Ind. 370 (1864); Shepherd v. Shepherd, 1 Hun, 240 (N. Y. Sup. Ct. 1874). But see Keralfy v. Keralfy, 36 Misc. 407, 74 N. Y. Supp. 708 (Sup. Ct. 1901).

[2] Baker v. Baker, 4 Ohio App. 170 (1915).

[3] Cohen v. Cohen, 150 Calif. 99, 88 Pac. 267 (1906); Cole v. Cole, 142 Ill. 19, 31 N. E. 109 (1892); Southworth v. Treadwell, 168 Mass. 511, 47 N. E. 93 (1897).

[4] Stillman v. Stillman, 99 Ill. 196 (1881); Albee v. Wyman, 10 Gray, 222 (Mass. 1857).

[5] Dietrick v. Dietrick, 134 Atl. at 340 (N. J. 1926).

DOWER—WIFE'S JOINING IN MORTGAGE—INDUCEMENT BY HUSBAND—To defeat her inchoate right of dower, a husband procured his wife's signature to a small mortgage on land belonging to him and worth much more than the mortgage indebtedness, and then refrained from paying off the mortgage. His agent, with his funds, purchased the land at the foreclosure sale, and conveyed it without consideration the husband's sister, who held for the benefit of the husband. The wife brings this suit to force the sister to reconvey the land to her husband so as to reinstate her inchoate dower. *Held:* The action is maintainable. *Byrnes v. Owens*, 243 N. Y. 211, 153 N. E. 51 (1926).

It is a well-settled principle that the inchoate right of dower possesses such elements of property as to be the subject of judicial protection.[1] Once the right has attached, by reason of the husband's being seised of an inheritable estate during coverture, a wife may not be deprived of it by fraud.[2] Courts, including that of New York, go even further and protect the intended wife before her inchoate right comes into existence, by setting aside antenuptial conveyances of property without consideration, made in anticipation of marrage.[3] In most jurisdictions, where the husband, after marriage, in order to defraud his wife of her dower, takes title to real estate in a "dummy," equity will look through the subterfuge and protect the wife.[4] But in New York, under the interpretation of its dower statute,[5] no relief is given to the wife,[6] on the strict principle that a wife has no inchoate right to protect until her husband is seised "either in fact or in law" of an inheritable estate. The mere oral agreement or understanding with the dummy that he will reconvey does not give the necessary seisin[7]—it merely gives the husband an equitable right to have the property reconveyed to him.

The dissenting opinion in the principal case is based on the following reasons: (1) There was no claim of fraud in having the wife execute the mortgage which releases her right if the mortgage is not paid; (2) there was no positive duty upon the husband to preserve that right by paying the mortgage; (3) by taking title after the sale in a "dummy," under the decisions, the husband was not seised of an estate of inheritance to which dower could attach. It is sub-

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[1] Buzick v. Buzick, 44 Iowa, 155 (1884); McClurg v. Schwartz, 87 Pa. 521 (1878); 1 TIFFANY, REAL PROPERTY (2d ed. 1920) § 230.

[2] Bownell v. Briggs, 173 Mass. 529, 54 N. E. 251 (1899); Douglas v. Douglas, 11 Hun, 406 (N. Y. 1877).

[3] Bookout v. Bookout, 150 Ind. 63, 49 N. E. 824 (1898); Petty v. Petty, 4 B. Mon. 215 (Ky. 1843); Young v. Carter, 10 Hun, 194 (N. Y. 1877). *Cf.* Higgins v. Higgins, 219 Ill. 146, 76 N. E. 89 (1905), and comment, 8 VA. L. REV. 52, note 9 (1921).

[4] Stroup v. Stroup, 140 Ind. 179, 39 N. E. 864 (1894); Redman's Admr. v. Redman, 112 Ky. 760, 66 S. W. 745 (1902); Crecilius v. Horst, 11 Mo. App. 304 (1881).

[5] N. Y. Cons. Laws (Cahill, 1923), Real Prop. § 190.

[6] Phelps v. Phelps, 143 N. Y. 197, 38 N. E. 280 (1894); Nicholas v. Park, 78 App. Div. 95, 79 N. Y. Supp. 547 (1st Dept. 1903); Melenky v. Melen, 233 N. Y. 19, 134 N. E. 822 (1922), where the court said "Dower attaches, not to choses in action, but to estates." See 35 HARV. L. REV. 206 (1922).

[7] Melenky v. Melen, *supra*, note 6, at 22.

mitted that though the majority opinion leads to what would seem the fairer result, and the one that would be obtained in other jurisdictions,[8] the dissenting opinion is the logical one under the New York decisions.

EVIDENCE—ADMISSIBILITY OF PAROL CONTEMPORANEOUS AGREEMENT—The plaintiff occupied a store and a small portion of a basement under a lease from the defendant. The plaintiff refused to pay the rent on the ground that at the time the lease was made the defendant made a parol contemporaneous promise, which induced the plaintiff to sign the agreement, that the partition would be removed and the plaintiff would be given the entire basement. Plaintiff now sues to recover property levied upon for the unpaid rent and seeks to introduce the parol agreement. *Held:* Evidence of the parol agreement is inadmissible. *Murphy v. Pinney,* 86 Pa. Super. 458 (1926).

The court quotes with approval *Gianni v. Russell & Co.,* 281 Pa. 320, 126 Atl. 791 (1924), which is the leading Pennsylvania case concerning the application of the parol evidence rule. For an interesting discussion of this subject see Earl G. Harrison, *Pennsylvania Rule as to Admissibility of Evidence to Establish Contemporaneous Inducing Promises to Affect Written Instruments,* 74 U. OF PA. L. REV. 235 (1926). A presentation of certain exceptions to the parol evidence rule may be found in 75 U. OF PA. L. REV. 62 (1926).

EVIDENCE—ADMISSIONS—TEST OF VOLUNTARY CHARACTER—The accused, a boy of nineteen, having caused the death of a pedestrian by striking her with an automobile was arrested and confined to jail without formal charge. On the coroner's motion the accused was brought to the coroner's inquest where he was questioned under oath in regard to the homicide. No instruction was given to him of his privilege to refuse to testify nor was he warned that the testimony might later be used against him. At the subsequent trial on a charge of involuntary manslaughter the defendant's admissions at the coroner's inquest were offered in evidence. *Held:* The evidence is inadmissible. *State v. Assenberg,* 244 Pac. 1027 (Utah, 1926).

If at the time of inquest a person is in custody on suspicion, he cannot be examined as a mere witness, but only as an accused party in the same manner as if brought before a committing magistrate.[1] His admissions or confession[2] cannot be used against him on a subsequent trial of an indictment growing out of the inquest unless they have been voluntarily made.[3] Whether a

[8] *Cf.* Gilson v. Hutchinson, 120 Mass. 27 (1876).

[1] People v. Mondon, 103 N. Y. 211, 8 N. E. 496 (1886).

[2] A confession is a species of admission which consists of an express acknowledgment by the accused in a criminal case of the truth of the guilty fact charged or an essential part of it. Its admissibility in a criminal case has an additional limitation to the ordinary requirements of an admission—that it must have been made without any inducement calculated to destroy its trustworthiness; it must have been made without hope of favor or fear of harm. 2 WIGMORE, EVIDENCE (2d ed. 1923) §§ 821, 1050.

[3] Maki v. State, 18 Wyo. 481, 112 Pac. 334 (1911).

statement is voluntary depends largely upon the facts of a particular case.[4] The test of voluntariness laid down by Wigmore is: Was the situation such that the person had to speak, felt obliged to speak, or was it a matter of pure choice with him whether to speak or not?[5] The question then arises how far under such a canon the fact of arrest or of presence before a coroner's inquest or of examination on oath or of failure to caution concerning the accused's rights may prevent the admission from being in the above sense voluntary; for it may be argued that any of these circumstances may in a given case make the admission practically compulsory. A statement is not rendered inadmissible because the accused was under arrest or in custody at the time,[6] nor by the fact that it was made in answer to a question which assumed his guilt.[7] In the earlier cases, confessions under oath were generally excluded for the reason that the examination of the prisoner should be without oath.[8] But this qualification of the accused was later removed and the rule became that the mere administration of an oath to the accused will not render the admission involuntary.[9] Unless otherwise provided by statute,[10] a statement otherwise voluntary is admissible although it does not appear that the accused was warned that what he said would be used against him, or although it appears that he was not so warned.[11] But there have been dicta and opinions expressed to the effect that while the absence of caution does not affect the voluntary character of an otherwise admissible statement, the practice ought to prevail that the accused be advised of his legal rights wherever the conditions are such that it is reasonably certain that he does not himself fully understand them.[12] From this analysis we find that none of these circumstances is individually the criterion of whether the statement is voluntary, and yet in a great number of cases where you find different combinations of these circumstances present the courts have held the statements inadmissible.[13] In the principal case the accused was a youth who was examined under oath on the

[4] State v. Thomas, 250 Mo. 110, 157 S. W. 330 (1913); People v. Kennedy, 159 N. Y. 346 (1899).

[5] 2 WIGMORE, *op. cit., supra,* note 2, § 843.

[6] Hilburn v. State, 121 Ga. 344, 49 S. E. 318 (1904); Commonwealth v. Corcoran, 182 Mass. 465, 65 N. E. 821 (1903); People v. Wentz, 37 N. Y. 303 (1867).

[7] Grant v. State, 55 Ala. 201 (1876); State v. Blodgett, 50 Or. 329 (1907); note 18 L. R. A. (N. S.) 799.

[8] Rex v. Haworth, 4 Car. & P. 256 (Eng. 1830); Rex v. Tubby, 5 Car. & P. 530 (Eng. 1843).

[9] United States v. Brown, 40 Fed. 457 (1889); Commonwealth v. Wesley, 166 Mass. 248, 44 N. E. 228 (1896).

[10] Under the provisions of the Texas Criminal Code, where the accused is under arrest, his confession to the officer or to others cannot be used against him unless he has been first cautioned that they may be used against him. Jackson v. State, 7 Tex. App. 363 (1879); Kennon v. State, 11 Tex. App. 356 (1882).

[11] State v. Hand, 71 N. J. L. 137, 58 Atl. 641 (1903); People v. Randazzio, 194 N. Y. 147, 87 N. E. 112 (1909); JOY, CONFESSIONS (1842) § 5.

[12] McNish v. State, 45 Fla. 83, 34 So. 219 (1903); State v. Andrews, 35 Or. 388, 58 Pac. 765 (1899); 2 WHARTON, CRIMINAL EVIDENCE (1912) § 676c.

[13] Tuttle v. People, 33 Colo. 243, 79 Pac. 1035 (1905); 70 L. R. A. 33, note.

motion of the coroner without being cautioned. If we test these circumstances by the broad general rule laid down by Wigmore—whether the accused felt obliged to speak, or if it was a matter of pure choice—we conclude that this case falls under the former, and hence that the statement was involuntary. How the court is going to decide the admissibility of a statement in a particular case then, depends largely on its views on the much disputed question as to how far a court should go in upholding the constitutional right of the accused against compulsory self-incrimination.[14]

HUSBAND AND WIFE—MARRIED WOMAN'S PROPERTY ACT—WIFE'S LIABILITY FOR COVENANTS IN JOINT DEED—The defendant, in order to release her dower, joined in a deed passing her husband's realty. She is now sued for breach of a covenant against incumbrances contained therein. *Held:* The defendant is not personally liable notwithstanding the *Married Woman's Property Act.*[1] *Crain v. Warner,* 87 Pa. Super. 605 (1926).

The court refused to take the view that, by releasing her right of dower, she became a surety for the payment of her husband's debts, but on the contrary held that her common law status remained unchanged. This interpretation is in accord with decisions in other states having *Married Woman's Property Acts* of the same general nature,[2] which leave unaffected the common law freedom from liability of a married woman for the breach of a covenant in the husband's deed.[3] In some states, the statutes, to avoid a possible misconstruction, expressly provide for the exemption from liability of a married woman in signing away her dower.[4] One jurisdiction, however, holds her liable by reason of her signing a joint deed.[5] On the other hand, the exemption from liability at common law for covenants on her own land[6] was changed by the modern *Married Woman's Property Acts* to liability.[7] It is submitted that

[14] Dos Passos, *Compulsory Examination of a Defendant Accused of Crime Both Before and at a Jury Trial,* 20 CASE & COMMENT 47 (1914); Knox, *Self-incrimination,* 74 U. OF PA. L. REV. 139 (1926).

[1] Act of June 8, 1893, P. L. 344, which provides that a married woman may contract as though unmarried, but she may not become an accommodation endorser, maker, guarantor or surety for another.

[2] Village of Western Springs v. Collins, 98 Fed. 933 (C. C. A. 7th, 1900); Humbird Lumber Co. v. Doran, 24 Idaho, 507, 137 Pac. 66 (1913); French v. Slack, 89 Vt. 514, 96 Atl. 6 (1915).

[3] The common law view is illustrated by the following decisions: Whitbeck v. Cook, 15 Johns. 482 (N. Y. 1818); Hughes v. Torrence, 111 Pa. 611, 4 Atl. 825 (1886); Semple v. Whorton, 68 Wis. 626, 32 N. W. 680 (1887).

[4] Stone v. Fry, 191 Mo. App. 607, 178 S. W. 289 (1915); Pauley v. Knouse, 109 Neb. 716, 192 N. W. 195 (1923); Augusta Bank v. Beard, 100 Va. 687, 42 S. E. 694 (1902).

[5] Bolinger v. Brake, 4 Kan. App. 180, 49 Pac. 950 (1896); Fisher v. Clark, 8 Kan. App. 483, 54 Pac. 511 (1898).

[6] Colcord v. Swan, 7 Mass. 291 (1811); Wadleigh v. Glines, 6 N. H. 17 (1832); Sawyer v. Little, 4 Vt. 414 (1832).

[7] Basford v. Pearson, 89 Mass. 504 (1863); Real v. Hollister, 17 Neb. 661, 24 N. W. 333 (1885); Sigel v. Johns, 58 Barb. 620 (N. Y. 1870).

the principal case is justified in theory, since dower is merely an inchoate right; in the intention of the parties, who never intended to be bound by a covenant; and in the purpose of the framers of the statute, which never contemplated the creation of a new liability.

INJUNCTION—PROTECTION OF ASSOCIATION NAME—LACHES—The Ancient Arabic Order, Nobles of the Mystic Shrine, brought a bill to enjoin the use of their emblems and a colorable imitation of their name by the Ancient Egyptian Arabic Order of the Nobles of the Mystic Shrine. The complainant association was organized in 1872 to engage in fraternal and charitable work, and has a present membership of 600,000. The defendant was organized in 1893 for similar purposes, and has a membership of 9,000. Membership in the complainant is strictly limited to whites; the defendant is a colored order. Because of the lapse of over thirty years since the adoption of the defendant's name, the defendant contends that laches bars the right to an injunction. *Held:* The right to an injunction was not barred by laches. *Burrell v. Michaux*, 286 S. W. 176 (Tex. 1926).

Courts of equity recognize the right of a fraternal association to the exclusive use of its adopted name, and have, on several occasions, granted injunctions to restrain a colorable imitation thereof by another association.[1] Laches will bar this remedy,[2] and a leading case held that a delay of twenty years, coupled with the other circumstances there, constituted laches.[3] Inasmuch as the lapse of time is much greater in the principal case, the greater part of the opinion is devoted to reconciling the two decisions. In *Creswill v. Grand Lodge*,[4] the defendant, in the time between its organization and the starting of the action, became a body of 300,000 members and acquired property of great value. In view of such a "vast expansion" of the order, the Court held that it would be inequitable to grant the injunction. In the principal case the court argues that passage of time alone is not laches, and since there was no such growth in the defendant order, an injunction would not be inequitable. The cases contrasted illustrate nicely the criticism made by an eminent text writer of the theory of laches prevalent in the federal courts.[5] The view of laches generally followed in the state courts is that it is prejudicial delay, and the theoretical basis for allowing it as a defense is that such delay is unfair, and

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[1] Grand Lodge, K. P. of North and South America v. Grand Lodge, K. P., 174 Ala. 395, 56 So. 963 (1911); Daughters of Isabella v. National Order of Daughters of Isabella, 83 Conn. 679, 78 Atl. 333 (1910); Benevolent and Protective Order of Elks v. Improved Benevolent and Protective Order of Elks, 122 Tenn. 141, 118 S. W. 389 (1909).

[2] Grand Lodge v. Graham, 96 Iowa, 592, 65 N. W. 837, 31 L. R. A. 133 (1896). See Colonial Dames of America v. Colonial Dames of State of New York, 29 Misc. 10, 11, 60 N. Y. Supp. 302, 303 (Sup. Ct. 1899), *aff'd.* 63 App. Div. 615, 71 N. Y. Supp. 1134 (1901).

[3] Creswill v. Grand Lodge, 225 U. S. 246 (1912).

[4] *Ibid.*

[5] 4 POMEROY, EQUITY JURISPRUDENCE, (2d ed. 1919) § 1444, n. 73.

impairs the equity of the complainant's bill.[6] The federal courts have based the doctrine of laches not on the unfairness of the complainant's conduct, but rather on motives of public policy against the disturbance of possessory titles, the theory of the statutes of limitations.[7] This is the doctrine applied in the two cases. In the *Creswill case* the wrong of the defendant turned out to be enormously profitable, and the complainant's delay of twenty years was held a bar to the injunction. In the principal case the wrong of the defendant brought it little wealth, so that a delay of thirty years was not fatal to the complainant's bill. The conclusion would appear to be that equity affords more protection to the successful wrongdoer than to the unsuccessful one. Logically, it seems that they should both receive the same treatment.

Consistent results might be obtained by a limitation of the doctrine of laches as applied in many trade-mark cases, viz., that as the injunction sought is in support of a strict legal right, it should not be refused unless the delay clearly amounted to acquiescence.[8] Whether, however, the rules of trade-mark cases should apply in these cases between associations not conducted for profit has been the subject of an interesting difference of opinion. Some decisions hold that equity should not be so strict in this type of case because no pecuniary injury is suffered by the complainant.[9] But the court in *Burrell v. Michaux* said: "We are of the opinion that the rules should apply to this character of case with even greater force than in the trade-mark cases. . . . An important element of the injury in a case like this, if not the greatest element, is an injury in respect to a matter not of ordinary pecuniary value, but one of first consideration to the complainants, and of incalculable worth as ordinary men account values." This reason, if accepted, would offer both a logical and desirable solution of the case.

INSURANCE—CONSTRUCTION OF LOSS BY HIGHWAY ROBBERY CLAUSE—The plaintiff was robbed of a diamond pin, which was torn from her waist, while she was moving through a crowd on board a ship anchored in a harbor. She felt the pin being removed, but did not see the hand of the thief. Recovery is sought upon an insurance policy containing a rider protecting against "loss from highway robbery, by force or violence." The rider also stated: "Mere disappearance of property from the person of the assured, unless accompanied by force or violence, and unless also within her knowledge at the time, is not covered." *Held:* The plaintiff could not recover. *Anderson v. Hartford Accident & Indemnity Co.*, 247 Pac. 507 (Calif. 1926).

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[6] Hauser v. Foley, 190 Ala. 437, 67 So. 252 (1914); Chase v. Chase, 20 R. I. 202, 37 Atl. 804 (1897); Ruckman v. Cox, 63 W. Va. 74, 59 S. E. 760 (1907).

[7] St. Paul, etc., R. R. v. Sage, 49 Fed. 315, at p. 326 (C. C. A. 8th, 1892); Naddo v. Bardon, 51 Fed. 493 (C. C. A. 8th, 1892); Jackson v. Jackson, 175 Fed. 710 (C. C. A. 4th, 1909).

[8] Fullwood v. Fullwood, L. R. 9 Ch. Div. 176 (1878); Saxlehner v. Eisnor, 179 U. S. 19 (1900).

[9] Colonial Dames of America v. Colonial Dames of State of New York, *supra*, note 2; Most Worshipful Grand Lodge v. Grimshaw, 34 App. D. C. 383 (1910).

The construction of a "loss by highway robbery" clause in burglary insurance policies has come up only twice [1] prior to the principal case. In automobile insurance policies, similar clauses have been held to have a definite meaning which is obtained from the criminal law.[2] While these cases involve statutes, the problem is not one of statutory but of contract construction.[3] It is well settled that it is robbery if the article is so attached to the clothes as to create resistance.[4] Highway robbery is robbery committed at or near a highway.[5] A harbor is such a highway,[6] and therefore that crime was committed when the thief took the plaintiff's diamond. It then becomes important to determine whether highway robbery in the principal case is to be treated differently because of the rider. The court reasoned that the taking must be with great force and violence and the assured must be fully aware of the thief's acts. However, the words "force and violence" merely signify robbery by "hold-up," and no particular degree of force is necessary for such robbery.[7] The plaintiff had knowledge of the robbery since she felt the pin being removed. It is only by means of a narrow construction [8] of the rider that it can be said that the assured had to be cognizant of all the robber's acts. This is opposed to the general rule of construction of insurance policies that, where there are two possible constructions, both of which are doubtful, the one is adopted which operates in favor of the assured.[9] The principal case, moreover, in holding the loss not to be covered by the rider, would appear, as was pointed out by the dissenting opinion, to ignore the intention of the parties to the contract.

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[1] Duluth Street Ry. v. Fidelity & Deposit Co., 136 Minn. 299, 161 N. W. 595 (1917), L. R. A. 1917, D, 687, note; Agee v. Employers' Liability Assurance Corp., 253 S. W. 46 (Mo. App., 1923).

[2] Hartford Fire Ins. Co. v. Wimbish, 12 Ga. App. 712, 78 S. E. 265 (1913); Michigan Commercial Ins. Co. v. Wills, 57 Ind. App. 256, 106 N. E. 725 (1914); Rush v. Boston Ins. Co., 88 Misc. 48, 150 N. Y. Supp. 457 (Sup. Ct. 1914).

[3] In the words of Cardozo, *J.*, in Van Vechten v. American Eagle Fire Ins. Co., 239 N. Y. 305, 307, 146 N. E. 432, 433 (1925), 38 A. L. R. 1124, note: "The problem before us is not one of statutory construction. It is one of the meaning of a contract. . . . Theft under this contract is theft as common thought and common speech would now image and describe it."

[4] People v. Campbell, 234 Ill. 391, 84 N. E. 1035 (1908), 123 Am. St. Rep. 113, note; 2 BISHOP, CRIMINAL LAW (9th ed. 1923), § 1167.

[5] Duluth Street Ry. v. Fidelity & Deposit Co., *supra,* note 1; State v. Brown, 113 N. C. 645, 18 S. E. 51 (1893).

[6] Gunter v. Geary, 1 Calif. 462 (1851); State v. Narrows Island Club, 100 N. C. 477, 5 S. E. 411 (1888); ANGELL, HIGHWAYS (3d ed. 1886) §§ 54, 55.

[7] Duluth Street Ry. v. Fidelity & Deposit Co., *supra,* note 1; Agee v. Employers' Liability Assurance Corp., *supra,* note 1.

[8] See MACGILLIVRAY, INSURANCE LAW (1912) 964.

[9] Bankers Mutual Casualty Co. v. State Bank of Goffs, 150 Fed. 78 (C. C. A. 8th, 1906); Casner v. New Amsterdam Casualty Co., 116 Mo. App. 354, 91 S. W. 1001 (1905); Duschenes v. Nat. Surety Co., 79 Misc. 332, 139 N. Y. Supp. 881 (Sup. Ct 1913).

INTOXICATING LIQUORS—POSSESSION FOR NON-BEVERAGE PURPOSES—PENNSYLVANIA ACT OF 1923—The defendant was indicted for the unlawful possession of intoxicating liquors under the Pennsylvania Act of 1923,[1] making the possession of "intoxicating liquor for beverage purposes" a criminal offense. The defendant admitted the purchase of the liquor without a physician's prescription, but testified that it was for medicinal purposes only. *Held:* The defendant was guilty. *Commonwealth v. Burdenella,* 87 Pa. Super. 594 (1926).

The court's reasoning is that since the defendant admitted the purchase without a physician's prescription, it was no defense that the possession was for medicinal purposes only, because the Legislature, when passing this Act, had in contemplation the National Prohibition Law, and that law states that no person may lawfully purchase intoxicating liquor for medicinal purposes, except on a physician's prescription.[2] Further examination of the Pennsylvania Act reveals that it refers only to intoxicating liquors for *beverage* purposes, and that no attempt is made to regulate intoxicating liquor to be used for *medicinal* purposes. Nor does the Act adopt the provisions of the Volstead Act, on which the court manifestly based its conclusion, as a part of the independent law of Pennsylvania, except as to the definition of intoxicating liquor.[3] That the Pennsylvania Act was passed in contemplation of the Federal Act might not be confuted, but to construe the provisions of the Federal Act as a part thereof would seem contrary to those general principles of statutory construction, which declare that penal statutes are subject to strict interpretation,[4] and that they will not be construed to include anything beyond their letter, even though within their spirit, and nothing can be added to them by inference or intendment.[5] Moreover, the decision apparently overlooks the principle that Federal penal laws are not enforceable in the state courts, and that an alleged offender against the state must be convicted by the state on the basis of its own independent laws.[6] There is nothing in the Eighteenth Amendment to the Federal Constitution which destroys this rule.[7] Under a statute similar to that of Pennsylvania's, Texas is opposed to the principal case. In three cases in that jurisdiction, on facts almost identical with those of the principal case, it was held that, under the Texas Penal Code, no person in that state can be punished for any act or omission unless the same is made penal by the written laws of that state.[8] In Pennsylvania, the offense for which the defendant was

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[1] Act of 1923, P. L. 34, § 3, Pa. Stat. (Supp. 1924), § 14098a-3.

[2] 41 Stat. 305, Title II, § 6, p. 310, U. S. Comp. Stat. (1925) § 10138½c.

[3] Act of 1923, P. L. 34 § 2(a), Pa. Stat. (Supp. 1924) § 14098-a-2(a).

[4] Warner v. Commonwealth, 1 Pa. 154 (1845).

[5] Commonwealth v. Exler, 243 Pa. 155, 89 Atl. 968 (1914); Commonwealth v. Jennings, 109 Va. 821, 63 S. E. 1080 (1909).

[6] Ely v. Peck, 7 Conn. 239 (1828); State v. Pike, 15 N. H. 83 (1844); United States v. Lathrop, 17 Johns. 4 (N. Y. 1819).

[7] State v. Gauthier, 121 Me. 522, 118 Atl. 380 (1922); Commonwealth v. Nickerson, 236 Mass. 281, 128 N. E. 273 (1920). See BLAKEMORE, PROHIBITION (1923) 17, 18, 23.

[8] Mayo v. State, 92 Tex. Cr. App. 624, 245 S. W. 249 (1922); Horak v. State, 95 Tex. Cr. App. 474, 255 S. W. 191 (1923); Fuller v. State, 95 Tex. Cr. App. 476, 255 S. W. 192 (1923).

indicted is statutory, and, therefore, it would seem that the same rule should apply. Finally, as is pointed out by the dissenting justice, the conclusion of the court operates to render the Act in question unconstitutional. The conclusion is, in effect, that "in any prosecutions under the Act, it is not necessary for the jury to find that the liquor was possessed for beverage purposes in any case in which the evidence warrants a finding that the liquor was not purchased in compliance with the Volstead Act." If this is to be the construction placed upon the Act, it is submitted that the title[9] does not give a fair indication of the import of the statute. This is contrary, it seems, to Article III, Section 3, of the Pennsylvania Constitution of 1873.[10] The case has been appealed to the Pennsylvania Supreme Court.

NEGLIGENCE—LIABILITY OF OWNER OF "DRIVE-IT-YOURSELF" AUTOMOBILE—The plaintiff sued the owner of a "drive-it-yourself" automobile to recover for damages resulting from the negligence of the hirer of the automobile, who had driven a car only two times previous to the occasion of the accident. This fact was not known to the defendant. *Held:* The defendant is not liable. *Saunders Drive-It-Yourself Co. v. Walker,* 284 S. W. 1088 (Ky. C. A. 1926).

It is well settled that the hiring of a vehicle from the owner creates a contract of bailment *locati rei*,[1] and that an automobile not being an inherently dangerous instrument the bailor of such a vehicle is not responsible to third persons for its negligent use by the bailee.[2] There is, however, a decided tendency in the recent decisions to hold the owner responsible because of his negligence in entrusting an automobile to a person whom the owner "knows" to be incompetent.[3] Incompetency under such circumstances is held to embrace infancy,[4] intoxication,[5] lack of skill[6] or mental incapacity.[7] The principal case would seem to lay down a rule of liability dependent not only on facts known to the owner but also on facts that from the exercise of ordinary care he should know. But the court in spite of this apparent requisite of a duty to ascertain the competency of the hirer, unquestionably, from its discussion and decision,

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[9] The title of the Act is, "An Act Concerning Alcoholic Liquors . . . Prohibiting the Possession of Intoxicating Liquors for Beverage Purposes."

[10] "Subject of Bills—Title—No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in the title." And it was so held in Commonwealth v. Borough of Dale, 272 Pa. 189, 115 Atl. 873 (1922).

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[1] 2 PARSONS, CONTRACTS (9th ed. 1904) § 200.

[2] Otoupalik v. Pheps, 73 Colo. 433, 216 Pac. 541 (1923); Doersam v. Isenburg, 205 App. Div. 447, 199 N. Y. Supp. 569 (1923).

[3] Gardiner v. Solomon, 200 Ala. 115, 75 So. 621 (1917); Neubrand v. Kraft, 169 Iowa, 444, 151 N. W. 455 (1915).

[4] Hopkins v. Droppers, 184 Wis. 400, 198 N. W. 738 (1924).

[5] Mitchell v. Churches, 119 Wash. 547, 206 Pac. 6 (1922).

[6] Elliott v. Harding, 107 Ohio, 535, 140 N. E. 338 (1923).

[7] BERRY, AUTOMOBILES (5th ed. 1926) § 1511; HUDDY, AUTOMOBILES (7th ed. 1924) § 200.

fails to adopt it, but rather bases its decision on the lack of actual knowledge on the part of the owner of the incompetency of the driver. It is difficult to see what effort the court could require the owner to expend in order to ascertain the competency of the hirer, if he were not negligent in failing to inquire of the hirer concerning his previous experience in driving an automobile. It is submitted that the court in not adopting the broader rule of liability arrived at a conclusion contrary to the trend of the better modern decisions,[8] holding that individual owners of automobiles have a duty to ascertain the competency of the owner, and also contrary to a duty consistent with the relation which the defendant company in the principal case bears to the public. The company was organized to derive profit from the operation on the public highways of its automobiles to any one who might apply. It thereby devoted its property to a public use on public streets for personal gain, charging its business with a public interest and creating the relation to the public of a public utility[9] owing a positive duty to the public to determine the competency of hirers in order not to abuse its use of the streets for its own gain.[10]

PUBLIC SERVICE COMMISSIONS—PENNSYLVANIA PUBLIC SERVICE ACT—APPOINTMENT—The defendant was appointed by the Governor during a session of the Senate, to fill a vacancy in the Public Service Commission of Pennsylvania for an unexpired term ending in 1931. The Senate did not act thereon. After its adjournment, the Governor issued a commission to the defendant to act until the end of the next session of the Senate. The Senate, in an extra session, called for the records, and approved the appointment for the unexpired term. Quo warranto proceedings were brought to test defendant's right to office. *Held:* The Senate might confirm the appointment for the full unexpired term, and ignore the secondary appointment. *Commonwealth v. Stewart*, 286 Pa. 511, 134 Atl. 392 (1926).

The principal case follows and amplifies the ruling laid down by the court in *Commonwealth v. Benn*,[1] previously discussed in this REVIEW.[2] In the earlier case, the court held that the Commission fulfilled a function of the Legislature, that the latter alone was the appointing power, and that the Governor was its agent to perform the duty of appointment.[3] Here it was decided that the Governor was limited by the express powers conferred on him by the *Public Service Act*,[4]

[8] Brown v. Green, 6 Boyce (Del.) 449, 100 Atl. 475 (1917); Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975 (1919); Raub v. Don, 254 Pa. 203, 98 Atl. 861 (1916). See Parker v. Wilson, 179 Ala. 361, 370, 60 So. 150, 153 (1912).

[9] City of San Antonio v. Besteiro, 209 S. W. 472 (Tex. Civ. App. 1919); POND, PUBLIC UTILITIES (3d ed. 1925) § 705.

[10] See City of Columbus v. Public Utilities Commission, 103 Ohio, 79, 96, 133 N. E. 806, 807 (1921).

[1] 284 Pa. 421, 131 Atl. 253 (1925).

[2] See 74 U. OF PA. L. REV. 296 (1926).

[3] Commonwealth v. Benn, *supra*, note 1, at 437, 131 Atl. at 258.

[4] Act of 1913, P. L. 1374, Art. IV, § 2, Pa. Stat. (1920) § 18106.

and could not exceed the scope of his agency. Consequently, after his having made an appointment in the discharge of his agency, any subsequent attempt on his part to limit that appointment would be null and void.

WILLS—CONSTRUCTION—DISTRIBUTION PER STIRPES OR PER CAPITA—In the second paragraph of his will the testator provided that after the death of his wife his real estate was to be divided between "my daughter and the two children of my deceased son share and share alike, the share of the two children to be placed in bonds." In the third paragraph he provided that "from the proceeds of my life insurance, I direct that one-half be paid to my daughter, and the other one-half to be invested in bonds for the use and benefit of the two children of my deceased son." The testator's daughter claimed that the second paragraph provided for a *per stirpes* division, and that therefore she was entitled to one-half of the real estate. *Held:* The daughter takes one-third, the division being *per capita. Conn v. Hardin*, 284 S. W. 1077 (Ky. 1926).

The principles underlying this decision are in accord with those set forth in *Canfield v. Jameson*, 208 N. W. 369 (Iowa, 1926), discussed in 75 U. OF PA. L. REV. 91 (1926). The decision here reached, however, is different, because in this will the evidence of an intention to have a *per capita* division, is not overcome by any indication of a treatment of the two children as a single class. The testator, moreover, showed in the third clause, where he wanted to achieve the result of a *per stirpes* division, that he knew how to do this in unequivocal language. It is therefore evident that the two cases, different in their decisions, are clearly distinguishable.

WILLS—CONSTRUCTION—INTENT OF TESTATOR—By one paragraph of his will the testator left "all the rest, residue and remainder of my estate, real and personal, which I may own at the time of my death, to my wife . . . to have and to hold . . . in lieu of dower." By other paragraphs the testator gave his wife the "power of distributing the estate," according to certain "recommendations." *Held:* The wife inherited only a life estate with a power of distribution, and not an estate in fee. *Livingston v. Ward*, 216 App. Div. 675, 216 N. Y. Supp. 37 (1st Dept. 1926).

In arriving at this conclusion the court applied the cardinal test for the construction of wills, namely, what did the testator intend?[1] This intention must be sought for in the language used, and, if possible, effect must be given to each and every word and phrase employed.[2] No words are to be "rejected as meaningless or repugnant if, by any reasonable construction, they may be made consistent and significant."[3] In the principal case, the paragraph which seemed to have the great-

[1] 40 CYC. 1386.

[2] Lathrop v. Merrill, 207 Mass. 6, 92 N. E. 1019 (1910); Keteltas v. Keteltas, 72 N. Y. 312 (1878); Provenchere's Appeal, 67 Pa. 463 (1871).

[3] Cardozo, *J.*, in Matter of Buechner, 226 N. Y. 440, at p. 443, 123 N. E. 741, at p. 742 (1919). Accord: Adams v. Massey, 184 N. Y. 62, 76 N. E. 916 (1906).

est influence upon the court's decision was the one set out above which devised the testator's property to his wife "to have and to hold . . . in lieu of dower." The testator here used technical terms which are presumed to be used in their legal sense,[4] and, when so employed, they do seem to indicate the testator's intent to give his wife no more than a life estate. The habendum clause is generally construed as limiting an estate,[5] especially when it is not inconsistent with express terms granting a greater estate. No such express terms were here present, and so the habendum clause should be given its usual effect. Furthermore, there was an absence of words of inheritance which, at common law, were necessary for the grant of a fee[6] and which the testator must have had in mind since he expressly included them in a devise to a friend under a different paragraph of his will. It is true that by statute[7] a fee can be passed without the use of these words in the grant but only provided an intent to pass a lesser estate does not appear. The phrase "in lieu of dower" would be contrary to and inconsistent with a devise of an estate in fee since dower merges in the fee.[8] A necessary element of a bequest in lieu of dower is that the widow have her choice between the specific legacy and her right to dower,[9] but if the widow here acquired a fee under the testator's will she would have no option to exercise, the dower right having merged in the fee.

Subsequent paragraphs of the will are consistent only with this interpretation of the principal clause. In them the testator showed clearly his intention to deal with an estate which he thought was his even after his wife's life estate had ceased. He referred to "my estate" and he actually devised it to any surviving children if his wife should not exercise her "power of distributing the estate" in their favor. In view of the provisions of the will taken as a whole, it is submitted that the court was correct in finding that the wife inherited only a life estate with a power of disposition.

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[4] Keteltas v. Keteltas, *supra*, note 2.

[5] 18 C. J. 331, § 329 and cases there cited.

[6] Bean v. French, 140 Mass. 229, 3 N. E. 206 (1885); Jackson v. Davenport, 20 Johns. 536 (N. Y. 1822); Lytle v. Lytle, 10 Watts, 259 (Pa. 1840).

[7] N. Y. Real Preperty Law, N. Y. Ann. Cons. Laws (2d ed. 1917) 7445, § 245.

[8] TIFFANY, REAL PROPERTY (2d ed. 1920) 225, and cases there collected.

[9] *Ibid.*