RECENT CASES

Courts—Contingent Future Payments Not Within Matter in Controversy in Determining Jurisdiction of United States Courts— The holder of a disability policy sued in a state court for $700 due in benefits. Insurer, a citizen of another state,[1] removed the case to the federal district court,[2] asserting that in view of the life expectancy of the insured, payments would exceed $3000. Plaintiff moved to remand the action to the state court for want of jurisdiction. *Held,* motion granted. Contingent future payments are not included within the matter in controversy. *Button v. Mutual Life Insurance Company of New York,* 48 F. Supp. 168 (W. D. Ky. 1943).

The difficulty in determining the jurisdiction of the United States district courts in cases in which the matter in controversy exceeds the sum or value of $3000 arises from the confusion over the proper construction of the phrase "matter in controversy." [3] Unfortunately, the term is indefinite,[4] and the lower courts, disconcerted by the failure of the Supreme Court to enunciate a clear definition,[5] have reached varying results in applying this vague language to many diverse situations.[6] Thus the matter in controversy may be limited to accrued damages only, or, construed more broadly, it may include damages which will be incurred in the future.[7] These two possibilities are illustrated by the cases of *Elgin v. Marshall* [8] and *Thompson v. Thompson,*[9] and in insurance cases involving disability benefits, the lower courts have variously followed the limiting construction of the former or the expansive trend of the latter. Hence the decisions are divided whether to consider within the matter in controversy the size of the reserve, which, by statute, an insurer must maintain

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1. "The district courts shall have original jurisdiction . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000, and . . . is between citizens of different States." 36 STAT. 1091 (1911), 28 U. S. C. A. § 41 (1) (Supp. 1942).

2. "Any . . . suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State." 36 STAT. 1094 (1911), 28 U. S. C. A. § 71 (1927).

3. Note (1937) 25 CALIF. L. REV. 336, 337; 1 MOORE, FEDERAL PRACTICE (1938) § 8.06.

4. Note (1934) 48 HARV. L. REV. 95, 96.

5. Notes (1934) 48 HARV. L. REV. 95, (1937) 25 CALIF. L. REV. 336.

6. Counterclaims: Dobie, *Jurisdictional Amount in the United States District Court* (1925) 38 HARV. L. REV. 733, 744; Note (1941) 25 MINN. L. REV. 356, 362. Injunctions: Dobie, *id.* at 736. Insurance policies: Notes (1941) 25 MINN. L. REV. 356, (1935) 19 MINN. L. REV. 768, 775. Taxation: Note (1934) 48 HARV. L. REV. 95.

7. Note (1934) 48 HARV. L. REV. 95, 96.

8. 106 U. S. 578 (1882) (in a suit brought by a holder of coupons to test the constitutionality of a city bond issue, only the value of the coupons was considered as the matter in controversy, though the validity of the issue itself was directly in question). The case involved a problem in tax construction. See Note (1934) 48 HARV. L. REV. 95.

9. 226 U. S. 551 (1913) (on appeal from an award of maintenance to wife and child, the court accepted jurisdiction by regarding the actuarial worth of possible future payments to be the matter in dispute).

to meet disability claims.[10] Similarly, the courts disagree over the inclusion within the jurisdictional amount of payments which may accrue in the future.[11] Recognizing the apparent Congressional purpose of preventing crowded dockets,[12] it seems preferable to confine the amount in controversy solely to accrued damages. Otherwise, the basis of jurisdiction must depend upon the present capitalized value of all future payments, which, like any actuarial sum, rests upon a calculus of probabilities, rather than upon the facts in each individual case. As the instant Court points out, the death or the return to health of the insured may result in the termination of any liability before a sum of $3000 ever became due. At any rate, a more definitive explanation of the meaning of the "matter in controversy" as applied to disability policies must come from the Supreme Court to avoid the needless expense and time consumed in deciding petitions to remove or remand.[13]

Injunction—Right to Sue for Injunction against Secretary of Agriculture for Improper Use of Milk Equalization Pool Funds Denied to Producers—Milk was marketed by a group of co-operative and independent producers by selling to handlers at a uniform price.[1] This price was paid into an equalization pool. Subsequently price adjustments were made in accordance with the use to which the milk was put,[2] e. g., if used as fluid milk it was paid for at one price, while if used in ice cream it was paid for at a different price, and any difference between the original price and the "use" price was adjusted by payments from the pool to the handler or by payments from him into the pool. The pool was then divided among the producers according to their interest. The Secretary of Agriculture issued an Order [3] which provided, among other things, for preferential money payments to qualifying co-operative milk producers from this equalization pool. Plaintiffs, independent producers, sued to restrain the Secretary from making such payments. *Held*, injunction denied. Plaintiffs have no interest in the pool, legal or equitable, any greater than the

10. Cases cited in instant case at 170.

11. *Ibid.*

12. Frankfurter, *Distribution of Judicial Power between United States and State Courts* (1928) 13 CORN. L. Q. 499, 523. In Healy v. Ratta, 292 U. S. 263, 270 (1934) the Court pointed out that the progressive increase of the jurisdictional amount points to a Congressional intent to narrow the jurisdiction of the district courts.

13. It may well be that Congress should distinguish between jurisdiction based on the presence of a federal question and that based on diversity of citizenship by adopting a higher jurisdictional minimum for the latter or abolishing it entirely. See Frankfurter, *supra* note 5 at 519, *passim*.

1. This price is computed by the Market Administrator of the particular area. Order No. 4, § 904.8 (a) and (b), 6 FED. REG. 3762.

2. Queensboro Farm Products v. Wickard, 47 F. Supp. 206. The background facts of this method of payment are referred to in Nebbia v. N. Y., 291 U. S. 502, 517, 54 Sup. Ct. 505, 507, 78 L. Ed. 940, 945 (1934); *State Marketing and Dairy Legislation* (1941) WORKS PROGRESS ADMINISTRATION MARKETING LAWS SURVEY 46; Polikoff, *Commodity Price Fixing and the Supreme Court* (1940) 88 U. OF PA. L. REV. 934, 947.

3. Order No. 4, 6 FED. REG. 3762, effective August 1, 1941, controlling milk in the Greater Boston, Massachusetts, Marketing Area. Issued by authority of the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. A. § 671 (1939).

general public, and mere showing of damage because of the Secretary's action is not sufficient. *Stark v. Wickard*, 136 F. (2d) 786 (App. D. C. 1943).

The instant case leaves in the air the question who owns the equalization pool. It has been decided that the handlers have no property interest in it.[4] It has never been contended that the Government has any proprietary right therein.[5] The final possibility of ownership is here closed by saying that independent individual producers have no interest in it. The Court says that the plaintiffs' only possible right to the pool is indirect and "is that which they may assert against the handlers under their contracts. . . ."[6] But producers cannot recover against handlers in any contract action because the handlers have performed all duties as respects payments into the pool under an order constituting "superior force,"[7] which they have no standing to question[8] and which they must obey under penalty of fine.[9] Any recourse against the handlers being impossible, and the instant case denying the producers the right to sue directly, they have no property right in the pool for "to take away all the remedy for the enforcement of a right is to take away the right itself."[10] It is submitted that the producers should have been granted an injunction here. They have definite, ascertainable claims against the pool. If one should go out of business his rights against the pool for the milk delivered to the handler would unquestionably continue. In the instant case money was taken from a fund to which all producers contributed to be given to one class of those producers. The fund was thus made smaller and, on distribution, producers received less for their milk than they would have had no deduction been made.[11]

4. U. S. v. Rock Royal Co-operative, Inc., 307 U. S. 533, 59 Sup. Ct. 993, 83 L. Ed. 1446 (1939).

5. *Cf.* Thompson v. Deal, 92 F. (2d) 478, 482 (1937) (where it is stated that if funds are not public money nor money subject to the appropriation of Congress, Congress cannot dispose of it, and the holder thereof is a mere custodian).

6. Instant case at 789.

7. McLemore v. Louisiana State Bank, 91 U. S. 27, 29, 23 L. Ed. 196 (1875).

8. The Act (7 U. S. C. A. § 608 (c) (15) (1939)) provides that the handler may challenge any order, but U. S. v. Rock Royal Co-operative, Inc., 307 U. S. 533, 59 Sup. Ct. 993, 83 L. Ed. 1446 (1939) adds that they can't challenge Orders affecting the pool because the disposition of it does not affect them.

9. 7 U. S. C. A. § 608 (c) (14) (1939).

10. Poindexter v. Greenhow, 114 U. S. 270, 303, 5 Sup. Ct. 903, 921, 29 L. Ed. 185, 197 (1884).

11. A greatly simplified description of the fund in operation and of producers' injury under the challenged provision is as follows: if a handler buys from producers exactly 100 lbs. of milk exclusively for use in Class I, with a minimum price of $3.40 —and if another handler similarly buys Class II milk at $2.20—the Act required the blended price to be computed in such manner that it amounts to $2.80; the first handler is obligated to pay all producers $3.40 by paying his own producers $2.80 and by paying 60 cents to the Market Administrator for the Producer Settlement Fund thus created.

However, if—by making some deduction—the Secretary computes the blended price 1 cent lower than he should under the Act, producers dealing with such handler would receive only $2.79. Therefore the fact of injury is direct, producers receiving a lower price. Furthermore, such handler still remains subject, under the Act and Order to pay the minimum price of $3.40; so the balance of 61 cents (60 plus 1) is paid into the fund. Assuming that the other handler's producers also sold 100 lbs. of milk, and adding this to the above 100 lbs., other producers could only be paid 59 cents instead of 60 from the fund because 2 cents (1 cent per 100 lbs.) so obtained are paid out as the co-operative payments here under attack: again the fact of injury is direct, producers receiving a lower price, due to the fund acquiring part of their price. (Substantially from plaintiff's Petition for Writ of Certiorari, p. 14.)

The situation is analogous to the case where one class is taxed for the benefit of another class. In *United States v. Butler*[12] money was to be taken from one class for the express purpose of giving it to another class, but it was called a tax. The decision enforced the right of an individual thus taxed to attack the constitutionality of the levy. Here it was not called a tax but the money given belonged to the producers nevertheless,[13] and was diverted from them to the co-operatives. The instant Court also says that "it is not sufficient to show . . . injury in order to challenge administrative action. . . ."[14] This does not seem to be fully in line with *Massachusetts v. Mellon*[15] which said that as a basis for successfully attacking the constitutionality of a Congressional appropriation, the plaintiff must show "direct injury . . . and not merely that he suffers in some indefinite way in common with people generally."[16] Here the producers have suffered more than mere "injury," in the sense indicated. They suffer "direct injury," common only to themselves, because of the Secretary's action. On the authority of *United States v. Butler,* if this were an unauthorized tax on all producers for the benefit of a class, the producers could bring a successful suit against its imposition.[17] If the pool had been distributed without authority the producers could have sued.[18] Standing to sue should not be denied in the instant case because an additional factor is present, namely, that the official discretion of a government officer would be subject to court control.[19]

Torts—Unauthorized Suit in the Name of Another Held Actionable—*A* brought an unsuccessful suit[1] against *B* in the name of a corporation of which *A* believed he was president. *B* later learned that *A* had been president of the corporation at one time, but that the corporation had

12. 297 U. S. 1, 56 Sup. Ct. 312, 80 L. Ed. 477 (1935).

13. *Cf.* U. S. v. Rock Royal Co-operative, Inc., 307 U. S. 533, 561, 59 Sup. Ct. 993, 1007, 83 L. Ed. 1446, 1463 (1939), where it is stated that "[if] the deductions from the fund are small or nothing, the patron [producer] receives a higher . . . price. . . ."

14. Instant case at 789.

15. 262 U. S. 447, 43 Sup. Ct. 597, 67 L. Ed. 1078 (1923).

16. *Id.* at 488, 43 Sup. Ct. at 601, 67 L. Ed. at 1078.

17. However, in U. S. v. Butler, 297 U. S. 1, 61, 56 Sup. Ct. 312, 317, 80 L. Ed. 477, 486 (1935), the court says that a tax expropriating money "from one group for the benefit of another" may be conceded to be constitutional "when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation." But it is not clear exactly what "interest" is. Here any interest would be negative. The *Butler* case also deplores the coercive nature of the levy therein; here the deduction seems likewise coercive in that if the independent producers join co-operative associations they lose the disadvantage under which they now operate.

18. Thompson v. Deal, 92 F. (2d) 478 (1937).

19. The *Thompson* case, *ibid.*, also involved the maladministration of a producer pool (in cotton). There the relief was granted but the official who distributed the funds was acting under an unconstitutional Act. Thus the Court, as it noted at 483, was not interfering with the "official discretion of a government officer." The instant Court distinguished this case from the *Thompson* case and gave as one of the reasons the fact that the Court was not there asked to interfere with the "official discretion of a government officer." (Instant case at 789.)

1. C. T. C. Investment Company v. London & Lancashire Indemnity Company of America, 116 F. (2d) 741 (C. C. A. 7th, 1940).

been legally dissolved more than five years prior to the institution of the suit. *B* now brings an action for damages occasioned by the wrongful prosecution in the name of the corporation. *Held,* judgment of the district court for *A* reversed. It is a tort to commence suit in the name of another without his authority. *London & Lancashire Indemnity Co. of America v. Duner,* 135 F. (2d) 895 (C. C. A. 7th, 1943).

It is somewhat surprising that the tort involved in an unauthorized suit has received so little litigation. In all there are fewer than a dozen cases dealing with the subject, and none at all in recent years. Both the person in whose name the unauthorized suit is brought and the person who is sued have an interest which is afforded legal protection.[2] The former may suffer injury in two ways; the burden of costs will ordinarily be imposed on him if the suit fails,[3] and secondly if the court has proper jurisdiction the judgment rendered in such suit will be binding on him notwithstanding the fact that the suit was carried on without his knowledge or consent.[4] The person who is sued is injured, for he is put to the trouble and expense of defending himself in an action which was started by some third person without the consent of the plaintiff;[5] he has an interest in being free from such vexatious litigation.[6] It is important to note that malice is not an essential element in this tort.[7] Thus in the instant case the person bringing the suit believed the corporation to be still in existence and therefore thought he had authority as president to bring the suit. However, although malice is not necessary to this tort, evidence of it will be admitted to increase the measure of damages.[8] Still another characteristic of this tort is that want of probable cause is not required; the plaintiff named in the suit may actually have a good cause of action against the defendant.[9] The instant case's claim to attention lies in its reaffirmance of this old and rather rare tort. For while one of the judges[10] imposed lia-

2. Such protection appears to have been given to the person in whose name the suit is brought much earlier than it was afforded the one who was sued. The statement is made in one of the old texts that the writ of deceit lay "where one man doth anything in the name of another, by which the other person is damnified and deceived; . . . if a man purchase a writ in my name, . . . and I know not thereof, I shall have this writ of deceit." 1 FITZHERBERT, NATURA BREVIUM (9th ed. 1794) 95-96. On the other hand the first case which held such a suit to be a tort to the person sued, at least in the American reports, appears to have been the Massachusetts case of Bond v. Chapin, 49 Mass. 31 (1844). Although there have been several cases since then, they do not seem to have found their way into the texts written by the modern authorities in tort law.

3. Metcalf v. Alley, 24 N. C. 38 (1841); 3 BL. COMM. *166.

4. Hackett v. McMillan, 112 N. C. 513, 17 S. E. 433 (1893).

5. Bond v. Chapin, 49 Mass. 31 (1844); Smith v. Hyndman, 64 Mass. 554 (1852); Foster v. Dow, 29 Me. 442 (1849); Moulton v. Lowe, 32 Me. 466 (1851); Streeper v. Ferris, 64 Tex. 12 (1885).

6. "The gist of the action is . . . for the improper liberty of using the name of another in prosecuting the suit, by which the defendant in the action is injured." Bond v. Chapin, 49 Mass. 31, 33 (1844); Foster v. Dow, 29 Me. 442 (1849).

7. Bond v. Chapin, 49 Mass. 31 (1844). "The gist of the action in such cases is not malice, but the want of authority." Smith v. Hyndman, 64 Mass. 554 (1852); Streeper v. Ferris, 64 Tex. 12 (1885).

8. Smith v. Hyndman, 64 Mass. 554 (1852).

9. Bond v. Chapin, 49 Mass. 31 (1844); Smith v. Hyndman, 64 Mass. 554 (1852); Foster v. Dow, 29 Me. 442 (1849); Streeper v. Ferris, 64 Tex. 12 (1885). "The action is . . . a groundless proceeding, irrespective of any merits it might have had if legitimately brought. The person so acting without authority, is liable to make good the damage sustained; and it has been said that though the person in whose name it is brought would have had a right to maintain it, this circumstance will afford no reason for reducing the damages." 2 SEDGWICK, MEASURE OF DAMAGES (7th ed. 1880) 532.

10. Circuit Judge Evans.

bility on grounds of malicious prosecution, refusing to accept the lower Court's finding of fact that the defendant was without knowledge that he lacked authority, his colleagues,[11] though admitting they would have arrived at a different finding if the evidence had been presented to them, accepted that conclusion of fact as not without substance, and unearthed this old tort, the unauthorized suit, as a basis for liability.

Trusts—Validity of Spendthrift Trust Created by Tenants by the Entireties—Husband and wife, tenants by the entireties, created a trust for their lives, with remainder over, in real estate, to be free from the claims of any creditor; and upon the death of either grantor to the survivor upon the same terms. Seven months later the wife died and a judgment creditor of the husband, who had acquired his judgment prior to the creation of the above trust, sought execution on the property. A bill in equity was brought to enjoin the proceedings. *Held,* the spendthrift clause was void, and the life estate of the surviving husband was subject to execution under the judgment against him. *Murphey v. C. I. T. Corporation,* 347 Pa. 591, 33 A. (2d) 16 (1943).

Tenancy by entireties, unique in nature, is essentially a joint tenancy, modified by the common law theory that husband and wife are one person.[1] The title to the property involved is in neither husband nor wife but in a distinct legal entity consisting of the indivisible unit of husband and wife.[2] Thus where an estate is conveyed to a husband and wife and to a third person the husband and wife take a moiety and the third person takes the other moiety.[3] Individual judgments against either spouse do not bind the interest held by them by the entireties as long as both remain alive,[4] and the husband and wife can by joint conveyance transfer the property to another free from the lien of any such judgment.[5] A trustee in bankruptcy of the husband is not entitled, during the life of the wife, to any part of the principal or income of the estate.[6] Joint action on the part of both husband

11. Circuit Judges Major and Kerner.

1. 2 TIFFANY, REAL PROPERTY (3d ed. 1939) § 430; in discussing the estate Littleton states "that the husband and wife are but one person in law. . . ." Co. LITT. *291; Blackstone defines the estate in the following manner: "If an estate in fee be given to a man and his wife, they are neither properly joint tenants nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moities, but both are seized by the entirety, *per tout et non per my* (by all and not by half); the consequence of which is, that neither husband nor wife can dispose of any part without the assent of the other, but the whole must remain to the survivor. 2 BL. COMM. *182.

2. "The estate of joint tenants is a unit, made up of divisible parts; that of husband and wife is also a unit, but it is made up of indivisible parts." Beihl v. Martin, 236 Pa. 519, 523, 84 Atl. 953, 954 (1912); Justice Stern points out, "The title, legal and equitable, was in what may be regarded as a distinct legal entity, consisting of the unified personalities of the husband and wife, somewhat as if—although the analogy is, of course, a crude one—the spouses together constituted a corporate body." C. I. T. Corporation v. Flint, 333 Pa. 350, 354, 5 A.(2d) 126, 128 (1939).

3. Co. LITT. *291; Johnson v. Hart, 6 W. & S. 319 (1843).

4. *In re* Meyer's Estate, 232 Pa. 89, 81 Atl. 145 (1911); Gasner v. Pierce, 286 Pa. 529, 134 Atl. 494 (1926).

5. Kerin v. Palumbo, 60 F. (2d) 480 (1932); see Shapiro, *Estates by Entirety,* 61 U. OF PA. L. REV. 476 (1913).

6. Meyer's Estate, 232 Pa. 89, 81 Atl. 145, 36 L. R. A. (N. S.) 205 (1911).

and wife is required in order to dispose of or encumber the estate by entirety.[7] Although the doctrine of tenancy by the entirety has been repudiated in some jurisdictions,[8] the legal fiction of the unity of husband and wife has been strictly adhered to in Pennsylvania.[9] Pennsylvania originated and fostered the doctrine of spendthrift trusts.[10] However, the Supreme Court of the state, as new situations arise involving attempts to create spendthrift trusts, is certainly free to extend or restrict the doctrine in accordance with its view of the merits presented in the case involved. The instant case presents such a situation. The marital entity has likewise received in Pennsylvania a particularly full development; but the Supreme Court has a like freedom to extend the doctrine of that fiction or refuse to extend it when new situations arise and the choice is therein presented. It would seem that the court in the instant case refuses to extend the doctrine of spendthrift trust and restricts the docrine of tenancy by the entireties when it concludes that the entire spendthrift provision was invalid on the basis that it was a spendthrift trust created by the settlor for his own benefit.[11] The decision favored those creditors who had no right, when they extended credit, to rely upon security of a property owned by the entireties.[12] A more strict application of the incidents of the estate by the entireties would have avoided this result. Assuming that the court is correct in holding that provision void which creates a spendthrift trust for the husband and wife during *their* lives as one created by a settlor for his own benefit (in the sense that the entity has created the trust for the entity) it does not follow that the provision creating the spendthrift trust in the survivor should likewise fail. It is submitted that the husband did not create that provision for himself, because *he* lacked the legal power to do so. Rather it was created by the entity—the unity of husband and wife; *they* were the settlors of the trust, *not he*. On this basis, therefore, that spendthrift trust provision should not fail as one created by the settlor for his own benefit.[13]

Wills—Integration—Probate of Loose Sheets as a Will—Liberalization of Internal Coherence Test—Husband and wife committed suicide. Near the bodies the wife's sister found a sealed envelope which

7. Sharp v. Baker, 51 Ind. App. 547, 96 N. E. 627 (1911); Schliess v. Thayer, 170 Mich. 395, 136 N. W. 365 (1912); Beihl v. Martin, 236 Pa. 519, 84 Atl. 953 (1912); see 42 L. R. A. (N. S.) 555.

8. See 2 TIFFANY, REAL PROPERTY (3d ed.) § 433.

9. Stuckey v. Keefe's Executors, 26 Pa. 397 (1856); McCurdy v. Canning, 64 Pa. 39 (1870); C. I. T. Corp. v. Flint, 333 Pa. 350, 5 A. (2d) 126 (1939); see Shapiro, *supra* note 5.

10. C. I. T. Corp. v. Flint, 333 Pa. 350, 5 A. (2d) 126 (1939); GRISWOLD, SPENDTHRIFT TRUSTS (1936) § 26; GRAY, RESTRAINTS ON ALIENATION (2d ed. 1895) §§ 214, 218.

11. Instant case at 594, 33 A. (2d) at 18; see RESTATEMENT, TRUSTS (1935) § 156, comment *a*; 1 SCOTT, TRUSTS (1939) § 156; GRISWOLD, SPENDTHRIFT TRUSTS (1936) §§ 471-498.

12. C. I. T. Corp. v. Flint, 333 Pa. 350, 5 A (2d) 126 (1939).

13. Mackason's Appeal, 42 Pa. 330, 82 Am. Dec. 517 (1862); Ghormley v. Smith, 139 Pa. 584, 21 Atl. 135, 11 L. R. A. 565 (1891). "In these cases it was pointed out—and it is, of course, the law—that an owner may create a trust for some other person so as to give him the enjoyment and beneficial ownership of the property, with control over its ultimate disposition, but protecting it against levy or attachment by his creditors." These words are quoted from Justice Stern's opinion in *C. I. T. Corp. v. Flint*, in which case he analogized the tenancy by the entireties to a corporate body.

she opened, and two hours later turned over to the police.[1] In the envelope were three loose folded billheads. One sheet was headed as the deceaseds' "last will," followed by unconnected specific devises and bequests on all three papers, but signed only on one sheet. Challenge of probate as a holographic will was based upon its execution as to form. *Held,* (one Justice concurring seriatim, three dissenting)[2] probate allowed since no statutory requirements were violated, there was no evidence of fraud, and the three papers were connected in their internal sense or coherence by adaptation of parts. *Covington's Estate,* 348 Pa. 1, 33 A. (2d) 235 (1943).

Execution is held proper where the physically separated sheets can be so integrated as to satisfy the judicial test of "internal coherence,"[3] and thus fulfill the statutory requirement that a will be signed at the end.[4] The latter requirement is deemed satisfied where it appears that the testator's intent was consummated without fraudulent additions, substitutions, or alterations.[5] Where "coherence" exists it overcomes the presumption that unsigned loose sheets were introduced after the testator's signature[6] and also eliminates the *probability* (as distinguished from the *possibility*) of fraud.[7] Heretofore, as a test of integration, the court strictly construed

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1. The appellees, although they did not claim fraud, argued that under the facts it was possible that the contents of the envelope could have been tampered with and that it was because of just this *possibility* that the courts had formulated the rules for the establishment of a valid will.

2. Justice Stern's concurring opinion did not take the broad stand of the majority. Two factors were emphasized in his opinion to distinguish this case from the previous decisions, (1) that the enclosure of the sheets in a sealed envelope was tantamount to a physical fastening (see Fosselman v. Elder, 98 Pa. 159 (1881)), and (2) that the will was holographic and therefore the possibility of fraudulent insertion was practically negligible.

The dissent purported to follow previous decisions in saying (1) that the order of connection must appear from the face of the instrument and cannot be established by extrinsic proof (see Seiter's Est., 265 Pa. 202, 108 Atl. 614 (1919)), and (2) that the will was not signed at the end since the purpose of the requirement was to remove *all possibility* of fraud. Brown's Est., 347 Pa. 244, 32 A. (2d) 22 (1943).

3. The instant case lists four general rules, "(1) That a valid will may be written on separate, not physically united, sheets of paper only the last one of which is signed. (2) That it is not necessary . . . that a specific reference be made on the signed page to the preceding pages. (3) That . . . it is not necessary that separate sheets be verbally united by the completion on a successive page of a sentence or paragraph begun on the preceding page. . . . (4) That the test . . . is still in force, to wit: Are the papers connected by their internal sense, by coherence or adaptation of parts?" Instant case at 10-11, 33 A. (2d) at 239.

4. Pa. Wills Act of June 7, 1917, P. L. 403, § 2, PA. STAT. ANN. (Purdon, 1930) tit. 20, § 191; *cf.* Bryen's Est., 328 Pa. 122, 195 Atl. 17 (1937).

5. Churchill's Est., 260 Pa. 94, 103 Atl. 533 (1918), cited in Brown's Est., 347 Pa. 244, 32 A. (2d) 22 (1943); Fisher's Est., 283 Pa. 282, 129 Atl. 90 (1925) (some provisions appeared to have been cut off; held, invalid).

6. Maginn's Est., 278 Pa. 89, 122 Atl. 264 (1923) *affirmed on different grounds,* 281 Pa. 514, 127 Atl. 79 (1924); Seiter's Est., 265 Pa. 202, 108 Atl. 614 (1919). Some states have extremely liberal requirements. *Cf.* Cole v. Webb, 220 Ky. 817, 295 S. W. 1035 (1927); Matter of Johnson, 80 N. J. Eq. 525, 85 Atl. 254 (1912); *In re* Swaim, 162 N. C. 213, 78 S. E. 72 (1913). For degree of proof needed, see Appeal of Sleeper, 129 Me. 194, 151 Atl. 150 (1930); Note (1930) 17 VA. L. REV. 69, and cases there cited.

7. *Probability* is a matter of proof, while *possibility* is a matter of conjecture; *cf.* Ginder v. Farnum, 10 Pa. 98, 100 (1848). "Whether sheets . . . have been substituted . . . must depend upon proof of facts and circumstances, and the countenance and appearance of the paper, and the character of the chirography, and is in fact a question of fraud, to be submitted to the jury upon the whole evidence of the case."

the possibility of fraud,[8] the necessity of rhetorical unity [9] and the requirement that coherence be only established from the face of the will.[10] Thus, in *Seiter's Estate*,[11] where the important facts differed from those of the instant case only in there being no holographic writing,[12] probate was denied; the dispositive provisions being so literarily unconnected and complete in themselves that one or more sheets *could* have been added or substituted with the document still retaining its "logical or adaptive sequence." [13] Although the facts of the instant case admittedly repelled any suspicion of fraud [14] none of the sheets was connected by language with any other.[15] This was held non-conclusive as long as there was a complete harmonious testamentary scheme.[16] The result was a liberalization of the "internal coherence" requirements and the rejection of the "possibility of fraud" test as impractical.[17] Coherence was established by the identical penmanship and grammatical construction,[18] the improbability of forgery,[19] the absence of inconsistent provisions,[20] and the evident dis-

8. Maginn's Est., 278 Pa. 89, 91, 122 Atl. 264 (1923); Seiter's Est., 265 Pa. 202, 108 Atl. 614 (1919); Brown's Est., 347 Pa. 244, 32 A. (2d) 22 (1943).

9. ". . . the objection would be that the signed last page, which was loose, would not fit in with the page ahead of it by continuity of thought or expression . . . being repetitious of some parts and contrary to others, and not starting where the preceding page left off." Bryen's Est., 328 Pa. 122, 127, 195 Atl. 17, 20 (1937). Instant case at 11, 33 A. (2d) at 239.

10. Note 6 *supra*. Note 22 *infra*. In the absence of evidence of fraud or of an actual attempt to substitute or alter the sheets the effect of the above requirements is to defeat the probate of wills because of requirements of form which are not found in the statute.

11. 265 Pa. 202, 108 Atl. 614 (1919). This case was cited by the appellees as being "on all fours" with the instant case. The Court distinguished it by saying, "there was nothing in the papers which 'of itself would support the conclusion that all the papers were intended as a last will. . . .'" Instant case at 16, 33 A. (2d) at 241.

12. See note 2 *supra*, where the concurring opinion felt this was a strong distinguishing factor. See also instant case at 13, 33 A. (2d) at 240.

13. Maginn's Est., 278 Pa. 89, 94, 122 Atl. 264, 265 (1923); see Seiter's Est., 265 Pa. 202, 108 Atl. 614 (1919).

14. Instant case at 16, 33 A. (2d) at 241. See note 1 *supra*.

15. The court suggests, but does not insist, that there is literary connection, being content to emphasize other "connecting factors." Instant case at 11-18, 33 A. (2d) at 239-242.

16. The separate pages have coherence ". . . if they do not contain any mutual inconsistencies or contradictions, or any repetitions, but, when read as a whole, constitute a harmonious scheme of testamentary disposition all the parts of which fit together without incompatibility or 'incoherence'." Instant case at 20-21, 33 A. (2d) at 243. This is the language of the concurring opinion, but it is submitted that this more clearly defines the general test that the majority formulates.

17. "Nor should courts decline to accept such papers as testamentary because their physical relationship is such that fraudulent substitution *might have* been possible. In will cases fraud is almost always *possible*." . . . "To adopt judicially the 'possibility of fraud' test in 'will cases' means in practical effect that if the contestant of *any* will can show that the challenged will was so made that fraud *might have been perpetrated* in its making, its invalidation becomes a very simple procedural matter." Instant case at 12, 15, 33 A. (2d) at 239, 241.

18. Instant case at 16, 33 A. (2d) at 241. This is to be distinguished from literary continuity which gives a coherent and continuous trend of thought.

19. "Page two is obviously not forged, and since it is *not* forged it is not a *substituted* page." Instant case at 13, 33 A. (2d) at 240. The dissent objects with logical justification to the statement as a *non sequitur*. Instant case at 22, 33 A. (2d) at 244.

20. Instant case at 13, 33 A. (2d) at 240; *cf.* note 9 *supra*.

posal of all of the testators' property.[21] The latter factor goes beyond former Pennsylvania decisions and allows proof of coherence by extrinsic evidence.[22] Although the majority opinion presents a many-sided and far reaching enthusiasm [23] for allowing probate of loose sheets, under the unusual facts involved, the ultimate purpose of the statutory requirement seems satisfied: that it was determined with sufficient certainty that the instrument offered for probate represented a completed testamentary intent.

21. Instant case at 13, 16, 33 A. (2d) at 240, 241. This is evidence that none of the sheets was removed, which, coupled with the presumption, in the absence of evidence to the contrary, that the only sheets existing were those offered for probate, would establish the three sheets as a completed will. See Wikoff's App., 15 Pa. 281, 289 (1850).

22. "The order of connection must manifestly appear upon the face of the will." Maginn's Est., 278 Pa. 89, 96, 122 Atl. 264, 266 (1923), citing Stinson's Est., 228 Pa. 475, 479, 77 Atl. 807, 809 (1910). It cannot be established by extrinsic evidence, Baker's App., 107 Pa. 381 (1884); Seiter's Est., 265 Pa. 202, 108 Atl. 614 (1919).

23. Some broad statements of the majority opinion might conceivably be used to sustain probate of loose sheets under facts that might not be as conclusive of a completed testamentary intent as were the facts of the instant case. It would seem, therefore, that the more conservative concurring opinion of Mr. Justice Stern is sufficient to distinguish the case from previous decisions and yet not "open the gates" to future controversies.