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Recent Cases

ATTORNEYS—UNAUTHORIZED PRACTICE OF LAW BY LAYMEN

*Curry v. Dahlberg*¹

An action was brought to recover amounts allegedly due under a contract whereby plaintiff agreed, for a stipulated percentage of the profits, to solicit shippers to employ the defendant, a layman, to secure refunds from railroads for overcharges on freight shipments. Defendant agreed with the shipper, when plaintiff had secured the business, to examine freight bills and file claims and diligently prosecute the same for the shipper, in consideration of payment of fifty percent of all amounts recovered, the defendant purporting to act as the shipper's agent in hiring the lawyer and in filing the claims, and the defendant to have exclusive control of recovery of the claim. The court refused relief to plaintiff on the ground that it was against public policy to enforce this contract, whereby defendant, a layman, was undertaking the practice of law, and plaintiff, a layman, was securing clients for him. The court further held that the agreement between plaintiff and defendant was champertous, and hence unlawful.

The problem of the practice of law by laymen is one now troubling the courts and the legal profession.² Trade associations, collection agencies, and title and trust companies have been the chief sources of difficulty.³ While the practice of law by laymen has probably grown up because such persons can give service of a sort to the public, the public is not adequately protected when dealing with these unlicensed agencies and persons.⁴ On the other hand, the mental and moral standards required of the licensed attorney, and the close scrutiny of him by the courts do furnish adequate protection.⁵ As to the purpose of regulation of the practice of law, it is not to protect any vested interest in those lawfully engaged in the practice, but to protect the public.⁶

It is to be noted that the regulation of professions by the imposition of cer-

1. 110 S. W. (2d) 742 (Mo. 1937).

2. Snively, *Review of Recent Activities to Eliminate Lay Encroachments* (1933) 19 A. B. A. J. 177.

3. Gambrell, *Lay Encroachments on the Legal Profession* (1921) 29 MICH. L. REV. 989.

4. *Lay Practice of the Law Injures Clients, not the Legal Profession* (1921) 5 J. AM. JUD. SOC. 52.

5. SUPREME COURT RULES, 335 Mo. Reports (1935); Hicks and Katz, *The Practice of Law by Laymen and Lay Agencies* (1931) 41 YALE L. J. 69; Atwood, *The Missouri Rule as to Regulation of the Bar* (1936) 1 Mo. L. REV. 237; Clark, *In the Public Interest* (1937) 2 Mo. L. REV. 161.

6. Clark v. Reardon, 104 S. W. (2d) 407, 410 (Mo. App. 1937); People v. People's Stock Yards State Bank, 344 Ill. 462, 473, 176 N. E. 901, 906 (1936); Atwood, *The Missouri Rule as to Regulation of the Bar* (1936) 1 Mo. L. REV. 237.

tain standards and conditions has not been confined to the legal profession alone,⁷ and the United States Supreme Court has held that reasonable requirements for the protection of society are within the police power of the state.⁸

While the inherent power of the courts to regulate the practice of law is well established,⁹ there are statutes in Missouri defining and regulating the practice of law,¹⁰ and there is some difference of opinion as to whether the courts' power is exclusive, or whether the legislature has such power.¹¹ In Missouri the courts have held that this inherent power is derived from that part of the state constitution¹² giving judicial power to the courts.¹³ It follows from the power to regulate the practice of law that courts can prohibit laymen engaging in the practice of law just as they can curtail unlawful practices by licensed attorneys.¹⁴ To hold otherwise would be a patent absurdity. Furthermore, the power to regulate extends not only to practice before the court itself, but to all branches of legal work, including the giving of legal advice,¹⁵ the drawing up of legal documents, *et cetera*.¹⁶

The means by which a court can regulate the practice of law by laymen are quo warranto proceedings,¹⁷ contempt proceedings,¹⁸ criminal proceedings,¹⁹ or, as in the instant case, by refusing to enforce contracts looking toward such practice. When, as here, it appears from the petition that the contract sought to be enforced contemplates the practice of law by a layman, the method used by this court of refusing to enforce the contract, as a means of discouraging such practice, is both effective and simple.

The agreement in this case contained two evils. First, the plaintiff was

7. *Dent v. West Virginia*, 129 U. S. 114 (1889) (involving minimum requirements for practice of medicine); *Hannon v. Siegel-Cooper Co.*, 167 N. Y. 244, 60 N. E. 597 (1901) (involving an attempt by a corporation to practice dentistry); *People v. John H. Woodbury Institute*, 124 App. Div. 877, 109 N. Y. Supp. 578 (1st Dep't 1908) (involving an attempt by a corporation to practice medicine).

8. *Dent v. West Virginia*, 129 U. S. 114 (1889).

9. *State ex rel. Selleck v. Reynolds*, 252 Mo. 369, 158 S. W. 67 (1913); *In re Richards*, 333 Mo. 907, 63 S. W. (2d) 672 (1933); *In re Sparrow*, 90 S. W. (2d) 401 (Mo. 1935); 7 C. J. §§ 728, 18a.

10. Mo. REV. STAT. (1929) §§ 11692 *et seq.*

11. *In re Richards*, 333 Mo. 907, 63 S. W. (2d) 672 (1933); *Clark v. Austin*, 101 S. W. (2d) 977, 980 (Mo. 1937); *Clark v. Reardon*, 104 S. W. (2d) 407, 410 (Mo. App. 1937); Howard, *Control of Unauthorized Practice Before Administrative Tribunals in Missouri* (1937) 2 Mo. L. REV. 313, 318 *et seq.*

12. Mo. CONST. art. VI, §§ 1, 2, 3.

13. *In re Richards*, 333 Mo. 907, 63 S. W. (2d) 672 (1933); *Clark v. Austin*, 101 S. W. (2d) 977 (Mo. 1937).

14. *Clark v. Reardon*, 104 S. W. (2d) 407, 411 (Mo. App. 1937); *People v. People's Stock Yards State Bank*, 344 Ill. 462, 473, 176 N. E. 901, 906 (1931).

15. Note (1938) 3 Mo. L. REV. 56.

16. Mo. REV. STAT. (1929) § 11692 (defining "law practice" and "law business").

17. *State ex rel. McKittrick v. C. S. Dudley & Co.*, 102 S. W. (2d) 895 (Mo. 1937).

18. *Clark v. Austin*, 101 S. W. (2d) 977 (Mo. 1937); (1938) 3 Mo. L. REV. 56.

19. Mo. REV. STAT. (1929) § 11693.

helping the defendant, a layman, practice law. Second, the plaintiff was engaged in solicitation, which even a lawyer could not do personally or by others. A Missouri case has held that the collection of claims or accounts is not necessarily engaging in the practice of law, nor is the selection by an agent of a lawyer for his principal, as the defendant purported to do here, but the soliciting and farming out of claims to lawyers is.²⁰ An attorney may not permit his services to be exploited by a collection agency, nor should he in any way aid or participate in the practice of law by laymen or lay agencies.²¹ Where there is a solicitation of claims, and an attempt to recover for services rendered in attempting to collect, the agent cannot recover from the principal if part of the agreement was for the agent to institute litigation if necessary.²²

A different, though somewhat related point in this case was that the agreement between plaintiff and defendant was champertous, in that it looked toward the stirring up of litigation by the parties, and for that reason was void.²³

The plaintiff filed a motion for a rehearing, contending that the court had no right to raise the question of illegality *sua sponte*; that the contract should be enforced because made before the legislature passed the law defining and regulating the practice and business of law; and that he was not practicing law even though the defendant was. The motion was overruled, the court holding that it could take cognizance of the illegality of the contract since it was shown in the facts stated in the petition; that even though the contract was entered into before the laws in question were passed, the power existed in the court before that to regulate such matters; and that while the plaintiff did not engage in the practice of law himself, the contract between him and the defendant looked toward such practice by the defendant, and hence was against public policy.²⁴

JOHN P. HAMSHAW.

20. *State ex rel. McKittrick v. C. S. Dudley Co.*, 102 S. W. (2d) 895, 901 (Mo. 1937).

21. Opinions of the Committee on Professional Ethics and Grievances of the American Bar Association (1936) 102, opinion 35.

22. *Buxton v. Lietz*, 136 N. Y. Supp. 829 (Mun. Ct. 1912) (agency attempted to recover for services rendered in attempting to recover claims); *Public Service Traffic Bureau, Inc., v. Haworth Marble Co.*, 40 Ohio App. 255, 178 N. E. 703 (1931) (involving same type of agreement as defendant entered into with shippers in principal case, and agency not allowed to recover from shipper for services rendered).

23. *Duke v. Harper*, 66 Mo. 51 (1877); *Kelerher v. Henderson*, 203 Mo. 498, 101 S. W. 1083 (1907); *Breeden v. F. M. A. & Glass Co., Inc.*, 220 Mo. 327, 119 S. W. 576 (1909); *Phelps v. Manecke*, 119 Mo. App. 139, 96 S. W. 221 (1906); *Taylor v. Perkins*, 171 Mo. App. 246, 157 S. W. 122 (1914).

24. 112 S. W. (2d) 345 (Mo. 1938).

BANKRUPTCY—EXAMINATION UNDER SECTION 21a.

*In re Chanson*¹

This was a petition for involuntary bankruptcy brought by creditors of the defendant. They filed their petition and asked for an order to the brother and husband of the bankrupt to compel answers to questions put by the creditors. The creditors contended that it was impossible for them sufficiently to set out the acts of bankruptcy committed by the defendant without this discovery, because the defendant refused to let them see her documents and papers. The order was granted and the court here said that though the petition was insufficient, because it did not set out particularly the acts of bankruptcy, and ordinarily would be dismissed, an exception should here be made where the information was not available to the creditors. The court also said that though the discovery provided for by the Bankruptcy Act was ordinarily limited to the discovery of assets, here too an exception should be made so that the creditors might establish their case. The order was affirmed, being limited, however, to obtaining dates, amounts, names of persons, and property alleged to have been transferred by the bankrupt.

Here is a case where the creditors had not sufficient grounds for filing their petition, and were permitted to use this discovery to force the defendant into bankruptcy. The earliest forms of procedure whereby one party could question another to obtain information in a case were found in the common law bill of particulars and the old equity bill of discovery. The former was used by the defendant to compel the plaintiff to make his petition more detailed. Common use of it was made where the defendant sought to have the separate items of an account listed. The equity bill of discovery was used by either party and could be used in conjunction with an entirely legal action, when the party sought further information in the case. This probably grew out of the equity pleading which contained first, the plaintiff's allegations including all his evidence and, second, a set of questions addressed to the defendant the answers to which, together with the defendant's affirmative defense, were to set out the entire case. These questions originally had to be based upon some allegation or point of evidence in the first part of the bill, but later this requisite became a mere fiction. Apparently the separate use of the question for the bill of discovery developed from this. It was not until 1854, however, in England that an act was passed making it unnecessary to go to equity to obtain the benefit of the bill of discovery. After this courts of law issued the order in that country.²

About this time procedure underwent a reform in the codes in the United States. The draftsmen of the first codes realized the importance of a discovery to be used directly by the courts of law, but many of the later code states

1. 20 F. Supp. 244 (S. D. N. Y. 1937).

2. For the history of discovery before trial, see excellent treatment in RAGLAND, DISCOVERY BEFORE TRIAL (1932).

did not include provision for the separate discovery. To some extent this is remedied in these states by liberal provisions for depositions, the original purpose of which was the preservation of testimony. The deposition is used also as the pre-trial discovery in those states where pre-trial depositions are permitted.³ This use of the deposition has been criticised as a so-called "fishing trip" into the opponent's case. Looking at the real purpose of a law suit, however, it would seem that the traditional battle of wits ought to be discouraged by as many admissions and settlements of issues as possible even before trial. The Missouri statutes as interpreted by the Missouri courts are rather liberal in permitting the use of depositions not only as a means of preserving testimony, but also as a discovery.⁴

The principal case involves a provision for examination of persons when an estate is in the process of bankruptcy administration. Section 21a of the Bankruptcy Act⁵ provides: "A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt *and his wife*, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act. . . ." The case here makes the particular issue of whether creditors can use the examination under this section to find acts of bankruptcy upon which to base their petition. The writer has found no cases going to the extent that this case has gone; in fact the court recognized that it was making an exceptional use of the examination. Authority seems to be contrary to such use. Where an attempt was made to use Section 21a for inquiring into the solvency of the alleged bankrupt, it was held a perversion of that section to so use it.⁶ The court said that the only purpose of the section was to aid in discovering assets of an estate that was in bankruptcy administration. Where the alleged bankrupt denied that he had committed any act of bankruptcy, and where the issues so raised were referred to a referee but no adjudication had as yet been made, it was held⁷ that at that point the estate was not even in process of bankruptcy administration for purposes of the section.⁸ As soon as the petition is filed and

3. *Id.* at 18.

4. MO. REV. STAT. (1929) §§ 1753 *et seq.* (depositions); §§ 1789 *et seq.* (preservation of testimony). Cases interpreting these sections: *Lewin v. Dille*, 17 Mo. 64 (1852); *Ex parte McKee*, 18 Mo. 599 (1853); *Ex parte Munford*, 57 Mo. 603 (1874); *Ex parte Gfeller*, 178 Mo. 248, 77 S. W. 552 (1903); *Matthews v. Missouri Pacific Ry.*, 142 Mo. 645, 44 S. W. 802 (1898); *Ex parte Welborn and Mansell*, 237 Mo. 297, 141 S. W. 31 (1911); *Ex parte Krieger*, 7 Mo. App. 367 (1879); *Ex parte Livingston*, 12 Mo. App. 80 (1882); *Orr and Lindsley Shoe Co. v. Hance*, 44 Mo. App. 461 (1891); *Eckerle v. Wood*, 95 Mo. App. 378, 69 S. W. 45 (1902).

5. 30 STAT. 552, 11 U. S. C. § 44 (1889).

6. *Abbott v. Wauchula Mfg. & Timber Co.*, 229 Fed. 677 (C. C. A. 5th, 1916).

7. *In re Davidson*, 158 Fed. 678 (D. Mass. 1907).

8. The following cases held that no examination could be had until after the debtor had been adjudicated bankrupt: *In re Crenshaw*, 155 Fed. 271 (S. D.

a receiver appointed to take possession of the property, it has been held that the estate is then in the process of administration and in the custody of the court sufficiently to warrant examination under Section 21a.⁹ In all these cases it is specifically pointed out that the purpose of the section is for the discovery of assets and not for other purposes. No attempt was made in those cases to find a basis for the petition itself so as to place the debtor in bankruptcy administration.

The use of the examination for purposes of reorganization of corporations under Section 77B of the Bankruptcy Act¹⁰ is restricted to a greater degree seemingly. It has been said that the filing of the petition in involuntary bankruptcy places the property in the custody of the court, but when the examination is used in conjunction with section 77B the estate of the debtor is not in the process of administration until an order is made approving the petition or answer of the debtor.¹¹

The interpretation and use of the section in the principal case seems to go too far. In the ordinary civil suit the so called "fishing trip" is useful and does not produce harm, but any attempt to force a person into involuntary bankruptcy with its attendant consequences should be discouraged until complete grounds for the administration have been actually discovered. Mere suspicion should not enable creditors to bring this process into play.

PAUL F. NIEDNER

CONSTITUTIONAL LAW—CORPORATIONS AS "PERSONS" UNDER THE FOURTEENTH AMENDMENT.

*Connecticut General Life Ins. Co. v. Johnson.*¹

For more than fifty years the development of that portion of American constitutional law relating to the Fourteenth Amendment has been based largely upon the assumption that corporations are "persons" under the due process and equal protection clauses of the Fourteenth Amendment. In the instant case the validity of that assumption has been challenged by Justice Black. In that case

Ala. 1907); *In re Davidson*, 158 Fed. 678 (D. Mass. 1907); *Skubinsky v. Bodek*, 172 Fed. 332 (C. C. A. 3rd, 1909); *In re Thompson*, 179 Fed. 874 (W. D. Pa. 1910); *Podolin v. McGettigan*, 193 Fed. 1021 (C. C. A. 3rd, 1912). The following cases held that the examination under Section 21a could be had as soon as the petition was filed and receiver appointed, because the estate was then in the process of bankruptcy administration within the meaning of the section: *In re Fixen & Co.*, 96 Fed. 748 (S. D. Cal. 1899); *In re Fleischer*, 151 Fed. 81 (S. D. N. Y. 1907); *Ex parte Bick*, 155 Fed. 908 (S. D. N. Y. 1907); *Wechsler v. U. S.*, 158 Fed. 579 (C. C. A. 2d, 1907); *United States v. Liberman*, 176 Fed. 161 (C. C. E. D. N. Y. 1910).

9. *Cameron v. United States*, 231 U. S. 710 (1913).

10. 48 STAT. 912, 11 U. S. C. § 207 (1934).

11. *In re Fox Metropolitan Playhouses*, 16 F. Supp. 950 (D. N. J. 1936).

1. 58 Sup. Ct. 436 (1938).

a Connecticut corporation was admitted to do business in California. The corporation entered into contracts of reinsurance with other corporations licensed to do business in California, reinsuring policies issued by said corporations in California. All of these contracts of reinsurance were made in Connecticut and both the premiums and the losses, if any, were payable there. The state of California sought to tax the premiums received from the contracts of reinsurance. The majority of the Supreme Court held that, inasmuch as corporations are within the protection afforded by the due process clause and inasmuch as the due process clause has been interpreted to deny the states the right to tax or otherwise regulate the corporation's activities outside the jurisdiction and inasmuch as the contracts in question were neither executed in California nor to be performed there, the tax sought to be imposed was violative of due process. Justice Black dissented from the majority ruling contending, among other reasons, that the word "person" as used in the Fourteenth Amendment does not include corporations. He asserted that, at the time of the passage of the amendment, no mention of a desire to protect corporations was made. The amendment was ratified in the belief that it was to provide equality for the then newly freed negro race. The validity of the argument that the framers of the amendment intended to protect corporations is denied by Justice Black because he says that such a secret intent on the part of the framers would not justify the construction placed on the amendment inasmuch as no disclosure of such an intent was made to the states when they ratified the amendment.

The tremendous effect and importance of the adoption of the views expressed by Justice Black by a majority of the Supreme Court, if such a startling reversal of the trend of the past fifty years ever occurs, makes it advisable to inquire into the true meaning of the Fourteenth Amendment. History books tell us that the Fourteenth Amendment, which went into effect on July 28, 1868, was passed to remedy the situation created by the passage of anti-negro legislation by the southern states materially restricting the freedom of the negroes. The famous *Slaughterhouse Cases*² were the first to interpret this amendment and, speaking for the majority of the court concerning the reasons for the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, Justice Miller said,³ ". . . no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and *without which none of them would have even been suggested*; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen" (italics the author's).

Until the case of *San Mateo County v. Southern Pac. R. R.*,⁴ there was no suggestion that corporations were to be included within the term "persons" as used in the Fourteenth Amendment. At that time Roscoe Conkling, in arguing

2. 83 U. S. 36 (1873).

3. *Id.* at 71.

4. 116 U. S. 138 (1885).

the case before the Supreme Court, contended that the committee which framed the amendment, he being a member of that committee, intended that corporations be within the scope of the words there used.⁵

Later that same year, in *Santa Clara County v. Southern Pac. R. R.*,⁶ the Supreme Court, through Mr. Chief Justice Waite said, prior to the arguments on the case, "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."⁷ No reasons were advanced for this ruling which probably did more to limit the legislative power of the states than any other single ruling ever made by the Supreme Court. Since that time no reasons for this holding have been advanced. In cases where the issue has arisen the Supreme Court has contented itself with the statement that the question was well settled and with the citation of the *Santa Clara case*.⁸ It would seem from the foregoing that the arguments advanced by Mr. Conkling in the *San Mateo case* were very persuasive upon the court.

Looking at the words of the Fourteenth Amendment, the argument advanced by Judge Woods, while a member of the federal district court of Louisiana, would seem very convincing. He there said:⁹ "Are corporations persons within the meaning of the" . . . [14th] amendment? . . . "The word 'person' occurs three times in the first section, in the following connections: 'All persons born or naturalized in the United States'—'nor shall any state deprive any person of life, liberty or property,' etc.—'nor' shall any state 'deny to any person within its jurisdiction the equal protection of the law.' The complainants claim that this last clause applies to corporations—artificial persons. Only natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses just quoted. If we adopt the construction claimed by complainants, we must hold that the word 'person,' where it occurs the third time in this section, has a wider and more comprehensive meaning than in the

5. See Graham, *The "Conspiracy Theory" of the Fourteenth Amendment* (1938) 47 YALE L. J. 371.

6. 118 U. S. 394, 396 (1885).

7. *Id.* at 396.

8. *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181 (1888); *Mo. Pac. Ry. v. Mackey*, 127 U. S. 205 (1888); *Minneapolis & St. Louis Ry. v. Beckwith*, 129 U. S. 26 (1889); *Charlotte, Columbia & Augusta R. R. v. Gibbes*, 142 U. S. 386 (1892); *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U. S. 578 (1896); *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150 (1897); *Smyth v. Ames*, 169 U. S. 466 (1898); *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U. S. 544 (1922).

9. *Insurance Co. v. New Orleans*, 13 Fed. Cas. No. 7,052, at 67, 68 (C. C. La. 1870).

other clauses of the section where it occurs. This would be a construction for which we find no warrant in the rules of interpretation."¹⁰

By looking at the words of the amendment, we may see the strange interpretation placed upon it by the Supreme Court. Section 1 reads, "All persons born or naturalized in the United States . . . are citizens of the United States . . . nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Section 2 provides for apportionment of representatives counting ". . . the whole number of persons in each State. . . ." Section 3 says: "No person shall be a Senator or Representative in Congress . . ." and goes on to deny the right to participate in governmental activities to citizens who took part in the rebellion.

It has been held that the term "liberty" applies only to the liberty of natural persons and does not include artificial persons.¹¹ The term "life" has never been applied to corporations.¹² That a corporation is not within the meaning of "person" in Section 2, nor within the meaning of "person" in Section 3, is indisputable. In other words, the term "person" includes corporations when referring to "property," but not when referring to "life" or "liberty," and when referring to equal protection, but not when referring to apportionment of representatives and qualifications for representatives. As Justice Black aptly points out,¹³ ". . . this clause is construed to mean as follows: 'Nor shall any State deprive any *human being* of life, liberty or property without due process of law; nor shall any State deprive any corporation of property without due process of law.'" Nowhere in the Fourteenth Amendment is there the slightest intimation that "person" is to mean one thing in a certain place and to mean something else in other places.¹⁴

10. It is interesting to note that Judge Woods who decided this case was a member of the Supreme Court at the time of the Santa Clara case and that he made no protest at that time against the adoption of the construction of the Fourteenth Amendment then placed upon it. Neither did Justice Miller who wrote the majority opinion in the Slaughterhouse cases. Neither the justices themselves nor any modern writers have advanced any reason for their change in attitude toward the proper construction of the amendment.

11. *Northwestern Life Ins. Co. v. Riggs*, 203 U. S. 243 (1906); *Western Turf Ass'n v. Greenberg*, 204 U. S. 359 (1907). There might seem to be some doubt as to this in view of *Grosjean v. American Press Co.*, 297 U. S. 233 (1936), which permitted a corporation to contend it was deprived of "liberty" but the court did not discuss this point. See Note (1937) 26 GEO. L. J. 132.

12. So far as the writer has been able to determine, no corporation has ever contended that it came within the scope of "life". Consequently, there is no square holding on this point. See, however, Judge Woods' dictum to the effect that only a natural person can be deprived of life in *Insurance Co. v. New Orleans*, 13 Fed. Cas. No. 5072, at 67 (C. C. La. 1870).

13. *Connecticut General Life Ins. Co. v. Johnson*, 58 Sup. Ct. 436, 442 (1938).

14. It has been contended that the wording of the Fourteenth Amendment is the result of a conspiracy by certain members of the committee which drafted the amendment to seem to aid the plight of the negroes while at the same time depriving the states of much of their power to regulate corporations. This con-

However correct the interpretation of the Fourteenth Amendment adopted by Justice Black may seem, it must not be forgotten that the proposition that corporations are "persons" within the meaning of a portion of the due process clause and within the meaning of the equal protection clause is well settled, and, although the writer does not believe in blind adherence to the doctrine of *stare decisis*, a reversal of this proposition by judicial decision would undoubtedly create much uncertainty inasmuch as the status of a law once declared unconstitutional and then declared constitutional is in much doubt¹⁵ and, still further, inasmuch as corporate enterprises would be utterly unprepared for the regulations and taxes which might be imposed upon them by the various state legislatures in the exercise of their regained power to tax and regulate freely the corporation. If it be desirable that the power once had by the states to regulate corporations be restored to them and if it be desirable that much of the uncertainty caused by the restoration of this power by judicial decision be avoided, perhaps the method of constitutional amendment suggested by Senator Borah would be the most feasible means of bringing about this result.¹⁶

MORTON M. LEIBOWITZ.

LANDLORD AND TENANT—LIABILITY FOR PERSONAL INJURIES WHERE CONTRACT TO REPAIR.

*Norris v. Walker*¹

Plaintiff is a child, and suit was brought in her behalf by her father as next friend. Defendants are owners of an apartment house, which they leased to the parents of plaintiff. Plaintiff alleged that when her parents were negotiating for the lease, they told defendants, verbally, that they had a small child, and that there was an unguarded stairway, which rendered the premises unsafe for

attention has not been definitely established and certainly attributes to the framers of the amendment an insight into future events which is nothing short of phenomenal inasmuch as, at that time, "due process" had merely been a safeguard against arbitrary procedure and not a safeguard of substantive rights as it subsequently became. For a discussion of the above contention, see Graham, *loc. cit. supra*, note 5.

15. The status of the law declared unconstitutional in *Adkins v. Children's Hospital*, 261 U. S. 525 (1923), is in much doubt due to the reversal of that decision in *West Coast Hotel v. Parrish*, 57 Sup. Ct. 578 (1937). An even worse situation would result from a reversal of the holding that a corporation is a "person" within the meaning of the due process and equal protection clauses inasmuch as there would be innumerable cases, not mentioned by name, which would be, in effect, overruled.

16. It is to be remembered that in March, 1937, shortly after President Roosevelt submitted to Congress his Court Reform Bill, Senator Borah proposed to amend the Fourteenth Amendment by prohibiting the Supreme Court from considering "due process" from anything but a procedural standpoint. Senator Borah further said that, if he thought there was a chance of its success, he would propose that the word "persons" be redefined so as not to include corporations. See *N. Y. Times*, Feb. 26, 1937, at 1.

1. 110 S. W. (2d) 404 (Mo. App. 1937).

such child, the plaintiff; that in consideration of the agreement of plaintiff's parents to rent said apartment, and in contemplation of the possibility of plaintiff falling through the open balustrade, defendant agreed to enclose the unguarded stairway. Further, that upon defendants so agreeing, plaintiff's parents became tenants from month to month of defendant, but that defendant, although often requested to do so, negligently failed to enclose said stairway; that as a direct result of defendants' negligence, in failing to enclose the stairway, plaintiff fell therefrom and was injured. Defendant demurred to the petition and the demurrer was sustained by the trial court. The Kansas City Court of Appeals, in affirming the ruling of the trial court, held that a tenant may not ground an action in tort for personal injuries, growing out of the landlord's failure to repair, after he had agreed to do so.

In the absence of an agreement to repair, it is rather clear that the landlord is not liable to the tenant, or one on the premises in the right of the tenant, for injuries or damages that may accrue to him, through the disrepair of the premises.² The reason is that after the tenant takes possession, the landlord has no right of entry, nor any control over the leased premises. This reason is not present in a case where the landlord has expressly agreed to repair. Nevertheless, there is a direct split of authority as to whether a tenant or one on the premises in the right of the tenant may maintain a tort action against his landlord, for injuries occasioned by the disrepair of the premises, after the landlord has agreed to repair. The instant case, and the Missouri decisions, are to the effect that such an action cannot be maintained, but that his sole remedy is a contract action for breach of the covenant to repair.³ They reason that a lessor's covenant to repair will not support an action for personal injury due to failure to make repairs, because those injuries are deemed too remote to have been contemplated by the parties when the covenant was made.⁴ However, in *Graff v. Lemp Brewing Co.*,⁵ the Kansas City Court of Appeals drew a distinction between an attempted recovery for personal injuries, in an action based on breach of a

2. *Vai v. Weld*, 17 Mo. 232 (1852); *Peterson v. Smart*, 70 Mo. 34 (1879); *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 738 (1890); *Glenn v. Hill*, 210 Mo. 291, 109 S. W. 27 (1908); *Corey v. Losse*, 297 S. W. 32 (Mo. 1927); *Gray v. Pearline*, 328 Mo. 1192, 43 S. W. (2d) 802 (1931); *Little v. Macadaras*, 29 Mo. App. 332 (1888); *Roberts v. Cottey*, 100 Mo. App. 500, 74 S. W. 886 (1903).

3. *Kohnle v. Paxton*, 188 S. W. 155 (Mo. 1916); *Turner v. Ragan*, 229 S. W. 809 (Mo. 1921); *Lahtinen v. Continental Bldg. Co.*, 339 Mo. 438, 97 S. W. (2d) 102 (1936) (where an invitee of the tenant was suing, but the principle involved is the same); *McBride v. Gurney*, 185 S. W. 735 (Mo. App. 1916); *Mathews v. Galbraith*, 238 S. W. 554 (Mo. App. 1922); see *Glenn v. Hill*, 210 Mo. 291, 301, 109 S. W. 27, 30 (1908).

4. *Kohnle v. Paxton*, 188 S. W. 155 (Mo. 1916); see *Korach v. Loeffel*, 168 Mo. App. 414, 422, 151 S. W. 790, 792 (1912). But cf. *Marcheck v. Klute*, 133 Mo. App. 280, 113 S. W. 654 (1908), where, as in the instant case, the purpose of the agreement to repair was to safeguard the tenant's children, and hence an injury to one of them in consequence of a failure to perform was contemplated by the parties when the stipulation was made. This distinction is also suggested in 1 *TIFFANY, LANDLORD AND TENANT* (1910) § 87 d. (10).

5. 130 Mo. App. 618, 109 S. W. 1044 (1908).

contract to repair, and a tort action based on a breach of the duty that that contract created, and allowed a recovery in the tort action.⁶ But the Supreme Court has since overruled the case.⁷

The more modern view is that in addition to liability for breach of contract, the law imposes a tort liability for damages caused by the lessor's negligent failure to perform his contract.⁸ One of the reasons given for this position is that the remedy is for the wrong committed by the landlord in his negligent failure to perform a duty voluntarily assumed by him, which he must know would protect the tenant, and that by his agreement, the landlord has tended to cause the tenant to hold back and wait for its execution on his part.⁹ A further reason is that the contract affords the landlord the right of going on the premises to make repairs, so that the tenant will probably rely upon this being done, and that the rent was presumably fixed with this obligation in mind.¹⁰

Regarding the trend of modern authority, and considering the fact that in the case under discussion the agreement to repair was made for the express purpose of preventing injury to the plaintiff, it seems that the court, although following the former Missouri decisions on the liability of a lessor to make repairs where he has so contracted, did not apply the more persuasive considerations.

OZBERT W. WATKINS, JR.

NEGLIGENCE—HUMANITARIAN DOCTRINE—INSTRUCTION ON CONTRIBUTORY
NEGLIGENCE

*Crews v. Kansas City Public Service Co.*¹

The plaintiff was walking north attempting to cross an intersection in order to board a street car that was approaching toward her from the east. She saw

6. However, a few years later, Judge Ellison of the same court in Dailey v. Vogl, 187 Mo. App. 261, 173 S. W. 707, (1915), expressly disapproved its decision in the Graff case, saying that its decision leads to an anomaly, in that the damages are the same in either form of action, as the damages in the contract action include damages for injury to the tenant; the other two judges, in separate opinions, agreed with the conclusion on other grounds, but stated that they did not intend this opinion to overrule the Graff case.

7. Kohnle v. Paxton, 188 S. W. 155 (Mo. 1916).

8. Stillwell's Adm'r v. South Louisville Land Co., 22 Ky. 785, 58 S. W. 696 (1900); Robinson v. Heil, 128 Md. 645, 98 Atl. 195 (1916); Barron v. Liedloff, 95 Minn. 474, 104 N. W. 289 (1905); Ashmun v. Nichols, 92 Ore. 223, 178 Pac. 234 (1919); Merchants' Cotton Press, etc., Co. v. Miller, 135 Tenn. 187, 186 S. W. 87 (1916); Flood v. Pabst Brewing Co., 158 Wis. 626, 149 N. W. 489 (1914) (where plaintiff was an invitee of the tenant); see Folley v. United Bldg. and Loan Ass'n of Hackensack, 117 N. J. L. 54, 57, 186 Atl. 591, 593 (1936); RESTATEMENT, TORTS (1934) § 537; cf. Rosenberg v. Krinick, 116 N. J. L. 597, 602, 186 Atl. 446, 449 (1936) (stating that there is no liability, unless such promise is supported by a new consideration).

9. Merchants' Cotton Press, etc., Co. v. Miller, 135 Tenn. 187, 186 S. W. 87 (1916).

10. HARPER, LAW OF TORTS (1933) § 103.

1. 111 S. W. (2d) 54 (Mo. 1937).

the street car coming and, thinking the motorman saw her, she waved a white handkerchief at him while crossing the car tracks. The motorman did not see the plaintiff until she was about eight or ten feet from the car. The right front of the car struck her causing the injuries complained of. The case was submitted to the jury upon negligence under the humanitarian doctrine, the court instructing the jury at plaintiff's request that if plaintiff was in a position of imminent peril, and if defendant's motorman saw, or by the exercise of ordinary care could have seen the plaintiff in such position of imminent peril and apparently oblivious to such imminent peril, and could have stopped or sufficiently slackened the speed of the car without injury to himself or his passengers to have prevented colliding with plaintiff and injuring her, but negligently failed to do so and as a result plaintiff was injured, then the verdict must be in favor of the plaintiff, "even though you should believe from the evidence that plaintiff failed to use ordinary care for her own safety and was careless in going upon said street car track in front of said approaching street car." The defendant contended the latter part of the instruction was prejudicially erroneous. This contention was rejected by the court and the judgment for the plaintiff was affirmed.

It is not proposed to dwell upon the necessity of the obliviousness of the plaintiff,² or the question of the defendant's primary or antecedent negligence which under some fact situations govern the instruction to be given,³ but to limit this discussion to whether or not the instruction in the principal case injected plaintiff's contributory negligence into the case as a foreign issue.

In reconciling and distinguishing cases on this point, it is important to note the manner in which the question of plaintiff's contributory negligence arises. It may arise in one of three ways. First, defendant may ask for an instruction in a case submitted wholly under humanitarian negligence, that if the jury find that plaintiff was contributorily negligent their verdict should be for the defendant. If the instruction is given, it is reversible error, for it is injecting foreign and prejudicial issues into the case.⁴ Second, defendant may ask for an instruction that if the jury find that plaintiff's negligence was the sole cause, their verdict should be for the defendant. It would be error to refuse to give such instruction for the defendant is entitled to submit any valid defense to the jury.⁵ This includes a defense of concurrent cause.⁶ The plaintiff cannot run

2. The question of the necessity of plaintiff's obliviousness is discussed in (1937) 2 Mo. L. Rev. 523.

3. The relation of defendant's antecedent negligence to the humanitarian doctrine is discussed in (1937) 2 Mo. L. Rev. 525.

4. *Mayfield v. Kansas City Southern Ry.*, 337 Mo. 79, 85 S. W. (2d) 116 (1935), noted in (1936) 1 Mo. L. Rev. 103; *Francis v. Missouri Transit Co.*, 85 S. W. (2d) 915 (Mo. 1935); *Dilallo v. Lynch*, 101 S. W. (2d) 7 (Mo. 1936).

5. *Borgstede v. Waldbauer*, 337 Mo. 1205, 88 S. W. (2d) 373 (1935); *Doherty v. St. Louis Butter Co.*, 339 Mo. 996, 98 S. W. (2d) 742 (1936); *Johnston v. Ramming*, 100 S. W. (2d) 466 (Mo. 1936); *McGrath v. Meyers*, 107 S. W. (2d) 792 (Mo. 1937); *Smithers v. Barker*, 111 S. W. (2d) 47 (Mo. 1937) (holding an instruction erroneous for plaintiff, authorizing a recovery although there was contributory negligence, where the jury would have been warranted in finding that plaintiff's negligence was the sole cause of his injury.)

6. *Ellis v. Metropolitan Street Ry.*, 234 Mo. 657, 138 S. W. 23 (1911).

a race with death and then hold the defendant responsible. Third, the situation in the principal case, where the plaintiff requests an instruction to the effect that his contributory negligence is no defense to the defendant. Such an instruction should not be deemed to inject the foreign issue of plaintiff's contributory negligence into the case. The plaintiff is entitled to make out a case of humanitarian negligence against the defendant and to have an instruction that his negligence in putting himself in a position of peril is no defense.⁷ Furthermore, if the defendant was overly zealous in attempting to convince the jury their verdict should be for him because of plaintiff's contributory negligence, the trial court would be fully justified in giving such an instruction at the request of the plaintiff, the instruction being in the nature of a cautionary instruction to limit the jury to the precise issue of humanitarian negligence, the plaintiff's negligence not barring a recovery by him. Considered as such, there is no collateral instruction on facts not at issue under the humanitarian doctrine.

HERBERT S. BROWN.

TAX SALE OF LAND SUBJECT TO EQUITABLE RESTRICTIONS.

*Schlafly v. Baumann*¹

Plaintiff sued to restrain defendant, collector of revenue for St. Louis, from selling a lot at a tax sale free and clear of restrictions. The lot in question was subject to an equitable restriction that it should be used only for residential purposes, the restriction covering the cost and type of building to be erected thereon. The Missouri Statutes² provide that the purchaser at a tax sale shall take an absolute estate in fee simple. The court granted the relief on the theory that the tax sale did not destroy the restrictive easements of adjoining property owners.

The majority rule is that a tax sale is in the nature of an *in rem* proceeding and, therefore, that a tax title is a new and independent title, free from all other interests in the land.³ A minority of jurisdictions follow the view that a proceeding for taxes is *in personam* and the purchaser at a tax sale takes no better title than the person whose lands were assessed had.⁴ The courts follow-

7. *Jordon v. St. Joseph Ry., Light, Heat & Power Co.*, 335 Mo. 319, 73 S. W. (2d) 205 (1934). But where under defendant's evidence the jury would have been warranted in finding that plaintiff's negligence was the sole cause of the injury, an instruction for the plaintiff on contributory negligence has been held erroneous. *Smithers v. Barker*, 111 S. W. (2d) 47 (Mo. 1937), cited *supra* note 5.

1. 108 S. W. (2d) 363 (Mo. 1937).

2. MO. REV. STAT. (1929) § 9957, as amended by Mo. Laws 1933, p. 438.

3. COOLEY, TAXATION (4th ed.) § 1492. "A tax title is a new title, and not merely the sum of the old titles." TIFFANY, REAL PROPERTY (2d ed.) § 558. *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747 (1887); *Hill v. Williams*, 104 Md. 595, 65 Atl. 413 (1906); *Jones v. Devore*, 8 Ohio St. 430 (1858).

4. *McDonald v. Hannah*, 51 Fed. 73 (C. C. Wash., 1892); *Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813 (1893); *Government of Philippine Islands v. Adriano*, 41 Philippine 112 (1920).

ing the majority rule have been reluctant to apply it strictly, and in the absence of an unequivocal state statute, the doctrine usually is not extended to include easements,⁵ especially where the easement is a visible, open and continuous one.⁶ Neither should the doctrine be extended to include equitable restrictions,⁷ although there is some authority to the contrary.⁸

It has been held that a covenant restrictive of the use of land gives a property right to the beneficiary of the covenant, of which he cannot be deprived without just compensation.⁹ This would seem to be fair, for such negative easements may be just as valuable as an affirmative easement across the land of another, such as a pipe line or right of way. A tax sale should not, therefore, operate so as to destroy such easements, especially where the easement is lawfully acquired prior to the levying of the taxes for which the servient tenement is sold.¹⁰

Whether the taxes, for which the land is being sold, were assessed exclusive of the easement, or including it, should make no difference. However, some cases make a distinction on this ground,¹¹ especially in cases involving restrictive easements, the primary purpose of which is to make *all* the land in the restricted area more valuable, or to keep out undesirable businesses or persons for the safety and peace of mind of the residents of the restricted district. Furthermore, this type of easement does not give an affirmative right in the land being sold.

Such restrictions benefit all the land in the restricted area. Because one landowner has become delinquent in his taxes is no reason for impairing the value of the lands of the other owners. The state is also benefited by increased revenues because of the enhanced value of the lots in the restricted area. It would be a great hardship upon the owners of such easements if they were forced to pay the delinquent taxes assessed against the other lands so restricted in order to protect the restrictions from destruction. Building restrictions are desir-

5. COOLEY, *TAXATION* (4th ed.) § 1494. *Jackson v. Smith*, 153 N. Y. App. 724, 138 N. Y. Supp. 654 (1st Dep't 1912).

6. *Hill v. Williams*, 104 Md. 595, 65 Atl. 413 (1906); *Tide-Water Pipe Co. v. Bell*, 280 Pa. 104, 124 Atl. 351 (1924).

7. 26 R. C. L. § 360. *Northwestern Improvement Co. v. Lowry*, 66 P. (2d) 792 (Mont. 1937), noted in (1937) 12 WASH. L. REV. 300.

8. *Hanson v. Carr*, 66 Wash. 81, 118 Pac. 927 (1911). The easement was granted after the taxes had accrued. This point was not raised. *Nedderman v. Des Moines*, 221 Iowa 1352, 268 N. W. 36 (1936); *In re Hunt*, 34 Ont. L. Rep. 256, 24 D. L. R. 590 (1915).

9. *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242, 117 N. E. 244 (1917). *Cf. Wharton v. United States*, 153 Fed. 876 (C. C. A. 1st, 1907); *Doan v. Cleveland Short Line Ry.*, 92 Ohio St. 461, 112 N. E. 505 (1915).

10. *Poetzsch v. Mayer*, 155 Misc. 422, 189 N. Y. Supp. 695 (Sup. Ct. 1921). *Cf. Stansell v. America Radiator Co.*, 163 Mich. 528, 128 N. W. 789 (1910). The servient owner cannot allow his land to be sold for taxes, buy in at the tax sale, and thus cause the destruction of the easement.

11. *Jackson v. Smith*, 153 N. Y. App. 724, 138 N. Y. Supp. 654 (1st Dep't 1912); *Metropolitan Life Ins. Co. v. McGurk*, 193 Atl. 696 (N. J. 1937), noted in (1938) 22 MINN. L. REV. 578.

able because they increase the general utility and value of the property to each owner, and do not merely give an affirmative right to a single adjoining owner. These reasons should constitute good grounds for holding that a tax sale does not extinguish equitable servitudes. .

HERBERT S. BROWN

WILLS—LEGACIES—CUMULATIVE OR SUBSTITUTIONAL

*Kemp v. Hutchinson*¹

By her will of 1928, testatrix directed that her property other than household goods be sold, and that half of her net estate be set aside as an annuity trust fund for her brother-in-law, L. C. Hutchinson, who should have on the first of January next after her death, and each such date thereafter, \$500 net for his natural life, with remainder, if any, over to certain persons. The other half of her estate was to be distributed in varying amounts to other relatives. Suffering financial losses, and some of the beneficiaries having died, testatrix felt obliged to make some changes, so she made a codicil in 1933 changing some of the beneficiaries, “. . . and as to my brother-in-law L. C. Hutchinson be given five hundred dollars in cash and a bed and bedding, also furniture for one room, where ever he lives. . . .” Testatrix died a little more than a year after the codicil. Plaintiffs are the executor and other beneficiaries and bring this action for the purpose of procuring a construction of testatrix’s will. Defendant, Hutchinson, has assigned his interest to the other two defendants. The court held that the provisions are cumulative, that Hutchinson shall receive: first, \$500 cash from the net estate; second, a bed and bedding; third, furniture sufficient for one room; fourth, that half of the remainder of the net value of the estate, after deducting said \$500, shall be placed in trust and administered as directed under the will.

In construing wills, to determine whether legacies in the codicil are cumulative or substitutional, the intention of the testator must be ascertained and made effective.² Evidence of testator’s circumstances and situation are available for the purpose of finding this intention,³ unless the language used is so unambiguous as to admit of only one interpretation.⁴ Direct declarations of the intention of the testator, however, are generally not admissible.⁵

1. 110 S. W. (2d) 1126 (Mo. App. 1937).

2. *Gould v. Chamberlain*, 184 Mass. 115, 68 N. E. 39 (1903); *Irvine v. Ross*, 339 Mo. 692, 98 S. W. (2d) 763 (1936); *Mo. REV. STAT.* (1929) § 567.

3. (1935) 94 A. L. R. 26, 215 (part of a long note on the admissibility of extrinsic evidence in the construction of wills, pp. 26-293).

4. *Brown v. Tuschoff*, 235 Mo. 449, 138 S. W. 497 (1911).

5. *Lehnhoff v. Theine*, 184 Mo. 346, 83 S. W. 469 (1904); (1935) 94 A. L. R. 26, 263. But evidence tending to show a knowledge of appreciation on testator’s part of his situation and circumstances is admissible, e. g. that he knew he was living on a diminishing income, that after execution of the will and before that of the codicil, his doctor told him that he would live through the summer, and that he would make greater inroads upon his principal than he had expected to

There are three ways in which this will and codicil could be construed. First, the codicil could operate in addition to the will, so that Hutchinson would take fully under both. This is in conformity with the principle that "legacies are generally considered cumulative when they are given by different instruments, as by will and codicil, or for different amounts or kinds of property. . . ."⁶ This view has even been stated as a presumption.⁷ This was the position taken by the court in the principal case. Second, the codicil could be considered a complete revocation of the will, the beneficiaries taking under it alone. But there is no express revocation of the prior instrument. Nor is there revocation by necessity, for the codicil does not purport to make a complete and contrary disposition of the property given by the will. The only possible theory for complete revocation is that the codicil sets forth an entirely different and inconsistent scheme of distribution. It is doubtful, however, whether the law will permit an entire revocation on this theory.⁸ Even if such a theory were permissible, it would scarcely apply here as the testatrix by codicil substituted certain beneficiaries for those named in the will, thus indicating a clear intention not to revoke the will entirely. In this connection, also, it should be noted that if the will were substituted and nullified by the codicil, testatrix would have died intestate as to part of her estate, against which there is a presumption.⁹ Third, the gift to Hutchinson by the codicil could be substituted for his gift under the will and the other beneficiaries under the will take except as provided to the contrary in the codicil.¹⁰ In favor of the latter position, it should be noted that testatrix's estate, not large to begin with,¹¹ was much depleted at the time of the execution of the codicil.¹²

The testatrix probably realized at the time of the execution of the codicil that her net estate at the time of her death might not greatly exceed \$500.¹³ It

make. *Gould v. Chamberlain*, 184 Mass. 115, 68 N. E. 39 (1903); *Sondheim v. Fechenbach*, 137 Mich. 384, 100 N. W. 586 (1904).

6. ATKINSON, WILLS (1937) 721; *cf.* 28 R. C. L. 295.

7. 69 C. J. 411, 412; 2 PAGE, WILLS (1920) § 1383.

8. ATKINSON, WILLS (1937) 384-385, 395. See note 10, *infra*.

9. *In re McClelland's Estate*, 257 S. W. 808 (Mo. 1924).

10. Note the similarity between implied partial revocation by subsequent instrument and the construction of the codicil as substitutional. The same result could be had without encountering the difficulty of not allowing implied partial revocation other than by necessity. See in this connection *Neibling v. Methodist Orphans' Home Ass'n*, 315 Mo. 578, 286 S. W. 58 (1926), 51 A. L. R. 639 (1927).

11. The will provides that half of the net estate shall be put in trust for Hutchinson, the other half *if any* to other persons. This shows that testatrix knew that her estate was not so abundant as to accommodate the annuity with ease. It is hard to tell from this provision just what testatrix meant by an "annuity trust fund," fifty per cent of the net balance be *set aside* . . . and invested in United States Bonds. . . ." Was the interest only to be used for the annual \$500 payments?

12. *Gould v. Chamberlain*, 184 Mass. 115, 68 N. E. 39 (1903) (depletion of the estate deemed an indication of a substitutional construction).

13. At the time of testatrix's death, her gross estate was only \$3,795.50, exclusive of household goods which was not to have been sold anyway. This was only a year after making the codicil, during which time there probably was no decided change, the estate prior to her will being around \$10,000, her hus-

can be safely said that she intended that Hutchinson should receive at least \$500, as well as the other chattels mentioned, before the other beneficiaries received anything. In addition there is nothing to indicate that she did not desire that he receive also the annuity so long as it could be provided from half of the remaining estate.¹⁴ There was no express revocation of the annuity by the codicil as there was of provisions for other beneficiaries under the will. If she wished to revoke the annuity, she could and likely would have done so by the use of the same sort of direct language with which she altered the beneficiaries. Thus it is tenable to hold, as the court did, that the annuity was to be effective and not supplanted by the codicil.

CHARLES M. WALKER.

WILLS—CONTEST—COSTS AND ATTORNEY'S FEES.

*McCrary v. Michael*¹

Plaintiffs unsuccessfully contested a will. Reversing the trial court's decision, the appellate court ordered that the costs of the contestants should not be paid from the estate but should be borne by the contestants. There was no claim made for attorney's fees. The court relied on a Missouri Statute² which provides: "In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law." The higher court said that since there was no statute placing the costs on the defendants (proponents here) they were to be borne by the contestants.

Of course, a successful contestant may recover his costs from an unsuccessful proponent.³ Where a will contest is without probable cause the courts uniformly hold that the contestants are not entitled to costs or attorney's fees.⁴ In the cases where the contestants have probable cause for contesting, they may have their costs paid out of the estate, according to some authorities.⁵ Some

band having willed her a \$5000 note and \$1000 worth of property, and she having a \$4000 house.

14. In view of the facts stated in note 12, *supra*, if Hutchinson had any considerable expectancy, he would probably not receive the annuity for his whole life.

1. 109 S. W. (2d) 50 (Mo. App. 1937).

2. MO. REV. STAT. (1929) § 1242.

3. Moyer v. Swygart, 125 Ill. 262, 17 N. E. 450 (1888). See also note 2, *supra*.

4. Sandusky v. Sandusky, 265 Mo. 219, 177 S. W. 390 (1915); *In re Castle's Will*, 17 N. Y. St. Rep. 810, 2 N. Y. Supp. 638 (Surr. Ct. 1888); *In re Whelan's Estate*, 17 N. Y. St. Rep. 772, 2 N. Y. Supp. 635 (Surr. Ct. 1888); *In re Roberts' Estate*, 147 Misc. 63, 263 N. Y. Supp. 723 (Surr. Ct. 1933); *In re De Lin's Estate*, 135 Ore. 8, 294 Pac. 600 (1931).

5. Pingree v. Jones, 80 Ill. 177 (1875) (error to charge executor); Perrine v. Applegate, 14 N. J. Eq. 531 (1862); *In re Marley's Will*, 140 App. Div. 823, 125 N. Y. Supp. 886 (3d Dep't 1910); *In re Jackman's Will*, 26 Wis. 364 (1870).

courts say that, if contestants are successful, a presumption is raised that they had probable cause and so should obtain their costs from the estate.⁶ A number of courts go so far as to hold that unsuccessful contestants who have probable cause may have their costs awarded to them out of the estate.⁷ Other jurisdictions have denied that contestants are entitled to costs from the estate, whether successful,⁸ or unsuccessful.⁹

Some jurisdictions even allow contestant's attorney's fees to be paid out of the estate.¹⁰ There should be no allowance for attorney's fees, whether successful or unsuccessful.¹¹ This is in accord with the general American practice in other civil cases where the rule is that each party must bear his own costs for counsel fees.¹²

If an unsuccessful party is allowed his costs from the estate this encourages will contests, which the law seeks to discourage, and also greatly diminishes estates. The strongest argument for holding that even a successful contestant is entitled to costs or attorney's fees is the case in which a party contests an invalid will so that a valid will may be established,¹³ the theory being that it is for the benefit of the estate that the property should be distributed according to a valid will. This view is without basis however because the parties are contesting for their own interest and not for the interest and benefit of the estate. However, where an executor in good faith contests the probate of another will, he is entitled to his expenses, for it is his duty to protect the estate.¹⁴ The executor stands in the same position as a trustee of an estate who is under a duty to defend the trust.¹⁵

Where statutes have been enacted, they often place the costs upon the con-

6. *In re Maurer's Will*, 44 Wis. 392 (1878).

7. *Seebrook v. Fedawa*, 33 Neb. 413, 50 N. W. 270 (1891); *In re Wandell's Estate*, 92 N. J. Eq. 195, 111 Atl. 683 (1920); *In re Carroll's Will*, 50 Wis. 437, 7 N. W. 434 (1880).

8. *Taylor v. Minor*, 90 Ky. 544, 14 S. W. 544 (1890).

9. *Carter's Adm'r v. Carter*, 10 Ky. Law Rep. 355 (1889); *Piper v. Heatherington*, 32 Miss. 306 (1856); *Wintermute's Will*, 27 N. J. Eq. 447 (1876); *Burr v. Burr*, 100 N. Y. 191, 3 N. E. 331 (1885); *In re Lamb's Will*, 22 N. Y. St. Rep. 351, 5 N. Y. Supp. 565, (Surr. Ct. 1889); *In re Seagrist's Will*, 1 App. Div. 615, 37 N. Y. Supp. 496 (1st Dep't 1896); *State v. Goodman*, 45 Wash. 55, 87 Pac. 1070 (1916).

10. *In re Warrington's Will*, 2 Boyce 595, 81 Atl. 501 (Sup. Ct. 1911) (only in exceptional cases); *Everson v. Hurn*, 89 Neb. 716, 131 N. W. 1130 (1915); *Smith v. Haire*, 138 Tenn. 255, 197 S. W. 678 (1917); *In re Nachtsheim's Will*, 166 Wis. 556, 164 N. W. 997 (1917) (statute).

11. *Greene v. Ballard*, 45 Ga. App. 509, 165 S. E. 310 (1932); *In re Estate of Berry*, 154 Iowa 301, 134 N. W. 867 (1912); *In re Eaton's Estate*, 204 App. Div. 609, 193 N. Y. Supp. 579 (3d Dep't 1923) (unsuccessful); *In re Gratton's Estate*, 136 Ore. 224, 298 Pac. 231 (1931); see also ATKINSON ON WILLS (1937) § 197.

12. See Goodhart, *Costs* (1929) 38 YALE L. J. 849; Note (1935) 21 VA. L. REV. 920.

13. *In re Faling's Estate*, 113 Ore. 6, 228 Pac. 821 (1924).

14. *In re Reimer's Will*, 237 App. Div. 343, 261 N. Y. Supp. 100 (2d Dep't 1933).

15. *In re Crawford's Estate*, 307 Pa. 102, 160 Atl. 585 (1931).

testants.¹⁶ Sometimes they provide that if contestants have reasonable grounds for contesting, then they get their costs from the estate.¹⁷ Where a statute uses the word "costs", it only means taxable costs and does not include attorney's fees.¹⁸ If the statute says "costs and expenses," then attorney's fees are allowed.¹⁹

The Missouri decisions upon this subject, other than the present case, are inadequate upon which to base any conclusions.²⁰

BARKLEY BROCK

16. *In re Salmon's Will*, 7 Boyce 446, 108 Atl. 93 (Ct. Gen. Sess. 1919); *In re Smith's Will*, 52 Wis. 543, 8 N. W. 616 (1881) (unsuccessful).

17. *Brown v. Corey*, 134 Mass. 249 (1883); *In re Roberts' Estate*, 147 Misc. 63, 263 N. Y. Supp. 723 (Surr. Ct. 1933); *In re Donges' Estate*, 103 Wis. 497, 79 N. W. 786 (1899).

18. *Estate of Olmstead*, 120 Cal. 447, 52 Pac. 804 (1898); *In re Deehan's Will*, 130 Me. 243, 154 Atl. 645 (1931); *Brilliant v. Simpson*, 110 Mich. 68, 67 N. W. 1101 (1896).

19. *Rioren v. Nesler*, 76 N. J. Eq. 576, 74 Atl. 791 (1909); *In re Statler's Estate*, 58 Wash. 199, 108 Pac. 433 (1910).

20. *Sandusky v. Sandusky*, 265 Mo. 219, 177 S. W. 390 (1915) (contestant who does not have probable cause cannot have attorney's fees out of the estate); *Weber v. Strobel*, 225 S. W. (Mo. 1920) (dictum that a successful contestant gets his costs out of the estate); *Calnane v. Calnane*, 223 Mo. App. 381, 17 S. W. (2d) 566 (1929) (dictum that costs can be against either estate or contestants); see also *Cash v. Lust*, 142 Mo. 630, 44 S. W. 724 (1897).

The general principles treated in this comment seem to be also involved in suits to construe wills or declare the provisions thereof void for matters of internal validity. However, the courts seem to be liberal in the allowance of costs and attorney's fees from the estate where parties seek construction of ambiguous provisions of a will. See *Trautz v. Lemp*, 72 S. W. (2d) 104 (Mo. 1934).