"In his death, the State has lost one of its best beloved and most distinguished citizens; this Court an able Judge.

"We move that this brief expression of our sincere regard be spread upon the records of this Court.

"James D. Shearer,
"Charles W. Farnham,
"Alf. E. Boyesen,
"Thomas S. Wood,
"John D. Sullivan,
"Henry B. Wenzell,
"Hugh T. Halbert,
Committee."

NOTES.

THE LAW SCHOOL.—The sixty-second annual session of the Law School has been inaugurated under the most favorable auspices; and present indications point to a very successful year.

In the regular teaching force of the school, but few changes have been made. Mr. Ralph Jackson Baker, who edited the LAW REVIEW last year and graduated *summa cum laude,* in June, has been elected an Instructor. He will teach courses on Trusts, Equitable Doctrines, and Public Service Corporations. Mr. Harold Evans, Esq., a graduate of the Law School, class of 1909, will lecture on Domestic Relations. Mr. Edward W. Evans, Esq., of the Philadelphia bar and also an alumnus of the school, will supervise the course in "Office Practice." Mr. Russell S. Wolfe, Esq., of the New York bar, will deliver a course of lectures on Code Pleading. Mr. Wolfe is also a graduate of the Law School and a former Editor-in-chief of the LAW REVIEW.

On the auxiliary teaching staff, several new names appear. Hon. W. U. Hensel, of Lancaster, Pa., will deliver a lecture on James Buchanan. Hon. John W. Gest, whose interesting article on "The Law and Lawyers of Balzac" appears in this number of the LAW REVIEW, will lecture on Legal Biography. And Hon. Hampton L. Carson, of the Philadelphia bar, will take as the subject of a lecture course, "The History of Legal Literature."

Several changes which have been made in the curriculum, become operative this year. Instead of first-year Equity, Dean Lewis will give first-year men a course in Associations, dealing, for the most part, with the Law of Agency. A new course on Public Service Corporations is open to third-year men. An interesting innovation in the form of a course in "Office Practice" will also be tried out. It has for some time been felt that the Law School should attempt to teach students to apply in a practical way some of the

legal theory which forms the basis of the regular courses of instruction. The course in "Office Practice" has this purpose in view. Four practical problems have been laid before the members of each of the three classes in the Law School; and no student can be advanced to a higher class, or graduated, who has not solved the problems to the satisfaction of the supervisor of the course. For instance, members of the third-year class will be required, before graduation, to write a will, validly making given dispositions of the fictitious testator's property; to draw a mortgage; to form a corporation, preparing the Certificate of Incorporation, the notice which must be published, proof of publication thereof, calls for the first meetings of stockholders and directors, and minutes of the first meeting; and to prepare all the papers necessary to properly bring a suit in assumpsit. For the first and second year classes similar problems have been prepared.

The number of students in attendance at the Law School is the largest since 1902. The registrations in the various classes are as follows: Third year class, 81; Second year class, 100; First year class, 175. There are also registered, eight special students, one partial student and two graduate students, bringing the total registrations up to 367. Only once before in the history of the Law School has the attendance been so large.

CORPORATIONS—ULTRA VIRES ACTS—ACCOMMODATION PAPER. —In a proceeding in equity against an insolvent corporation the receivers reported, in respect to claims presented by several banks arising on negotiable promissory notes, that the defendant corporation was an accommodation indorser. The Court held that although the execution or indorsement of accommodation paper is an act beyond the scope of corporate authority, the innocent holder for value of such paper could recover on it. It appeared, however, on all the evidence, that the banks could not be considered holders without notice.[1]

"The proposition is well supported by authority that it is *ultra vires* of a corporation to execute accommodation paper or to enter into contracts of guaranty or suretyship not in furtherance of its business, unless given express authority to do so."[2] Counsel for the receivers urged that the Court declare the paper void *ab initio*, adopting the doctrine stated in an opinion by Mr. Justice Gray in respect to contracts *ultra vires*. "The charter of a corporation * * * is the measure of its powers * * *. All contracts

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[1] Johnson v. Johnson Bros., 80 Atl. Rep. 741 (Me. 1911).

[2] (*a*) Note to *In re* Assignment Mutual, etc., 70 Am. St. Rep. 164; (*b*) 3 Thom. Corp., 2nd Ed., § 2225 and cases cited; (*c*) 7 Am. and Eng. Ency. Law, 2nd Ed., 793; (*d*) 1 Mora. Corps., 2nd Ed., § 423 and cases cited.

made beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds; the obligation of everyone contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks they have never undertaken; and above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law." [3] The Court, however, refused to apply this rule, characterizing it as too rigid. Quoting from the opinion in a recent case, it said: "It would see from the later opinion of courts and jurists that the doctrine of *ultra vires* is thought to have been heretofore too often and too strictly applied, especially in cases of contracts of corporations (other than municipal, at least), not in themselves harmful to the public." [4]

That such is the tendency is undoubtedly true. Mr. Freeman [5] says: "After a study of the cases * * * the impression is forced upon us, that the doctrine of *ultra vires* as applied to contracts of private corporations, has almost lost its meaning. The undermining of the foundation upon which it has rested from its inception has proceeded simultaneously from different directions until the doctrine itself seems almost ready to fall under its own weight." Mr. Seymour D. Thompson, after tracing the development of what he calls "The Revolt against the Doctrine of Ultra Vires," declares: "My own view is that the doctrine of *ultra vires* has no proper place in the law of private corporations except in respect of contracts which are bad in themselves, the making of which is prohibited by considerations of public morality, of justice or of a sound public policy, and which stand upon such a footing that neither party can be regarded as innocent or blameless in entering into them." [6] Mr. Lilienthal says, "We have seen how the doctrine of *ultra vires,* irrespective of the question of State interference, has developed or rather disintegrated"; [7] while Mr. George Wharton Pepper acknowledges that, "If we return from the domain of theory to our final survey of existing conditions in American courts, it seems hard to escape a conclusion favorable to the view which results in the enforcement, in so many cases, of unauthorized and prohibited contracts." [8]

It is submitted, however, that it was unnecessary to consider the "rigid" or the "more reasonable" doctrine. It is established beyond controversy that "notwithstanding the rule that corporations have no power to make or endorse negotiable paper for accommoda-

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[3] Central Transp. Co. v. Pullman Car Co., 139 U. S. 24 (1890).

[4] Oakland Electric Co. v. Union Gas and Electric Co., 107 Me. 279 (1910).

[5] *Supra,* note 2 (*a*).

[6] 28 Am. Law Rev. 397, 398.

[7] 11 Har. L. R. 396.

[8] 9 Haw. L. R. 271.

tion, such paper will be good in the hands of an innocent purchaser for value without notice of such fact." [9] "Unless the corporation be specially authorized to do so, the execution or endorsement of accommodation paper for the benefit of a third person is an act beyond the scope of its corporate authority but * * * a *bona fide* holder taking without notice of its character could enforce it." [10]

The rule is stated flatly in an early case as an incontrovertible proposition needing no citation of authorities,[11] but it is admittedly an exception to the general doctrine of *ultra vires* in favor of negotiable paper, and a rather difficult one to support by any rule of logic. Nevertheless an analogy is found in cases where an agent is given authority to execute commercial paper in the business of his principal and in excess of his authority he executes paper for his own benefit. In such case the tendency throughout the United States is to allow the innocent holder for value to recover against the principal.[12] This is an exception to the general rule exempting the principal from liability for acts of an agent beyond the scope of his authority. In view of the fact that both parties are innocent and both have trusted the fraudulent agent it may well be asked: Why should the principal be liable? It may be said that the principal inaugurated the sequence of events causing the plaintiff to act to his detriment by conferring power upon the agent. But this is not true in the particular instance mentioned.

The same arguments are applicable to the case where a corporation issues accommodation paper *ultra vires*. It is said that it is the obligation of every one contracting with a corporation to take notice of the legal limitations of its powers. It is well settled that "private corporations, unless prohibited by charter or statute have the implied power to execute promissory notes or other evidences of indebtedness, in payment or settlement of all debts, in the course of the execution of their corporate purposes." [13] A corporation having the power to issue notes, exercises that power wrongfully, by issuing accommodation paper. This is unknown to the party contracting with the corporation and as a practical matter is incapable of discovery by him. Again there is a balancing of equities between the innocent holder for value and the corporation, *i. e.*, the stockholders, who are also innocent. The law has favored the former, thus conforming to the well established policy of the law merchant of avoiding any rule tending to hinder the free circulation of negotiable paper.

E. H. B., Jr.

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[9] 3 Thom. Corp., 2nd Ed., § 2228 and cases cited.
[10] 1 Daniel Neg. Inst., 4th Ed., §386.
[11] Bird v. Daggett, 97 Mass. 494 (1867).
[12] North River Bank v. Aymar, 3 Hill (N. Y.) 262 (1842).
[13] 3 Thom. Corp., 2nd Ed., §2185.

EVIDENCE—BREACH OF PROMISE TO MARRY—CHARACTER.—An old, but perplexing and interesting, question is raised in the recent case of McKane v. Howard.[1] The defendant, in a breach of promise suit, pleaded that prior to the alleged contract, the plaintiff had been guilty of criminal conversation with divers men; and that the defendant was ignorant of this fact at the time of making the alleged promise. In rebuttal, the plaintiff offered testimony that her reputation for chastity was good; and the evidence was admitted over the objection of the defendant. Damages were awarded the plaintiff in the court below; but the Court of Appeals decided that evidence of the plaintiff's good character had been improperly admitted. "The testimony of her witnesses that her reputation was good did not meet or respond to the issue; it did not prove or tend to prove that she was not guilty of each illicit act testified to by the defendant's witnesses. * * * The character of a party in a civil case cannot be looked to as evidence that she did or did not do an act charged. * * * Defendant's evidence being directed to prove a defence, and not that her general character for chastity was bad, because of which damages should be diminished, though reaching to the fact of character, was not such an attack on general character for chastity as would permit the plaintiff to introduce evidence of her good reputation for chastity."

It is a rule of law, that in civil proceedings, unless the character of a party be directly put in issue by the proceeding itself, evidence of general character is not admissible, not only because of its slight probative value, but also because of its tendency unnecessarily to confuse the issues.[2] Reputed character is always to be considered by the jury in mitigation of damages in an action in which the harm to reputation is recognized as an element of recovery, as, for instance, the daughter's reputation for chastity in a father's action for seduction;[3] the reputation of the plaintiff in an action for malicious prosecution,[4] or in a suit for breach of promise to marry.[5] On the face of it, the principal case seems to be correct in principle; and, it is, in fact, supported by some eminent authorities.

In a leading Pennsylvania case[6] on the subject, Woodward, J., said: "He (the defendant) proved a specific fact—a gross indiscretion on the part of the plaintiff in suffering Reed to take liberties with her person. True, the good character of the party increases the improbability of an alleged crime, but it does not disprove it. * * * Evidence of character never avails against positive and direct proof." In a late Massachusetts case[7] the defendant proved

[1] 95 N. E. Rep. 642 (N. Y. 1911).
[2] 1 Greenleaf 40; Day v. Ross, 154 Mass. 13 (1891).
[3] Hoffman v. Kemerer, 44 Pa. 452 (1863).
[4] Bacon v. Towne, 4 Cush. 240 (Mass. 1849).
[5] Burnett v. Simpkins, 24 Ill. 267 (1860).
[6] Leckey v. Bloser, 24 Pa. 401 (1855).
[7] Colburne v. Marble, 196 Mass. 376 (1907).

specific acts of unchastity on the part of the plaintiff, and the court declared that he did not thereby open the field to the plaintiff to offer evidence to support her reputation.

Courts of other jurisdictions take an opposite view which although it seems to represent the weight of authority, numerically speaking, is not *ipso facto* the better rule. It has been held by an Indiana court that "the appellant's testimony (showing specific acts of unchastity) put her character in issue, and it would be a harsh rule that would not allow her to vindicate her character." [8] And, to use the words of an Illinois court, "Then (when specific acts of immorality are pleaded) the attack upon the character of the plaintiff is as direct as in the case of an indictment for a crime. And no reason is perceived why, when such attack is made, although it comes from a defendant instead of a plaintiff, the latter should not be permitted to prove general good character, for the purpose of rendering it improbable that the charge is well founded." [9] To the same effect are decisions in other jurisdictions.[10]

It is submitted that the fallacy in this line of reasoning lies in the statement that the plaintiff's character is attacked by such a defense. This statement is manifestly incorrect. Her character is not attacked in any legal sense, and consequently is not in issue. It is clear that the reputed character or reputation of a person is not attacked in any legal sense by the affirmative proof of specific acts of immorality. Specific acts of misconduct do not evidence bad reputation, and *a fortiori* good reputation does not tend to prove the non-commission of improper acts. Admitting this reasonable view, the principal case seems to be strictly correct in theory, and the cases *contra* seem to have turned on the courts' ostensible determination to allow a person's good reputation to be upheld at all hazards and without regard to fundamental rules of evidence.

M. G.

PROPERTY—RIGHT AS BETWEEN LIFE TENANT AND REMAINDERMAN IN DISTRIBUTION MADE BY A CORPORATION.—The question raised in Newport Trust Co. v. Van Rensselaer,[1] whether a distribution made by a corporation during the continuance of a life estate is to be treated as income or capital, and, accordingly, belongs to life tenant or remainderman, is primarily a question of the intention manifested by the will or other instrument by which the right to the income is, for the time being, severed from the corpus.

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[8] Jones v. Layman, 123 Ind. 569 (1889).

[9] Sprague v. Craig, 51 Ill. 288 (1869).

[10] Smith v. Hall, 69 Conn. 651 (1897); Harriman v. Layman, 118 Ia. 590 (1902).

[1] 78 Atl. Rep. 1009 (R. I. 1911).

This is expressly or impliedly recognized by all the cases on the subject.[2]

In most cases the instrument merely directs the payment of "earnings," or "income," or occasionally "dividends" to the life tenant; and such terms are not sufficiently explicit to furnish a rule for the guidance of a court when the distribution by the corporation is of an unusual or extraordinary nature. And it is mainly on the disposition of such dividends that the courts differ. The general rule applying to ordinary distributions is that a regular cash dividend belongs to the person holding the stock at the time the dividend is declared.[3] The case of a life tenant dying between the declaration and the payment of a dividend, seems not to have arisen in America; but in Wright v. Tuckett,[4] Vice-Chancellor Wood adhered to the general rule, and directed the dividend to be paid to the representative of the tenant for life. Since a dividend is not due when declared, and since stockholders have no legal title to the profits of the business until a division is made,[5] it is submitted that a better rule would be to give the dividend to the person having the beneficial interest in the stock at the time the dividend is payable.

It is also to be observed that the conflict of opinion previously mentioned is confined to distributions which are made from earnings past and current. The courts substantially agree that a dividend, so called, whether in the form of cash or stock, which represents a reduction or enhancement of the value of assets representing capital, from sources other than the accumulation of earnings, belongs to the corpus and not to the income.[6]

In the principal case the court was confronted with the disposition of an extraordinary dividend. The D., L. & W. R. R. Co. organized a coal company, and declared a dividend of 50 per cent. to stockholders of the railroad company, payable in cash or part to be paid to the coal company for stock therein. The organization of

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[2] Gibbons v. Mahon, 136 U. S. 549 (1890); Spooner v. Phillips, 62 Conn. 62 (1892); Thomas v. Gregg, 78 Md. 545 (1894).

[3] Bates v. Mackinley, 31 Beav. 280 (Eng. 1862); Matter of Kernochan, 104 N. Y. 618 (1887); 2 Thompson on Corp., §2201; Taylor on Priv. Corp., §799.

[4] 1 John. & Hem. 266 (Eng. 1860).

[5] Robertson v. de Brulatour, 188 N. Y. 301 (1907); Waterman v. Alden, 42 Ill. App. 294 (1891).

[6] Kalbach v. Clark, 133 Iowa 215 (1907); Hite v. Hite, 93 Ky. 257 (1892); Gilkey v. Paine, 80 Me. 319 (1888); Walker v. Walker, 68 N. H. 407 (1895); and see Pritchitt v. Nashville Trust Co., 96 Tenn. 472 (1896) for a full discussion of the subject of this note. For a novel analysis of a stock dividend, and its division according to its sources, see Carter v. Crehore, 12 Haw. 309 (1900).

An apparent exception to this general rule is found in cases where the business is such that the capital, in the ordinary course of the company's activities, is being consumed or undergoing changes of form, *e. g.*, a land company. Reed v. Head, 88 Mass. 174 (1863); Thomson's Est., 153 Pa. 332 (1893).

the coal-selling company was the railroad's method of complying with the decision of the United States Supreme Court [7] that it could not carry its own coal; and the coal company accordingly contracted to buy all the coal mined by the railroad company at the mines. Though not a tangible asset, the company gave up a valuable right—to sell its coal at the market. The coal company capitalized the profit to be made out of this re-sale; so it is apparent that the railroad gave up a means of income. But the road received nothing for this right or asset; so that it had no new fund out of which to declare the dividend. The distribution was, therefore, an unusual cash dividend from earnings past and current.

There are four well defined lines of decision on the disposition of such a dividend. The early English rule, now practically obsolete and of little more than historical interest, gave all extraordinary or unusual dividends, whether of stock or cash, to the remainderman.[8] The later English rule, commonly called the Massachusetts rule, regards cash dividends, however large, as income, and stock dividends, however made, as capital.[9] This rule is not as simple of application as it appears, because the inquiry must first be made "whether such distribution is an apportionment of additional stock representing capital or a division of profits and income." [10] This rule does not inquire whether the dividend was earned before the death of the testator or during the life tenancy; and disposition is made irrespective of the period covered by the accumulation of the fund from which it is declared. Likewise in New York and Kentucky the courts flatly reject the principle of apportionment between capital and income, and give any dividend, whether stock or cash, to the life tenant.[11] The Pennsylvania rule, often called the American rule, like the New York rule, refuses to let the character of the dividend control its distribution; but unlike both Massachusetts and New York rules, inquires when the fund out of which the dividend is paid, was accumulated. In the leading case in which the court applied this equitable rule,[12] it had to distribute a stock dividend; but the same principle of apportionment has been applied in cases of cash dividends.[13]

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[7] U. S. v. D., L. & W. R. R. Co., 213 U. S. 366 (1908).

[8] Brauder v. Brauder, 4 Ves. Jr. 800 (Eng. 1799); Irving v. Houston, 4 Paton Sc. App. (Eng. 1893). But see qualification of this case in Bouch v. Sproule, L. R. 12 App. Cas. 385 (1887).

[9] Sproule v. Bouch, L. R. 29 Ch. D. 635 (1885), opinion of Fry, J., quoted with approval by Lord Herschell in Bouch v. Sproule, *supra; In re* Alsbury, L. R. 45 Ch. D. 237 (1890); Green v. Bissell, 79 Conn. 547 (1907); Waterman v. Alden, *supra;* Minot v. Paine, 99 Mass. 101 (1868).

[10] Mr. Justice Gray, in Gibbons v. Mahon, 136 U. S. 549 (1890), which approves the Massachusetts rule.

[11] Hite v. Hite, *supra;* Robertson v. de Brulatour, *supra.* And see Chester v. Buffalo Co., 70 App. Div. 443 (N. Y. 1902).

[12] Earp's Appeal, 28 Pa. 368 (1857).

[13] Van Doren v. Alden, 19 N. J. Eq. 176 (1868); Holbrook v. Holbrook, 74 N. H. 201 (1907); Oliver's Est., 136 Pa. 43 (1890).

The trustee in the principal case took half the dividend in stock in the coal company, and the other half in cash. But the case differs from the usual case of a stock dividend, for here the stock in effect given to stockholders, was stock in another company. There was no controversy over the stock, so that the interesting question of the right to subscribe to new stock was not raised. The court had to dispose of the cash only; and its decision, together with Petition of Brown,[14] brings Rhode Island in line with the Massachusetts rule.

C. L. M.

SALES—DELIVERY OF GOODS DIFFERING FROM THE DESCRIPTION GIVEN.—The question of the liability of a seller of seeds upon warranties of their identity has been productive of much discussion and litigation. A case on this subject, presenting a rather interesting problem, was recently decided in the House of Lords.[1] A quantity of seed, described as "common English sainfoin," was sold, the following provision being one of the conditions of the sale: "Sellers give no warranty, express or implied, as to growth, description, or any other matters." The seed was re-sold by the buyer, and was later discovered to be "giant sainfoin" and not "common English sainfoin." Of this fact the buyer was ignorant at the time of the sale, as the appearance of the two varieties of seed is substantially identical. The buyer, therefore, sued the seller for damages. In the Court of Appeal[2] he was unsuccessful; but the House of Lords allowed recovery.

Both courts agreed that in a sale by description, it is an implied condition of the sale that the goods furnished be of the same description as those contracted for. Further, upon a breach of this condition, the buyer may do either one of two things: reject the goods, or accept them and sue for damages. Up to this point there is no doubt as to his rights.

This difficulty is, however, now encountered. The courts, in defining the buyer's right to sue for damages upon acceptance of the goods, have invariably said that he can no longer treat the conditions as such, but only as an agreement, a representation, or a warranty. The rule is usually stated somewhat as follows: "If, indeed, he" (the buyer) "has received the whole, or any substantial part, of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak more properly, perhaps, ceases to be available as a condition, and becomes a warranty in the narrow sense of the word, namely, a stipulation by way of

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[14] 14 R. I. 371 (1884).

[1] Wallis v. Pratt, App. Cas. 1911, 394.

[2] 79 L. J. K. B. 1013.

agreement, for the breach of which compensation must be sought in damages."[3] These statements are all, if not incorrect, at least most confusing.

If it is true that the condition becomes a warranty upon acceptance of the goods, it follows that a buyer is remediless when there is a non-warranty clause in the contract of sale. This was the conclusion of a majority of the judges in the Court of Appeal in the principal case. The logic of such a position is compelling. But a dissenting opinion by Fletcher Moulton, L. J., considered so satisfactory by the House of Lords that they delivered only short opinions affirming it, looks beneath the surface of the mere words so constantly used by courts and text-writers, and embodied in the Sales Acts, and analyzes the true nature of a condition.

A condition is an implied contract, for breach of which the buyer has two remedies, viz., that of rejecting the goods and treating the contract of sale as rescinded, or that of suing for damages. It is error to conceive of an acceptance of the goods as operating an automatic substitution of a warranty for the condition. When the buyer accepts the goods, he does not thereby waive the conditions; he merely waives one of his remedies therefor. Consequently, the buyer's rights to sue, being independent of any warranty created for the purpose, are not affected by a non-warranty clause in the contract of sale.

The decision of the House of Lords should have the effect of dispersing much of the confusion that has enveloped the distinction between warranties and conditions. The simple fact that one of the remedies for a breach of the latter is also a remedy for a breach of the former, does not, when the buyer avails himself of it, destroy the identity of the condition as such. Whether the obligation in question is a condition or a warranty depends upon the construction of the contract of sale, and not upon matter subsequent thereto. Such matter may take away the superior legal advantages of a condition, as compared with those of a warranty, but does not make it a warranty.

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[3] Williams, J., in Behn v. Burness, 32 L. J. N. S. 204 (1863). Statements to the same effect may be found in Ellen v. Topp, 6 Ex. 424 (1851), and in Bentsches v. Taylor, 2 Q. B. 274 (1893). Mr. Benjamin states the rule in much the same language. Benjamin on Sales, 562. The English Sales of Goods Act of 1893 (generally considered a codification of the pre-existing law on this point) says (Sec. 11, Sub.-sec. 1, Cl.c.), "Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods." The American Sales Act, Sec. 11, provides that "where the obligations of either party to a contract to sell or a sale are subject to any condition which is not performed, such party may refuse to proceed with the contract or sale, or he may waive performance of the condition. If the other party has promised that the condition shall happen or be performed, such first-mentioned party may also treat the non-performance of the condition as a breach of warranty."

The combination of circumstances found in the principal case is one not likely often to arise. There seems to be only one other decision on similar facts, and it was decided the same way.[4] The recent decision would, therefore, seem to settle the English law on this point.

P. V. R. M.

WASTE—RIGHT OF MORTGAGEE TO RESTRAIN THE MORTGAGOR IN POSSESSION.—There is a Delaware statute which gives the Chancellor power to restrain waste upon mortgaged premises upon petition of the mortgagee. In the case of Ennis v. Smith, et al.,[1] it appeared that the mortgagor had made a contract with a third party to fell and remove certain timber standing on the mortgaged premises. Part of the timber had already been felled, but was still on the mortgaged premises, when the mortgagee secured an injunction to restrain further cutting and to prevent the removal of what was already cut. The court, showing that the statute mentioned was merely an affirmance of a jurisdiction theretofore exercised by the Courts of Chancery, readily granted an order to restrain future cutting, but experienced considerable difficulty in determining whether the trees already felled might be removed or not. After apparent hesitation it granted an order, restraining the removal of the trees cut prior to the service of the preliminary decree, conditional upon the mortgagee's giving bond to indemnify the defendant if it should appear that they were correct in their contention that the order should not cover the removal of the trees already cut. It appeared in the case that the mortgagor was insolvent, though the other defendant was solvent. The mortgage was overdue by reason of the failure of the mortgagor to pay a part of the debt, and therefore the legal title to the premises was in the plaintiff.

A study of the authorities shows that the hesitancy of the Chancellor in extending the injunction to cover the removal of the timber already cut, was proper. The courts in all common law jurisdictions have uniformly granted injunctions upon prayer of the mortgagee to restrain future waste upon the mortgaged premises such as would materially impair the security.[2] Whether the mortgage is to be considered as passing the legal title[3] or as merely giving a lien for the debt,[4] seems not to have been considered by the courts in giving this remedy. In the case under discussion, however, the mortgage being over-due, the mortgages had an undoubted

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[4] Howcroft v. Laycock, 14 Times L. R. 460 (1898).

[1] 80 Atl. Rep. 636 (Del. 1911).

[2] King v. Smith, 2 Hare 239 (Eng. 1843); Delano v. Smith, 206 Mass. 365 (1910).

[3] Prudential Ins. Co. v. Guild, 64 Atl. Rep. 694 (N. J. 1906).

[4] Williams v. Chicago Exhibition Co., 188 Ill. 19 (1900).

legal title to the premises, even if the mortgage itself did not give him a legal estate. Having a legal estate in the premises, he had a complete and adequate remedy at law. He might have brought trespass for waste.[5] He also had an action of replevin for timber cut and removed,[6] inasmuch as it is a principle of the common law that property severed from the realty so as to become a chattel, belongs to the legal owner of the land—the mortgagee in the present case. Hence the mortgagee, having such interest in the land, and the actual and constructive possession, may maintain an action for the value of the property severed, or an action for specific chattels[7] either in the nature of a replevin[8] or trover.[9]

The court, in the principal case, cited in its opinion, Bank of Chenango v. Cox;[10] but that case should not have controlled the court because the courts of New Jersey take a unique view of the mortgagee's legal estate, and give him no legal remedy based upon the constructive right of possession which is in him.[11] The courts of other states have permitted the mortgagor to claim timber in the hands of a purchaser from the mortgagor.[12] In the case at bar the mortgagee's remedies at law were complete and adequate if the defendants persisted in their wrongdoing. It did not appear that both parties were insolvent even if that be an important factor in the case. Chancellor Kent declared the law on this subject in a case which involved a similar state of facts:[13] "It would seem then, to be a stretch of jurisdiction to apply the injunction to this incidental remedy, and to stay the use or disposition of the chattel. This would be enlarging the substituted remedy in this court much beyond the remedy at law. * * * There must be a very special case made out to authorize me to go so far, and such cases may be supposed. A lease, for instance, may have been fraudulently procured by an insolvent person, for the very purpose of plundering the timber under shelter of it. I do not mean to be understood to say that the Court will never interfere; but that it ought not to be done in ordinary cases like this."

In view of the authorities cited it would appear that the injunction issued by the Delaware court should not have restrained the removal of the timber already cut. The extraordinary circumstances declared by Kent to be the foundation of the order do not appear in the case.

L. P. S.

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[5] Stowell v. Pike, 2 Me. 387 (1823).
[6] Waterman v. Matteson, 4 R. I. 539 (1857).
[7] Johnson v. Bratton, 112 Mich. 319 (1897).
[8] Dorr v. Dudderar, 88 Ill. 107 (1878).
[9] Searle v. Sawyer, 127 Mass. 491 (1879).
[10] 26 N. J. Eq. 452 (1875).
[11] Kircher v. Schalk, 39 N. J. L. 335 (1877).
[12] Frothingham v. McKusick, 24 Me. 403 (1844).
[13] Watson v. Hunter, 5 Johns. Ch. 169 (1821).

WILLS—PARTIAL REVOCATION.—In Hartz v. Sobel,[1] the testatrix had inserted in her will, bequests of $5000 to each of two nephews, who were likewise appointed executors. Subsequently, she took a sharp instrument, cut the name of one of the nephews out of the bequest and the clause appointing executors, and changed the plural of the words "nephews," "executors" and "children," to the singular. The will was not re-executed. Upon the death of the testatrix, the will, in its mutilated condition, was found, together with a duplicate copy of the original instrument. In deciding the case, under the statute,[2] Lumpkin, J., after an historical consideration of the subject and an elaborate review of the authorities, held that the revocation was not accomplished by any of the statutory methods, and was, therefore, ineffective; and the duplicate copy was admitted in evidence to prove the original bequests and appointments.

The law in regard to the revocation of wills is by no means uniform. Under the Statute of Frauds,[3] it was well recognized that a partial revocation was permissible and the obliteration or excision of words or clauses, unless of a material part of the will, was regarded as a revocation *pro tanto* only.[4] In those States of the United States where the Statute of Frauds is in force, a similar interpretation is given to it.[5]

By the provisions of the Statute 1 Vict. c. 26,[6] this doctrine has been abolished in England. The law in England now seems to be that a partial revocation is of non-effect and where the original testamentary disposition is discernible on the face of the instrument, the will will be probated as originally executed.[7] Parol evidence,

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[1] 71 S. E. Rep. 995 (Ga. 1911).

[2] Code of 1863, sec. 2441: "An express revocation may be effected by any destruction or obliteration of the original will or a duplicate, done by the testator or by his directions with an intention to revoke; such intention will be presumed from the obliteration or canceling of a material portion of the will; but if the part canceled be immaterial, such as the seal, no such presumption arises."

[3] 29 Car. II: "No device in writing of any lands, tenements or hereditaments, *nor any clause thereof*, shall be revocable otherwise than by burning, canceling, tearing or obliterating."

[4] Burkitt v. Burkitt, 2 Vern. 498 (1705); Sutton v. Sutton, Cowp. 812 (1778); Larkins v. Larkins, 3 Bos. and Pul. 16 (1802); Mence v. Mence, 18 Ves. 348 (1811); Roberts v. Round, Hagg. Eccl. 548 (1830); Francis v. Grover, 5 Hare, 39 (1845).

[5] Wheeler v. Bent, 24 Mass. 61 (1828); In the Will of Kirkpatrick, 22 N. J. Eq. 463 (1871); Cogbill v. Cogbill, 2 H. and M. (Va.) 467 (1808); Stover v. Kendall, 1 Cold. (Tenn.) 557 (1860); Wells v. Wells, 4 B. Mon. (Ky.) 152 (1826).

[6] "No obliteration, interlineation or other alteration made in any will after the execution thereof shall be valid or have any effect except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore prescribed," etc.

[7] In the Goods of Stone, 1 Sw. and Tr. 238 (1858); In the Goods of Parr, L. J. 29 P. and D. 70 (1859); In the Goods of Leach, 23 L. T. 111 (1890).

however, is inadmissible to establish the contents of the original document,[8] unless the doctrine of dependent relative revocation is applied.[9]

The law in the various United States jurisdictions adopts one or the other of the above viewpoints, depending upon whether or not the re-enactment of the Statute of Frauds in the particular jurisdiction contains the words "or any part." The majority of jurisdictions seem to have omitted these words; and the law, as presented in the leading case, represents the weight of authority,[10] although some courts base their decisions on the principle of dependent relative revocation.[11]

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[8] Townley v. Watson, 3 Curt. 761 (1844).

[9] In the Goods of McCabe, L. R. 3 P. and D. 94 (1873).

[10] Simrell's Est., 154 Pa. 604 (1893); Wolf v. Bollinger, 62 Ill. 368 (1872); Giffin v. Brooks, 48 Ohio St. 211 (1891); Clark v. Smith, 34 Barb. 140 (1861); Gay v. Gay, 60 Ia. 415 (1882).

[11] Gardner v. Gardiner, 65 N. H. 230 (1889); Doane v. Hadlock, 42 Me. 72 (1856).