RECENT CASES

BILLS AND NOTES—HOLDER IN DUE COURSE—A bank which receives unmatured negotiable paper from the payee by merely giving such payee credit upon its books, in the absence of evidence that a debt of payee to the bank had been canceled by the credit or that the payee had later withdrawn the money so credited to his account, is not a purchaser for value and hence not a holder in due course, so as to cut off equities or defenses, within N. I. L. § 52—Standing Stone Nat. Bank v. Walser, 77 S. E. Rep. 1006 (N. C., 1913).

N. I. L. § 52. cl. 3 requires that a holder take the paper in good faith and for value in order to be a holder in due course. For a bank to give an indorser credit for the amount of the paper or the amount agreed upon as consideration for its transfer to the bank, creates the relation of debtor and creditor between the bank and the indorser, and does not, without more, constitute the bank a purchaser for value. City Deposit Bank v. Green, 130 Iowa 384 (1906); Warman v. Bank, 185 Ill. 60 (1900); Citizens' Bank v. Cowler, 180 N. Y. 346 (1905); Elgin City Banking Co. v. Hall, 108 S. W. Rep. 1068 (1907); *contra*, Dymock v. Bank, 67 Mo. App. 97 (1896). But if the bank cancel a preëxisting debt owing to it from the indorser, the bank becomes a holder in due course, Bank v. Green, *supra*; Wallabout Bank v. Peyton, 123 N. Y. App. 727 (1908); but, it seems, that such cancellation must be in pursuance of an agreement between the bank and the endorser. Consol. Nat. Bank v. Kirkland, 99 N. Y. App. 121 (1904). Or if, after credit given, the bank permit the indorser to draw against that credit, before the maturity of the paper, the bank becomes a purchaser for value. Shawmut Nat. Bank v. Manson, 168 Mass. 425 (1897); Bank v. Tommei, 131 Mich. 674 (1903); Morrison v. Bank, 90 D. 697 (1900); even though at the maturity of the paper, the endorser have a balance in the bank exceeding the amount of the note, Northfield Nat. Bank v. Arndt, 112 N. W. Rep. 451 (Wis. 1907).

One who purchases accommodation paper by giving his own note for it thereby becomes a holder in due course. Mehlinger v. Harriman, 185 Mass. 245 (1904).

CARRIERS—DEVIATION FROM SHIPPING DIRECTIONS—Where a connecting carrier received goods with explicit directions as to their transportation, the diversion of them to a different route, on which they were destroyed by flood and fire, for the effect of which a common carrier would not be ordinarily responsible, was held to be a conversion, rendering the carrier liable as an insurer. Saxon Mills v. N. Y. N. H. and H. R. R., 101 N. E. Rep., 1075 (Mass. 1913).

In the principal case the deliberate diversion of the shipment was tantamount to a conversion. Briggs v. Boston & Lowell R. R., 6 Allen 247 (Mass. 1863); McKahan v. Amer. Ex. Co., 209 Mass. 270 (1911); Forsythe v. Walker, 9 Pa. 148 (1848). It was not a mere failure to forward shipping directions, which simply would have made the defendant liable for the proximate results of his negligence, as in North v. Merchants Transportation Co., 146 Mass. 315 (1888); Little Miami R. R. Co. v. Washburn, 22 Ohio 324 (1872); Booth v. M. K. & T. R. R., 37 S. W. Rep. 168 (Texas, 1896). On the contrary it caused, and apparently intended to cause, a delivery of the goods to one whom neither the shipper nor the consignee had authorized to receive them. This of itself was a conversion. Claflin v. Boston & Lowell R. R., 7 Allen 341 (Mass. 1863); Forbes v. Boston & Lowell R. R., 133 Mass. 154 (1882); Georgia R. R. v. Cole, 68 Ga. 623 (1882); Mich. Southern R. R. v. Day, 20 Ill. 375 (1858).

It is well established that a carrier unjustifiably deviating from the agreed route of transportation becomes liable as an insurer for loss or injury to the shipment; nor can it avail itself of any exception made in its behalf in the contract of carriage. Thus a deviation has been held to deprive a vessel of the benefit of a stipulation against liability for loss caused by perils of the sea, if such loss is subsequent to an unauthorized diversion. Le Duc v. Ward, L. R. 202 Q. B.

Div. 475 (1888); Williams v. Grant, 1 Conn. 487 (1816); or a stipulation against liability for loss arising from negligence of stevedores in loading or discharging the ship. Thorley v. Orilus S. S. Co., 1 K. B. 600 (1907); or against liability for loss by fire, Robinson Bros. v. M. D. T. Co. 45 Iowa 470 (1877); Maghee v. C. & A. R. R., 45 N. Y. 514 (1871); L. C. P. Co. v. Rogers, 20 Ind. App. 594 (1898). An unjustifiable deviation deprives the carrier of the benefit of a provision that the shipment shall be at owner's risk. Swift & Co. v. Furness W. & Co., 87 Fed. 345 (1898); or of a stipulation that the shipment is to be delivered to the connecting carrier at owner's risk, Waltham Co. v. N. Y. & T. S. S. Co., 204 Mass. 253 (1910). It is well settled that a deviation deprives the carrier of the benefit of a provision in the bill of lading that it shall not be liable for loss beyond its own line, St. L. I. M. & S. R. R. v. Caldwell, 89 Ark. 218 (1909); Southern Ry. v. Frank, 5 Ga. App. 574 (1908); Eckles v. Mo. Pac. R. R., 112 Mo. App. 240 (1905). Where the undertaking of the initial carrier is one for a through shipment it becomes liable for the deviation of a connecting carrier, notwithstanding a provision in the bill of lading to the effect that its liability shall cease upon delivery to its next connecting line. L. & B. Co. v. T. & N. O. R. R., 155 Mo. App. 175 (1910).

CRIMES—BRIBERY—A, a city treasurer, requested the B bank, with which he had deposited city funds, to loan another city depository sufficient amount to tide it over an investigation. The B bank acceded to his request under a threat by him to withdraw the city funds from it in case of refusal. A was indicted for bribery. *Held*, that A's threat did not amount to a "bribe" in the absence of proof that he was personally interested in the assisted bank. People v. Hyde, 141 N. Y. S. 1089 (1913).

The court says, "It (the bribe) must consist of something real, substantial, and of value to the receiver, as distinguished from something imaginary, illusive or amounting to nothing more than the gratification of a wish or hope on his part."

Bribery is "the giving, offering or receiving of anything of value, or any valuable service, intended to influence one in the discharge of a legal duty." 2 Am. and Eng. Encyc. of Law (2 Ed.) 907. The thing offered as a bribe must be shown to be of some value, but as the gist of the offense is its tendency to pervert justice the degree of its value is immaterial. State v. McDonald, 106 Md. 233 (1885). The value need not even exist at the time when the promise is made. Watson v. State, 39 Ohio St. 123 (1883).

The asking of money by a public officer to influence his action, which is not official, and which he has no authority by law to perform, is not bribery. People v. Jackson, 95 N. Y. S. 286 (1905). To give entertainments for the purpose of unduly influencing legislation is morally bad but does not constitute bribery. Randall v. Association, 97 Mich. 136 (1993). A mere present to an officer after the act is not bribery if there was no prior understanding. Hutchinson v. State, 36 Tex. 293 (1871).

One who conveys an offer to bribe from a third person is himself guilty although the money is to be paid by the third person. People v. Northey, 77 Col. 618 (1888); and the third person is also guilty. People v. Kerr, 6 N. Y. S. 674 (1889).

CRIMINAL PROCEDURE—WITHDRAWAL OF PLEA OF GUILTY—Defendants, having pleaded guilty in pursuance of a compromise with special counsel for the prosecution, after sentence was passed contrary to the terms of the compromise, moved for leave to withdraw their plea. Held, that after sentence the prisoner's motion to withdraw his plea is addressed to the sound legal discretion of the judge, which is synonymous with judicial conscience, exercisable not arbitrarily but in conformity with the rules and the spirit of the law; that a plea of guilty entered because the prisoner has been misled, like a confession induced by hope of reward, may be withdrawn, in accordance with the rules and spirit of the law, and hence that the judge's refusal to permit such withdrawal was error and reversible. State v. Griffin, 77 S. E. Rep. 1080 (Ga., 1913).

Before sentence is passed, some cases hold that the prisoner may withdraw his plea of guilty as a matter of right. State v. Griffin, *supra*; Williams v. Commonwealth, 25 Ky. Law Rep. 2041 (1904); Davis v. State, 20 Ga. 674 (1856). But the weight of authority seems to be that the withdrawal of the plea is not a matter of right but a matter for the discretion of the court, whether sentence has or has not been passed. People v. Miller, 114 Cal. 10 (1896); Peters v. Koepke, 156 Ind. 35 (1901); Comm. v. Mahoney, 115 Mass. 151 (1874); Clark v. State, 57 N. J. Law 489 (1895); Morningstar v. Comm., 4 Walker 346 (Pa. Sup. ct., 1884); Comm. v. Joyce, 7 Pa. Dist. R. 400 (1898); Comm. v. Stephenson, 9 Kulp 561 (Luzerne Co., Pa. 1899); State v. Shanley, 38 W. Va. 516 (1893). After judgment, clearly, withdrawal can be only by leave of the court. State v. Stevenson, 64 W. Va. 392 (1908).

A plea of guilty, induced by error, should be permitted to be set aside. Krolage v. People, 224 Ill. 456 (1901); State v. Coston, 113 La. 717 (1904); State v. Howie, 130 N. C. 677 (1902). But a mere allegation, without specification of mistake, is insufficient. Comm. v. Yushkis, 11 Kulp 104 (Luzerne Co., Pa., 1902). Reliance upon a vain hope of clemency or compromise, in the absence of any deception of the prisoner, is no ground to set aside the plea. U. S. v. Bayaud, 23 Fed. 722 (1883); People v. Lennox, 67 Cal. 113 (1885); Beatty v. Roberts, 125 Iowa 619 (1904); State v. Richardson, 98 Mo. 564 (1889).

Likewise a plea entered under intimidation should be set aside. Sanders v. State, 85 Ind. 318 (1882) mob violence; State v. Calhoun, 50 Kan. 523 (1893), threats from district attorney; Little v. Comm., 142 Ky. 92 (1911), threats from judge. But the intimidation must be well-grounded and calculated to excite fear of bodily harm in a reasonable person. People v. Perez, 9 Cal. App. 265 (1908); *re* Malison, 36 Kan. 725 (1887).

EVIDENCE—CHARACTER OF THE DEFENDANT—In a murder trial where there is no evidence given as to a defendant's character he is not entitled to an instruction that his character is presumed to be good; there being no presumption for or against, his character is simply a non-existent quantity in the evidence, People v. Lingley, 101 N. E. Rep. 170 (N. Y., 1913).

It is undoubtedly well settled that the defendant's failure to produce testimony as to his good character will not raise any inference that the character is bad. People v. Gleason, 122 Cal. 370 (1898); Fletcher v. State, 49 Ind. 134 (1874); State v. Dockstader, 42 La. 436 (1876); State v. Kabrich, 39 La. 277 (1874); People v. White, 24 Wend. 524 (N. Y., 1840); State v. Sanders, 84 N. C. 729 (1881); Com. v. Weber, 167 Pa. 153 (1895); McKnight v. U. S. 97 Fed. 208 (1899). And though some courts have taken the view, *contra* to the principal case, that the defendant's general good character is presumed. U. S. v. Neverson, 1 Mackey 152 (Dok 1880); State v. Kabirch, 39 La. 277 (1874); State v. Smith, 50 Kan. 69 (1892); Ackley v. People, 9 Barb. 609 (N. Y., 1850); State v. S. Neal, 29 N. C. 251 (1847); Mullen v. U. S., 106 Fed. 892 (1901). The better view, and that adopted in most of the recent decisions, is that there is no presumption one way or the other. Darmor v. State, 54 Ala. 127 (1875); Nixon v. State, 123 Ga. 581 (1905); Addison v. People, 193 Ill. 405 (1901); Knight v. State, 70 Ind. 375 (1880); State v. Gartrell, 171 Mo. 489 (1903); People v. Pekarz, 185 N. Y. 470 (1903); People v. Langley, 114 App. Div. 427 (N. Y. 1906). For to indulge in a presumption of good character would give the accused the untrammeled benefit of evidence which, if he had introduced it, might have been disputed.

EVIDENCE—RES GESTAE—A statement by one not a participant, bystander or witness to a homicide that the defendant had killed decedent is not admissible as part of the *res gestae*. Martinez v. People, 132 Pacif. Rep. 64 (Colo., 1913).

The court defines *res gestae* as "matter incidental to the main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of the transaction, and without a knowledge of which the main fact might not be properly understood. They are the events themselves speaking through the instinctive words and acts of the participants, the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it and serve to illustrate its character."

In a few courts, the declarations of a mere bystander have been included. Flynn v. State, 43 Ark. 293 (1884); State v. Riley, 42 La. An. 995 (1890); Bruler v. Rr. Co., 143 N. Y. 417 (1894). But in the greater number, no such discrimination is made, provided, however, the declarations of the bystander relate only to that which has come under his observation. Hartnett v. McMilan, 168 Mass. 3 (1897); Hitchcock v. Burgett, 38 Mich. 505 (1878); Coll v. Transit Co., 180 Pa. 618 (1897); State v. Duncan, 116 Mo. 288 (1893). It must always appear that the declarant who made the declaration in question was more than a mere observer. He must have taken part in the event either by word or act. State v. Riley, 42 La. Ann. 995 *supra*.

The rule excluding mere narrative of past transactions applies also to the declarations of third persons, though they were present at the time of the commission of the alleged crime. State v. Girt, 13 Minn. 341 (1868); People v. Gonzales, 71 Cal. 569 (1887).

HOMICIDE—DEFENSE OF ANOTHER—In State v. Greer, 78 S. E. Rep. 310 (N. C., 1913), it was held that a party who interferes in behalf of his brother has no right to kill his opponent to prevent the latter from killing or doing great bodily harm to the brother if the latter was in the wrong in bringing on the difficulty.

Is one who assists a relative in peril bound by the latter's act in bringing on the difficulty? The general rule is that the relative who interferes will not be allowed to use more force than the one whom he is assisting would be allowed to use. Sherril v. State, 138 Ala. 3 (1903); Utterback v. Com., 105 Ky. 723 (1896); State v. Cook, 78 S. C. 253 (1907). The rights of the one who interferes are affected by the principle that the party bringing on the difficulty cannot avail himself of the doctrine of self-defense. Bush v. People, 10 Colo. 566 (1887); Stanley v. Com., 86 Ky. 440 (1887). The relative who is in peril must be free from fault in bringing on the difficulty. Gibson v. State, 91 Ala. 64 (1890). Otherwise the plea of self-defense will not avail the accused, unless, however, the relative in whose behalf he has interfered has retreated or attempted to do so. Smurr v. State, 105 Ind. 125 (1885).

There is some authority, however, for the holding that the one interfering is entitled to the plea of self-defense in all cases, except those where he knew, or as a reasonable man should have known, that his relative was the aggressor. State v. Harper, 149 Mo. 514 (1899); Chambers v. State, 46 Tex. Crim. Rep. 61 (1904); Warnock v. State, 3 Ga. App. 590 (1908).

Where a person engaged in a difficulty with another is so drunk as not to be mentally able to know his duty to retreat to save himself from injury, or is physically unable to retreat, his brother is not bound to stand by and see him killed or suffer great bodily harm; but he may interpose and defend him even to the extent, if necessary, of taking his assailant's life. State v. Greer, 22 W. Va. 800 (1883).

PROPERTY—WILLS—RIGHT OF HUSBAND IN PA. TO TAKE AGAINST HIS WIFE'S WILL, UNDER THE ACT OF 1909—A husband who elects to take against his wife's will and under the Act of April 1, 1909 (P. L., 87) is entitled to such a share of her estate as she could have taken. *In re* Buckland's Estate, 86 Atl. Rep. 1098 (Pa., 1913).

The case is the final and logical step in the interpretation of the Act of 1909, *supra*, which allows the widow $5,000 absolutely and one-half of the remaining real estate for life and one-half of the remaining personalty absolutely, when her husband dies intestate and without issue. The constitutionality of the Act was upheld in Guenther's Est., 235 Pa. 67 (1912). The case also decided that though the fact was not specifically mentioned in the act it applied equally where the widow chose to take against her husband's will as when he died intestate. This power was granted by the Act of May 4, 1855 (P. L., 480) and the court construed it to mean the right to take under whatever intestate laws were in force at the time of the husband's decease. This act also gave a surviving husband the right to take against the will of his wife such a share in her estate as she could have elected to take in the estate of her husband. Construing this clause in the same way the result reached in the principal case is inevitable. The point was similarly decided in Moore's Est., 50 Pa. Super Ct. 76 (1912).

REAL PROPERTY—RULE AGAINST PERPETUITIES—CONDITIONAL FEES—Where property was conveyed to the trustees of an incorporated society for a specified use upon the express condition that neither the trustees nor the society shall at any time "sell or convey, alienate, encumber or charge the said above-described premises, in any manner or for any purpose whatsoever," followed by a reversionary clause providing for a reconveyance to the donor or her heirs for breach of condition, it was held that the conditions were binding on all concerned and were not void as being a restraint on alienation or in violation of the Rule against Perpetuities. Penna. Horticultural Society v. Craig, 240 Pa. 137 (1913).

In England the right of entry for condition broken is held to be within the operation of the Rule against Perpetuities as being too remote. Ry. Co. v. Gomm, 20 Ch. D. 562 (1881); Dunn v. Flood, 25 Ch. D. 629 (1883). In Birmingham Canal Co. v. Cartwright, 11 Ch. D. 421 (1879) it was held that where there is a present right (a right which the grantor or his heir has by way of revertor or right of entry, as distinguished from a limitation over to a third party) to an interest in property it is valid, even though it may arise at a period beyond the legal limit, because the person entitled to it may release it and hence the total interest in the land may at any time be alienated absolutely by the combined action of grantor and grantee. This case, however, is expressly overruled by Ry. Co. v. Gomm, *supra.*

In America, however, conditions violating the Rule haave been repeatedly upheld and forfeitures for their breach enforced. French v. Old South Society 106 Mass. 479 (1871); Cowell v. Springs Co., 100 N. S. 55 (1879); Tobey v. Moore, 130 Mass. 448 (1881); Hunt v. Wright, 47 N. H. 396 (1867); Hopkins v. Grimshaw, 165 W. S. 342 (1896).

In Brattle Square Church v. Grant, 69 Mass. 142 (1855), it was held that a limitation over to a third person was void as violating the Rule but goes on with the *dictum;* that if the interest had been in the grantor instead of a third person, then would the limitation have been valid. This *dictum* has been universally followed in this country, though as seen it is expressly denied in England, Ry. v. Gomm, *supra.*

In Sharon Iron Co. v. Erie, 41 Pa. 341 (1861), it was argued that a condition violated the Rule, but as the court held that there had been a waiver of the breach, if any, it had no occasion to consider, and did not consider, the objection on the score of perpetuity. The question seems never to have been decided in Pennsylvania until the principal case, which cities and follows Brattle Square Church v. Grant (*supra*). In almost none of the American cases has the objection of remoteness been discussed by the court. This great consensus of authority, although without any proper consideration of the question involved, may perhaps be held to settle the law of the United States, and to create in this country an exception, arbitrary though it be, to the Rule against Perpetuities.

The American courts nowhere seem to make any distinction between a strict common law condition with a right of entry and a so-called conditional limitation, more properly speaking determinable limitations or special limitations. In England no distinction appears to have been made by the courts, though it is claimed that Ry. v. Gomm and Dunn v. Flood, *supra*, decide nothing as to strict common law conditions, but only as to executory limitations, Challis on Real Property, 3d Edition, 187–191. Mr. Challis argues that Ry. v. Gomm and Dunn v. Flood are simply examples of equitable limitations. The case of Attorney General v. Cummings, decided in 1895, reported 1 Irish Reports 406 (1906) seems to agree with Mr. Challis, but the later case of *In re* Hollis Hospital, 2 Ch. 540 (1899) fully discusses Mr. Challis' view, disagrees with it and settles once and for all that strict common law conditions are within the Rule, not being such vested estates as are excluded. This is reaffirmed in *in re* Ashforth, 1 Ch. 535 (1905) which holds that the Rule against Perpetuities applies to legal contingent remainders as well as to equitable limitations.

SALES—WARRANTIES—On a sale of goods by name or description a condition is implied that the goods shall be merchantable under that name and it is of no consequence whether the seller is a manufacturer or not. Interstate Grocer Co. v. George Wm. Bentley Co., 101 N. E. Rep. 147, (Mass., 1913).

The case follows the English view (and that of the American Sales Act) that the seller impliedly warrants the merchantable character of the goods which he sells as fully when he is merely a dealer in goods of that description as when he is a manufacturer. Jones v. Just, L. R. 3 Q. B. 197 (1868); Preist v. Last, 2 K. B. 148 (1903); Wallis v. Russell, 2 Ir. 585 (1902); Randall v. Newson, 2 Q. B. D. 102 (1877); Mody v. Gregson, L. R. 4 Ex. 49 (1868). This view has been adopted by some jurisdictions in this country. Dushane v. Benedict, 120 v. S. 630 (1886); Oil Well Co. v. Priddy, 83 N. E. Rep. 623 (Ind. 1908); Campion v. Marston, 99 Me. 410 (1904); Murchie v. Cornell, 155 Mass. 60 (1891); Wilson v. Lawrence. 139 Mass. 318 (1855). But the majority of American decisions hold that where the seller is merely a dealer and not a manufacturer or producer no such warranty exists. Reynolds v. Gen. Electric Co., 141 Fed. 551 (1905); McCoa v. Elam Drug Co., 114 Ala. 74 (1896); Chicago Provision Co. v. Tilton, 87 Ill. 547 (1877); Borden Co. v. Fraser 118 Ill. Ap. 655 (1905); Ehrsam v. Brown, 76 Kan. 206 (1907); Kernam v. Crook, 100 Md. 210 (1905); Hosard Iron Works v. Buffalo El. Co., 113 N. Y. App. Div. 562 (1906); Pascal v. Goldstein, 100 N. Y. Sup. 1025 (1906); Strauss v. Salzer, 109 N. Y. Sup. 734 (1908). Where, however, the skill or judgment of the seller is evidently relied on, the nature of his occupation will make no difference.

TRUSTS—STATUTE OF FRAUDS—PROOF OF EXPRESS TRUSTS IN LAND BY PAROL—Two men entered into an oral agreement to purchase land for their joint benefit, and agreed that a purchase by either should inure to the benefit of both. The defendant purchased the land, taking the deed to himself alone. In trespass to try title, the plaintiff tendered half the amount of cash paid down and security for an equal portion of the purchase money notes given, praying a declaration of a trust in an undivided moiety of the land. There was evidence tending to show a mutual rescission of the agreement antedating the purchase. *Held:* Judgment for the defendant. The trust might be proved by parol but the evidence of mutual rescission was sufficient. Sachs v. Goldberg (Tex., 1913) 159 S. W. 92.

In England and those American jurisdictions which have enacted the substantial equivalent of section seven of 29 Car., 11, c. 3, the trust, being one in lands and not arising or resulting by the implication or construction of law, would not be enforceable unless declared in the conveyance to the defendant or proved by a memorandum signed by him. Browne, Stat. of Frauds, (5th Ed.) 93. In Texas, this section has not been enacted. James v. Fulcrod (1851) 5 Tex. 512; Stafford v. Stafford (1902) 96 Tex. 106; Lucia v. Adams, (1904) 36 Tex. Cir. App. 454. Ames. Cas. Tr. 177. No direct statutory obstacle seemed to exist, therefore, to the proof by parol of an express trust in the land when purchased by either party. There is direct authority to that effect, the trust having been enforced in Gardner v. Rundell (1888) 70 Tex. 453; Lucia v. Adams, *supra*. Parker v. Bodley (Ky. 1815) 4 Bibb 103, is opposed to this result. The fourth section of 29 Car. 11, is in force in Kentucky; the seventh section is not, Ames Cas. Tr. 177. The court said, "It is evident that the trust in the present case, if it can be so denominated, is one created by contract, and is consequently within the statute." Henderson v. Hudson (Va., 1810) 1 Mun. 510, is to the same effect. See also Dean v. Dean (1826) 6 Conn. 285, Todd v. Munson (1885) 53 Conn. 579.

But despite the legislative failure to enact section seven, the courts of Texas have held that certain kinds of express trusts in land may not be proved by parol. Where such a trust arises without transmutation of possession, that is, unconnected with a conveyance of the title to which it attaches, it may not be proved or established by parol. Allen v. Allen (1908) 101 Tex. 362. This is due to the first and fourth sections of the English Act which are substantially reproduced in Texas. Rev. Stat. 1911; Art. 1103, p. 263, Art. 3965 p. 819. Parol proof of such trusts would abrogate these sections. Idem. The court says of the earlier decisions in James v. Fulcrod, *supra*, and cases proceeding upon its authority, that they involved transactions in which persons having the title to land have, in writing, conveyed or contracted to convey the title to others for the benefit either of the grantor or third persons. This is the commonly known trust arising on transmutation of possession. Such a trust orally declared by the grantor prior to or at the time of conveyance may, where section seven is not in force, be

proved by parol, whether in favor of the grantor or a third person. Allen v. Allen, *supra*, Freeman v. Freemen (Pa. 1851) 2 Pars. Eq. Cas. 81; Hall v. Livingston, (1869) 3 Del. Ch. 348; Shelton v. Shelton (N. C. 1859) 5 Jones Eq. 292; Leggett v. Leggett (1883) 88 N. C. 108. Sections one and four are not regarded as infringed thereby.

This distinction between the permissible proof of the two classes of trusts in land arises from a conception that there is a legislatively-created zone, where fraud may flourish, existing between section seven on one hand and sections one and four on the other. So far as trusts are concerned, the field of section seven is broad and includes all that is comprehended in the two other sections, excluding parol proof of both classes of trusts in land. But the other sections, while included in section seven, do not include it, and prohibit parol proof of trusts arising without transmutation of possession, while leaving untouched the right to prove the other class of trusts in realty, where transmutation does take place. It is said that to uphold parol evidence of the former trusts would be a judicial assumption, based upon mere failure of the legislature to adopt section seven, that the law-makers intended the earlier sections not to apply to this class of trusts although it presents a situation expressly within the terms of the language used. Allen v. Allen, *supra*. If the owner of land declares himself a trustee of it for another, either voluntarily, Schumacher v. Dolan (Iowa 1912) 134 N. W. 624, or for valuable consideration, Ownes v. Ownes (1872) 23 N. J. Eq. 60, that is a conveyance to him of an estate or interest in the land, although an equitable one, and must therefore be in writing by section one of 29 Car. 11, c. 3. Hamilton v. Buchanan (1893) 112 N. C. 463; Freeman v. Freeman, *supra*. But if he conveys it to another by a written conveyance, but subject to an oral trust for himself or a third person, the equitable right thereby created is not a contract within section four, and as to the conveyance of an interest or estate, the courts satisfied their statutory consciences by saying the written conveyance by the grantor to the grantee-trustee was a sufficient recognition of the requirement of section one. Allen v. Allen, *supra*. If the enforcement of the equitable right did amount to the enforcement of a conveyance, the strength of the section was exhausted before that time was reached. It may be suggested that it is this latter point which presents difficulty and fosters doubt. Upon it depends the validity of the assumption that sections one and four do not fully cover the cases brought under section seven. See Browne 96.

In the consideration of the principal case, however, the soundness of this distinction between classes of trusts may be conceded in states with statutes similar to those in Texas. But into which class should the facts of that case bring the trust thereby created? The parties agreed that if either bought the land he should stand seized of an undivided moiety thereof in trust for the other; the agreement alleged was not that he would take title in their joint names as legal owners. Is the situation then any different merely because the defendant, who had the entire legal title, made the agreement to hold part thereof in trust for the plaintiff before he received that title? Is the chronological order of acquisition of title and declaration and arising of trusts so important? It may well be thought such a case as this presents a trust arising without transmutation of possession, and parol proof thereof should not be received even under the distinction recognized in Texas. This was the result in Parker v. Bodley, *supra*, and Henderson v. Hudson, *supra*, although the court rested its decision upon the basis of a contract and not of a trust.

WILLS—INCORPORATION BY REFERENCE—An instrument, improperly executed as a will, was referred to by the testator in a well executed codicil as his will; and there was other clear evidence that the instrument in question was in existence at the time of the codicil's execution. Held, the defectively executed instrument was incorporated into the codicil by reference and was therefore entitled to be probated. Watson v. Hinson, 77 S. E. Rep. 1089 (N. C., 1913).

In order to incorporate an extrinsic document it is essential (1) that the will contain a clear, explicit, and unambiguous reference to a specific document; (2) that from such description the court be able to satisfy itself as to the identity of the document offered for incorporation; and (3) that the document be in actual existence at the time of the execution of the will making reference to it.

Molineux v. Molineux, Cro. Jac. 144 (1607); Allen v. Maddock, 11 Moore P. C. 427 (1858); Smart's Goods, (1902) Probate (Eng.) 238; *re* Young, 123 Cal. 342 (1899); Bryan's Appeal, 77 Conn. 240 (1904); Hunt v. Evans, 134 Ill. 496 (1890); Tuttle v. Berryman, 94 Ky. 553 (1893); Newton v. Seaman's Friend Soc., 130 Mass. 91 (1881); *re* Twombly, 53 N. Y. Supp. 385 (1898); Gerrioh v. Hinman, 8 Or. 351 (1880); Hanberger v. Root, 6 W. & S. 431 (1843); Baker's Appeal, 107 Pa. 381 (1884); Ford v. Ford, 70 Wis. 19 (1887). The document to be incorporated need not itself be a valid instrument. Habergham v. Vincent, 2 Vea. Jr. 228 (1795); St. John's Parish v. Bostwick, 8 App. D. C. 543 (1896); Shaw v. Camp, 163 Ill. 144 (1896); Fickle v. Snepp, 97 Ind. 289 (1884); Chambers v. McDaniel, 28 N. C. (6 Ired. L.) 226 (1845). But in New York the rule is that only a properly attested document can be incorporated by reference. Brown v. Clark, 77 N. Y. B. 69 (1879); Booth v. Baptist Church, 126 N. Y. 215 (1891). In order to admit parol evidence, there must be a distinct, and definite reference in the will to some paper. Luke's Goods, 34 L. J. Prob. N. S. 105 (1865); Brewis's Goods, 33 L. J. Prob. N. S. 124 (1864); Kehoe's Goods, Ir. L. R. 13 Eq. 13. If there be such a description in the will, parol evidence is admissible to show that there are no other documents filling the description and to aid the court, by putting it in the testator's position, to satisfy itself as to the identity of the document offered. Allen v. Maddock, *supra*; Goods of Almosnino, 1 Sw. & Tr. 508 (Eng. 1859). Parol evidence can be used only in aid of the construction of what the testator has written. Van Straubenzee v. Monck, 3 Sw. & Tr. 6 (1862). The reference must be to an existing instrument; parol evidence is not admissible to establish the fact that it was existing. There is no presumption to aid the profounder. Sunderland's Goods, L. R. 1 P. & D. 198 (1866). It has been held that where the reference in the will is not distinctly to a then existing document but where a codicil later republishes the will, and it is shown that the document was in existence at the date of the codicil, the document is to be probated. Goods of Truro, L. R. 1 P. & D. 201 (1866). But when the reference in the will is to "friends to be named in a letter", and the other facts are the same, the letter cannot be incorporated. Goods of Mary Reid, 38 L. J. (N. S.) P. & M. 1 (1868).