RECENT CASES.

BILLS AND NOTES—NEGOTIABLE INSTRUMENTS—FILLING IN BLANKS—A promissory note was delivered with a blank space for the amount of the attorney's fees, in case of confession of judgment. *Held:* The holder had implied authority to fill up the blanks. Kramer v. Schnitzer, 109 N. E. 695 (Ill. 1915).

It is a settled principle of commercial law that when instruments in blank are completed by the holder, the maker becomes absolutely liable. Roth v. Donnelly, 8 Ga. App. 851 (1910). The presence of the signature gives the holder implied authority to fill up the blanks. Johnston v. Hoover, 139 Ia. 147 (1908). Moreover, the maker is liable to an innocent third person, though the blanks were fraudulently filled by a prior holder, some courts placing his liability on the ground of implied authority. Geddes v. Blackmore, 132 Ind. 551 (1892). Most courts, however, rely on the theory of estoppel and negligence. Gillespie v. Rogers, 184 Pa. 488 (1898). These rules, well recognized in the law merchant, have been approved by the Negotiable Instruments Law. Sec. 14 provides that the holder of a negotiable instrument "has a *prima facie* authority to complete it by filling up the blanks therein," if filled up "in accordance with the authority given and within a reasonable time." Houston v. Day, 145 Mo. App. 410 (1909). If "it is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given, and within a reasonable time." Hartington Nat. Bank v. Breslin, 128 N. W. 659 (Neb. 1910) See also Equitable Trust Co. v. Lyons, 129 N. Y. S. (1911).

CARRIERS—INJURIES TO PASSENGER—MENTAL SUFFERING—Two intoxicated and boisterous men were locked by the conductor in the toilet of a passenger train, where they cursed and swore in the hearing of a lady passenger. *Held:* She could recover for the fright and shock. Seaboard Air Line Rwy. Co. v. Mobley, 69 So. 614 (Ala. 1915).

A carrier is bound to use all reasonable precautions of which human judgment and foresight are capable to make a passenger's journey safe and comfortable. Dwinelle v. N. Y. C. & H. R. R. Co., 120 N. Y. 117 (1890). It must use the highest degree of care reasonably practicable to protect its passengers from insult and injury by fellow-passengers. Lucy v. Chicago, *etc.*, Rwy. Co., 64 Minn. 7 (1896). A railway company is liable to a passenger for mental suffering, unaccompanied by physical pain, caused by vulgar, profane and indecent language of others permitted to remain on the cars with the passenger. Houston, *etc.*, Rwy. Co. v. Perkins, 21 Tex. Civ. App. 508 (1899). The carrier is not liable for injuries inflicted by one passenger upon another under such unusual circumstances, that the servants of the carrier could not possibly have prevented them. Segal v. St. L., *etc.*, Rwy. Co., 80 S. W. Rep. 233 (Tex. 1904). But where the indignity offered the passenger might reasonably have been anticipated, it becomes the duty of those in charge of the train to exercise the utmost vigilance to prevent it, and failure to do so will make the carrier liable. L. & N. R. R. Co. v. Finn, 16 Ky. L. R. 57 (1894). The measure of care which a carrier must exercise may vary according to time and place. Thus, a carrier owes a higher degree of care toward an actual passenger on a train, than toward a prospective passenger waiting in a station. Nashville, *etc.*, Rwy. Co. v. Crosby, 183 Ala. 237 (1913).

CARRIERS—WHAT IS BAGGAGE?—Among the contents of a passenger's trunk, lost by a carrier, was a butter knife. *Held:* This was not such "baggage" as to make the carrier liable for its loss. Louisville & N. R. Co. v. Fletcher, 69 So. Rep. 634 (Ala. 1915).

The decision in the principal case is based on the well-established rule that "baggage" consists of whatever a passenger takes with him for his own personal use and convenience, according to the habits and wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purposes of the journey. Chicago R. I. & P. R. Co. v. Whitten, 90 Ark. 462 (1909); New York Cent. R. Co. v. Fraloff, 100 U. S. 24 (1879). Thus articles for use in housekeeping after the journey's end are not baggage. Macrow v. Great Western R. Co., L. R. 6 Q. B. 612 (1871); McCaffrey v. Canadian P. R. Co., 1 Manitoba L. Rep. 350 (1884); Davidson v. Cunard S. S. Co., 118 N. Y. Supp. 929 (1909). But bedding belonging to a poor man, who is moving with his family, has been held to be baggage on the ground that this is both customary and necessary. Ouimet v. Henshaw, 35 Vt. 605 (1861). This has even been extended to include cutlery and dishes. Parmelee v. Fischer, 22 Ill. 212 (1859); but these cases seem to be *contra* to the weight of authority. However, if a carrier receives household goods or merchandise as personal baggage, knowing their true character, it will be liable for such articles as for baggage. Mauritz v. N. Y., L. E. & W. R. Co., 23 Fed. 765 (1885); Minter v. Pacific R. Co., 41 Mo. 503 (1867). See also Elliot on Railroads, § 1646. Although many cases have held that the question, what is baggage, is one of fact for the jury, Merrill v. Grinnell, 30 N. Y. 594 (1864); New York Cent. R. Co. v. Fraloff, *supra;* Ouimet v. Henshaw, *supra;* yet it must be understood that this is the case only when there is uncertainty or dispute as to some fact upon which the whole question may turn. Otherwise it is strictly a question of law for the court. 3 Hutchinson on Carriers § 1255.

For a complete discussion of this subject see 39 L. R. A. (N. S.) 634.

CIVIL PROCEDURE—SURVIVAL—BREACH OF PROMISE—Relying upon a promise to marry, a milliner gave up her business, but no marriage took place. An action was brought, but before the trial the defendant died and his executor was joined. *Held:* The action could not be maintained against the executor. Quirk v. Thomas, 113 L. T. 239 (Eng. 1915).

The principal case is in accord with the English and American cases. Finlay v. Chirney, 20 Q. B. Div. 494 (Eng. 1888); Hayden v. Vreeland, 37 N. J. L. 372 (1875); French v. Seamens, 50 N. Y. S. 776 (1898); Lattimore v. Simmons, 13 S. & R. 185 (Pa. 1825). It has been held, however, that the action does not abate. Allen v. Baker, 86 N. C. 91 (1882). After the death of the defendant no amendment can be made to alter the form of action. Smith v. Sherman, 58 Mass. 408 (1849). At common law all actions except real actions abated on the death of the party, but statutes remedied this as to contract actions. However, though a promise to marry is sued upon as a contract action, *i. e.,* assumpsit, Donovan v. Folly, 5 Pa. Dist. Rep. 91 (1895), yet it is regarded as a personal action, and the statutes do not embrace it. Wade v. Kabbfleish, 58 N. Y. 282 (1874); Hayden v. Vreeland, *supra.* Its peculiarity lies in the fact that the injury to be compensated is personal and so the same rule of damages is applicable as in actions *ex delicto.* Damages are given for injured feelings and anxiety of mind. Harrison v. Swift, 95 Mass. 144 (1866).

CONTRACTS—MISTAKE OF LAW—A lessee in a suit for rent declared that the lease of four tracts of land was the result of accident or mistake, claimed title to one of the four tracts at the time of its execution, and demanded reimbursement for the payments of rent therefor. *Held:* The lessor could recover the entire rent. Clark v. Lehigh, *etc.,* Co., 250 Pa. 304 (1915).

The general rule, *ignorantia legis neminem excusat,* has been universally followed in criminal cases with apparent rather than real exceptions. On the application of the rule to civil cases, however, the courts have differed widely, the great weight of authority holding with the principal case, that ignorance of the law is no ground for relief from the obligation of a contract. Prescott v. Cooper Bank, 37 La. Ann. 553 (1885); Lazaraus v. Lehigh Coal Co., 246 Pa. 178 (1914). See also 5 COL. L. REV. 25 (1905), and 8 COL. L. REV. 486 (1908). Other courts, however, have confined the term *"legis"* or *"juris"* in the maxim to mistakes of the general rules of law, not to errors of the parties as to their own private legal rights or interests. Cooper v. Phibbs, L. R. 2 H. L. 149, 170 (Eng. 1867); Burton v. Haden, 60 S. E. 736 (Va. 1908); Alabama, *etc.,* Rwy. Co. v. Jones, 73 Miss. 110 (1895). In such cases the contract will be set aside as made under mutual mistake as to the relative rights of the parties. In cases of great hardship or where the adverse party would obtain an unconscionable advantage, equity may afford relief, Mackey v. Smith, 67 Pac. 982 (Wash. 1902); but between the border of great hardship and actual fraud there are many contracts made in ignorance of the law which will be enforced. Morris v. Crowe, 206 Pa. 438 (1903). Whether in such cases the mistake is one of law or of fact is not uniformly treated by the cases. Fink v. Smith, 170 Pa. 124 (1885).

The *dictum* of the court in the principal case as to the construction of the "coal lease" is of the utmost importance as throwing light upon a very much confused and controverted question. For a full discussion of this subject see 64 UNIV. OF PENNA. L. REV. 42 (1915).

CONTRACTS—PERFORMANCE—IMPOSSIBILITY—Where a contract called for the use of crushed local sandstone of a certain quality, it was found after part performance that the specified material did not exist in sufficient quantities. *Held:* The contractor was relieved of his obligation to perform. Jewett v. Sayre, 109 N. E. 636 (Ohio 1915).

The general rule is that a man who voluntarily contracts without qualification is not excused because of inevitable accident or other contingency not foreseen, which makes performance impossible. Lorillard v. Clyde, 142 N. Y. 456 (1894). The theory is that such a doctrine protects the integrity of contracts. A distinction was early made between obligations imposed by law and those voluntarily assumed on the principle that in the latter the party can expressly provide against contingencies. Paradin v. Jane, Aleyn 26 (1681). But this doctrine has been generally held not to apply where performance depended upon the existence of a given thing and such existence, or continued existence, was the assumed basis of the agreement, when in fact there was no existence. Walker v. Tucker, 70 Ill. 527 (1873); Bruce v. Indianapolis Gas Co., 46 Ind. App. 193 (1910). It is within this principle that the court placed the principal case. It also operates where the thing existed but was destroyed. Outfitting Co. v. Siegel, Cooper & Co., 237 Ill. 610 (1908); Dixon v. Breon, 22 Pa. Super. Ct. 340 (1903). It is similar to the continued existence of a particular person. Robinson v. Davis, L. R. 6 Exch. 268 (Eng. 1871). Though this principle is sometimes termed an exception to the general rule, the better view is that the relief is afforded upon the construction of the contract. The condition is implied that the parties contracted on the existence or continued existence of a particular thing. Dexter v. Norton, 4 N. Y. 62 (1871). The rule has been held not to apply where the thing destroyed is the thing which one of the parties has expressly contracted to produce and deliver. Logan v. Gas Co., 95 N. Y. Supp. 163 (1905).

CONTRACTS—UNCERTAINTY—MUTUALITY—A manufacturer contracted with a dealer to supply him at specified prices with such quantity of fur coats as should be required by his business during the next season. *Held:* The contract was not void for uncertainty or want of mutuality. Scott v. Stevenson Co., 153 N. W. 316 (Minn. 1915).

The rules applicable to contracts for the supply of such materials as one may need in his business for a specified time, may be stated thus: If the quantity to be delivered is conditioned by the will, wish or want of one of the parties it is void for want of consideration and mutuality; but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty. So an accepted offer to sell or deliver articles at specified prices during a limited time in quantities as the acceptor may want or desire in his business, is lacking in mutuality behause the acceptor is not bound to want or desire any of the articles. Cold Blast Co. v. Kansas City Bolt Co., 114 Fed. 417 (1902); Higbie v. Rust, 211 Ill. 333 (1904). Accepted orders for goods under such void contracts constitute sales of the goods thus ordered, but they do not validate the contract as to future orders. Crane v. Crane & Co., 105 Fed. 869 (1901). On the other hand, the decided weight of authority holds that an accepted offer to furnish such articles as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding. Minn. Lumber Co. v. Coal Co., 160 Ill. 85 (1896); Lima Co. v. Casting Co., 155 Fed. 77 (1907); Secor v. Ardsley Ice Co., 117 N. Y. Supp. 414 (1909). Nor can the acceptor escape his obligation by a change in his business which will appreciably affect his needs. McKeever v. Cononsburg Co., 138 Pa. 184 (1890). He is bound to so conduct his business in the future as to need substantially the same amount of materials as in the past. Hickey v. O'Brien, 123 Mich. 611 (1900); Wells v. Alexander, 130 N. Y. 642 (1891).

EQUITY JURISDICTION—INJUNCTION TO ENJOIN ENFORCEMENT OF A STATUTE—A bill was filed to enjoin the cancellation of liquor licenses under a statute requiring dealers to pay an agency license for distributing brewery products manufactured in another state. *Held:* Equity should intervene if the enforcement of the statute would result in injury to the property rights of the complainant, or abridge his rights under the federal Constitution. Evansville Brewing Ass'n v. Excise Commission, 225 Fed. 204 (Ala. 1915).

The general rule is that an injunction will not issue to restrain the enforcement of the criminal law. Norfolk Southern R. Co. v. Morehead, 83 S. E. 259 (N. C. 1914). The fact that a statute is unconstitutional gives equity no ground for interference. Brown v. State, 59 Wash. 195 (1910); nor that the complainant would be injured by its enforcement. Benz v. Kremer, 142 Wis. 1 (1910). But the courts generally are inclined to make an exception where the enforcement of an invalid statute would do irreparable injury to property rights. Sherod v. Aitchison, 142 Pac. 351 (Ore. 1914); or where the complainant would have no plain, speedy, and adequate remedy at law, Ewing v. Webster, 103 Iowa, 226 (1897); or where constitutional rights are abridged, as in the principal case; or to avoid multiplicity of actions. Chicago v. Collins, 175 Ill. 445 (1898). The exceptions, however, are not universally recognized. Equitable relief is frequently withheld on the general ground of lack of jurisdiction in criminal matters, and because an adequate remedy exists at law. Cobb v. French, 111 Minn. 429 (1910); Winn v. Dyess, 167 S. W. 294 (Tex. 1914). Nor have some courts feared the oppressiveness of a multiplicity of suits. Montgomery v. West, 146 Ala. 680 (1906).

EVIDENCE—PAROL AGREEMENT TO VARY LEASE—A lease contained a provision that the lessee would deliver up the premises in the condition in which he received them but there was a parol agreement that he should have the right to remove certain fixtures. *Held:* The parol agreement was inadmissible. Hamilton v. Fleck, 244 Pa. 607 (1915).

The weight of authority is that a parol agreement cannot be proved to vary the terms of a lease. Stephen v. Ely, 102 N. Y. 79 (1900); Noble v. Bosworth, 19 Pick. 314 (Mass. 1857); Wadleigh v. Janvrin, 41 N. H. 503 (1866). Some courts, however, hold that as long as the parol agreement

does not vary the written terms of the lease it may be offered in evidence. South Balto. Co. v. Mulbach, 69 Md. 395 (1888); McCracken v. Hall, 7 Ind. 30 (1855). The reason for the rule is put by some courts on the ground that parol evidence is not admissible to vary or *add* to terms of a written contract. Naurmberg v. Young, 44 N. J. L. 331 (1882). Some courts hold that a parol agreement as to fixtures will not be enforced because of the Statute of Frauds. Horne v. Smith, 105 N. C. 322 (1890). In other states a contract for the sale of fixtures does not come within the Statute of Frauds. Pea v. Pea, 35 Ind. 387 (1872); Balto. Co. v. Mulbach, *supra*. It has been held that a parol agreement for the reservation of a house from a deed may not be shown in evidence, while a parol reservation of a cotton gin may be shown. Smith v. Ogden, 63 Ga. 499 (1879). A parol agreement by the landlord that any buildings which the lessee might erect in the future may be removed has been held valid. Dubois v. Kelly, 10 Barb. 496 (N. Y. 1851).

EVIDENCE—PRESUMPTION OF LEGITIMACY—A man and his wife were living separately by agreement, when the defendant was indicted for adultery alleged to have resulted in the birth of a child to the wife. Want of access by the husband was proved only beyond a reasonable doubt. *Held:* Evidence of the birth of the child was admissible. State v. Shaw, 94 Atl. 434 (Vt. 1915).

The principal case is in accord with the weight of authority. Timmann v. Timmann, 142 N. Y. Supp. 298 (1913); Phillips v. Allen, 84 Mass. 453 (1861); Ortwein v. Thomas, 127 Ill. 554 (1887). Sometimes it is held that it must be evidence satisfactory to the jury. Banbury Peerage Case, I Sim & Stu. 153 (Eng. 1811); Ewell v. Ewell, 137 N. W. 55 (Mich. 1912); or that it must be clear and conclusive evidence. Kleinert v. Ehlers, 38 Pa. 439 (1881); Wallace v. Wallace, 73 N. J. E. 402 (1907); Kennedy v. State, 173 S. W. 842 (Ark. 1915). Even a preponderance of evidence has been considered sufficient. Wright v. Hicks, 12 Ga. 155 (1852); Wilson v. Babb, 18 S. C. 59 (1882). On the other hand it has been deemed necessary to establish the impossibility of access. Bunel v. O'Day, 123 Fed. 317 (1903); Watts v. Owens, 62 Wis. 512 (1885); State v. Lavin, 80 Ia. 333 (1890).

MASTER AND SERVANT—SCOPE OF EMPLOYMENT—A chauffeur, who on his way to the garage after the day's work, stopped to fix a tire and had his clothes drenched by rain, drove to his home, changed his clothes, had supper and returned to the garage. On the way back he made a side trip of a few blocks for some cigars, and on this trip ran over the plaintiff's sons. *Held:* The master was liable. Blaker v. Phila. Elec. Co., 60 Pa. Super. Ct. 56 (1915).

Acts done in furtherance of the master's business and authorized by him either expressly or by implication, are within the scope of the servant's employment. Roberts v. Railroad, 143 N. C. 176 (1906); Steele v. May, 135 Ala. 483 (1902). Where the facts are disputed, or where more than one inference may be drawn from the same facts, the question of the scope of authority is for the jury. Brennan v. Merchant, 205 Pa. 158 (1903); Sharp v. Railroad, 184 N. Y. 100 (1906). In the principal case the court held that it might be inferred that the act of the chauffeur in driving home was as much for the benefit of the master as for his own, since it was necessary for the efficient performance of his duty that he should be in good physical condition. The deviation for the cigars was not sufficient to take the servant out of the scope of employment. A mere deviation from the strict course of duty, even for the servant's own purposes will not always relieve the master. Ritchie v. Waller, 63 Conn. 155 (1893); Joel v. Morrison, 6 Carr & P. 501 (Eng. 1834).

This line of cases depends chiefly on the facts of each case. The principal case is illustrative of one set of circumstances. Cf. Provo v. Conrad, 153 N. W. 753 (Minn. 1915), 64 UNIV. OF PENNA. L. REV. 102.

MEASURE OF DAMAGES—WRONGFUL EXTRACTION OF OIL—A life tenant of oil lands not previously explored, leased the oil on a royalty basis. The remaindermen brought suit for an accounting. *Held:* The measure of damages is a sum equal to the royalties provided. Findley v. Warren, 248 Pa. 315 (1915).

Where oil has been taken wrongfully under a mistaken belief as to the right to do so, the courts agree that the measure of damages is the value of the oil *in situ*. Kalile v. Crown Oil Co., 100 N. E. 681 (Ind. 1913). This is true both in case of waste, Williamson v. Jones, 43 W. Va. 562 (1897), and trespass, Bender v. Brooks, 103 Tex. 329 (1910). This value is usually ascertained by taking the market price of the oil at the surface less the cost of production. Crawford v. Forest Oil Co., 208 Pa. 5 (1904); Gladys City Oil, *etc.*, Co. v. Right of Way Oil Co., 137 S. W. 171 (Tex. 1911). Under this view it has been held that the value of the oil at the surface will be charged where the defendant does not plead nor prove the cost of extraction. Right of Way Oil Co. v. Gladys City Oil, *etc.*, Co., 157 S. W. 737 (Tex. 1913). But the usual royalty has been adopted in case of special circumstances, as where the oil was taken under a void lease that provided such royalties. Turner v. Seep, 167 Fed. 646 (1909), modified on other grounds, 179 Fed. 74 (1910).

NEGLIGENCE—DRIVER'S FAULT IMPUTED TO GUEST—A guest in an automobile was injured in a collision due to the concurrent negligence of the driver and another motorist. *Held:* The negligence of the driver was not to be imputed to the guest. Hackworth v. Ashby, 178 S. W. 1074 (Ky. 1915).

The principal case is in accord with the general rule that the negligence of the driver of a vehicle will not be imputed to a passenger who exercises no control over the driver. Littlefield v. Gilman, 207 Mass. 539 (1911); Terwilliger v. Railroad, 152 App. Div. 168 (N. Y. 1912). Michigan and Wisconsin are apparently the only jurisdictions holding *contra* to the general rule. Granger v. Farrant, 179 Mich. 19 (1914); Lanson v. Fon du Lac, 141 Wis. 57 (1909). But where the passenger has full knowledge of the danger and voluntarily incurs the risk, he may be guilty of contributory negligence. Rebillard v. Railroad, 133 C. C. A. 9 (1914), where an automobile without lights proceeded along a bad road; Jefson v. Railway, 72 Misc. 103 (N. Y. 1911), where an automobile went fifty miles an hour without protest from the guest. The passenger must exercise due care for his own safety. Failure to do so constitutes contributory negligence. Senft v. Western Md. Rwy. Co., 246 Pa. 446 (1914); United Rwys. v. Crain, 123 Md. 332 (1914).

PROPERTY—COVENANTS RUNNING WITH THE LAND—A lessee covenanted not to assign without the consent of the lessor. With lessor's consent the lessee assigned, and the assignee then sought to assign without consent from the original lessor. *Held:* Covenants restricting assignment run with the land and bind the assignees even though they are not named. *Re* Stephenson Co., 113 L. T. 230 (Eng. 1915).

The principal case is in accord with the English cases. Williams v. Earle, 19 L. T. 238 (Eng. 1868); McCacken v. Colton, 85 L. T. 594 (Eng. 1902). In the United States the prevailing opinion is that such covenants do not bind the assignee. McCormick v. Stowell, 138 Mass. 431 (1885); Dougherty v. Mathers, 35 Mo. 520 (1865). Some States, however, follow the English rule. Keu v. Trainor, 150 Ill. 150 (1894); Brolasky v. Hood, 6 Phila. 193 (Pa. 1866). In order that a covenant may run with the land its performance or nonperformance must affect the nature, quality or value of the property or must affect the mode of enjoyment. Norman v. Wells, 17 Wend. 136 (N. Y. 1837). The word "assigns" need not be mentioned in covenants running with the land. Conover v. Smith, 17 N. J. Eq. 51 (1864). An exception has been made where the covenant relates to a thing not *in esse*. Spencer's Case, 5 Co. 16*a* (Eng. 1583); but this doctrine has been repudiated. Minshull v. Oakes, 2 H. and M. 793 (Eng. 1864); Oil Co. v. Blair, 113 Pa. 83 (1886).

PROPERTY—GIFTS—CERTIFICATE OF STOCK—A certificate of stock was assigned to a third person, to be delivered by him to the donee upon the death of the donor. *Held:* This was a valid gift *inter vivos*. Innes v. Potter, 153 N. W. 604 (Minn. 1915).

An expectant interest in personal property was not formerly recognized, and it is well settled that a verbal promise to give goods in the future at the death of the intended donor passes no title and confers no rights in the intended donee. Bruce v. Squires, 68 Kan. 199 (1904). To constitute a valid gift, it must go into effect immediately, and must pass entirely beyond the control of the donor. Snyder v. Snyder, 131 Mich. 658 (1902). There must therefore be a delivery, but it is sufficient if the delivery is made to a third person in trust for the donee, Snyder v. Frank, 101 N. E. 684 (Ind. 1913). In such a case it is immaterial that the beneficial enjoyment of the donee is postponed until the death of the donor. Jones v. Nichols, 130 N. W. 125 (Ia. 1911). This rule applies even though the interest is retained by the donor during his life. Tucker v. Tucker, 138 Iowa, 344 (1908). But if the third person is merely the donor's agent, the death of the donor before delivery to the donee revokes the agency, and the gift is defeated. Grant Trust & Savings Co. v. Tucker, 96 N. E. 487 (Ind. 1911).

PROPERTY—GIFTS INTER VIVOS—DELIVERY—A cheque was deposited to the joint account of two persons, and the question arose as to whether there had been a valid gift to the one who actually deposited the cheque, from the one to whose order the cheque was drawn. *Held:* The issuance of a pass-book and its delivery by the bank to one joint depositor, is not sufficient delivery to deprive the other depositor of his dominion over the account. Hunt v. Naylor, 95 Atl. 138 (N. J. 1915).

To constitute a valid gift there must be coupled with the intention of the donor a delivery of the property to the donee or his agent. Irons v. Smallpiece, 2 B. & Ald. 551 (Eng. 1819); Mahan v. U. S., 16 Wall. 143 (U. S. 1872); Buswell v. Fuller, 156 Mass. 309 (1892); Walsh's Appeal, 122 Pa. 177 (1888). The delivery must be absolute. Matthews v. Hoagland, 48 N. J. Eq. 455 (1891); Young v. Young, 80 N. Y. 422 (1880); Walsh's Appeal, *supra*. As far as the nature of the property allows the delivery should be actual. McHugh v. O'Connor, 91 Ala. 243 (1890); Brown v. Brown's Adm'r, 43 Ky. 535 (1844). But ownership may pass to the donee by constructive delivery. Theological Seminary v. Robins, 128 Ind. 85 (1891); Vosburg v. Mallory, 135 N. W. 577 (Ia. 1912); Newman v. Bost, 122 N. C. 524 (1898). Where the donee is already in possession a re-delivery to the donor is not necessary to constitute a valid gift, if the intention of the donor is expressed. Tenbrook v. Brown, 17 Ind. 410 (1861); Osgood v. Carter, 110 Me. 550 (1913); Miller v. Neff's Adm'r, 33 W. Va. 197 (1889). Delivery of a bank book by the donor is sufficient to make a valid gift *inter vivos* of the deposit, if that intent is present. Appeal of Guinan, 70 Conn. 342 (1898); Polley v. Hicks, 58 Ohio St. 218 (1898); Watson v. Watson, 69 Vt. 243 (1896). But cf. Wilson v. Featherston, 122 N. C. 747 (1898).

PROPERTY — THEATRES — REFUSAL OF ADMISSION — Theatrical managers threatened to eject a dramatic critic from their theatres on the ground that his attendance was for the purpose of writing adverse criticisms. *Held:* An injunction should be granted. Woolcott v. Shubert *et al.*, 154 N. Y. Supp. 754 (1915).

At common law the theatre was a strictly private concern and one arbitrarily refused a ticket had no remedy. Burton v. Scherpf, 1 Allen 133 (Mass. 1861). A card of admission to a place of public amusement was a mere license and revocable. Wood v. Leadbitter, 13 M. & W. 837 (Eng. 1845). The person ejected could recover the price paid and the expenses incurred on the faith of the ticket in a contract action, but he had no remedy in tort for the humiliation and inconvenience suffered. Horney v. Nixon, 213 Pa. 20 (1905).

The private character of such tickets is still recognized by the courts and reasonable stipulations are upheld. Collister v. Hayman, 183 N. Y. 250 (1905). But the doctrine of Wood v. Leadbitter, *supra*, has been recently criticised, 63 UNIV. OF PENNA. LAW REVIEW, 223 (1914), and has been definitely overruled. Hurst v. Pictures Theatre, 30 T. L. R. 642 (Eng. 1914). The same result has been achieved by statute in many of the states. Cal. St. 1893, c. 185; and discrimination in the sale of such tickets on ground of race, color or creed, has been forbidden. N. Y. Civil Rights Law, Laws 1909, c. 14, Consol. Laws, c. 6, Laws 1913, c. 265. These statutes have been declared constitutional as within the police power of the state, Western Turf Association v. Greenberg, 204 U. S. 359 (1907); and as not creating an action for damages, but merely enlarging the remedy. Woolcott v. Shubert, *supra*. Under such acts recovery can be had not only on the contract, but in a tort action for any damage or humiliation suffered, either because of a refusal to sell a ticket, Davis v. Tacoma R. and Power Co., 35 Wash. 203 (1904); or because of its revocation after sale. Aaron v. Ward, 203 N. Y. 351 (1911).

SALES—RETENTION OF POSSESSION BY VENDOR—A purchaser left some barrels of sugar in the possession of the vendor, where they were levied on by creditors of the latter. *Held:* The creditors were entitled to the sugar. Brooklyn Cooperage Co. v. Cora Planting and Mfg. Co., 69 So. 195 (La. 1915).

The retention of possession by the seller after an absolute sale was early considered to be one of "the signs and marks of fraud" within the Statute of 13th Elizabeth. Twyne's Case, 1 Smith's Leading Cases, 1 (Eng. 1585). It has continued so ever since, though as to its conclusiveness the courts have not been able to agree. The early English rule regarded it as conclusive evidence of fraud. Edwards v. Harben, 2 T. R. 587 (Eng. 1788); but this decision was soon overruled. Martindale v. Booth, 3 Barn. & Ad. 498 (Eng. 1832). It is now well settled in England that retention of possession by the seller is, at most, evidence tending to show fraud. Hale v. Metropolitan Co., 28 L. J. Ch. (N. S.) 777 (Eng. 1859); Alton v. Harrison, L. R. 4, Ch. App. 622 (Eng. 1869). The early English rule was at one time followed in the federal courts. Hamilton v. Russel, 1 Cranch 309 (U. S. 1803); but has been abandoned. Warner v. Norton, 61 U. S. 448 (1857). In some of the states it is regarded as conclusive evidence of fraud. McKibbin v. Martin, 64 Pa. 352 (1870); Lovejoy v. Raymond, 127 Ill. App. 519 (1906); but in most jurisdictions it is but *prima facie* evidence. Ingalls v. Herrick, 108 Mass. 351 (1871); Collins v. Taggart, 57 Ga. 355 (1876); Harris v. Chaffee, 21 Atl. 104 (R. I. 1890). In several states this question is now regulated by statutes which as a rule declare that such sales are merely *prima facie* evidence of fraud and may be rebutted. Barr v. Church, 52 N. W. 591 (Wis. 1892); Schidlower v. McCafferty, 83 N. Y. Suppl. 391 (1903). The principal case holds that a mere constructive delivery is insufficient to destroy the presumption. Some cases hold otherwise. Ingalls v. Herrick, *supra*. In Pennsylvania and those states which maintain that such transactions are fraudulent *per se*, an actual delivery must be shown if the goods sold are capable of such delivery. Dewart v. Clement, 48 Pa. 413 (1864); McKibbin v. Martin, *supra*. But retention of possession by the vendor at a sheriff's sale is not even presumptively fraudulent. Myers v. Harvey, 2 Pen. and W. 478 (Pa. 1831).

SURETYSHIP—DISCHARGE—NOTICE OF DEFAULT OF PRINCIPAL—A treasurer of the plaintiff corporation admitted a shortage in accounts, but none of the directors had actual knowledge of any dishonesty. The treasurer had in fact made a large defalcation. *Held:* The fact that the surety received no notice of the shortage would not discharge him, as constructive knowledge of the default imposed no duty on the corporation to give notice. Wait v. Homestead Bldg. Assn., 85 S. E. 637 (W. Va. 1915).

As a general rule, a surety is not entitled to notice from an obligee upon a default of the principal. Welch v. Walsh, 59 N. E. 440 (Mass. 1910); but where an employer takes a continuing bond of indemnity conditioned for the faithful performance of an employee, he impliedly stipulates that he will not retain such employee after a breach of guaranty. Phillips v. Foxhall, L. R. 7, Q. B. 666 (Eng. 1872); Phoenix Insurance Co. v. Rapp, 113 Ill. 390 (1885). However, the employer must have actual knowledge of the wrongdoing, and it is not sufficient that the default might have been discovered by an investigation. Tapley v. Martin, 116 Mass. 275 (1874); Wayne v. Commercial Bank, 52 Pa. 343 (1866). Mere inaction of the obligee will not discharge the surety unless it amounts to fraud or concealment. Watertown Ins. Co. v. Simmons, 131 Mass. 85 (1881). The default of which the employer is required to notify the surety must amount to actual dishonesty. Charlotte Rwy. Co. v. Gaw, 59 Ga. 685 (1877); Aetna Ins. Co. v. Fowler, 108 Mich. 557 (1896). Even where the bond calls for immediate notice, the company need not act on mere suspicion, but is entitled to reasonable time to investigate whether actual default has been made. Bank of Tarboro v. Deposit Co., 128 N. C. 366 (1901).

Where the employer is a corporation the duty of giving notice upon default of an employee is not so clearly defined, and the cases are in conflict. Where the president and other officers have knowledge of a default, the surety should be notified and it is not necessary that the directors officially have knowledge. Life Insurance Co. v. Scott, 81 Ky. 540 (1884). Knowledge of an employee with regard to a matter covered by his employment is regarded as knowledge on the part of the directors. Saint v. Wheeler & Wilson, 95 Ala. 362 (1891). On the other hand, a number of states, following the decision of the principal case, say that a company is not bound by constructive knowledge of a default and that the failure of one officer to give notice of such default will not relieve the sureties from liability. U. S. v. Kirkpatrick, 9 Wheat. 720 (U. S. 1824); Fidelity Co. v. Bank, 97 Ga. 634 (1895); Railway Co. v. Schaeffer, 59 Pa. 350 (1868).

SURETYSHIP—LIABILITY OF SURETY DIRECTLY TO THIRD PERSONS—An injured pedestrian sued a contractor and his surety jointly under a contract for the construction of a city sewer wherein the contractor and his surety had agreed to hold the city harmless against any damage from personal injuries growing out of the work. *Held:* The surety could not be sued in the first instance, but only after the liability of his principal or of the city had been established. Owens v. Georgia Life Ins. Co. *et al.*, 177 So. W. 294 (Ky. 1915).

The liability of a surety to third persons is strictly interpreted and cannot be extended by implication beyond the terms of the contract. Sterling v. Wolf, 163 Ill. 467 (1896). Most of the litigation occurs over building contracts which contain a bond for the payment of the material and labor used. There, in order to hold the surety directly liable to the beneficiaries, there must be an express promise to pay for the material furnished. Peoples Lumber Co. v. Gillard, 136 Cal. 55 (1902); Phila. v. Nichols Co., 214 Pa. 265 (1906). At least the contract must contain language sufficient to impose a direct obligation to pay. Greenfield Ice Co. v. Parker, 159 Ind. 571 (1902). If the contract does not disclose a primary intention to benefit the plaintiff, he cannot recover from the surety in the first instance. Hart v. State, 120 Ind. 83 (1889). In another class of cases, of which the principal case is illustrative, where the surety has promised to indemnify the contractor against loss or damage caused by negligence, the rule is practically the same. Unless the contract expressly provides that it is taken out for the benefit of the injured party, none of the cases hold that the injured party may, in the first instance, proceed directly against the surety. Clark v. Bonsal, 157 N. C. 270 (1911). Before a liability can be placed upon a surety a liability must first be placed upon the obligor. Simons v. Gregory, 120 Ky. 116 (1905).

TORTS—CONTRIBUTORY NEGLIGENCE—An automobile driver who was run down by a train had not brought his car to a stop before crossing the tracks. *Held:* Failure to stop as well as to look and listen is not necessarily contributory negligence, but is a question of fact for the jury. Ft. Worth & D. C. Rwy. Co. v. Alcorn, 178 S. W. 833 (Texas, 1915).

All courts hold that a traveler owes the duty of looking and listening. Salter v. Utica & B. R. R. R. Co., 75 N. Y. 273 (1878). This applies whether it be a pedestrian, Stewart v. N. Y. Railroad Co., 170 Mass. 430 (1898); or one traveling in a vehicle. Noakes v. N. Y. R. R. Co., 106 N. Y. Supp. 522 (1909). The majority of courts, including the court in the principal case, decline to extend the duty so as to include the actual halting of the vehicle, but regard it as a mixed question of law and fact. Leavenworth R. R. Co. v. Rice, 10 Kansas 426 (1872). It has been held that such would demand more care than displayed even by the most prudent. Davis v. N. Y. C. & H. R. R. R. Co., 47 N. Y. 400 (1872); Duffy v. Chicago & N. W. Rwy. Co., 32 Wis. 269 (1873). It has also been held that this would be usurping the jury's function. Dolan v. Delaware & Hudson Co., 71 N. Y. 287 (1877). The minority view requires the actual stopping of the vehicle. Strong v. Grand Trunk Rwy. Co., 156 Mich. 66 (1909); Henze v. St. Louis, Kansas City & N. Rwy. Co., 71 Mo. 636 (1880). Some decisions hold it imperative only when the noise of the wagon prevents effective listening. Kelly v. Chicago and Alton, 88 Mo. 534 (1885). The Pennsylvania courts endorse the minority view. Failure to stop is negligence *per se* and a question for the court. N. Pa. R. R. Co. v. Heileman, 49 Pa. 60 (1865). It has been held that some circumstances might even require the leading of one's horses across the track. Penna. R. R. Co. v. Beale, 73 Pa. 504 (1873). There is a tendency in the courts to hold automobiles to a stricter observance of the duty to stop than horses, because of the greater ease with which it can be done. Brommer v. Penna. R. R. Co., 179 Fed. 577 (1910).

TORTS—HIGHWAYS—LIABILITY OF CONTRACTOR WHEN COUNTY IS EXEMPT—A contractor doing work on a county road left a pile of stones unlighted and unguarded on the highway, and a traveler at night was injured thereby. *Held:* The contractor was not liable. Ockerman v. Woodward, 178 S. W. 1100 (Ky. 1915).

It is the general rule that in the absence of a statute a county is not liable for defects in, or for the negligent construction of, a highway under its control. This immunity is based on the ground that the county is a mere arm of the state, a territorial division for governmental purposes and so partakes of the immunity of the state. Smith v. Commissioners, 29 Ohio C. C. 610 (1905); Kelley v. Cumberland County, 229 Pa. 289 (1910). Nor are the officers of the county liable personally. Templeton v. Beard, 74 S. E. 735 (S. Car. 1912). But there is a dearth of authority as to the liability of contractors doing work for the county. The Kentucky cases hold that a contractor owes no duty where there is none imposed on the county, hence no liability. Traction Company v. Grover, 123 S. W. 264 (Ky. 1909); Schneider v. Cahill, 127 S. W. 143 (Ky. 1910). It has been held that even though the county may not be liable, an independent contractor is, his liability not depending on the contract but upon a duty generally imposed by law. Wade v. Gray, 61 So. 168 (Miss. 1913). The cases differ from those holding cities and townships and their contractors liable for defective roads, as municipal corporations have a general duty to safeguard their highways and are not regarded as governmental subdivisions of the state.

TRADE-MARKS—EXCLUSIVE RIGHTS—An application for a trade-mark for gin, consisting of a cat in boots with a bottle by its side, was opposed by the owner of a mark which represented a cat on a barrell. *Held:* The design of a cat was common to gin trade and no exclusive right to use it could be maintained. *In re* Bagots, 113 L. T. 67 (Eng. 1915).

The term trade-mark is defined as a distinctive mark through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others. Elgin Watch Co. v. Illinois Co., 179 U. S. 665 (1900). The exclusive right to the use of a mark or device claimed as a trade-mark is founded on priority of appropriation, but this is not so when the particular device has become a common sign of the trade. Carrol & Sons v. McIlvain, 171 Fed. 125 (1909); 58 UNIV. OF PENNA. L. REV. 115. In the principal case, where the name for this kind of gin was "Old Tom Cordial", it was undisputed that the defendant had been the originator of the idea of representing a tom cat on the bottle labels, but it was also clear that other dealers in gin without objection had adopted this device and pictured cats in different positions, so that there was no exclusive right to the use of a cat's figure. In accord with this, it has been held that the design of a white swan, used for many years by flour manufacturers, was not subject to exclusive rights. Bulte v. Igleheart Bros., 137 Fed. 492 (1905); nor the number "600", which was commonly used to designate the quality on oil barrels. Vacuum Oil Co. v. Climax Ref. Co., 120 Fed. 254 (1903); nor the figure of a horse on packages of horse salve. Bickmore Co. v. Karns Mfg. Co., 126 Fed. 573 (1903). And where tin tags of all colors had been in use by tobacco manufacturers for several years, there is no exclusive right to a certain colored tag. Continental Tobacco Co. v. Larns & Co., 133 Fed. 727 (1904). But while there is no monopoly of the right to use the particular device, there is an exclusive right limited to its representation in the same or substantially similar appearance, style, or position. Bickmore Co. v. Karns Mfg. Co., 134 Fed. 833 (1905). Likewise, if the use of the common design shows a studied intention to imitate the competitor's design and confuse the public, it will be declared an infringement. Lanahan v. Kissel Sons, 135 Fed. 899 (1905); Johnson v. Seabury, 69 N. J. Eq. 696 (1905).

TRADE-NAMES—USE OF NAMES—An individual candy manufacturer, with a wide reputation, sold to a corporation his business and good will, together with the privilege of using his name in the manufacture and sale of candy. *Held:* He could not thereafter use his name in connection with the manufacture and sale of candy. Guth v. Guth Chocolate Co., 224 Fed. 932 (1915).

The mere right to use a name is not assignable. Messer v. "The Fadettes", 168 Mass. 140 (1897); but if a person has the right to use his own name in connection with an article of trade, which he manufactures, he may, on transferring the business, transfer the right to use his name. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462 (1895). Any trade-mark, including a surname, may be sold with the business or establishment to which it is incident, and the vendor may thereafter be enjoined from using that name in that business. Le Page v. Russia Cement Co., 51 Fed. 943 (1892). It is not upon the ground of the invasion of the trade-name adopted by another, but by reason of the contract he has made, that he is deprived of the right himself to use his name. Russia Cement Co. v. Le Page, 147 Mass. 206 (1888). A man has a right to use his own name in connection with an article which he manufactures, if he does so in good faith, though the effect may be to confound the article to some extent, in the public mind, with an article manufactured by some other person. Chemical Co. v. Myer, 31 Fed. 453 (1887); but a dishonest and fraudulent use of one's own name for the purpose of deceiving the public will be prevented. Rogers v. Rogers, 17 C. C. A. 576 (1895).

TRUSTS—BANK DEPOSITS—COLLECTION—A cheque which had been deposited in a bank for collection, was sent for payment to the drawee, who charged the account of the maker and credited the account of the collecting bank, but made no remittance. Two days later the drawee failed. *Held:* The maker of the cheque was absolved from further liability on the obligation

for which the cheque was given. Planters Mercantile Co. v. Armour Packing Co., 69 So. 293 (Miss. 1915).

Cheques deposited in a bank for collection do not at once become the property of the bank; but the bank continues to be the agent of the depositor until the collection of the cheque, which remains, during that time, the property of the depositor. Balach v. Frelinghuysen, 15 Fed. 675 (1896). As agent of the depositor, the collecting bank is bound to exercise reasonable care in selecting its sub-agents to receive payment on the cheque. It is not reasonable care to select the drawee himself, and place the evidence of the debt in his hands. Drovers National Bank v. Anglo-American Co., 117 Ill. 100 (1886). Where a cheque has been sent for payment directly to the drawee, who has sufficient funds of the drawer to pay it, but neglects to do so, and subsequently fails, the payee cannot thereafter recover the amount of the cheque from the drawer. Wagner v. Cook, 167 Pa. 259 (1895). A custom permitting a collecting bank to send a cheque for collection directly to the drawee is unreasonable and will not be recognized by the courts. Farley National Bank v. Pollock, 145 Ala. 321 (1905). In a few jurisdictions the rule is subject to the qualification that if the drawee bank is known to be the only bank in the place, it is not negligence, *per se*, for the collecting bank to send the cheque directly to it for payment. Wilson v. Carlinville National Bank, 187 Ill. 222 (1900). But see Winchester Milling Co. v. Bank of Winchester, 120 Tenn. 225 (1907).

TRUSTS—ORAL EVIDENCE—LIMITATION ON ABSOLUTE GIFT—A testatrix disposed of all her property to the appellant in terms amounting to an absolute gift, but it was her intention that three of her relatives should receive certain amounts out of the estate, of which the appellant was aware and promised orally to do. *Held:* The estate was subject to a trust in favor of the relatives. Ficke's Estate, 59 Pa. Super. Ct. 535 (1915).

Despite the Statute of Frauds, it is settled both in England and this country that where a testator makes a devise absolute in form but upon a private understanding that the devisee will apply the estate to objects mentioned by the testator a trust arises, and this whether the promise was express or implied from silence. Norris v. Frazer, 15 Eq. Rep. 318 (Eng. 1869); Shields v. McAuley, 37 Fed. 302 (1888); Carver v. Todd, 48 N. J. E. 102 (1891). The evidence, however, must be clear, unequivocal, and convincing. Sherman v. Sandell, 106 Cal. 373 (1895); Ryder v. Ryder, 244 Ill. 297 (1910).

While the law is thus settled with regard to testamentary dispositions, the same harmony does not prevail where there is an absolute gift *inter vivos* with an oral promise by the grantee to hold in trust. In England the courts have decided that since the oral trust cannot be enforced because of the Statute of Frauds, it is but equitable that the grantee should be compelled to restore the property. Booth v. Turle, L. R. 16 Eq. 182 (Eng. 1873); De La Rochefaucauld v. Bonstead, 1 Ch. 196 (Eng. 1897). In this country the courts, while declaring the trust cannot be carried out, make no provision for having the property reconveyed to the grantor. Savings Bank v. McMahon, 37 S. C. 309 (1892); Pavey v. Insurance Co., 56 Wis. 221 (1882). In Massachusetts the grantor can recover from the grantee a fair value for the land but not the land itself. Cromwell v. Norton, 79 N. E. 433 (Mass. 1906). Where it was the intention of the grantor to create a trust, but by accident or mistake an absolute conveyance was made, equity will enforce the trust. Barnard v. Flinn, 8 Ind. 204 (1856); Nevis v. Topfer, 121 Iowa, 433 (1903).

TRUSTS—RIGHT TO FOLLOW TRUST FUNDS—A trust company mingled a trust fund with its general funds, the balance being always in excess of the trust, and the *cestui que trust* sought to claim as a preferential creditor, the company being insolvent. *Held:* The *cestui que trust* is not entitled to claim the amount of the trust, as against others whose money went into the same fund. Commonwealth v. Tradesmen's Trust Co. (No. 2), 250 Pa. 378 (1915).

Trust property can be followed so long as it can be identified and is not in the hands of an innocent purchaser for value. *In re* Hallett, L. R. 13 Ch. Div. 696 (Eng. 1878); Commercial National Bank v. Armstrong, 39 Fed. 684 (1889); Breit v. Yeaton, 101 Ill. 242 (1881); Holmes v. Gilman, 138 N. Y. 376 (1893); Thompson's Appeal, 22 Pa. 16 (1853). Most jurisdictions hold that this applies to trust funds mingled with the trustee's general account. *In re* Hallett, *supra;* Brennan v. Tillinghast, 201 Fed. 609 (1913); Blair v. Hill, 163 N. Y. 672 (1901); Hewitt v. Hayes, 205 Mass. 356 (1910). But some courts hold that money so mingled is incapable of sufficient identification and cannot be followed. Bright v. King, 45 S. W. 508 (Ky. 1898); Phillips v. Overfield, 100 Mo. 466 (1890); Carmany's Appeal, 166 Pa. 622 (1895). In general if the trustee becomes insolvent the *cestui que trust* has no preference simply because of the relationship and the trust property must be accurately identified. Seiter v. Mowe, 182 Ill. 351 (1899); Little v. Chadwick, 151 Mass. 109 (1890); Cavin v. Gleason, 105 N. Y. 262 (1887). But in a few states it is enough to show that the trust fund went into the insolvent's estate. Hopkins v. Burr, 24 Colo. 502 (1898); Plow Co. v. Lamp, 80 Ia. 722 (1890); Hunt v. Smith, 58 N. J. Eq. 25 (1899). Many jurisdictions apply the same rule to banks acting as trustees, as to individuals. Commissioners of Marquette v. Wilkinson, 119 Mich. 655 (1899); Woodhouse v. Crandall, 197 Ill. 104 (1902). But because of the reason for allowing the *cestui que trust* to follow the trust fund into the general funds of the individual trustee, the court in the principal case distinguished the case of a bank or trust company.

TRUSTS—SALE BY TRUSTEE—APPLICATION OF PURCHASE MONEY—The defendant purchased a number of shares of stock from a trustee who embezzled the money. *Held:* The defendant, having determined that the trustee had power to sell, was not bound to see that purchase money was properly applied. Streater's Estate, 250 Pa. 328 (1915).

The principal case follows the prevailing rule that a trustee may sell the personal property of an estate, especially if he have authority to change the securities or vary the investments, and if he makes a sale in good faith, the purchaser acquires a good title, although the trustee later misapplies the money. Batchelder v. National Bank, 188 Mass. 25 (1904); Spencer v. Weber, 163 N. Y. 493 (1900). At common law the receipt of a trustee was always a valid discharge, but in equity since the *cestui que trust* was regarded as the true owner, the purchaser was obliged to get a receipt from him or see at his peril that the purchase money was properly applied. Indiana Rwy. Co. v. Swannell, 54 Ill. App. 260 (1894). Because of its unfairness and inconvenience the common law rule has been abolished by statute in England. Trustees Act, § 201 (1893); and in many states in this country, Kan. Gen. Stat., § 9702 (1909); Wis. Stat., § 2092 (1898). If the trust directs the land to be sold for the payment of debts generally, the purchaser is not bound to see that the purchase money is rightly applied. Conover v. Stathoff, 38 N. J. Eq. 55 (1884); Learned v. Tritch, 6 Col. 432 (1882); but if the trust provides for the payment of specific and definite debts or legacies, the vendee does not get a good title unless the proceeds go to pay such debts or legacies. Duffy v. Calvert, 6 Gill, 487 (Md. 1848); St. Mary's Church v. Stockton, 8 N. J. Eq. 520 (1851). If the proceeds are not to be paid to the *cestui que trust,* but are to be retained by the trustee for special purposes, the purchaser has no burden to see that the money is properly applied. Guill v. Northern, 67 Ga. 345 (1881); Keister v. Scott, 61 Md. 507 (1883).

WILLS—REVOCATION BY SUBSEQUENT INSTRUMENT—A testator, by an instrument intended as a subsequent will, expressly revoked the prior instrument. The second was invalid because of the incompetency of a subscribing witness. *Held:* The former will was not revoked. Moore v. Rowlett, 109 N. E. 682 (Ill. 1915).

A revoking will must have all the formalities prescribed for the making of a will. West v. West, 144 Mo. 119 (1898); Leard v. Askew, 114 Pac. 251 (Okla. 1911). Generally the mere executing of a subsequent will is not sufficient to establish revocation unless the prior will is expressly or impliedly revoked. Smith v. Gorham, 152 Ill. App. 125 (1909); Gordon v. Whitlock, 92 Va. 723 (1896). Under some statutes it has been held otherwise. Bruce v. Sierra, 57 So. 709 (Ala. 1912). In most states a prior will is revoked by the execution of a second, even though it never becomes active as a will, if the later contains an express revocatory clause. Blackett v. Ziegler, 133 N. W. 901 (Iowa, 1911); *In re* Peirce's Estate, 115 Pac. 835 (Wash. 1911). In some states an inconsistent disposition has the same effect. Wabash R. Co. v. Young, 154 Ind. 24 (1900); Carpenter v. Miller's Exrs., 3 W. Va. 174 (1869). But in others revocation, whether express or implied, becomes effective only when the subsequent will becomes operative at the death of the testator. Stetson v. Stetson, 200 Ill. 601 (1903); Bates v. Hacking, 29 R. I. (1908). See 1 Stimson Am. Statute Law, § 2673, and a comprehensive note in 28 Am. St. Rep. 344.