RECENT CASES.

BANKS AND BANKING—CONSTITUTIONAL LAW—POWER OF NATIONAL BANKS TO ACT AS EXECUTORS.—The Burnes National Bank, appointed executor by a will, petitioned the Supreme Court of Missouri for a writ of mandamus to the proper probate court, directing the latter to issue letters testamentary to the Bank. A statute of Missouri was construed by the Supreme Court of that state as excluding national and state banks from so acting. The Court refused to issue the writ. *Burnes National Bank v. Duncan*, 257 S. W. 784 (Mo. 1924). The Bank appealed. *Held:* The national bank could act as executor despite the inhibition of the state statute. Justices Sutherland and McReynolds dissented. *Burnes National Bank v. Duncan*, 265 U. S. 17 (1924).

The Federal Reserve Act, Act of December 23, 1913, c. 6, sec. 11, par. K; 38 STAT. AT L. 251, empowered the Federal Reserve Board "to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as . . . executors." This provision was amended, Act of September 26, 1918, 40 STAT. AT L. 967, and the following clause was added: "Whenever the laws of such state authorize or permit the exercise of any or all of the foregoing powers by state banks, trust companies, or other corporations which compete with national banks, the granting to and exercise of such powers by national banks shall not be deemed to be in contravention of state or local law."

The dissenting justices believe the amendment is unconstitutional, basing their reasoning upon the fact that the devolution and administration of decedents' estates are matters exclusively within state jurisdiction. See *Byers v. McAuley*, 149 U. S. 608 (1893); *Tilt v. Kelsey*, 207 U. S. 43 (1907). Therefore, they contend, Congress may not impose its will upon the states in their choice of administrators and executors. But it is submitted that the opinion of the majority is correct and that the amendment is valid. It has long been settled that Congress may establish national banks, as a suitable means for carrying into effect the other powers granted to it by the Constitution. *McCulloch v. Maryland*, 4 Wheat. 416 (U. S. 1819). Congress may grant to these national banks such powers as are appropriate to their business. *Osborn v. Bank of United States*, 9 Wheat. 738 (U. S. 1824). Where the competitors of national banks are permitted to exercise fiduciary powers, these powers have become an incident to the business of banking, and may therefore be conferred by Congress upon national banks. *National Bank v. Fellows*, 244 U. S. 416 (1917). That the state law forbids national banks to exercise such powers should make no difference, since in any field in which Congress has the right to legislate, its will is supreme. See *Davis v. Elmira Savings Bank*, 161 U. S. 275 (1896); *Van Reed v. Peoples National Bank*, 198 U. S. 554 (1905).

BANKS AND BANKING—STATE INSTITUTION BECOMING NATIONAL BANK—RIGHT TO ACT AS EXECUTOR.—The testator died leaving a will which named a trust company his executor. Prior to his death the company had

become a national bank and had then consolidated with another national bank. On the testator's death the company in its new name petitioned the court to grant it letters testamentary. *Held:* Petition refused. *Petition of Commonwealth-Atlantic National Bank of Boston*, 144 N. E. 443 (Mass. 1924).

It is now quite clear that, whatever state law may provide in the matter, probate courts must appoint federally incorporated national banks to fiduciary capacities in exactly the same manner in which they appoint their own state incorporated banks or trust companies. *First Nat'l. Bank of Bay City v. Fellows*, 244 U. S. 416 (1917); *Missouri v. Duncan*, 265 U. S. 17 (1924).

The court in the instant case accepts this in principle but distinguishes the case on the ground that the petitioning national bank is not the person named in the will. As to just what happens when a corporation reorganizes under a new charter or merges with another similar corporation the law is not quite clear. Some cases consider that the new corporation is a continuance of the old. *Metropolitan Bank v. Claggett*, 141 U. S. 520 (1891). Others treat it as a new entity which automatically assumes all the rights and liabilities of the old. *Atlantic Nat'l. Bank v. Harris*, 118 Mass. 147 (1875); *Matter of Bergdorf*, 206 N. Y. 309, 99 N. E. 714 (1912). But irrespective of the theory, all hold that the new organization has everything the old one had. *City Bank v. Phelps*, 97 N. Y. 44 (1884); *McCarthy v. Liberty Nat'l. Bank*, 175 Pac. 940 (Okla. 1918); *Prop'rs., etc., v. Boston & Maine R. R.*, 245 Mass. 52, 139 N. E. 839 (1923). Nor has there been any distinction made where the change was from a state to a federally incorporated organization. In fact, all the cases on this point have said very firmly that it is one and the same corporation. *Coffey v. National Bank of Missouri*, 46 Mo. 140 (1870); *City Bank v. Phelps, supra; Metropolitan Bank v. Claggett, supra.*

While the court in the instant case agrees with the foregoing principles, it considers that the appointment of an executor is not the sort of thing that can pass to the new organization. This view was discussed and rejected in several instances where the change was from one state organization to another. *Matter of Bergdorf, supra; Chicago, etc., Co. v. Zinser*, 264 Ill. 31, 105 N. E. 718 (1914). In the case in Illinois it was pointed out that a testator who appoints a corporate executor must expect changes in the control of the organization and in the public regulation of such activities and takes that risk. The Massachusetts court itself does not consider it material that following the merger the identity of the individuals in control of the bank is materially different. But it does claim that, since it is incorporated under different authority and subject to a somewhat different system of regulation, it is not sufficiently the same organization for it to appoint it executor under the will. Such a position would require the court to hold, if the legislature of Massachusetts should materially change the regulations for trust companies, that no trust company could subsequently be appointed executor under a will executed prior to the enactment. It is submitted that, in view of the fact that reorganization of corporate entities

under new charters, has in no case been permitted to affect any other rights or liabilities which accrued previously, the petition submitted should have been granted.

CONFLICT OF LAWS—POWER OF ATTORNEY TO CONFESS JUDGMENT.—Judgment was confessed in Illinois under a power of attorney contained in a note executed in Indiana, but made payable in Illinois. By statute in Indiana judgment could be confessed only upon written authority, including an affidavit that the debt was owing. (BURNS' ANN. IND. STS. 1914, sec. 615, 1004.) The plaintiff brought suit on the judgment in Indiana. *Held:* (two dissents) The Illinois judgment is not entitled to full faith and credit. *Egley v. T. B. Bennett & Co.*, 144 N. E. 533 (Ind. 1924).

Analysis of the above case discloses that its decision depends upon the answer to two questions: (1) what law governs the validity of the power of attorney to confess judgment? (2) how does that law regard such a power of attorney?

Where a contract entered into in one state is to be performed in another, there is wide diversity of opinion as to what law will determine its validity. 23 HARV. L. REV. 1, 79, 194, 260. Some jurisdictions take the view that the intention of the parties is to be the controlling factor; *In re Missouri S. S. Co.*, L. R. 42 Ch. Div. 321 (1889); others hold that the contract is governed by the law of the place where it is to be performed; *Krantz v. Kazenstein*, 22 Pa. Super. 275 (1903); *Vennum v. Mertens*, 119 Mo. App. 461, 91 S. W. 292 (1906); a third class regard it as determined by the law of the place where it is executed. *Scudder v. Union National Bank*, 91 U. S. 406 (1875); *Acme Food Co. v. Kirsch*, 166 Mich. 433, 131 N. W. 1123 (1911). The last view mentioned was adopted by the court in the principal case. It is the one supported by the authorities, and, it is submitted, is the preferable view. MINOR, CONFLICT OF LAWS, 411; TIERNAN, CONFLICT OF LAWS, 29.

If a clause in a contract is invalid under the law governing the validity of that contract, the general rule is that it is invalid everywhere. *Orr's Adm. v. Orr*, 157 Ky. 570, 163 S. W. 757 (1914); MINOR, CONFLICT OF LAWS, 402. A different result arises, however, where the clause in question is not void under the governing law, but only unenforceable. In such a case it does not necessarily follow that another jurisdiction which recognizes such a provision is not at liberty to enforce it. *Shelmerdine v. Lippincott*, 69 N. J. L. 82, 54 Atl. 237 (1903); and see 38 L. R. A. (N. S.) 814. It has been held that a warrant of attorney to confess judgment goes to the remedy. *Hamilton v. Schoenberger*, 47 Iowa 385 (1877); *Mason v. Ward*, 80 Vt. 290, 67 Atl. 820 (1907). If the governing law does not declare the warrant of attorney void, but only refuses to enforce such authority, and enforcement is sought in another jurisdiction, the question of whether effect will be given to the authority will depend upon the laws of the latter jurisdiction, under the established principle that stipulations in a contract referring to the remedy will be governed by the law where the remedy is sought. MINOR, CONFLICT OF LAWS, sec. 205; *Shelmerdine v. Lippincott, supra.*

At common law confession of judgment under power of attorney without process on the defendant was not permitted. 1 BLACK ON JUDGMENTS, sec. 50. In the absence of statute authorizing such confession, there is great conflict of authority as to the validity of such a power of attorney. ANN. CASES 1914-A, 646. In some jurisdictions it is held to be void as against public policy because it gives the defendant no day in court, and puts him at the mercy of the party in whose favor the power operates. *First National Bank v. White*, 220 Mo. 717, 120 S. W. 36 (1909); *Farquhar & Co. v. Dehaven*, 70 W. Va. 738, 75 S. E. 65 (1912). This was the view taken by the majority of the court in the principal case. Other courts uphold the validity of the power of attorney on the ground that it constitutes a waiver by the defendant of his right to have process served upon him. *Saunders v. Lipscomb*, 90 Va. 647, 19 S. E. 450 (1894); *Hazel v. Jacobs*, 78 N. J. L. 459, 75 Atl. 903 (1910). Of course, if the clause is void, judgment confessed under it in another jurisdiction would not be binding elsewhere, but could be attacked collaterally. *Pennoyer v. Neff*, 95 U. S. 714 (1887).

Under a statute similar to the one in Indiana which required the authority to be in an instrument separate from the main obligation, it has been held that combining the two did not make the authority void, but only unenforceable, and that a judgment upon such power of attorney coming from another state could not be impeached. *Shelmerdine v. Lippincott, supra.* But see *contra, Acme Food Co. v. Kirsch, supra.* However, it is submitted that the instant case was correctly decided, in view of the fact that the statute in question did not authorize such a warrant of attorney, and the further fact that the public policy of the state, as evidenced in earlier cases involving similar principles, was opposed to its validity. See *Maitland v. Reed*, 37 Ind. App. 469, 77 N. E. 290 (1905).

CONSTITUTIONAL LAW—DUE PROCESS—REPEAL OF STATUTE OF LIMITATIONS. —The plaintiff's husband was killed because of the negligence of the defendant. For two years after his death, she received compensation under the Workmen's Compensation Act. Then the provision applying to her was declared unconstitutional. The statute of limitations had by that time run against a tort action, but the Legislature passed an act enabling those affected by the decision to bring suit within one year. The plaintiff sued under the statute. *Held:* (Three judges dissenting) Judgment for the plaintiff. *Robinson v. Robins Dry Dock and Repair Co., et al.*, 238 N. Y. 271, 144 N. E. 578 (1924).

The question of whether the defense of the statute of limitations is such a property right that its loss by a repeal of the statute is guarded against by the due process clause of the Constitution is a subject of conflicting decisions. It is undoubtedly true that title to real property or chattels acquired by adverse possession is unaffected by any change in the statute. *Moore v. Luce*, 29 Pa. 262 (1857). The Supreme Court of the United States in *Campbell v. Holt*, 115 U. S. 620 (1885), distinguished between ownership in property gained by adverse possession and the right to the defense of the statute in actions of tort and contract. In the latter actions, it was said, the statute bars the remedy and not the right; the statute is a matter of public policy

and may be set aside. This view was later qualified and was held applicable only to such laws as were intended to remedy a mischief and to promote public justice. *Winfree v. Northern Pacific Railway Co.*, 227 U. S. 296 (1913); *Petition of Canadian Pacific Railway Co.*, 278 Fed. 197 (D. C. 1921).

A minority of the states are in accord with the rule of *Campbell v. Holt*. *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. 239 (1898); *Orman v. Van Arsdell*, 12 N. M. 344, 78 Pac. 48 (1904). A majority, however, agree with the dissenting opinion of Mr. Justice Bradley that a complete defense under the statute is property within the protection of the due process guarantee, since, there being no right without a remedy, the destruction of the remedy destroys the right. *Rockport v. Walden*, 54 N. H. 167 (1874); *Moore v. State*, 43 N. J. L. 203 (1881); *Lawrence v. Louisville*, 96 Ky. 595, 29 S. W. 450 (1895). Massachusetts, unwilling to adopt *Campbell v. Holt*, but feeling that injustice would result from too strict a following of the opposite rule, decided in *Danforth v. Groton Water Co.*, 178 Mass. 472, 59 N. E. 1033 (1901), affirmed in *Dunbar v. B. & P. R. R.*, 181 Mass. 383, 63 N. E. 916 (1902), that, where the defense was based on a mere technicality, the court has discretion to decide whether or not it is within the due process clause. In the principal case, the New York court adopts the Massachusetts view. It is submitted that it was influenced to do so by the nature of the case before it, and that the dissenting opinion in *Campbell v. Holt* lays down the logical rule.

CONSTITUTIONAL LAW—VALIDITY OF DECLARATORY JUDGMENT ACT.—The Uniform Declaratory Judgment Act provides that "any person interested under a deed, will, written contract, . . . may have determined any question of construction or validity arising under the instrument." Under this act, which had been adopted by Tennessee, PUB. ACTS 1923, Chap. 29, the plaintiff asked for a declaration of her rights under a will, which rights the defendant had denied but not invaded. The defendant questioned the validity of the statute. *Held:* The act is constitutional. *Miller v. Miller*, 261 S. W. 965 (Tenn. 1924).

It is clear that unless this act requires of the courts only what comes within the scope of their constitutional grant of judicial power it is invalid, for the legislature cannot give the courts powers and duties not lying within that grant. *Hayburn's Case*, 2 Dall., 409 (U. S. 1792); *Shephard v. Wheeling*, 30 W. Va. 479, 4 S. E. 625 (1887); *Moreau v. Freeholders*, 68 N. J. L. 480, 53 Atl. 208 (1902). Thus it has been held that the courts cannot (by legislative act alone) be required to give advisory opinions on moot questions of undisputed rights as to which their decisions can have no binding effect. *United States v. Evans*, 213 U. S. 297 (1909); *Lonergan v. Goodman*, 241 Ill. 200, 89 N. E. 349 (1909); cf. 12 C. J. 871. But between this situation and the common case calling for compensatory damages for rights already violated, there is an intermediate stage, in which there is a real dispute between the parties as to rights which, however, have not yet been violated. It is this situation that the declaratory judgment acts are intended to cover.

In *Anway v. Grand Rapids Ry. Co.*, 211 Mich. 592, 179 N. W. 350 (1920), a broadly phrased act was held unconstitutional in a case involving the construction of a contract contemplated but not yet executed. The court said that since it could not make a binding judgment it could not take jurisdiction of the case; and held the entire act invalid on the ground that it required the court to do so something outside of its grant of judicial power. See 12 A. L. R. 50, 6 A. B. A. JOUR. 145; 21 COL. L. REV. 115 and 168. Several statutes passed after this decision were so worded that they apply only to actions respecting rights which already exist and are in actual controversy but which have not been violated. These have been held constitutional. *State v. Grove*, 109 Kan. 619, 201 Pac. 82 (1921); *Blakeslee v. Wilson*, 190 Cal. 479, 213 Pac. 495 (1923); *Braman v. Babcock*, 98 Conn. 549, 120 Atl. 150 (1923).

The Uniform Declaratory Judgments Act, approved by the American Bar Association in 1922, is similarly worded, and provides that the court may refuse judgment whenever it feels that its decision will not settle the controversy. (Sec. 6.) This act has been adopted in Colorado, North Dakota, Pennsylvania, Tennessee and Wyoming. Since Colorado's constitution provides for such matters, the constitutional question was not raised there. *Colorado & Utah Coal Co. v. Walter*, 226 Pac. 864 (1924). In Pennsylvania the act has not come before the Supreme Court, but in one lower court decision under the act the judgment was rendered without question, *Snavely's Estate*, 4 D. & C. 405 (Pa. 1924), and in another it was refused merely on the ground that the case belonged to the Common Pleas rather than the Orphans' Court, *Duff's Estate*, 4 D. & C. Reps. 315 (Pa. 1924). The principal case is the first in which the validity of the Uniform Act has been discussed, and the decision is entirely in accord with the principles laid down in the cases on the other Declaratory Judgment Acts.

CONTRACTS—CONSTRUCTION—DEFAULTING PARTY PERMITTED TO RECOVER. —The defendant entered into a contract for the purchase of Japanese peas, one of the clauses of which provided that "if the seller made default in shipping, . . . the contract should be closed by *invoicing back* the goods at such price, whether higher or lower than the contract price, as the London Corn Exchange should determine; that the said association should, if requested by either party, declare the closing price and this price should be accepted as final by all parties." The seller failed to ship any peas under the contract and applied to the association to declare a closing price. Because of a falling market the price determined upon left a balance in the seller's favor. *Held:* In spite of his default and failure to fill any part of the contract the seller was entitled to recover this balance. (Scrutton, *L. J.*, dissents) *Lancaster v. F. J. Turner & Co.*, (1924) 2 K. B. 222.

This case presents the unusual situation of a seller profiting from his involuntary default. The court was confronted with the task of either construing the contract strictly or adopting some means to avoid what seems an unequitable result. The general rule is that a contract should be interpreted

reasonably; *Stern v. Archibald*, 151 Cal. 220, 90 Pac. 536 (1907); *Bingell v. Royal Insurance Co.*, 240 Pa. 412, 87 Atl. 955 (1913); *McDonald v. Aetna Indemnity Co.*, 90 Conn. 226, 96 Atl. 926 (1916); and should be construed to avoid unjust or absurd results. *Barnsdall Oil Co. v. Leahy*, 195 Fed. 731, 115 C. C. A. 521 (1912); *Cummings v. Nielson*, 42 Utah 157, 129 Pac. 619 (1912); *Fairbanks Morse Co. v. Twin City Supply Co.*, 170 N. C. 315, 86 S. E. 1051 (1915). But it is not within the province of the court to change the clear meaning of the language used to protect one of the parties from his improvident contract. *Gazos Creek Mill v. Coburn*, 8 Cal. App. 150, 96 Pac. 359 (1908); *Brobst v. Albrecht*, 19 Pa. D. R. 989 (1910); *Old Colony St. Rwy. Co. v. Brockton*, 218 Mass. 84, 105 N. E. 866 (1914). The problem is not the one that arises in quasi-contracts where the defaulting party seeks to recover for what he has performed and so may be conscionably entitled to part of the contractual benefits. *Shaw v. Badger*, 12 S. & R. Pa. 275 (1825); *McDonough v. Evans*, 112 Fed. 634 (D. C. 1902). In the instant case the seller had performed no part of the contract. That the court reached the result which it did in the present case is striking in view of the frequent denial in England of recovery for part performance where the plaintiff has broken the contract. *Sinclair v. Bowles*, 9 Barn. & C. 92 (Eng. 1829); *Forman & Co. Proprietary v. The Ship Liddesdale*, (1900) A. C. 190.

Though the case seems a hard one, there is little doubt that the decision of the court is correct. Just such a situation was foreseen by Scrutton, *L. J.* in *Bourgeois v. Wilson Holgate Co.*, 25 Com. Cas. 260 (Eng. 1919) where a similar contract was construed. Recovery could not be denied without disregarding the express terms of the contract, unless, indeed, it should be held that the clause relating to "invoicing back" had no application when there had never been a shipment. The question of whether a recovery would have been permitted had the plaintiffs' default been voluntary is raised but is left undecided.

CONTRACTS—FRAUD—NEGLIGENCE IN SIGNING.—The plaintiff's agent told the defendant, an experienced business man, that a contract he presented for the defendant's signature was the agreement which the parties had previously made orally. The defendant signed the contract without reading it. Later he learned that it omitted a material condition but stated that it constituted the entire agreement. When the plaintiff sued on the contract, the defendant set up that it had been procured by fraud. *Held:* Evidence of fraud inadmissible. A verdict was directed for the plaintiff. *J. B. Colt Co. v. Britt*, 123 S. E. 845 (S. C. 1924).

In attempting to weigh negligence against fraud in such cases, courts have reached opposite results. While some have ruled sternly that a right founded on fraud will not be enforced; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40 (1881); *Providence Jewelry Co. v. Crowe*, 113 Minn. 209, 129 N. W. 224 (1911); others have applied the maxims *caveat emptor* and *vigilantibus non dormientibus subveniunt leges*, and have stressed the sanctity of the written contract. *Andrus v. St. Louis Smelting, etc., Co.*, 130 U. S. 643 (1889); *Dunham Lumber Co. v. Holt*, 123 Ala. 336, 26 So. 663

(1898); *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 98 N. W. 923 (1904). Where the defendant was at some disadvantage in reading or understanding the contract, the law has been lenient with him; *Endsley v. Johns*, 120 Ill. 469, 12 N. E. 247 (1887); *Williams v. Hamilton*, 104 Iowa, 423, 73 N. W. 1029 (1898); and where the plaintiff has induced the defendant not to read it by more than the mere misstatement of its contents, most courts have granted relief; *Bates v. Harte*, 124 Ala. 427, 26 So. 898 (1899); *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235 (1908); even where the defendant has been overcredulous, *Linington v. Strong*, 107 Ill. 295 (1883); but the jurisdiction of the principal case is strict in requiring the signer of a contract to read it. *J. B. Colt Co. v. Freedman*, 124 S. C. 211, 117 S. E. 351 (1923).

In accord with the principal case are decisions which refuse to aid one who will not help himself; *Jagers v. Jagers*, 49 Ind. 427 (1875); *International Textbook Co. v. Lewis*, 130 Mo. App. 158, 108 S. W. 1118 (1908); and which say that the consequence is attributable to the signer's own fault, since he had no right to rely on the plaintiff's statement. *Poland v. Brownell*, 131 Mass. 138 (1881); *Fivey v. Pennsylvania R. R. Co.*, 67 N. J. L. 627, 52 Atl. 472 (1902). But it seems to be the tendency of the law to limit the rule of *caveat emptor* and to allow a greater reliance on the word of another. *Buckley v. Acme Food Co.*, 113 Ill. App. 210 (1903); *Lotter v. Knospe*, 144 Wis. 426, 129 N. W. 614 (1911); *Smith and Co. v. Kimble*, 31 S. D. 18, 139 N. W. 348 (1913). Jurisdictions which oppose the doctrine of the principal case hold that fraud must be more strictly penalized than negligence; *Strand v. Griffith*, 97 Fed. 854, 38 C. C. A. 444 (1889); *Cummings v. Ross*, 90 Cal. 68, 27 Pac. 62 (1891); *Shrimpton v. Philbrick*, 53 Minn. 366, 55 N. W. 551 (1893); and refuse to allow the plaintiff to plead that the defendant should not have trusted him. *Hale v. Philbrick*, 42 Iowa 81 (1875); *Warden, etc., Co. v. Whitish*, 77 Wis. 430, 46 N. W. 540 (1890); *Maxfield v. Schwartz*, 45 Minn. 150, 47 N. W. 448 (1890). These cases argue that the wilful wrong of fraud is not offset by the careless fault of negligence. They reject the suggestion of contributory negligence and point out that to bar relief, "the intent to cause the harm must be met by the intent to suffer it."

While it is acknowledged that the facts of any given case must be weighed carefully to determine whether fraud or negligence is the greater wrong, it is submitted that the principal case by penalizing negligence too severely, and by dealing leniently with fraud for the sake of encouraging prudence, inclines against the trend of the law.

COPYRIGHT—INFRINGEMENT—TOY DOLL AS COPY OF CARTOON CHARACTER.—The plaintiff, who owns the copyright of the "Barney Google and Spark Plug" cartoons, sought to restrain the defendant from putting a stuffed doll, an effigy of the horse, "Spark Plug," on the market, pending a suit for infringement of his copyright. *Held:* Injunction granted. *King Features Syndicate v. Fleischer, et al.*, 299 Fed. 533 (C. C. A. 1924).

Under the Copyright Act of 1909, the plaintiff has the exclusive right "to print, reprint, publish, copy and vend the copyrighted work," which was the cartoon strip, "Barney Google and Spark Plug." Act of March 4, 1909, c. 320, sec. 1 (a), 35 STAT. AT L. 1075. To sustain its decree the court decided that a stuffed doll, an effigy of "Spark Plug," was a "copy" of the cartoon character. In determining what is a copy, most decisions seem to agree essentially that "a copy is that which comes so near to the original as to suggest that original to the mind of every person seeing it." *Hanfstaengl v. Smith & Sons*, (1905) 1 Ch. D. 519. The test is limited in the cases to visual observation. One court has laid down the formula, "How does it look," *Wilson v. Haber Bros.*, 275 Fed. 346 (C. C. A. 1921); and the Supreme Court refused an auditory test in *White-Smith Music Co. v. Apollo Co.*, 209 U. S. 1 (1907), where it was held that a perforated music roll was not a copy of a printed sheet of music, "an expression of a collocation of sounds." In applying the visual test of copy, the courts have granted the authors of copyrighted works the sole use of their "idea or conception" even though the copy was in some other field of business, *Bleinstein v. Donaldson*, 188 U. S. 239 (1903), and did not impair the commercial value of the original. *Falk v. Donaldson*, 57 Fed. 32 (C. C. 1893). It does not matter that the medium of expression be different, or that the "copy" differ in size and material, or be used for a different purpose, if the substance of the words be taken. *Fall v. Howell*, 37 Fed. 202 (C. C. 1888). Copyrighted cartoons have been infringed by "copies" which were dramatic plays on the stage, *Hill v. Whalen*, 220 Fed. 359 (D. C. 1914), and living pictures (tableaux). *Bradbury, Agnew & Co. v. Day*, 32 Times L. R. 349 (K. B. Div. 1916). A picture of a statue has been held to be a "copy" in an opinion containing a dictum that a statue might be called a "copy" of a picture. *Bracken v. Rosenthal*, 151 Fed. 136 (C. C. 1907). In the instant case the relation of cartoon and doll seems analogous to that of picture and statue.

There is no doubt that the defendant used the "idea" of the plaintiff when he made the doll, and that the doll would instantly suggest the cartoon to every mind. In view of the facts that differences of size and material are not important, and that an infringement of a copyrighted work may be in an entirely different field of commerce, it is submitted that the court decided correctly that the stuffed doll was a "copy" of the cartoon. The decision was but an application, however new and unusual, of the existing law.

CRIMINAL LAW—FORMER JEOPARDY—"SAME TRANSACTION" AND INDENTITY OF OFFENSES TESTS IN LIQUOR PROSECUTIONS.—The defendant, indicted for violation of liquor laws, pleaded former jeopardy based on an acquittal of a charge of maintaining a "blind tiger," claiming the unlawful sales of liquor for which he was prosecuted in the instant case were part of the same transaction as the acts alleged in the first prosecution. *Held:* The plea of former jeopardy must be based on the identity of offenses and not

on the same transaction. Conviction sustained. *Foran v. State*, 144 N. E. 529 (Ind. 1924).

The doctrine that no person shall be put in jeopardy twice for the same offense is provided for in the Federal Constitution (Amend. 5) and in most of the state constitutions. It is generally held to be merely declaratory of the common law, *U. S. v. Gilbert*, 2 Sumner 19, 38 (U. S. C. C. 1834); *Comm. v. Cook*, 6 S. & R. 577 (Pa. 1822); *Harris v. State*, 17 Okla. Cr. 69, 175 Pac. 627 (1920), and in Missouri is apparently only partially incorporated in the state constitution, with the common law prevailing in so far as it is not modified by constitutional or statutory provision. *State v. Linton*, 283 Mo. 1, 222 S. W. 847 (1920). In England the doctrine is not in the nature of a constitutional safeguard, but is rather a matter of practice. See BISHOP, CRIMINAL LAW, par. 982.

The rule against former jeopardy is often limited in its application only to a second prosecution for the identical act and crime, both in law and fact, for which the first prosecution was instituted; as the Court said in *State v. Rose*, 89 Ohio St. 383, 106 N. E. 50 (1914), "the words 'same offense' mean same offense, not the same transactions, not the same acts, not the same circumstances or same situation." *Burton v. U. S.*, 202 U. S. 344 (1905); *Campbell v. People*, 109 Ill. 565 (1885). So in *Johnson v. Comm.*, 256 S. W. 388 (Ky. 1923), betting on each hand in stud poker at same sitting was held a separate offense, so that prosecution for one did not bar prosecution for another. But it is frequently held that where two offenses arise out of the same transaction, prosecution for one bars prosecution for the other. *State v. Colgate*, 31 Kan. 511, 3 Pac. 346 (1884); *Roberts v. State*, 14 Ga. 8 (1853). A striking example is *Fiddler v. State*, 7 Humph. 508 (Tenn. 1847), where a conviction of racing a horse on a public street was held a bar to prosecution for betting on that race, though it was admitted each was a separate offense. Generally, however, the offenses are more closely merged, see *State v. Damon*, 2 Tyler 387 (Vt. 1803), sometimes so closely as perhaps to come properly within the well recognized principle that where one offense is but a lower degree of a greater offense, as manslaughter to murder, or is an essential ingredient of a greater offense, such as assault to assault and battery, a conviction or acquittal of one will bar prosecution for the other. For discussion and classification see *Elder v. State*, 65 Ind. 282 (1879) and *State v. Colgate, supra.*

The application of these rules in the prosecutions of violations of liquor laws has resulted in some confusion. Thus specific sales may be prosecuted after prosecution as a common seller. *State v. Coombs*, 32 Me. 529 (1851); *State v. Marchindo*, 65 Mont. 431, 211 Pac. 1093 (1922); *State v. Cleaver*, 196 Iowa 1278, 196 N. W. 19 (1923). *Contra, State v. Nutt*, 28 Vt. 598 (1856). In Massachusetts conviction as a common seller bars prosecutions for specific sales. *Comm. v. Jenks*, 1 Gray 490 (Mass. 1854), but an acquittal does not have a like effect. *Comm. v. Hudson*, 14 Gray 11 (Mass. 1859). Recent cases seem to recognize that unlawful possession of liquor is so much a part of unlawful selling or manufacturing as to make the "same transaction" test more just, even though both are distinct offenses. *State v. Lin-*

ton, supra; Coulter v. State, 94 Tex. Cr. Rep. 96, 252 S. W. 168 (1923); *Newton v. Comm.*, 198 Ky. 707, 249 S. W. 1017 (1923); see *Morgan v. State*, 28 Ga. App. 358, 111 S. E. 72 (1922). In the principal case the defendant apparently attempted to persuade the court to make an exception in liquor cases to the settled law of the state, the "same transaction" test having been definitely repudiated in *Elder v. State, supra*. The refusal of the court to recognize such an exception marks an adherence to the strict test of former jeopardy which it laid down in 1879, in the face of a tendency of other states to apply to liquor prosecutions the more lenient "same transaction" test.

CRIMINAL LAW—TRIAL BY JURY—WAIVER OF TRIAL BY TWELVE JURORS.—The relator was defendant in a prosecution for bank robbery. During trial a juror was excused because of urgent necessity, and with the defendant's consent the trial proceeded with eleven jurors. In his appeal to the Superior Court, no exception to this proceeding was taken; but a year and a half after his conviction was sustained, he petitioned for his discharge on a writ of habeas corpus, on the ground that his trial was a nullity. *Held (inter alia):* The trial was not invalid and the defendant is bound by his waiver. *Comm. ex rel. Sam Ross v. John Egan, Warden*, Supreme Court of Pennsylvania, Miscellaneous Docket No. 367, 1924.

The question whether in a trial for felony a defendant could make a binding waiver of the usual number of jurors has never come before an appellate court of Pennsylvania. It had already been decided, however, that a trial of a misdemeanor under such circumstances was valid. *Comm. v. Beard*, 48 Pa. Super. 319 (1911). From the diverse rulings in the various states much confusion has resulted, but it is almost universally held that in civil cases a waiver of the right to a complete panel of twelve is valid; by the great weight of authority, a similar waiver in misdemeanors is binding, but is not in trials for capital offenses; but as to felonies less than capital there is a decided conflict. See 43 L. R. A. 60. In the Federal courts the rule is probably now settled that a waiver is not binding even in misdemeanors. See 57 U. OF PA. L. REV. 32.

Much of the confusion can be resolved by a comparison of the various constitutional provisions for trial by jury. See concurring opinion of Woods, *J.*, in *State v. Cottrill*, 31 W. Va. 162, 6 S. E. 428 (1888); and *State v. Baer*, 103 Ohio St. 585, 134 N. E. 786 (1921). Some provisions are held to be merely a guaranty of privilege, others mandatory that there must be a trial by jury. In this connection it then becomes important to decide whether the waiver of one juror involves the principle that a jury trial can be waived entirely. If one juror can be waived, why not others, or all? Where is the stopping point? Shaw, *C. J.*, anticipated this query by saying no discreet trial judge would allow too wide a divergence from the forms of trial. *Comm. v. Dailey*, 66 Mass. 80 (1853). Practical though it may be, this answer does not solve the legal problem. In Iowa a sharp distinction between a waiver of a trial by a full panel and an entire waiver of trial by a jury has been

drawn. *State v. Grosshcim*, 79 Iowa 75, 44 N. W. 541 (1890). But it has also been held the problem is the same. *Jennings v. State*, 134 Wis. 307, 114 N. W. 492 (1908). And the reasoning of some courts indicates that they assumed, without discussion, that there was no distinction. *State v. Baer, supra.*

Even if it be decided that the problems are not the same in principle, the constitution must still be looked to, for there is still the question whether it is mandatory that there be twelve men and no less comprising the jury. In view of the importance of this constitutional aspect of the problem, it is most surprising that it was not considered in the instant case. Nor does *Comm. v. Beard, supra,* from which the court proceeded, refer to the constitution. States whose constitutional provision is worded much the same as Pennsylvania's generally hold that there can be a waiver in misdemeanors and felonies. See full discussion in *State v. Baer, supra.* It would seem, therefore, that the court arrived at a sound conclusion, though it neglected the constitution and devoted itself entirely to the question whether there was a valid distinction between waiver in trial for felony and one in trial for misdemeanor. Its conclusion that there is none seems entirely sound; even if the right of waiver in criminal trials is governed largely by public interest, as suggested in 12 COL. L. REV. 163, still there seems to be little reason to distinguish between two classes of crimes between which the difference is merely technical. *In re McQuown*, 19 Okla. 347, 91 Pac. 689 (1907). Indeed, the original leading cases laid down general rules intended to be applied to any grade of offense. *Comm. v. Dailey, supra; Conceni v. People*, 18 N. Y. 128 (1858). And more recent cases are to same effect, definitely including homicide in their application of the rule. *State v. Baer, supra; State v. Browman*, 191 Iowa 608, 182 N. W. 823 (1921); *State v. Ross*, 197 N. W. 234 (S. D. 1924). But it is doubtful, in view of remarks in the principal case, whether the Pennsylvania courts are prepared to go so far as to include homicides in the rule.

CRIMINAL LAW—YEAR-AND-A-DAY RULE—INVOLUNTARY MANSLAUGHTER.—The defendant was indicted for involuntary manslaughter, for causing a death by the negligent operation of an automobile. The indictment disclosed on its face that the victim died one year and two days after he was struck. The defendant moved to quash the indictment. *Held:* Motion denied. *Commonwealth v. Evaul*, 5 Pa. D. & C. 105. (Q. S., Phila. Co., 1924.)

The court argues that the common law writers, Hawkins, Coke, and Blackstone, treat the year-and-a-day rule under the title "Murder," and do not refer to it in writing of either voluntary or involuntary manslaughter; and that therefore the rule cannot be applied to such a case as the one at bar. From this reasoning, however, it would follow that the rule should not apply to voluntary manslaughter either. Yet this is not the case, for the Court of King's Bench in *Rex v. Dyson*, (1908) 2 K. B. 454, gave effect to it, and there have been dicta in a number of American cases to the effect that the year and a day rule governs both murder and manslaughter. *Commonwealth v. Macloon*, 101 Mass. 1 (1869); *State v. Bantley*, 44 Conn. 537 (1877). Indeed, the learned justice in the instant case himself admits that the rule was

applied to the graver forms of manslaughter. Logically, the rule should extend to all forms of homicide.

The practical reasons against such an extension, however, are very strong. The rule was evolved at a day when the science of medicine was in embryo. Where a man died long after receiving a wound, the causal connection between the death and the stroke could not be determined accurately. But the reason for the rule has ceased to exist, and therefore the rule should cease as well. While it would be impossible for a court to refuse to adhere to it in a case of murder or voluntary manslaughter, there is no practical reason for extending it to such a case as the one at bar. The court was bound by no precedent, for all the reported cases on the subject deal with voluntary manslaughter. The decision is a refusal to allow the logical application of archaic principles to hinder the working of justice.

INSURANCE — CONSTRUCTION — "EXTERNAL, VIOLENT AND ACCIDENTAL MEANS"—DEATH BY TYPHOID.—A railroad employee drank water from pipes intended to carry drinking water, but which, because of a defective valve, contained polluted water, from which he contracted typhoid fever and died. *Held:* That death was caused by "external, violent and accidental means" within the meaning of an insurance policy. *Christ v. Pacific Mut. Life Ins. Co.*, 144 N. E. 161, Ill. (1924).

It is a well-settled rule, as laid down in *United States Mutual Accident Ass'n. v. Barry*, 131 U. S. 100 (1889) that if the act which precedes the injury, though intentional, produces something unforeseen, unexpected, and unusual, the injury is accidentally caused. But some cases hold that where the insured has done the precise act which he intended to do and his act has produced a consequence which he did not foresee, there is no liability. *Smith v Travelers' Ins. Co.*, 219 Mass. 147, 106 N. E. 607 (1914).

In holding the insurers liable in policies insuring against accidental death, the courts have generally followed the rule of interpretation which resolves doubts as to the meaning of ambiguous language against the party who has drawn up the contract. This enables them to give a liberal construction of the policy in favor of the beneficiary, since the insurance company draws up the policy. Thus, in *Higgins v. Midland Casualty Co.*, 281 Ill. 431, 118 N. E. 11 (1917), it was held that sunstroke was a bodily injury sustained through accidental means. Arsenic poisoning contracted in the course of employment, resulting in death, was within a policy insuring against death by accidental, external and violent means, *Matthiessen & Hegeler Zinc Co. v. Industrial Board*, 284 Ill. 378, 120 N. E. 249 (1918); so also were inhaling of gas, *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 20 N. E. 347 (1889); suffocation by drowning, *Clark v. Iowa State Traveling Men's Ass'n.*, 156 Iowa 201, 135 N. W. 1114 (1912); eating of tainted food, *Johnson v. Fidelity & Casualty Co.*, 184 Mich. 406, 151 N. W. 593 (1915); opening of a pimple, causing fatal infection, *Lewis v. Ocean Accident Corp.*, 224 N. Y. 18, 120 N. E. 56 (1918); fright caused by the insured's horse running away, *McGlinchley v. Fidelity & Casualty Co.*, 80 Me. 251, 14 Atl. 13 (1888). And it is only necessary that the act be accidental as regards the insured. Thus, an intentional murder of the insured was

held to be occasioned by the happening of an external, violent and purely accidental event. *Mabee v. Continental Casualty Co.*, 37 Idaho 667, 219 Pac. 598 (1923). But a fall because of illness is not caused by accidental means, and death resulting from an injury so received is not accidental within the policy. *Aetna Life Ins. Co. v. Robinson*, 262 S. W. 118 (Tex. 1924).

In the principal case, the disease producing death was itself the effect of an accident, and in such a situation, the courts hold that the death is attributable to the accident alone. *Western Commercial Travelers' Ass'n. v. Smith*, 85 Fed. 401, 29 C. C. A. 223 (1898). While it would seem that the policy was drawn up to include only death occasioned by a violent accident, nevertheless, the decision reached by the court is in accord with the great weight of authority.

LARCENY—DEPOSIT OF PROCEEDS IN BANK—ABILITY OF OWNER TO TRACE AND RECOVER.—The owner of bonds placed them in a safe deposit box in Bank A. The cashier of the A Bank, who was also a partner therein, stole them from the box, and received a check for the proceeds, which he deposited in the B Bank to the credit of the A Bank. The latter became insolvent, and the owner of the bonds petitioned the court that the proceeds of the larceny be paid over to her. The A Bank had at all times on deposit in the B Bank funds in excess of the proceeds from the sale of the securities. *Held:* The plaintiff is entitled to the proceeds. *Conneautville Bank's Assigned Estate*, 280 Pa. 545, 124 Atl. 745 (1924).

Although the relationship of the holder of a safe deposit box and the bank in which the box is located is an anomalous one, the courts regard it as one of bailment. *National Safe Deposit Co. v. Stead*, 250 Ill. 584, 95 N. E. 973 (1911); *Reading Trust Co. v. Thompson*, 254 Pa. 333, 98 Atl. 953 (1916). A trust relationship does not exist because the legal title to the contents of the box remains in the depositor. The taking of the securities was larceny, and the A Bank acquired no title to the bonds.

The court in the instant case unequivocally declares that the proceeds obtained from the sale of the stolen bonds cannot be considered as a trust. Courts seek to preserve existing equities in certain cases by constructing trusts, and the commonest examples of such constructive trusts are to be found where the legal title has passed through fraud, concealment, or misrepresentation. 1 PERRY ON TRUSTS (6th ed.), sec. 166, *et seq.* There are cases however, where the courts have impressed a trust upon the proceeds of a larceny. *Newton v. Porter*, 69 N. Y. 133 (1877); *Aetna Indemnity Co. v. Malone*, 89 Neb. 260, 131 N. W. 200 (1911); *contra, Chambers v. Chambers*, 98 Ala. 454, 13 So. 674 (1892).

The principle is well settled that a *cestui que trust* may pursue trust funds as long as he can trace them, and where the bank, in which such funds have been deposited, becomes insolvent, the *cestui que trust* is entitled to have his trust funds segregated. *In re Hallett's Estate*, L. R. 13 Ch. Div. 696 (1879); *Cook v. Tullis*, 18 Wall. 332 (U. S. Sup. Ct. 1873); *Woodhouse v. Crandall*, 197 Ill. 104, 64 N. E. 292 (1902). Preference is allowed even where the trust

funds have lost their identity in a general account, provided that there has existed at all times funds sufficient to discharge the trust *res. National Bank v. Insurance Co.*, 104 U. S. 54, 68 (1881); *Hewitt v. Hayes*, 205 Mass. 356, 91 N. E. 332 (1910). In *Newton v. Porter, supra*, the owner of stolen bonds was permitted to follow the proceeds of their sale as a trust into the hands of the thieves and their confederates, while in *Aetna Indemnity Co. v. Malone, supra*, the proceeds derived from a bank robbery were permitted to be followed as a trust *res.*

The decision in the instant case undoubtedly follows a modern tendency to accord relief under such circumstances, although the courts ordinarily achieve such a result by first impressing with a trust the proceeds of the larceny. The failure of the court to impress a trust in the present case probably may be explained by the fact that there was no equity jurisdiction in Pennsylvania until early in the Nineteenth Century, and as a result, certain equitable remedies have had a limited development and application in that jurisdiction.

NAMES—MARRIED WOMEN—RIGHT TO RETAIN MAIDEN NAMES.—The Comptroller-General of the United States ruled that a married woman in government employ must sign her married name to the payroll in order to draw pay. Doctor X, a married woman employed by the government who had retained her maiden name, protested against this. The case has not been decided by the courts. See 11 EQUAL RIGHTS Nos. 29, 32.

The ruling appears to be based on the belief that while a married woman may have an assumed name, she has but one legal name, *i. e.*, her husband's surname. It is well settled that a personal name is not a matter of law, but of fact, and can be changed at will; *Re Snook*, 2 Hilt. 566 (N. Y. 1859); *Linton v. First Nat. Bank*, 10 Fed. 894 (C. C. 1882); see G. S. Arnold, 15 YALE L. JOUR. 227, reviewed in 19 HARV. L. REV. 548; although a certain amount of user is necessary before the new name is acquired, either as evidence of a *bona fide* intention to keep the name; *Smith v. U. S. Casualty Co.*, 197 N. Y. 420, 90 N. E. 947 (1910); or to assure identification. *Laflin and Rand Co. v. Steytler*, 146 Pa. 434, 23 Atl. 215 (1892); *Loser v. Plainfield Savings Bank*, 149 Iowa 672, 128 N. W. 1101 (1910); *Everett v. Standard Acc. Ins. Co.*, 45 Cal. App. 332, 187 Pac. 996 (1919). The statutes which provide for a change of name by the Legislature, or by decree of court, are without exception held to be permissive; that is, they simply provide a convenient means of record and of notice to the public, so that the change is immediate. *Smith v. U. S. Casualty Co., supra; In re McVita*, 189 Fed. 250 (D. C. 1911); *State v. Ford*, 89 Ore. 121, 172 Pac. 802 (1918). A married woman is not excluded from the benefits of these general rules, and can acquire a new name by usuage. *Clark v. Clark*, 19 Kan. 522 (1878); *Parmelee v. Raymond*, 43 Ill. App. 609 (1892); see 18 LAW NOTES 164. Divorce statutes generally provide for a resumption of the maiden name by decree of court, but since a divorced woman can assume her maiden name without such a decree; *Fendall v. Goldsmid*, L. R. 2 Prob. Div. 263 (1877); *Rich v. Mayer*, 7 N. Y. Supp. 69 (1889); these statutes must also be taken as permissive. Accordingly, it appears that if Doctor X had gone by her mar-

ried name, she could have regained her maiden name by a certain amount of user; for immediately upon marriage a woman customarily assumes her husband's name; *Freeman v. Hawkins*, 77 Tex. 498, 14 S. W. 364 (1890)); *Carrall v. State*, 53 Neb. 431, 73 N. W. 939 (1898); Schouler, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS, (6th ed. 1921) 66; and it can be changed only in the usual way. However, this assumption of the husband's surname seems not to be in accordance with any rule of law, but simply a recognition of custom. Therefore, if the woman did not acquiesce in the custom, but persisted in the use of her maiden name, as in the instant case, it would seem that she would not gain a new name by marriage, but would retain her former name. Since Doctor X's maiden name is her legal name, we are forced to conclude that the basis of the Comptroller-General's ruling is unsound.

TORTS—FRAUD—MISREPRESENTATION AS TO PARENTAGE.—The plaintiff was taken into defendants' home in 1887, shortly after birth, under a contract with the county to keep her for eighteen years, and she lived there until 1912. The plaintiff now complains that "defendants, with intent to deceive her, led her to believe, and she did believe, that she was defendants' natural child," that, on account of this belief, she "performed a woman's work in the household and a man's work in the field" of defendants from 1905 to 1912, which services were worth $2500; that they intentionally encouraged and sustained such belief, by which she was deceived and defrauded. The defendants demur. *Held:* Demurrer sustained. *Miller v. Pelzer, et al.*, 199 N. W. 97 (Minn. 1924).

The court denied relief to the plaintiff by reasoning in this manner: This action sounds in tort. If the facts disclosed constitute a cause of action, it must be upon the theory that defendants violated a legal duty in concealing from plaintiff, when she arrived at her majority, the truth concerning her parentage. The court finds that there was no duty to make such disclosure.

It is submitted that the court decided the case on a point foreign to the gist of the complaint. The plaintiff does not contend that she was damaged by the failure to disclose, by the "silent deception" as the court terms it. The plaintiff contends that she was damaged by the open fraud and deceit of the defendants, that on account of her belief in the state of facts which the defendants induced and encouraged her to believe, she performed valuable services for the defendants without any compensation. The defendants admit these allegations by their demurrer. Is it not unjust to permit the defendants to profit by their own fraud and to deny to the innocent plaintiff the damage occasioned her by defendants' conduct?

In a case with almost similar facts, *Graham v. Stanton, admin'x.*, 177 Mass. 321, 58 N. E. 1023 (1901), in which the plaintiff was taken into the house of defendant's intestate and performed services induced by the false representation that she had been legally adopted, Holmes, *J.*, speaking for the court, says: "If there was any evidence of fraud . . . , it is settled . . .

that the remedy is an action of tort for the deceit and that a contract is not to be implied." In the Minnesota case, there was a misrepresentation as to the plaintiff's status, and this misrepresentation was intentionally continued during the whole period of plaintiff's stay with the defendants, in order to call forth the faithful services, free of cost, of a servant and hired man combined. The good motive of the foster-parents is immaterial; a course of action is no less fraudulent because it is inspired by a profiting benevolence. *Foster v. Charles*, 7 Bing. 105 (Eng. 1830); Lord Blackburn in *Smith v. Chadwick*, L. R. 9 App. Cas. 187 (1884), at page 201.

The complaint does not disclose any procedural difficulties. Although the rule at common law seems to deny a child the right to sue its parent in a civil action for an injury referable to the period of minority; *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S. W. 664 (1903), (cruel treatment by stepmother); *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905), (rape by father); this rule does not apply to one *in loco parentis*, especially when the child has been taken from the custody of its foster parents. *Clasen v. Pruhs*, 69 Neb. 278, 95 N. W. 640 (1903). This is all the more true when the adult foster child is seeking relief for an injury referable to the period of majority. The Minnesota Statute of Limitations—"the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud"—was not a bar to the action, as the plaintiff alleged she had not discovered the fraud until within six years next before the action was commenced. Minn. Gen. Stat. 1913, sec. 7701 (6); *Downer v. Union Land Co. of St. Paul*, 113 Minn. 410, 129 N. W. 777 (1911).

TRUSTS AND TRUSTEES—DISCLAIMER BY CONDUCT—THIRTY YEARS WITHOUT ACTION HELD DISCLAIMER.—A, B and C were appointed trustees of land under a will. Thirty years after his appointment A died having taken no action to accept or disclaim the trust. B and C had died prior to A's death and C's executor had appointed new trustees. A purchaser of the land from these trustees demanded proof of a disclaimer by A and commenced action to recover back a deposit he had made toward the purchase price. *Held:* The deposit could not be recovered since by his thirty years of inactivity A had disclaimed the trust. *In re Clout and Frewer's Contract*, (1924) 2 Ch. 230.

No person is bound to act as a trustee. If he disclaims by word or act the disclaimer is valid. *Stacey v. Elph*, 1 Myl. & K. 195 (Eng. 1833); *Dodge v. Dodge*, 109 Md. 164, 71 Atl. 519 (1908). But it is stated by text writers that if the trustee does nothing he is presumed to have accepted the trust, and that the longer he remains inactive the greater is the presumption of acceptance. ARCHER, PRINCIPLES OF EQUITY, 282; FLINT, LAW OF TRUSTS AND TRUSTEES, 179; LEWIN, TRUSTS (12th ed.) 224. The earliest case on which this principle rests decided that in order to determine when title passed under a deed of surrender acceptance would be presumed until it was disclaimed. *Thompson v. Leach*, 2 Vent. 198 (Eng. 1692). Of the later cases which accepted the rule on the authority of *Thompson v. Leach*.

either the acceptance or the disclaimer could usually be proved from the acts of the trustee. *Doyle v. Blake*, 2 Sch. & Lef. 231 (Ire. 1804); *Townson v. Tickell*, 3 Barn. & Ald. 31 (Eng. 1819); *Eyrick v. Hetrick*, 13 Pa. 488 (1850); *Barclay v. Goodloe's Executors*, 83 Ky. 493 (1884). In Ireland Lord Chancellor Sugden applied the rule in two cases, in one of which the trustee had failed to act for twenty-three years, *In re Uniacke*, 1 J. & Lat. 1 (Ire. 1844); and in the other of which the non-action had continued for thirty-four years, *In re Needham*, 1 J. & Lat. 34 (Ire. 1844). These cases are rejected in the instant case, which adopts the rule of *In re Gordon*, L. R. 6 Ch. Div. 531 (1877), in which non-action for three years by an executor-trustee who had renounced probate but had not disclaimed the trust was held to be a sufficient disclaimer; and of *In re Birchall*, L. R. 40 Ch. Div. 436 (1889), where a trustee refused to act but nine years later attempted to exercise trust powers and it was held that he had disclaimed by his failure to act. The later American cases seem to be in accord with the instant case in that non-action is taken as evidence as a disclaimer. *In the mater of George W. Robinson*, 37 N. Y. 261 (1867); *Adams v. Adams*, 64 N. H. 224, 9 Atl. 100 (1886); *Brandon v. Carter*, 119 Mo. 572, 24 S. W. 1035 (1893). This is in accordance with the general principle that one cannot be compelled to take positive action to escape a duty which another seeks to impose upon him.