RECENT CASE NOTES

CARRIERS—VALIDITY OF REGULATION REQUIRING CLAIM FOR PERSONAL INJURIES TO BE MADE BY PASSENGER WITHIN THIRTY DAYS.—The plaintiff while riding on a drover's pass was injured by the negligence of the defendant carrier. A clause in the contract of carriage provided that the carrier should be released from liability for injury to the plaintiff, unless he or his personal representative gave notice in writing within thirty days after the injury. The plaintiff, having failed to give notice within the time prescribed, sued for damages. *Held,* (three justices *dissenting*) that the regulation was reasonable, and that the failure to give notice within thirty days precluded a recovery. *Gooch v. Oregon Short Line Ry.* (1922) 42 Sup. Ct. 192.

In the absence of a controlling statute, carriers are privileged to make regulations which are reasonable. *Burge v. Georgia Ry. & Elec. Co.* (1909) 133 Ga. 423, 65 S. E. 879. The extent of the business and the difficulty of investigating old claims make time limitations as to notice of claims reasonable. *Georgia, Fla. & Ala. Ry. v. Blish Milling Co.* (1915) 241 U. S. 190, 36 Sup. Ct. 541. Such notice is a condition precedent to the carrier's duty to pay damages. *St Louis, I. M. & S. Ry. v. Starbird* (1916) 243 U. S. 592, 37 Sup. Ct. 462. The Cummins Amendment to the Interstate Commerce Act provided that it should be unlawful, in case of damage to goods, for a common carrier to require notice to be given within a shorter period than ninety days. Act of March 4, 1915 (38 Stat. at L. 1196, 1197), re-enacted in Act of Feb. 28, 1920 (41 Stat. at L. 456, 494). Congress, however, has made no provision for notice of claim in the case of personal injuries. A caretaker of live stock travelling on a drover's pass has the status of a passenger and can recover for an injury caused by the carrier's negligence. *Ry. v. Lockwood* (1873, U. S.) 17 Wall. 357; *Norfolk Southern Ry. v. Chatman* (1917) 244 U. S. 276, 37 Sup. Ct. 499. The requirement in the instant case was held valid and unaffected by the Cummins Amendment because less time is needed for the notice of claims for personal injuries than is deemed proper for goods. A further reason given by the court was that a record is kept of goods, and not of passengers, and therefore, in the latter case, fraud would be common unless the period in which to present claims is more limited. It is submitted, however that it is unreasonable to make it more difficult to recover for injuries to the person than for injuries to goods. There seems to be less likelihood of fraudulent claims in the former than in the latter case. Goods are unpacked when out of the carrier's possession, while personal injuries usually occur in the presence of the agents of the carrier. Congress did not specifically provide for the situation involved in the instant case and it appears to be the first of its kind to come before the courts. It is to be expected that the railroads will immediately take advantage of this decision by printing a "thirty-day" limitation on their tickets. This result should be anticipated by a statutory prohibition of a shorter period than at least ninety days.

CONTRACTS—AUCTIONS—BID RECEIVED AT PUBLIC SALE OPERATES AS OFFER.—The Secretary of the Navy offered a yacht for sale to the highest bidder. Levinson and Johnson submitted bids. Levinson's bid having been accepted as the highest, a bill of sale was delivered to him. Thereafter it was discovered that Johnson's bid, which had been mislaid, was actually the highest. Possession of the boat was never given to Levinson. The Secretary of the Navy filed a bill to determine the rights of the parties. *Held,* (one judge *dissenting*) that there was

no contract with Johnson. *Levinson v. United States and Johnson* (1922) 42 Sup. Ct. 275.

The tender of a bid by letter at a public sale has the same operative effect as the tender of a bid at a public auction. 1 Williston, *Contracts* (1920) sec. 31; see *Boyle v. Adams* (1892) 50 Minn. 255, 52 N. W. 860; *Tyree v. Williams* (1814, Ky.) 3 Bibb, 365; *United States, ex rel. Goldberg, v. Meyer* (1911) 37 App. D. C. 282; aff'd. (1913) 231 U. S. 218, 34 Sup. Ct. 84. An advertisement that the property will be sold at a public sale to the highest bidder is no more than an invitation to submit bids or offers. *Freeman v. Poole* (1915) 37 R. I. 489, 93 Atl. 786; *Anderson v. Wis. Cent. Ry.* (1909) 107 Minn. 296, 120 N. W. 39; see *United States, ex rel. Goldberg, v. Meyer, supra;* Anson, *Contract* (Corbin's ed. 1919) sec. 64; 1 Williston, *op. cit.* sec. 31. Hence a bid may be withdrawn at any time before its acceptance, but when it is accepted a valid contract is created. *Payne v. Cave* (1789, K. B.) 3 T. R. 148; *Hibernia Sav. Society v. Behunke* (1898) 121 Calif. 339, 53 Pac. 812; *George v. Pracheil* (1912) 92 Neb. 81, 137 N. W. 880. The auctioneer is privileged to reject the highest bid even though the advertisement states that it will be accepted. *McPherson Bros. v. Okawagan County* (1907) 45 Wash. 285, 88 Pac. 199; *Anderson v. Wis. Cent. Ry., supra.* It has been suggested that in such an auction the submission of the highest bid creates a contract. Langdell, *Summary of the Law of Contracts* (2d ed. 1880) sec. 19. This theory, however, has never been judicially accepted. See *Freeman v. Poole, supra.* An advertisement may be sufficiently explicit to constitute an offer. 1 Williston, *op. cit.* sec. 31; see *So. Hetton Coal Co. v. Haswell Coal Co.* [1898, C. A.] 1 Ch. 465. The theory has been advanced in England that the tender of the highest bid creates a collateral contract to accept the highest bid. See *Warlow v. Harrison* (1859, Exch.) 1 El. & El. 309; *Harris v. Nickerson* (1873) L. R. 8 Q. B. 286; *Spencer v. Harding* (1870) L. R.5 C. P. 561; Anson, *op. cit.* sec. 64. Even if such a contract existed, however, the bidder would merely have a right that a contract to sell be made with him. There would still not be a right to the property itself. Johnson's bid having operated merely as an unaccepted offer, the instant case seems sound.

JURY—RIGHT TO SPECIAL JURY.—The plaintiff sued the defendant for libel contained in a newspaper article commenting on certain proceedings in the New Zealand University Senate. The defendant made application under the Juries Act for a special jury, alleging that expert knowledge of economic and political doctrines would be essential to an understanding of the matter in issue. *Held,* that the defendant was entitled to a special jury. *Archer v. New Zealand Times Co.* [1922, Sup. Ct.] N. Z. L. R. 90.

One class of special jury, the "struck jury," existed at common law in cases where the issues were too complex for the ordinary freeholder. It was usually formed by both parties striking out names from a selected list. 3 Blackstone, *Commentaries* *357; *Rex v. Edmonds* (1821, K. B.) 4 Barn. & Ald. 471. This type of jury is granted in specified cases by statute in England and in many American jurisdictions. 1 Thompson, *Trials* (2d ed. 1912) sec. 7. It is permitted as a matter of right upon compliance with the statute. *Lommen v. Minneapolis Gaslight Co.* (1896) 65 Minn. 196, 68 N. W. 53; *Brilliant Coal Co. v. Barton* (1919) 203 Ala. 38, 81 So. 828. But it is sometimes allowed only in the discretion of the trial court. *State v. Withrow* (1896) 133 Mo. 500, 34 S. W. 245; *Lemons v. Harris* (1914) 115 Va. 809, 80 S. E. 740. Special juries of the kind in the instant case have been seldom authorized in the United States. The New York statute, however, provides for the granting of such a jury in cases where it appears to the court that the importance or intricacy of the case requires it. Laws, 1904, ch. 458. *Coler v. Brooklyn Daily Eagle* (1909) 133 App. Div. 300,

117 N. Y. Supp. 273; *Jerome v. New York Evening Journal* (1908) 124 App. Div. 372, 108 N. Y. Supp. 801 (libel of a public officer in his official capacity sufficiently important); *People v. McClellan* (1908) 124 App. Div. 664, 109 N. Y. Supp. 76 (action to determine the right to the mayoralty of New York City); *Industrial and General Trust Co. v. Tod* (1905, Sup. Ct.) 46 Misc. 492, 95 N. Y. Supp. 44 (action by holder of railway bonds for breach of an agreement to reorganize the railroad involved questions of sufficient intricacy). In Louisiana, jurymen selected from certain occupations or professions may be impanelled when the courts deem it advisable. *Golding v. Petit* (1875) 27 La. Ann. 86; *Kellogg v. Clinton* (1876) 28 La. Ann. 674; see *Bruce v. Beall* (1898) 100 Tenn. 573, 47 S. W. 204. A New York court once emphatically declared itself as opposed on general principles to special juries as involving new machinery and tending to prolong litigation without producing results commensurately satisfactory. *Ives v. Ranger* (1892) 65 Hun, 622, 20 N. Y. Supp. 32. In a day of attempted judicial reform it might be interesting to determine the relative value of the verdict of the special jury as contrasted with that of the ordinary jury.

KANSAS INDUSTRIAL COURT—CONSTITUTIONALITY NOT INVOLVED IN COLLATERAL PROCEEDINGS.—The plaintiffs, officials of the United Mine workers of America, sued out from the Supreme Court of the United States two writs of error to the Supreme Court of Kansas to review two judgments affirming the action of a district court of Kansas in adjudging them guilty of contempt for disobeying orders entered pursuant to the provisions of the Kansas Court of Industrial Relations Act (Kansas Laws, 1920, ch. 29) on the ground that the act was unconstitutional. *Held*, that the writs should be dismissed. *Howat et al. v. State of Kansas* (1922, U. S.) 42 Sup. Ct. 277.

The plaintiffs did not deny the constitutionality of section II, empowering the Court of Industrial Relations to conduct investigations, and it was expressly provided by section 28 that any adjudication that any section or provision was invalid should not affect the validity of the rest of the act. *State v. Howat* (1920) 107 Kan. 423, 191 Pac. 585. It is clear that the plaintiffs could not question the validity of other provisions not involved in the proceeding. See *Arizona Employers' Liability Cases* (1919) 250 U. S. 400, 429, 39 Sup. Ct. 553, 559. And when a witness is summoned before a court of competent jurisdiction he cannot refuse to testify because he thinks the court has not jurisdiction of the subject matter. *Blair v. United States* (1919) 250 U. S. 273, 39 Sup. Ct. 468. Manifestly there was no federal question here. Although the defendants in the second case attacked the constitutionality of the act, the court refused to review its decision because the validity of the order committing the defendants for contempt did not at all depend upon the validity of the Act. *State v. Howat* (1921) 109 Kan. 376, 198 Pac. 686; COMMENTS (1921) 31 YALE LAW JOURNAL, 75. The court of first instance had jurisdiction of the case and power to issue the injunction without reference to the act. The injunction so issued could be questioned only by direct proceedings on appeal, and not collaterally in a proceeding for contempt. See *Gompers v. Bucks Stove & Range Co.* (1911) 221 U. S. 418, 450, 31 Sup. Ct. 492, 501. It is disappointing not to have the validity of this interesting legislation determined, but the writs of error were properly dismissed. For a discussion of the Court of Industrial Relations with the provisions of the act, see Vance, *Kansas Court of Industrial Relations and its Background* (1921) 30 YALE LAW JOURNAL, 456; see also (1921) 31 *ibid.* 206.

MORTGAGES—SUBROGATION—ADVANCEMENT OF MONEY FOR REDEMPTION.—The defendant X held land subject to a mortgage to A for $1,500 and a subsequent mortgage to the plaintiff B for $6,000. A contract to sell the land to the defendant

C was then recorded. The first mortgage was foreclosed and a sheriff's certificate issued to A. An Iowa statute allowed the owner a year and the junior lienholder nine months within which to redeem. Code, 1897, sec. 4046. After nine months, but before the expiration of a year, B gave $1,500 to X, thereby inducing him to discharge A's lien. After C acquired legal title, B claimed to be subrogated to the rights of the first mortgagee. *Held,* (two judges *dissenting*) that although B's second mortgage was a valid encumbrance on the land, he was not subrogated to the first mortgage, which had been entirely discharged. *Berry v. Krittenbrink* (1922, Iowa) 186 N. W. 428.

The majority of the court, in holding the first mortgage discharged, said: "A discharge of a prior lien by the primary debtor necessarily operates to the benefits of other subsequent lienholders, and this is true regardless of the source of the funds used by the debtor in effecting such discharge." The general rule thus stated is subject to exceptions. Equity applies the principle of conventional subrogation when a third party, pursuant to an agreement that the mortgage is to be kept alive for his security, advances money to a mortgagor to pay off an encumbrance. *Home Savings Bank v. Bierstadt* (1897) 168 Ill. 618, 48 N. E. 161. Such an agreement is said to be "implied," if justice demands it. *Kent v. Bailey* (1917) 181 Iowa, 489, 164 N. W. 852; *Cook v. Kelly* (1917) 200 Ala. 133, 75 So. 953. Where the mortgagor, by fraudulently representing that there are no other encumbrances on the land, obtains a loan in order to pay off a prior mortgage, the doctrine of subrogation is invoked in behalf of the lender on the theory of a constructive trust. *State Sav. Trust Co. v. Spencer* (1918, Mo. App.) 201 S. W. 967; *Hill v. Ritchie* (1916) 90 Vt. 318, 98 Atl. 497; *contra, Southern Trust Co. v. Garner* (1920) 145 Ark. 58, 223 S. W. 369, disapproved in (1920) 34 HARV. L. REV. 86. A resulting trust is raised when one loans money and takes a mortgage in the name of another. *Hanrion v. Hanrion* (1906) 73 Kan. 25, 84 Pac. 381; *In re Tobin's Estate* (1909) 139 Wis. 494, 121 N. W. 144. In the present case, the rights of the purchaser of the land were not prejudiced, and inasmuch as there is no inflexible rule that payment by the principal debtor extinguishes the mortgage, it seems that the minority, in urging that X was merely a trustee for B and that consequently the mortgage should be equitably sustained for B's benefit, adopted the better view.

SALES—WRONGFUL RETENTION OF GOODS BY BUYER.—The defendant refused to pay for paper delivered to him by the plaintiffs on the ground that the paper was of an inferior grade. The plaintiffs demanded that the paper be returned if it was unsatisfactory, and the defendant refused, stating that he would hold it until the plaintiffs sent paper of the agreed quality. The Sales Act provided that the "buyer will be deemed to have accepted goods (a) by verbal or written acceptance (b) by doing any act in relation to them inconsistent with the ownership of the seller (c) by retaining them after a reasonable time in which to examine them has elapsed without rejecting them." Conn. Gen. Sts. 1918, ch. 230, sec. 4714. Acceptance was predicated by the plaintiff on the last ground. *Held,* that the defendant's rejection was conditional, and therefore had the effect of an acceptance. *Fillmore v. Garvin* (1921) 97 Conn. 207, 116 Atl. 184.

A buyer who has not had an opportunity to examine goods prior to delivery is entitled to a reasonable time after delivery in which to examine them. Conn. Gen. Sts. 1918, ch. 230, sec. 4713; *Fiske v. Dunbar* (1919) 118 Me. 342, 108 Atl. 324; *Sponge Divers' Assoc. v. Smith, Kline, & French Co.* (1919, E. D. Pa.) 257 Fed. 328. "Where goods are delivered to a buyer and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he intimates to him that he refuses to accept them." Conn. Gen. Sts. 1918, ch. 230, sec. 4716; *Mulcahy v. Dieudonne* (1908) 103 Minn. 352, 115 N. W.

636; *McCormick, etc. Co. v. Cochran* (1887) 64 Mich. 636, 31 N. W. 561. This section of the statute seems clearly applicable in the instant case. It is admitted that notification of an intention to reject was given to the plaintiff within a reasonable time, but the court was of opinion that the rejection was conditional, and that there was, therefore, no rejection within the meaning of the statute. The defendant made clear his intention never to accept *these goods;* his rejection of them, it seems, was as absolute as it could be. Whether he was justified in retaining the goods after demand was a different question. The retention was clearly such an exercise of dominion over them as would have entitled the plaintiff to recover on ground (b) above. Nevertheless such unjustifiable conduct did not modify in any way his expressed intention never to accept *these goods.* The condition, if there was one, was attached rather to the surrender of the goods than to the rejection of them. If, for example, the defendant had indicated in the letter of rejection an intention not to accept the goods unless the plaintiffs diminished the price, making allowance for the inferior quality, there would have been a conditional rejection. Such, however, was not the case here. Although the instant decision is justified by the statute, it seems to have been based upon the wrong ground.

SPECIFIC PERFORMANCE—RESTRICTIVE BUILDING COVENANTS AS AFFECTING MARKETABLE TITLE.—The plaintiff contracted to sell to the defendant a lot under general building restrictions which provided that "no building shall be erected or permitted within fifty feet of any front street . . . . nor within five feet of any rear line." The lot contained a house less than fifty feet from the front line by 5.17 feet and a garage which touched the rear line. The house had been built before the restrictions were imposed by the company which originally sold the lots. A provision in the restriction allowed a waiver only by the company and then only if the individual owners were not injured thereby, except that two adjoining owners might agree in writing to the erection of a building having one side on the boundary line. The trial court granted specific performance on the ground that the plaintiff had a marketable title. *Held,* (three judges *dissenting*) that the title was not marketable. *Chesebro v. Moers* (1922) 233 N. Y. 75, 134 N. E. 842.

Three principles of construction are generally used in determining what matters of law or fact are sufficient to make a title unmarketable. First, that restrictive covenants will not be extended by implication, but will be strictly construed against the covenantee. *Kjerner v. Hayhurst* (1920) 193 App. Div. 908, 183 N. Y. Supp. 636; *Binswanger v. Hyman* (1921, Pa.) 114 Atl. 628. Second, that the effect of a covenant will be determined by the circumstances existing at the time of its execution. *Clark v. Devoe* (1891) 124 N. Y. 120, 26 N. E. 275; *Dick v. Goldberg* (1920) 295 Ill. 86, 128 N. E. 723. Third, that a purchaser will not be excused from his contract because of the bare possibility that the title may later prove defective. *Duncan v. Glore* (1920) 189 Ky. 132, 224 S. W. 678; *Kenefick v. Shumaker* (1917) 64 Ind. App. 552, 116 N. E. 319; Maupin, *Marketable Title to Real Estate* (3d ed. 1921) 769. Under these principles of construction and in view of the inaction of the covenantees, enforcement of the covenant as to the house would hardly be granted. See *Underwood v. Herman* (1913) 82 N. J. Eq. 353, 89 Atl. 21; *Smith v. Taranto* (1913, Sup. Ct.) 140 N. Y. Supp. 794. Nor could the adjoining owner complain of the rear line violation, having himself erected a garage on the rear line. *Pappas v. Excelsior Brewery Co.* (1915) 170 App. Div. 692, 156 N. Y. Supp. 845. The fact that the purchaser can successfully defend a possible suit does not determine whether there is a marketable title. *Bull v. Burton* (1919) 227 N. Y. 101, 124 N. E. 111. But the remoteness of a suit has often caused the courts in the exercise of their

discretion to decree specific performance against an unwilling purchaser. See *Empire Realty Corp. v. Sayre* (1905) 107 App. Div. 415, 95 N. Y. Supp. 371; *Zelman v. Kaufherr* (1909) 76 N. J. Eq. 52, 73 Atl. 1048; *Goldstein v. Rosenberg* (1920) 191 App. Div. 492, 181 N. Y. Supp. 559. The minority view, that such an exercise of discretion by the trial court was justifiable and ought not to have been disturbed, seems sound.

TRUSTS—RESULTING TRUSTS—CONVEYANCE TO PARTNER—PART PAYMENT OF CONSIDERATION BY FIRM.—The plaintiff's intestate was engaged in a business partnership with his brother. The latter bought a farm, paying part of the consideration with his own money and the balance with funds derived from the partnership. The plaintiff sought to establish a resulting trust in a half-interest of the farm. *Held,* that in the absence of evidence as to the actual amount contributed, such contribution of partnership funds was insufficient to establish a resulting trust. *Herren v. Herren* (1921, Wash.) 203 Pac. 34.

When the legal title is conveyed to one person and the consideration is paid by another, the latter is presumed to have acted for his own benefit, and in the absence of a statute a resulting trust is raised in his favor. *Howe v. Howe* (1908) 199 Mass. 598, 85 N. E. 945; *Fox v. Shanley* (1920) 94 Conn. 350, 109 Atl. 249; (1916) 2 VA. L. REG. (N. S.) 228; 1 Perry, *Trusts* (6th ed. 1911) sec. 126. This presumption is rebutted if the consideration was advanced as a loan. *Surye v. Lemberger* (1921, N. J. L.) 114 Atl. 454. And when a duty of support exists, as in the case of a husband, a gift is presumed, although there is no such presumption when a wife furnishes the purchase money. *Bailey v. Dobbins* (1903) 67 Neb. 548, 93 N. W. 687; *Crawford v. Hurst* (1921) 299 Ill. 503, 132 N. E. 521; (1918) 27 YALE LAW JOURNAL, 705. To raise a resulting trust in the whole property it is evident that the whole purchase money must have been furnished. *Winston v. Mitchell* (1889) 87 Ala. 395, 5 So. 741. A resulting trust must arise, if at all, at the time legal title is taken. *Beecher v. Wilson* (1888) 84 Va. 813, 6 S. E. 209. Hence it is essential that no uncertainty exist as to the proportion of the property to which the trust attaches. *O'Donnell v. White* (1894) 18 R. I. 659, 29 Atl. 769; *Harton v. Amason* (1916) 195 Ala. 594, 71 So. 180. It has therefore been held that a "general contribution" to the purchase price is not sufficient to create a resulting trust. *Furber v. Page* (1892) 143 Ill. 622, 32 N. E. 444. And according to the earlier cases no trust would result unless the payment had been for an "aliquot part" of the property, a particular fraction, as one-half or one-fourth. *McGowan v. McGowan* (1859, Mass.) 14 Gray, 119. But in the later cases the term "aliquot part," when used in this connection, has been defined as a definite measurable interest. *Hinshaw v. Russell* (1917) 280 Ill. 235, 117 N. E. 406; *Fox v. Shanley, supra; Neathery v. Neathery* (1913) 114 Va. 650, 77 S. E. 465. However, it is evident that to establish the existence of a resulting trust it must clearly appear that a definite amount has been contributed. Inasmuch as the plaintiff in the instant case failed to establish the amount of the contribution by the partnership and his interest therein the court was clearly correct in its decision.

WILLS—REVOCATION BY CANCELLATION.—The testator, intending to cancel his will, wrote across its face a signed statement containing these words: "This will is hereby revoked." A statute provided that "no will . . . . shall be revoked . . . . unless such will be burnt, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose of revoking the same." N. Y. Cons. Laws, 1909, ch. 18, sec. 34. *Held,* that the will was not revoked. *Matter of Parsons* (1922, Surro.) 117 Misc. 753, 191 N. Y. Supp. 910.

An unattested statement is not sufficient to constitute a revocation "by later

will, codicil, or other writing," unless executed with the same formalities as a will. *Matter of Miller* (1906, Surro.) 50 Misc. 70, 100 N. Y. Supp. 344. The English Wills Act requires that revocation by act shall be by "burning, tearing, or otherwise destroying," and hence no cancellation or obliteration can operate as such unless it amounts to a destruction of some part of the will. (1837) 1 Vict. c. 26, sec. 20; *Cheese v. Lovejoy* (1876, C. A.) L. R. 2 Prob. Div. 251. Under the New York statute and those of other American jurisdictions based upon the English Statute of Frauds, no words need be actually effaced or destroyed. The physical act may be only slight, if accompanied by a sufficient intention to revoke. *Glass v. Scott* (1900) 14 Colo. App. 377, 60 Pac. 186; *In re Alger* (1902, Surro.) 38 Misc. 143, 77 N. Y. Supp. 166. It is essential, however, that some material portion of the will be cancelled. *Howard v. Hunter* (1902) 115 Ga. 357, 41 S. E. 638; *In re Shelton* (1906) 143 N. C. 218, 55 S. E. 705. Drawing lines through the testator's signature, therefore, is a sufficient physical cancellation, even though the words remain legible. *Woodfill v. Patton* (1881) 76 Ind. 575; *Glass v. Scott, supra.* But a writing upon the back or margin of a will has been held not to be a revocation within the contemplation of the statute, upon the theory that no material part of the will has been cancelled. *In re Ladd* (1884) 60 Wis. 187, 18 N. W. 734; *Dowling v. Gilliland* (1919) 286 Ill. 530, 122 N. E. 70; *contra, Warner v. Warner* (1864) 37 Vt. 356; see *Evan's Appeal* (1868) 58 Pa. 238. Courts have reached different results in the application of this rule varying with the facts of each case. *Oetjen v. Oetjen* (1902) 115 Ga. 1004, 42 S. E. 387; *Matter of Akers* (1902) 74 App. Div. 461, 77 N. Y. Supp. 643. When the words were written across the face of the will, however, as in the principal case, a contrary and more satisfactory result has been reached. *Noesen v. Erkenswick* (1921) 298 Ill. 231, 131 N. E. 622. The instant case seems to construe the statute too narrowly, since the only requirement is a clearly recorded indication by the testator of his intention to revoke, exercised on a *material* part of the will. The court appears to have disregarded a decision to the contrary on nearly identical facts in the Surrogate's Court of another county. *In re Barnes* (1912, Surro.) 76 Misc. 382, 136 N. Y. Supp. 940.