RECENT CASE NOTES

ADOPTION—FAILURE TO GIVE NOTICE TO NATURAL PARENTS—EFFECT ON CHILD'S RIGHT TO INHERIT FROM FOSTER PARENTS.—The plaintiff and his wife adopted the defendant without giving the requisite statutory notice to the natural parents. Upon the death of his wife, the plaintiff contested the defendant's right to share in her estate on the grounds of the invalidity of the adoption. The lower court held the defendant entitled to share as an adopted child. *Held*, on appeal, that the judgment be reversed. *In re Mathew's Will*, 223 N. W. 434 (Wis. 1929).

In most jurisdictions an adopted child has a statutory right to inherit from his foster parent. PECK, ADOPTION LAWS IN THE UNITED STATES (1925) 21. The heirs of the foster parent generally cannot attack his right of inheritance on the ground of a "technical" non-compliance with the statute. *Jones v. Leeds*, 41 Ind. App. 164, 83 N. E. 526 (1908) (failure of adopting parents to sign decree); *In re Gunn's Estate*, 227 Mich. 368, 198 N. W. 983 (1924) (failure of adopted child to sign decree); *In re Howard's Estate*, 125 Okla. 86, 256 Pac. 54 (1926) (failure of natural parent to give written consent); *cf. Anderson v. Blakesly*, 155 Iowa 430, 136 N. W. 210 (1912) (defective adoption construed as a contract specifically enforceable so far as it purports to confer a right of inheritance). But where there was a failure to give notice of the proceeding to the natural parent some courts have allowed the heir to divest the child of his inheritance on the theory that such notice was essential to the jurisdiction of the court in the adoption proceeding. *Truelove v. Parker*, 191 N. C. 430, 132 S. E. 295 (1926); *Furgeson v. Jones*, 17 Ore. 204, 20 Pac. 842 (1888); Note (1926) 5 N. C. L. REV. 67. *Contra: Coleman v. Coleman*, 81 Ark. 7, 98 S. W. 733 (1906); *cf. Harper v. Lindsay*, 162 Ga. 44, 132 S. E. 639 (1926). On similar reasoning the surviving foster parent has been allowed to contest the inheritance, as in the instant case. *Keal v. Rhydderch*, 317 Ill. 231, 148 N. E. 53 (1925). However, the purpose of requiring notice is to protect the natural right of the parent to his child. See *Lacher v. Venus*, 177 Wis. 558, 570, 188 N. W. 613, 617 (1922). And, clearly, the natural parent may have the decree set aside where he has not been notified of the proceeding. *Sullivan v. People*, 224 Ill. 468, 79 N. E. 695 (1906); *Chance v. Pigneguy*, 212 Ky. 430, 279 S. W. 640 (1926). But it does not necessarily follow from this that the heir of the foster parent may rely upon the same defect to contest the child's right to inherit. See *Appeal of Woodward*, 81 Conn. 152, 166, 70 Atl. 453, 459 (1908). And inasmuch as the natural parent has raised no objection, it would seem that the failure to give notice should have no effect as between the foster parent and the adopted child. *Cf.* VAN FLEET, COLLATERAL ATTACK (1892) § 408.

BANKRUPTCY—COMPENSATION TO ATTORNEYS FOR CREDITORS FOR SERVICES TO BANKRUPT ESTATE.—The plaintiff, an attorney for creditors, employed the defendant attorneys to conduct bankruptcy proceedings against a debtor. The defendants were subsequently retained as counsel for the trustees in bankruptcy. The defendants thereafter contracted with the plaintiff to collaborate under his general supervision in the performance of services to the trustees and to divide with him the allowances to be made by the bankruptcy court. Upon refusal by the defendants to pay over any part of the fees so received, action was brought to recover the agreed share. A judgment for plaintiff was affirmed by the Circuit Court

of Appeal. *Held*, on appeal, that the contract was illegal and void. Judgment reversed. *Weil v. Neary*, 278 U. S. 160, 49 Sup. Ct. 144 (1929).

Courts have frequently voiced their disapproval of the employment by a receiver or trustee in bankruptcy of counsel identified with the interests of the creditors. See *In re T. L. Kelley Dry-Goods Co.*, 102 Fed. 747, 749, (E. D. Wis. 1900). But, when an attorney for creditors has in fact been so employed, compensation has generally been allowed him to the extent to which his services have directly inured to the benefit of the estate. *In re Smith*, 203 Fed. 369 (C. C. A. 6th, 1913). In the district where the instant case arose a court rule specifies that, unless specially authorized by the court, receivers or trustees shall not retain as their counsel any interested attorney. RULES OF BANKRUPTCY OF THE DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, Rule 5; see (1925) 10 IOWA L. BULL. 209, 221. And compensation has been denied to an attorney who was employed in violation of this rule. *In re Robertson*, 4 F. (2d) 248 (C. C. A. 3d, 1925). The instant court holds that this rule clearly renders the contract under review illegal. But it also holds that, even in the absence of this rule, the contract is void as contrary to public policy, and that it is immaterial that the services were beneficial to the estate. But *cf. In re Levinson*, 19 F. (2d) 253 (W. D. Wash. 1927); 2 COLLIER, BANKRUPTCY (13th ed. 1924) 1354. The decision in the instant case is a step towards the enforcement of the policy of keeping distinct the representatives of the interests of the creditors and of the bankrupt estate. It would seem desirable to enforce this policy further by denying compensation in all cases for services rendered to the estate by attorneys for creditors, except where they have been specially authorized by the court. See Rogers, *The Bankruptcy Act and Suggested Changes* (1925) 2 N. Y. U. L. REV. 118, 120.

BANKRUPTCY—LEASES—RENT ACCELERATION CLAUSE.—A two-year lease of land provided that the bankruptcy of the lessee should terminate the lease and should thereupon entitle the lessor to damages equal to the rent for the residue of the term. Within a year the lessee became bankrupt. The district court disallowed the lessor's claim for accelerated rent as damages. *Held*, on appeal, that the judgment be reversed. *R. C. Taylor Trust v. Kothe*, 30 F. (2d) 77 (C. C. A. 1st, 1929).

The rule of the *Auditorium* case [*Central Trust Co. of Ill. v. Chicago Auditorium Ass'n*, 240 U. S. 581, 36 Sup. Ct. 412 (1916)] that bankruptcy is sufficient breach of an executory contract which requires the use of capital to permit a provable claim for damages has been held not to apply to leases of land. *Wells v. 21st St. Realty Co.*, 12 F. (2d) 237 (C. C. A. 6th, 1926); see (1927) 36 YALE L. J. 418. Nor does the bankruptcy of the lessee terminate the lease. See *Watson v. Merrill*, 136 Fed. 359, 363 (C. C. A. 8th, 1905). Neither is subsequently accruing rent a provable claim. *In re Mlle. Lemaud*, 13 F. (2d) 208 (D. Mass. 1926). But if the lease contains a provision for the acceleration of rent, this will be enforced, where the landlord has not terminated the lease. *Rosenblum v. Uber*, 256 Fed. 584 (C. C. A. 3d, 1919); *In re Pittsburg Drug Co.*, 164 Fed. 482 (W. D. Pa. 1908). While a provision that the lessor may re-enter in case of bankruptcy is enforceable, an accompanying provision that he may recover actual damages is not, since there is no "fixed liability . . . absolutely owing" as required by § 63a (1) of the Bankruptcy Act. *In re Roth & Appel*, 181 Fed. 667 (C. C. A. 2d, 1910); *Slocum v. Soliday*, 183 Fed. 410 (C. C. A. 1st, 1910). In the instant case, the landlord is permitted both to re-enter and to prove a claim for future rent. The requirement of a "fixed liability . . . absolutely owing" is satisfied since the recoverable sum is certain and becomes due automatically and not merely at the op-

tional re-entry of the lessor. It would seem better to allow the lessor to prove his actual damages but, as the cases now stand, he can protect himself only by the use of provisions such as those in the instant case. The enforcement of such provisions seems somewhat unfair to the other creditors, though in the instant case the measure of recovery is not so greatly in excess of actual damages as to render the result objectionable. *Quaere*, however, whether the claim would not be disallowed on the ground that the stipulation was a penalty if a long term lease were involved. *Cf. In re Merwin & Willoughby Co.*, 206 Fed. 116 (N. D. N. Y. 1913).

BANKS AND BANKING—DEPOSIT IN TWO NAMES—RESPONSIBILITY OF BANK FOR PAYMENT TO DEPOSITOR AFTER NOTICE OF OTHER CLAIM.—Complainant and her husband opened a savings account with the defendant bank, in the name of husband "or" wife, under a deposit agreement that any part or all was payable to either. The husband withdrew part of the fund and redeposited it with the bank in his own name. The complainant notified the bank that the money was hers and requested them not to pay to the husband. The bank agreed not to pay for a few days. She promised to send a written notice to the bank that evening and to secure an injunction at once. Notice was not sent. A few days later the bank allowed the husband to draw out the money. A few hours after this the bank was served with summons in a divorce proceeding brought by complainant against her husband. Judgment of the trial court holding the bank liable for the sum was affirmed in the Appellate Court. *Held*, on appeal, that judgment be reversed. *Landretto v. First Trust & Sav. Bank*, 164 N. E. 836 (Ill. 1929).

The defendant bank being clearly privileged under the deposit agreement to pay to the husband from the joint account, the issue here is as to the subsequent payment to the husband from the personal account after plaintiff gave notice of her claim. Ordinarily, when a bank pays to a depositor after another person has claimed the money the bank is held liable to that person if he can prove ownership of the funds. *Brown v. Daugherty*, 120 Fed. 526 (D. Mo. 1903); 1 MORSE, BANKS AND BANKING (6th ed. 1928) §§ 342-343. Under this rule the responsibility of the bank would depend on whether the plaintiff can establish title to the money as against her husband and since the court assumed that the money originally was the property of the wife the result might possibly imply that the deposit in the two name form changed the ownership of the money. The court does not face this point squarely, however, and there is much confusion among the authorities as to the effect on the "title" of making a deposit in two names with permission to either to withdraw. COSTIGAN, CASES ON TRUSTS (1925) 299 n.; (1927) Note 48 A. L. R. 189; (1926) 36 YALE L. J. 138. It would seem desirable to provide specifically for the problem of "title" by amendment of the Two Name Deposit Act which has been widely adopted. PATON, DIGEST (1926) § 1809a; *cf. Rice v. Bennington Bank*, 93 Vt. 493, 108 Atl. 708 (1920) (Uniform Act held to apply only to protection of bank, and not to title). The decision might be supported on the theory adopted by a few courts that a bank which pays to a depositor after another has made a claim is protected if it has waited a reasonable time for proofs of such claim or for court order. *Drumm-Flato Comm. Co. v. Gerlack Bank*, 92 Mo. App. 326 (1902); *Huff v. Oklahoma State Bank*, 87 Okla. 7, 207 Pac. 963 (1922).

BROKERS—MEASURE OF DAMAGES IN EXCLUSIVE SALES CONTRACT.—The plaintiff real estate agent had a 30-day contract for the exclusive sale of the defendant's property at a price to net $5700. The defendant sold

through another broker for $6000, whereupon suit was brought for compensation. The claim for the $300 "excess" was stricken from the plaintiff's bill by the lower court, leaving only allegations as to time and money spent to find a customer. *Held*, on appeal, that the ruling be affirmed, on the ground that the action for commissions would not lie since the plaintiff had secured no customer "ready, able and willing" to perform. *Isern v. Gordon*, 273 Pac. 435 (Kan. 1929).

Where the contract fixes no commission and the sale is to be for a net price, it is generally held that the compensation for procuring a customer is impliedly any excess over that amount. *McKibben v. Wilson*, 105 Kan. 200, 182 Pac. 638 (1919); *Noyes v. Caldwell*, 216 Mass. 525, 104 N. E. 495 (1914). *Contra: Ticknor v. Spence*, 26 Ga. App. 663, 106 S. E. 809 (1921). Full commission is usually awarded where the broker procures a customer who enters into a contract with the owner, although the customer subsequently refuses to perform. *Bird v. Rowell*, 180 Mo. App. 421, 167 S. W. 1172 (1914). But where the agreed compensation was an "excess," recovery has been denied in this situation. *Youngman v. Miller*, 210 Mo. App. 151, 241 S. W. 433 (1922) (on the ground that no sale having been made, there was no excess). But if, under similar facts, the owner refuses to perform, the agreed compensation is recoverable, although an "excess" contract. *Overton v. Harrison*, 207 Ala. 590, 93 So. 564 (1922). And where a customer was procured, but the owner refused to deal with him, commissions were awarded. *Walker v. Chancey*, 117 So. 705 (Fla. 1928). But *cf. Williamson v. Sasser*, 179 N. C. 497, 103 S. E. 73 (1920). Where the broker has not procured a customer, but the owner himself sells, no compensation can be recovered by the broker unless his contract is one of "exclusive sale." See *Harris v. McPherson*, 97 Conn. 164, 167, 115 Atl. 723, 724 (1922). And some jurisdictions deny recovery even in the latter situation. *Roberts v. Harrington*, 168 Wis. 217, 169 N. W. 603 (1918) ("exclusive sale" construed to mean "exclusive agency"); *Sunnyside Land Co. v. Bernier*, 119 Wash. 384, 205 Pac. 1041, 20 A. L. R. 1261 (1922). But where the sale is made through another broker, some compensation is allowed whether an "exclusive sale" or "exclusive agency." *Cf.* (1927) 6 AM. LAW SCHOOL REV. 111, 112. Recovery may be limited to the reasonable value of the services rendered, in addition to expenses incurred. *Williamson v. Sasser, supra.* Or it may include loss of prospective profits. *Morning Star Mining Co. v. Bennett*, 164 Ark. 244, 261 S. W. 639 (1924). And damages measured by the excess have been held to be recoverable. *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684 (1919); *cf. Robertson's Ex'r v. Atlantic Coast Realty Co.*, 129 Va. 494, 106 S. E. 521 (1921) (continuation of same action). Inclusion of prospective profits has been objected to as being too speculative and subject to collusion. See *Millican v. Haynes*, 212 Ala. 537, 539, 103 So. 564, 565 (1925). It would seem preferable, however, to allow such recovery rather than to allow the owner to profit by his breach by limiting the award to actual costs. See *Schwartz v. Akerlund*, 240 Ill. App. 480, 487 (1926). But see SEDGWICK, DAMAGES (9th ed. 1912) § 834c.

CARRIERS—CONTRACTUAL LIMITATION OF TIME IN WHICH TO SUE.—The British Carriage of Goods by Sea Act of 1924, modeled after the Hague Rules of 1921, provides for a one-year period of limitations to sue carriers in the event of loss or damage of goods. This act was incorporated in two bills of lading for carriage of goods from England to New York, and two separate suits were brought in the New York state courts more than a year after the cause of action arose. In one case it was held that the contractual limitation barred recovery. *Sapinbropf v. Cunard Steamship*

Co., 1929 Am. Mar. Cas. 240 (Sup. Ct. N. Y. Co. 1928). In the other it was held that the limitation was contrary to public policy and recovery was allowed. *Greenspon-Newman, Inc. v. Cunard Steamship Co.*, 1929 Am. Mar. Cas. 11 (Sup. Ct. Kings Co. N. Y. 1928).

The presence of a statute of limitations does not prevent an agreement between carrier and shipper prescribing a shorter period within which suit against the carrier must be brought. *Central Vt. R. R. v. Soper*, 59 Fed. 879 (C. C. A. 1st, 1894); 1 MOORE, CARRIERS (2d ed. 1914) 477; 1 WOOD, LIMITATIONS (4th ed. 1916) § 53d. *Contra: Express Co. v. Walker*, 26 Ky. L. R. 1025, 83 S. W. 106 (1904). But the validity of such agreements has been held to depend upon the reasonableness of the period fixed. *Missouri, K. & T. Ry. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397 (1913) (upholding ninety-day limitation); *Shipping Board v. Texas Star Flour Mills*, 12 F. (2d) 9 (C. C. A. 5th, 1926) (six-month limitation unreasonable where, because of delay in delivery, shipper had only one month to investigate and sue). Some states by statute have prohibited such agreements absolutely. *St. Louis & S. F. R. R. v. James*, 36 Okla. 196, 128 Pac. 279 (1912); *Southern Kansas Ry. v. Hughey*, 182 S. W. 361 (Tex. Civ. App. 1916). But as to interstate shipments, these local prohibitions are inoperative. *Missouri, K. & T. Ry. v. Harriman, supra.* A federal statute provides that agreements affecting interstate commerce are invalid if the period set is less than two years after notice of disavowal of the claim by the carrier. Transportation Act, 41 STAT. 494 (1920), 49 U. S. C. § 20 (11) (1926). The New York court has held that this two-year minimum period sets a standard of public policy which will be enforced even in cases involving shipments outside the scope of the act. *South & Cent. Amer. Com. Co. v. Panama R. R.*, 237 N. Y. 287, 142 N. E. 666 (1923) (four-month limitation held void in shipment from Panama Canal to New York); (1924) 33 YALE L. J. 790. But the policy of the Transportation Act has been held not to invalidate a local statute of limitations providing for a maximum period shorter than two years after notice of disavowal. *Louisiana & W. R. R. v. Gardiner*, 273 U. S. 280, 47 Sup. Ct. 386 (1927) (state law barred action two years after the shipment). Nor has this policy been adopted in the through export bill of lading provided by the Interstate Commerce Commission for shipments from inland points to foreign countries, which stipulates a one-year limitation period. *In the Matter of Bills of Lading*, 66 I. C. C. 687 (1922). It would seem that the latter provision furnishes as close an analogy to the instant situation as the Transportation Act. *Cf. Cudahy Pkg. Co. v. Munson S. S. Line*, 22 F. (2d) 898 (C. C. A. 2d, 1927). And the interest in uniformity probably would be better served by upholding a contractual provision valid under English law and in accord with the Hague Rules, rather than by invalidating it on the basis of a policy which is as yet unsettled. *Cf. Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 27 N. E. 665 (1891).

CONFLICT OF LAWS—MOVABLES—THE LAW OF THE SITUS—PUBLIC POLICY. —The plaintiff delivered a diamond to a firm in New York, giving authority to sell. Without the knowledge or consent of the plaintiff the firm pledged it with the defendant in New Jersey. In an action of replevin brought in New Jersey, the trial court instructed the jury to find for the plaintiff if they found that the transaction between the plaintiff and the New York firm did not constitute a sale. Verdict and judgment for plaintiff. *Held*, on appeal (two judges *dissenting*), that the judgment be reversed, on the ground that under the New York Factors' Act, the firm had the power to make the pledge. *Charles T. Dougherty Co., Inc. v. Krimke*, 144 Atl. 617 (N. J. 1929).

The modern theory is that the law of the situs should govern the creation and transfer of interests in tangible chattels. *Schmidt v. Perkins*, 74 N. J. L. 785, 67 Atl. 77 (1907), 11 L. R. A. (N. S.) 1007 (1908); GOODRICH, CONFLICT OF LAWS (1927) § 147; CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1926) §§ 51, 300, 409. But see STORY, CONFLICT OF LAWS (8th ed. 1883) §§ 383, 384, 390 for the older doctrine. Nevertheless, where the chattel has been removed from the original jurisdiction without the knowledge or consent of the "owner" (including chattel mortgagee, conditional vendor, lessor, etc.), many cases have applied the law of the original jurisdiction in order to protect such "owner" against third persons if he would have been protected in the first state. *Cooper v. Philadelphia Worsted Co.*, 68 N. J. Eq. 622, 60 Atl. 352 (1905); *Adams v. Fellers*, 70 S. E. 722 (S. C. 1911), 35 L. R. A. (N. S.) 385 (1912); *Goetschius v. Brightman*, 245 N. Y. 186, 156 N. E. 660 (1927). *Contra: Farmer v. Evans*, 233 S. W. 101 (Tex. 1921). An attempt has been made to generalize from these cases that the second state has no "jurisdiction" to deprive the owner of his interest in the property. Beale, *Jurisdiction Over Title of Absent Owner in a Chattel* (1927) 40 HARV. L. REV. 805; *cf.* CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1926) §§ 52, 52 (b) (iv). But this statement can not be said to rest upon any clear authority. GOODRICH, *op. cit. supra* § 149; Comment (1928) 37 YALE L. J. 966; *cf.* (1929) 42 HARV. L. REV. 827. A more satisfactory explanation of the cases seems to be that the policy of the two states is fundamentally the same (in providing some means for protecting an "owner" out of possession against third persons), and the second state has deemed it desirable to forego compliance with its local requirements in order to procure a like dispensation by the first state, if the situation should be reversed. See *Union Securities Co. v. Adams*, 33 Wyo. 45, 49, 236 Pac. 513, 514 (1925). But where the policies of the two states are fundamentally opposed (where the "owner" is provided a means of protecting himself in one state, but not in the other), the state of the situs has usually determined the interests of the parties according to its own local rules. *Turnbull v. Cole*, 70 Colo. 364, 201 Pac. 887 (1921) (mortgagee's interest under Colorado mortgage protected against vendor's interest under conditional sale made in Utah and good there against third persons); *Marvin Safe Co. v. Norton*, 48 N. J. L. 410 (1886) (vendor under Pennsylvania conditional sale protected against innocent purchaser in New Jersey, although in Pennsylvania purchaser would have been protected); *Judy v. Evans*, 109 Ill. App. 154 (1903) (attachment for a debt of conditional vendee of chattel allowed in Illinois although it would not been allowed against conditional vendor in Indiana where sale was made); MINOR, CONFLICT OF LAWS (1901) § 130. *Contra: Barrett v. Kelley*, 66 Vt. 515, 29 Atl. 809 (1894). The policy of New Jersey as to pledges by factors is directly opposed to that of New York. *Towne v. Goldman*, 26 N. J. L. J. 47 (1903); *Thompson v. Goldstone*, 171 App. Div. 666, 157 N. Y. Supp. 621 (2d Dep't, 1916); NEW YORK ANN. CONS. LAWS (Cahill, 1923) c. 42, § 43; 1 WILLISTON, SALES (2d ed. 1924) §§ 317, 320. Hence, in the instant case, there would seem to be no reason for departing from the general rule of allowing the law of the situs to govern.

CORPORATIONS—CHANGE OF PREFERENTIAL RIGHTS—MOTION FOR APPRAISAL OF SHARES.—The petitioner owned shares in the defendant corporation which were preferred as to capital distribution, but not as to dividends. The defendant, with the necessary consent of two-thirds of its shareholders, had filed an amendment to the certificate of incorporation retiring the old issues of preferred shares and authorizing the issue of shares preferred both as to dividends and capital distribution, but limited

to dividends of seven per cent. Section 38 (11) of the New York Stock Corporation Law provides that "if the amended certificate alters the preferential rights of any outstanding shares" any holder of such shares not voting in favor of the alteration may demand an appraisal and payment of the value of his shares. *Held* (three judges *dissenting*), that the petitioner's motion for an appraisal should be granted. *Silberkraus v. Schaffer Stores Co.*, 250 N. Y. 242, 165 N. E. 279 (1929).

Statutes designed to protect the dissenting shareholders in this situation exist in only two states. N. Y. STOCK CORP. LAW (1923) § 38 (11); OHIO CORP. ACT (1927) §§ 8623-15, 8623-72. In the only other case calling for an interpretation of this type of statute the petitioner based his claim upon an amendment creating two additional classes of shares to be preferred over those held by the petitioner both as to dividends and capital distribution. The petitioner's claim was denied. *Dresser v. Donner Steel Co.*, 247 N. Y. 553, 161 N. E. 179 (1928) (memorandum opinion; three judges dissented). The court in the instant case distinguished it from the *Dresser* case on the ground that in the latter the petitioner's preferential rights were unchanged, though perhaps reduced in value, while in the present case the existing preferential right was extinguished and new rights substituted. These new rights would probably prove to be more valuable than the old, but because of the limitation as to dividends this is uncertain. It is submitted that the purpose of the legislation here involved must have been to protect the dissenting preferred shareholder whenever a change in the share structure might reduce the value of his interest in the corporation. By the decision in the *Dresser* case this purpose was partially defeated. See (1928) 37 YALE L. J. 1153. Although not willing to repudiate this prior holding the court by the decision in the instant case restricts its scope and reaches a result more consonant with the policy embodied in the statute.

COURTS—JURISDICTION—DIVORCE ACTIONS AGAINST FOREIGN CONSULS.—The wife of a Roumanian vice-counsel brought a divorce suit in a federal district court. The action was dismissed on the ground that the federal courts have no jurisdiction in cases involving domestic relations. *Popovici v. Popovici*, 30 F. (2d) 185 (N. D. Ohio 1927). When the same action was brought in a state court, the consul asked for a writ of prohibition from the supreme court of the state on the ground that the federal courts have exclusive jurisdiction in actions against consuls. Writ denied. *State ex rel. Popovici v. Agler*, 164 N. E. 524 (Ohio 1928).

Under the Judicial Code the federal courts are given exclusive jurisdiction in all actions against consuls. 36 STAT. 1160 (1911), 28 U. S. C. § 371 (1926). Federal courts have customarily exercised such jurisdiction and state courts have declined to take it. *Davis v. Packard*, 7 Pet. 276 (U. S. 1833); Puente, *Amenability of Foreign Consuls to Judicial Process in the United States* (1929) 77 U. OF PA. L. REV. 447; Note (1922) 35 HARV. L. REV. 752. *Contra: State v. De La Foret*, 2 Nott. & McC. 217 (S. C. 1820). This exclusive jurisdiction has generally been assumed to include actions for separation or divorce. *Higginson v. Higginson*, 96 Misc. 457, 158 N. Y. Supp. 92 (Sup. Ct. 1916); Puente, *op. cit. supra* at 457; DOBIE, FEDERAL PROCEDURE (1928) 258. In dismissing the instant suit the federal court relied on the rule laid down in *Barber v. Barber* [21 How. 582, 584 (U. S. 1858)] that federal courts will not assume jurisdiction in cases involving domestic relations. This rule, uniformly applied in cases involving diversity of citizenship, where the state courts have concurrent jurisdiction, cannot be relied on to cover a suit against a consul, where the Judicial Code denies state jurisdiction. A possible device for avoiding the

explicit language of the Code, not resorted to by either court, is to say that this action is not "against" a consul, but merely an action *"in rem," i. e.*, declaratory of "status." *Cf. Kinderlin v. Meyer*, 2 Miles 242 (Phila. Dist. Ct. 1838) (action making consul garnishee held to be not "against" a consul). But such interpretation seems particularly inapplicable here, where the consul's marital interests are adversely affected. In addition, without further extension of their powers, state courts are powerless to enforce alimony decrees against a consul. *Cf. In re Aycinina*, 1 Sandf. 690 (N. Y. Super. Ct. 1848). Any such extension of powers, taking from the control of the federal government cases involving foreign relations, seems to be undesirable and to defeat the purpose of the Judicial Code. See *Davis v. Packard, supra* at 284. The assumption of jurisdiction by the state court in the instant case, apparently to avoid injustice to the wife, seems unwarranted, inasmuch as there is no bar to the reopening of this action in the federal courts. *Bunker Hill & Sullivan M. & C. Co. v Shoshone Mining Co.*, 109 Fed. 504 (C. C. A. 9th, 1901). The Supreme Court has granted certiorari. 49 Sup. Ct. 265 (U. S. 1929).

COURTS—ORIGINAL JURISDICTION OF SUPREME COURT—ACTIONS TO WHICH A STATE IS A PARTY.—The defendant had been withdrawing on an average of 8,500 cubic feet of water per second from Lake Michigan for sewage purposes. The plaintiff state brought suit in the United States Supreme Court for an injunction restraining the defendant from abstracting such quantities of water on the ground that its citizens and property owners were being damaged by the reduction of levels in the various lakes and rivers. *Held*, that the court had jurisdiction and that the cause be referred to a master to prepare a form of decree. *Wisconsin v. Illinois*, 49 Sup. Ct. 163 (U. S. 1929).

The Constitution provides that the Supreme Court shall have original jurisdiction in all cases in which a state shall be a party. U. S. CONST. Art. III, § 2 (2). Where a question of state property rights or boundaries is involved, a clear case for such jurisdiction presents itself. *South Dakota v. North Carolina*, 192 U. S. 286, 24 Sup. Ct. 269 (1904) (action on a bond); *Louisiana v. Mississippi*, 202 U. S. 1, 26 Sup. Ct. 408 (1906) (state boundary). But this jurisdiction does not exist where the suit is brought under disguise of a state action to enforce claims of individuals. *Louisiana v. Texas*, 176 U. S. 1, 20 Sup. Ct. 251 (1900) (action by plaintiff state to enjoin enforcement of statute by defendant state having injurious effect on a group of merchants in plaintiff state); *Oklahoma v. Atchison, T. & S. F. Ry.*, 220 U. S. 277, 31 Sup. Ct. 434 (1911) (action by state brought for benefit of shippers to restrain carrier from charging unreasonable rates); Note (1923) 10 VA. L. REV. 147. Between these two extremes fall the cases wherein the state has been allowed to sue as quasi-sovereign or *parens patriae* to preserve the health, comfort and welfare of its inhabitants. *Kansas v. Colorado*, 185 U. S. 125, 22 Sup. Ct. 552 (1902) (diversion of water by defendant depriving citizens of plaintiff of supply for irrigation purposes); *Wyoming v. Colorado*, 259 U. S. 419, 42 Sup. Ct. 552 (1922) (violation of riparian rights of citizens of plaintiff state); see Coleman, *The State as Defendant* (1917) 31 HARV. L. REV. 210, 223. The power to make treaties and declare war having been surrendered to the general government, it is essential that some remedy should be afforded to the states for the protection of their citizens. See *Rhode Island v. Massachusetts*, 12 Pet. 657, 726 (U. S. 1838); *Kansas v. Colorado, supra* at 141, 22 Sup. Ct. at 557. It has been suggested that the court take jurisdiction where the dispute is one that would normally be the subject of diplomatic adjustment. See *North Dakota v. Minnesota*, 263 U. S. 365, 373, 44 Sup. Ct. 138,

139 (1923). But a state may not institute judicial proceedings as *parens patriae* to protect its citizens from the operation of a statute of the United States since with respect to their relations to the federal government, the latter and not the state represents them as *parens patriae*. *Commonwealth of Massachusetts v. Mellon*, 262 U. S. 447, 43 Sup. Ct. 597 (1923). In the instant case, the plaintiff is suing not only in its capacity of *parens patriae* but also to protect its own interests in its navigable waters which are affected by the defendant's activities. By entertaining the instant suit the court obviates the necessity of a great number of separate suits brought by individual landowners residing in the plaintiff state. *Cf. Missouri v. Illinois and Chicago District*, 180 U. S. 208, 241, 21 Sup. Ct. 331, 344 (1901).

FORCIBLE ENTRY AND DETAINER—AVAILABILITY OF ACTION TO PLAINTIFF WHO OBTAINED POSSESSION BY OUSTER OF DEFENDANT.—The plaintiff, claiming title under a sheriff's deed, forcibly took possession of the defendant's premises in his absence. Nine months later the defendant returned and forcibly retook possession. The plaintiff brought a statutory action of forcible entry and detainer to regain possession. The lower court gave judgment for the plaintiff. *Held*, on appeal, that the judgment be reversed. *Benevides v. Lucio*, 13 S. W. (2d) 71 (Tex. Comm. App. 1929).

Upon the theory that statutes of forcible entry and detainer are intended to prevent breaches of the peace by prompt restoration of possession, most jurisdictions require of a plaintiff in such an action that he show merely actual possession and ouster therefrom. *Iron Mountain & H. R. R. v. Johnson*, 119 U. S. 608, 7 Sup. Ct. 339 (1887); *Sunday v. Moore*, 135 Wash. 414, 237 Pac. 1014 (1925). As to what is sufficient possession, see Note (1911) 21 ANN. CAS. 1126; (1911) 59 U. OF PA. L. REV. 327. Hence the defense of a superior right to possession has generally not been allowed. *Casey v. Kitchens*, 66 Okla. 169, 168 Pac. 812, L. R. A. 1918B 667 (1917); *Orentlicherman v. Matarese*, 99 Conn. 122, 121 Atl. 275 (1923). A minority of courts, however, consider the criminal action sufficient to prevent breaches of the peace and permit the right to possession to be put in issue in the civil action. *Murry v. Burris*, 6 Dak. 170, 42 N. W. 25 (1889); *Page v. Dwight*, 170 Mass. 29, 48 N. E. 850 (1897). The instant court does not purport to follow this minority view and declines to inquire into the plaintiff's rights under the sheriff's deed. The result is reached on the narrower ground that the action should not be available to one who relies on a possession which was itself obtained through a forcible ouster of the present defendant. While this view is not entirely unreasonable, other courts have not adopted it. *King's Administrators v. St. Louis Gas Light Co.*, 34 Mo. 34 (1863); *Cain v. Flood*, 21 N. Y. Civ. Proc. 116, 14 N. Y. Supp. 776 (Common Pleas 1891), *aff'd*, 138 N. Y. 639, 34 N. E. 512 (1893). And the policy of discouraging breaches of the peace would seem to be furthered by permitting the action to be employed even by one who has obtained possession in such a manner, so long as his possession has become actual and peaceable.

FRAUDULENT CONVEYANCES—BULK SALES ACT—DELIVERY OF GOODS UNDER CHATTEL MORTGAGE AS A "DISPOSAL."—A merchant in good faith mortgaged his stock of goods to the defendant to secure a loan, reserving for himself the privilege of sale in the ordinary course of business. Seven months later the merchant defaulted in his payments and surrendered possession of all the goods to the defendant. The Bulk Sales Law invalidates the "sale or disposal" of a stock of merchandise otherwise than in the ordinary course of business unless the purchaser duly notifies the sel-

ler's creditors. KAN. REV. STAT. ANN. (1923) c. 58, § 101. The plaintiff, trustee in bankruptcy of the merchant, sought to have the mortgage set aside for the defendant's failure to comply with the statute. The lower court gave judgment for the defendant. *Held*, on appeal, that the delivery of the goods to the defendant was a "disposal" of them within the statute. Judgment reversed. *Joyce v. Armourdale State Bank*, 274 Pac. 200 (Kan. 1929).

A chattel mortgage on merchandise where there is no transfer of possession is generally held not to be within the prohibition of the Bulk Sales Law. *Hannah & Hogg v. Richter Brewing Co.*, 149 Mich. 220, 112 N. W. 713 (1907) (statute invalidated "any sale, transfer, or assignment"); *Noble v. Ft. Smith Wholesale Grocery Co.*, 34 Okla. 662, 127 Pac. 14 (1911) ("sales, exchanges, and assignments" prohibited). This is also true where possession is surrendered to the mortgagee. *Farrow v. Farrow*, 136 Ark. 140, 206 S. W. 134 (1918) ("sale, transfer, or assignment" prohibited); *Farmers' Co-op. Co. v. Bank of Leeton*, 4 S. W. (2d) 1068 (Mo. 1928) ("sale, trade, or disposition" prohibited); *Appel Mercantile Co. v. Kirtland*, 105 Neb. 494, 181 N. W. 151 (1920) ("sale, trade, or other disposition" prohibited). *Contra: Linn County Bank v. Davis*, 103 Kan. 672, 175 Pac. 972 (1918); *Beene v. National Liquor Co.*, 198 S. W. 596 (Tex. Civ. App. 1917) ("sale or transfer" prohibited) [but this view of the Texas statute was rejected in *Re Griffin Drug Co.*, 289 Fed. 140 (N. D. Tex. 1923)]. Nor is a sale under foreclosure of a chattel mortgage within the statute. *Wasserman v. McDonnell*, 190 Mass. 326, 76 N. E. 959 (1906) ("sale" prohibited). However, a chattel mortgage, followed immediately by a release of the equity of redemption amounts to a "sale" within the statute. *Mills v. Sullivan*, 222 Mass. 587, 111 N. E. 605 (1916). And a chattel mortgage may be held void when there is an apparent intention to evade the statute. *Waldrep v. Exchange State Bank*, 81 Okla. 162, 197 Pac. 509 (1921). Furthermore some states have expressly included mortgages within the prohibition of the Bulk Sales Law. OKLA. COMP. STAT. ANN. (1921) § 6030; ARK. DIG. STAT. (Crawford & Moses, 1921) § 4870 *et seq.*; *cf.* N. Y. LIEN LAW (1923) § 230-a. In the absence of such a statutory prohibition, some courts have said that the result depends on whether the mortgagee gets "title" or only a "lien." See *Linn County Bank v. Davis*, 103 Kan. 672, 674, 175 Pac. 972, 973 (1918). But this distinction is not supported by the cases. *Aristo Hosiery Co. v. Ramsbottom*, 46 R. I. 505, 129 Atl. 503 (1925) (chattel mortgage not within statute although "title theory" adopted); *Beene v. National Liquor Co.*, *supra*, (within statute although "lien theory" followed). The instant decision is rested upon the ground that delivery of possession constitutes a "disposal" under the local statute. Inasmuch as creditors can easily be defeated by such transactions, and since good and bad faith are too indeterminable to be of utility in reaching a decision, the result seems commendable.

FRAUDULENT CONVEYANCES—RECOVERY OF EXPENDITURES BY GRANTEE.—The plaintiff, a judgment creditor, sued an insolvent debtor and his daughter to set aside a voluntary conveyance to the daughter as being in fraud of creditors. A decree was rendered for the defendants in the lower court. *Held*, on appeal, that the decree be reversed, but that the grantee be given a prior lien for sums in excess of receipts expended by her for maintenance of the property. *Marion Automobile Co. v. Brown*, 272 Pac. 914 (Ore. 1928).

The finding of a court as to whether a grantee under a fraudulent conveyance acted in "good" or "bad faith" is frequently made decisive on the issue of the allowance of his claim for expenditures against the creditors

of the grantor. Knowledge of the grantor's fraudulent motive destroys the grantee's privilege to hold the conveyance as security for consideration paid by him. *Sweeney v. Farmer's State Bank of Greenville*, 219 Ky. 471, 293 S. W. 959 (1927). The grantee's good faith, however, will protect him to the extent of the payments made. *Butler v. Arnold*, 115 Wash. 204, 196 Pac. 582 (1921); *London v. Anderson Brass Works*, 197 Ala. 16, 72 So. 359 (1916). And so, where the "good faith" grantee was a creditor of the grantor. *Cartan v. Phelps*, 89 N. J. Eq. 599, 105 Atl. 240 (1918); *cf. Cryer v. Conway*, 181 Ky. 526, 205 S. W. 562 (1918). But payments to the grantor after notice of the fraud are not protected. *Fluegel v. Henschel*, 7 N. D. 276, 74 N. W. 996 (1898). Likewise a claim for the value of improvements made subsequent to notice will not be successful. *Walker v. Williamson*, 177 Ky. 599, 198 S. W. 10 (1917). But if the creditor seeks an accounting for rents and profits, this claim for improvements will be allowed despite "bad faith." *Rucker v. Abell*, 47 Ky. 566 (1848); *King v. Wilcox*, 11 Paige 589 (N. Y. 1845). And an innocent grantee can recover the value of the improvements at the time the conveyance is set aside. *Borden v. Doughty*, 42 N. J. Eq. 314 (1886). Expenditures to discharge liens for taxes and incumbrances cannot be claimed by a grantee who has acted in "bad faith." *Sheridan v. McCormick*, 39 N. D. 641, 168 N. W. 59 (1918) (taxes and interest); *Leinbach v. Dyatt*, 117 Kan. 265, 230 Pac. 1074 (1924) (mortgage and taxes). But a grantee, not found guilty of "bad faith," is entitled to subrogation to the rights of the holders of the discharged liens. *Printz v. Brown*, 31 Idaho 443, 174 Pac. 1012 (1918) (mortgage and taxes); *cf. Hicks v. Beals*, 83 Ore. 82, 163 Pac. 83 (1917) (chattel mortgage paid off by a vendee who violated the Bulk Sales Law). Those who, in good faith, claim through the grantee are similarly protected. *Bomberger v. Turner*, 13 Ohio St. 263 (1862) (grantee's heir; taxes and improvements); *Lilianthal v. Lesser*, 102 App. Div. 500, 92 N. Y. Supp. 619, *aff'd*, 185 N. Y. 557, 77 N. E. 1190 (1906) (grantee's executors; mortgage). When an accounting for rents and profits is sought, the grantee can make a successful claim for discharged incumbrances whether he has acted in "good faith" or not. *Loos v. Wilkinson*, 113 N. Y. 485, 21 N. E. 392 (1889) ("bad faith"; taxes, interest, repairs, commissions of the rent-collector, but not insurance premiums); *Young v. Ward*, 115 Ill. 264, 3 N. E. 512 (1885) ("bad faith"; mortgage). *Contra: Strike's Case*, 1 Bland 57 (Md. 1826), *aff'd*, 2 Harr. & G. 191 (1828) ("bad faith"; taxes, street-assessments, ground rent). The nature of the disbursements in the instant case was not specified, nor did the court decide whether the grantee acted in good faith. The instant decision is well supported, assuming the grantee acted in good faith; and even if in bad faith, expenditures to the extent that they were for preservation of the property might well be protected. *Cf. Frank v. Von Bayer*, 236 N. Y. 473, 141 N. E. 920 (1923).

INFANTS—AVOIDANCE OF CONTRACTS—NECESSITY OF RESTORATION OF CONSIDERATION.—The defendant, an infant of 17, purchased radio parts from the plaintiff which he assembled into sets and sold. In a suit for an unpaid balance, the defendant pleaded his infancy. The lower court gave judgment for the plaintiff. *Held*, on appeal, that the judgment be reversed. *Shutter v. Fudge*, 143 Atl. 896 (Conn. 1928).

The general rule that an infant who disaffirms a contract is not required to account for the consideration he has received but which is no longer in his possession has frequently been qualified where the infant is suing for a return of what he has paid. Thus a few states refuse recovery where the infant cannot make restitution, if the contract was "fair, rea-

sonable, and provident." *Adams v. Beall*, 67 Md. 53, 8 Atl. 664 (1887); *Johnson v. Northwestern Mutual Life Insurance Co.*, 56 Minn. 365, 59 N. W. 992, 26 L. R. A. 187 (1894); *cf. Lavoie v. Wooldridge*, 79 N. H. 21, 104 Atl. 346 (1918). This seems to be the English view. *Steinberg v. Scala (Leeds) Ltd.*, 129 L. T. 624 (1923). And some courts allow the seller to recoup for deterioration or reasonable use of goods returned. *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275 (1899), 47 L. R. A. 303 (1900); *Pettit v. Liston*, 97 Ore. 464, 191 Pac. 660 (1920), 11 A. L. R. 487 (1921). But where the suit is against the infant, as in the instant case, the courts seldom require him to account for any of the consideration he has consumed or squandered. *Oneonta Grocery Co. v. Preston*, 167 N. Y. Supp. 641 (Sup. Ct. 1917); *McGuckian v. Carpenter*, 43 R. I. 94, 110 Atl. 402 (1920). Such a rule seems necessary if the defense of infancy is to be of any practical utility. But wherever the plaintiff can trace his property into other forms remaining in the hands of the defendant it is believed that such property should be recovered. This is often done in equity. *Whitman v. Allen*, 123 Me. 1, 121 Atl. 160, 36 A. L. R. 776 (1923) (restoration of a horse infant had received in exchange for the original automobile); *cf. MacGreal v. Taylor*, 167 U. S. 688, 17 Sup. Ct. 961 (1896) (subrogation to prior liens paid off with money loaned to the infant); *Chandler v. Jones*, 172 N. C. 569, 90 S. E. 580 (1916) (same). And similarly a recovery in indebitatus assumpsit would seem desirable to the extent that the infant is shown to retain a benefit from the transaction. *Hall v. Butterfield*, 59 N. H. 354 (1879); see ANSON, CONTRACTS (Corbin's ed. 1924) 193. It does not appear in the instant case whether this element was present.

PRINCIPAL AND AGENT—AGENT'S ACCEPTANCE OF A CHECK AS PAYMENT TO HIS PRINCIPAL.—The plaintiff, as conditional vendor, sought to replevy a car from the defendant who had purchased it from Bland, the conditional vendee. The plaintiff refused to recognize as payment a check, subsequently honored, given his agent by Bland, for the proceeds of which the agent had not accounted to the plaintiff. The lower court gave judgment for the defendant. *Held*, on appeal, that the judgment be affirmed on the ground that the agent's receipt of a check, later honored, was equivalent to a payment to his principal. *Pacific Acceptance Corp. v. Jones*, 272 Pac. 1084 (Cal. 1928).

The payment of a debt, in money, to an agent authorized by the creditor to receive it discharges the obligation even though the agent does not account to his principal. *Lusby v. Hershey State Bank*, 217 N. W. 459 (Iowa 1928); *cf. Hart v. Northwestern Bank*, 191 Ill. App. 396 (1915). And courts have said repeatedly that, unless the agent is expressly authorized to accept some other form of payment, he is empowered to accept only money. See *Dixon v. Guay*, 70 N. H. 161, 162, 46 Atl. 456 (1900); *Rotan Grocery Co. v. Jackson*, 153 S. W. 687, 688 (Tex. Civ. App. 1913). Thus an agent's acceptance of chattels does not extinguish the creditor's claim against the debtor. *Woodruff v. Amer. Road Mach. Co.*, 23 Ky. L. R. 1551, 65 S. W. 600 (1901); *cf. Merchant v. Rogan*, 150 S. W. 956 (Tex. Civ. App. 1912) (board). Nor may a debtor discharge his obligation by setting off against it a debt due him from the creditor's agent. *Pearson v. Scott*, 9 Ch. D. 198 (1878); *Parker v. Leech*, 76 Neb. 135, 107 N. W. 217 (1906). It has been held repeatedly that the agent's receipt of a note in payment does not discharge a debt owed his principal. *Ward v. Evans*, 2 Ld. Raym. 928 (1703); *West Pub. Co. v. Corbett*, 165 Mo. App. 7, 145 S. W. 868 (1912); see *Wilken v. Voss*, 120 Iowa 500, 503, 94 N. W. 1123, 1124 (1903) (principal permitted to repudiate sale after agent had received a note and certificate of deposit in payment). But *cf.*

Nichols & Shepard Co. v. Hackney, 78 Minn. 461, 81 N. W. 322 (1900) ("general" agent may discharge debt owed principal by receiving a note). And this is true even though the agent has received payment of the note in money. *Everts v. Lawther*, 165 Ill. 487, 46 N. E. 233 (1897); *cf. Reinhart Grocery Co. v. Knuckles*, 172 Mo. App. 627, 155 S. W. 1105 (1913). Obviously a debt due the principal is not discharged by his agent's receipt of a draft or check which is later dishonored. *Roberts Shoe Co. v. McKim*, 34 Nev. 191, 117 Pac. 13 (1911) (check); *Rogers v. Tiedeman*, 9 Ga. App. 811, 72 S. E. 285 (1911) (draft). But *cf. Fed. Reserve Bank v. Malloy*, 264 U. S. 160, 44 Sup. Ct. 296 (1924) (an agent bank, holding a check for collection, received in payment the drawee's draft, subsequently dishonored, and the court considered this payment as to secondary parties on the check). But where an agent receives a draft or check which is cashed in due course the debt owed to the principal is held to be discharged even though the agent fails to account for the proceeds. *Gibson v. Ward*, 9 Ga. App. 363, 71 S. E. 506 (1911) (draft); *California Stearns Co. v. Treadwell*, 82 Cal. App. 553, 256 Pac. 242 (1927) (check). And courts say that the payment dates from the time the check is honored. See *Pape v. Westacott*, [1894] 1 Q. B. 272, 284; *Potter v. Sager*, 184 App. Div. 327, 329, 171 N. Y. Supp. 438, 439 (4th Dep't 1918); *cf. Broughton v. Silloway*, 114 Mass. 71 (1873) (principal allowed to repudiate sale between time of agent's receipt of check and its being honored). The instant case follows the apparent weight of authority and seems to reach a desirable result in view of the increasing use of checks in place of cash in business transactions; a custom of which courts may well take judicial notice. See *Potter v. Sager, supra* at 328, 171 N. Y. Supp. at 439.

REAL PROPERTY—DOWER IN EQUITABLE ESTATES—EXECUTORY CONTRACTS FOR PURCHASE OF LAND.—The plaintiff's husband contracted during coverture to purchase certain lands, the contract being terminable at the option of the vendor upon default of the vendee. The vendee died, leaving payments in default. It does not appear that the vendor exercised his option. The widow brought a proceeding to enforce her dower rights. *Held*, that the interest of the decedent in the lands be sold and that the widow be endowed from the proceeds. *Matter of Kelleher*, 133 Misc. 581 (Surr. Ct. N. Y. 1929).

The common law allowed no dower in an equitable estate. 2 BL. COMM. *129 *et seq.; D'Arcy v. Blake*, 2 Sch. & Lef. 387 (1805); *Claiborne v. Henderson*, 3 Hen. & M. 322 (Va. 1809). This rule has been changed by statute in England and many American jurisdictions. 3 & 4 W. IV, c. 105 (1833) now superseded by 12 & 13 GEO. V, c. 16, § 148 (1922) (abolishing dower); 1 SCRIBNER, DOWER (2d ed. 1883) 420 *et seq.*; 1 TIFFANY, REAL PROPERTY (2d ed. 1920) § 214. The same result has been reached in many of the remaining jurisdictions in this country by judicial construction of statutes not expressly so providing. 1 SCRIBNER, *op. cit. supra* at 414 *et seq.*; see *Lugar v. Lugar*, 160 App. Div. 807, 810, 146 N. Y. Supp. 37, 39 (1st Dep't 1914); *cf.* N. Y. REAL PROPERTY LAW (1909) § 190. The question often arises as to whether a vendee under a contract for the sale of land who dies before receiving a conveyance has acquired a sufficient equitable estate to entitle his widow to dower. Where the payments have been completed, dower is generally granted. *Reed v. Whitney*, 7 Gray 533 (Mass. 1856); *Howell v. Parker*, 136 N. C. 373, 48 S. E. 762 (1904). But see *Dalton v. Mertz*, 197 Mich. 390, 392, 163 N. W. 912, 913 (1917). But where they have not been completed, many courts will not allow dower, though no default has occurred. *Greenbaum v. Austrian*, 70 Ill. 591 (1873); see *Moran v. Catlett*, 93 Neb. 158, 161, 139 N. W. 1041,

1043 (1913); (1913) 13 COL. L. REV. 550. *Contra: Church v. Church*, 3 Sandf. Ch. 434 (N. Y. 1846); *Spaulding v. Haley*, 101 Ark. 296, 142 S. W. 172 (1911). Where there is a default in payments at the time of the vendee's death, as in the instant case, most courts would probably deny dower. *Lobdell v. Hayes*, 4 Allen 187 (Mass. 1862). But see *Malin v. Coult*, 4 Ind. 535, 536 (1853); *Klutts v. Klutts*, 5 Jones Eq. 80, 81 (N. C. 1859); *Williams v. Kinney*, 43 Hun 1, 10 (N. Y. 1887); *Matter of Boshart*, 107 Misc. 697, 701, 177 N. Y. Supp. 567, 571 (Surr. Ct. 1919). It has been said that to compel the completion of the purchase payments merely to endow the widow would be to enrich her at the expense of the heirs and creditors. See *Greenbaum v. Austrian*, *supra* at 594. The type of relief provided in the instant case is not open to this objection and seems equitable to all parties.

REMOVAL OF CAUSES—USE OF COUNTERCLAIM TO OBTAIN JURISDICTIONAL AMOUNT.—In an action for $3000 brought in a state court by a non-resident plaintiff, the defendant filed a cross-petition for $3000. The plaintiff thereupon obtained a removal to the federal court, under the Judicial Code permitting removal by a non-resident defendant when the matter in dispute exceeds $3000. 36 STAT. 1094 (1911), 28 U. S. C. § 71 (1926). The defendant moved to remand. *Held*, that the motion be denied. *San Antonio Suburban Irrigated Farms v. Shandy*, 29 F. (2d) 579 (D. Kan. 1928).

Where, in an action brought for less than the jurisdictional amount a non-resident defendant seeks to remove on the basis of a counterclaim, removal is generally denied. *Bennett v. Devine*, 45 Fed. 705 (C. C. S. D. Iowa 1891); *Harley v. Firemen's Fund Ins. Co.*, 245 Fed. 471 (W. D. Wash. 1913). But *cf. Lee v. Continental Ins. Co.*, 74 Fed. 424 (C. C. D. Utah 1896) (removal permitted, since state statute barring action on a counterclaim unless it was presented in the original suit deprived the defendant of the privilege of bringing the action in a federal court). But since a counterclaim in excess of the jurisdictional amount represents a claim which could be brought originally in a federal court, the refusal to permit removal in such a case will tend to induce a litigant to bring a separate federal suit instead of filing his counterclaim. While the federal courts may be averse to extending their jurisdiction, it would seem on the whole undesirable to adopt a rule leading to multiplicity of suits. But this consideration is not present where, as in the instant case, removal is sought by a non-resident plaintiff on the basis of the defendant's counterclaim which exceeds the jurisdictional amount. Some courts have permitted removal in this situation on the theory that the counterclaim makes the nominal plaintiff the actual defendant as to a claim in excess of $3000. *Zumbrunn v. Schwartz*, 17 F. (2d) 609 (D. Ind. 1927); *Pierce v. Desmond*, 11 F. (2d) 327 (D. Minn. 1926). Other courts have refused to allow removal. *Mohawk Rubber Co. v. Terrell*, 13 F. (2d) 266 (W. D. Mo. 1926) (counterclaim said not to be in its nature an independent suit); *Glover Machine Works v. Cooke Jellico Coal Co.*, 222 Fed. 531 (E. D. Ky. 1915) ("defendant" interpreted as applicable only to titular defendant). But insofar as a party is denied the opportunity to litigate in a federal court a claim against him, because of the form in which the claim happens to be brought up, he would seem to be deprived of a substantial procedural privilege intended to be given under the Judicial Code.

STATUTE OF FRAUDS—ORAL CONTRACT TO BEQUEATH MONEY.—The plaintiff alleged that the deceased made an oral contract with her to bequeath to her $6000. The estate consisted both of personalty and realty. In a

suit for specific performance the lower court denied a recovery. *Held*, on appeal, that the judgment be affirmed on the ground, *inter alia*, that the contract was within the statute of frauds as an agreement for the conveyance of an interest in land. *Ohlendiek v. Schuler*, 30 F. (2d) 5 (C. C. A. 6th, 1929).

Generally, an oral contract to bequeath the whole or any proportion of an estate, which consists in part of realty, is held to be within the statute of frauds. *Swash v. Sharpstein*, 14 Wash. 426, 44 Pac. 862 (1896); *Edwards v. Brown*, 308 Ill. 350, 139 N. E. 618 (1923). *Contra: Stahl v. Stevenson*, 102 Kan. 844, 171 Pac. 1164 (1918). The contract being unenforceable as to the realty is unenforceable as a whole. *Pond v. Sheean*, 132 Ill. 312, 23 N. E. 1018 (1890). *Contra: Mayfield v. Cook*, 201 Ala. 187, 77 So. 713 (1918). But where the contract was to bequeath a specific sum of money, there are numerous instances of the enforcement of such oral agreements where the statute of frauds was not raised. *Grundt v. Shenk*, 222 App. Div. 82, 225 N. Y. Supp. 317 (2d Dep't 1927); *Jefferson v. Simpson*, 83 W. Va. 274, 98 S. E. 212 (1919). And where the statute has been pleaded, such agreements have been held to be valid. *King's Ex'rs v. Hanna*, 48 Ky. 369 (1849); see *Appleby v. Noble*, 101 Conn. 54, 124 Atl. 717 (1924). As a matter of statutory interpretation, it seems difficult to construe a contract to leave a sum of money as a contract to dispose of an interest in land. The only reason for extending the statute of frauds to this situation would appear to be to avoid the danger of fraudulent claims against the estate. But this danger would seem to be sufficiently obviated by the strict requirement that claims against the estate be proved definitely and certainly by documentary evidence or by disinterested witnesses. *O'Brien v. Foley*, 150 App. Div. 257, 134 N. Y. Supp. 825 (2d Dep't 1912).

TORTS—RESPONSIBILITY OF OWNER OF AUTOMOBILE FOR NEGLIGENCE OF CO-OWNER—EFFECT OF HIGHWAY LAWS.—One of two joint owners of an automobile, while driving the car for his own use and without the other's knowledge, negligently injured the plaintiff. The plaintiff brought suit against the defendant as co-owner, under a statute providing that "every owner of a motor vehicle" shall be responsible for all damage caused by its use "with the permission, express or implied, of such owner." N. Y. CONS. LAWS ANN. (Supp. 1928) c. 27, § 282-e. The lower court allowed recovery. *Held*, on appeal (one justice *dissenting*), that the judgment be reversed. *Leppard v. O'Brien*, 232 N. Y. Supp. 454 (App. Div. 3d Dep't 1929).

The purpose of statutes of this type is to impose responsibility for damage caused by an automobile upon the owner, as the one having control of its use. In carrying out this purpose, the courts consider as his agents the members of a car-owner's family and all others who drive his car with his permission. See *Fluegel v. Coudert*, 244 N. Y. 393, 394, 155 N. E. 683 (1927); *Hawkins v. Ermatinger*, 211 Mich. 578, 585, 179 N. W. 249, 251 (1920). The general tendency of the courts has been to refuse to extend the responsibility created by these statutes beyond their strictest interpretation. *Psota v. Long Island R. R.*, 246 N. Y. 388, 159 N. E. 180 (1927) (permission exceeded by inviting passengers against instructions); *Rowland v. Spalti*, 196 Iowa 208, 194 N. W. 90 (1923) (son detours from authorized route). But in a few instances a broader interpretation has been given to cover situations which could scarcely have been within the definite contemplation of the legislatures. *Kelly v. City of Niagara Falls*, 131 Misc. 934, 229 N. Y. Supp. 328 (Sup. Ct. 1928) (city-owned police car); *Seleine v. Wisner*, 200 Iowa 1389, 206 N. W. 130 (1925) (plaintiff riding in car as borrower's guest). While the instant case follows the gen-

eral trend of decisions, it would not have been unreasonable to have found responsibility within the terms of the statute. Nor would it be illogical to imply the requisite consent from the fact of joint purchase. See dissent in instant case, *supra* at 458. Moreover, the instant decision seems to afford opportunity for circumventing the intended statutory enforcement of the "family car doctrine." *Cf. Mittelstadt v. Kelly*, 202 Mich. 524, 168 N. W. 501 (1918) (recovery against father denied under similar statute where son was co-owner). Thus, by making his entire family joint owners of his automobile, a father might entirely evade the responsibility which the legislature unquestionably aimed to impose on him as the keeper of a "dangerous instrumentality." See *Bowerman v. Sheehan*, 242 Mich. 95, 103, 219 N. W. 69, 71 (1928).

WILLS—PAROL EVIDENCE TO EXPLAIN MISNOMER OF LEGATEE.—The testator made bequests to Arlene Dwyer, daughter of James Dwyer, and to William Cronin in trust for his son Daniel. James Dwyer's daughter was named Helene. William Cronin had no son named Daniel, but had one named William. The testator had known William Cronin and James Dwyer for many years, was the godfather of the children in question, and usually called William Cronin's son "Danny." The executor brought a bill in equity to obtain the construction of the will. *Held*, that the misnomer of the legatees could be explained by extrinsic evidence. *Farrell v. Sullivan*, 144 Atl. 155 (R. I. 1929).

The early view of the courts was that a will should be construed literally and without resort to extrinsic evidence. 5 WIGMORE, EVIDENCE (2d ed. 1923) §§ 2461, 2470. This view was later expanded so as to permit evidence of surrounding circumstances, except where the meaning of the words was clear on their face. *St. Luke's Home v. Ass'n for Indigent Females*, 52 N. Y. 191 (1873); 5 WIGMORE, *op. cit. supra* § 2461. But even this limitation, known as the rule against disturbing a plain meaning, is losing ground. 5 WIGMORE, *op. cit. supra* § 2462. Thus, such evidence is admitted where there is a devise by a description correct in some respects and erroneous in others—*falsa demonstratio non nocet. Patch v. White*, 117 U. S. 210, 6 Sup. Ct. 617 (1886). In such case, the erroneous description is ignored, but the remainder must be definite and certain. 5 WIGMORE, *op. cit. supra* §§ 2473, 2476. If the latter is uncertain, it cannot be made definite by implying terms of certainty into the will. Note (1920) 15 ILL. L. REV. 99. Evidence of surrounding facts is also admissible to identify an erroneously named legatee, as in the instant case. *In re Stuart's Estate*, 184 Iowa 165, 168 N. W. 779 (1918); *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324 (1889); 1 PAGE, WILLS (2d ed. 1926) § 916; (1921) 19 MICH. L. REV. 668. It is likewise admissible to show the existence of a latent ambiguity, and most courts allow it to explain such ambiguity. *Winfield v. Saunders*, 142 Atl. 907 (N. J. 1928); *cf. Patch v. White*, *supra;* (1925) 24 MICH. L. REV. 84. But such evidence is inadmissible to explain a patent ambiguity. *McKee v. Collinson*, 292 Ill. 458, 127 N. E. 92 (1920). However, evidence of declarations of the testator's intention, as a means of interpreting the will, is refused in all cases except those of latent ambiguities. *Day v. Webler*, 93 Conn. 308, 105 Atl. 618 (1919); 2 PAGE, *op. cit. supra* § 1420. The courts are divided as to whether it is necessary for the external objects precisely to fit the description in the document in order that a latent ambiguity exist. 5 WIGMORE, *op. cit. supra* § 2472. The instant case admits evidence of surrounding circumstances, but does not discuss evidence of declarations of the testator's intention as no question of latent ambiguity is involved.