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APPEAL—PARTY IN INTEREST—JURISDICTION.—STATE V. SANDERS, 35 So. 509 (LA.).—A tax collector prescribed a mode in which taxes should be paid and refused to receive those tendered in any other mode. The district court issued a peremptory mandamus to compel him to receive taxes differently tendered. *Held,* that, under a statute limiting the right of appeal to cases involving large sums, the tax collector had no interest sufficient to give him the right of appeal. Blanchard, J., *dissenting.*

Under such statutes a constitutional question involving a smaller amount may be appealed. *New Orleans v. Arthurs,* 36 La. Ann. 98. But mode of paying taxes has sometimes been held not to be a constitutional question. *Cobb v. McGuire,* 36 La. Ann. 801. However, statutes limiting the right of appeal are construed liberally. *San Francisco v. Certain Real Estate,* 43 Cal. 515; *Shelton v. Wade,* 4 Tex. 148. Besides, unless the statute expressly limits the right of appeal to one party, both have the right. *The Sidney,* 139 U. S. 336. And in Louisiana there are cases deciding that where one party has an appealable interest the other ipso facto has the right of appeal. *Handy v. New Orleans,* 39 La. Ann. 107; *State v. Judge,* 23 La. Ann. 761. Since, then, the majority of the court admit that the plaintiff would have had the right to appeal, had he lost, it would seem as if the defendant should have had the right.

BANKRUPTCY—HOMESTEAD—JURISDICTION.—INGRAM V. WILSON, 11 AM. B. R. 192 (C. C. A.).—*Held,* that the homestead of a bankrupt does not vest in the trustee in bankruptcy and that to enforce a privileged debt suit must be brought in the State courts.

The Bankruptcy Act does not affect property exempt under State laws, Act 1898, sec. 17. But, of course, such property is not exempt from privileged debts. Therefore, on this account, there would have been good reason for federal courts' jurisdiction in cases like the present, and also because the trustee in bankruptcy has at least temporary control of the debtor's homestead. *Robinson v. Wilson,* 15 Kan. 595. It has been held, too, that the trustee represents the general rights of creditors. *In re St. Helen Mill Co.,* 3 Sawy. 88; *In re Gurney,* 7 Bliss 414. However, under the bankruptcy act of 1867 exempt property was without the control of the federal courts. *In re Bass,* 3 Woods 382. And such has been the rule under the act of 1898. *In re Woodruff,* 96 Fed. 317; *Lockwood v. Exchange Bank,* 190 U. S. 294. The same rule would apply, as was held in the present case, to a privileged debt as to a waiver.

BANKRUPTCY—TRUSTEE—FRAUDULENT CONVEYANCE—TRACING FUNDS.—WELCH V. POLLEY, 11 AM. B. R. 215 (N. Y.).—A trustee, about to become bankrupt, fraudulently conveyed part of the real estate which he held in trust. His trustee in bankruptcy sued the vendee and recovered. *Held,* that

the cestui que trust may recover the proceeds from the trustee and his trustee in bankruptcy.

The decision of the Supreme Court, which is here reversed, 86 App. Div. 260, was to the effect that the right of the cestui que trust was against the real estate in the hands of the third party and not against the trustee. Cases are there cited showing that where money is paid by A to B, who has a just claim, but where C is in fact legally entitled, C must sue A and has no cause of action against B. *Butterworth v. Gould,* 41 N. Y. 450; *Hathaway v. Homer,* 54 N. Y. 655. But in respect to property the rule is different. Property may usually be followed into whatsoever form it can be traced. *Church v. Lee,* 5 Johns. 348; *Street v. Nelson,* 80 Ala. 230. In a case similar to the present one, *Re Mulligan,* 116 Fed. 715, no action lay against the trustee in bankruptcy, but it was not distinctly proved that the money he received was the proceeds of the property of the plaintiff. In the present case the proceeds were traced directly into the hands of the trustee in bankruptcy. Therefore, although some cases hold that, since it was mingled with other funds, it lost its identity, and the cestui que trust was in no better position than the other creditors, *Steamboat Co. v. Locke,* 73 Me. 370, yet the general rule is, that such money may be recovered in preference to other debts. *Bank v. Peters,* 123 N. Y. 272; *Trust Co. v. St. Louis, etc., Co.,* 99 Fed. 485.

CONSTITUTIONAL LAW—NEGROES AS GRAND JURORS—INQUIRY OF FEDERAL COURT INTO RULES OF LOCAL PRACTICE.—ROGERS V. ALABAMA, 24 SUP. CT. 257. —Plaintiff in error made a motion, two printed pages in length, to quash an indictment, because of the exclusion of negroes from the grand jury list, alleging that this was due to the inequality of his race under the State constitution. The State court struck the motion from the files, under color of local practice, on the ground of prolixity. *Held,* that this was a violation of the Fourteenth Amendment of the Federal Constitution.

The United States Supreme Court has repeatedly held that whoever, while representing a State in an official capacity, deprives another of his legal rights, thereby violates the Fourteenth Amendment, whether this be done with or without the authority of the State laws. *Ex parte v. Virginia,* 100 U. S. 339; *Trauder v. W. Va.,* 100 U. S. 303; *Neal v. Delaware,* 103 U. S. 370; *Gibson v. Mississippi,* 162 U. S. 565. And the same court will freely examine the validity of the pleadings, as well as the sufficiency of the evidence, when a constitutional question is involved. *U. S. Rev. Stat.,* sec. 709; *Boyd v. Thayer,* 143 U. S. 180; *Murdock v. Memphis,* 20 Wall. 590; *Osborn v. Florida,* 160 U. S. 650; *McLaughlin v. Fowler,* 154 U. S. 663. Nor will it hesitate to look behind any disguise assumed by a State court. *Neal v. Delaware, supra; Mitchell v. Clark,* 100 U. S. 645. A prisoner has a constitutional right to offer evidence in support of a motion to quash the indictment which charges that he has been discriminated against because of race. *Smith v. Mississippi,* 162 U. S. 601; *Williams v. Mississippi,* 170 U. S. 213; *Carter v. Texas,* 177 U. S. 442. The principal case extends this rule even to a motion that may seem superfluous, so long as it is not irrelevant. This is holding merely that the criminal has a right to prove his case, however weak it may seem. But see *Calwell v. Texas,* 137 U. S. 692.

CONSTITUTIONAL LAW—CORPORATIONS—FULL FAITH AND CREDIT TO FOREIGN JUDGMENTS.—ANGLO-AMERICAN PROV. CO. V. DAVIS PROV. CO., 24 SUP.

CT. 92.—New York Code Civ. Proc., sec. 1780, provides that suits between foreign corporations can be maintained only when the cause of action arises within the State. This statute is interpreted by the New York courts as precluding an action on the judgment of a sister State by one foreign corporation against another. *Held,* not to violate Art. 4, sec. 1, U. S. Const., guaranteeing full faith and credit to such judgments.

The constitutional provision establishes a rule of evidence rather than of jurisdiction. *Wisconsin v. Insurance Co.,* 127 U. S. 265. While, generally, a judgment is entitled to full faith and credit in the courts of a foreign jurisdiction, *Insurance Co. v. Harris,* 97 U. S. 331, yet the court of the former may investigate the jurisdiction of the court where decision was rendered, *Thompson v. Whitman,* 18 Wall. 457. The Constitution does not require a State to give jurisdiction against its will, *Missouri v. Lewis,* 101 U. S. 22; but when jurisdiction is acquired, the Constitution determines the effect of the judgment.

CONTRACTS—DISCHARGE—ACCORD AND SATISFACTION—TENDER UPON CONDITION.—NEELY V. THOMPSON, 75 PAC. 117 (KAN.).—Defendant sent plaintiff statement of account, with $7.90 "in full satisfaction of balance due." Plaintiff cashed the check, which contained the words, "Balance in full for fees," but at the same time wrote to defendant denying that his claims were so satisfied. *Held,* that the creditor was bound to understand that, if he accepted the check, he took it subject to the condition that it should be in full settlement of the demand. Mason, J., *dissenting.*

Where an offer of an accord is made upon the condition that it be taken in full of all demands, the party to whom it is made has no alternative but to refuse it, or accept it upon such condition; and if he takes it, no protest or declaration made by him at the time can affect the case. *Bull v. Bull,* 43 Conn. 455. He cannot accept the benefit and reject the condition. He who tenders the money owns it, and has the right to say on what condition it shall be received. *Nassoiy v. Tomlinson,* 148 N. Y. 326; *Fuller v. Kemp,* 138 N. Y. 231. "Always the manner of the tender and of the payment shall be directed by him that maketh the tender or payment, and not by him that accepteth it." *Pinnel's Case,* 5 Co. 117. The dissenting opinion seems to overlook the fact that the ownership of the money does not change till the condition has been accepted; and, while admitting the weight of authority to be otherwise, holds that where the money paid is for a portion of the debt admittedly due, no consideration exists for the release of the portion in dispute.

EVIDENCE—CASH REGISTER RECORDS—MEMORANDA AS INDEPENDENT EVIDENCE.—CULLINAN V. MONCRIEF, 85 N. Y. SUPP. 745.—Cash register records, introduced to sustain testimony of a party to a transaction, *held,* inadmissible.

At first sight it would seem that the records of a cash register, preserved by way of accounts, are so closely analagous to the records in shop-books as to come under the rule which admits the latter as evidence. *McKelvey on Evidence,* sec. 163. Because such records contain the element of "daily routine of business," which the decisions seem to deem essential to the reliability of such evidence. *Prince v. Smith,* 4 Mass. 455. But the rule is confined to shop-books with great strictness. *Richardson v. Emery,* 23 N. H. 220; *Kotwitz v. Wright,* 37 Tex. 82. And it is evident that cash register records could not be received, on any other grounds, as independent evidence, or even in an

auxiliary way unless the witness could not otherwise remember the transaction. *People v. McLoughlin,* 150 N. Y. 365.

EVIDENCE—IMPEACHING WITNESS—PREVIOUS STATEMENTS—REFRESHING MEMORY.—PEOPLE V. CREEKS, 75 PAC. 101 (CAL.).—In a murder trial, the State called as a witness the mother of the accused. Her testimony at the inquest had been material toward showing the prisoner's guilt. To the surprise of the State, she now failed to repeat that testimony, alleging that doubts of its truth had arisen in her mind. *Held,* that as she had not made statements to the damage of the State at the trial, but had merely failed to aid in the proof, she could not be made to testify as to what her former evidence had been. Van Dyke, J., *dissenting.*

Such proceedings would be an attempt to substitute former for present testimony. *Comm. v. Phelps,* 11 Gray 73. Of themselves, former inconsistent statements of a witness are irrelevant to the question of guilty or not guilty, though they tend to impeach his credit. A witness cannot be questioned in regard to such statements, by the party who called him, though he swore to them before the grand jury. *People v. Safford,* 5 Denio 112,—a case parallel to the present case, save that no bias of witness appeared. A witness, —whichever party calls him—cannot be impeached unless he has given testimony against the impeaching party. *People v. Mitchell,* 94 Cal. 550. The right of counsel to refresh the memory of a witness in no way depends on the surprise which his testimony may have created, and a witness who has omitted details should not be asked whether he had not testified to the omitted details before the committing magistrate or grand jury. *Putnam v. U. S.,* 162 U. S. 697, 705.

DEED OPERATING AS A MORTGAGE—OPTION TO PURCHASE.—REICH V. DYER ET AL., 86 N. Y. SUPP. 544.—Plaintiff being indebted to the defendant, executed a deed of property giving the latter an option to purchase at a price fixed in the deed within a year. *Held,* that such a deed was in fact a mortgage. Laughlin, J., *dissenting.*

The dissenting opinion is the more reasonable one. From the facts, which are not clear, it seems that the parties intended an absolute deed to be made to defendant's testatrix, on condition that within a year she accept the property at an agreed price. Upon failure to purchase, defendant's testatrix was to become mortgagee. They could not have intended the transaction to operate as a mortgage, because if it operated as such, it could never become an absolute conveyance. "Once a mortgage always a mortgage," 1 *Jones on Mort.,* par. 7; *Bisp. on Eq.,* sec. 153. Every conveyance of land accompanied by a conditional agreement is not necessarily a mortgage. *Baker v. Thrasher,* 4 Denio 493; *Macaulay v. Porter,* 71 N. Y. 173. The intention of the parties should govern. *Hughes v. Shaff,* 19 Ia. 335; *Foley v. Kirk,* 33 N. J. Eq. 170. The defendant's testatrix impliedly accepted the option to purchase at the end of the year, on the ground of estoppel by conduct. *Wash. on Real Prop.,* sec. 1914; *Bigelow on Estoppel,* 454.

HOMICIDE—SELF-DEFENSE—NECESSITY OF RETREAT.—STATE V. CASTLE, 46 S. E. 1 (N. C.).—Where it appeared that the accused, who was the foreman of a lumber camp, shot two of the hands during a difficulty commenced by

the latter, *held*, that if the foreman was where he had a right to be he was not required to retreat before firing in self-defense.

Following the English doctrine, many of the American courts hold that a homicide will not be excused on the ground of self-defense unless the slayer does that which is reasonably in his power to avoid the necessity of extreme resistance; he should retreat to the wall or other impediment before dealing a deadly blow. *Pond v. State*, 8 Mich. 150; *State v. Harper*, 1 Edm. Sel. Cas. (N. Y.) 180; *Pierson v. State*, 12 Ala. 149. But the prevailing view in this country is that the slayer need not retreat where the attack is violent and with a deadly weapon. *Beard v. United States*, 158 U. S. 550; *Runyan v. State*, 57 Ind. 80; *Tweedy v. State*, 5 Ia. (Clarke) 433; *State v. Ellenger*, 1 Brewst. (Pa.) 352. Where a man is attacked in his own house he is not bound to save himself by flight or retreat before taking life if this is necessary to protect himself or his home from forcible entry. *Alberty v. United States*, 162 U. S. 499; *State v. Middleham*, 62 Iowa 150; *Willis v. State*, 43 Neb. 102. In Ohio it has been held that homicide may be justified on the ground of self-defense without showing either that the slayer previously retreated or that such retreat was impracticable. *State v. Noble*, 1 Ohio, Dec. 1, and a like rule prevails in Texas by virtue of statute regulation, *Williams v. State*, 30 Tex. App. 429; Penal Code 573.

INSURANCE—LOSS BY FIRE—PARTNERSHIP—CHANGE OF INTEREST.—ROYAL INS. CO. V. MARTIN, 24 SUP. CT. 247.—Plaintiff insured his entire stock in trade under a policy providing that the risk should cease "to be in force as to any property insured which should pass from the insured to any other person otherwise than by operation of law," unless the approval of the insurer was secured. Plaintiff took his sons into the firm and himself became a silent partner, without such approval. *Held*, that the plaintiff could not recover even on his own interest in the partnership.

Insurance policies in case of doubt are to be construed in favor of the insured. *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405. And it is well settled that a partner has an insurable interest in the partnership property to the extent of his interest, *Converse v. Citizens' Ins. Co.*, 10 Cush. 37; *Peck v. Ins. Co.*, 22 Conn. 575; *Wood, Fire Ins.* (2d ed.), sec. 298. In most States it has been held that the sale of his interest by one partner to his co-partner was not such an alienation as was forbidden by a clause similar to the above, when no approval was secured. *Powers v. Guardian F. & L. Ins. Co.*, 136 Mass. 108; *Pierce v. Nashua Ins. Co.*, 50 N. H. 297; *Lockwood v. Middlesex Ins. Co.*, 47 Conn. 553. But the contract of insurance is personal and the introduction of a new member into a firm may often increase the risk. The insurer therefore has a right to demand that he be consulted. *Malley v. Ins. Co.*, 51 Conn. 222; *Richards, Ins.*, sec. 33. While the insured, as partner, still retains an interest in the property, it is a joint, and entirely different, interest from the one insured. The present decision accords with the general rule, although the opposite is held in *Cowen v. Iowa Ins. Co.*, 40 Iowa 55; *Blackwell v. Ins. Co.*, 48 O. S. 533.

JUDGMENT—FALSE RETURN—IMPEACHING RECORD.—GRAHAM V. LOH, 69 N. E. 474 (IND.).—An action was brought to vacate a judgment for fraud predicated on a false return of the officer, the defendant not having been

served with summons. *Held,* that unless the holder of the judgment had been guilty of fraud the action could not be maintained. Wiley, J., *dissenting.*

This decision is opposed to the prevailing view. *Black on Judgments,* sec. 377; *Freeman on Judgments,* sec. 495; *Ridgeway v. Bank,* 11 Humph. (Tenn.) 523; *Kibbe v. Benson,* 84 U. S. 629. According to these authorities the defendant may have relief whenever he has not been guilty of any fault. Such a proceeding is to be regarded as a direct attack upon the judgment. *Cotterall v. Koon,* 151 Ind. 182. The only Indiana case at all similar, *Nealis v. Dick,* 72 Ind. 378, in which it was held that because the prevailing party was guilty of fraud the judgment ought to be set aside. The principal case is, however, not unsupported. *Walker v. Robbins,* 55 U. S. 584; *Knox City v. Harshman,* 133 U. S. 152; *Taylor v. Lewis,* 19 Am. Dec. 135; the doctrine of these cases being based upon public policy.

MUSICAL COMPOSITIONS—COPYRIGHT—IMITATION.—BLOOM V. NIXON, 125 FED. 977.—Plaintiffs were owners of a copyrighted song which was rendered during the performance of a musical comedy by an actress. *Held,* that an imitation of the actress while singing such song, by another actress, in which she attempted to mimic the gestures of the original actress, and used only a portion of the song, was not within the statute prohibiting the performance, without the consent of the proprietor, of any dramatic or musical composition for which a copyright had been obtained.

The case proceeds upon the theory that it was the gestures which were represented through the medium of the song and these were not protected by the copyright. We find no cases in which this precise question has been considered. In the case of *Martinetti v. Maguire,* 1 Abb. (U. S.) 356, a bill to enjoin the reproduction of spectacular effects was dismissed, but questions of morality were also involved. The general rule is that any use of the original production, other than by multiplying it, as by public recitations, does not constitute an infringement of a copyright. *High on Injunctions,* sec. 1017.

NATURALIZATION—REQUIREMENT OF STATE STATUTE—PERJURY IN STATE COURT—JURISDICTION OF FEDERAL COURT.—UNITED STATES V. SEVERINO, 125 FED. 949.—In addition to the requirements of the United States law relative to naturalization, a State passed an act providing for the filing of a petition, accompanied by an affidavit of a citizen. *Held,* that perjury committed in making this affidavit was not punishable in the federal courts.

In New York it has been declared that a State court, acting under the naturalization laws of the United States, acts as the agent of the federal government and has no jurisdiction to punish criminal offenses against the United States, those being exclusively within the jurisdiction of the federal courts. *In re Ramsden,* 13 How. Prac. 429. In such other courts as have considered the question, it was held that false swearing, in naturalization proceedings, in State courts, is perjury at common law, and may be punished by the State as well as by the federal courts. *Comm. v. Fuller,* 8 Metc. (Mass.) 313; *Sutton v. State,* 9 Ohio 133. The principal case carries the latter rule one step farther in giving the State courts exclusive jurisdiction to punish perjury committed where, although acting in naturalization proceedings, they are acting pursuant to a State law.

RAILROADS—NEGLIGENCE—PEDESTRIANS—DUTY TO KEEP A LOOKOUT.—MCCLANAHAN V. VICKSBURG, 35 So. 903 (LA.).—While intoxicated, a man entered upon a railroad track in the daytime in the open country and fell on the track. While lying in this position he was killed by a train, the engineer not seeing him until within a short distance. *Held*, that, while the deceased was guilty of contributory negligence, the failure of the engineer to keep a closer lookout was such negligence as to justify a recovery. Provosity, J., *dissenting*.

Whether a railroad company is liable to a trespasser to maintain a strict lookout is a widely disputed question. *Yarmal v. Railroad*, 75 Mo. 575; *Smith v. Railroad*, 14 N. C. 728; *Patton v. Railroad*, 89 Tenn. 370; *Memphis & C. R. Co. v. Womack*, 84 Ala. 149; *Denman v. St. P. & D. R. Co.*, 26 Minn. 357. And even while it may owe such a duty to its passengers, this does not imply a corresponding duty toward a trespasser. *N. Y., N. H. & H. R. R. Co. v. Kelly*, 35 C. C. A. 571. It would seem that in the States where such a liability is placed upon the railroad company, a like responsibility would rest upon a trespasser, since the danger is equally obvious to either. But in such a case it has been held that if the engineer, in the exercise of reasonable care, might have avoided the accident, the company will be liable. *B. & O. R. Co. v. Hellenthal*, 31 C. C. A. 414; *Kirthy v. C. M. & St. P. R. Co.*, 65 Fed. 386; *B. & O. R. Co. v. Anderson*, 85 Fed. 413; *Chicago, N. W. R. Co. v. Donahue*, 75 Ill. 106; *Wood, R. Law* (2d ed.), 1468. This would seem to be a reasonable rule, since no one is justified by the negligence of another in taking his life, through either intent or negligence. The question of the responsibility of a railroad company to a trespasser to maintain a lookout is entirely unsettled, but once the danger is discovered, nothing less than the utmost efforts to prevent the accident will relieve it.

STREET AND INTERURBAN RAILROAD—ANNEXED TERRITORY—CONTRACTS.—IND. RY. CO. V. HOFFMAN, 69 N. E. 399 (IND.).—There was a contract between a city and a street railway company by which the company agreed to transport passengers on transfers upon any of its lines within the city limits. *Held*, that where the city subsequently in the exercise of its governmental power extended its limits, the company was bound to carry passengers upon its interurban line to the new city limits without extra charge.

This seems to be the first decision on this point in this court. The case holds that a city may increase the benefits which it derives from a contract without the consent of the other party on the ground that the possible exercise of this governmental power of extension must have been in contemplation of the parties. It is well established that the contract of a municipality cannot be altered or abrogated without the consent of both parties. 20 *Am. & Eng. Ency.*, 1157; *Sawyer v. Concordia*, 12 Fed. Rep. 754; *Nelson v. Parish*, 111 U. S. 716. A city is not excused from its contract where it fails to exercise its governmental power and as a result is unable to receive any benefit from the contract. *Murray v. Kansas City*, 47 Mo. App. 105. As tending to support the present decision it has been held that a legislative act modifying the territorial limits of a city is not unconstitutional although it operates to decrease the security of prior creditors. *State v. Lake City*, 25 Minn. 404; *Wade v. City of Richmond*, 18 Gratt. (Va.) 583. The court in the principal case relies almost entirely upon the principle that municipal ordinances be-

come operative within the annexed territory as a natural consequence of the annexation. *Toledo v. Edens,* 59 Ia. 352.

STREET RAILWAYS—RIDING ON CAR STEPS—LIABILITY FOR INJURIES.—MOSKOWITZ V. BROOKLYN HEIGHTS R. Co., 85 N. Y. SUPP. 960.—*Held,* that a person who elects to ride on the steps of a crowded street car, and who is thrown off by the oscillation of the car while it is running at the customary rate of speed, assumes the risk of injuries so occasioned. Hirschberg and Woodward, JJ., *dissenting.*

While riding on the platform or steps of a steam railroad car is generally regarded as negligence *per se, Goodwin v. R. Co.,* 84 Me. 203, it is not so considered as to street cars, *Cummings v. R. Co.,* 166 Mass. 220. In many cases, however, it is said to constitute such negligence as to preclude a recovery for resulting injuries, unless the crowded condition of the car makes it necessary: *Tham v. Traction Co.,* 191 Pa. St. 249; *Archer v. R. Co.,* 87 Mich. 101. In *Ayers v. R. Co.,* 156 N. Y. 104, it was held that a passenger on a street car assumes the risks ordinarily incident thereto, and the tendency of the New York decisions seems to in harmony with this view. The dissenting opinion in the present case contends that a common carrier inviting a passenger for hire to occupy a precarious position upon the platform impliedly represents that the car will be so run as to insure his safety. See *Nolan v. R. Co.,* 87 N. Y. 63; *Wilde v. R. Co.,* 163 Mass. 533; *Pomashi v. Grant,* 119 Mich. 675.

SURETIES—OBTAINING PREFERENCES—INUREMENT TO CO-SURETIES.—CAMPAU V. DETROIT DRIVING CLUB, 98 N. W. 267 (MICH.).—A part of the sureties on a forfeited bond liquidated their *pro rata* share of the indebtedness, subsequently levying on the property of the principal. *Held,* that the assets so required did not inure to the benefit of the co-sureties. Hooker, C. J., and Montgomery, J., *dissenting.*

The court reasons that the relation of co-suretyship was severed upon payment by part of the sureties of their proportion of the principal debt. They then apply the doctrine that indemnity given to the surety after the debt has been discharged does not inure to the benefit of co-sureties, *Gould v. Fuller,* 18 Me. 364; *Moore v. Isley,* 22 N. C. 374. While the general rule is that indemnity obtained by one of several sureties prior to the determination of the relation is subject to the claim of all, *Guild v. Butler,* 127 Mass. 386; *Berridge v. Berridge,* 44 Ch. Div. 168; yet when the debt is paid in equal proportion, the equities cease, and co-sureties are not entitled to share in the indemnity subsquently obtained from the principal, *Messer v. Swan,* 4 N. H. 481. The dissenting opinion points out that the doctrine followed has been applied only in those instances where the full amount of the debt was paid; whereas in the present case only a *pro rata* share was liquidated; and contends that equity should not ingraft upon the general rule an exception that will enable one co-surety to overreach another.

TRUSTS—SAVINGS BANK—DEPOSITS IN TRUST FOR ANOTHER.—IN RE TOTTEN, 85 N. Y. SUPP. 928.—Where one deposits funds in trust for another, without knowledge of beneficiary, and subsequently withdraws such accounts, *held,* that, after the depositor's death, the *cestui que trust* can recover from the estate of the deceased the amount of the deposits.

This class of voluntary trusts has given rise to an irreconcilable conflict

of opinion. The decision follows the liberal New York doctrine, well exemplified in *Martin v. Funk*, 75 N. Y. 134, which apparently has found favor in some other jurisdictions: *Minor v. Rogers*, 40 Conn. 512; *Ray v. Simmons*, 11 R. I. 266; *Gaffney's Estate*, 146 Pa. St. 49. The Massachusetts courts, on the other hand, have declared that a deposit by one as a trustee will not be sufficient to create an irrevocable trust; that, to make the delivery effectual, the donor must part with every vestige of dominion over the property: *Sherman v. Bank*, 138 Mass. 581; *Clark v. Clark*, 108 Mass. 522. The weight of authority seems to support the Massachusetts rule: *Robinson v. Ring*, 72 Me. 140; *Davis v. Bank*, 53 Mich. 163; *Gano v. Fisk*, 43 Ohio St. 462; *Schollmier v. Schollmier*, 78 Iowa 426; *Smith v. Speer*, 34 N. J. Eq. 336; and even in New York there is a strong tendency to renounce the broad doctrine followed in the main case: *Beaver v. Beaver*, 117 N. Y. 421; *Cunningham v. Davenport*, 147 N. Y. 43.

WATER COURSES—PAROL LICENSE—IRREVOCABLE GRANT—IRRIGATION.—MAPLE ORCHARD CO. v. MARSHALL, 75 PAC. 369 (UTAH).—*Held*, that a parol license to enter on land to construct a pipe line for purposes of irrigation operates as an irrevocable grant, after entry and construction of the pipe line at considerable expense and after commencing the use of the water.

This court is so far favorable to irrigation projects as to hold that the taking of property for the purpose of carrying water for the irrigation of an otherwise unproductive farm is a taking for a public use, justifying the invocation of eminent domain. *Nash v. Clark*, 75 Pac. 371. A parol license to do a certain act or succession of acts on the land of another is in all cases revocable, so far as it remains unexecuted, or so far as any future enjoyment of the easement is concerned, at the will of the licensor, even where the licensee has made an expenditure of money upon the land of the licensor upon the faith of the license. *Houston v. Laffee*, 46 N. H. 507. So where the expenditure is trifling, *Wiseman v. Lucksinger*, 84 N. Y. 31. This seems the general rule, but many cases support the present court. Thus, a parol license for a party-wall is taken out of the statute of frauds by its execution. *Russell v. Hubbard*, 59 Ill. 335. Where money has been expended on the faith of such license, so that the parties cannot be placed in *statu quo*, equity grants relief as in any other case of part performance of a parol contract for the sale of land, upon the ground of preventing fraud. *Prince v. Case*, 10 Conn. 375.

WILL—VALIDITY—NON-CONTINGENT CLAUSE.—REDHEAD V. REDHEAD, 35 So. 761 (ALA.).—*Held*, that an instrument beginning, "Realizing the uncertainty of life at all times, and the dangers incident to travel, I leave this as a memoranda of my wishes should anything happen to me during my proposed trip," is a valid will, although the testator did not die until after his return from the trip referred to.

The question involved in such a will is whether the testator intended the validity of the will to be contingent upon the happening of the condition therein named, or merely to show the circumstances under which the will was made. *Damon v. Damon*, 8 Allen 192; *Schouler, Wills* (2d ed.), sec. 286. The English rule very strongly favors construing a will as non-contingent whenever this can be done reasonably. *Porter, Goods of*, L. R. 2 P. & D. 22.

And the rule is sometimes strained in its application. *Dobson's Case,* L. R. 1 P. & M. 88; *Martin's Case,* L. R. 1 P. & M. 388. The same preference for non-contingent wills is found in the American decisions, but the difficulty of its application under varying circumstances makes the results most inconsistent when compared. *Cody v. Conly,* 27 Gratt. 313; *Redfield, Wills* (2d ed.), 176; *Schouler, Wills,* sec. 288. In the leading case of *French v. French,* 27 W. Va. 432, a will is held non-contingent which is worded: "Let all men know hereby, if I get drowned this morning, March 7, 1872, that I bequeath," etc.; whereas in *Dougherty v. Dougherty,* 4 Metc. (Ky.) 25, a will is held conditional which reads: "As I intend starting in a few days for the State of Missouri, and should anything happen that I should not return alive, my wish is," etc. Many of the decisions turn on finely drawn distinctions. The principal case fairly represents the borderland between contingent and non-contingent wills. *Tarver v. Tarver,* 9 Pet. 174; *Robnett v. Ashlock,* 49 Mo. 171; *Ex parte Lindsay,* 2 Bradf. (N. Y.) 204; *Morrow's Appeal,* 116 Pa. St. 440.