# RECENT CASES.

ADMINISTRATORS—MISCONDUCT—COMMISSIONS.—IN RE GALL, 95 N. Y. SUPP. 124.—Where an administratrix has been guilty of misconduct, *held*, that on the settlement of her account, the surrogate may, in his discretion, deny her statutory commissions.

Such is the general rule. *Hall v. Wilson*, 14 Ala. 295; *State ex rel. Wolff v. Berning*, 74 Mo. 87. Though the contrary has been held. *In re Fitzgerald*, 57 Wis. 508. But the misconduct must consist of fraud, gross negligence, or wilful default causing loss to the estate. *Smith v. Kennard's Ex'r*, 38 Ala. 695; *St. Paul Trust Co. v. Kittson*, 62 Minn. 408. And unwise administration unaccompanied by fraud and bad faith, where long delay in accounting was without excuse, has been held sufficient. *In re Atherton's Estate*, 8 Knep. 150. But, on the other hand, that unfaithful administration on the part of an executor will not deprive him of compensation for his services so far as they have been beneficial to the estate. See *Jennison v Hapgood*, 10 Pick. 77.

ADVERSE POSSESSION—COLOR OF TITLE—TAX DEEDS.—BRANNAN V. HENRY, 39 So. 92 (ALA.).—*Held*, that a tax deed, though void as a muniment of title, is admissible to show color of title to support adverse possession if it sufficiently describes the land.

The tendency has been to support this proposition. Some federal decisions have rejected it in the past, but the most recent cases support it where the deed is not void on its face. *Truce v. Am. Ass.*, 122 Fed. 598, 58 C. C. A. 266; *Bartlett v. Ambrose*, 42 U. S. App. 381. The older cases followed it rather on the ground of the accuracy of the description of the land. *Harrison v. Spencer*, 90 Mich. 586; *Rensens v. Lawson*, 91 Va. 226; *Edgerton v. Bird*, 6 Wis. 527. And some even where the property was inaccurately described. *Smith v. Shattock*, 12 Ore. 362; *Childs v. Shower*, 18 Iowa 261. *Contra*, *Berendo v. Kaiser*, 66 Tex. 352. Color of title can be claimed only for as much as is described. *Stevens v. Johnson*, 55 N. H. 405. In the following cases claims of color of title under invalid tax deeds were not allowed. *Moore v. Brown*, 11 How. 424; *Matterson v. Devoe*, 18 Kan. 223; *Brougher v. Stone*, 72 Miss. 647.

ATTORNEY AND CLIENT—SIGNATURE OF ATTORNEY ON BOND.—HAYES V. BRONSON, 61 ATL. 549 (CONN.).—An attorney, while acting for a firm as plaintiffs in a replevin suit, signed the replevin bond "John Doe, Attorney for Plaintiff."—*Held*, that he bound himself personally and not his clients.

A principal cannot be charged on a bill drawn by "A. B., agent." *Pentz v. Stanton*, 10 Wend. 271. A Court of Equity will look beyond the form of execution, and, having ascertained the intention of the signer, will, if possible, give the effect intended. *Stark v. Stark*, 94 U. S. 477. An unsealed instrument signed in the name of the agent binds the principal if that intent appears on its face and the agent has authority. *McDonald v. Bear River Co.*, 13 Cal. 220. Even if the agent sign as such and use his own seal he may not be

personally bound. *Delbers v. Del. & H. C. Co.*, 4 Wend. 285. But an agent is not personally liable on a note made by him to one who took it with knowledge of intention to act as agent. *Bradley v. McKee*, 5 Cranch C. C. 298. Nor will he be personally bound if contrary intention appears on the face of the instrument. *Haskins v. Edwards*, 1 Iowa, 246. But the attorney has a remedy over against the principal, if he has acted in good faith. *Clark v. Randall*, 9 Wis. 135.

CONTRACTS—EXCLUSIVE CONTRACT FOR PERSONAL SERVICES—INJUNCTION.—TAYLOR IRON & STEEL CO. v. NICHOLS ET AL., 61 ATL. 946 (N. J. EQ.).—*Held*, that where a contract contains an agreement that one shall devote his entire time to the service of another it does not imply a covenant not to serve a third party during the period covered by the contract.

Even if employees quit under circumstances showing bad faith equity will not force them to remain in service against their will. *Arthur v. Oakes*, 63 Fed. 310. Employees cannot, while in service, perform some duties and refuse to perform other necessary duties. *So. Cal. Ry. v. Rutherford*, 62 Fed. 796. The mere fact of an employee's knowledge of the business will not justify an injunction against violation of his contract. *Rogers Mfg. Co. v. Rogers*, 58 Conn. 356. To justify the injunction there must be an express covenant *not* to enter the employ of another and also proof of special skill or expertness. *Burney v. Ryle*, 91 Ga. 701. Under an exclusive contract for services when the pecuniary injury would be incapable of proof an injunction would be granted even in the absence of the negative clause. *Col. Club v. Reilly*, 11 Ohio Dec. 272. But even under such circumstances the injury must be irreparable. *Sternberg v. O'Brien*, 48 N. J. Eq. 370. And not remediable at law. *Hair Co. v. Huckins*, 56 Fed. 366. Where performance for another would violate contract negative clause would be implied. *Duff v. Russell*, 133 N. Y. 678. In *Hamblin v. Dunneford*, 2 Edw. Ch. 529, an injunction was refused, although there was an express covenant not to perform and the breach was acknowledged.

CONTRACTS—PUBLIC POLICY—LABOR UNIONS.—JACOBS v. COHEN, 34 N. Y. LAW JOUR. 58.—*Held*, that a tripartite agreement, made by an employer with a labor union and with his employees, who were members of the union, in which he contracted not to engage any person, who was not a member of the union and in good standing, and to discharge any person who should fail to keep up his standing in the union, is not an agreement in violation of any public policy.

Both opinions in this case spend much time in comparing it with *Curran v. Gallen*, 152 N. Y. 33. That case is, however, easily distinguishable. In *Curran v. Gallen*, *supra*, the purpose of the agreement was to coerce those who were not parties to it. In this case the employers were parties to the contract. This distinction is made clear in *Stevedore's Ass'n v. Walsh*, 2 Daly (N. Y.) 1. But see *dicta* in *People v. Fisher*, 14 Wend. 9. This distinction is by no means uncommon. *Case of the Journeymen Cordwainers of the City of New York*, 1810; (*People v. Treguler*,) 1 Wheelers Crim. Cases, 142; *Com. v. Hunt*, 4 Metc. 111. It is recognized by statute in England, 5 Geo. IV., c. 95, secs. II and III. Agreements between employees or between employers for their common benefit are valid, provided no unlawful means are used to carry out their ends. *Collins v. Locke*, 4 App. Cas. 674; *Slate v. Stewart*, 59 Vt. 273; *Snow v. Wheeler*, 113 Mass. 179. It has been held,

however, that labor is a commodity and that association agreements which stifle competition between the members of an association are void. *Moore v. Bennett*, 140 Ill. 69.

CORPORATIONS—NOTES—PERSONAL LIABILITY OF OFFICERS.—AUNGST V. CREQUE, 74 N. E., 1073 (OHIO.).—*Held*, that a promissory note which reads "thirty days after date we promise to pay," etc., and signed "The Akron White Sand and Stone Co., H. K. Mihills, Sec'y and Treas,, D. B. Aungst, Pres.," is, on its face, the note of the company alone and is not the note of H. K. Mihills and D. B. Aungst, and the latter are not personally bound thereon.

Although the above decision is in harmony with the law in some jurisdictions, there is a great conflict between the various states and no definite rule can be laid down in this country as to how a note, signed as in the present case, will be construed. Thus where a note is made out "we promise to pay," etc., and signed "A B Company, C D Pres.," some states hold that parole testimony is inadmissible and the company is alone liable. *Liebscher v. Kraus*, 71 Wis. 387. On the same set of facts other states hold that parole testimony is inadmissible but that the agent is personally liable. *Mathews v. Dubuque Mattress Co.*, 87 Iowa, 246. While still other states admit parole testimony to remove the ambiguity. *Case Mfg. Co. v. Saxman*, 138 U. S. 431; *Bean v. Mining Co.*, 66 Cal. 451. The same confusion of decisions exist when the name of the company appears in the margin of the instrument and it is signed by "A. B. Pres." Compare *Carpenter v. Farnsworth*, 106 Mass. 561; *National Bank v. Clark*, 139 N. Y. 307; and *Franklin v. Johnson*, 147 Ill. 520.

CRIMINAL LAW—SELF DEFENSE—DUTY TO RETREAT.—STATE V. GARDNER, 971 N. W. (MINN.). 971.—In a trial of homicide, in which there is an attempted justification by self defense, *held*, that it is reversible error to charge that such justification can not be made out unless accused in good faith endeavored to escape.

The application of the doctrine "retreat to the wall," as stated in Coke (*3 Inst. 55*), has been undergoing a change in this country in recent years and in some of the jurisdictions has been positively relaxed. *State v. Matthews*, 148 Mo. 185; *Runyan v. State*, 57 Ind. 80. The Supreme Court, in recent cases, *Beard v. United States*, 158 U. S. 550, and *Rowe v. U. S.*, 164 U. S. 546, has approved of the modifications of the old common law doctrine and held that a person "was not obliged to retreat" under the circumstances. The reason for this change appears to be the general introduction of firearms, and the recognition by courts that self-defense should not be distorted by an unreasonable requirement of the duty to retreat, into self-destruction. *Duncan v. State*, 49 Ark. 543.

EVIDENCE—LEASES—COLLATERAL AGREEMENTS.—GREENE V. KERR, 95 N. Y. SUPP. 569.—*Held*, that an oral agreement to repair during the term as distinguished from repairs to be made before the tenancy commenced is not collateral to the written lease and is inadmissable in an action for rent.

The language of this ruling cannot be reconciled with the case of *Morgan v. Griffith*, L. R., 6 Exch. 70. Both decisions are, however, consistent with the undisputed rule that oral conditions, precedent to the obligation of a written contract, may be shown, and, with its corollary, that a condition subsequent must be contained in the writing to be enforceable. *Pym v. Campbell*, 6 E. & B. 370; *Davis v. Jones*, 17 C. B. 625. Apparent inconsistencies

in the law are due to the very narrow distinctions drawn between the application of these two rules of intention. Compare *Angell v. Duke*, 32 L. T. Rep. N. S. 320, and *Mann v. Nunn*, 43 L. T. Rep. C. P. N. S. 241. Many courts hold that there must be some ambiguity upon the face of the written instrument before these rules can be applied. *Englemier v. Taylor*, 98 N. Y. 788; *Englehorn v. Reitlinger*, 122 N. Y. 76. This rule has, however, been criticised as fallacious in theory and practice. *4 Wig. Ev.* sec. 2431 (b). The difficulty in defining a collateral agreement is pointed out in *Hall v. Berton*, 38 N. Y. Supp. 979. Each case must stand upon its own particular circumstances. *4 Wig. Ev.* 2435.

INSURANCE—CONSTRUCTION OF POLICY—"FIRE" DEFINED.—WESTERN WOOLEN MILL CO. v. NORTHERN ASSUR. CO. OF LONDON, 139 Fed. 637.—*Held*, that the word "fire" as used in an insurance policy, in the absence of language showing a contrary intention, is to be given its ordinary meaning, which includes the idea of visible heat and light.

Such is the better and prevailing rule, although there was considerable conflict in the early cases. *Wood on Fire Ins.*, 237; *Gibbons v. German Ins. Co.*, 30 Ill. App. 263. But it is not necessary that there be ignition of the subject matter of the insurance. It is enough that the proximate cause of the damage be fire. *Bolestracci v. Fireman's Ins. Co.*, 34 La. Ann. 844. And where buildings were blown up under the direction of the chief magistrate of a city to prevent the spreading of a conflagration, the loss was held to be covered by an ordinary policy against fire. *City Fire Ins. Co. of N. Y. v. Corlies*, 21 Wend. 367.

JURISDICTION—EXCESS OF—LIABILITY OF INFERIOR JUDGE.—RUSH v. BUCKLEY, 61 ATL. 774, (ME.).—Where a judge of an inferior court has jurisdiction over the general subject matter of an alleged offense, if he acts in good faith, he will not be liable in damages for an erroneous decision. Emery, J., *dissenting*.

It is universally conceded that when inferior courts and judicial officers act without jurisdiction the law can give them no protection whatever. *Cooley on Torts*, p. 489. A rather odd reason is that given in *Bishop Non-Contract Law*, Sec. 783; "those judges who receive a small salary should not be compelled to respond in damages for honest mistakes." The leading American case held in a *dictum* that if the want of jurisdiction were known there could be no exemption from damages of the judge in an inferior court. *Bradley v. Fisher*, 13 Wall. 335. Many English cases assert the total exemption of a judge of record from responsibility or accountability in any way except to the King. *Milter v. Sears*, 2 W. Bl. 1141. The American opinions seem to be about evenly divided as to the liability of an inferior judge for judgment under an unconstitutional statute. *Kelly v. Bemis*, 70 Mass. 83; *Allen v. Gray*; 11 Conn. 95; *Trescott v. Waterloo*, 26 Fed. 592. In Texas the latter question has been regulated by statute. *Sersumas v. Both*, 34 Tex. 335. An honest purpose would not protect the judge if entirely without authority of law. *Truesdell v. Combs*, 33 Ohio, St. 186. The distinction between *prima facie* total want of jurisdiction and *bona fide* error is well shown in *Robertson v. Parker*, 99 Wis. 652.

LANDLORD AND TENANT—DANGEROUS PREMISES—INJURY TO LICENSEE.—ROSS v. JACKSON, 51 S. E. 578 (GA.).—*Held*, that a landlord is liable to one lawfully present on the rented premises by invitation of the tenant for injuries

arising from defective construction, or from failure to keep the premises in repair, where the defect is known to the landlord, or in the exercise of reasonable diligence could have been known, and the injured person was himself in the exercise of due care.

Ordinarily there is no warranty on the part of the lessor that the premises are in good condition and the rule of *caveat emptor* applies. *Hill v. Woodman*, 14 Me. 38. But by letting the premises with some latent defect in them, such as structural weakness or decay, the landlord impliedly authorizes the continuance of the nuisance and is liable. *Ahern v. State*, 115 N. Y. 203; *Cowen v. Sunderland*, 145 Mass. 363. Furthermore, the liability of the landlord extends to injuries sustained by one socially calling on the tenant as well as to the tenant himself. *Henkel v. Muir*, 31 Hun (N. Y.) 28. In such cases the courts have never drawn any line between a person present for business and one present for pleasure. *Campbell v. Portland Sugar Co.*, 62 Me., 562. However, if the premises are in good repair when demised, but afterward become ruinous and dangerous, the landlord is not responsible, therefore, either to the occupant or the public. *Clancy v. Byrne*, 56 N. Y. 129.

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—DUTIES OF TRAVELER.—IDLETT V. CITY OF ATLANTA, 51 S. E. (GA.) 709.—*Held*, that ordinary diligence on the part of a person passing along a sidewalk of a public street of a municipal corporation, and ordinary diligence on the part of the corporation in constructing and repairing the sidewalk, do not imply a like degree of vigilance in foreseeing danger and guarding against it.

Corporations have made strenuous efforts to establish the rule that knowledge of a defect in and subsequent user of a walk would estop a person injured from claiming damages. *Jones Neg. Mun. Corp.* sec. 221. But this is not the law. Ordinarily, as the laying out of the way has established its legal necessity, the mere fact that one knowing of a defect passes over it will not defeat his claim should he suffer harm. *Samples v. City of Atlanta*, 95 Ga. 110. A person, although knowing a walk is defective, may still use it if his act in so doing is reasonably prudent. *City of Emporia v. Schmedling*, 33 Kan. 485. Knowledge of danger is not negligence *per se*. *4 Am. & Eng. Ency. of Law*, p. 35. Knowlege of the danger is never conclusive evidence of negligence, but it is a question to be submitted to the jury. *Smith v. City of St. Joseph*, 45 Mo. 449. However, if the danger arising from a defect in a street or highway is obviously of such a character that no person in the exercise of ordinary prudence would attempt to pass over the same, or, in other words, if such attempt would of itself plainly and unequivocally amount to a want of ordinary care and diligence, the court may so instruct the jury as a matter of law. *Samples v. City of Atlanta*, 95 Ga. 110.

NAVIGABLE WATERS—RIGHT OF UPLAND OWNER TO REACH.—CONDERT ET AL V. UNDERHILL ET AL, 95 N. Y. SUPP. 134.—*Held*, that an owner of upland has no right to trespass on the land of another for the purpose of reaching the navigable waters beyond.

Where the fee of land between high and low water mark is in the state, an erection of a wharf or pier by an upland proprietor upon this land is not a trespass and will not be disturbed except in case it become a public nuisance. *Commonwealth v. Wright*, 3 Am. Jurist 185. In the present case the fee of the share by an ancient grant rested in a municipal corporation. That a permanent dock erected by an upland proprietor on such land under water is a

trespass. *Brookhaven v. Smith*, 98 App. Div. 212 N.Y. It has been held that proprietors of lands upon navigable waters are entitled to erect wharves and piers for their own and the public use in order to gain access to the navigable parts of the waters. *Steamboat Co. v. Visger*, 179 N. Y. 206. But there the land in question belonged to the state wherein the present case is distinguishable.

NUISANCE—PRESCRIPTION.—OVER V. DEHUE, 75 N. E. 664 (IND.).—In a suit to restrain defendant from operating his foundry, interfering with the enjoyment by plaintiff of his premises, the evidence showed that defendant had operated his foundry for twenty years and that plaintiff had occupied his property for over twenty years. *Held*, not sufficient to give defendant a prescriptive right to operate the foundry in manner complained of.

It is a well established principle that no lapse of time can confer a right to maintain a public nuisance. *Cooley on Torts*, page 730 (2nd Edition); *Inhabitants of Charlotte v. Iron Works*, 8 L. R. A. 828. And regarding a private nuisance the mere fact that the business constituting the nuisance was in operation a few years before a party erected a dwelling is no defense to an action in the absence of a claim of prescriptive right. *Fertilizer Co. v. Malone*, 73 Md. 268; *Mulligan v. Elias*, 12 Abb. Prac. (N. S.) 259. Bringing suits for damages for such use shows sufficiently the want of acquiescence by plaintiff. *Bunten v. Railway Co.*, 50 Mo. App. 414. Although defendant in present case operated his foundry for prescriptive period with knowledge of plaintiff and no complaint from latter, yet the peculiar manner of operating the foundry which caused the nuisance had not been in existence for the entire period. Therefore, the defendant had no right to maintain it, and decision was according to the weight of authority. *Campbell v. Seaman*, 63 N. Y. 568.

OFFICERS—TERM OF OFFICE—TERMINATION.—PROWELL V. STATE EX REL. HASTY ET AL.—39 So. 164 (ALA.).—*Held*, that the words, "until his successor is elected and qualified," as used in the Constitution and statutes relative to the terms of officers, are not intended to prolong the terms of office beyond such reasonable time after the election as will enable the newly elected officer to qualify, and after the expiration of such reasonable time, if the newly elected officer fails to qualify, the office becomes vacant.

At common law there was no rule which gave an individual elected or appointed to office the right to continue in office after the expiration of the term limited by law and until a successor was chosen and qualified. *People v. Tieman*, 30 Barb. 193. Nevertheless, an officer had the right to continue to occupy the office as a mere *locum tenens* and perform the duties incident to the office. *In matter of Woodworth*, 37 Cal. 614. Where a statute speaks of a "vacancy" in an office the word has no technical meaning. *People v. Osborne*, 7 Colo. 605. An office is not vacant when there is a *de facto* incumbent. *Harrison v. Simonds*, 44 Conn. 318. The length of time which will be allowed the officer to quailfy depends upon the statutes creating the office. *People v. Perkins*, 26 Pac. 245. Apparently the principal case is one of first impression, there being no decision on facts that are precisely similar.

PLEADING—PARTIES—MISNOMER—MODE OF OBJECTION.—MCINTOSH COUNTY COM'RS V. AIKEN, 51 S. E. (GA.) 585.—*Held*, that where, in a civil case, the party proceeded against is designated and described by a wrong name, the objection of misnomer should be taken by a plea in abatement, and not by a motion to dismiss.

At one time a doubt existed as to whether a mistake of the plaintiff's Christian or surname were not a ground of non-suit. 1 *Chitty's Pleading*, 440. In general, however, a misnomer of defendant is only pleadable in abatement, and cannot be taken advantage of in arrest of judgment. *State v. Knowlton*, 70 Me. 200. A misnomer is waived by a failure to plead it or by a default. *Bank v. Jaggers*, 31 Ind. 38. Even the want of a charter, or one with great irregularities, must be pleaded in bar. *Rheem v. Wheel Co.*, 9 Casey, 348. But here, in a suit in *assumpsit* against two, one is arrested and the other returned "not found," and it appears on the trial that defendant who is not brought in is misnamed in the declaration, being called "John" instead of "George," plaintiff will fail on the ground of variance. *Waterbury v. Mather*, 16 Wend. 611. In the case of *Jackson Tp. v. Barnes*, 55 Ind. 136, where a suit was brought against another and different corporation for a debt for which it was not liable a demurrer was sustained. Such cases are, however, exceptional. In some states pleas in abatement have been abolished. *Phillips v. State*, 35 Ark. 384. In New York a misnomer should be set up *quasi* in abatement. *White v. Miller*, 7 Hun (N. Y.) 433.

PROMISSORY NOTE—CERTAINTY—EXCHANGE AND COLLECTION CHARGES.—SMITH V. FIRST STATE BANK OF TYLER, 104 N. W. (MINN.) 369.—*Held*, An instrument in the general form of a promissory note, whereby the maker promises to pay a definite sum, with exchange and collection charges is not a promissory note.

The rule stated above is in direct conflict with the provisions of the negotiable instruments act, sec. 2, 4, 5. Previous to the enactment of this statute, the courts in the various states had been nearly evenly divided on the question of the negotiability of instruments with such stipulations. In respect to exchange, the weight of authority being perhaps against negotiability. *Winsor Sav. Bank v. McMahar*, 38 Fed. 283; *Culbertson v. Nelson*, 93 Iowa 187. And as regards collection charges probably leaning towards the rule as adopted in the act. *Porsey v. Wolff*, 142 Ill. 589; *Appenheimer v. Farmers & Merchants Bank*, 97 Tenn. 19; *National Bank v. Sutton Mfg. Co.* 6 U. S. App. 312. In some states, although such provision is declared void by statute, the negotiability of the instrument is not affected. *Levens v. Briggs*, 21 Ore. 333.

TORTS—IMPUTED NEGLIGENCE—INJURY TO CHILD.—JACKSONVILLE ELECTRIC CO. V. ADAMS, 39 So. 183 (FLA.).—*Held*, that the contributory negligence of parents in permitting a child of four to go, unattended, upon the streets of a city upon which electric cars are operated cannot be imputed to the child in an action by him against the corporation for damages resulting from its negligence.

There is no conflict in individual states, some following the ruling of the case in hand, and others adopting the New York rule which hold that such negligence in parents will prevent child from recovering. Until recently, however, Kansas, Maryland and Wisconsin were not committed to either doctrine. *Chicago v. Wilcox*, 21 L. R. A. 76 Note. Maryland has now adopted the New York rule in *Cumberland v. Lating*, 95 Md. 42. Wisconsin has approved it in *Johnson Adm'r. v. Chicago & Northeastern R. R. Co.*, 49 Wis. 529, and the Kansas court seems to assume that parents' negligence would be a valid defense to action by child. *Smith v. Santa Fe R. R.*, 25 Kan. 739. Indiana, Maine, Massachusetts, and Minnesota also follow New York. The

remaining states hold that negligence of parents is not to be imputed to the child. *Chicago v. Wilcox, supra.*

TRADEMARKS—LICENSE TO USE—VALIDITY.—LEA v. NEW HOME SEWING MACH. Co., 139 FED. 732.—Where a contract licenses the use of a trade mark or name, to be used by the grantee in a business with which the grantor has or has had no connection, *held*, that such contract is a fraud upon the public and therefore void.

This case follows the fundamental rule that a trade mark cannot be assigned nor its use licensed except as incidental to the transfer of the business or property with which it has been used. *MacMahan Pharmacal Co. v. Denver Chemical Mfg. Co.*, 51 C. C. A. 302. And where the whole pecuniary value of a name depends solely upon the personal qualities of the one to whom it belongs, the right to the use of the name is not transmissible. *Hegeman & Co. v. Hegeman*, 8 Daly 1; *Blakeley v. Sousa*, 197 Penn. St. 305. But this rule has been held to apply only when the name is sought to be tranferred apart from the business. *Kidd v. Johnson*, 100 U. S. 617; *Booth v. Jarrett*, 52 How. Pr. 169. The whole doctrine of assignability and licensing of trademarks rests upon the consideration whether or not such assignment would operate as a fraud upon the public and if such be the tendency, it will be held invalid. *Manhattan Medicine Co. v. Wood*, 108 U. S, 218; *Connell v. Reed*, 128 Mass. 477.

TRUSTS—SPENDTHRIFT—ESTATE OF CESTUI QUE TRUSTS.—DUBOIS v. BARBOUR ET AL., 61 ATL. 752 (R.I.).—*Held*, that, where a trustee is to pay to the *cestui que trust* sums not exceeding a certain amount, it is not a vested interests and is not subject to *cestui's* debts.

Generally in both England and the United States the beneficial interest cannot be so fenced about by restrictions as to secure to it the inconsistent characteristics of right of enjoyment to beneficiary and immunity from creditors. *Brandon v. Robinson*, 18 Ves. 429; *Nichols v. Levy*, 5 Wall. 441. But by the weight of authority in the United States where the trustee has full discretion as to the disbursement of the income the *cestui* takes no present estate and creditors cannot levy. *Bispham Eq.* p. 96. It is in the power of the parent to place property in the hands of trustees free from interference by the *cestui* or creditors. *Leavitt v. Beirne*, 21 Conn. 8. The spendthrift *cestui* can appoint an agent to receive the income to the use but cannot alienate it. *In Re Mehaffrey's estate*, 139 Pa. 276. Neither the accrued income in the possession of the trustee nor the accruing income can be assigned by the *cestui*. *Partridge v. Covender*, 96 Mo. 452. Even though the beneficiary has the right under the will to devise the estate the payment of his debts may be forbidden by the terms of the trust instrument. *Hill v. McRae*, 27 Ala. 175. *Halstead v. Davison*, 10 N. J. Eq. 290, holds that in the absence of fraud by the *cestui* his interest cannot be levied on by creditors even though the disposal of the estate is not at the discretion of the trustee. But, in some states, statutes forbid the curtailing of the right of the creditors by any provisions of the trust. *Trustee v. Rach*, 87 Ky. 116.

VENDOR AND PURCHASER—UNRECORDED DEED—CONSTRUCTIVE NOTICE.—HARMAN v. SOUTHERN RY., 51 S. E. (S. C.) 689.—*Held*, that a subsequent purchaser of a tract of land, the owner of which had given a deed to a railroad for right of way, had constructive notice of the right of way of the railroad

company, though the deed had not been recorded, from the maintenance and operation of the road over the land.

Notice is whatever reasonable inquiry would develop. In law, that is notice of a fact which would provoke a reasonably prudent man to such inquiries as, pursued with reasonable diligence, would lead to full knowledge. *Chicago & E. I. R. Co. v. Wright*, 153 Ill. 307. If a license is granted by a lot-owner to a railroad company to lay and operate tracks on the street in front of his lots, and the tracks are in operation when the lots are sold, the purchaser is charged with notice of the license. *Merchant's Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 79 Iowa, 613. But possession is not notice except during its continuance, and a vendor is not bound to take notice of the antecedent possession of third persons. 16 *Ency. of Law* 800. Neither is a purchaser of lands chargeable with notice of deeds lying outside of his chain of title. *Paul v. R. Co.*, 51 Ind. 527. This explains the apparently conflicting case of *Irish v. Sharp*, 89 Ill. 261. In that case, the purchaser did not derive his title through the person who granted the unrecorded mortgage and it did not lie in the proper and regular chain of title. A case directly in point is *Ind. Bloomington & Western Ry. Co. v. McBrown*, 114 Ind. 198. There the purchaser knew, at the time he bought the land, that the grade for a railroad track was constructed thereon, and this was held to be sufficient to put him upon inquiry, and if he failed to make proper inquiry as to the nature of the claims he bought it at his peril.