RECENT CASE NOTES

BAILMENTS—INNKEEPERS—RESPONSIBILITY FOR LOSS OR DAMAGE TO THE GOODS OF A GUEST.—The plaintiff, a guest of the defendant innkeeper, delivered her jewels to him for safe-keeping in the defendant's safe. The jewels were stolen. A statute provided that if an innkeeper kept a safe and posted a notice thereof, on failure of the guest to deposit such property with him, he would not be responsible for loss by theft or otherwise. In the event of such deposit being made, the innkeeper's duty to pay damages was limited to $250. N. Y. Cons. Laws, 1909, ch. 25, sec. 200. To an action based on negligence the defendant pleaded a limitation of his responsibility to $250. *Held,* that the statutory limitation did not apply to an action based on negligence. *Shaine v. Jacobson, Inc.* (1923, Spec. T.) 121 Misc. 590, 201 N. Y. Supp. 781.

The English courts originally held that the responsibility of an innkeeper was based on negligence. Beale, *Law of Innkeepers and Hotels* (1906) sec. 183. In states following this theory a high degree of care is required. *Merritt v. Claghorn* (1851) 23 Vt. 177; *Baker v. Dessauer* (1874) 49 Ind. 28. By the weight of authority his responsibility is that of an insurer, only the act of God, or of a public enemy, or the negligence of the guest, being defenses. *Butler & Co. v. Quilter* (1900, Q. B.) 17 T. L. R. 159; *Willard v. Reinhardt* (1853, N. Y. C. P.) 2 E. D. Smith, 148; *Pettit v. Thomas* (1912) 103 Ark. 593, 148 S. W. 501. The fact of loss creates a *prima facie* case and the burden is on the innkeeper to establish exculpatory circumstances. See Beale, *op. cit.* sec. 190. Yet even at common law an innkeeper could impose reasonable conditions to his responsibility upon notice to his guest. *Fuller v. Coats* (1868) 18 Ohio St. 343 (guest required to deposit overcoat). But upon compliance with the condition the common law responsibility applies. *Pinkerton v. Woodward* (1867) 33 Calif. 557; *Maxwell Co. v. Harper* (1917) 138 Tenn. 640, 200 S. W. 515; *Wilkins v. Earle* (1870) 44 N. Y. 172 (compliance with statute). For statutes modifying the common law rule, see Beale, *op. cit.* App'x. Statutes as in the instant case requiring goods of the guest to be deposited have been strictly construed as in derogation of the common law. *Weadock v. Swart* (1910) 163 Mich. 602, 128 N. W. 734 (gold watch and chain held not included under "articles of gold and silver manufacture"); *Ramaley v. Leland* (1871) 43 N. Y. 539 (watch not within "money, jewels, or ornaments"); *contra: Stewart v. Parsons* (1869) 24 Wis. 241; *Rains v. Maxwell Co.* (1903) 112 Tenn. 219, 79 S. W. 114. It has even been held the notice must be posted as required by the statute and that actual notice to the guest is not sufficient. *Batterson v. Vogel* (1879) 8 Mo. App. 24; *contra: Purvis v. Coleman* (1860) 21 N. Y. 111. And a statute requiring the guest to deposit his goods has been construed not to include goods or money necessary for the guest's personal convenience. *Profilet v. Hall* (1859) 14 La. Ann. 530; *Maltby v. Chapman* (1866) 25 Md. 310; *cf. Rosenplaenter v. Roessle* (1873) 54 N. Y. 262. On the other hand, if the guest fails to deposit his goods, even negligence seems not to render the innkeeper liable. *Jones v. Savannah Hotel Co.* (1914) 141 Ga. 530, 81 S. E. 874; but *cf. Chatillon v. Co-Operative Apartment Co.* (1915, Spec. T.) 90 Misc. 108, 152 N. Y. Supp. 593. But where the goods have been deposited as in the instant case, negligence is rightly held to destroy the innkeeper's immunity from responsibility above the stated sum. The limitation is framed to protect an insurer, not a tort feasor.

CONSTITUTIONAL LAW—WORKMEN'S COMPENSATION ACT—PENALTY CLAUSE.—The defendant employer on refusal to pay an award of the Industrial Commission,

was sued by the State to recover the award plus a fifty per cent penalty imposed by Ohio Gen. Code, 1921, secs. 1465-74, on any employer who fails to pay an award within ten days. The defendant claimed that the penalty clause was unconstitutional. Under Art. IV, sec. 2, of the Ohio Constitution no law can be held unconstitutional without the concurrence of all but one of the judges. *Held,* (five of seven judges *dissenting*) that the clause was constitutional. *DeWitt v. State* (1923, Ohio) 141 N. E. 551.

To be valid a penalty must be reasonable under the circumstances and non-discriminatory. *Seaboard Air Line Ry. v. Seegers* (1907) 207 U. S. 73, 28 Sup. Ct. 28; *Beckler v. Am. Ry. Express Co.* (1922) 156 Ark. 296, 246 S. W. 1; 26 A. L. R. 1197, note. It cannot be so large as to deter actions to test the validity of the statute. *Mo. Pac. Ry. v. Tucker* (1913) 230 U. S. 340, 33 Sup. Ct. 961; *Superior Laundry Co. v. Rose* (1923, Ind.) 137 N. E. 761; (1921) 34 HARV. L. REV. 327. Several compensation acts have penalties similar to that in the instant case but have been construed to give the employer an opportunity to contest the validity of an award before the penalty accrues. Thus the Texas statute imposing a penalty on the employer who "refuses to pay without justifiable cause" has been held not to apply to one who on reasonable grounds brings suit to set aside an award, though he is unsuccessful. Vern. Tex. Ann. Civ. Sts. Supp. 1918, art. 5246-44; *Ga. Casualty Co. v. McClure* (1922, Tex. Civ. App.) 239 S. W. 644. The Nebraska provision for a penalty has been held not to accrue where there is any reasonable controversy until the obligation of the employer is ascertained by the exercise of proper diligence. Neb. Rev. Sts. 1913, sec. 3666, as amended by Laws, 1919, ch. 91, sec. 4; *Hall v. Germantown State Bank* (1921) 105 Neb. 709, 181 N. W. 609. In Illinois, however, a provision that the employee always can recover attorney's fees if the award is not paid within twenty days has been upheld. *Freedman v. Industrial Comm.* (1918) 284 Ill. 554, 120 N. E. 460. It is clear that the purpose of these statutes is to hasten the payment of the compensation awards. However, since the Ohio act allows only ten days for a review of the award, the addition of the large penalty seems coercive. If the awards were to be paid by weekly or monthly installments the penalty clause might with more justification be held reasonable; but it is doubtful whether the constitutionality of the act can be upheld where, as here, the award was of a lump sum with a large penalty for non-payment.

CONTRACTS—AGREEMENT TO ARBITRATE IN A FOREIGN JURISDICTION.—The plaintiff and the defendant, both domestic corporations of New York, contracted for the shipment of raisins from the plaintiff in California to the defendant in New York. The agreement provided that all disputes arising between the parties should be submitted to arbitration before the arbitration committee of the Dried Fruit Association at San Francisco. The goods were late in arriving and the defendant corporation refused to accept them. The plaintiff corporation moved for an order directing that arbitration proceed between the parties. *Held,* that the agreement, while valid, could not be enforced in the courts of New York. *Inter-Ocean Food Products v. York Mercantile Company* (1923, 1st Dept.) 206 App. Div. 426, 201 N. Y. Supp. 536.

American courts have been jealous of any attempt to oust their jurisdiction. A contract therefore which attempts to fix as the sole forum a court in a foreign jurisdiction, will generally be disregarded by the court where suit is brought. *Slocum v. Western Assurance Co.* (1890, S. D. N. Y.) 42 Fed. 235; *Nashua River Paper Co. v. Hammermill Paper Co.* (1916) 223 Mass. 8, 111 N. E. 678; (1908) 8 COL. L. REV. 409; (1919) 28 YALE LAW JOURNAL, 190. In England the courts apparently recognize the validity of such an agreement but refuse to order the parties to proceed to the foreign tribunal. *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society* [1903] 1 K. B. 249; *Kirchner v. Cruban* [1909]

1 Ch. 413; *The Cap Blanco* [1913] 1 P. 130. New York by a recent statute has established the legality of arbitration contracts in general and authorizes a stay of proceedings in contracts of this nature but does not provide for an order that arbitration shall proceed in the foreign jurisdiction. N. Y. Cons. Laws, Supp. 1920, ch. 72, sec. 2; COMMENTS (1923) 33 YALE LAW JOURNAL, 90. But the question in the instant case has been expressly left open. *Berkovitz v. Arbib & Houlberg* (1921) 230 N. Y. 261, 130 N. E. 288. Problems under the New York statute may arise in several ways. (1) Where one party refuses to arbitrate, in accordance with the principal case the other could not obtain an order from the court directing arbitration in the foreign jurisdiction. (2) But he could probably maintain suit in the domestic court for damages on the principal contract. The tendency in America is to ignore such an arbitration clause in a suit for such damages, even though the courts admit its validity provided it is not expressly made a condition precedent. *U. S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co.* (1915, S. D. N. Y.) 222 Fed. 1006. (3) If the party refusing to arbitrate brought an action upon the principal contract, it is probable that the courts in New York under their Arbitration Act would follow the holdings of the English courts under the English Arbitration Act of 1889, 52 & 53 Vict. c. 49, sec. 4, and stay the proceedings at the request of the party who wished to arbitrate. *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society, Ltd., supra.* This has no application to (2) since his refusal to arbitrate would probably constitute a waiver. (4) The party demanding arbitration might sue for breach of the agreement to arbitrate. This remedy is unsatisfactory due to the difficulty of ascertaining damages in such a case. (5) There seems no reason why the party demanding arbitration might not submit his claim to the foreign arbitrator and then enforce the decree of the arbitrator in the domestic court, provided that the actual arbitration complied with "due process" by giving the other party proper notice and an opportunity to be heard. See *Feyerick v. Hubbard* (1902) 71 L. J. K. B. 509. These predictions rest upon the assumption that the New York statute will be liberally construed.

CONTRACTS—ANTICIPATORY REPUDIATION—SUBSEQUENT DEFECTIVE ATTEMPTS TO PERFORM.—The plaintiff, as agent of a Finland concern, contracted to sell the defendant a quantity of pulp to be shipped from Finland at stated future dates. Before the time set for the first shipment, the defendant repudiated. The plaintiff refused to rescind the contract and later made defective shipments which the defendant declined to accept. The plaintiff sued, before the time set for the final delivery, for the defendant's anticipatory repudiation. *Held,* that the plaintiff should recover, as he had not waived his rights by his attempts to perform. *Lagerloef Trading Co. v. American Paper Products Co.* (1923, C. C. A. 7th) 291 Fed. 947.

Where there is an anticipatory repudiation by one party to a bilateral contract, the other has at once a right to damages for the "breach." *Wester v. Casein Co.* (1912) 206 N. Y. 506, 100 N. E. 488; Anson, *Contract* (Corbin's ed. 1919) sec. 385; *contra: Daniels v. Newton* (1874) 114 Mass. 530. The repudiator's act is a waiver of further performance or tender thereof as a condition precedent to the other's right to damages; nor will compensation be allowed for enhanced damages caused by continued performance. *Ripley v. McClure* (1849) 4 Exch. 345; *Hart Parr Co. v. Finley* (1915) 31 N. D. 130, 153 N. W. 137; *Sarachan & Rosenthal v. Wilson & Co.* (1924, 4th Dept.) 207 App. Div. 768, 202 N. Y. Supp. 591; Ann. Cas. 1917 E, 712, note; *contra: Roeblings Sons Co. v. Lock-Stitch Fence Co.* (1889) 130 Ill. 660, 22 N. E. 518. Notice, as by bringing suit, or a change of position by the injured party, is sufficient evidence of an election to treat the repudiation as a breach. *Churchill Grain Co. v. Newton* (1914) 88 Conn. 130, 89 Atl. 1121; *United Press Assoc. v. National Newspaper Assoc.* (1916, C. C. A. 8th) 237 Fed. 547;

Ballantine, *Anticipatory Breach and the Enforcement of Contractual Duties* (1924) 22 MICH. L. REV. 329, 347. But where the repudiator is urged to perform, it has been held that he may set up as a defense any supervening circumstance which would have justified him in declining to perform his part. *Frost v. Knight* (1872) L. R. 7 Exch. 111, 112; *Dalrymple v. Scott* (1892) 19 Ont. App. 477; *contra: Cort v. Ambergate Ry. Co.* (1851) 17 Q. B. 126; see Williston, *Contracts* (1920) secs. 1297, 1298, 1323. However, by merely extending grace to the repudiator the other party does not, as he would by consent to a rescission, extinguish his rights under the contract. *Braithwaite v. Foreign Hardwood Co.* [1905] 2 K. B. 543; *Henderson Tire & Rubber Co. v. Wilson* (1923) 235 N. Y. 489, 139 N. E. 583; (1923) 32 YALE LAW JOURNAL, 508; but see *Rubber Trading Co. v. Manhattan Rubber Mfg. Co.* (1917) 221 N. Y. 120, 116 N. E. 789. And as a tender is not a condition precedent to suit by the promisee, it seems that a defective tender, as in the instant case, should not of itself be of operative effect. *Canda v. Wick* (1885) 100 N. Y. 127; *Braithwaite v. Foreign Hardwood Co., supra; British & Benningtons Ltd. v. Northwestern Cachar Tea Co. Ltd.* [1923, H. L.] A. C. 48. A recovery was properly allowed on proof of ability and willingness to perform at the time of the repudiation. *Cort v. Ambergate Ry., supra; O'Neill v. American Legion of Honor* (1904) 70 N. J. L. 410, 57 Atl. 463.

EJECTMENT—DISSEISIN OF PLAINTIFF'S ENTIRE ESTATE—BALANCE OF CONVENIENCE.—The plaintiff had a ten-year lease under a contract providing that the lessor or his grantee could terminate the lease provided certain conditions were performed. The defendant later became the owner in fee and notified the plaintiff to quit. The plaintiff refused, and contested the summary proceedings brought against him on the ground that the conditions precedent were not performed. The lower court ruled for the defendant but was later reversed and a new trial ordered. During the time between the two trials the defendant tore down the building leased and erected a theatre at a cost of over $100,000. The plaintiff brought ejectment. *Held,* (one judge *dissenting*) that the plaintiff should recover. *Golde Clothes Shop v. Loew's Buffalo Theatres* (1923, N. Y.) 141 N. E. 917.

The court intimated that the convenience of the parties will be balanced only in injunction, not in ejectment, cases. It has, however, been held that an injunction will issue against such an action of ejectment, where the court wishes to balance the convenience. *Magnolia Construction Co. v. McQuillan* (1923, N. J.) 121 Atl. 734; see (1923) 33 YALE LAW JOURNAL, 211. And under modern code procedure, this may be effected more directly and more expeditiously by setting up such facts as an equitable defense. See Cook, *Equitable Defenses* (1923) 32 YALE LAW JOURNAL, 645. Moreover under the Codes which abolish forms of action and the difference between actions at law and actions in equity, the form of action brought should not of itself determine the relief to be given. *Cole v. Jerman* (1904) 77 Conn. 374, 59 Atl. 425; *Cockerell v. Henderson* (1909) 81 Kan. 335, 105 Pac. 443; *Bruheim v. Stratton* (1911) 145 Wis. 271, 129 N. W. 1092; see Albertsworth, *The Theory of the Pleadings in Code States* (1921) 10 CALIF. L. REV. 202; see COMMENTS (1923) 32 YALE LAW JOURNAL, 707. The decision in the instant case is sound since the defendant was not in the position of an innocent disseisor. *Green v. Biddle* (1823, U. S.) 8 Wheat. 1; see *Welles v. Newsom* (1888) 76 Iowa, 81, 40 N. W. 105. But even had the disseisin been innocent the same result would be reached, since courts have generally refused to balance the convenience where the disseisin as in the instant case is of the plaintiff's entire estate. In such a case the prevailing rule allows the innocent disseisor the value of the improvements placed by him on the land. *Thompson v. Ill. Cent. Ry.* (1920, Ind. App.) 129 N. E. 55; *Wakefield v. Van Tassell* (1905) 218 Ill. 572, 75 N. E. 1058; see (1923) 33 YALE LAW JOURNAL, 100.

FUTURE INTERESTS—LIMITATIONS—FEE UPON A FEE—DEATH WITHOUT DESCENDANTS—CONSTRUCTION.—The grantor by a deed effective under the Statutes of Uses conveyed premises in fee to a granddaughter, her heirs and assigns, reserving, however, a life estate in himself. It was further provided that if the grantee should die without children or children's descendants the title should revert to the living grandchildren of the grantor. Subsequently the grantor died intestate survived by the grantee and other grandchildren. In a suit to quiet title it was contended that since the words used gave the grantee a fee at common law, the limitation to the grandchildren was void as the limitation of a fee upon a fee. *Held,* (two judges *dissenting*) that the limitation over was valid; but that since death without descendants referred to death during the life of the grantor, the contingency was no longer possible and the grantee's estate was indefeasible. *Harder v. Matthews* (1923) 309 Ill. 548, 141 N. E. 442.

Blackstone, referring to the common law conveyance of lease and release, states that a fee cannot be limited upon a fee by deed, but may be by executory devise. 2 Blackstone, *Commentaries,* *173, *334; see *Rogers v. Eagle Fire Co.* (1832, N. Y. Senate) 9 Wend. 611, 628. Such a limitation was considered invalid as a transfer of a conditional right of entry. A few courts, disregarding the reason for the rule, have applied this language to deeds operative under the Statute of Uses. *Palmer v. Cook* (1896) 159 Ill. 300, 42 N. E. 796; *Glenn v. Jamison* (1896) 48 S. C. 316, 26 S. E. 677; *Printup v. Hill* (1901, C. C. N. D. Ga.) 107 Fed. 789, changed by Ga. Code, 1911, tit. 6, ch. 1, sec. 3658; but see *Roberts v. Dazey* (1918) 284 Ill. 241, 119 N. E. 910; see COMMENTS (1914) 8 ILL. L. REV. 495; (1919) 14 *ibid.* 458. The holding to the contrary in the instant case settles, in harmony with both reason and authority, a point long in confusion in the law of Illinois. Kales, *Future Interests* (2d ed. 1920) sec. 443; see also *Simonds v. Simonds* (1908) 199 Mass. 552, 85 N. E. 860; *Bryan v. Eason* (1908) 147 N. C. 284, 61 S. E. 71. The decision on the second point in issue, however, seems questionable. When the intent of the grantor is doubtful, the courts apply to deeds presumptions of intent originally used in construing wills. Thus if a fee is devised to A, with a limitation over to B on A's death without descendants, it is usually said that "death" refers *prima facie* to death at any time. *Britton v. Thornton* (1884) 112 U. S. 526, 5 Sup. Ct. 291; *Fifer v. Allen* (1907) 228 Ill. 507, 81 N. E. 1105; Kales, *op. cit.* 531; *contra: Teal v. Richardson* (1903) 160 Ind. 119, 66 N. E. 435. On the other hand if the fee is preceded by a life estate and the limitations over exhaust all the possibilities, as to X for life, then to A in fee, and upon A's death to his descendants, if he leave any, otherwise to B, it is uniformly held that "death" refers *prima facie* to death only during the life of the life tenant. Such a construction avoids the inconsistency that would result from cutting down A's fee to a life estate. *Ames v. Smith* (1918) 284 Ill. 63, 119 N. E. 969; Kales, *op. cit.* 532. The majority of American courts, as in the instant case, apply the same rule to a limitation over on contingencies that do not exhaust all the possibilities. *Bonner v. Wedekind* (1922) 193 Ky. 743, 237 S. W. 394; *Satterfield v. Tate* (1909) 132 Ga. 256, 64 S. E. 60; *McCormick v. McElligott* (1889) 127 Pa. 230, 17 Atl. 896; see 25 L. R. A. (N. S.) 1045, note. This is justified as a means of securing an early vesting of the estate and of favoring the primary objects of the testator's bounty. *In re Peavey's Estate* (1919) 144 Minn. 208, 215, 175 N. W. 105, 108; (1920) 4 MINN. L. REV. 375. The English courts even in such a case construe "death" to refer to death at any time. This is said to give to words their ordinary and literal meaning. *O'Mahoney v. Burdett* (1874, H. L.) L. R. 7 Eng. & Ir. A. C. 388, overruling *Edwards v. Edwards* (1852, Ch.) 15 Beav. 357; *In re Creagh* (1920, Ch.) 1 Ir. 8; *Van Luven v. Allison* (1901) 2 Ont. L. Rep. 198. A few cases have ascertained the intent of the grantor without either presumption. *St. John v. Dann* (1895) 66 Conn. 401, 34 Atl. 110; *cf. Buchanan v. Buchanan* (1888) 99 N. C. 308, 5 S. E. 430. And some of the courts applying the rather arbitrary American rule seize

upon slight indications of a contrary intent to deny its operation. *Pennsylvania Land Co. v. Justi* (1906) 121 Ky. 765, 90 S. W. 279 (grantee's estate should "return back again" to the family); *Shiver's Estate* (1874, Orphans' Ct. [Pa.]) 9 Phila. 354 (trust created on death of life tenant to pay limitations over); *cf. Jordan v. Hinkle* (1900) 111 Iowa, 43, 82 N. W. 426 (difference in ages of testator and legatee shown as extrinsic fact). This might well have been done in the instant case. As was pointed out in the dissenting opinion, the deed directed that upon the happening of the contingency title was to "revert and go to and vest in" the ultimate grantees.

GIFTS—CHOSES IN ACTION—WRITING NOT UNDER SEAL EVIDENCING INTENT.—The owner of bonds held by a bailee wrote a letter to the bailee expressing her intent and desire to make a gift of the bonds to the bailee and his wife. After the owner's death, her representatives filed a bill in chancery to recover the bonds. *Held,* (one judge *dissenting*) that the letter was effective to create an irrevocable gift *inter vivos*. *Northern Trust Co. v. Swartz* (1923, Ill.) 141 N. E. 433.

Despite early conflict among the writers, choses in action may generally be the subjects of valid gifts. Costigan, *Gifts* Inter Vivos *of Choses in Action* (1911) 27 L. QUART. REV. 326; Rundell, *Gifts of Choses in Action* (1918) 27 YALE LAW JOURNAL, 643. In determining what constituted an overt act sufficient to evidence a gift intent the older cases required a written assignment in addition to an actual tradition. 2 Kent, *Commentaries,* *440; *Matthews v. Hoagland* (1891) 48 N. J. Eq. 455, 21 Atl. 1054; but see *Snellgrove v. Bailey* (1744, Ch.) 3 Atkyns, 214 (gift *causa mortis* of bond valid without assignment). By the modern rule delivery of the instrument alone is sufficient where the chose in action is evidenced by a written document. *Farrell v. Passaic Water Co.* (1913) 82 N. J. Eq. 97, 88 Atl. 627; L. R. A. 1915 D, 733, note. And by the better view a transfer by deed is also sufficient. *Malone's Committee v. Lebus* (1903) 116 Ky. 975, 77 S. W. 180; *contra: Allen-West Com. Co. v. Grumbles* (1904, C. C. A. 8th) 129 Fed. 287. A few decisions have even held that a writing not under seal may create a valid gift of a chose in action. *Schauer v. Von Schauer* (1911, Tex.) 138 S. W. 145; *Burkett v. Doty* (1917) 176 Calif. 89, 167 Pac. 518. And the instant case soundly applies the same rule where the chose in action is already in the possession of the intended donee. *Cf. Cowen v. First National Bank* (1901) 94 Tex. 547, 63 S. W. 532. These decisions are logical steps in the evolutionary process making choses in action freely transferable.

LANDLORD AND TENANT—LIABILITY TO LICENSEE FOR CONCEALED DEFECT.—The defendant A leased a garage to the defendant B. Both knew that the elevator needed repairs for the purpose intended. The defendant lessee covenanted to repair. The plaintiff, who was in the company of an owner of an automobile which was stored in the garage, was injured when the elevator fell due to the excessive load it was carrying. The lower court found for the plaintiff against both defendants. *Held,* (two judges *dissenting*) that the judgment be affirmed. *Warner v. Lucey* (1923, 3d Dept.) 207 App. Div. 241, 201 N. Y. Supp. 658.

The duty of an occupier to a licensee is merely to warn him of known concealed defects. *Lewko v. Krause* (1922) 179 Wis. 83, 190 N. W. 924; Burdick, *Torts* (3d ed. 1913) sec. 554; (1918) 2 MINN. L. REV. 534; but see *Stanwood v. Clancey* (1909) 106 Me. 72, 75 Atl. 293. But to one who comes on the premises to transact business in which he has an interest in common with the occupier he owes a duty to use ordinary care to discover defects. *Indermauer v. Dames* (1866) L. R. 1 C. P. 274; Bohlen, *Affirmative Obligations in the Law of Tort* (1905) 53 AM. L. REG. 227; (1920) 30 YALE LAW JOURNAL, 93. The absence of such a common interest in the instant case makes the plaintiff a licensee. *Fleckenstein v. Great Atlantic & Pacific Tea Co.* (1917) 91 N. J. L. 145, 102 Atl. 700; (1918) 16 MICH. L. REV. 458. The defendant lessee was then correctly held liable since he failed

to warn the plaintiff. See *Johnson v. Glasier* (1918) 40 S. D. 13, 166 N. W. 154; (1918) 4 IOWA L. BULL. 208. In the absence of fraud, a lessor who has leased a tumble-down house is said not to be liable to parties lawfully on the premises. *Cavalier v. Pope* [1906, H. L.] A. C. 428. But in a few jurisdictions a failure to repair after covenanting to do so renders him liable. *Flood v. Pabst Brewing Co.* (1914) 158 Wis. 626, 149 N. W. 489; *contra: Willis v. Snyder* (1920) 190 Iowa, 248, 180 N. W. 290; (1921) 68 U. PA. L. REV. 297. And he is generally liable when he repairs negligently. *Zelzer v. Cook* (1909, App. T.) 62 Misc. 471, 115 N. Y. Supp. 173; Ann. Cas. 1915 D, 829; but see *Thomas v. Lane* (1915) 221 Mass. 447, 109 N. E. 363. Or where there is a defect in that part of the premises which he controls. *Fitzimmons v. Hale* (1915) 220 Mass. 461, 107 N. E. 929; *contra: Fairman v. Investment Society* [1923, H. L.] 1 A. C. 74; (1923) 32 YALE LAW JOURNAL, 742. Similarly where there is a "nuisance" on the premises at the time of the lease. *Patten v. Bartlett* (1914) 111 Me. 409, 89 Atl. 375; L. R. A. 1915 B, 374. In such cases the lessee's knowledge or covenant to repair does not excuse the lessor. *Lusk v. Peck* (1909, 4th Dept.) 132 App. Div. 426, 116 N. Y. Supp. 1051; 3 Shearman and Redfield, *Negligence* (6th ed. 1913) sec. 709a. The landlord is liable for concealed defects known to him at the time of the lease. *Ames v. Brandvold* (1912) 119 Minn. 521, 138 N. W. 786; L. R. A. 1916 F, 1086. But the lessee's knowledge or covenant to repair relieves the lessor from liability since the injured party's rights against the lessor are said to be no greater than the lessee's. *Harper v. Fall* (1896) 63 Minn. 520, 65 N. W. 913; 1 Tiffany, *Landlord and Tenant* (1912) 652. But the distinction between a concealed defect and a nuisance is not determinable from the cases. See Smith, *Torts Without Particular Names* (1920) 69 U. PA. L. REV. 110. When premises are leased for a public use, the owner must use reasonable care to discover defects. *Junkermann v. Tilyou Realty Co.* (1915) 213 N. Y. 404, 108 N. E. 190. And here also the lessee's knowledge or covenant to repair does not excuse the lessor. *Folkman v. Lauer* (1914) 244 Pa. 605, 91 Atl. 218; see NOTES (1921) 21 COL. L. REV. 262. In the instant case the court regarded the lease as for a public use and hence the lessee's covenant to repair did not excuse the lessor. The extension of the "public use" doctrine to include such property as a garage as well as the number of exceptions to the general principle of non-liability of a lessor indicates a tendency towards a rule rendering the landlord liable to those lawfully on the premises.

PARENT AND CHILD—EMANCIPATION—RIGHTS OF CREDITORS.—A crop was raised by minor children pursuant to permission given them by their father to cultivate certain land and keep the proceeds. A judgment creditor of the father levied execution upon the crop. The children intervened. Their claim was allowed and the creditor appealed. *Held,* that the decree be affirmed. *Marlar v. Smith* (1924, Miss.) 98 So. 338.

Emancipation of a child may be either partial or complete. *Memphis Steel Construction Co. v. Lister* (1917) 138 Tenn. 307, 197 S. W. 902; *Wallace v. Cox* (1916) 136 Tenn. 69, 188 S. W. 611. Partial emancipation is limited to the extinguishment of the father's rights in the child's earnings for a certain period or for certain purposes. *Tillotson v. McCrillis* (1839) 11 Vt. 477; *Tennessee Manufacturing Co. v. James* (1892) 91 Tenn. 154, 18 S. W. 262. The father does not thereby relieve himself of his duty to support. *Porter v. Powell* (1890) 79 Iowa, 151, 44 N. W. 295; *Wallace v. Cox, supra.* But this duty may be merely to provide necessaries not covered by the child's earnings. *Lufkin v. Harvey* (1915) 131 Minn. 238, 154 N. W. 1097. The father has the power to revoke this partial emancipation and revest in himself the right to the child's earnings after revocation. *Wilson v. McMillan* (1878) 62 Ga. 16; *Memphis Steel Construction Co. v. Lister, supra.* In the so-called "complete emancipation" the father divests himself not only of these beneficial relations, but also of his duty to support. *Rounds v. McDaniel* (1909) 133 Ky. 669, 118 S. W. 956; *Panther Creek Mines v.*

Industrial Commission (1921) 296 Ill. 565, 130 N. E. 321. But this is true only if the child is physically and mentally capable of supporting himself. *Iroquois Iron Co. v. Industrial Commission* (1920) 294 Ill. 106, 128 N. E. 289; *Simmons v. Stewart* (1923, Ky.) 248 S. W. 892. No act of the father, however, can change the status of the child after complete emancipation. *Campbell v. Campbell* (1856) 11 N. J. Eq. 268; *McCarthy v. Boston & Lowell R. R.* (1889) 148 Mass. 550, 20 N. E. 182. But it seems the child himself may always disaffirm the emancipation agreement and restore all the filial relations. A few courts apparently recognize this power in the child, but have then called the relation a partial emancipation. *Porter v. Powell, supra; Lufkin v. Harvey, supra.* Even under partial emancipation a revocation can be effected only by the father and not by his creditors. *Wilson v. McMillan, supra; Lord v. Poor* (1844) 23 Me. 569; *Trapnell v. Conklyn* (1892) 37 W. Va. 242, 16 S. E. 570. Nor can creditors reach the child's future earnings as a fraudulent conveyance. *Johnson v. Silsbee* (1870) 49 N. H. 543. The instant case is therefore sound.

QUASI-CONTRACTS—MONEY LENT UNDER MISTAKEN AUTHORITY OF AGENT TO BORROW—DEPOSIT OF CHECK TO CREDIT OF PRINCIPAL.—The president of the defendant corporation representing that he was borrowing for the corporation obtained from the plaintiff a check payable to the defendant. The check was deposited to the defendant's account under a forged indorsement of the defendant's treasurer. The same day the president withdrew a like amount by a check bearing the forged signature of the treasurer and appropriated the proceeds. An action was brought for money had and received. *Held,* that the plaintiff could not recover, since the defendant had no knowledge of the transaction and enjoyed no benefit. *Credit Alliance Corporation v. Sheridan Theatre Co.* (1923, Tr. T.) 121 Misc. 656, 202 N. Y. Supp. 217.

Where an agent without authority borrows money some states refuse the lender a recovery from the principal at least at law, even though the money was expended by the agent for the benefit of the principal. *Railroad National Bank v. Lowell* (1872) 109 Mass. 214; *Spooner v. Thompson* (1876) 48 Vt. 259; *Otis v. Stockton* (1884) 76 Me. 506. Others allow a recovery where the money was used to pay the debts of the principal. *White River School Township v. Dorrell* (1900) 26 Ind. App. 538, 59 N. E. 867. It has been held that there may be a recovery where the money was used to discharge a lien, but not a personal claim. *Title Guarantee & Trust Co. v. Haven* (1909) 196 N. Y. 487, 89 N. E. 1082. The more equitable view is to allow a recovery to the extent of the benefit actually received by the defendant. *Leonard v. Burlington Mutual Loan Assoc.* (1881) 55 Iowa, 594, 8 N. W. 463; *First National Bank v. Oberne* (1886) 121 Ill. 25, 7 N. E. 85. Even in a state holding this view, however, the principal has been relieved from liability where the money was simply placed to his account and immediately withdrawn, and appropriated by the agent. *Fay v. Slaughter* (1902) 194 Ill. 157, 62 N. E. 592. This is in accord with the rules governing bank deposits. A sum deposited in a bank only presumptively creates an obligation to the person in whose name it is deposited and payment by the bank after notice of the rights of the true owner is held to render the bank liable for conversion. *First National Bank v. Bache* (1872) 71 Pa. 213; *Egbert v. Payne* (1881) 99 Pa. 239. And where the deposit is made in the name of a third party the bank may in an action by that party show that he was not the real owner. *Aidala v. Savoy Trustee* (1911, App. T.) 128 N. Y. Supp. 618. Thus, where the president of a corporation deposited corporate funds to his personal account, the bank is justified is transferring the amount to the account of the corporation. *Forey v. American National Bank* (1915) 136 La. 298, 67 So. 10. The mere crediting of the account of a party without his knowledge creates no rights or duties in him; at most he has the power to ratify the act of the agent. See *Schaap v. State National Bank* (1918) 137 Ark. 251, 208 S. W. 309; but see *contra:* Woodward, *Quasi-Contracts* (1913) 123; (1924) 24

COL. L. REV. 90. In the instant case, therefore, no ratification having occurred, the court properly held that the defendant received no such benefit as justifies a recovery. It seems unsound to attach any liability to the ownership of a bank account, merely because it has been used by third parties as a medium for their fraudulent transactions. The plaintiff's proper remedy is against the drawee bank for the payment of a check on a forged indorsement of the payee. See *Prudential Insurance Co. v. National Bank of Commerce* (1920) 227 N. Y. 510, 125 N. E. 824.

SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF LAND—ATTEMPTED REPUDIATION BY VENDEE NO BAR TO LATER SUIT.—The defendant contracted to sell certain lots to the plaintiff for $16,000. The plaintiff paid a $700 deposit. She later repudiated, refused to pay further sums due, and sued the defendant in assumpsit to recover the deposit on the theory that no memorandum of the transaction had been made sufficient to take it out of the statute of frauds. The supreme court on appeal held for the defendant. Before the case was retried, the plaintiff had the suit transferred to the equity side of the court, filing a bill for specific performance of the contract. The defendant meanwhile had sold the lots to a third party. *Held*, that the plaintiff was entitled to specific performance, but that the deposit be returned as damages because of the disposition of the property. *Barton v. Molin* (1923, Mich.) 195 N. W. 797.

An executory contract for the sale of land is generally said to vest the equitable ownership in the vendee. 1 Pomeroy, *Equity Jurisprudence* (4th ed. 1919) sec. 368; 5 *ibid.* sec. 2261. The vendor is thus trustee of the legal title for the vendee as security for the purchase price and the relationship of the parties is treated as analogous to that of mortgagee and mortgagor. *Lewis v. Hawkins* (1874, U. S.) 23 Wall. 119; *Brown v. Canterbury* (1907) 101 Tex. 86, 104 S. W. 1055; 3 Tiffany, *Real Property* (2d ed. 1920) 2763. The vendee's interest, the so-called "equity of purchase," may be foreclosed in equity. *Abbott v. Molestad* (1898) 74 Minn. 293, 77 N. W. 227; (1915) 28 HARV. L. REV. 641. And it seems that the resulting position of the vendee is treated as a property interest, as he has most of the incidents of ownership. The authorities divide on how far repudiation of contract obligations by the vendee affects his right to specific performance. In the first stage of the instant case, the contract was held a valid one with *dicta* to the effect that the plaintiff was not entitled to repudiate the contract and recover any of the deposit. *Barton v. Molin* (1922) 219 Mich. 347, 189 N. W. 74. The plaintiff was here declared entitled to specific performance, her ownership being unaffected by her repudiation of the contract. This is analogous to the situation of a lessee after breach of a covenant not amounting to a breach of condition; the relationship of lessor and lessee still continues. 2 Tiffany, *Landlord and Tenant* (1912) 1364. But where a plaintiff has been held to have the power by such repudiation to destroy his estate as owner and recover his deposit less damages for breach of contract, or when he has rescinded the contract on other valid grounds, his property interest in his purchase is destroyed, with the right to specific performance on which it depends. *Davis v. Wagner* (1922, Tex. Civ. App.) 237 S. W. 612; *Payne v. Graves* (1834, Va.) 5 Leigh, 561; see *Kendall v. Pinnix Realty Co.* (1922) 183 N. C. 425, 111 S. E. 705 (rescission and suit for the deposit on grounds of fraud). Given the rule as to the return of the deposit, both lines of reasoning are consistent in their treatment of the right of specific performance. The defendant in the instant case could in the first instance either have returned the deposit or have sued to foreclose the vendee's interest in the property. *Fitzhugh v. Maxwell* (1876) 34 Mich. 138; see *Underwood v. Slaght* (1921) 213 Mich. 391, 182 N. W. 106.

TORTS—WRONGFUL DEATH—RELEASE BY INJURED PERSON FOR CONSIDERATION NO DEFENSE.—The plaintiff's husband, injured in the defendant's employ while

engaged in interstate commerce, settled for his injuries and executed a release. He later died and his wife as administratrix sued for the loss to her and her children under the Employer's Liability Act, Act of April 22, 1908 (35 Stat. at L. 65), and amendment, Act of April 10, 1910 (36 Stat. at L. 291). The former creates in the administrator an action for wrongful death, and the latter allows tort actions of deceased to survive. From an instruction that the release, if properly executed, was a defense to both actions, the plaintiff appealed. *Held,* that the judgment should be reversed, as a release is no bar to the action for the wrongful death. *Goodyear v. Davis* (1923, Kan.) 220 Pac. 252.

Death statutes are of two types:—death acts, following Lord Campbell's Act (1846) 9 & 10 Vict. c. 93, and based on the actual pecuniary loss to the deceased's dependents, and survival acts, removing death as a defense to causes of action for pain, suffering and loss of time. Tiffany, *Death by Wrongful Act* (2d ed. 1913) sec. 26. The two rights are generally recognized as distinct. *Whitford v. Panama Ry.* (1861) 23 N. Y. 465; *Seward v. Vera Cruz* (1884, H. L.) L. R. 10 A. C. 59. So by the better view the representative may avail himself of both remedies. *Leggott v. Great Northern Ry.* (1876) L. R. 1 Q. B. Div. 599; *Stewart v. United Electric Light & Power Co.* (1906) 104 Md. 332, 65 Atl. 49; NOTES (1902) 15 HARV. L. REV. 854. Some courts, however, restrict the death acts proper to cases of instantaneous death. *Sawyer v. Perry* (1895) 88 Me. 42, 33 Atl. 660; *Dolson v. Lake Shore & M. S. Ry.* (1901) 128 Mich. 444, 87 N. W. 629. Others restrict survival acts to cases in which death results from causes other than the injury. *McCarthy v. Chicago, R. I. & P. Ry.* (1877) 18 Kan. 46; *Holton v. Daly* (1882) 106 Ill. 131. And others make the remedies elective. See *Legg v. Britton* (1890) 64 Vt. 652, 24 Atl. 1016. The Federal Act has been interpreted to give two rights of action. *Michigan Cent. R. R. v. Vreeland* (1913) 227 U. S. 59, 33 Sup. Ct. 192. And, after the amendment, to allow a recovery by the representative on both rights in one suit. *St. Louis, I. M. & S. Ry. v. Craft* (1915) 237 U. S. 648, 35 Sup. Ct. 704. With apparent inconsistency the same courts that allow a double recovery hold that a settlement with the injured person is a defense to an action for wrongful death. *Read v. Great Eastern Ry.* (1868) L. R. 3 Q. B. 555; *State v. United R. R. & Electric Co.* (1913) 121 Md. 457, 88 Atl. 229; Tiffany, *op. cit.* sec. 124. This is somewhat anomalous in the absence of legislative intent to give but one action. *Littlewood v. Mayor of New York* (1882) 89 N. Y. 24; *Hill v. Pennsylvania R. R.* (1896) 178 Pa. 223, 35 Atl. 997; Elliott, *Railroads* (3d ed. 1921) sec. 2065; NOTES (1900) 14 HARV. L. REV. 290. But the Federal Act was intended "not to take away from employees rights theretofore existing" but "to extend the right to recover for death or injuries . . . . to be as inclusive as any of the similar remedial state statutes superseded in their operation." See Senate Report No. 432, 61st Cong. 2d Sess. 12-15; House Report No. 513, 61st Cong. 2d Sess. 3-6. In several states a release had not been a bar. *Rowe v. Richards* (1915) 35 S. D. 201, 151 N. W. 1001; *Wall v. Massachusetts N. Ry.* (1918) 229 Mass. 506, 118 N. E. 864; *Blackwell v. American Film Co.* (1922) 189 Calif. 689, 209 Pac. 999. The words of the amendment, "there may be only one recovery for the same injury," unfortunately have been applied to preclude the fair and desirable result of the instant case. *Seaboard Air Line Ry. v. Oliver* (1919, C. C. A. 5th) 261 Fed. 1.

TRUSTS—POWER OF ATTORNEY TO COLLECT A CHOSE IN ACTION AND APPLY TO A TRUST—REVOCATION BY DEATH.—By a voluntary deed of trust from B to the plaintiff, B was to receive the income for life and after her death half of the fund was to be divided among the defendants. B also gave the plaintiff a power of attorney to collect any property to which she was entitled under a decree of court to be entered, and a letter authorizing the plaintiff to receive the property and transfer it to itself under the agreement of trust executed by B. The decree was entered, and the plaintiff collected part of the property and applied it to the

trust. B died, and the plaintiff as executor of B's estate collected the rest of the property. The plaintiff brought action for judicial settlement of its account. *Held,* (two judges *dissenting*) that the property delivered to the plaintiff after the death of B did not belong to the trust fund but fell into B's residuary estate. *Farmers' Loan & Trust Co. v. Winthrop* (1923, 1st Dept.) 207 App. Div. 356, 202 N. Y. Supp. 456.

By the prevailing rule a parol gift of a chose in action not evidenced by a common law or mercantile specialty is at most an authority to collect in the right of the donor. *Cook v. Lum* (1893) 55 N. J. L. 373, 26 Atl. 803; *contra: Jones' Adm'r v. Moore* (1898) 102 Ky. 591, 44 S. W. 126. It may therefore be revoked by the donor. *Dow v. Prescott* (1815) 12 Mass. 419. And is usually revoked by death. *Organized Charities v. Mansfield* (1909) 82 Conn. 504, 74 Atl. 781; *contra: Read v. Long* (1833, Tenn.) 4 Yerg. 68. But so far as the power has been exercised before revocation it is effective. *Frederick's Appeal* (1866) 52 Pa. 338. An interest in the subject matter of the agency will make it irrevocable by death. *Hunt v. Rousmanier* (1823, U. S.) 8 Wheat. 174. But the interest of a trustee is not sufficient. *Organized Charities v. Mansfield, supra.* So in the instant case the property collected after B's death was properly considered not a part of the trust fund, and distinct from that collected before the death. It seems that the latter should be interpreted to have become a part of the trust fund by virtue of a transfer of title to the trustee after the exercise of its power and not, as the dissent intimated, by virtue of an original declaration of trust. The case is probably one in which a failure to take the proper legal steps prevented the settlor's intent from being carried out. If, as was pointed out by the majority opinion, she had made a gift of the chose in action by deed of assignment to the plaintiff in trust, it would not have been revoked by her death. *DeCaumont v. Bogert* (1885, N. Y. Sup. Ct.) 36 Hun, 382. Or she could have declared herself trustee of the chose in action for the benefit of herself and the defendants. *Estate of Smith* (1891) 144 Pa. 428, 22 Atl. 916. Usually some act of delivery is required to make this effective. See *Govin v. DeMiranda* (1894, Sup. Ct.) 76 Hun, 414, 27 N. Y. Supp. 1049. In the instant case the court could hardly have found either of these, even by a strained interpretation.

Unfair Competition—Refusal to Deal with Persons Trading with a Competitor.—The petitioner, a wholesale grocery company engaged in interstate commerce, threatened to discontinue purchasing from a manufacturer if the manufacturer should continue to sell directly to a competing wholesaler. The Federal Trade Commission, proceeding under the Federal Trade Commission Act of Sept. 26, 1914 (38 Stat. at L. 717), which declared unlawful "unfair methods of competition" in interstate commerce, issued an order directing the petitioner "to desist from . . . . hindering or preventing any . . . . firm from the purchasing of groceries . . . . direct from manufacturers, or attempting so to do," and from hindering a manufacturer from selling to any person he might wish. From a judgment of the Circuit Court of Appeals dismissing the order, the Commission appealed. *Held,* that the judgment be affirmed, as the acts of the petitioner did not constitute an unfair method of competition. *Federal Trade Commission v. Raymond-Bros. Clark Co.* (1923, U. S.) 44 Sup. Ct. 162.

The court adopts the general statement that one may refuse business relations with another for any reason. *Scottish Co-Operative Wholesale Society v. Glasgow Fleshers Assoc.* (1898, Outer House) 35 Scot. L. 645; *Macauley Bros. v. Tierney* (1895) 19 R. I. 255, 33 Atl. 1; 2 Cooley, *Torts* (3d ed. 1906) 587. But motive may make such conduct unlawful. Thus when done for the purpose of influencing a juryman it may constitute bribery. See *State v. Woodward* (1904) 182 Mo. 391, 407, 815 S. W. 857, 862; *cf. Caruthers v. State* (1883) 24 Ala. 406. Or to induce a breach of contract. *Schonwald v. Ragains* (1912) 32 Okla. 223, 122 Pac. 203; *cf. Quinn v. Leathem* [1901, H. L.] A. C. 495. Under the Sherman Act, refusal

by a combination of individuals or companies, in interstate commerce, to deal with another unless he cease trading with a third person is regarded as being in unlawful restraint of trade. *Grenada Lumber Co. v. Mississippi* (1910) 217 U. S. 433, 30 Sup. Ct. 535; *Binderup v. Pathé Exchange* (1923, U. S.) 44 Sup. Ct. 96. It is conceivable that similar conduct by an individual or single corporation might have the same effect, even where the refusal does not appear to contain a monopolistic tendency. The question is essentially economic rather than legal and might well be left to the discretion of the Federal Trade Commission, which has the machinery to determine whether a method of competition is "unfair." But the Supreme Court has declared that only such conduct as was considered unlawful before the Federal Trade Commission Act will be so regarded now. *Federal Trade Commission v. Gratz* (1920) 253 U. S. 421, 427, 40 Sup. Ct. 572, 575. Under this restricted view, the court has abundant authority at common law for its decision that the mere refusal to trade with one who deals with a competitor is not unlawful. *Scottish Co-Operative Wholesale Society v. Glasgow Fleshers' Assoc., supra; Transportation Co. v. Standard Oil Co.* (1902) 50 W. Va. 611, 40 S. E. 591. Under a more liberal view, which seems more consonant with modern commercial conditions than an adherence to common law principles, a different result could be reached. See Oliphant, *Trade Regulation* (1923) 9 A. B. A. JOUR. 211.

WILLS—EXERCISE OF DISCRETIONARY POWER BY SUCCESSORS OF TESTAMENTARY TRUSTEES.—A testatrix devised to her husband to hold in trust for her son, with power to invest as he saw fit, to pay over the income in such manner and proportion as he thought best for the support and maintenance of the son, his wife, and children, and to pay over at any time any or all of the principal to or for the benefit of the son. Upon the original trustee's death, the plaintiff was appointed successor. The advice of the court was sought to determine whether or not the plaintiff had power to make advances from the principal requested by the son, and whether the income should be used for the benefit of the first or second wife of the son. *Held,* (one judge *dissenting*) that the powers survived to the plaintiff and that the income should be used for the benefit of the present rather than the first wife. *Greenwich Trust Co. v. Converse* (1923, Conn.) 122 Atl. 916.

When a discretionary power is given a trustee by reason of personal confidence imposed in him and no contrary intent is expressed, the power will not inure to his successor. *Whitaker v. McDowell* (1909) 82 Conn. 195, 72 Atl. 938; *Hazard v. Bacon* (1920) 42 R. I. 415, 108 Atl. 499. But where a power is attached to the office of trustee it will pass with it. *Mercer v. Safe Deposit Co.* (1900) 91 Md. 102, 45 Atl. 865; Perry, *Trusts* (6th ed. 1911) sec. 503. Whether or not a power is attached to the office is a question of intent. *Bradford v. Monks* (1882) 132 Mass. 405; *Luquire v. Lee* (1905) 121 Ga. 624, 49 S. E. 834. It is sometimes said that when there is no intent expressed, the discretionary powers should be *prima facie* personal. *Virginia Trust Co. v. Buford* (1920) 123 Miss. 572, 86 So. 356; *cf.* (1909) 23 HARV. L. REV. 59. Other courts say that it is given *prima facie* to the office, as the testator should express any contrary intent. *In re Smith* [1904] 1 Ch. 139; see *In re Blakely* (1898) 19 R. I. 324, 33 Atl. 518. If the intent of the testator is to confer a benefit as in the instant case, the discretionary power should be co-existent with the beneficiary rather than the trustee. Though the range of discretion is very wide, the case may well be sustained on the ground that when the exercise of a discretionary power is necessary to carry out the purpose of the testator, it should be given to the successor. *Chase v. Davis* (1876) 65 Me. 102; *Matter of Wilkin* (1905) 183 N. Y. 104, 75 N. E. 1105. In cases of this sort equity may assist in carrying out the intent of the testator, and in some cases will take over the administration, substituting equitable rules for arbitrary power. *Weiland v. Townsend* (1881) 33 N. J. Eq. 393; *Tilly v. Letcher* (1919) 203 Ala. 277, 82 So. 527.