RECENT CASE NOTES

AGENCY—TORTS—RESPONSIBILITY OF HUSBAND FOR INJURIES CAUSED BY WIFE DRIVING FAMILY AUTOMOBILE.—The defendant maintained an automobile for the use of himself and his family. His wife while driving alone and for her own pleasure negligently injured the plaintiff. The defendant assigned as error the trial court's ruling that the relationship of principal and agent was sufficiently established. *Held,* that there was no error, for the defendant by keeping an automobile for the pleasure of his family made this use of it his business. *Stickney v. Epstein* (1923, Conn.) 123 Atl. 1.

The courts have rejected the dangerous instrumentality rule as a possible ground for imposing responsibility on the owner of a family automobile. *Jones v. Hoge* (1907) 47 Wash. 663, 92 Pac. 433. See (1922) 31 YALE LAW JOURNAL, 785; NOTES (1914) 28 HARV. L. REV. 91; *contra: Southern Cotton Oil Co. v. Anderson* (1920) 80 Fla. 441, 86 So. 629. The majority of courts apply the doctrine of *respondeat superior* and hold the father responsible when the son or wife occupies the position of chauffeur for another member of the family. *Stowe v. Morris* (1912) 147 Ky. 386, 144 S. W. 52; *Graham v. Page* (1921) 300 Ill. 40, 132 N. E. 817. Or when the son or wife is alone and therefore filling the dual role of chauffeur and passenger. *Miller v. Weck* (1920) 186 Ky. 552, 217 S. W. 904; *contra: Arkin v. Page* (1919) 287 Ill. 420, 123 N. E. 30. But this view requires an extension of the concept of a father's "business" to include his family's pleasure in the use of his automobile; it has therefore been criticized as straining the principles of agency and as an encroachment on the general rule that a father is not responsible for the torts of his wife and children. *Van Blaricom v. Dodgson* (1917) 220 N. Y. 111, 115 N. E. 443; *Hays v. Hogan* (1917) 273 Mo. 1, 200 S. W. 286. However, these doctrines themselves were shaped without reference to this new set of facts, and to be applied thereto must be themselves extended. *Cf. Lumley v. Gye* (1853, Q. B.) 2 El. & Bl. 216. See Holmes, "The Path of the Law," *Collected Legal Papers* (1920) 167, 181; and "Law in Science and Science in Law," *ibid.* 210, 239. In determining under which rule to bring the new situation, the social result should be consciously considered. Pound, "Courts and Legislation," 9 *Modern Legal Philosophy Series* (1917) 202; Cardozo, *The Nature of the Judicial Process* (1921) 65. If the *paterfamilias* is held liable, insurance by heads of families against such risks may be expected to follow, and that group of the community, the owners, who are chiefly benefited by the existence of the automobile, will bear the loss. If he is not made responsible, a judgment against one of his dependents will generally be valueless, and the loss will remain on the injured person. The instant case therefore adapts the doctrine of *respondeat superior* to what is apparently the sounder social policy and by so doing follows the spirit of the historical development of that doctrine. See Holmes, "Agency," *op. cit.* 49; Wigmore, "Responsibility for Tortious Acts," 3 *Select Essays in Anglo-American Legal History* (1909) 474. For presentations of the conflicting views, see (1920) 29 YALE LAW JOURNAL, 467; Huddy, *Automobiles* (6th ed. 1922) secs. 660-662.

BANKS AND BANKING—DEPOSITS FOR A SPECIFIC PURPOSE—OVERPAYMENT—MITIGATION OF DAMAGES.—The plaintiff, a purchaser of grapes, deposited with the defendant bank a check for $30,000, the bank to pay stated amounts to designated sellers on receipt of bills of lading. The defendant received a bill of lading for grapes in excess of the quantity purchased and paid more than the amount set. The plaintiff refused to take the excess and sued the bank for the amount paid therefor. *Held,* that the plaintiff should have mitigated damages by receiving and reselling the grapes, and that he could recover merely the loss,

if any, caused by the bank's act. *Kornblum v. Bank of Italy* (1923, Calif. App.) 222 Pac. 143.

A specific deposit must be used only for the designated purposes. *Dolph v. Cross* (1911) 153 Iowa, 289, 133 N. W. 669; *Union Trust & Savings Bank v. Southern Traction Co.* (1922, C. C. A. 7th) 283 Fed. 50. Thus, it may not be used in payment of an existing debt of the depositor arising out of other transactions. *Southern Exch. Bank v. Pope* (1921, Ga.) 108 S. E. 551. And the documents against which payment is made must correspond in all respects with the terms of the letter of credit established, to be a valid charge against it. *Brazilian & Portuguese Bank v. British & American Exchange Banking Corp.* (1868, Exch.) 18 L. T. R. 823; Ward, *American Commercial Credits* (1922) 257; COMMENTS (1924) 33 YALE LAW JOURNAL, 651. If then a bank pays against unauthorized documents, the so-called "duty" to mitigate damages must logically be placed upon it. See *Imbrie v. Nagase & Co.* (1921, 2d Dept.) 196 App. Div. 380, 187 N. Y. Supp. 692. And there seem to be no sound reason for applying a different rule where a bank overpays under an established credit, whether or not the credit be evidenced by letter. A buyer is privileged, as against his seller, to reject goods in excess of the amount contracted for. *Iron Cliffs Co. v. Buhl* (1879) 42 Mich. 86, 3 N. W. 269; Uniform Sales Act, sec. 44 (2). He owes his seller no "duty" to receive the goods and mitigate damages; so to hold would make him liable in an action for refusal to accept. *Rock v. Vandine* (1920) 106 Kan. 588, 189 Pac. 157; COMMENTS (1923) 32 YALE LAW JOURNAL, 380. But the result in the instant case may be sustained on the facts. None of the purchases corresponded exactly with the figures designated in the instructions, and there was evidence that the plaintiff did not require the payment of the exact sum authorized for each seller named.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—NATIONAL BANKS—POWER OF STATE TO PROHIBIT BRANCH BANKS.—A Missouri statute prohibited the establishment of branch banks. Mo. Rev. Sts. 1919, sec. 11737. A proceeding in the nature of *quo warranto* was brought by the state to determine by what authority, under this statute, the national bank could establish and conduct a branch bank. Upon the overruling of a demurrer to the information, the case was appealed. *Held*, (three judges *dissenting*) that the statute validly applied to national banks and that the judgment be affirmed. *First National Bank of St. Louis v. Missouri* (1924, U. S.) 44 Sup. Ct. 213.

Since a national bank acts under federal authority, no state legislation can incapacitate it or frustrate its purpose. *First National Bank v. California* (1923) 262 U. S. 366, 43 Sup. Ct. 602. And where Congress has acted it takes precedence over state legislation. *Davis v. Elmira Savings Bank* (1896) 161 U. S. 275, 16 Sup. Ct. 502; *In re Turner's Estate* (1923) 277 Pa. 110, 120 Atl. 701. But national banks have never been expressly empowered to establish branch banks. (1911) 29 Opinions of the Atty. Gen. 81. When a bank acts beyond the powers granted by Congress, it subjects itself to that extent to state regulation. *First National Bank v. Commonwealth* (1911) 143 Ky. 816, 137 S. W. 518. Similarly Congress has the power to pass a uniform bankruptcy act, but the states still retain the power to legislate provided no conflict with the national act results. *Mayer v. Hellman* (1875) 91 U. S. 497; *Old Town Bank of Baltimore v. McCormick* (1903) 96 Md. 341, 53 Atl. 934. And when the nature of the case does not demand uniformity, the states may legislate as to interstate commerce in the absence of congressional action. *Willson v. Blackbird Creek Marsh Co.* (1829, U. S.) 2 Pet. 245; *License Cases* (1847, U. S.) 5 How. 504; Cooke, *The Pseudo-Doctrine of the Exclusiveness of the Power of Congress to Regulate Interstate Commerce* (1911) 20 YALE LAW JOURNAL, 297. Or even as to national defense. *Gilbert v. Minnesota*

(1920) 254 U. S. 325, 41 Sup. Ct. 125; (1921) 19 MICH. L. REV. 870. But these are all cases of powers expressly granted by our constitution. *A fortiori* should the states retain some control where the power, as here to establish national banks, is merely implied. See *McCulloch v. Maryland* (1819, U. S.) 4 Wheat. 316. This is particularly so since Congress remains free to lay down a uniform rule which would place the matter beyond state control. *Cf. Farmers' National Bank v. Deering* (1875) 91 U. S. 29. Until Congress so acts the law as declared in the instant case is sound.

CONTRACTS—OPTIONS—FIRST PRIVILEGE TO PURCHASE.—The defendant leased certain premises to the plaintiff with the stipulation: "First privilege is extended to the said party of the second part to purchase said property at any time during the lease term at a price of $5,500." The plaintiff tendered performance, and the defendant refused to convey on the ground that the clause did not give the plaintiff an absolute option to purchase, but only the first chance should the lessor decide to sell. The lessee sued for specific performance. *Held,* that the decree be for the plaintiff. *Tantum v. Keller* (1924, N. J. Ch.) 123 Atl. 299.

The language of the covenant is ambiguous, but it might have been construed as contemplating only an option conditional on the lessor's election to sell at all. *Schroeder v. Gemeinder* (1875) 10 Nev. 355; see *Buckmaster v. Thompson* (1867) 36 N. Y. 558; *Wells v. Fisher* (1923) 237 N. Y. 79, 142 N. E. 358; *cf. Reed v. Cambell* (1886, Ch.) 43 N. J. Eq. 406, 4 Atl. 433 (first privilege to renew lease); *Hill v. Prior* (1919) 79 N. H. 188, 106 Atl. 641; *Cloverdale Co. v. Littlefield* (1921) 240 Mass. 129, 133 N. E. 565; *contra: Kastens v. Ruland* (1923, N. J.) 120 Atl. 21 (words construed as absolute option). That the price was made definite is not, as the court seems to think, conclusive against this interpretation. *McCormick v. Stephany* (1900, Ch.) 61 N. J. Eq. 208, 48 Atl. 25; *Burleigh v. Mactier* (1919, N. J. Ch.) 108 Atl. 84. An enforceable option must state all the terms of the contract in order to satisfy the statute of frauds. *Couch v. McCoy* (1905, S. D. W. Va.) 138 Fed. 696; *Monahan v. Allen* (1913) 47 Mont. 75, 130 Pac. 768. But the price may be left to be determined by a bona fide offer of any third party. *Harper v. Runner* (1909) 85 Neb. 343, 123 N. W. 313; *Cummings v. Nielson* (1913) 42 Utah, 157, 129 Pac. 619; *Adams v. Helburn* (1923, Ky.) 249 S. W. 543; see *Jones v. Moncrief-Cook Co.* (1908) 25 Okla. 856, 108 Pac. 403; Fry, *Specific Performance* (6th ed. 1921) 165. Again, the price may be left to be fixed by appraisers. *Lester Agricultural Chemical Works v. Selby* (1904, Ch.) 68 N. J. Eq. 271, 59 Atl. 247; *Martin v. Van Sant* (1917) 99 Wash. 106, 168 Pac. 990. An agreement to give the lessee the first privilege to purchase in case the lessor decides to sell is enforceable even against a purchaser from the lessor with notice. *Hayes v. O'Brien* (1894) 149 Ill. 403, 37 N. E. 73; *Slaughter v. Mallet Land & Cattle Co.* (1905, C. C. A. 5th) 141 Fed. 282; *Jurgenson v. Morris* (1920, 2d Dept.) 194 App. Div. 92, 185 N. Y. Supp. 386. But not where the terms are so indefinite that the "option" is a mere agreement to make an agreement. *Fogg v. Price* (1888) 145 Mass. 513, 14 N. E. 741; (1923) 33 YALE LAW JOURNAL, 97.

EVIDENCE—ATTORNEY AND CLIENT—WAIVER OF PRIVILEGE.—The plaintiff, in a suit to recover the value of a car of corn, testified in his own behalf concerning certain communications made to his attorney. The attorney was later called as a witness and was questioned as to the subject matter of these communications. To this the plaintiff objected. Under Ohio Gen. Code, 1910, sec. 11494 a witness who testifies on any subject waives his privilege as to that subject. The lower court sustained the objection. *Held,* that by "subject" was meant the subject of the controversy and that it was the intention of the legislature to include the subject matter of his testimony generally, and that the privilege was waived. *Spitzer v. Stillings* (1924, Ohio), 142 N. E. 365.

The privilege existing between attorney and client was originally regarded as that of the attorney. *Anon.* (1693, K. B.) Skinner, 404. Its aim was to protect the honor of the attorney. See *Jones v. Countess of Manchester* (1673, K. B.) 1 Ventr. 197. In the first half of the eighteenth century the modern theory that the privilege was that of the client grew up beside the older one. 5 Wigmore, *Evidence* (2d ed. 1923) sec. 2290; *Wilson v. Rastall* (1792, K. B.) 4 T. R. 753. Early in the nineteenth century the privilege became that of the client alone. *Wright v. Mayer* (1801, Ch.) 6 Ves. Jr. 281. The change was made to promote a freedom of consultation by removing apprehension of disclosure by legal advisers. 5 Wigmore, *Evidence* (2d ed. 1923) sec. 2291. This privilege, however, may be waived. *Hunt v. Blackburn* (1888) 128 U. S. 464, 9 Sup. Ct. 125. Some courts hold that there is no waiver unless a specific reference to the communications is made. *Tate v. Tate* (1881) 75 Va. 522; *Fearnley v. Fearnley* (1908) 44 Colo. 417, 98 Pac. 819 (statute). But such a specific reference on cross examination is not a waiver. *Air Line Ry. v. Parker* (1913) 65 Fla. 543, 62 So. 589. Others hold that testimony as to an interview with an attorney is a waiver as to all that occurred at that interview. *Louisville & N. R. R. v. Hill* (1896) 115 Ala. 334, 22 So. 163. A broader view is that there is a waiver of all matters relating to the "same subject" testified to by the client. *Oliver v. Pate* (1873) 43 Ind. 132. Under such a view it has been held that a reference to communications with the attorney is not necessary. *In re Young's Estate* (1911) 59 Or. 348, 116 Pac. 95. In the instant case the decision is based upon a reasonable interpretation of the statutory phrase "on the same subject."

EVIDENCE—CONFESSIONS—ADMISSIONS—TRUSTWORTHINESS WHEN INDUCED BY PROMISES OR THREATS.—To a police court complaint charging adultery the defendant pleaded guilty. He was later indicted for incest for the same act. At the incest trial, the plea of guilty to the adultery charge was introduced in evidence. It was objected to on the ground that it was a "confession" made as a result of "inducements and offers" and a preliminary hearing demanded. *Held,* that the plea of guilty was an "admission," and that there was no error in denying a preliminary hearing. *Commonwealth v. Haywood* (1923, Mass.) 141 N. E. 571.

A defendant's statements bearing on his guilt are, under the sounder theory, excluded in criminal proceedings when induced by promises or threats, if they contain acknowledgments of such operative facts of guilt that they are considered apt to be untrustworthy. *People v. Heide* (1922) 302 Ill. 624, 135 N. E. 77; 2 Wigmore, *Evidence* (2d ed. 1923) secs. 822, 866; (1921) 30 YALE LAW JOURNAL, 418. Experience has indicated that the more operative facts are admitted, the more likely are the statements to be false when induced by promises or threats. Such untrustworthiness should also warrant their exclusion in civil proceedings. *Tilley v. Damon* (1853, Mass.) 11 Cush. 247; *Scott v. Home Insurance Co.* (1870, C. C. D. Mo.) Fed. Cas. No. 12,533; *contra:* see *Fidler v. McKinley* (1859) 21 Ill. 308; 2 Wigmore, *op. cit.* sec. 815, note 1. In criminal proceedings the danger that the prejudicial effect of such statements is not destroyed by striking out has further induced most courts to allow a preliminary hearing where promises or threats are alleged. *State v. Storms* (1901) 113 Iowa, 385, 85 N. W. 618; 18 L. R. A. (N. S.) 777, note. Where the facts are merely evidential, the statements are admitted even if induced by promises or threats. The theory in such a case must be that the statements are sufficiently untrustworthy. *People v. Ammerman* (1897) 118 Calif. 23, 50 Pac. 15. It has not been commonly noted that a "confession" rarely embraces all the operative facts essential to a conviction. Statements within this class shade off imperceptibly into "admissions," that is acknowledgments of insufficient operative facts or of evidentiary facts of guilt. *Cf. State v. Guil* (1919) 56 Mont. 485, 186 Pac. 329. The court in the principal case considered the former plea of guilty as an "admission" rather than a "confession" as it did not contain an acknowledgment

of the relationship of the parties. But it was in itself a complete acknowledgment of a crime, and of an essential part of the crime charged. As such it seems more in harmony with the policy of the classification to consider the defendant's plea a "confession."

EXTRADITION—FUGITIVES FROM JUSTICE—NECESSITY FOR PHYSICAL PRESENCE AT TIME OF COMMISSION OF CRIME.—The relator was indicted in Ohio for failure to support his minor children. He was a resident of New York, but had made several short visits to Ohio during the period covered by the indictment. A requisition from the Governor of Ohio for his arrest was honored by the Governor of New York, and an executive warrant issued. The relator sued out a writ of habeas corpus. *Held,* (two judges *dissenting*) that the writ be sustained, since the relator was not a fugitive from justice. *People, ex rel. Gottschalk, v. Brown* (1923, 4th Dept.) 207 App. Div. 695, 201 N. Y. Supp. 862.

A person who commits a crime against a state while outside of its territory may be punished by the state on a subsequent acquisition of personal jurisdiction. *State v. Wolkow* (1922) 110 Kan. 722, 205 Pac. 639; 19 L. R. A. 775, note; 33 L. R. A. (N. S.) 331; Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE LAW JOURNAL, 457, 462. The same principle has been applied to the crime of non-support. *In re Fowles* (1913) 89 Kan. 430, 131 Pac. 598; *State v. Sanner* (1910) 81 Ohio St. 393, 90 N. E. 1007; *contra: Ex parte Kuhns* (1913) 36 Nev. 487, 137 Pac. 83. The power to extradite, however, is limited by constitutional provision and congressional statutes to persons who are fugitives from justice. See U. S. Const. Art. 4, sec. 2; U. S. Rev. Sts. 1874, sec. 5278. The term "fugitive from justice" is generally confined to persons within the demanding state at the time the crime was committed. *Hyatt v. Corkran* (1903) 188 U. S. 691, 23 Sup. Ct. 456; COMMENTS (1915) 3 CALIF. L. REV. 236; NOTES (1918) 18 COL. L. REV. 70; Ann. Cas. 1918 D, 1011, note. Extra-territorial crimes, which are the most dependent upon extradition for their enforcement, are thus without the pale of our extradition procedure. Due perhaps to the increasing recognition of such crimes, recent cases have adopted a more liberal interpretation of the term "fugitive from justice." The accused need not do within the demanding state all the acts necessary to accomplish the crime; any overt material act there is sufficient. *Strassheim v. Daily* (1911) 221 U. S. 280, 31 Sup. Ct. 558; *Finch v. West* (1921) 106 Neb. 45, 182 N. W. 565. In crimes which may be consummated without any overt act, it is sufficient that the accused visited the state during the period covered by the indictment. *Hogan v. O'Neill* (1921) 255 U. S. 52, 41 Sup. Ct. 222 (conspiracy). Or that he passed through in a train. *Ex parte Montgomery* (1917, S. D. N. Y.) 244 Fed. 967. Similarly in the case of a county a visit of a few days has been held to give jurisdiction of the crime of failure to support. *State v. Ford* (1922) 151 Minn. 382, 186 N. W. 812. The cases tend to regard the requirement of physical presence as a mere technicality, and to construe the extradition statute in favor of a more expeditious enforcement of the criminal laws of the states. This might well have been done in the instant case.

[While this issue of the JOURNAL was in press the Court of Appeals reversed the decision of the Appellate Division. Three judges dissented. See the April 18, 1924 number of the NEW YORK LAW JOURNAL.—ED.]

LABOR LAW—TRADE UNIONS—MEMBERSHIP—REMEDIES FOR WRONGFUL EXPULSION.—The plaintiff member sued the defendant trade union for wrongful and malicious expulsion. The defense was that the plaintiff had not exhausted the remedy within the association. From a judgment of the lower court overruling the defense the defendant appealed. *Held,* that the court's ruling be affirmed. *Grand International Brotherhood of Locomotive Engineers v. Green* (1923, Ala.) 98 So. 569.

Voluntary associations may impose any qualifications for membership. *Mayer v. The Journeymen Stonecutters' Assoc.* (1890) 47 N. J. Eq. 519, 20 Atl. 492. A member may withdraw at any time without the consent of the association in the absence of a contrary agreement between the members. *Somo v. Indpendent Order of Foresters* (1917) 83 Or. 654, 164 Pac. 187. It is often said that courts have no jurisdiction to give relief against expulsion except where property rights are involved. *Rigby v. Connol* (1880) L. R. 14 Ch. Div. 482. But courts take jurisdiction when the decision within the organization is illegal or contrary to the rules of the association itself. *Schneider v. Local Union No. 60* (1905) 116 La. 270, 40 So. 700 (member fined and suspended for refusal to appoint man recommended by the union to public office); *Gardner v. East Rock Lodge* (1921) 96 Conn. 198, 113 Atl. 308. Similarly when the action is not bona fide or is contrary to "natural justice." *Otto v. Journeymen Tailors' Protective and Benevolent Union* (1888) 75 Calif. 308, 17 Pac. 217; *Burn v. National Amalgamated Labourers' Union* [1920] 2 Ch. 364; see (1920) 30 YALE LAW JOURNAL, 202. But not on questions of the internal government of the association. *Stivers v. Blethen* (1923) 124 Wash. 473, 215 Pac. 7 (local union ordered by executive council to reimburse employer for money paid out to member as wages pending appeal). And it is usually stated that a member must exhaust his remedies within the association before seeking relief in court. *Pixley v. Cleaver* (1920) 105 Neb. 485, 181 N. W. 138. For the limitations of this doctrine see (1922) 31 YALE LAW JOURNAL, 328. The holding of the principal case, that the rule applies only when the member is seeking reinstatement and not when he is suing for damages, is supported by the cases. *Bonham v. Brotherhood of Railroad Trainmen* (1920) 146 Ark. 117, 225 S. W. 335; *Thompson v. Grand International Brotherhood of Locomotive Engineers* (1905) 41 Tex. Civ. App. 176, 91 S. W. 834. This seems reasonable so far as the remedy within would be inadequate in a suit for damages. An association would hardly award damages against itself for expelling a member; and to require him to exhaust the remedy within would only extend the proceedings. But whether the member should have a right to damages if the union is willing to reinstate him is questionable. In joining the union a member would seem to agree to bear any injury due to mistakes of lower tribunals of the union until passed upon by its highest tribunal.

MORTGAGES—DEPOSIT OF TITLE DEEDS—ORAL AGREEMENT TO EXECUTE A MORTGAGE.—The defendant's intestate, indebted to the plaintiff for $1,200, orally agreed in consideration of a further advance of $100, to execute a mortgage on certain land for the entire indebtedness. The plaintiff advanced this sum and received the deeds to the land for the sole purpose of having a legal mortgage executed. Before this could be done the intestate died. The plaintiff sought specific performance of the agreement. *Held,* that the Statute of Frauds was a bar to the plaintiff's recovery. *Sleeth v. Sampson* (1923) 237 N. Y. 69, 142 N. E. 355.

In England, an equitable mortgage may be created by a deposit of title deeds. *Bank of New South Wales v. O'Connor* [1889, P. C.] 14 A. C. 273, 282. Most American jurisdictions do not recognize this doctrine because it violates the Statute of Frauds and the spirit of our registry system. *Meador v. Meador* (1871, Tenn.) 3 Heisk, 562; *Grames v. Consol. Timber Co.* (1914, D. Or.) 215 Fed. 785; *contra: Jennings v. Augir* (1914, D. Wash.) 215 Fed. 658; NOTES (1914) 14 COL. L. REV. 672. New York early adopted the English view, but it has recently been discredited there. *Rockwell v. Hobby* (1844, N. Y.) 2 Sandf. Ch. 9; see *Ebling Brewing Co. v. Gennaro* (1919, 2d Dept.) 189 App. Div. 782, 785, 179 N. Y. Supp. 384, 387. The court suggested in the instant case that since the deposit was not given for an immediate security the doctrine was not applicable. But most English cases consider that a deposit of deeds pending the preparation of a legal mortgage gives an even stronger case for relief

to the lender. *Ex parte Bruce* (1813, Bankruptcy) 1 Rose, 374; *Hockley v. Bantock* (1826, Ch.) 1 Russ. 141; *contra: Norris v. Wilkinson* (1806, Ch.) 12 Ves. 192. Strong *dicta* in several New York cases have intimated that a recovery might be allowed on the oral agreement alone. *Sprague v. Cochran* (1894) 144 N. Y. 104, 112, 38 N. E. 1000, 1002; *Stoddard v. Hart* (1861) 23 N. Y. 556, 561; but see *Meixel v. Meixel* (1914, 1st Dept.) 116 App. Div. 518, 146 N. Y. Supp. 587; see Stone, *The "Equitable Mortgage" in New York* (1920) 20 COL. L. REV. 519, 522. And a few courts have so held. *Foster Lumber Co. v. County Bank* (1905) 71 Kans. 158, 80 Pac. 49 (payment sufficient part performance); *Cole v. Cole* (1874) 41 Md. 301 (failure to carry out the agreement constituting fraud); *Irvine v. Armstrong* (1883) 31 Minn. 216, 17 N. W. 343 (inequitable not to give relief). But by the majority view an agreement to give a mortgage is within the Statute of Frauds. *Edwards v. Scruggs* (1908) 155 Ala. 568, 46 So. 850; 3 Tiffany, *Real Property* (2d ed. 1920) sec. 603. And payment of money alone is not sufficient part performance. *Poarch v. Duncan* (1906) 41 Tex. Civ. App. 275, 91 S. W. 1110; 1 Williston, *Contracts* (1920) sec. 491; see *Newman v. Newman* (1921) 103 Ohio St. 230, 133 N. E. 70; 18 A. L. R. 1098, note. The result in the instant case seems sound. The exception to the statute made in cases of part performance should not be extended to make such a transaction enforceable, as it would enable a simple loan to be converted into a security transaction. This is particularly true when as in the instant case a past indebtedness constituted the bulk of the consideration.

PROPERTY—SALVAGE—POSSESSION SUFFICIENT TO MAINTAIN TRESPASS AGAINST SUBSEQUENT SALVOR.—The plaintiffs located and attempted to salvage a wreck thought to contain gold. They maintained buoys over the wreck, and had succeeded in raising some of the cargo but no gold was found. The defendants demanded the privilege of aiding as co-salvors and sent down divers. The plaintiffs sought an injunction and damages for the trespass. An interim injunction was refused and plaintiffs appealed. *Held,* that the injunction be granted and the plaintiffs recover damages for the trespass. *The Tubantia* (1924, P. D. & Ad.) 40 T. L. R. 335.

The operative facts said to constitute "possession" seem to be made to vary according to the result the court desires to reach in any particular case. Thus an action to recover the possession of a wild animal may be brought by one who has mortally wounded it so that actual capture is reasonably certain to follow. *Liesner v. Wanie* (1914) 156 Wis. 16, 145 N. W. 374. Whereas encouragement of the development of natural resources has led to the rule that possessory rights in mineral deposits on public lands are not acquired by mere presence, unless coupled with discovery or active work toward discovery. *Whiting v. Straup* (1908) 17 Wyo. 1, 95 Pac. 849. With lost goods, discovery plus some act of control gives such "possession" as founds trover against a third party. *Agnew v. Baker* (1917) 204 Ill. App. 56 (ordering abandoned car to be repaired); *Weeks v. Hackett* (1908) 104 Me. 264, 71 Atl. 858. But where the issue was larceny by the finder, full physical control before the felonious intent was formed was declared mere custody. *Pritchett v. State* (1854) 34 Tenn. 285. Where no conscious physical control has been even attempted, ownership of a thing on or in which the disputed chattel is found has sometimes been allowed as an equivalent. *Goddard v. Winchell* (1892) 86 Iowa, 71, 52 N. W. 1124; *McKee v. Gratz* (1922) 260 U. S. 127, 43 Sup. Ct. 16; but see *Vickery v. Hardin* (1922, Ind.) 133 N. E. 922 (treasure trove). But intent to exclude the public from the land has been held requisite. *Hoagland v. Amusement Co.* (1902) 170 Mo. 335, 70 S. W. 878; *Batteiger v. Penn. Co.* (1916) 64 Pa. Super. Ct. 195. Otherwise, however, where it seemed that return of the lost chattel to the owner was best accomplished by treating the owner of the *locus in quo* as the possessor, though there was no intent to exclude

others. *Foulke v. N. Y. Consol. Ry.* (1920) 228 N. Y. 269, 127 N. E. 237. A similar policy leads to the protection of a first attempting salvor. Thus presence near the wreck satisfies the requirement of actual control except where the salvor is shown to be manifestly incompetent. *The Amethyst* (1840) Fed. Cas. No. 330; see *The Eidilio* (1917, E. D. N. C.) 246 Fed. 470. To support a maritime lien against the owner, valuable salvage service is further required. *The Killeena* (1880) L. R. 6 P. 193; *Merrill v. Fisher* (1910) 204 Mass. 600, 91 N. E. 132; NOTES (1920) 33 HARV. L. REV. 453. But as against third parties there need be only an intent to exercise the control to the exclusion of others. *Eads v. Brazleton* (1861) 22 Ark. 499 (buoy over wreck not sufficient); Holmes, *The Common Law* (1881) 216. The instant case is sound.

SALES—SALE OF A GOING CONCERN—DELIVERY OF CHATTELS IN THE POSSESSION OF THIRD PARTIES.—The defendant agreed to buy the plaintiff's business, including the lease, good will and inventoried stock. One item in the bill of sale called for two hundred and forty-five batteries, at $15 each. The plaintiff failed to deliver one hundred and four of these batteries, which at the time for performance were rented out and in the hands of the plaintiff's customers. The defendant refused to perform. The plaintiff sued for $5,000, the amount agreed upon in the contract as liquidated damages should the defendant fail to perform. *Held,* that the plaintiff could not recover. *Allen v. Baker* (1923, Or.) 220 Pac. 574.

At common law and under section 43 (3) of the Uniform Sales Act, where goods are at the time of the sale in the hands of a third person, the seller does not fulfill his obligation to deliver until the third person acknowledges to the buyer that he holds the goods on the buyer's behalf. *Bentall v. Burn* (1824, K. B.) 3 Barn. & C. 423; *Edwards, Hudmon & Co. v. Meadows* (1881) 71 Ala. 42; *Bassett v. Camp* (1881) 54 Vt. 232; Williston, *Sales* (1909) sec. 454. "Goods" is defined as including all chattels personal other than choses in action. Sales Act, sec. 76. But it can hardly be considered as including the good will of a business, and the universal applicability of the above rule on delivery may be doubted, where the thing sold by an indivisible contract is a going business, the respective transfers of a lease, good will, book accounts, and inventory being only parts of a whole. Recognition of a going business, as such, is repeatedly found in the law. So wherever "going concern value," as distinct from the physical assets, is used by courts as a basis for rate allowances to public service corporations. *Omaha v. Omaha Water Co.* (1910) 218 U. S. 180, 30 Sup. Ct. 615; *People v. Willcox* (1914) 210 N. Y. 479, 104 N. E. 911; *contra: Houston v. S. W. Bell Tel. Co.* (1922) 259 U. S. 318, 42 Sup. Ct. 486; see COMMENTS (1922) 32 YALE LAW JOURNAL, 390; *ibid.* 507. Or where in preventing the appropriation of trade values the courts are in substance giving legal protection to "going value." *American Waltham Watch Co. v. United States Watch Co.* (1899) 173 Mass. 85, 53 N. E. 141; *Waterman Co. v. Modern Pen Co.* (1914) 235 U. S. 88, 35 Sup. Ct. 91; *International News Service v. The Associated Press* (1918) 248 U. S. 215, 39 Sup. Ct. 68. Or again, in condemnation proceedings, compensation is usually given on the basis of the enhanced market value, which is held to include "going value." *King v. Minneapolis Union Ry.* (1884) 32 Minn. 224; *Philbrook v. Berlin-Shelburne Power Co.* (1909) 75 N. H. 599, 74 Atl. 873; *Voigt v. Milwaukee County* (1914) 158 Wis. 666, 149 N. W. 392. Where a business is sold, the going concern quality is often the major value transferred. In such a case rules governing the sale of chattels as applied at least to such of the inventory as in use in a way peculiar to the business, and not anticipated by the Sales Act, should be subject to appropriate modification. This consideration might be applied to the instant case, especially since chattels kept for renting purposes, when rented out and earning profits, are better assets than those yet to be rented.

TORTS—INJURIOUS FALSEHOOD—NO RECOVERY IN ABSENCE OF MALICE.—Posters announcing the plaintiff's appearance at the defendants' theatre were not altered after defendants learned that the statement was untrue. The plaintiff sued for injurious falsehood, or alternatively, for libel, alleging as damages the loss of an engagement. *Held,* that this was not libelous and that the plaintiff could not recover for injurious falsehood as there was no "actual intent of injuring the plaintiff." *Shapiro v. LaMorta* (1923, K. B.) 40 T. L. R. 39.

The modern tendency is to allow recovery for non-defamatory but malicious falsehoods causing damage. *Hollenbeck v. Ristine* (1898) 105 Iowa, 488, 75 N. W. 355; *American Insurance Co. v. France* (1903) 111 Ill. App. 382; *Ratcliffe v. Evans* [1892, C. A.] 2 Q. B. 524. In some jurisdictions, however, it has been held that the charge must also be defamatory. *Knight v. Blackford* (1884, Sup. Ct. D. C.) 3 Mackey, 177; *Legg v. Dunlevy* (1881) 10 Mo. App. 461. In defamation an unauthorized use of defamatory words *prima facie* satisfies the fictional prerequisite of malice in law. *Allen v. Edward Light Co.* (1921) 209 Mo. App. 165, 233 S. W. 953; *Switzer v. Anthony* (1922) 71 Colo. 291, 206 Pac. 391; *Morrison v. Ritchie & Co.* (1902, Ct. of Sess.) 39 Scot. L. 432. But if the statement is conditionally privileged the plaintiff must show that the defamatory words were not spoken pursuant to the right and duty which created the privilege, but from some other motive. *Doane v. Grew* (1915) 220 Mass. 171, 107 N. E. 620. Similarly in disparagement of property the defendant's real or supposed interest creates a privilege which is extinguished only upon proof of actual malevolence. *Swan v. Tappan* (1849, Mass.) 5 Cush. 104; *British Railway Traffic & Electric Co. v. C. R. C. Co.* [1922] 2 K. B. 260. Here, too, if the defendant has no interest to protect and the false words are mere impertinent interference "malice" is said to be presumed. *Nagy v. Manitoba Free Press* (1907) 16 Manitoba, 619, *affirmed* 39 Can. Sup. Ct. 340; see Smith, *Disparagement of Property* (1913) 13 COL. L. REV. 13. In requiring proof of ill-will or intent to injure as an independent fact in injurious falsehoods the courts have apparently arrived at the same result as in the cases of qualified privilege without creating a *prima facie* cause of action from the mere fact of injury.

TRUSTS—RESULTING TRUST FROM PAYMENT OF PURCHASE PRICE—DESCENT—PURCHASERS FROM TRUSTEE.—A husband purchased land with his wife's money, and without her knowledge or consent, took title in his name. The husband died, and the wife remarried. On the death of the wife, the children of the first marriage claimed the land to the exclusion of a child born of the second marriage, and brought suit against her to remove an alleged cloud on title. *Held,* that the plaintiffs and defendant were seised in fee as tenants in common. *Tyndall v. Tyndall* (1923) 186 N. C. 271, 119 S. E. 354.

A resulting trust in favor of one paying the purchase price of land is not executed by the Statute of Uses. *Strimpfler v. Roberts* (1852) 18 Pa. 283; 1 Tiffany, *Real Property* (1920) 398; *contra: Hutchins v. Heywood* (1871) 50 N. H. 491. The *cestui* has an "equitable" defense to an action of ejectment by the trustee. *Hynds v. Hynds* (1918) 274 Mo. 123, 202 S. W. 387; see Cook, *Equitable Defenses* (1923) 32 YALE LAW JOURNAL, 645. He may get a "reconveyance" and so destroy the apparent title of the trustee. *O'Donnell v. O'Donnell* (1922) 303 Ill. 31, 135 N. E. 28; *Pollman v. Curtice* (1919, C. C. A. 8th) 255 Fed. 628 (same as to purchaser with notice). The trustee has only a power to pass good title to a purchaser for value without notice. *Talley v. Mozley* (1919) 149 Ga. 529, 101 S. E. 1020; see *Goode v. Riley* (1891) 153 Mass. 585, 28 N. E. 228; Hohfeld, *Fundamental Legal Conceptions* (1923) 155. But he is liable in damages for such a conveyance in breach of the resulting trust. *Davis v. Dickerson* (1918) 137 Ark. 14, 207 S. W. 436; 3 Pomeroy, *Equity Jurisprudence* (4th ed. 1918) sec. 1058. These results as to the "rights" of the trustee and *cestui*

are most frequently expressed in terms of "legal" and "equitable title." On procedure *cf.* COMMENTS (1923) 32 YALE LAW JOURNAL, 707. The conclusion of the principal case, that the heirs of the *cestui* are seised in fee, is a sound recognition that subject to the liability of conveyance by the trustee to a bona fide purchaser, the only effective "title" was in the *cestui.* Such title descends without regard to common law seisin. *Shackleford v. Elliott* (1904) 209 Ill. 333, 70 N. E. 745. The adjudication of the court destroys the power of the trustees to pass good title, since it takes the place of a bill for reconveyance or a decree revesting title. See 5 Pomeroy, *op. cit.* sec. 2165.

TRUSTS—VOLUNTARY DECLARATION OF TRUSTS OF PERSONALTY—EFFECT OF NON-DELIVERY AND FAILURE TO COMMUNICATE.—With intent to protect his father in case he died before he was able to transfer his property in Germany, the complainant in 1917 signed a document declaring that he held certain stock for the benefit of his father, an alien enemy, and that for convenience the stock remained in the name of the complainant who retained no interest except as trustee. The complainant retained the stock and the document and did not communicate its contents to anyone other than the attorney who advised it. The defendant, Alien Property Custodian in 1919, took the stock as alien enemy property. The complainant sued as owner for the return of the stock. The lower court dismissed the bill. *Held,* that the plaintiff recover since the document never became operative. *Stoehr v. Miller* (Dec. 17, 1923) U. S. C. C. A. 2d, Oct. Term, 1923, No. 159.

Where a settlor constitutes another trustee of personal property for the benefit of a third party, he must do sufficient acts to divest himself of all title and interest in the *res* with the express intent to vest them in the trustee. *Orton v. Tannenbaum* (1920, 2d Dept.) 194 App. Div. 214, 185 N. Y. Supp. 681; Lewin, *Trusts* (12th ed. 1911) 73. This may be done by a delivery of the *res* or of a deed of conveyance or assignment. *Talbot v. Talbot* (1911) 32 R. I. 72, 78 Atl. 535; Ann. Cas. 1912 C, 1235, note. In the case of a family settlement, however, the courts require only slight evidence of a delivery. *Tarbox v. Grant* (1898) 56 N. J. Eq. 199, 39 Atl. 378 (deed executed in presence of beneficiaries); *Fletcher v. Fletcher* (1844, Ch.) 4 Hare, 67 (recital in deed of agreement with trustees); see *Clavering v. Clavering* (1704, Ch.) 2 Vern. 473. Where the settlor constitutes himself trustee, any declaration of an intent to hold in trust *in praesenti* is sufficient. *Korompilos v. Tompras* (1923, Mo.) 251 S. W. 80 (parol); *Rollestone v. National Bank of Commerce* (1923, Mo.) 252 S. W. 394 (writing); 12 L. R. A. (N. S.) 547, note. And extrinsic circumstances are admissible to determine the intent where the declaration is equivocal. *Ambrosius v. Ambrosius* (1917, C. C. A. 2d) 239 Fed. 473; *Allen v. Hendrick* (1922) 104 Or. 202, 206 Pac. 733. A delivery of the trust *res* or of a deed of assignment is not necessary. *Janes v. Falk* (1892) 50 N. J. Eq. 468, 26 Atl. 138; *O'Neil v. Greenwood* (1895) 106 Mich. 572, 64 N. W. 511; *Knagenhjelm v. R. I. Hospital Co.* (1921) 43 R. I. 559, 114 Atl. 5; *contra: Govin v. De Miranda* (1894, N. Y.) 76 Hun, 414. It has even been held that where such a declaration of trust is in writing there need not be a communication to any person of the declaration of trust. *In re Smith's Estate* (1891) 144 Pa. 428, 22 Atl. 916; *In re Eshbach's Estate* (1900) 197 Pa. 153, 46 Atl. 905; see *In re Cozens* [1913] 2 Ch. 478, 486; *cf. Landon v. Hutton* (1892) 50 N. J. Eq. 500, 25 Atl. 953. Such a view is open to the danger that the declaration may have been prepared without a present trust intent. The court in the instant case, however, seems to approve this view, but the facts of the case did not require a decision of this point. The result reached by the court is sound since in accordance with the intent of the settlor, the trust was never perfected.