# RECENT CASE NOTES

BANKS AND BANKING—BILLS AND NOTES—INDORSEMENT OF FICTITIOUS PAYEE AS FORGERY.—H, representing that he had a client, K (in fact a non-existent person) who desired to borrow money on a mortgage, secured from the plaintiff his check drawn on the defendant bank to the order of K, and delivered in return a forged note and mortgage. H indorsed K's name on the check, followed by his own. After negotiation it was paid by the defendant drawee. H paid the interest charges on the loan for four years, but upon his becoming insolvent the fraud was discovered. In an action by the drawer against the drawee for the amount of the check, the defendant's motion for a directed verdict was refused and a judgment was rendered for the plaintiff. *Held*, on appeal, (two judges dissenting) that the defendant's motion was correctly refused because the indorsement of K's name was a forgery. A new trial was granted on other grounds. *McCornack v. Central State Bank*, 211 N. W. 542 (Iowa, 1926).

Where the drawer knows that the payee is fictitious, it becomes a bearer instrument under § 9 (3) of the N. I. L., and the rule as to forged indorsements has no application. But *cf. Write Away Pen Co. v. Buckner*, 188 Mo. App. 259, 175 S. W. 81 (1915); (1926) 11 IOWA L. REV. 278 (assumed and trade names not fictitious, and indorsement by party using name required). But it is otherwise where the drawer does not have such knowledge. BRANNAN, N. I. L. (4th ed. 1926) 83–101. An imposter may validly indorse an instrument secured in person under the assumed name. *Corinth Bank & Trust Co. v. Security Nat'l Bank*, 148 Tenn. 136, 252 S. W. 1001 (1923). Where the transaction is not in person there is a conflict. (1920) 34 HARV. L. REV. 76. But where, as in the instant case, a person purporting to be an agent, fraudulently secures a check payable to the non-existent principal, most decisions (generally accompanied by vigorous dissents) consider his indorsement a forgery, allowing the drawer to recover from the drawee. *Robertson Banking Co. v. Brasfield*, 202 Ala. 167, 79 So. 651 (1918); *Strang v. Westchester County Nat'l Bank*, 235 N. Y. 68, 138 N. E. 739 (1923); (1923) 7 MINN. L. REV. 582; (1923) 22 MICH. L. REV. 61. *Contra: Marcus v. Peoples Nat'l Bank*, 57 Pa. Super. Ct. 345 (1914); but *cf. Lesley v. Ewing*, 248 Pa. 135, 93 Atl. 875 (1915). The dissent in the instant case relied on the drawer's admission of the existence of the payee found in N. I. L., § 61; but the majority interpreted this, in accord with decisions in other states, to properly apply only to situations where the payee is an infant, unauthorized corporation, or one using an assumed name, etc. *Cf. Soekland v. Storch*, 123 Ark. 253, 185 S. W. 262 (1916). BRANNAN, *op. cit. supra*, at 545–554. Courts refuse to extend its application to situations similar to that in the instant case. *Caledonian Ins. Co. v. Nat'l City Bank*, 208 App. Div. 83, 203 N. Y. Supp. 32 (1924). The equities, however, seem to favor the drawee, especially where the loss remains undiscovered for a long period. *Cf.* (1923) 37 HARV. L. REV. 149 (suggesting an equitable defense be given to drawee). A possible solution would be to amend the N. I. L. so as to provide that the drawer's right against the drawee in such cases be barred unless notice be given the drawee within one year (or other relatively short period) after payment. This would give reasonable certainty, and would not relieve the drawee (or purchaser) from his inquiry as to the genuineness of indorsements. And placing the burden on the defrauded drawer to make discovery within a reasonable period would eliminate undue accumulation of remote losses

falling upon the drawee, and make the recourse of the drawee (who before paying would usually have determined the responsibility of immediate indorsers) against prior indorsers of more positive value. The same remedy has been applied in most states in the somewhat similar situations relating to raised and forged checks. PATON, DIGEST (1926) § 2013a.

CONSTITUTIONAL LAW—STATE LICENSES AS BURDENS ON FOREIGN COMMERCE.—The defendant was convicted under a Pennsylvania statute which required licenses of those selling steamship tickets, or transportation orders, to or from foreign countries. Such licenses were procurable with the approval of the commissioner of banking on the payment of a fee of $50 and the filing of a penal bond. The conviction was affirmed by the Supreme Court of Pennsylvania and the defendant took the case to the United States Supreme Court on writ of error. *Held,* (Holmes, Brandeis, and Stone, JJ., dissenting) that the judgment be reversed, since the statute, being a direct burden an foreign commerce, was unconstitutional. *Di Santo v. Pennsylvania,* 47 Sup. Ct. 267 (U. S. 1927).

Where the defendants were salaried employees of transportation companies, somewhat similar statutes have been held unconstitutional as "direct burdens" on interstate commerce. *McCall v. California,* 136 U. S. 104, 10 Sup. Ct. 881 (1890) (license tax of $100 a year imposed on agent soliciting trade); *Texas Transport Co. v. New Orleans,* 264 U. S. 150, 44 Sup. Ct. 242 (1924) (license tax of $400 a year required of general freight agent); *Real Silk Hosiery Mills v. Portland,* 268 U. S. 325, 45 Sup. Ct. 525 (1925) (tax of $100 a year required of a solicitor). The instant decision extends these holdings to a situation where the defendant is not a salaried employee. State regulation of interstate commerce, however, has been permitted in certain cases, though regarded as a "direct burden," where there was no need of a uniform system, and Congress had not entered the field. *Cooley v. Board of Wardens,* 12 How. 299 (U. S. 1851) (pilot regulations); *Escanaba & Michigan Transportation Co. v. Chicago,* 107 U. S. 678, 2 Sup. Ct. 185 (1883) (bridge regulations); *Missouri Pacific Ry. v. Larabee Flour Mills Co.,* 211 U. S. 612, 29 Sup. Ct. 214 (1909) (local freight car switching facilities); see Frankfurter and Landis, *Compact Clause of the Constitution—A Study in Inter-State Adjustments* (1925) 34 YALE LAW JOURNAL, 685, 720. Likewise under the police power, where local conditions were deemed to require it. *Morgan's S. S. Co. v. Board of Health,* 118 U. S. 455, 6 Sup. Ct. 1114 (1886) (quarantine); *Reid v. Colorado,* 187 U. S. 137, 23 Sup. Ct. 92 (1902) (quarantine); *Plumley v. Massachusetts,* 155 U. S. 461, 15 Sup. Ct. 154 (1894) (regulation of sale of oleomargarine). Such regulation may involve a tax if not for revenue purposes and not regarded as "unduly burdensome." *Morgan's S. S. Co. v. Board of Health, supra* ($30 tax to cover quarantine expenses); *Cooley v. Board of Wardens, supra* (surplus over pilot costs for relief pilots and their families). Since the fee prescribed by the instant statute is small and, as pointed out by Mr. Justice Brandeis in his dissenting opinion, its provisions meet a local need in the prevention of fraud, *i. e.* protecting people of small means from oppressive sales, it could reasonably be held valid. It would be better to leave these matters to state regulation until Congress provides proper national supervision of these employments.

CONSTITUTIONAL LAW—UNIFORMITY OF FEDERAL INHERITANCE TAX ALLOWING CREDIT FOR LIKE TAX PAID TO ANY STATE—The Revenue Act of 1926 [44 Stat. 69, (1926) U. S. Comp. Stat. (Supp. 1926) § 6336 ⅝a] imposes a federal inheritance tax, but allows credit, not exceeding 80% of the tax imposed, for any inheritance tax actually paid to any state.

The state of Florida, under whose constitution no inheritance tax can be levied, sued to enjoin the collection of the federal tax, on the ground that it was not uniform throughout the United States. *Held*, that the tax is proper, and is not subject to collateral attack by a state. *Florida v. Mellon*, 47 Sup. Ct. 265 (U. S. 1927).

An inheritance tax is almost universally regarded as an excise tax which is subject only to the constitutional provision that it be uniform throughout the United States. *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747 (1900). But see *Williams v. State*, 125 Atl. 661, 664 (N. H. 1924) (held a property tax); (1923) 33 YALE LAW JOURNAL, 103. This requirement is held satisfied when the tax "operates with the same force and effect in every place where the subject of it is found." See the *Head Money Cases*, 112 U. S. 580, 594, 5 Sup. Ct. 247, 252 (1884). Such was the interpretation made by the Federal Convention of 1787. See *Knowlton v. Moore*, *supra*, at 106, 20 Sup. Ct. at 772. Thus a liquor tax was considered uniform though it yielded nothing in dry states. See *Flint v. Stone Tracy Co.*, 220 U. S. 107, 174, 31 Sup. Ct. 342, 358 (1911). Likewise a head tax on aliens landed in any port. *Head Money Cases*, *supra*. And an inheritance tax where the net estate taxed was determined by deducting from the gross estate such charges against it as were allowed by the laws of the jurisdiction. *New York Trust Co. v. Eisner*, 256 U. S. 345, 41 Sup. Ct. 506 (1921). Hence it seems that the tax need not produce revenue in every state. Nor is it improper because, due to local conditions, it does not bear equally among the states. *LaBelle Iron Works v. United States*, 256 U. S. 377, 41 Sup. Ct. 528 (1921). Nor must there be uniformity in the manner of collection. See *Tappan v. Merchants' Nat'l Bank*, 19 Wall. 490, 505 (U. S. 1873). Thus, objection to a tax because its execution was forcibly delayed in certain sections has not been allowed. *United States v. Riley*, Fed. Cas. No. 16,164 (S. D. N. Y. 1864). While there is an inequality in the proportion of federal revenue produced among the several states by the instant tax, it is not borne by the individual, who must pay either the federal government or the state. Nor does it fall exclusively upon the states which levy no inheritance tax, since some states imposing such a tax have so low a rate that they cannot take full advantage of the credit allowed. See Trumbull, *The States' Rights Doctrine* (1927) 1 CONN. BAR J. 4, 11.

CONTRACTS—SPECIFIC PERFORMANCE—EFFECT OF OPTION TO BUY ON TERMS TO BE AGREED UPON.—The defendant leased certain premises to the plaintiff, the lease providing that the plaintiff should have an option to buy within a specified period, the amount to be paid "on terms to be agreed upon." The plaintiff remained on the premises about a year, and made improvements in reliance on the option. The plaintiff attempted to accept by a tender of cash, and upon the defendant's refusal, brought suit, repeating his tender of cash and offering to comply with any other terms the defendant might specify. From a decree granting specific performance on condition of cash payment, an appeal was taken. *Held*, that the decree be affirmed. *Morris v. Ballard*, 16 Fed. (2d) 175 (C. A. D. C. 1926).

In the absence of a statute, a contract containing a provision for arbitration is not specifically enforceable. *Hopkins v. Gilman*, 22 Wis. 476 (1868); (1922) 31 YALE LAW JOURNAL, 670. If, however, the terms to be arbitrated are not deemed essential, the court will decree specific performance. *Houston v. Barnett*, 90 Or. 94, 175 Pac. 619 (1918); *City of Anniston v. Alabama Water Co.*, 207 Ala. 497, 93 So. 409 (1922); (1923) 32 YALE LAW JOURNAL, 415. Somewhat analogous to the arbitration cases are those in which terms are to be later agreed upon by the parties. If

such terms are regarded as essential, there is said to be no binding contract. 1 WILLISTON, CONTRACTS (1920) § 45; ANSON, CONTRACTS (Corbin's ed. 1919) 64. What constitutes an essential term is uncertain. But the time, terms of payment, and the date of conveyance are recognized as such. *Cline v. Strong*, 52 Ind. App. 286, 100 N. E. 569 (1913); *Binns* v. *Smith*, 93 N. J. Eq. 33, 115 Atl. 69 (1921). The instant "option" does not contain all these stipulations usually regarded as necessary for an offer. The holding indicates that, in some instances at least, the operative effect of the offer may depend upon the nature of the acceptance. Thus, if the plaintiff had attempted to accept "on terms to be agreed upon" it is quite likely that the court would have denied recovery. *Leslie v. Mathwig*, 131 Minn. 159, 154 N. W. 951 (1915); see *Jamestown Portland Cement Corp. v. Bowles*, 228 Mass. 176, 180, 117 N. E. 41, 43 (1917); *cf. Sun Printing & Publishing Ass'n v. Remington P. & P. Co.*, 235 N. Y. 338, 139 N. E. 470 (1923). Even under the acceptance in the instant case, however, it is doubtful whether these facts would be sufficient to sustain an action for damages. *Cf. Sun Printing & Publishing Ass'n v. Remington P. & P. Co., supra; Prior v. Hilton & Dodge Lumber Co.*, 141 Ga. 117, 80 S. E. 559 (1913). Yet equity, which is said to require greater definiteness than law, does grant specific performance under similar circumstances. *Heyward v. Willmarth*, 87 App. Div. 125, 84 N. Y. Supp. 75 (2d Dept. 1903); *Kastens v. Ruland*, 94 N. J. Eq. 451, 120 Atl. 21 (1923); but *cf. Cline v. Strong, supra.* By the use of the conditional decree, in the instant case, there was no unfair advantage granted to either party. The defendant thereby obtained the most favorable terms he could have contemplated at the time he made the offer; the plaintiff was given what he bargained for, namely, the power of purchasing.

CONTRACTS—THIRD PARTY BENEFICIARY'S RIGHT—EQUITABLE OR LEGAL.—In a corporate reorganization the new corporation (here defendant), in consideration of a transfer of assets, agreed to discharge the debts and obligations of the old company. The plaintiff, having a tort claim against the old company, brought a bill in equity in a Massachusetts court against the new corporation. The suit was removed to the federal court. *Held*, on demurrer, that a cause of action was stated under Massachusetts law and that the bill was properly brought in equity. *Collins Mfg. Co. v. Wickwire Spencer Steel Co.*, 14 Fed. (2d) 871 (D. Mass. 1926).

Massachusetts has for some time purported to reject a third party beneficiary's right to sue at law. *Exchange Bank v. Rice*, 107 Mass. 37 (1871); see *Mellen v. Whipple*, 67 Mass. 317, 324 (1854); *N. Y. Central Ry. v. Vermont Central Ry.*, 243 Mass. 56, 66, 136 N. E. 825, 828 (1922); but *cf.* 1 WILLISTON, CONTRACTS (1920) § 367. But in equity it has, of course, allowed a third party to recover where a "trust" was held to have been created. *Nash v. Commonwealth*, 174 Mass. 335, 54 N. E. 865 (1899). And it has allowed equitable relief to a third party on the ground that the promisor's duty is an asset of the promisee. *Forbes v. Thorpe*, 209 Mass. 570, 95 N. E. 955 (1911). Two later cases may be construed as limiting the application to situations where assets have been transferred from the promisee to promisor. *New England Structural Co. v. Russell Boiler Works*, 231 Mass. 274, 120 N. E. 852 (1918); *Codman v. Deland*, 231 Mass. 344, 121 N. E. 14 (1918). But recovery under this theory does not seem to be limited to the specific assets transferred. See *Forbes v. Thorpe, supra*, at 581, 582, 95 N. E. at 959; *cf. Bagaley & Co. v. Waters*, 7 Ohio St. 359 (1857) (assumption of debts due some creditors in consideration of transfer of assets is not a "trust" within statute aimed to protect other creditors). And this theory would seem to authorize a liberal recognition of

creditor beneficiaries' rights should the court feel so disposed. Its defect lies in its exclusion of donee beneficiaries and in its assumption that a third party's right is necessarily derivative. See ANSON, CONTRACTS (Corbin's ed. 1924) § 295. It can not be definitely said that a third party beneficiary's right was originally legal or equitable. *Cf. Tomlinson v. Gill*, Ambler, 330 (Ch. 1756); *Dutton v. Poole*, 2 Lev. 210 (K. B. 1677). Code states have referred to it in both ways. *Petty v. Warren*, 90 W. Va. 397, 110 S. E. 826 (1922) (equitable—under subrogation theory); *Bank of Laddonia v. Bright-Coy Co.*, 139 Mo. App. 110, 120 S. W. 648 (1909) (legal—under transfer of assets theory); *Brill v. Brill*, 282 Pa. 276, 127 Atl. 840 (1925) (either). And statutes, permitting recovery by beneficiaries, have been variously worded and interpreted. *Cf. Preston v. Preston*, 205 Mich. 646, 172 N. W. 371 (1919) (equitable); *Butts v. Butts*, 81 W. Va. 55, 94 S. E. 360 (1917) (legal). But there seems no reason for code states to make such distinctions in their language except for purposes of determining the right to jury trial or the application of statutes which expressly apply only to legal or equitable actions. See Clark, *The Union of Law and Equity* (1925) 25 COL. L. REV. 1; *cf. Hand v. Kennedy*, 83 N. Y. 149 (1880); *Marinack v. Blackburn*, 93 W. Va. 585, 116 S. E. 7 (1923) (statute of limitations). And in non-code jurisdictions purporting to recognize the beneficiaries' right solely in equity the distinction is so slightly regarded that recovery has been allowed at law where jury trial was waived. *Mobile Shipbuilding Co. v. Federal Bridge Co.*, 280 Fed. 292 (C. C. A. 7th, 1922). But if such jurisdiction has an illiberal joinder statute, the right must be called equitable if there is to be joinder of all parties concerned. See (1922) 20 MICH. L. REV. 543. In the light of these cases the instant holding seems proper.

CORPORATIONS—SPECIFIC PERFORMANCE DENIED AGAINST PROMOTER ON CONTRACT MADE FOR PROPOSED CORPORATION.—The defendant, representing that a realty corporation was being formed, negotiated to purchase certain lands from the plaintiffs. The defendant stated to the plaintiffs that he desired to enter into and execute the said contract and to take title to the said property in the name of the Ruth Realty Corporation. The agreement was signed "Ruth Realty Corp., by Charles Baum." The corporation never having been formed, the plaintiff sued the defendant for specific performance. From a judgment for the defendant, the plaintiff appealed. *Held*, that the judgment be affirmed since an agent, contracting for a non-existent principal, is not responsible on the contract. *Weiss v. Baum*, 218 App. Div. 83, 217 N. Y. Supp. 820 (2d Dept. 1926).

A promoter who enters into an agreement on behalf of a proposed corporation is not bound where the facts indicate an understanding that the contract is conditional upon incorporation, and the corporation is not formed. *Belding v. Vaughan*, 108 Ark. 69, 157 S. W. 400 (1913). Or that the proposed corporation alone should be looked to for performance. *Heckman's Estate*, 172 Pa. St. 185, 33 Atl. 552 (1896) (one promoter, as agent of lessor, contracted with the other promoters); *Strause v. Richmond Woodworking Co.*, 109 Va. 724, 65 S. E. 659 (1909) (delivery of goods to corporation after formation, corporation alone being billed). Likewise where there has been an "adoption" by the subsequently formed corporation. *Bradshaw v. Jones*, 152 S. W. 695 (Tex. Civ. App. 1912); *Burress v. Montgomery*, 23 Ga. App. 590, 99 S. E. 143 (1919) (provision in contract releasing promoter upon assumption of obligation by corporation). Such "adoption" need not be express. *Carle v. Corhan*, 127 Va. 223, 103 S. E. 699 (1920) (note for debt under contract accepted from corporation); *Bradshaw v. Jones, supra* (services in securing bonuses for proposed rail-

road continued after its incorporation); see *Lane & Co. v. United Oil Cloth Co.*, 103 App. Div. 378, 380, 92 N. Y. Supp. 1061, 1063 (1905) (delivery of goods to corporation formed and acceptance of payment therefrom). In many cases, on facts similar to those in the instant case, courts have found the contract to be between the third party and the promoter and have held him responsible for its breach. *Desplaines Safety Deposit Co. v. Bour*, 192 Ill. App. 569 (1915) (lease—corporation subsequently formed); *Morse v. Illotson & Wolcott Co.*, 253 Fed. 340 (C. C. A. 2d, 1918) (contract to execute mortgage in return for loan—corporation formed); *Heisen v. Churchill*, 205 Fed. 368 (C. C. A. 7th, 1913) (purchase of lumber—corporation not formed); (1927) 12 CORN. L. Q. 192. Or for the purchase price. *Wells v. Fay Co.*, 143 Ga. 732, 85 S. E. 873 (1915) (delivery to corporation upon formation); see *Lewis v. Fisher*, 167 Mo. App. 674, 676, 151 S. W. 172, 173 (1912). On this analysis of the contract relationship, there should be no objection to granting specific performance in the instant case. Such is the holding in a recent case. *Cf. Jaenke v. Taylor*, 161 La. 996, 109 So. 814 (1924) (decree set forth); modified, 160 La. 109, 106 So. 711 (1925) (corporation never formed).

CRIMINAL LAW—WAIVER OF JURY TRIAL.—The defendants, indicted for larceny and conspiracy, waived trial by jury. At the close of the prosecution's evidence, the defendants' motion to withdraw the waiver was denied and they were convicted. *Held*, on appeal, that the case be remanded since jury trial could not be waived where the court's jurisdiction was limited by statute to cases where the court sat with a jury, although there was no constitutional objection to the waiver of a jury trial. *Commonwealth v. Rowe*, 153 N. E. 537 (Mass. 1926).

Jury trial has been subjected to much adverse criticism as an inefficient and unjust piece of judicial machinery. Hall, *Juries Jeopardize Justice* (1924) 56 CHICAGO LEGAL NEWS, 405; Sebille, *Trial by Jury an Ineffective Survival* (1925) 59 AM. L. REV. 65; McWhorter, *Abolish the Jury* (1923) 57 AM. L. REV. 42. Although so firmly imbedded in our constitutions and judicial thought that there is little chance of its abolition, it seems possible and desirable to allow the accused to waive it. In Maryland and Connecticut, where statutes give the courts jurisdiction without a jury if the accused elects to waive jury trial, it is waived in seventy to ninety per cent of the criminal cases brought into the courts. Cases are tried in one-third of the time required for a trial by jury, and considerable expense is saved to the state. *Report of the Judicial Council of Massachusetts* (1925) 11 MASS. L. Q. 21; *ibid.* at 97, 104. Waiver of jury trial in state courts is not forbidden by the Federal Constitution. *Hallinger v. Davis*, 146 U. S. 314, 13 Sup. Ct. 105 (1892). And the instant case, in suggesting that the state constitution does not prevent a waiver, is in accord with authority. *State v. Worden*, 46 Conn. 349 (1878); *Logan v. State*, 86 Ga. 266, 12 S. E. 406 (1890). But where, as in the instant case, a statute conferring jurisdiction on the court specifies that it sit with a jury, it has been held that the court has no jurisdiction to try a case without a jury. *Paulsen v. People*, 195 Ill. 507, 63 N. E. 144 (1902); see *Commonwealth v. Dailey*, 12 Cush. 80, 83 (Mass. 1853). A statutory amendment has been recommended in Massachusetts empowering the courts to try all criminal cases (except capital cases) without a jury where the accused elects to waive his privilege. *Report of the Judicial Council of Massachusetts* (1925) 11 MASS. L. Q. 140; (1926) 12 *ibid.* 10. The instant case is of importance in that it indicates that the lack of such legislation is the only obstacle to the adoption of a highly desirable judicial reform.

ELECTION OF REMEDIES—PLEADINGS IN TWO INCONSISTENT ACTIONS FILED SIMULTANEOUSLY—PARTY IN DOUBT AS TO WHICH REMEDY EXISTS.—The plaintiff contracted to buy land from the defendant, and paid $5,000 on the purchase price. The defendant started a suit for specific performance. The plaintiff then sued the defendant for damages and rescission. The defendant's motion to strike out inconsistent causes of action was granted. The plaintiff then served a counterclaim for damages for a breach of the contract in the specific performance suit, and on the same day amended his complaint in this action, for the return of the $5,000 on the ground of fraud of the defendant in inducing the contract. The defendant moved for judgment on the pleadings. *Held*, that the motion be denied, on the ground that there was no election of remedies since only one remedy may exist. *Socolow v. Stone Realty Co.*, 128 Misc. 152, 218 N. Y. Supp. 408 (Sup. Ct. 1926).

Some courts hold that the mere institution of one inconsistent action is not a conclusive election. *Register v. Carmichael*, 169 Ala. 588, 53 So. 799 (1910) (must be a detriment to the other party or a judgment before it is conclusive). Others hold that there is an election as soon as the inconsistent action is commenced. *Frisch v. Wells*, 200 Mass. 429, 86 N. E. 775 (1909). In any event, however, the doctrine of election should apply only where two inconsistent remedies actually exist. *Abbadessa v. Puglisi*, 101 Conn. 1, 124 Atl. 838 (1924); *Bierce v. Hutchins*, 205 U. S. 340, 27 Sup. Ct. 524 (1906). Accordingly, courts hold that the prosecution to a non-suit of one of two inconsistent actions is not such an election as to prevent recovery in the other. *Harber v. Harber*, 158 Ga. 274, 123 S. E. 114 (1924) (unsuccessful suit for dower not a bar to recovery of legacy under will declaring all bequests conditional upon relinquishment of all other claims against estate); *Nave v. Powell*, 62 Ind. App. 274, 110 N. E. 1016 (1916) (unsuccessful defense of breach of warranty no bar to subsequent defense on ground of seller's fraud); *McGibbon v. Schmidt*, 172 Calif. 70, 155 Pac. 460 (1916) (unsuccessful suit to recover payments made under contract no bar to suit for specific performance). *Contra: Foote v. Scarlett*, 134 Atl. 865 (N. J. 1926) (suit for rescission and recovery of payment is bar to action for specific performance). And it has been held that there was no election where the inconsistent suit had been discontinued and the court in a subsequent action found that there was no remedy available under the prior action. *Schenck v. State Line Tel. Co.*, 207 App. Div. 454, 202 N. Y. Supp. 378 (2d Dept. 1923) (deceit action discontinued because barred by statute of limitations, no bar to suit for rescission and reconveyance of land); *Int'l Realty & Security Corp. v. Vanderpoel*, 127 Minn. 89, 148 N. W. 895 (1914) (suit for rescission and recovery of payments, voluntarily dismissed because of laches, no bar to specific performance). But where the court decided that two remedies existed, the institution of an action for one has been held an election although withdrawn before judgment. *Ireland v. Waymire*, 107 Kan. 384, 191 Pac. 304 (1920) (suit for value of converted property is a bar to suit for return of property). It has been said that if a party is doubtful which of two inconsistent remedies exists upon the facts of his case, he may pursue one or all until he recovers through one. See *Union Central Life Ins. Co. v. Drake*, 214 Fed. 536, 548 (C. C. A. 8th, 1914); *Rankin v. Tygard*, 198 Fed. 795, 806 (C. C. A. 8th, 1912); *Corbett v. Boston & M. R. R.*, 219 Mass. 351, 357, 107 N. E. 60, 62 (1914); *Richmond Union Ry. v. New York Seabeach Ry.*, 95 Va. 386, 28 S. E. 573 (1897) (suit allowed against principal while suit against agent pending). *Contra: Browne v. Folsom*, 94 Okla. 286, 222 Pac. 246 (1923). Hence, the instant decision, in holding that there was no "election" where the two actions were commenced simultane-

ously, seems proper since the plaintiff was not permitted to sue for rescission and damages in the same action. Otherwise, it might be necessary for him to pursue one action to a non-suit before he could institute the other. Election of remedies is a harsh doctrine, the benefits of which are questionable, and its scope should not be extended. See *Friederichsen v. Renard*, 247 U. S. 207, 213, 38 Sup. Ct. 450, 452 (1917); *Metropolitan Life Insurance Co. v. Childs Co.*, 230 N. Y. 285, 291, 130 N. E. 295, 297 (1921).

EVIDENCE—NEGLIGENCE ACTION—ADMISSIBILITY OF EVIDENCE OF LIABILITY INSURANCE CARRIED BY DEFENDANT.—The plaintiff, administratrix, sued to recover damages for the death of her husband caused by the negligent operation of an automobile by the defendant. The plaintiff's offer to show, on cross examination of the defendant, that the latter carried liability insurance was refused. From a judgment for the defendant, the plaintiff appealed. *Held, inter alia,* (three judges dissenting) that it was error to exclude this evidence. *Jessup v. Davis*, 211 N. W. 190 (Neb. 1926).

Evidence that the defendant carries liability insurance is generally inadmissible to establish his responsibility. *Hill v. Jackson*, 272 S. W. 105 (Mo. App. 1925); *Lavinski v. Cooper*, 142 S. W. 959 (Tex. Civ. App. 1911). A witness, however, may be questioned to show his connection with the insurance company for the purpose of impeaching his credibility. *Jablonowski v. Modern Cap. Mfg. Co.*, 279 S. W. 89 (Mo. 1925). A juror can likewise be challenged on this ground to prevent a biased verdict. *Fulcher v. Pine Lumber Co.*, 132 S. E. 9 (N. C. 1926). *Contra: Adams v. Cline Ice Cream Co.*, 131 S. E. 867 (W. Va. 1926). Courts differ as to the method of such questioning. (1919) 29 YALE LAW JOURNAL, 241; (1926) 10 MINN. L. REV. 632; (1920) 20 MICH. L. REV. 563. Such evidence does not tend to discredit the defendant's testimony. 2 WIGMORE, EVIDENCE (2d ed. 1923) 969. It is possible to argue that because a defendant carried insurance he may not have exercised due care. *Cf. Walters v. Appalachian Power Co.*, 75 W. Va. 676, 84 S. E. 617 (1915). Or that such evidence might impeach his good faith in contesting the suit, inasmuch as defense of such suit may be a condition precedent to his claim against the insurer. *Miller v. Central Taxi Co.*, 110 Neb. 306, 193 N. W. 919 (1923). The objection to such evidence is the general tendency of juries, whenever possible, to shift losses to the insurance companies. *Ronan v. Trumbull Co.*, 131 Atl. 788 (Vt. 1926). Hence most courts exclude such evidence on this ground unless the "witness" exception is applicable. *Coblentz v. Jaloff*, 115 Or. 656, 239 Pac. 825 (1925); *Sutton v. Bell*, 79 N. J. L. 507, 77 Atl. 42 (1910). In the instant case, since the trial judge felt that the circumstances were such as to render the admission unfair, the appellate court should not have rendered a contrary ruling.

PLEADING—PARTIES—BRINGING IN THIRD PERSONS—SECTION 193 OF N. Y. C. P. A.—In an action by an infant against his vendor to recover a payment made under a land contract, avoided by the plaintiff on the ground of infancy, the defendant moved to bring in the plaintiff's alleged principal as a defendant under the N. Y. C. P. A., § 193. This section provides that "where any party . . . shows that some third person . . . is or will be liable to such party . . . for the claim made against such party . . . the court . . . may order such person to be brought in." *Held,* that the motion be denied on the ground that the third parties were not "presently unconditional indemnitors." *Zauderer v. Market St. L. B. Realty Corp.*, 218 N. Y. Supp. 669 (Sup. Ct. 1926).

Until recently in this country, in actions historically triable at law for money judgments only, the defendant could not bring in third parties over

the objection of the plaintiff. *Bauer v. Dewey*, 166 N. Y. 402, 60 N. E. 30 (1901); *Carroll v. Weaver*, 65 Conn. 76, 31 Atl. 489 (1894). Section 193 of the N. Y. C. P. A., following the trend of the older English statute, has changed this in New York. CARMODY, SUPPLEMENT TO N. Y. PRACTICE (1924) §§ 176, 193; ENG. PRAC. RULES, Order XVI, rule 48. Other jurisdictions have reached somewhat similar results by use of the cross-petition. *Nat'l Surety Co. v. Atascosa Ice Co.*, 273 S. W. 821 (Tex. 1925); *Bowman v. City of Greensboro*, 130 S. E. 502 (N. C. 1925). Though the English statute is expressly limited in application to cases of "contribution or indemnity," the courts seem to have given it a liberal interpretation. *Payne v. British Time Recorder Co.* [1921] 2 K. B. 1 (vendor's seller brought in by vendor in action by buyer for breach of warranty); (1918) 54 CAN. L. J. 382; (1918) 52 Ir. L. T. 149; WHITE, THE ANNUAL PRACTICE (1924) 281. Despite the fact that the language of the New York provision is much broader, a few decisions under it have been less liberal than the English cases. *May Co. v. Mott Ave. Corp.*, 121 Misc. 393, 201 N. Y. Supp. 189 (Sup. Ct. 1923) (in suit by broker for commission against vendor, latter not allowed to bring in vendee who represented there was no broker); *New Netherland Bank v. Goodman*, 201 N. Y. Supp. 188 (Sup. Ct. 1923) (bailee not allowed to bring in receiver of goods in suit by bailor). *Cf. Krombach v. Killian*, 215 App. Div. 19, 213 N. Y. Supp. 138 (2d Dept. 1925) (insured not allowed to bring in insurer). More recent cases, however, have been more liberal. *Travlos v. Commercial Union*, 217 App. Div. 352, 217 N. Y. Supp. 459 (1st Dept. 1926) (re-insurer brought in by insurer); *Williams v. Thompkins*, 206 N. Y. Supp. 637 (1st Dept. 1924) (person assuming responsibility on notes brought in by maker); *Kleinman v. Chase Nat'l Bank*, 124 Misc. 173, 207 N. Y. Supp. 191 (1st Dept. 124) (indorser brought in by subsequent indorser); (1923) 23 COL. L. REV. 593; Rothschild, *Civil Practice in New York* (1923) 23 COL. L. Rev. 618, 630. The instant case, in limiting the application of the section, seems directly opposed to the spirit of modern procedure.

FIXTURES—CONDITIONAL VENDOR HAS NO LIEN ON THE REALTY.—The plaintiff installed electric wires and fixtures in the defendant's building under a conditional sales contract. The other defendants secured subsequent liens on the realty. After the vendee failed to pay the agreed price, the plaintiff sued for a lien upon the realty and for a decree that the premises be sold. Judgment was given for the plaintiff by the lower court. *Held*, on appeal, that the judgment be reversed on the ground that the contract provided only for retention of title and not a lien, and that no lien on the realty existed either by virtue of statute or the common law. *East N. Y. Electric Co. v. Petmaland Realty Co.*, 243 N. Y. 477, 154 N. E. 330 (1926).

Where removal of a fixture will not materially injure the premises, a vendor retaining title may assert his right against a prior mortgagee. *Detroit Steel Co. v. Sisterville Brewing Co.*, 233 U. S. 712, 34 Sup. Ct. 753 (1914); *Holt v. Henley*, 232 U. S. 637, 34 Sup. Ct. 459 (1914); *Power Mfg. Co. v. Bailey*, 131 Atl. 696 (Del. Super. Ct. 1925); *Davis v. Bliss*, 187 N. Y. 77, 79 N. E. 851 (1907); *DeBevoise v. Maple Ave. Const. Co.*, 223 N. Y. 496, 127 N. E. 487 (1920). As against a subsequent real mortgagee, there is said to be some conflict as to the rights of a conditional vendor. (1921) 13 A. L. R. 478, note. But usually where the chattels are found to be removable the conditional vendor is protected. *Ritchie v. So. Gem Coal Co.*, 12 Fed. (2d) 605 (E. D. Ill. 1926) (chattels held irremovable); *Anglo-American Mill Co. v. Community Mill Co.*, 41 Idaho, 561, 240 Pac. 446 (1925) (chattels held removable). The mere fact that some damage

will result from removal is not enough to preclude removal. *DeBevoise v. Maple Ave. Const. Co., supra* (leaving exposed part of unplastered walls not "substantial injury"); *Central Union Gas Co. v. Browning*, 210 N. Y. 10, 103 N. E. 822 (1913) (gas ranges held removable); *cf. Kirk v. Crystal*, 118 App. Div. 32, 103 N. Y. Supp. 17 (1st Dept. 1907), *aff'd* 193 N. Y. 622, 86 N. E. 1126 (1908) (heating plant consisting of boiler and pipes through building connected with radiators held not removable). In the instant case the jury found that the equipment was not removable without material injury to the freehold. This rendered ineffectual "the reservation of property" as against any person who had not assented thereto. Uniform Conditional Sales Act, § 7; N. Y. Cons. Laws (Cahill, 1923) c. 42, § 67. The plaintiff in the instant case could have protected himself by filing a mechanic's lien at the beginning of the installation for the full amount of the contract price. *Heinlein v. Murphy*, 3 Misc. 47, 22 N. Y. Supp. 713 (Brooklyn City Ct. 1893); see *Barrett v. Schaefer*, 162 App. Div. 52, 57, 146 N. Y. Supp. 1056, 1060 (2d Dept. 1914). Such lien would be effective from the date of filing. N. Y. Cons. Laws (Cahill, 1923) c. 34, § 3. It has been held that where the chattels have been irremovably installed, and such lien has been filed, the vendor cannot enforce his rights under the conditional sales contract, on the ground of election. *Kirk v. Chrystal, supra; Bramhall, Dean Co. v. McDonald*, 172 App. Div. 780, 158 N. Y. Supp. 736 (1st Dept. 1916). Irremovability alone, however, would justify such holdings within the instant case. A reservation in the conditional sales contract of a power to file a mechanic's lien does not of itself constitute an election. *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 36 Sup. Ct. 50 (1915). It would seem that if such power were reserved to file a lien covering chattels installed, the filing of the lien as to the chattels installed should not destroy the vendor's right under the conditional sales contract as to the uninstalled chattels. But in the absence of a mechanic's lien, a few courts, in circumstances similar to those of the instant case, have protected the conditional vendor by giving him an equitable lien. *Camden v. Fairbanks*, 204 Ala. 112, 86 So. 8 (1920), 206 Ala. 293, 89 So. 456 (1921); *Wolf v. Herman Savings Bank*, 168 Mo. App. 549 (1912).

INTERSTATE COMMERCE—RECOGNITION BY STATE COURT OF FEDERAL AUTHORITY TO FIX INTRASTATE RATES.—Under the Transportation Act of 1920, § 416 [41 Stat. 484, U. S. Comp. Stat. (Supp. 1923) § 8581–4] the Interstate Commerce Commission has authority, when it "finds that any rate . . . causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate . . . commerce . . . on the other . . . or unjust discrimination against interstate or foreign commerce . . ." to "prescribe the rate . . . thereafter to be charged, . . ." The Interstate Commerce Commission, finding that intrastate rates were so low as to discriminate against Fargo, North Dakota, in interstate commerce, increased intrastate rates in Minnesota within 232 miles of North Dakota. A suit by the Minnesota Railroad and Warehouse Commission to enjoin the use of such rates was dismissed. *Held*, on appeal, that the judgment be affirmed on the ground that the court had "no authority to make or unmake" such rates. *State ex rel. Railroad and Warehouse Commission v. Northern Pac. Ry.*, 210 N. W. 399 (Minn. 1926).

The instant case is of interest in that it is a recognition by a state court of the authority of the federal government to regulate intrastate rates. Query, however, as to how great the interest of the locality discriminated against must be in proportion to the intrastate commerce affected before such recognition will be given.

TRUSTS—RESULTING AND CONSTRUCTIVE TRUSTS—PROMISSORY UNDERTAKING TO HOLD IN TRUST.—Upon the defendant's representation that certain land could be purchased to advantage for the purpose of erecting a theater, the plaintiff paid to the defendant money to purchase the land, the defendant orally agreeing to take title in her own name for the benefit of the plaintiff. The defendant purchased the land and, since a zoning resolution prohibited the erection of a theater, she subsequently contracted to sell the land to a third person, intending to keep the proceeds. The plaintiff sued to enjoin the sale, but subsequently agreed to allow the sale upon condition that the proceeds be held subject to the outcome of the suit. The lower court gave judgment for the plaintiff and the defendant appealed. *Held*, that the judgment be affirmed on the ground that the defendant held the land in trust for the plaintiff, section 94 of the Real Property Law being inapplicable since it would be unconscionable for the defendant to retain the property in view of the express agreement to hold in trust. *Waters v. Hall*, 218 App. Div. 149, 218 N. Y. Supp. 31 (1st Dept. 1926).

Normally, where lands are conveyed to one person, the consideration for which is wholly paid by another, a trust results in favor of the person who paid. *Mercury Club v. Keillen*, 153 N. E. 753 (Ill. 1926); see *O'Brien v. Gill*, 166 App. Div. 92, 97, 151 N. Y. Supp. 682, 685 (2d Dept. 1915). Such a resulting trust has been abolished in New York by statute. Real Property Law, § 94; *Garfield v. Hatmaker*, 15 N. Y. 475 (1857); *Douglas v. Kohart*, 196 App. Div. 84, 187 N. Y. Supp. 102 (2d Dept. 1921). For similar statutes, see Mich. Comp. Laws (1915) §§ 11571–3; Minn. Gen. Stat. (1923) §§ 8086–8; Wis. Stat. (1921) §§ 2077–9; Ky. Stat. (Carroll, 1915) §§ 2353–4; Kan. Rev. Stat. (1923) c. 67, §§ 406–8 (provision for preservation of trust where express oral agreement shown); Ind. Stat. Ann. (Burns, 1926) §§ 13447–9 (same). Under such a statute, some courts have not allowed proof of an oral agreement on the part of the grantee to hold the land for the one paying the consideration. Ames, *Oral Trusts in Land* (1907) 20 HARV. L. REV. 549, 555 *et seq.* *Cf. Deposit Bank v. Rose*, 113 Ky. 946, 69 S. W. 967 (1902) (return of purchase money allowed). The statute is inapplicable where a trust has been declared in writing. *Woerz v. Rademacher*, 120 N. Y. 62, 23 N. E. 1113 (1890). An express oral trust cannot be specifically enforced as such unless a "part performance" is shown. Real Property Law, §§ 242, 270. *Cf. Canada v. Totten*, 157 N. Y. 281, 51 N. E. 989 (1898). But neither section 94 nor section 242 can be availed of by the creditors of the grantee in a contest with the cestui if the grantee is willing to carry out the oral trust. *Simon v. Schurck*, 29 N. Y. 598 (1864). Nor by the grantee where a constructive trust will be imposed. *Cf. Poppenhusen v. Poppenhusen*, 68 Misc. 548, 125 N. Y. Supp. 269 (1910), *aff'd* 149 App. Div. 307, 133 N. Y. Supp. 887 (2d Dept. 1912) (grantee president of corporation paying consideration); *Widmayer v. Warner*, 192 App. Div. 499, 182 N. Y. Supp. 629 (2d Dept. 1920) (grantee orally agreed to hold only as security until payment of purchase price by buyer); *cf.* (1925) 34 YALE LAW JOURNAL, 682. Likewise where the land has been sold in accordance with the oral agreement, neither section 94 nor section 242 prevents recovery of the proceeds by the cestui, it being considered an oral trust of personalty. *Bork v. Martin*, 132 N. Y. 280, 30 N. E. 584 (1892). The basis of relief in the New York cases seems to be to prevent unjust enrichment. Where the court is convinced that the parties understood that there was to be no gift to the grantee, recovery is not denied by reason of sections 92 and 242. *Whitaker v. Westberg*, 124 Misc. 556, 208 N. Y. Supp. 638 (Sup. Ct. 1925), *aff'd* 215 App. Div. 785, 213 N. Y. Supp. 935 (2d Dept. 1925) (grantee orally promised to convey to buyer upon demand).

TRUSTS—TAXATION OF THE EXERCISE OF A POWER OF APPOINTMENT BY THE DONEE OVER A FOREIGN TRUST.—The donee of a power of appointment over a trust created and administered outside of North Carolina, the domicil of the donee, exercised the power by a will probated in that state. The res was outside of North Carolina. A tax levied under a state statute (which taxed transfers made by or in default of a power of appointment as though the property belonged absolutely to the donee of the power) was upheld by the state court. The case was taken to the United States Supreme Court on writ of error. *Held*, that the tax was a taking of property without due process of law since the trust estate had no situs actual or constructive in North Carolina. *Wachovia Bank & Trust Co. v. Doughton*, 47 Sup. Ct. 202 (U. S. 1926).

A tax levied under a statute similar to that of North Carolina has been upheld where the res was "within the state." *Orr v. Gilman*, 183 U. S. 278, 22 Sup. Ct. 213 (1902) (tax allowed under statute passed after creation of power of appointment). Tangible property is within the state of its actual situs for this purpose. *Frick v. Pennsylvania*, 268 U. S. 473, 45 Sup. Ct. 603 (1925). Intangible property, however, is said to have a constructive situs at the state of the domicil on the ground that such state controls the privilege of succession. *Silverman v. Blodgett*, 105 Conn. 192, 134 Atl. 778 (1926). But see (1927) 36 YALE LAW JOURNAL, 694. A tax like that sought to be imposed in the instant case is said to be on the privilege to exercise the power of appointment, and, within the preceding case, might be held taxable at the domicil. *Cf. Chanler v. Kelsey*, 205 U. S. 466, 27 Sup. Ct. 550 (1907). But the validity of the exercise, however, is not determined by the law of the domicil of the donee of the power, but by the law of the place where the trust is created. *Russell v. Joys*, 227 Mass. 263, 116 N. E. 549 (1917) (state of donor of power recognized appointment although not valid under laws of state of donee). And, as in the instant case, where the res of a foreign trust subject to a power of appointment is without the state, it has been held that the state of the donee can not tax. *Walker v. Treasurer*, 221 Mass. 600, 109 N. E. 647 (1915); *In re Canda's Estate*, 197 App. Div. 597, 189 N. Y. Supp. 917 (1st Dept. 1921); *In re Bowditch's Estate*, 189 Calif. 377, 208 Pac. 282 (1922). The same analysis might have been applied to the situation where a power of revocation has been reserved by the cestui-settlor over a foreign trust; but such a tax has been upheld. *Bullen v. Wisconsin*, 240 U. S. 625, 36 Sup. Ct. 473 (1916). *Cf.* (1926) 36 YALE LAW JOURNAL, 283. This holding, as pointed out in the minority opinion in the instant case, appears to be inconsistent with the decision of the majority. The present result is satisfactory in that it reduces multiple taxation, since the state where the trust is created usually taxes transfers by appointment. *In re Thorne's Estate*, 145 Minn. 412, 177 N. W. 638 (1920); *In re Hostetter's Estate*, 267 Pa. 193, 109 Atl. 920 (1920); *cf. In re Schmidlapp's Estate*, 236 N. Y. 278, 140 N. E. 697 (1923) (tax by state where trust is administered on transfer at death of non-resident who had power of revocation).

VENDOR AND PURCHASER—VENDEE'S LIEN GRANTED TO ASSIGNEE OF SUB-VENDEE.—L, having contracted to sell land to K, became unable to convey marketable title. The plaintiff, a subsequent assignee of a sub-vendee, joined as defendants his immediate assignor, the original vendee, K, and the original vendor, L, in a suit to recover the amount paid by the plaintiff on the contract of assignment, and claimed a lien on the land for such amount. L's motion to dismiss the complaint and to cancel the lis pendens on the land was granted and the plaintiff amended his complaint so as not to claim the lien. The plaintiff's assignor moved for an order vacating the can-

cellation of the lis pendens and the discontinuance against L. The motion was denied. *Held*, on appeal, that the order be reversed since the plaintiff is entitled to a vendee's lien, and his immediate assignor is entitled to such lien if compelled to return payments made by the plaintiff, as though they were the assignees of the original vendee. *Epstein v. Kroopf*, 218 N. Y. Supp. 644 (App. Div. 2d Dept. 1926).

New York seemed finally to have abandoned Fry's rule of mutuality when it held that the vendee's assignee could obtain a decree for specific performance against the vendor, conditioned upon performance by the assignee. *Epstein v. Gluckin*, 233 N. Y. 490, 135 N. E. 861 (1922). But the old spectre of mutuality was revived by a lower New York court, which, while professing to follow *Epstein v. Gluckin*, held that the vendee's assignee, having demanded specific performance from his vendor, gave the latter the right to specific performance against the assignee, since such an assignee had been held entitled to specific performance against a vendor. *H. & H. Corp. v. Broad Holding Corp.*, 204 App. Div. 569, 198 N. Y. Supp. 763 (2d Dept. 1923). This decision was widely criticized since it gave the vendor a right for which he had not contracted, and imposed on the assignee a duty he had never assumed, and also because it was believed that *Epstein v. Gluckin* had discarded the concept of mutuality as a working tool in cases of specific performance. (1923) 32 YALE LAW JOURNAL, 831; (1923) 37 HARV. L. REV. 162; (1923) 8 CORN. L. Q. 374. The same court now gives the assignee of a sub-vendee an equitable lien against the vendor to the extent of the original vendee's interest and supports its decision by reference to *Epstein v. Gluckin* and the *H. & H. Corp.* case. In the instant case, however, the plaintiff is granted not specific performance, but recovery of money paid on a contract of assignment. The plaintiff unquestionably has such a right against his assignor. The latter's assignor, in whose place he stands, can recover against his vendee under the contract of sale. *Winn v. Strong*, 196 Iowa, 498, 194 N. W. 50 (1923); *cf. Young v. Jewell*, 206 Ky. 380, 267 S. W. 164 (1924) (recovery by grantee against remote grantor for deficiency in acreage not allowed because remedy said to be against immediate grantor); but *cf. Lassiter v. Farris*, 202 Ky. 330, 259 S. W. 696 (1924) (purchaser suing for deficit in acreage properly joined grantor's grantor as party defendant). The original vendee in turn has an equitable lien on the land to the extent of the money paid to the vendor. *Davison v. MacDonald*, 124 Misc. 726, 209 N. Y. Supp. 145 (Sup. Ct. 1925). The instant decision, in allowing an action against the original vendor, avoids circuity of action, is not unfair to either the original vendor or vendee, and reaches a desirable result, a result which, however, does not inevitably follow from *Epstein v. Gluckin*. It is difficult to see any connection between the problems presented in the present case and those in the *H. & H. Corp.* case which the court in the instant case cites at great length.

WILLS—ADEMPTION AND SATISFACTION OF LEGACIES AND DEVISES.—The testator executed a will giving his son, the defendant, a one-half interest in all real and personal property. A one-quarter interest was given to each of his two grandchildren, the plaintiffs. Subsequently, the testator deeded one-half of his real property to the defendant for a nominal consideration. Upon the death of the testator, all of the personal property was used in paying the debts of the estate. The plaintiffs sued to quiet title to the remaining land, contending that the devise to the defendant was satisfied by the conveyance to him. The defendant filed a cross-bill claiming one-half of the remaining land under the will. Evidence that the deed was given in satisfaction of the devise was excluded and judgment was rendered for

the defendant. *Held,* on appeal, that the judgment be affirmed, since there can be no ademption or satisfaction of a devise of real estate. *Kemp v. Kemp,* 154 N. E. 505 (Ind. 1926).

A legacy, either specific or general, may be adeemed, or more accurately, satisfied, by a gift to the legatee during the testator's life subsequent to the making of the will. See *Kramer v. Kramer,* 201 Fed. 248, 255 (C. C. A. 5th, 1912); (1924) 24 COL. L. REV. 405, n. 2. If the testator is *in loco parentis* to the beneficiary and the gift is *ejusdem generis* as the legacy, a presumption of a satisfaction is raised. *Richards v. Humphreys,* 15 Pick. 133 (Mass. 1833); *Gibson v. Buis,* 142 Tenn. 133, 218 S. W. 220 (1919); but *cf. Johnson v. Belden,* 20 Conn. 322 (1850); *Cowles v. Cowles,* 56 Conn. 240, 13 Atl. 414 (1888). Otherwise, intention must be clearly shown. *In re Cramer,* 183 Wis. 516, 198 N. W. 386 (1924) (testator not *in loco parentis*); *Carmichael v. Lathrop,* 108 Mich. 473, 66 N. W. 350 (1896) (gift not *ejusdem generis*); *Burnham v. Comfort,* 108 N. Y. 535, 15 N. E. 710 (1888) (gift of money not satisfaction of devise of realty); *cf. In re Lefever,* 39 Pa. Super. Ct. 189 (1909) (legacy satisfied by gift of realty); *cf. Weston v. Johnson,* 48 Ind. 1 (1874); *Arthur v. Arthur,* 10 Barb. 9 (N. Y. 1850). It has been held, however, that the doctrine of satisfaction does not apply to a devise of realty, no distinction being drawn between specific and general devises. *Arthur v. Arthur, supra; Weston v. Johnson, supra,* relying on dicta in *Davys v. Boucher,* 3 Y. & Col. 397, 411 (Ex. 1839). For cases following, but criticising this view, see *Allen v. Allen,* 13 S. C. 512, 527 (1879); *Burnham v. Comfort,* 37 Hun, 216, 220 (N. Y. 1885). *Contra: Hansbrough's Ex'rs v. Hooe,* 12 Leigh, 316 (Va. 1841). This exception appears to have originated by analogizing satisfaction and revocation in applying the revocation provision in the Statute of Frauds, and the later one which was in the Wills Act. See *Davys v. Boucher, supra,* at 411; *Arthur v. Arthur, supra,* at 20, 22. Revocation, oral or implied, and ademption or satisfaction, however, rest on different bases, and should be distinguished. See *Gregory v. Lansing,* 115 Minn. 73, 77, 131 N. W. 1010, 1011 (1911); *Jacobs v. Button,* 79 Conn. 360, 365, 65 Atl. 150, 152 (1906). These statutory provisions were aimed at oral and implied revocations. See (1909) 4 ILL. L. REV. 350; (1920) 29 YALE LAW JOURNAL, 468. The fact that satisfaction is allowed in bequests and legacies indicates that there is nothing inherent in present statutes preventing satisfaction of devises. The policy behind satisfaction is to prevent double portions. See *In re Blundell* [1906] 2 Ch. 222, 226, 227. This policy appears to apply with equal force in the case of devises, and in view of the illogical origin of the rule to the contrary, such policy should control.