

## RECENT CASE NOTES

**APPEAL AND ERROR—DISOBEDIENCE BY JURY OF ERRONEOUS INSTRUCTION.**—In an action for breach of contract the trial court erroneously instructed the jury as to the measure of damages. It appeared by the affidavits of all the jurors that the measure of damages actually applied was substantially that contended for by the defendant. *Held*, on appeal, that notwithstanding the fact that the jury did not follow the erroneous instructions, but applied the correct rule, the judgment must be reversed. *Bondy v. Harvey*, 217 N. Y. Supp. 877 (App. Div. 1st Dept. 1926).

Failure of the jury to follow the erroneous instructions of the trial court is usually reversible error. *Myers v. Cassity*, 209 Ky. 315, 272 S. W. 718 (1925); *Gaylor v. Munroe*, 260 S. W. 929 (Tex. Civ. App. 1923) reversed on other grounds, 268 S. W. 724 (1925); *Lacey v. Great Northern Ry.*, 70 Mont. 346, 225 Pac. 808 (1924). But where the jury fails to follow erroneous instructions and reaches a substantially correct result there should be no reversal. *Rodgers v. Schroeder*, 287 S. W. 861 (Mo. 1926); *Louisville & N. R. R. v. Louisville Provision Co.*, 212 Ky. 709, 279 S. W. 1100 (1926); *Arkla Lumber & M'fg Co. v. West Virginia Timber Co.*, 132 S. E. 840 (Va. 1926). *Contra: Myers v. Cassity, supra*; see *Farmers' Bank & Trust Co. v. Harding*, 209 Ky. 3, 8, 272 S. W. 3, 5 (1925). Such error is not prejudicial to the appellant. *Louisville & N. R. R. v. Louisville Provision Co., supra*; *Memphis Furniture M'fg Co. v. Wenjss Furniture Co.*, 2 Fed. (2d) 428 (C. C. A. 6th, 1924). A fair and just verdict should be the end desired, not the preservation of technical and inflexible rules of procedure. (1923) 21 MICH. L. REV. 343; (1919) 17 *ibid.* 592. Decisions like the instant case result in needless and expensive delay.

**APPEAL AND ERROR—PROCEDURAL REFORM—ADMISSION OF EVIDENCE ON APPEAL.**—In an appeal of an equity case, the respondent moved that leave be granted to present for oral examination a witness, whose testimony respondent declared he was deprived of "by accident and mistake." R. I. Gen. Laws (1923) c. 339, § 30, provided that in equity cases the appellate court might grant leave to present further evidence when omitted for such cause. *Held*, that the motion be granted and order issued that the witness appear before the Supreme Court at the hearing of the appeal on the merits, and that the appellant be allowed to present contradictory evidence at that time. *Haynes v. Greene*, 134 Atl. 853 (R. I. 1926).

In attempting to limit new trials two things must be avoided: violations of the constitutional guaranty of trial by jury, and the possibility of having the new procedure substantially prejudice one of the parties in its operation. Admission of evidence on appeal, within limits, has been advocated as an expedient means of shortening litigation. SCOTT, *FUNDAMENTALS OF PROCEDURE AT LAW* (1922) 157-167; Clark, *History, Systems and Functions of Pleading* (1925) 11 VA. L. REV. 517, 550. Accordingly, statutes in several states authorize appellate courts to receive evidence which the respondent failed to offer below, provided the issue is "capable of proof by record or other incontrovertible evidence." N. J. Laws 1912, c. 231, § 28; Kan. Laws 1909, c. 182, § 580; Mass. Acts 1913, c. 716, § 3. In the absence of such legislation such omissions are usually grounds for granting entire new trials. *Lamb v. De Vault*, 139 Ill. App. 398 (1908); *Varner v. Interstate Exchange*, 138 Iowa, 201, 115 N. W. 1111 (1908). Such statutes have been held not to violate the guaranty of trial by jury. Pound, *Procedural Reform* (1910) 4 ILL. L. REV. 491, 505. Moreover, the constitutional guaranty of trial by jury does not extend to issues historically triable in

equity. *Swanson v. Alworth*, 209 N. W. 907 (Minn. 1926). It is often stated that the equity appellate court tries the case *de novo*. *Rubens v. Rubens*, 101 Wash. 675, 172 Pac. 831 (1918). Some statutes expressly so provide, declaring that the appellate court should not regard the finding of fact by the lower court. *E. g.*, Neb. Comp. Stat. (1922) § 9150. Some courts have construed such provisions as requiring a re-submission of all the evidence. *Commonwealth v. Haggin*, 30 Ky. L. 788, 99 S. W. 906 (1907); *cf. Kiriakos v. Fountas*, 109 Ohio St. 553, 143 N. E. 129 (1924) (similar construction given to constitutional provision granting "appellate jurisdiction" in equity suits). Under this procedure there should be no objection to appellate consideration of oral evidence not admitted below. But others have construed such statutes as requiring merely a consideration of the trial record. *Miltsch v. Tassler*, 108 Neb. 208, 187 N. W. 796 (1922). Even under such procedure there would seem to be no objection to admitting evidence on issues not tried below. But on other issues, the admission of oral evidence before the appellate court would present the difficulty of weighing oral evidence against documentary evidence. Prejudice resulting from this difficulty is not likely to occur under the instant statute for admission of the evidence is entirely discretionary with the appellate court. *Murphy v. Duffy*, 46 R. I. 210, 124 Atl. 103 (1924) (court, confronted with this difficulty, ordered new trial).

ARBITRATION AND AWARD—ARBITRATION AGREEMENT NOT ENFORCEABLE IN FEDERAL COURT.—The plaintiff, a resident of Pittsburg, entered into a contract in New York with the defendant, a resident of New York. In 1921 an arbitration clause, enforceable under the New York Arbitration Law, was incorporated into the contract. The plaintiff sued in the federal court in violation of the arbitration clause. *Held*, that since the Arbitration Law affected only the "remedy" as distinguished from the "right" of the parties, it could not deprive the federal court of jurisdiction over actions brought by non-residents. *Lappe v. Wilcox*, 14 Fed. (2d) 861 (N. D. N. Y. 1923).

Arbitration clauses from their inception have been uniformly disfavored by the courts. Cohen, *The Law of Commercial Arbitration and the New York Statute* (1921) 31 YALE LAW JOURNAL, 147, 152. Usage has compelled the courts to recognize such agreements. *Finucane Co. v. Board of Education*, 190 N. Y. 76, 83, 82 N. E. 737, 739 (1907) (damages allowed for its breach). Nevertheless, the same court held that arbitration was not a condition precedent to suit upon the contract. *Finucane Co. v. Board of Education*, *supra*; *cf. Munson v. Straights of Dover S. S. Co.*, 102 Fed. 926 (C. C. A. 2d, 1900) (where fact that nominal damages might be allowed for breach of agreement to arbitrate did not affect action on main contract). The Arbitration Law of New York made the arbitration clause irrevocable and specifically enforceable in New York State courts. *Matter of Berkovitz v. Arbib & Houlberg Inc.*, 230 N. Y. 261, 130 N. E. 288 (1921). But where the main contract is sued upon in a federal court, as in the instant case, the former difficulty is revived. *Cf. Atlantic Fruit Co. v. Red Cross Line*, 276 Fed. 319 (S. D. N. Y. 1921). In the *Matter of Petition of Red Cross Line*, 199 App. Div. 961, 191 N. Y. Supp. 949 (1st Dept. 1921) where an arbitration agreement was contained in a maritime contract, this construction gave rise to confusion. The United States Supreme Court regarded this as proper, although maritime contracts, as such, are within the exclusive jurisdiction of federal courts, since, *inter alia*, "the substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation." Brandeis, J., in *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 123, 44 Sup. Ct. 274, 277 (1924). But the Circuit Court of Appeals subsequently decided that the plaintiff could recover on the main contract by the appropriate remedies allowed him in the federal court. *Atlantic Fruit Co. v. Red Cross Line*, 5 Fed. (2d) 218 (C. C. A. 2d, 1924).

If the defendant were able to enforce his "substantive right" to arbitrate in the state court so as to obtain an award before the plaintiff recovered his judgment on the main contract in the federal court, the federal court would have to give effect to the award. See *Red Cross Line v. Atlantic Fruit Co.*, *supra*, at 121, 44 Sup. Ct. at 276. Since the enforcement of the arbitration clause would result in an award which extinguishes the obligations arising under the main contract, it would seem natural to consider it as an integral part of the main contract. Whether the Supreme Court, however, will reach that result by making the "substantive right" which the defendant has in his remedy (arbitration clause) enforceable in the federal court is still an open question.

CHATTEL MORTGAGES—PRIOR ASSENT OF MORTGAGEE IS NOT ACCEPTANCE.—

Plaintiff was requested by A to become surety on his note. She agreed to do so upon A's promise to give a chattel mortgage on his farming implements and stock. Thereafter, the mortgage was executed and delivered to the recorder who complied with instructions to record and mail to the plaintiff. Subsequently, but before the plaintiff learned of the execution of the mortgage, the defendant sheriff attached the chattels covered by the mortgage under an execution delivered to him by judgment creditors of A. The plaintiff recovered judgment in an action of replevin and the Appellate Court affirmed the judgment. *Held*, on a writ of certiorari, that the judgment be reversed, for the reason, *inter alia*, that an acceptance will not be presumed in opposition to proof that the mortgagee had no knowledge of the existence of the instrument. *Talty v. Schoenholz*, 154 N. E. 139 (Ill. 1926).

It is commonly stated that delivery of a deed is not complete until it is actually accepted by the grantee. 1 JONES, MORTGAGES (7th ed. 1915) § 501. Where, however, the grantor hands the instrument to a third party for the use of the grantee, neither the grantor nor volunteers claiming under him by virtue of descent or will can question the rights of the grantee who had no knowledge of the deed until after such intervening claims. *Bradley v. Bradley*, 185 Iowa, 1272, 171 N. W. 729 (1919); see *Rogers v. Head's Iron Foundry*, 51 Neb. 39, 45, 70 N. W. 527, 529 (1897). It is said that acceptance is presumed or that subsequent acceptance relates back to the time of delivery. See *Hibberd v. Smith*, 67 Calif. 547, 561, 4 Pac. 473, 482 (1885). In fact, however, the requirement of acceptance appears to be dispensed with for that purpose. But otherwise, where the deed was executed to a donee and, before acceptance by him, the premises were again conveyed by the grantor to a purchaser for value without notice. *Meade v. Robinson*, 234 Mich. 322, 208 N. W. 41 (1926). Also where the intervening right was that of a survivor of a joint tenancy. *Green v. Skinner*, 185 Calif. 435, 197 Pac. 60 (1921). Likewise, where a chattel mortgage was executed and delivered to a third party by a debtor to secure his creditor without the latter's knowledge, and thereafter, but before acceptance, judgment creditors of the debtor levied execution. *Evans v. Coleman*, 101 Ga. 152, 28 S. E. 645 (1897); *Kuh v. Garvin*, 125 Mo. 547, 28 S. W. 847 (1894). The same result was reached where it was a real property mortgage. *Hemstreet v. Kutzner*, 58 Ind. 319 (1877). *Contra: Merrills v. Swift*, 18 Conn. 256 (1847). And where it was a deed. *Hibberd v. Smith*, *supra*. *Contra: Nat'l Bank v. Bonnell*, 46 App. Div. 302, 61 N. Y. Supp. 521 (2d Dept. 1899). The result of the instant case, on its facts, is opposed to the current of decisions. *McDonald Land Co. v. Shapleigh Hardware Co.*, 163 Ark. 524, 260 S. W. 445 (1924); *In re Guyer*, 69 Iowa, 585, 29 N. W. 826 (1886); *Day v. Sines*, 15 Wash. 525, 46 Pac. 1048 (1896). The court relied on *Union Mutual Life Ins. Co. v. Campbell*, 95 Ill. 267 (1880). In that case, however, the grantee was a

volunteer, and the conveyance was made to him to administer for the benefit of the grantor's family, not for his own benefit. It would seem, therefore, that since actual acceptance is for some purposes dispensed with, and since no formality by way of acceptance is required, that a previous bargain based on a valuable consideration could well be held to be a "presumed" acceptance within the ritualistic requirements. Policy would seem to require such a result.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—FLEXIBLE TARIFF.—The President, pursuant to the Tariff Act of 1922, 42 Stat. 941, U. S. Comp. Stat. (Supp. 1923) § 5841-c, 19-24 (empowering him to change tariff rates after due investigation) raised the tariff on barium dioxide 50 per cent. The plaintiff brought suit to recover the excess tariff on the ground that the Act was a delegation of the legislative power in violation of sections 1 and 8 of Article I of the Constitution. *Held*, (one judge dissenting) that the relief be denied since the President carried out the expressed will of Congress, and therefore there was no usurpation of the constitutional powers of that body. *Hampton & Co. v. United States*, 49 TREAS. DEC. 595 (1926).

It is often said that legislative power can not be delegated. See 2 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (1910) 1317; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495 (1892). The terms "delegation" and "legislative powers" have become so confused, however, that the maxim has become quite meaningless. (1924) 37 HARV. L. REV. 1118. Courts have quite uniformly sanctioned "delegation" to "non-legislative" bodies of powers termed "not in any real sense" legislative. *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349 (1904) (Secretary of Treasury given power to establish tea standards). Thus an enormous amount of power not "strictly" or "exclusively" or "essentially" legislative has been delegated to administrative and executive bodies. *Inter-Mountain Rate Cases*, 234 U. S. 476, 34 Sup. Ct. 986 (1914) (Interstate Commerce Commission empowered to fix railroad rates); *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480 (1911) (Secretary of Agriculture given power to make rules and regulations for the protection of government forest reserve); *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367 (1907) (Secretary of War allowed to condemn bridges interfering with navigation). *Mahler v. Eby*, 264 U. S. 32, 44 Sup. Ct. 283 (1924) (Secretary of Labor empowered to deport aliens). In such cases the courts say that "legislative powers" are not "delegated," but merely the finding of a fact which is a "contingency" upon which the statute is to become operative. *State v. Hinkel*, 131 Wis. 103, 111 N. W. 217 (1907) (act enabling town electors to determine liquor license fee held constitutional); *State v. Zimmerman*, 197 N. W. 823 (Wis. 1925); (1925) 34 YALE LAW JOURNAL, 325; (1925) 3 WIS. L. REV. 124. The legislature's consideration of more weighty problems might seriously be interfered with were it not possible to delegate relatively unimportant matters of detail. On the other hand, there is the danger of too great a concentration of power in one man or small bureau. The instant decision represents a liberal attitude toward the delegation of legislative powers, but as pointed out in the dissenting opinion, it goes much further than previous cases.

CONSTITUTIONAL LAW—PARDONING POWER—SUSPENDED SENTENCE.—The defendant was indicted under a non-support statute which provided for fine or imprisonment or both, and empowered the court imposing the sentence to suspend the same upon the giving of a bond by the defendant conditioned on his supporting his wife. A demurrer was sustained to the indictment. *Held*, on appeal, (three judges dissenting) that the judgment

be affirmed on the ground that the suspension of the sentence was an invasion of the pardoning power of the governor. *State v. Jackson*, 109 So. 724 (Miss. 1926).

Where a constitution confers upon the executive the power to grant pardons and reprieves, the legislature cannot exercise such power. *United States v. Klein*, 13 Wall. 128 (U. S. 1871); *State v. Kirby*, 96 Miss. 629, 51 So. 811 (1910). Most courts hold that a statute authorizing a court to suspend the execution of sentence for an indefinite time, does not infringe upon the pardoning power of the governor. *State v. Starwich*, 119 Wash. 561, 206 Pac. 29 (1922) (giving court general power in cases of first offenders, except in certain cases); (1922) 26 A. L. R. 393, note. *Contra: State v. Anderson*, 43 S. D. 630, 181 N. W. 839 (1921) (statute giving court power in all criminal offenses). The legislature may impose any reasonable penalty for certain acts. See *Ware v. Sanders*, 146 Iowa, 233, 246, 124 N. W. 1081, 1085 (1910). In the instant case the statute, in effect, provides for alternative punishments: (1) fine or imprisonment or both, or (2) bond conditioned on support of wife. Inasmuch as each alternative may be regarded as a penalty, there remains an opportunity for the executive to pardon or reprieve. See *Ware v. Saunders, supra*. The main purpose of such a statute is to provide for the support of the wife. See *People v. Elbert*, 287 Ill. 458, 462, 122 N. E. 816, 818 (1919). This end is best attained by freedom of the husband, under pressure of the bond and suspended sentence. Similar statutes are in force in nearly every state. Their validity, on this ground, seems to have been questioned in but one case, and there the statute was sustained. *People v. Stickle*, 156 Mich. 557, 121 N. W. 497 (1909).

CRIMINAL LAW—"RIGHT" OF ACCUSED TO COUNSEL—REASONABLE TIME TO PREPARE DEFENSE.—The defendant was indicted for murder, and trial was set for Tuesday, February 23. He employed no counsel, and on Friday, four days before trial, one was assigned to him by the court. The defendant not being acquainted with the counsel was suspicious and refused to communicate with him, thinking he was a spy. At the trial counsel moved for a continuance on the ground that he had not had time to prepare his case in four days, two and one-half of which were holidays. The motion was denied and the defendant convicted. *Held*, on appeal, (five judges dissenting) that the judgment be affirmed since, *inter alia*, there was no showing that more time was needed to procure witnesses, or that counsel by additional time could have more "admirably" conducted the defense. *State v. Lynch*, 134 Atl. 760 (N. J. 1926).

In criminal cases refusal to allow counsel a "reasonable time" under the circumstances in which to prepare a defense is reversible error. *Goben v. State*, 201 Pac. 812 (Okla. 1921); *cf. Fuson v. Commonwealth*, 199 Ky. 804, 251 S. W. 995 (1923). Courts, however, hold that the accused must show that he suffered some disadvantage through lack of time, *e. g.*, such as impossibility of obtaining witnesses. *James v. State*, 27 Wyo. 378, 196 Pac. 1045 (1921). But other courts have recognized that the mere presence of witnesses is only a part of the preparation necessary to the conducting of a defense. *Allen v. Commonwealth*, 168 Ky. 325, 182 S. W. 176 (1916); *State v. Roberson*, 157 La. 974, 103 So. 283 (1925). Skillful conduct of the defense is not conclusive that the counsel had a reasonable time for preparation. *Smith v. Commonwealth*, 133 Ky. 532, 118 S. W. 368 (1909). The instant case, while purporting to recognize the "right" of an accused to counsel, in effect reduces it to a mere formality in that it denies an opportunity to make reasonable use of such counsel. The decision seems particularly harsh because counsel was not only unable to

share the confidence of the prisoner, but also hampered in obtaining information from outside sources due to the holidays.

**CRIMINAL PROCEDURE—RAPE—SUFFICIENCY OF INDICTMENT.**—A statute provided that every male of the age of 17 years and upwards who shall have carnal knowledge of any female "not his wife" under the age of 16 shall be guilty of rape. The indictment charged that Fathers, who was over 17 "unlawfully, willfully, and feloniously" made an assault upon Ella Slade who was under 16 "with the intent to ravish and carnally know her." The defendant was convicted. *Held*, on appeal, that the judgment be reversed on the ground that the indictment did not allege that the prosecutrix was not the wife of the defendant. *People v. Fathers*, 153 N. E. 704 (Ill. 1926).

Generally, an indictment or information for rape, or assault with intent to commit rape, need not allege that the prosecutrix was not the wife of the accused. *Curtis v. State*, 89 Ark. 394, 117 S. W. 521 (1909); *State v. Eddy*, 244 Pac. 538 (Or. 1926). See 3 BISHOP, *NEW CRIMINAL PROCEDURE* (2d ed. 1913) § 956. That the prosecutrix is his wife is usually regarded as a matter of defense. *State v. Williamson*, 22 Utah, 248, 62 Pac. 1022 (1900); *Commonwealth v. Landis*, 129 Ky. 445, 112 S. W. 581 (1903); (1910) 16 ANN. CAS. 901, note. But where the statute specifies an assault on one "not the wife" of the defendant, some courts hold that a failure to negative the marital relation renders the indictment insufficient. *Young v. Territory*, 8 Okla. 525, 58 Pac. 724 (1899); *Dudley v. State*, 37 Tex. Cr. App. 543, 40 S. W. 269 (1897); *People v. Miles*, 9 Calif. App. 312, 101 Pac. 525 (1908). *Contra: State v. Morrison*, 46 Mont. 81, 125 Pac. 649 (1912). *Cf. Rex v. Wright*, 39 Nova Scotia, 103 (1906) (waived by failure to object before pleading to indictment). If the language of the indictment clearly negatives the idea of marriage it should be sufficient. See *Curtis v. State*, *supra* at 400, 117 S. W. at 524; *State v. Haynes*, 242 Pac. 603, 604 (Or. 1926). See *contra: People v. Miles*, *supra*, at 314, 101 Pac. at 526. The difference between the surnames of the prosecutrix and the defendant in the instant case should suffice. Even in Illinois it has been held that an indictment charging a forcible assault need not allege that the prosecutrix was not the wife of the accused. *People v. Dravilles*, 321 Ill. 390, 152 N. E. 212 (1926). The instant holding seems too technical. *Cf.* (1926) 36 YALE LAW JOURNAL, 275.

**EVIDENCE—SILENCE AFTER AN ACCUSATION—EFFECT OF SUBSEQUENT DENIAL.**—While under arrest the defendants were accused of murder by one F. Both defendants remained silent for several minutes and then one made a denial and the other stated he would tell his tale in court. Evidence of these statements and the defendants' conduct was admitted in a trial for murder, and the defendants were convicted. *Held*, on appeal, (one judge dissenting) that the admission of the evidence was reversible error. *State v. Hester*, 134 S. E. 885 (S. C. 1926).

A defendant's silence after an accusation of crime, under circumstances calling for a denial, renders evidence of the accusation and the defendant's conduct admissible as showing an assent to the truth of such accusation. *State v. Won*, 248 Pac. 201 (Mont. 1926); *People v. O'Donnell*, 315 Ill. 568, 146 N. E. 490 (1925); *People v. Taylor*, 70 Calif. App. 239, 232 Pac. 998 (1924). Some courts regard the mere fact of arrest of itself as a sufficient excuse for silence, and hence exclude such evidence. *Saunders v. State*, 244 Pac. 55 (Okla. 1926). But the more practical view is that arrest is merely one of the circumstances to be considered in determining whether or not a denial should have been made. *Quinn v. State*, 109 So.

368 (Ala. 1926); (1920) 30 YALE LAW JOURNAL, 300. A spontaneous denial renders an inference of assent unreasonable, and therefore the accusation and denial are excluded. *Commonwealth v. Johnson*, 213 Pa. 607, 63 Atl. 134 (1906). Likewise where the defendant replies that his counsel has advised him to keep silent. *People v. Pfanschmidt*, 262 Ill. 411, 104 N. E. 804 (1914). *Contra: People v. Graney*, 48 Calif. App. 773, 192 Pac. 460 (1920). Where, however, the denial or reply follows a period of silence, as in the instant case, it would not seem unreasonable for the jury to draw an inference of assent, and hence the evidence might well have been held admissible. *Cf. Price v. United States*, 5 Fed. (2d) 650 (C. C. A. 6th, 1925). Since the fact of such a reply alone is equivocal, it would seem that the ruling made by the trial court, which had an opportunity to observe evidence of all the circumstances, should be conclusive.

EVIDENCE—WAIVER OF INCOMPETENCY UNDER "DEAD MAN" STATUTE.—The plaintiff sued an executor for services rendered to the deceased. On cross-examination she was asked why she had increased the amount of the claim stated in her complaint before trial. She replied by relating the services rendered to the deceased. From a judgment for the plaintiff in the lower court, the defendant appealed on the ground that the reply was improperly admitted under a statute rendering incompetent the testimony of one party to a transaction with a party now deceased. *Held*, that the judgment be reversed, because the question referred only to the plaintiff's conduct after the institution of the suit and not to any transaction with the deceased. *Pulliam v. Hege*, 135 S. E. 288 (N. C. 1926).

Most states have "dead man" statutes rendering interested parties incompetent to testify as to past transactions with a person since deceased. 5 JONES, COMMENTARIES ON EVIDENCE (2d ed. 1926) § 2222; 1 WIGMORE, EVIDENCE (2d ed. 1923) § 578. The protection of such statutes, however, is held to be waived where the representative of the deceased calls the survivor to testify as to the transaction. *Payne v. Payne*, 11 Fed. (2d) 464 (C. C. A. D. C. 1926); *Waldauer v. Parks*, 106 So. 881 (Miss. 1926). Or introduces a deposition or former testimony of the deceased. *Wooton v. Jones*, 286 S. W. 680 (Tex. Civ. App. 1926). Or cross examines the survivor as to the transaction. *Grissom v. Sternberger*, 10 Fed. (2d) 764 (C. C. A. 4th, 1926); *Kings County Trust Co. v. Hyams*, 242 N. Y. 405, 152 N. E. 129 (1926). But there is no waiver if the cross-examination is limited to matters admitted over objection. *Bowlen v. Baker*, 147 Tenn. 36, 245 S. W. 416 (1922); *In re Goehring's Estate*, 263 Pa. 47, 106 Atl. 60 (1919). Or if the purpose of the cross-examination is merely to disclose the witness's interest. *Cordingley v. Kennedy*, 239 Fed. 645 (C. C. A. 8th, 1917); *Goodlet v. Kelley*, 74 Ala. 213 (1883). Hence it seems that most courts require that the cross-examination must actually "open the door" to the transactions in question to constitute a waiver. *Grissom v. Sternberger, supra*; 5 JONES, *op. cit. supra*, § 2279. Some courts, however, are more liberal in admitting such evidence. Thus it has been held that an interested person may testify regarding a fact existing after the death of the deceased although such testimony might inferentially tend to disclose a transaction with the deceased. *Keating v. Nolan*, 51 Pa. Super. Ct. 320 (1912); *Krepps v. Carlisle*, 157 Pa. 358, 27 Atl. 741 (1893). And where the decedent's representative questioned the survivor concerning an incident occurring during the decedent's life, a relevant answer was held admissible although it went into the transactions with the deceased. *Messinger v. Patterson Savings Inst.*, 91 N. J. L. 654, 103 Atl. 178 (1918). Since, in the instant case, the question was propounded by the defendant and the answer was relevant, the court might well have held that the defendant had "opened the door" to the

transaction. Such testimony may be properly evaluated by the judge or jury, or exposed by cross-examination. While the purpose of the statutes is said to be to protect estates from fraudulent claims, a strict application may often endanger the estates of the living by preventing proof of honest claims. *Cf.* 1 WIGMORE, *op. cit. supra*, § 578.

**HUSBAND AND WIFE—MARRIAGE OF INSANE PERSONS SUBJECT TO ATTACK BY THIRD PARTIES.**—The insured's father was made the original beneficiary of his war risk insurance. Subsequently, the insured married and named his wife as beneficiary. The insured and his father died, and the plaintiffs, heirs of the father, sued on the policy, and the insured's wife intervened. The wife demurred to the plaintiff's allegation that the marriage ceremony was performed when the insured was insane. *Held*, that the demurrer be overruled on the ground that any contract made by an insane party is "void" and may be attacked in any proceeding where its existence is in issue. *Sothorn v. United States*, 12 Fed. (2d) 936 (E. D. Ark. 1926).

A contract entered into with an insane person by a party who has no knowledge of the insanity is binding on the insane person after it has been executed. *In re Pfeil's Estate*, 134 Atl. 385 (Pa. 1926); *Molton v. Camroux*, 2 Exch. 487 (1848), *aff'd* 4 Exch. 17 (1849); but see 1 WILLISTON, CONTRACTS (1920) § 257 (all contracts by one under guardianship said to be "void"). *Contra: Jordan v. Kirkpatrick*, 251 Ill. 116, 95 N. E. 1079 (1911). Where the other party had knowledge of the insanity, however, it is "voidable" by the insane person. *De Vries v. Crofoot*, 148 Mich. 183, 111 N. W. 775 (1907) (recovery by insane person of value of land sold by him); ANSON, CONTRACTS (Corbin's ed. 1919) § 166, n. But not by a third party. *McClure Realty & Investment Co. v. Eubanks*, 151 Ga. 763, 103 S. E. 204 (1921); *cf. Porter v. Brooks*, 159 S. W. 192 (Tex. Civ. App. 1913). It has been held, however, that a marriage entered into by an insane person can be collaterally attacked. *Jenkins v. Jenkins*, 32 Ky. 102 (1834) (wife not entitled to dower); *cf. Orchardson v. Cofield*, 171 Ill. 14, 49 N. E. 197 (1898); see 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS (6th ed. 1921) § 1107. Otherwise, where the insane party has ratified such a marriage in a lucid interval. *Sabolot v. Populas*, 31 La. Ann. 854 (1879) (ratification by cohabitation); *cf. Castor v. Davis*, 120 Ind. 231, 22 N. E. 110 (1889) (court "presumed" insanity did not last a lifetime in order to protect wife's interest in the estate); *Cole v. Cole*, 37 Tenn. 57 (1857); but see TIFFANY, DOMESTIC RELATIONS (3d ed. 1921) 20. But where collateral attack has been allowed, the facts have usually disclosed that the other party induced the insane person to marry in order to get his property. *Cf. Orchardson v. Cofield, supra*. Marriages by insane persons are now generally controlled by statutes. Some declare the marriages invalid from the date of a judicial annulment decree. Ark. Dig. (Crawford, 1921) § 7041; N. Y. Cons. Laws (Cahill, 1923) c. 14, § 7. Others prohibit certain marriages, including marriages by insane people. Under such a statute it has been held that a prohibited marriage cannot be attacked after the death of one of the parties. *Lau v. Lau*, 122 Atl. 345 (N. H. 1923) (widow's rights recognized); *cf. Bruns v. Cope*, 132 Ind. 289, 105 N. E. 471 (1914) (same result where such marriages were declared "void" by the statute). Thus it appears that there is a tendency to shield such marriages from collateral attack. The instant decision seems undesirable for it would appear that the widow should be protected in the absence of proof that any undue advantage was taken of the insane person.

**INSURANCE—TRUSTEE OF BANKRUPT BENEFICIARY CORPORATION ENTITLED TO CASH VALUE.**—The defendant issued insurance policies on the life of A,

the chief stockholder and vice-president of the beneficiary corporation. The premiums were paid by the corporation. The insured listed the cash value of the policies as assets on the corporation's books. The corporation became bankrupt, and the insured, under a reserved power in the policies, named a new beneficiary. The trustee in bankruptcy sued for the cash value of the policies. *Held*, that the plaintiff is entitled to recover. *MacLaren v. Mutual Life Ins. Co.*, 14 Fed. (2d) 308 (D. Minn. 1926).

The fact that the value of the policy is listed by the insured as an asset of the beneficiary does not destroy the reserved power of the insured to change the beneficiary. *Brown v. Home Life Ins. Co.*, 3 Fed. (2d) 661 (D. Okla. 1925). Nor does the possession of the policy by the beneficiary. *Jory v. Supreme Council of A. L. of H.*, 105 Calif. 20, 38 Pac. 524 (1894). Otherwise, where a gift of the policy has been made to the beneficiary. *McEwen v. New York Life Ins. Co.*, 42 Calif. App. 133, 183 Pac. 373 (1919). Or where a party is made beneficiary to secure a loan. *McGrew v. McGrew*, 190 Ill. 604, 60 N. E. 861 (1901). Nor does the mere voluntary payment of premiums prevent a change of beneficiary. *Wentworth v. Equitable Life Assur. Soc.*, 65 Utah, 581, 238 Pac. 648 (1925); *cf.* COOLEY, BRIEFS ON THE LAW OF INSURANCE (1905) 3765. Otherwise, where such payment is made in consideration of a promise by the insured not to change the beneficiary. *Jacobson v. New York Life Ins. Co.*, 199 Iowa, 770, 202 N. W. 578 (1925). Where the beneficiary is a business concern, and pays the premiums, it has been held that while the insured may change the beneficiary, the concern may recover such payments from the subsequent beneficiary upon the death of the insured. *Brown v. Home Life Ins. Co.*, *supra*. The instant case appears to be the first raising the question of the beneficiary's right that the insurance company pay the cash surrender value of the policy before the death of the insured.

MONOPOLIES—RESTRAINT OF TRADE—COMBINATION TO CONTROL SUPPLY OF LABOR.—The defendant association controlled substantially all of the American merchant marine on the Pacific coast and conducted a central employment bureau, which assigned jobs to seamen in the order of application without reference to the type of work, vessel, or voyage which the men preferred. The plaintiff, a member of the Seamen's Union, sued under the Sherman Act to enjoin the defendant from requiring a certificate from its employment bureau as a condition to employment of any person by any of its members, as an unreasonable restraint of interstate commerce. The lower court dismissed the suit. *Held*, on appeal, that the order be reversed. *Anderson v. Shipowner's Ass'n of the Pacific Coast*, U. S. Sup. Ct. Oct. T. 1926, No. 306.

Employers' associations which are formed to secure control of the labor market have been held not within the Sherman Act even though their activity "incidentally" interfered with interstate commerce. *Tilbury v. Oregon Stevedoring Co.*, 7 Fed. (2d) 1 (C. C. A. 9th, 1925); *Industrial Ass'n of San Francisco v. United States*, 268 U. S. 64, 45 Sup. Ct. 403 (1925) (agreement of employers in the building trade to refuse permits for purchase of certain building materials to employers who did not adopt "American Plan"). It has also been held that "incidental" interference with interstate commerce resulting from regulation of business in which a group of entrepreneurs is engaged does not bring the combination within the Sherman Act. *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50 (1898). In none of these cases was the end ultimately desired the termination of interstate shipments of commodities, *i. e.*, the restraining of interstate commerce. In the first two the end was rather to strengthen the position of the members of the combination in the bargaining competition with their workers, and in the latter to reasonably regulate business. Striking employees on interstate

carriers have been privileged to strike under the Clayton Act even when the substantial interference with interstate commerce would seem to have been neither "incidental" nor "indirect." *Michaelson v. United States*, 266 U. S. 42, 45 Sup. Ct. 18 (1924). But the court in the instant case refused to allow an entrepreneur association to control any "instrumentality of commerce," whether material equipment or labor supply, to the detriment of interstate trade or commerce. It is significant that the court seemed to abandon the argument used in the *Industrial Ass'n* case, *supra*, that it would be inconsistent to hold unlawful an employer's combination to frustrate activity of employees, since an agreement by employees to strike with the object of closing a mine, but which indirectly interfered in like degree with interstate commerce, had not been held unlawful under the Sherman Act. *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 42 Sup. Ct. 570 (1922). The purpose of the Shipowners' Association in the instant case was not different from that of the defendants in either the *Tilbury* case, *supra*, or the *Industrial Association* case, *supra*. *Query*: Is a different conclusion reached (1) because the court did not like the specific practices of the defendant, (2) because the restraint was more extensive as a matter of fact than in the previous cases, or (3) because the court recognized that a different treatment of combinations to control the supply of labor, organized on the one hand by employers' associations, and on the other by labor unions, may be justified on economic and social grounds, as well as under the Clayton Act, although in both cases interstate commerce is affected.

PROCEDURE—INSURANCE—PROOF OF WAIVER OF CONDITION UNDER AN ALLEGATION OF PERFORMANCE.—In an action on a fire insurance policy the plaintiff alleged that he had complied with all the conditions. At the trial the plaintiff's evidence was admitted to show a waiver of the non-fulfillment of the condition that the assured furnish proofs of loss. Judgment was given for the plaintiff. *Held*, on appeal, that the judgment be reversed on the ground that the evidence admitted was inconsistent with the allegations of the complaint. *Aetna Ins. Co. v. Hughes*, 249 Pac. 908 (Okla. 1926).

In ordinary breach of contract actions, most courts require waiver of non-fulfillment of condition to be specifically alleged in order that proof of it may be admitted at the trial. *Flickinger v. Wrenn Ins. Co.*, 172 Calif. 132, 155 Pac. 627 (1916); (1925) 11 CORN. L. Q. 394. But in insurance cases, where the defendant's general denial or demurrer is the last plea of record, as in the instant case, some courts hold such allegation unnecessary. *Fraternal League v. Sweeney*, 184 Ind. 378, 111 N. E. 305 (1916); *Makos v. Banker's Accident Ins. Co.*, 234 S. W. 369 (Mo. 1921). *Contra*: *Kahler v. Iowa Ins. Co.*, 106 Iowa, 380, 76 N. W. 734 (1898); *United Benevolent Soc. v. Shepherd*, 66 S. W. 577 (Tex. Civ. App. 1902); (1926) 20 ILL. L. REV. 499. But if the plaintiff specifically denies the defendant's plea of non-fulfillment of condition, failure to allege a waiver in the complaint or reply bars proof of it at trial. *Dwelling-House Ins. Co. v. Johnson*, 47 Kan. 1, 27 Pac. 100 (1891). *Contra*: *Pace v. American Cent. Ins. Co.*, 173 Mo. App. 485, 158 S. W. 892 (1913). Where by statute it is unnecessary that the plaintiff reply to the defendant's plea, most courts do not require a special allegation in the complaint. *Norris v. Hartford Ins. Co.*, 57 S. C. 353, 35 S. E. 572 (1900); *Mabee v. Continental Casualty Co.*, 37 Idaho, 667, 219 Pac. 598 (1923). *Contra*: *Insurance Co. v. Gore*, 284 S. W. 1107 (Ky. 1926); *cf. Volunteer Life Ins. Co. v. McGinnis*, 25 Ga. App. 508, 103 S. E. 824 (1920). At least two jurisdictions with such statutes have required a special allegation where the waiver is of what is termed a "promissory warranty." *Anderson v. Fidelity Ins. Co.*, 116 Misc. 679, 190 N. Y. Supp. 548 (Sup. Ct. 1921) (agreement to furnish statement as to origin of fire); *Aronson v. Frankfurt Ins. Co.*, 9 Calif. App. 473, 99 Pac. 537 (1909) (notice

of loss); but *cf. Miller v. Union Indemnity Co.*, 209 App. Div. 455, 204 N. Y. Supp. 730 (4th Dept. 1924). But not where the waiver is of a "warranty." *Black Co. v. London Pav. Co.*, 190 App. Div. 218, 180 N. Y. Supp. 74 (4th Dept. 1919) (statement as to amount of losses suffered by insured for period before application); *Raulet v. N. W. Nat'l Ins. Co.*, 157 Calif. 213, 107 Pac. 292 (1910) (incumbrance on property at time of application); (1919) 5 CORN. L. Q. 351. Even those courts which require a special allegation of waiver are liberal in construing the pleadings as being sufficient to allow proofs of the waiver. *Sun Fire Office v. Fraser*, 5 Kan. App. 63, 47 Pac. 327 (1896); *Miglier v. Phoenix Ins. Co.*, 102 Misc. 461, 169 N. Y. Supp. 45 (Sup. Ct. 1918); *cf. Continental Ins. Co. v. Chance*, 48 Okla. 324, 150 Pac. 114 (1915). Although more cases are probably in accord with the instant case, yet it seems out of line with the modern pleading tendency toward simplified procedure.

QUASI-CONTRACTS—RECOVERY OF PURCHASE MONEY PAID UNDER A CONTRACT FOR THE SALE OF LAND AFTER BREACH BY THE VENDEE.—The plaintiff, after giving \$500 in part payment under a contract to purchase land, refused to perform further. Nearly a year later, the plaintiff notified the defendants of his readiness to complete the purchase, but the defendants nevertheless sold the land to other persons. Time was not made of the essence by the contract, nor was there any provision for forfeiture. The plaintiff sued on the common counts for money had and received to recover the purchase money paid. The lower court gave judgment for the defendants. *Held*, that the judgment be reversed. *Chandler v. Wilder*, 110 So. 306 (Ala. 1926).

Where both parties are in default at the time stipulated for performance, it would seem that recovery of the purchase money paid should be allowed. KEENER, QUASI-CONTRACTS (1893) 229; *cf. Dent v. Johnson*, 111 Neb. 162, 195 N. W. 938 (1923); *Liebling v. Renfer*, 211 Ill. App. 370 (1918). Where the vendee is materially in default, but the vendor is ready and willing to perform, the majority of the cases deny recovery to the defaulting vendee. *Jensen v. Corning Farm Co.*, 49 Calif. App. 681, 194 Pac. 83 (1920); *Gibson v. Brannum*, 107 Okla. 130, 230 Pac. 861 (1924); WOODWARD, QUASI-CONTRACTS (1913) § 177. *Contra: Dooley v. Stillson*, 46 R. I. 332, 128 Atl. 217 (1925); See 3 WILLISTON, CONTRACTS (1920) § 1476. This result, apparently, is reached whether or not there is a forfeiture provision in the contract. *Friedland v. Argentor Holding Corp.*, 214 App. Div. 242, 211 N. Y. Supp. 896 (1st Dept. 1925) (forfeiture provision); *Moss v. Rubenstein*, 117 Misc. 385, 191 N. Y. Supp. 496 (Sup. Ct. 1921) (no forfeiture provision). And, generally, without considering whether the breach is wilful, or unintentional or unavoidable. WOODWARD, *loc. cit. supra*; 3 WILLISTON, *loc. cit. supra*. The rule obtains though the vendor re-sells the land after the vendee's default. *King v. Milliken*, 248 Mass. 460, 143 N. E. 511 (1924); *Sanders v. Brock*, 230 Pa. 609, 79 Atl. 772 (1911); *cf. Harrington v. Eggen*, 51 N. D. 87, 199 N. W. 447 (1924). It has, however, been intimated that if the purchaser subsequently reconsiders his refusal and tenders payment to the vendor before the resale, the vendor might be put to an election to perform the contract or to return the payments received. *Sanders v. Brock, supra*. See Ballantine, *Forfeiture for Breach of Contract* (1921). 5 MINN. L. REV. 329, 336. Although the instant case presents such a situation, it was not decided on that ground. It would seem that a subsequent change of mind should not alter the legal relations arising from the repudiation. The court in the instant case seems to have treated the subsequent resale as a "rescission" of the contract, entitling the vendee to a refund of the money paid. *Cf. Pierce v. Staub*, 78 Conn.

459, 62 Atl. 760 (1906). Although the formalistic approach of the court to the problem through the unanalyzed concept of "rescission" is to be regretted, the actual result would appear to be sound. It has been argued that to permit a wilful contract breaker to recover payments made would be to encourage breach of contract. WOODWARD, *op. cit. supra*, §§ 167-172. But a denial of recovery imposes a forfeiture correspondingly harsher as the degree of partial performance is greater, and may result in giving to the defendant more than a fair compensation for the non-completion of the contract. *Britton v. Turner*, 6 N. H. 431 (1834) (contract of service); Ballantine, *loc. cit. supra*. "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else." HOLMES, COLLECTED LEGAL PAPERS (1921) 167, 175. In other situations a defendant's dereliction is measured by the plaintiff's harm, and it is believed that here also a more desirable result will be reached by permitting recovery for benefits conferred by part performance, but holding the vendee to strict accountability for any damage caused by his default. For the attitude of the courts to the same problem in cases of contracts for the sale of goods, building contracts, and contracts of service, see WOODWARD, *op. cit. supra*, §§ 174-176; Ballantine, *loc. cit. supra*; (1923) 33 YALE LAW JOURNAL, 101; (1923) 2 WIS. L. REV. 318; (1921) 69 U. PA. L. REV. 187.

TAXATION—INCOME TAX—PARTNERSHIP PROFITS ASSIGNED TO WIFE TAXABLE TO HUSBAND.—By federal statute [40 Stat. 1070, (1919) U. S. Comp. Stat. (Supp. 1919) § 6336 ½ i] members of partnerships are liable for income tax on their distributive share of the net profits, but only in their individual capacity. By an agreement, terminable by either party at any time, the plaintiff assigned to his wife one-half of his share in the future profits of a partnership, and she became responsible for one-half of any losses that he might sustain as a partner. The plaintiff paid, under protest, an income tax assessed upon his entire share. In a suit to recover part of the tax, the lower court found for the Collector. *Held*, on appeal, (one judge dissenting) that the tax was proper and would be even though the assignment were absolute. *Mitchel v. Bowers*, 15 Fed. (2d) 287 (C. C. A. 2d, 1926).

It has recently been held that since income from community property is at the disposition of the husband, it is taxable wholly to him. *United States v. Robbins*, 269 U. S. 315, 46 Sup. Ct. 148 (1926). But *cf. Maggs, Community Property and the Federal Income Tax* (1926) 14 CALIF. L. REV. 351, 356. By this criterion, the tax in the instant case seems proper, since the power to terminate the assignment at any time gives the assignor the option of resuming his right to the profits or of allowing them to pass to his wife. But the same result seems desirable, even though the assignment were absolute, where there is an attempt to evade the surtax. Thus the Treasury has consistently ruled that assignment of future profits, with or without consideration, does not exempt them from taxation as income of the assignor. (1923) A. R. R. 2245, II-1 Cum. Bull. 61; (1924) S. M. 2763, III-2 Cum. Bull. 53; (1926) S. M. 4892, V-7 Weekly Bull. 10. These rulings cite as analogies, holdings that payments by a lessee directly to the stockholders of a lessor company constitute taxable income to the lessor company. *Blalock v. Georgia Ry. & Electric Co.*, 246 Fed. 387 (C. C. A. 5th, 1917); *Rensselaer & Saratoga R. R. v. Irwin*, 249 Fed. 726 (C. C. A. 2d, 1918). The reason given for such holding is that except for this arrangement, the payments would be made to the lessor company, and hence would be taxable to it. See *West End St. Ry. v. Malley*, 246 Fed. 625, 627 (C. C. A. 1st, 1917); *Houston Terminal Co. v. United States*, 250 Fed. 1, 5 (C. C. A. 5th, 1918); *cf.* (1922) Mim. 3040, II-1 Cum. Bull. 48.

TRUSTS—CHARITABLE TRUSTS—POWER OF EQUITY TO PERMIT MORTGAGING OF TRUST PROPERTY.—Land and buildings were deeded in trust to be used as an educational institution, the deed containing a provision against alienation or encumbrance. The buildings fell into such decay that it became necessary to mortgage the trust property to preserve it. The heirs of the donor sued to enjoin execution of the mortgage. The lower court gave judgment for the defendants. *Held*, on appeal, that the judgment be reversed on the ground that the court could not authorize the mortgage, because it would violate the intent of the donor. *Lovelace v. Marion Institute*, 110 So. 381 (Ala. 1926).

Equity courts, under the "judicial cy pres" doctrine, are said to have power to carry out the purpose of the settlor as nearly as possible where it is impracticable to follow the exact terms of the trust. BOGERT, TRUSTS (1921) 225. But the "prerogative cy pres" power, applied in England whenever the purpose of the charity is illegal, or where the property is left to charity generally, is said, in America, to be vested in the various legislatures. *Mormon Church v. United States*, 136 U. S. 1, 10 Sup. Ct. 792 (1889); 4 KENT, COMMENTARIES (13th ed. 1884) 581, n. (b). Most American courts profess to administer charitable trusts under the guise of judicial cy pres; but many of the actual holdings are as liberal as could be expected under the "prerogative power." *Adams v. Page*, 76 N. H. 96, 81 Atl. 1074 (1911) (property left to found a hospital; court applied it to one already in existence); *In re Y. W. C. A.*, 96 N. J. Eq. 568, 126 Atl. 610 (1924) (land devised for permanently maintaining home for working girls sold, and proceeds administered for their benefit); *Minot v. Baker*, 147 Mass. 348, 17 N. E. 839 (1888) (trustee who was designated to select charitable beneficiaries died; court applied fund according to its own plan). Thus in a number of cases there seems to be little factual distinction between the "judicial" and "prerogative" cy pres doctrines. It has been stated that American courts apply both. 2 REDFIELD, WILLS (3d ed. 1876) 544; criticized by PERRY, TRUSTS (6th ed. 1911) 1182, n. 1. The court in the instant case concedes that it has equitable jurisdiction to "uphold . . . enforce and prevent the abuse" of charitable trusts. Such has been the holding of the Alabama courts. *Williams v. Pearson*, 38 Ala. 299 (1862) (devise to township for benefit of pauper children upheld); *Johns v. Birmingham Trust Co.*, 205 Ala. 535, 88 So. 835 (1921) (devise to defendant to select as beneficiary an association which cared for orphan children); cf. *Universalist Convention of Alabama v. May*, 147 Ala. 455, 41 So. 515 (1906) (cy pres doctrine repudiated because based upon prerogative of crown). Other courts, under their "general equitable jurisdiction" have apparently sanctioned a sale of the trust res where its retention as such was no longer practicable. *Town of South Kingstown v. Wakefield Trust Co.*, 134 Atl. 815 (R. I. 1926); *Patton v. First Presbyterian Church of Greenville*, 129 S. C. 15, 123 S. E. 493 (1924). Thus it appears that there is no inherent disability in equity jurisprudence to prevent a court from authorizing a mortgage in a case such as the instant one. Whether or not such power should be exercised ought to be controlled by the needs of the beneficiary and not by a self-imposed limitation deduced from the technical lack of authorization by the settlor, or his supposed intent.