RECENT DECISIONS.

ADMINISTRATION—REPLEVIN AGAINST EXECUTOR. Defendant's testator was bailee of paintings belonging to plaintiff, who sued defendant as executor for the possession of the goods or their value. *Held*, the possession lawfully devolved upon the executor as bailee, and the rule that executors are liable in their representative capacity to the true owner for property received by them in such capacity applies. *Moran* v. *Morrill* (1903) 78 App. Div. 440.

The general rule is that an executor cannot subject the estate in his hands to any new liability either by his contract or his wrongful act. *Van Slooten* v. *Dodge* (1895) 145 N. Y. 327. An action to recover a chattel is *ex delicto*, *Wall* v. *De Mitkiewicz* (1896) 9 D. C. App. Ca. 109, *Rector* v. *Chevalier* (1823) 1 Mo. 345, the wrongful detention being the gist of the action. N. Y. Code Civ. Proc. § 1695; *Gildas* v. *Crosby* (1886) 61 Mich. 413. While the rule laid down in the principal case is so stated in *De Valengin* v. *Duffy* (1840) 14 Pet. 282, the decision limits the rule to a case where the estate has been enriched by money received by the executor in his representative capacity. Goods belonging to another are not part of the estate. Shep. Touchstone, 498; 2 Woerner on Administration, 2d ed. § 312; *Cooper* v. *White* (1856) 19 Ga. 554. There seems to be no authority, and certainly no logical ground, for giving a right against the estate for their unlawful detention, a personal tort by the executor, by which the estate has been in no way enriched.

CONSTITUTIONAL LAW—FEDERAL JURISDICTION—PROTECTION OF FEDERAL OFFICERS. The petitioner, while acting on the posse of a United States revenue collector, was instrumental in the arrest of one Thomas for violating internal revenue laws, and testified against Thomas at the commitment proceedings. Thereafter, and while petitioner was on his way to make another arrest, he was attacked by Thomas, and struck him in self-defence. For this he was indicted by the State grand jury. *Held*, the case was removable into the federal court, the defendant having acted "under color of office" in the exercise of "a right or authority claimed" under a federal law—U. S. Rev. Stat. Sec. 643. *Commonwealth of Virginia* v. *De Hart* (C. C., W. D. Va. 1902) 119 Fed. 626.

Where a United States officer is charged with a duty and does acts under color of his duty, which, but for his office, would be a crime against the State, the United States courts have jurisdiction, and under the act of Congress, *supra*, can remove the case from the State courts into the federal courts. *State* v. *Hoskins* (1877) 77 N. C. 530. The statute applies to deputies and assistants of marshals, when engaged in enforcing a revenue law. *Davis* v. *South Carolina* (1882) 107 U. S. 597. It would make no difference that the assault arose out of a previous transaction, as the officer on his way to make an arrest was engaged in the discharge of his duty. *In re Neagle* (1889) 135 U. S. 1.

CONSTITUTIONAL LAW—HIGHWAY EASEMENTS—COMPENSATION. A railway company operating its road in the streets of a city was compelled by legislative act to elevate its tracks by means of a viaduct which deprived plaintiff's premises of light and air. *Held*, the statute compelling the erection of the viaduct was constitutional, and, the act being essentially done by the State, plaintiff could not recover. *Muhlker* v. *N. Y. & H. R. R. Co.* (1903) 173 N. Y. 549. See NOTES, p. 347.

CONTRACTS—PUBLIC OFFICER'S BOND. The superintendent of the mint at New Orleans gave bond that he should "faithfully and diligently perform, execute, and discharge, all and singular, the duties of said office

according to the laws of the United States, then this obligation to be void and of no effect, otherwise to remain in full force and value." Section 3504, U. S. Comp. Stat. 1901, p. 2341, prescribe that "the superintendent of each mint shall receive and safely keep until legally withdrawn all moneys or bullion which shall be for the use or expense of the mint." Without personal fault on the part of the superintendent $25.000 of treasury notes were burned. *Held*, the superintendent was liable on his bond for the face value of the notes destroyed. *Smythe* v. *United States* (1903) 188 U. S. 156.

The court is fully supported, by the authorities which it cites, in holding that nothing short of an act of God or of a public enemy will excuse the performance of such a bond. The ground for granting a recovery of the face value of the notes does not seem plain. The lower court (1901, 46 C. C. A. 354) proceeds upon the ground that the bond is absolute and not one of indemnity, and there is some authority for this view. *State* v. *Gresham* (1848) 1 Ind. 190; *State* v. *Hayes* (1887) 30 W. Va. 107. This seems to have been the view of the prevailing opinion in the Supreme Court, although it is somewhat disguised in an attempt to avoid overruling *United States* v. *Morgan* (1850) 11 Howard 154, which the dissenting justices relied upon to show that such bonds were given for indemnity only.

CONTRACTS—STATUTE OF FRAUDS—WILL AS MEMORANDUM. Defendant took possession of the lands in controversy under a parol contract with his grandfather, who owned the lands, whereby it was agreed that if the defendant would live with his grandfather the latter would devise the lands to him. The defendant went to live with his grandfather who made a will as agreed. Subsequently the grandfather deeded the lands in question for no consideration to the plaintiff, who brings ejectment. *Held*, the will was a sufficient memorandum to take the case out of the statute of frauds. *Shoyer* v. *Smith* (Pa. 1903) 54 Atl. 24.

The general rule that the memorandum, in order to satisfy the statute, must contain all the terms of the contract,—*Abeel* v. *Radcliff* (N. Y. 1816) 13 Johns. 297; *May* v. *Ward* (1883) 134 Mass. 127—seems also to have been the law in Pennsylvania. *Soles* v. *Hickman* (1852) 20 Pa. St. 180; *Rineer* v. *Collins* (1893) 156 Pa St. 342. In each of the two cases cited by the court in the principal case as upholding its position, the will contained the terms of the contract; *Brinker* v. *Brinker* (1847) 7 Pa. St. 53; *Smith* v. *Tuit* (1889) 127 Pa. St. 341; but in the principal case the will apparently made no reference to any contract or to any of its terms. The ruling, therefore, seems wrong. No reliance was placed on the doctrine of part performance.

CORPORATIONS—TRANSFER OF SHARES—FORGED DEED OF TRANSFER. One of two owners of shares of stock pledged them with the defendants and gave the latter a deed of transfer on which the signature of the co-owner was forged. At the request of the defendants, who were innocent, and on the faith of the transfer deed, the corporation registered the defendants as shareholders. It was afterward made liable to the true owner. *Held*, the corporation might recover from the defendants the damages sustained. *Sheffield Corporation* v. *Barclay*, [1903] 1 K. B. 1.

In refusing to follow the opinion of LINDLEY, J., in *Simm* v. *Anglo-America Assn* (1879) 5 Q. B. D. 188, the court adopted a sound principle, and one supported by two American decisions. *Boston & Albany R. Co.* v. *Richardson* (1883) 135 Mass. 473; *Beacon* v. *Howard Ins. Co.* (1875) 42 Md. 384. Though there is but little authority upon this subject, yet upon an analogy to the implied warranty of title by the vendor of personalty, *Edwards* v. *Pearson* (1890) 6 T. L. R. 220, it would seem sound to hold the transferee impliedly warrants the genuineness of his deed of transfer. *Boston & Albany R. Co.* v. *Richardson*, *supra*. The cases, however, are inclined to place their decisions partly on the vague ground that "as between two innocent parties the loss must be borne by the party causing it." *Brown Lancaster Co.* v. *Howard Ins. Co.*, *supra*.

DAMAGES—CONTRACTS—ANTICIPATORY BREACH. Defendant newspaper contracted to buy news from plaintiff press association for ten years. After four years defendant repudiated the contract. Three years later plaintiff made an assignment in insolvency. *Held*, plaintiff is entitled to recover as damages the value of the contract from the date of breach to the date of insolvency only. *United Press* v. *Abell Co.* (1903) 79 App. Div. 550.

The party injured by a breach of contract may recover as damages the actual loss sustained—the value of the contract. *Devlin* v. *Mayor* (1875) 63 N. Y. 25; 2 Sedgwick on Damages (8th ed.) §§ 607, 609, 618. This value is to be ascertained in view of all the circumstances of the case. *Wakeman* v. *Wheeler & Wilson Mfg. Co.* (1886) 101 N. Y. 205. In the principal case the contract was personal, depending for its proper performance upon the skill, knowledge and discretion of the plaintiff as a news-gatherer. It was therefore unassignable and the ability to perform terminated with the plaintiff's assignment in insolvency. After that date, had the defendant not repudiated, the plaintiff could have earned nothing under the contract, so that to allow the plaintiff the value of the contract from breach to insolvency seems a correct application of the principle that damages are intended as compensation for the loss sustained.

DOMESTIC RELATIONS—CONSTITUTIONAL LAW—ALIMONY. The plaintiff obtained a decree of divorce, with alimony, against the defendant. The decree was modified under N. Y. Laws 1900, c. 742, passed subsequent to the decree, authorizing the Supreme Court to modify the award of alimony after final judgment. *Held*, the act was unconstitutional as to decrees entered before its passage, as depriving the plaintiff of property without due process of law. *Livingston* v. *Livingston* (1903) 173 N. Y. 377.

The court had no authority under the statutes in force at the time of the decree to modify it after final judgment. *Kamp* v. *Kamp* (1874) 59 N. Y. 212; *Erkenbach* v. *Erkenbach* (1884) 96 N. Y. 456. The question then arises whether subsequent legislation can remedy this defect. The case seems right in deciding that it cannot. Although a decree of alimony differs in some respects from an ordinary judgment, *Romaine* v. *Chauncey* (1892) 129 N. Y. 566; *In re Robinson* (1884) 27 Ch. Div. 160, it is, nevertheless, a property right substituted for the marital obligation to support. *Romaine* v. *Chauncey*, *supra*. The judgment is for the payment of money, and such an obligation is beyond the power of the legislature to modify in any manner. *Germania Savings Bank* v. *Suspension Bridge* (1899) 159 N. Y. 363; *McCullough* v. *Virginia* (1898) 172 U. S. 102.

DOMESTIC RELATIONS—FOREIGN DIVORCE—ESTOPPEL. Plaintiff sued in New York for dower. She had secured a divorce in Massachusetts, the husband being served by publication and never having submitted himself to the jurisdiction. *Held*, plaintiff having procured the decree of the Massachusetts court could not be heard to dispute its validity. *Starbuck* v. *Starbuck* (1903) 173 N. Y. 503.

The contrary decision of the court below was criticized in 1 COLUMBIA LAW REVIEW, 485. It is a matter of congratulation that the court avoided the dictum in the much criticized case of *People* v. *Baker* (1879) 76 N. Y. 78, that the plaintiff might be divorced by *ex parte* proceedings though the defendant would still be married. See *Dunham* v. *Dunham* (1896) 162 Ill. 589. Substantially the reasoning of the principal case is employed in *Kerrigan* v. *Kerrigan* (1862) 15 N. J. Eq. 146, and *In re Ellis' Estate* (1893) 55 Minn. 401.

DOMESTIC RELATIONS—FOREIGN DIVORCE—JURISDICTION. The deceased, a citizen of Massachusetts, went to South Dakota and instituted a suit for divorce. His wife put in an answer and then withdrew. The deceased, after obtaining a decree, returned to Massachusetts. A Massachusetts statute provided that if an inhabitant went to another State to procure a

divorce, the divorce should be of no force or effect. The Massachusetts court found the deceased had never obtained a domicil in South Dakota, and held the defendant in the South Dakota suit entitled to be administratrix. *Held*, the full faith and credit clause of the federal Constitution was not violated. *Andrews* v. *Andrews* (1903) 188 U. S., 14.

Under this clause of the Constitution, jurisdiction is always open to question, and a judgment may be disregarded in another State if any fact essential to jurisdiction was lacking. *Thompson* v. *Whitman* (1873) 18 Wall. 457. It is an established doctrine of the United States Supreme Court that domicil of some sort within the State is necessary to give jurisdiction to grant a divorce. *Bell* v. *Bell* (1901) 181 U. S. 175; *Streitwolf* v. *Streitwolf* (1901) 181 U. S. 179. In those cases the proceedings were *ex parte*, but in the present case the court refused to distinguish them, holding that domicil is indispensable even if both parties appear. Therefore, though the court places some reliance on the statute, the Massachusetts court could have reached the same conclusion even in its absence.

EQUITY—CLOUD ON TITLE. A leased land to B, who covenanted to pay taxes. The lease was assigned to the defendant, and the reversion to the plaintiff. The defendant later assigned the lease to one Dryden, and on taxes falling in arrears bought in the property under a tax sale and claimed adversely to the plaintiff. On demurrer to a bill to remove cloud on title, it was *held*, though the plaintiff was out of possession and ejectment would lie, still equity had jurisdiction on the ground of fraud and because the remedy at law was inadequate as a void instrument of title would be left outstanding. *Oppenheimer* v. *Levi* (Md. 1903) 54 Atl. 74.

The holding of the court that there was not an adequate remedy in this case means that ejectment would never be an adequate remedy where the defendant was claiming under a paper title, and is contrary to principle and authority, as the judgment would make the deed a *res judicata*. *Pratt* v. *Pond* (Mass. 1863) 5 Allen, 59; *Bassett* v. *Brown* (1869) 100 Mass. 355; *Dawley* v. *Brown* (1880) 79 N. Y. 390. There would have been a complete remedy at law in the ejectment which the court concedes would lie. A plaintiff cannot transfer the adjudication of a legal controversy to equity by the mere allegation of fraud. *Green* v. *Spaulding* (1882) 76 Va. 411.

EQUITY—INJUNCTION TO RESTRAIN PROCEEDINGS IN ANOTHER STATE. Defendant brought suit against plaintiff in New York, for breach of contract, and later commenced an action in Connecticut on the same cause of action. Plaintiff asked the New York court to restrain defendant from prosecuting the action in Connecticut, on the ground that it was only brought to avoid certain evidence which could be introduced in New York, but not in Connecticut. *Held*, an injunction should be granted. *Locomobile Co. of America* v. *American Bridge Co. of New York* (1903) 80 N. Y. Sup. 288. See NOTES, p. 3501.

EQUITY—SPECIFIC PERFORMANCE—CONTRACT OF HUSBAND AND WIFE TO LIVE TOGETHER. Defendant was sued for divorce, and in consideration of his wife's foregoing their differences and becoming reconciled and living with him, promised to convey certain land to trustees for the benefit of his children. The wife discontinued her action and lived with defendant. On refusal to convey, the wife and the children by their guardian brought a suit for specific performance. *Held*, the conveyance would be decreed. *Moayon* v. *Moayon* (Ky. 1903) 72 S. W. 33.

The objection that there was a want of mutuality was met by holding the reconciliation to be substantial performance. A similar case is *Barbour* v. *Barbour* (1892) 49 N. J. Eq. 429. The same result might perhaps be reached by treating the contract like a marriage settlement, where the children may sue even when one party is in default. *Harvey* v. *Ashley* (1748) 3 Atk. 607.

EVIDENCE—HEARSAY—RES GESTA. In an action on an insurance policy in which the death of the insured was the issue, the plaintiff sought to introduce a letter written by the insured after he was last seen, announcing his intention to commit suicide. *Held*, such letter was admissible as part of the *res gesta*. *Rogers* v. *Manhattan Ins. Co.* (Cal. 1903) 71 Pac. 348. See NOTES, p. 351.

EVIDENCE—PRESUMPTION OF DEATH. The owner of property taken by condemnation proceedings had been absent and unheard of by his family for more than seven years, and his widow and heirs at law claimed the compensation. *Held*, the presumption of death after seven years' absence raised by Code Civ. Proc. § 841 applies only to one on whose life an estate in land depends, and to establish death in other cases additional evidence is necessary. *In re Boerum St.* (N. Y. 1903) 66 N. E. 11.

Although the burden of proof is upon one asserting the death of a person, yet it is the general rule that if the person has not been heard of for seven years by those, if any, who, had he been alive, would naturally have heard of him, he is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death. *Bennett, Adm'r* v. *Sloman* (1900) 70 N. H. 289; *Flood* v. *Growney* (1895) 126 Mo. 262; 1 Greenl. Ev. § 41. But there is no presumption as to the time of death in most jurisdictions. *Davie* v. *Briggs* (1878) 97 U. S. 628; *Nepean* v. *Doe & Knight* (1837) 2 M. & W. 894. The principal case recognizes this general rule but refuses to apply it until all the evidence obtainable is before the court. *Matter of Tobin* (1888) 15 N. Y. St. Rep. 749.

EVIDENCE—TESTIMONY OF ARBITRATORS TO IMPEACH AN AWARD. A pending cause was by argument of the parties submitted to arbitration. An award was made, purporting on its face to be unanimous. The unanimity was denied, and in support of the denial depositions of the arbitrators were offered in evidence. *Held*, they were inadmissible. *Corrigan* v. *Rockefeller* (Ohio, 1902) 66 N. E. 95.

The point was whether the testimony of an arbitrator is inadmissible to impeach the award as that of a juror is inadmissible to impeach a verdict. The case seems to be the first in America. In Ireland no analogy between an arbitrator and a juror is recognized. *Brophy* v. *Holmes* (1828) 2 Moll. 1. In England while it has long been the rule that mistake or misconduct of arbitrators could not be pleaded in an action on the award, *Wills* v. *MacCarmack* (1762) 2 Wils. 148; *Braddick* v. *Thompson* (1807) 8 East, 344, yet there has been difference of opinion on motions to vacate awards in arbitrations entered into under rule of court. The Exchequer refused to hear such testimony as was offered in the principal case; *Phillips* v. *Evans* (1843) 12 M. & W. 309; *Haggar* v. *Baker* (1845) 14 M. & W. 9; while the Queen's Bench and the Common Pleas admitted it. *Hutchinson* v. *Shepperton* (1849) 13 Q. B. 955; *In re Hall* (1841) 2 M. & G. 847. The House of Lords finally ruled that such evidence is admissible only to show that the arbitrators acted within their jurisdiction. *Buccleugh* v. *Board of Works* (1872) L. R. 5 H. L. 418.

NEGOTIABLE INSTRUMENTS—FORGED CHECK—RECOVERY OF MONEY PAID BY MISTAKE. Plaintiff bank certified a check for $5.00, drawn on it by B. B raised the check to $500 and defendant bank cashed it. Plaintiff paid the check when presented by defendant, but the next day discovered the forgery and demanded that defendant repay the money. *Held*, plaintiff could recover. *Imperial Bank* v. *Hamilton Bank* (1902) 72 L. J. P. C. 1.

In *Cocks* v. *Masterman* (1829) 8 L. J. K. B. 77 and *London, etc., Bank* v. *Bank of Liverpool* [1896] 1 Q. B. 7 it is stated broadly that if the holder of a bill receives the money on it, and is suffered to retain it during the whole of the day, the party who paid it cannot recover it back, on discovering an irregularity, The court holds that this rule, despite the broad language used in both cases, is not applicable to the principal case. In the cases named the holder was entitled to immediate notice in order that he might at once notify the drawer and indorser, and thus fix their

liability. But in the principal case there was no indorser, and B, the drawer and forger, was not entitled to any notice. No loss having been occasioned by the delay, notice given the day after payment was within a reasonable time and sufficient to entitle the plaintiff to recover the money paid. A similar result has been reached in New York. *Goddard* v. *Bank* (1850) 4 N. Y. 147.

PLEADING AND PRACTICE—JOINT DEBTORS—JOINDER OF EXECUTOR. Four parties were joint makers of a note. Plaintiff sued three survivors, and joined with them the executor of the fourth maker, deceased, relying on N. Y. Code Civ. Proc. § 758, which provides that the "estate of a person jointly liable upon a contract with others shall not be discharged by his death." *Held*, the executor could not be joined without proof of the insolvency of the survivor. *Potts* v. *Dounce* (1903) 173 N. Y. 335.

At common law death terminated the liability of the deceased on a joint contract, but equity always gave a remedy against the obligor's estate when the survivor was insolvent or the execution against his property was returned unsatisfied, 1 Pars. Cont. 30, Parsons on Partnership § 350, *Pope* v. *Cole* (1873) 55 N. Y. 124, except that where the deceased was a mere surety there was no recovery in law or equity. *Risley* v. *Brown* (1876) 67 N. Y. 160; *U. S.* v. *Price* (1850) 9 How. 83. The principal case decides in effect that § 758 of the code gives the same remedy against the estate of the deceased at law as was always given in equity. *Matter of Robinson* (1899) 40 App. Div. 23, and *Merrill* v. *Blanchard* (1896) 7 App. Div. 167, are to the same effect. But the court says that § 758 "must be regarded as making a material alteration in the law, and as imposing a liability where none existed before." That might be true in the case of a deceased surety. *Risley* v. *Brown*, *supra*; *U. S.* v. *Price*, *supra*.

PROCEDURE—CONTEMPTS—PURGING BY OATH. After a petition in involuntary bankruptcy had been filed, on rule to commit the bankrupt for contempt, consisting of failure to turn over all his assets to the trustee, to which the bankrupt answered under oath, denying that he had failed to turn over all his property, it was *held*, the court might, notwithstanding this, commit him for contempt. *In re Shachter* (D. C., N. D. Ga. 1902) 119 Fed. 1010. See NOTES, p. 348.

REAL PROPERTY—MORTGAGES—FIXTURES. A mortgaged a factory with the fixtures and machinery twice. Thereafter B placed in the factory certain machines under a hire-purchase agreement. The machines were placed upon concrete foundations and bolted down to prevent oscillation. A then mortgaged the premises to C. Later the second mortgagee entered into possession, and subsequently B served upon A notice of non-payment of machine hire and demanded possession of the machines. Thereafter C acquired all the rights of the first and second mortgagees. B brought this action against C for the possession or value of the machines. *Held*, B could not recover. *Reynolds* v. *Ashby & Son* [1903] 1 K. B. 87.

The case is fully supported by the English rule that the machines became part of the realty and that B's license to remove them was revoked by the entry of the second mortgagee under whose right C was allowed to retain the machines. The courts of Massachusetts and Delaware hold the rights of a prior mortgagee a good defence. *Meagher* v. *Hayes* (1890) 152 Mass. 228; *Watertown S. E. Co.* v. *Davis* (Del. 1876) 5 Houston 192. In Maine neither mortgage would form a defence. *Tapley* v. *Smith* (1840) 18 Me. 12. In the other jurisdictions C would be allowed to defend on the third mortgage.

REAL PROPERTY — POWERS — EXTINGUISHMENT OF POWERS. Trustees charged, amongst other duties, with the maintenance of a lunatic, were given a power of sale. *Held*, the duration of this power, if it is not invalid because of the law against perpetuities, is a question of intention. The power is not determined so long as the lunatic is unable to call for a conveyance, even though he has become absolutely entitled to the property. *In re Jump*, [1903] 1 Ch. 129.

The accomplishment of the purposes for which the power is given extinguishes the power. For this reason the merger of the fee simple sometimes extinguishes the power. In the principal case, however, the testator's intention clearly was to provide for the lunatic. While the lunatic might, if he were competent, demand the fee simple, his insanity prevents him from doing this and leaves unaccomplished the complete fulfillment of the testator's purpose—the lunatic's maintenance. The power is, therefore, unextinguished. The case is well supported by *In re Lord Sudeley*, [1894] 1 Ch. 334, and *In re Cotton's Trustees* (1882) 19 Ch. D. 624, which hold that intention controls. It must be distinguished from cases of trust for the purposes of sale. *In re Tweedie* (1884) 27 Ch. D. 315. Several cases apparently in conflict are distinguishable on the ground of intention, as pointed out in Sugden on Powers (6th ed.) II. 509. Cf. *Wheate* v. *Hall* (1810) 17 Ves. 80.

RECEIVERS—COST OF RECEIVERSHIP—POWER TO ADJUDGE AGAINST COMPLAINANT. The authorized costs and expenditures of a receiver in the management and sale of mortgaged property exceeded the proceeds of the sale of the property. *Held*, the court, having expressly retained jurisdiction over the subject matter and the parties until the final settlement of the receiver's accounts, could render judgment for the deficit against the complainant at whose request the receiver had been appointed. *Chapman* v. *Atlantic Trust Company* (1902) 119 Fed. 257.

A receiver being an officer of the court and his authorized expenses and compensation being part of the costs of an action, it would seem to be within the plenary powers of a court of equity to impose them where it sees fit. While as a general rule the receiver looks to the subject matter of the section for reimbursement, this discretionary power of the court has been generally recognized. *Howe* v. *Jones* (1885) 66 Iowa 156; *Farmers Nat. Bank* v. *Backus* (1898) 74 Minn. 264; *Hughes* v. *Link Belt Machinery Co.* (1900) 95 Ill. App. 323. There is little authority upon the exact point decided in the main case. *Knickerbocker* v. *McKindley Coal Co.* (1897) 67 Ill. App. 291; *Ephraim* v. *Pacific Bank* (1900) 129 Cal. 589; *accord. Farmers Loan Co.* v. *Or. Pac. R. R. Co.* (1897) 31 Ore. 237, *contra.*

STATUTES—CUSTOMS LAWS - FORFEITURE OF SMUGGLED GOODS—RIGHT OF DEFRAUDED VENDOR TO RECLAIM. Plaintiff, at Antwerp, was induced by fraudulent representations to sell diamonds to H. The diamonds were seized by customs officers while H was attempting to smuggle them into the United States. Plaintiff tendered the amount paid him by H, and claimed the right to rescind the sale to H because of fraud, and to reclaim the diamonds. *Held*, plaintiff could not recover the diamonds. *581 Diamonds* v. *U. S.* (C. C. A., 6th Circ. 1903) 119 Fed. 556.

The statute provides "that if any owner, importer, consignee, agent or other person" shall attempt to evade duties the goods shall be forfeited. The position of the court is that notwithstanding H's fraud and his vendor's (plaintiff's) consequent right to rescind the sale, title and possession had vested in H and made him "owner" within the terms of the statute. The court admits the hardship to the plaintiff, but says "to permit secret claims of ownership to be asserted after forfeiture would be in plain violation of the written law." But the true owner may reclaim goods seized while in the hands of a thief or trespasser attempting to smuggle. *U. S.* v. *1150½ Pounds of Celluloid* (1897) 82 Fed. 627; *U. S.* v. *208 Bags of Kainit* (1889) 37 Fed. 326; *Cargo ex Lady Essex* (1889) 39 Fed. 765.

TAXATION—TRANSFER TAX—BANK DEPOSITS OF A NON-RESIDENT DECEDENT. The testator was a resident of Illinois and a statute of that State subjected all his personal property to an inheritance tax. He left a large sum in New York deposited on call, and had a debt owing him by a New York firm. The New York transfer tax was imposed upon these items. *Held*, no constitutional right was violated thereby. *Blackstone* v. *Miller* (1903) 188 U. S. 189.

The decision gives federal sanction to numerous opinions of the New York Court of Appeals. In *Matter of Bronson* (1896) 150 N. Y. 1, it was held that bonds of a domestic corporation in possession of a non-resident decedent were not subject to the tax, but shares of stock in such a corporation were; in *Matter of Whiting* (1896) id. 27, that bonds of a foreign corporation, owned by a non-resident decedent but physically present in New York, were taxable; in *Matter of Houdoyer* (1896) id. 37, that deposits of a non-resident in a domestic trust company were subject to the tax. The principle involved is that the tax, being on the transfer rather than upon the property itself, *State* v. *Dalrymple* (1889) 70 Md. 294, may be imposed wherever the laws of the imposing jurisdiction must be invoked to enforce the transfer. It is no constitutional objection that double taxation may result.

TORTS—NEGLIGENCE—VIOLATION OF STATUTE. The plaintiff, a child of thirteen years, was employed by the defendant to work on a printing press. The N. Y. Labor Law (sec. 70) provides: "A child under the age of fourteen years shall not be employed in any factory in this State," and makes such employment a misdemeanor. The plaintiff was injured while working around the machine. The plaintiff having shown only the breach of the statute and the injury, a nonsuit was granted in the trial court. *Held*, the breach of the statute constituted evidence of negligence te be considered by the jury together with the question of the child's contributory negligence. *Marino* v. *Lehmaier* (1903) 173 N. Y. 530. See NOTES, p. 344.

WILLS—MARSHALLING ASSETS. A will contained a general direction for payment of debts. It then created two pecuniary legacies, and made two specific devises. The undisposed of personalty and realty proved insufficient to pay the debts. *Held*, the pecuniary legatees were entitled to have the assets marshalled so that, as against the specific devisees, they might stand in the place of creditors in so far as their legacies had to abate in order to satisfy estate debts. *In re Roberts*, [1902] 2 Ch. 834.

Obviously such marshalling can be proper only when the devised land is charged with the payment of debts. *Aldrich* v. *Cooper* (1802) 8 Ves. 381; *Foster* v. *Cooke* (1791) 3 Bro. C. C. 347; *Rickard* v. *Barrett* (1857) 3 K. & J. 289. The English Courts have gone very far in construing a direction to pay debts as a charge on lands devised, and have established the rule that where lands are given to executors for conversion into a trust fund, together with a general direction to pay testator's debts, these are charged on the land. *In re Tanqueray-Willaume* (1881) 20 Ch. D. 465. The present decision, though an advance, is supported by *dicta* in *In re Stokes* (1892) 67 L. T. 223 and *In re Salt* [1895] 2 Ch. 203, which purported to overrule *In re Bate* (1890) 43 Ch. D. 600. Probably neither the principal case nor *In re Tanqueray-Willaume*, *supra*, would be law in America, where the rule is, that an intention to charge land with either debts or legacies must be plainly manifested. *Hoes* v. *Van Hoesen* (1848) 1 N. Y. 120; *Graham* v. *Little* (N. C. 1848) 5 Ired. Eq. 407; *Seaver* v. *Lewis* (1817) 14 Mass. 83.