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RECENT IMPORTANT DECISIONS

ADVERSE POSSESSION—TACKING.—To a suit in ejectment, defendant pleaded, (1) the statute of limitations of seven years, claiming adverse possession for that length of time; (2) also twenty years' adverse possession as a basis for the presumption of a grant. The possession relied upon is partially that of defendant's predecessor, between whom and defendant there was no privity. Held, (1) the defense of the statute of limitations is without merit. Successive possessions cannot be tacked to make up the period of that statute unless connected by privity; (2) but no privity is necessary to raise the presumption of a grant where the possession relied upon is continuous for twenty years, and this defense must prevail. Ferguson v. Prince, (Tenn. 1916) 190 S. W. 548.

The defendant's claim should have been rested on the statute of limitations, and not on the presumption of a lost grant. That statute should be considered as one of repose, and operate to defeat a title to land continuously held by adverse claimants for the statutory period, regardless of privity. This is the law of England, but is the minority rule in this country. Rich v. Naftziger, 255 Ill. 98, 99 N. E. 341; Wishart v. McKnight, 178 Mass. 356. The court reached the proper conclusion by employing the fiction of a lost grant, but the presumption of such a grant is correctly invoked only where the right claimed is an easement in land, and not the land itself. See 11 Mich. L. Rev. 245.

ATTORNEY AND CLIENT—QUANTUM MERUIT.—Plaintiffs, who were attorneys at Los Angeles, wired Mumford, who lived in New Jersey, that he was heir to an estate in California; sent some information and details which were used by Mumford; and asked to be employed as associate attorneys, stating terms. Later they forwarded other information at Mumford's request, and were twice consulted by Mumford's New Jersey attorney as to possible employment. They now seek to recover quantum meruit for services rendered. Held, they are entitled to no compensation. In re Mumford's Estate, (Cal. 1916) 160 Pac. 667.

To support such recovery, there must be an evident showing that the services were rendered with some understanding or expectation by both parties that compensation was to be made. In re McPherson's Estate, 129 La. 182; Paul v. Wilbur, 189 Mass. 48. And the court found no such understanding in the principal case. On the contrary, it found that the information was given under the understanding that it was necessary to an intelligent decision whether or not plaintiff's services were necessary, and not that they should be paid therefor. This presumption arose from plaintiff's own letter, stating that Mumford was "to be put to no expense unless we are employed and are successful," and this was strengthened by the fact that the plaintiffs said nothing as to their claim when it became apparent that they would not be employed. It is clear that there can be no recovery where the attorney acts without defendant's knowledge or consent, even though it be admitted
that his services were beneficial and the result valuable. *Morris & Crow v. Kesterson,* (Tex. Civ. App. 1905), 88 S. W. 277. But there may be a recovery on an implied contract on proof of knowledge of defendant that plaintiff was rendering services for him as his attorney, he expressing no dissent to their rendition. *Davis v. Walker,* 131 Ala. 204, 31 So. 554. In *Paul v. Wilbur,* supra, an attorney drew up the necessary papers for the incorporation of a railroad, which was sold by the attorney's client to defendant, who proceeded to consummate the incorporation plans. At his request, plaintiff attorney delivered said papers to defendant, and it was held that the defendant must have anticipated paying for said services, and was therefore liable. The attorney's rights against defendant were held not to be affected by an agreement, unknown to him, that defendant was taking title to the road for the benefit of the original client, who was to furnish the papers drawn by plaintiff. In *Succession of Kernan,* 105 La. 592, 30 So. 239, one of the several parties interested in the succession employed plaintiff attorney professedly for himself and his co-heirs. The latter stood by, making no objection, and availing themselves of plaintiff’s efforts, and it was held that they were also liable to him for fees. This case was relied on by plaintiff in *In re McPherson’s Estate,* supra, but there the one employing plaintiff did not profess to be employing him for the other co-heirs, but on the contrary, made them defendants in part of the litigation. The fact that the other co-heirs, through their attorneys, joined plaintiff and his client in another phase of the suit, in which they were equally benefited, was held not to render them liable in any way to plaintiff. The fact that they had employed attorneys to represent them was emphasized by the court as clearly showing that they had never considered plaintiff as being employed for them.

**Bankruptcy—Discharge Barred by Fraudulent Transfer.**—An insolvent debtor, owning a number of stores, with intention to break the leases on two of the unprofitable ones, organized a corporation, of which he held all the stock except a few shares held by his wife and another, conveyed to it the remaining stores, and after the appointment of his trustee in bankruptcy, delivered the corporate stock to such trustee. *Hold,* that the conveyance of his property to the corporation hindered and delayed the creditors, hence was fraudulent as to them and a bar to a discharge. *In re Braus,* 237 Fed. 139.

When the legal effect of the conveyance is to hinder or delay creditors, the intent will be presumed regardless of actual motives. *Logan v. Logan,* 22 Fla. 561, 1 Am. St. Rep. 212; *Matthews v. Thompson,* 186 Mass. 14, 104 Am. St. Rep. 550. In the following cases the legal effect of transfers to corporations was held to be to hinder and delay creditors: *Mulford v. Doremus,* 60 N. J. Eq. 80, 45 Atl. 688; *Kelley v. Pollock and Bernheimer,* 57 Fla. 459, 49 So. 934, 131 Am. St. Rep. 1101; *Bank v. Trebein,* 59 Oh. St. 316, 52 N. E. 834; *Benton v. Minn. Tailoring Co.,* 73 Minn. 498, 76 N. W. 265; *Kellogg v. Douglas County Bank,* 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 598. But in the following cases the holdings were to the contrary. *Plant v. Billings-Drew,* 127 Mich. 11, 86 N. W. 399; *Scripps v. Crawford,* 123 Mich. 173, 81 N. W. 1098. Where the firm is solvent independently of the stock received in ex-
change, there is of course no hindrance or delay. *Coaldale Coal Co. v. State Bank*, 142 Pa. St. 288, 21 Atl. 811. The decision in the instant case would have been the same in all jurisdictions since the sale “was only designed to change the rights of creditors and to prevent the landlords from collecting their rent.” It would seem on principle that stock is not the equivalent of chattels for the purposes of the creditors “because in practice the judgment debtor must buy in the stock at the sale, and then try to get possession of the chattels and sell them. He may or may not succeed in this without substantial delay or hindrance. That will depend upon how surely he can disregard the corporate form, which in turn depends in part upon whether he is the only shareholder, and whether there have been other debts contracted by the corporation. Even then he must have another sale.”

**Bankruptcy—Preferences.**—Jones obtained money from a bank on a note to which he had forged the names of indorsers; within four months prior to bankruptcy, and while he was insolvent, he procured his brother-in-law Dean, who had knowledge of the facts, to “take up” the notes, giving the latter a mortgage on all of his (Jones’) property. §60b of the Bankruptcy Act provides that a transfer within four months before bankruptcy shall be voidable if the person receiving the same has reason to believe it was intended to give a preference; §67e provides that if a debtor within such period makes any transfer “with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them,” it shall be rendered null and void except as to purchasers in good faith and for a fair present consideration. In the trustee’s suit to set aside the mortgage, held, that it was not voidable as a preference under §60b, but was null and void under §67e. *Dean v. Davis*, 37 Sup. Ct. 130.

The mortgage was not a preference within the meaning of §60b because it was given to secure a contemporary rather than a pre-existing debt and because its effect was to prefer the bank rather than Dean. But because Jones knew that he was insolvent, that he was making a preferential payment, and that bankruptcy would result, the lower courts were justified in concluding that the intent (or obviously necessary effect) of the transfer was “to hinder, delay, or defraud creditors” within the meaning of §67e, the operation of which is much broader than §60b, and “that Dean, who knowing the facts co-operated in the bankrupt’s fraudulent purpose, lacked the saving good faith.” In the decision are collected other cases in which it is held that a mortgage is a fraudulent conveyance where taken as security for a loan which the lender knows is to be used to prefer favored creditors; also those holding the contrary where the lender does not know that improper payments to favored creditors are intended. *Van Idenstine v. National Discount Co.*, 227 U. S. 575, 582, and *Coder v. Arts*, 213 U. S. 223, are distinguished on the grounds that in the former case the pledgee was found to have had no knowledge of the debtor’s fraudulent intent, and in the latter case it was found that the debtor had no intent to hinder, delay or defraud creditors.
Bankruptcy—Priority to Workmen and Servants.—Bankrupt milk company engaged claimants to haul milk from surrounding producers to the factory, payment to be made according to the amount hauled, with a fixed minimum, the amounts per hundred paid to claimants being deducted from the price paid to the producers; the claimants had their own routes, supplied their own teams and equipment, and were entitled, if the amount of milk hauled warranted, to engage assistants. §64b of the Bankruptcy Act gives priority to claims for wages due to “workmen, clerks, or servants.” Held, that though claimants performed services and engaged in manual labor, they were not “workmen” or “servants” within the meaning of the act. In re Footville Condensed Milk Co., 237 Fed. 136.

Subordination and personal subservience to the employer, the element which, says the court, affords the ultimate test, is lacking in this case, just as it is in the case of draymen, cahmen, expressmen, or other independent contractors. The relation of master and servant excludes the right to assign or delegate the performance of the obligation assumed. Using one's own wagons, tools, etc., does not alone remove one from the servant to the independent contractor class. In re Yoder, 127 Fed. 894; Sproks v. Lackawanna Dairy Co., 189 Fed. 287. Neither the editor of a newspaper, nor the manager of a business, even if he incidentally performs menial or clerical service or makes sales, is a workman or servant—although they are ultimately subservient to their employers. In re Greenberger, 203 Fed. 583; In re Zotti, 178 Fed. 287; In re Crown Point Brush Co., 200 Fed. 882; Blessing v. Blanchord, 223 Fed. 35; In re Continental Paint Co., 220 Fed. 189. But a travelling salesman paid by way of commissions, or a bookkeeper or steward—though incidentally serving as directors or officers—are servants. In re New England Thread Co., 158 Fed. 778; In re H. O. Roberts Co., 193 Fed. 294; In re Swan Co., 194 Fed. 749. It is difficult exactly to define the degree of, or proximity of subservience to the ultimate source of authority necessary to place one in one class or another.

Bankruptcy—Promises Made After Filing of Petition.—Defendant had been adjudicated a voluntary bankrupt, plaintiff being one of his creditors. Defendant, wishing to obtain money to effect a composition, promised to pay plaintiff's claim in full if the latter would assist him; plaintiff accordingly endorsed defendant's note for the amount needed, and the composition was carried through. After discharge, defendant repeated his promise, but without further consideration. Defendant paid the note, but refused to pay the balance of plaintiff's claim, and pleaded his discharge when sued by plaintiff. Held, that the promise to pay the balance of plaintiff's claim was fraudulent and void. Lieblein v. George, (Mich. 1916) 160 N. W. 538.

In Zavelo v. Reeves, 227 U. S. 625, 57 L. Ed. 676, 33 Sup. Ct. 365, the Supreme Court of the United States, in a case involving facts apparently identical, held that the promise was good and was not discharged, because made after the filing of the petition. The Michigan Supreme Court does not refer to Zavelo v. Reeves, and its decision is explicable only on the assump-
tion that its attention was not called to that case by counsel. As to the court's statement that defendant's promise was fraudulent and void, it is only necessary to answer, with the Zavelo case, that though an advantage accrued to the plaintiff as the result of the advancement, the pleadings do not show that it came as the result of fraud or collusion.

CARRIERS—PERSONAL INJURY.—Deceased boarded a pay-as-you-enter car, which was so crowded that he, together with many others, was compelled to ride upon the rear platform, from which he was thrown and killed by a sudden lurch of the car. His wife brings this action, and appeals from a directed verdict for defendant below. Held, it was error for court below to direct a verdict for defendant. Larskowski v. Detroit United Ry., (Mich. 1916) 159 N. W. 530.

Plaintiff in this case presented a sufficient case for the consideration of the jury, inasmuch as the deceased was riding on the platform on the implied invitation of the defendant. He was admitted when the interior was full, and this was evidence of negligence on the part of defendant, but was not negligence per se in deceased. The question should have been submitted to the jury. In the case of Camden, etc. Ry. v. Hoosay, 99 Pa. 492, the Pennsylvania court held that the plaintiff was guilty of such negligence in standing on the platform for several minutes as to defeat his right of recovery for injuries resulting from being pitched therefrom, even though every seat on the train was taken, and the aisles crowded, for it appeared that he could have found standing room inside the cars. The court stood four to three on the point. It was intimated that had he been "compelled thereto by circumstances," it would have been a question for the jury. Most courts disapprove of this strict ruling, due to a consideration of the congested condition of traffic which prevails today. Failure to provide seats was held to prevent a company from taking advantage of a rule prohibiting passengers from standing on the platform in Willis v. Ry., 32 Barb. 399. And the general holding is that if the company accepts one as a passenger on the platform or steps, even though he might have found standing room inside, he is not guilty of such negligence as defeats his right of recovery. Anderson v. Ry., 42 Ore. 505, 71 Pac. 659. And although some courts hold a company to be negligent if it permits such overcrowding as makes it necessary for passengers to ride on the platform (Stuchly v. Ry., 182 Ill. App. 337), the general rule is that the company is not liable per se for injury due to overcrowding on the platform, but only for want of due care in preventing such injuries as might reasonably be expected to result from such overcrowding. This rests on the theory that the public today acquiesces in overcrowding. Lehberger v. Ry., 79 N. J. Law 134, 74 Atl. 272; McCumber v. Ry., 207 Mass. 559, 93 N. E. 608; Anderson v. Ry., supra. But allowing passengers on the platform, the company owes them a degree of care proportionate to the danger to which they are exposed. LeBarge v. Ry., 138 Ia. 691, 116 N. W. 816. In the case of Norvell v. Ry., 67 W. Va. 467, 68 S. E. 288, the company was held liable for injuries to one necessarily on the platform, unless such passenger had contributed to the injury by his own negligence, thus holding
it negligence per se to allow overcrowding. Pennsylvania requires toward one necessarily on the platform only such care as toward any other passenger. *Pildish v. Ry.*, 61 Pa. Super. Ct. 195. In this case the theory of the *Camden* case, supra, was followed, it being held that one remaining on the platform when he might have had standing room inside assumes all the risks of his position. But this is contrary to the weight of authority.

**Constitutional Law—Interstate Commerce and Police Power.**—The Federal Supreme Court on January 22, 1917, rendered decisions in three cases, appealed from the district courts of Michigan, South Dakota and Ohio, wherein the so called “Blue Sky” laws were upheld as constitutional. These laws get their popular name from the fact that they were made to regulate those promoters whose promises were “as limitless as the blue sky.” Briefly stated, it was held that reasonable restrictions upon the operations of those engaged in the sale of “securities” was not a violation of the interstate commerce clause but was a justifiable exercise of the police power of the state. *Merrick v. Halsey & Co.*, (Michigan), 37 Sup. Ct. 227; *Caldwell v. Sioux Falls Stock Yards Co.*, (South Dakota), 37 Sup. Ct. 224, and *Hall v. Geiger-Jones Company*, (Ohio), 37 Sup. Ct. 217.

A full discussion of these cases appears on pages 369-385 of this issue.

**Constitutional Law—Religious Liberty.**—A statute of Alabama made it a misdemeanor for any person to treat or offer to treat diseases of human beings by any system of treatment whatsoever without a license. Code, §7564. An ordinance of the city of Birmingham made all misdemeanors against the laws of the State also offenses against the city. Defendant, who was not a licensed physician, employed prayer in treating a patient for various diseases, but also examined and massaged the affected parts. He contended that he was exercising his religion as embraced in the teachings of the Altrurian Church, and that the ordinance denied religious liberty in violation of the Constitutions of the United States and the State of Alabama. Held, that the ordinance was constitutional and also that the defendant practiced medicine without a license within the meaning of the ordinance. *Fealey v. City of Birmingham*, (Ala. 1916) 73 So. 296.

It is well settled that the regulation of the practice of medicine is a valid exercise of the police power. *State v. McAninch*, 172 Ia. 96, 154 N. W. 399; *People v. Tom J. Chong*, 28 Cal. App. 121, 151 Pac. 553; *In re Ambler*, 11 Okl. Cr. 449, 148 Pac. 1061; *McNaughton v. Johnson*, 37 Sup. Ct. 178. The principal case did not decide that prayers alone without recourse to material or human agencies would constitute practicing medicine under the statute, since the defendant did not limit his operations to mere prayers. This question was decided in the case of *People v. Cole*, (N. Y. 1916) 113 N. E. 790. In that case the defendant was indicted for practicing medicine without registration. At the trial he proved that he was a member of the Christian Science Church and that he gave a “treatment” by interposing with God that the disease might be cured, it being a tenet of the church that such prayer would completely cure the disease. The court in deciding the case...
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held that the defendant did practice medicine within the meaning of the statute, but a new trial was ordered because the trial court in instructing the jury failed to recognize a clause in the statute excepting the practice of the religious tenets of any church. The reasoning in this case was followed in People v. McTier, 184 Ill. App. 635. In the recent case of Crane v. Johnson, 37 Sup. Ct. 176, the Supreme Court of the United States upheld the validity of a California statute regulating the practice of medicine, which specifically excepted “treatment by prayer” and the “practice of religion.” In that case the person objecting to the statute did not pretend to use prayer in his treatment.

CONTRACTS—MUTUALITY.—Plaintiff and defendant entered into an agreement in writing whereby defendant, a manufacturer of sugar, agreed to sell, and plaintiff as a wholesale dealer in groceries, agreed to buy, all of plaintiff’s “August requirements” of sugar at a fixed price. Sugar advanced in price. Plaintiff demanded of defendant an amount of sugar alleged to be the ordinary and normal quantity used by plaintiff for his trade. Defendant declined to deliver. Held, the contract was invalid for want of mutuality. Jenkins & Co. v. Anaheim Sugar Co., 237 Fed. 278.

That the plaintiff’s obligation to buy none of its “August requirements” from any person other than the defendant, was detriment to the promisee, and sufficient consideration to support the contract, the court agreed. The presence of consideration should furnish the only element of mutuality required. The court further declared that an agreement to buy and sell the requirements of an established business in which the use of the thing “required” is but incidental to the carrying on of the business itself is valid and should be upheld, but that invalidity results when the amount of the commodity to be purchased is determined by the mere wish, desire, or caprice of the purchaser. This distinction rests on no sound legal principle. The demand for “certainty,” and for the elimination of “caprice” has probably resulted from two considerations, viz: the desire to simplify the question of damages, and the good policy of minimizing a large element of speculation which exists in such contracts. But the difficulty of ascertaining the damages of a breach can in no way touch the validity of the agreement, and if the state is to furnish the business sagacity which the parties lack, it should be offered by the legislature, not the courts. In a recent, and better reasoned, case involving the same question it was held that if the intention of the contract be clear, the mere uncertainty of the amount involved does not invalidate it. Ramey Lumber Co. v. Schroeder Lumber Co., 237 Fed. 39. This is sound. It cannot be explained on principle how an option which results from the very terms of the contract, and for which there is admittedly sufficient consideration, can defeat the validity of the agreement.

CORPORATIONS—HOLDING STOCK IN LOCAL CORPORATION BY FOREIGN CORPORATION IS “DOING BUSINESS” IN THE STATE.—A Maine corporation owned practically all the stock of an Illinois corporation organized to sell life insurance. Under its Maine charter the corporation could not sell life insur-
ance. Under the Illinois statutes it was unlawful for one corporation to hold the stock of another. Held, that the Maine corporation was “doing business” in Illinois so as to make it amenable to the Illinois statutes prohibiting such holding, and since the whole scheme was an attempt by the promoters to do indirectly what they could not do directly, it must be declared illegal. Central Life Securities Co. v. Smith, et al., (C. C. A. 1916), 236 Fed. 170.

The weight of authority is clearly against this case. Mannington v. Hocking Valley Ry., 183 Fed. 133; Peterson v. C., R. I. & P. Ry. Co., 205 U. S. 364; Conley v. Mathieson Alkali Wks., 190 U. S 406; People v. American Bell Telephone Co., 117 N. Y. 241; United States v. American Bell Telephone Co., 29 Fed. 17; Gilchrist v. Helena, &c Ry., 47 Fed. 593; Toledo Traction, Light & Power Co. v. Smith, 205 Fed. 643. And the weight of reason seems also with the majority rule. Thus in People v. Bell Co., supra, Ruger, J., says: “Doing business” in the state “must be determined from the actual character of the business carried on * * * and not from the existence of any unexercised powers reserved to it by its contracts; for the material question is whether it has, in fact, done business within the state, and, if so, what was the nature, character and extent, and not whether it possesses the natural or contractual right to carry on such business.” And in United States v. American &c. Co., supra, Jackson, J., points out that it is not sufficient to give jurisdiction in personam over foreign corporations that they have property rights, however extensive, within the district, or that they have pecuniary interests, however valuable, in a business managed and conducted by others. So control or ownership of stock is merely a status, or at most, a power; it is a right, not a transaction; passive, not active. It is elementary that a corporation holding shares is a distinct entity from the corporation whose shares are held, and that the latter is not the agent of the former so as to confer personal liability, unless secondarily by statute. In the instant case no reasons are assigned for departing from the majority rule. Three cases are cited: Col. Trust Co. v. M. B. Works, 172 Fed. 313; Dittman v. Dist. Co. of Am., 64 N. J. Eq. 537; and Martin v. Ohio Stove Co., 78 Ill. App. 105. Of these the latter two are not in point but Col. Trust Co. v. M. B. Works not only fully sustains the instant case but points out the basis for the differentiation from the main line of authority. In that case a Delaware corporation was organized to hold the stock of a Pennsylvania brick manufacturing corporation, in order to evade the stricter corporation laws of Pennsylvania. The court simply proceeded to strip away the corporate cloak assumed to evade the law. See Metcalf v. Arnold, 110 Ala. 180; United States v. United Shoe Machinery Co., 234 Fed. 127, 15 Mich. L. Rev. 78. So in the instant case it appears that the incorporators were, as the court states, trying to do indirectly what they could not legally accomplish directly. In all the cases cited for the majority rule it will be found that the holding was wholly innocent in its purpose, and in all but Conley v. Mathieson Alkali Works, supra, it was merely incidental to the rights of the parties involved, so that there were neither motives of public policy nor fraud to justify interference by the courts. Caesar v. Capell, 83 Fed. 493; Blodgett v. Lanyon Zinc Co.,
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120 Fed. 893. Thus it seems plain that the instant case is limited in its effect to removing from the application of the general rule those holding companies organized primarily to evade the law.

Corporations—Issue of Stock for Patents Under Michigan Statutes.
—The corporation was capitalized at $200,000 of which $100,000 was subscribed and $20,000 paid in cash and property. Also a contract was entered into by which $70,000 in stock was issued to A, B, & C in return for their promise to assign the American patent, when it should be issued, to an air compressor for automobiles. Later, when it was found impossible to obtain an American patent, the directors of the corporation voted to accept the foreign patents already held by A, B, & C in lieu of the American patent. Held, that this contract was in fraud of the other stockholders and that the stock issued to A, B, & C should be delivered up to be canceled, and they barred from sharing in distribution of corporate assets on dissolution. In re American Air Compressor Co., (Mich. 1916), 160 N. W. 388.

Clause 6 of §2 of the General Incorporation Laws of Michigan (How. Ann. Stat. §9533) provides that 10% of the authorized capital stock of a corporation must be paid in cash or property, and in the latter case there must be affidavits by at least three of the incorporators averring actual transfer to the corporation, and swearing to the actual value. Here it seems that $70,000 in stock was to be issued on the mere possibility of a patent, and it is difficult to conceive how a patent right in futuro could have been transferred to the corporation or how it could have satisfied the further requirement of the statute that it be transferable by the corporation and subject to levy and execution by the corporate creditors. The matter was not brought up in the case and was not mentioned in the opinion, as it was not necessary to decide the case. This is regrettable. In many corporations a large amount of stock is issued for patent rights. The Michigan statute is in terms most rigid. The evaluation of a patent right, which must be sworn to, is a difficult matter at best, and it is of the greatest importance to a large number of honest and well-intentioned citizens that the courts define just what is required of incorporators who wish to issue shares for patent rights which are necessarily more or less conjectural in value.

Evidence—Expert Testimony Not Admissible on Question of Signature by Mark.—A will was signed by a feeble man, 92 years of age, who made a mark as a substitute for his signature. Three witnesses testified that the testator had made the mark; two testifying that the testator had made the mark unassisted, while the third testified that he had aided the testator's feeble hand in making the mark. Plaintiffs contesting the will offered expert testimony to show that this was not the mark of the testator. Held, that the court properly excluded the testimony, as a mark is not "writing" within the meaning of New York Laws 1880, Ch. 36, and Laws 1888, Ch. 555, which permit the comparison of writing by experts. In re Coffrey's Will, (1916) 161 N. Y. Supp. 277.

The court decided this case upon the authority of In re Hopkins, 172 N. Y. 360, 65 N. E. 173, 65 L. R. A. 95, 92 Am. St. Rep. 746, where it was ex-
pressly held that a mark was not writing within the meaning of the above statutes. A close examination of those statutes shows that they only extend the field of expert testimony and do not declare what constitutes writing, so that the court would have decided that a mark is not writing subject to comparison by experts, without the existence of the statute. The cases holding with the instant case go on the theory that these disputed marks have no prevailing characteristic which would enable an expert to speak, with any degree of certainty, as to the identity of the person who made them; hence a comparison is improper. Some of the cases holding to the above theory are Jackson, ex dem. Van Dusen v. Van Dusen, 5 Johns. 144, 4 Am. Dec. 330; Jackson v. Jackson, 39 N. Y. 153; Shinkle v. Crock, 17 Pa. St. 159. Another line of cases go upon the theory that, since the jury must compare the mark to see if it is genuine, the comparison should be made more intelligible by comparisons made by experts. They hold that such comparison is possible; for marks made by hands trembling with old age, or by illiterate persons, have characteristics of their own differing from those made by steady hands and with intelligent design. State v. Tice, 30 Ore. 457, 48 Pac. 367.

On the question of comparison of cross-marks there is also a division of opinion. Travers v. Snyder, 38 Ill. App. 379, holds that cross-marks can not be distinguished so as to produce dependable evidence unless by some strong proof it is shown that the signer's mark had some peculiar distinguishing characteristic. See also State v. Byrd, 93 N. C. 624. The case of Shank v. Butsch, 28 Ind. 19, strongly intimates that cross-marks are writing and subject to the same rule as other signatures.

Evidence—Unauthenticated Books of Entry.—Plaintiff claims on contracts for sawing lumber for the defendant. Carruth, an employee of plaintiff, kept account of the work done on tallyboards at the mill, from which, as well as from oral reports of Carruth, plaintiff made up the book admitted in evidence. Carruth was out of the state and was not produced to authenticate these figures, nor was any attempt made to obtain his deposition; on this ground defendant objected to the admission of the book. Held, this book was properly admitted, on grounds of convenience and necessity, and that such admission must be left to the discretion of the trial court. Squires v. O'Connell, (Vt. 1916) 99 Atl. 268.

The court justified the entry of the book without authentication on grounds of practical convenience. Formerly, when employers, engaged in small industries, had only a few employees, strict rules of authentication may have been quite practicable; but nowadays large concerns employ thousands of men, many of whom are obliged to make individual reports from which the books must finally be made up, and the strict rule would work severe inconvenience. The courts are facing this practical difficulty, and are as above, leaving it to the discretion of the trial court to determine when such authentication may be dispensed with. The reliability of the present systems of bookkeeping as opposed to the old slipshod methods, seems to be another reason for relaxing the rigid rules of authentication. 2 Wigmore, Evid., §§1521, 1530; Griffith v. Boston & Maine Ry. Co., 87 Vt. 278, 89 Atl. 220;

Evidence—Value of Services Measured by Union Scale.—Plaintiff sued on a mechanic's lien to recover for labor and materials used in doing plumbing for defendant. Evidence was admitted showing the union rate of wages for journeymen plumbers. Defendant objected because it had not been shown that the contract was based upon union prices. Held, that the trial court properly admitted the evidence. Schalich v. Bell, (Cal. 1916), 161 Pac. 983.

In determining the value of services courts have quite generally excluded evidence tending to show rewards for similar services in analogous cases, because it raises too many collateral issues; yet it would seem that such a method of showing the proper amount of recovery would be most accurate. Harris v. Russell, 93 Ala. 59, 9 So. 541; McKnight v. Detroit & M. Ry. Co., 135 Mich. 307, 97 N. W. 772. In Seurer v. Horst, 31 Minn. 479, 18 N. W. 283, proof of wages received by another employee of defendant was excluded as not being evidence of the value of plaintiff's services. To the same effect is Forey v. Western Stage Co., 19 Ia. 535. To show the reasonableness of fees charged for services of a physician or an attorney, evidence is usually rejected as to fees charged in previous similar cases. Collins v. Fowler, 4 Ala. 647; Robbins v. Harvey, 5 Conn. 335. Some courts allow value received for similar services to be shown, but in such cases it is always difficult to show sufficient similarity. Maurice v. Hunt, 80 Ark. 476, 97 S. W. 664; Peters v. Davenport, 104 Ia. 625, 74 N. W. 6; Krammen v. Meridean M. Co., 58 Wis. 399, 17 N. W. 22. The practical difficulty of establishing the value of personal services is well illustrated in a New York case where the plaintiff had personally cared for a very corpulent man, kept his house, and done his sewing. Plaintiff's witness was allowed to show what she was accustomed to pay for such services under similar circumstances. The court recognized the difficulty of the situation and remarked, "In this we see no error. It was, as we have said, the best that the situation permitted the plaintiff to do." Edgecombe v. Buckhout, 146 N. Y. 332, 49 N. E. 991, 28 L. R. A. 816. In view of the present difficulty of determining the value of services of the various trades, it would seem that the union scale of wages would be a dependable and fair basis. Incidentally, the court's recognition of union wages as a fair scale offers a bit of encouragement to labor organizations.

Injunction—To Prevent Solicitation of Customers by Former Employee.—For a number of years the defendant was a driver and solicitor for the plaintiff laundry company. He left the employ of the latter suddenly and began soliciting the plaintiff's customers for a rival laundry. Few, if any, of the customers knew of the defendant's change of employment.
The lower court granted an injunction restraining the defendant from soliciting the business, but not from receiving the laundry, of the plaintiff's customers. The plaintiff appealed, contending that the defendant should be restrained from receiving laundry from the plaintiff's customers. Held, the decision of the trial court should be affirmed. New Method Laundry Co. v. MacColl, (Calif. 1916) 161 Pac. 990.

An express agreement not to use business secrets, which an employee has learned, is not necessary in order to grant equitable relief. Stevens & Co. v. Stiles, 29 R. I. 399, 71 Atl. 802, 20 L. R. A. N. S. 933; MacBeth-Evans Glass Co. v. Schmelbach, 239 Pa. 76, 86 Atl. 688. The ground of the jurisdiction is to prevent a breach of the trust and confidence necessary between employer and employee. In Empire Steam Laundry Co. v. Losier, 165 Cal. 95, 130 Pac. 1180, 44 L. R. A. N. S. 1159, the same court held, in a case precisely similar, that the defendant should be restrained from soliciting or receiving laundry from the plaintiff's customers. The decree in this case has been criticized as being too broad. See 1 Cal. L. Rev. 385. It is possible that even the decree in the principal case might be said to be too broad. There are some well considered cases which hold that an employee may solicit his former employer's customers so long as he does so in a fair manner. Grand Union Tea Co. v. Dodds, 164 Mich. 50, 128 N. W. 1090, 31 L. R. A. N. S. 260; Robb v. Green, [1895]2 Q. B. 1. This doctrine seems just, for it puts the employee under no disability to earn a living because of his former employment. There are, however, decisions in which injunctions have been granted, quite as sweeping in extent as in the principal case. People's Coat, Apron & Towel Co. v. Light, 157 N. Y. Supp. 15; Stevens & Co. v. Stiles, supra.

MARRIAGE—UNCLE AND NIECE.—The defendant and her uncle were domiciled in the state of Maryland where there was a statute which forbade a marriage between uncle and niece and declared it to be void. They went to Rhode Island and were married, the marriage being valid there. They came back to Maryland and the husband died soon after, leaving most of his property to the defendant. The plaintiff, a nephew of the husband, sued to have the marriage declared null and void. Held, that the marriage being valid in Rhode Island was valid in Maryland—at least could not be questioned after the death of one of the parties. Fensterwald v. Burk (Md. 1916) 98 Atl. 358.

The general rule is that a marriage valid at the place where performed is valid everywhere. Sutton v. Warren, 10 Met. (Mass.) 451; Harrison v. Harrison, 22 Md. 468. To this rule it has been held there are two exceptions: the first a marriage which is regarded as incestuous or contrary to the laws of God and Christendom; the second a marriage which is contrary to a settled state policy and prohibited by statute. Pennegar v. State of Tennessee, 87 Tenn. 244, 2 L. R. A. 703. It is universally held that a marriage between parties in the lineal descending or ascending line or between brother and sister is incestuous and contrary to the laws of God. Story, Conflict of Laws, 113, 114. There is more difference of opinion as to marriages between
uncle and niece, parties in the third degree of relationship. Their marriage is not generally regarded as being incestuous and void on that ground. Bowers v. Bowers, 10 Rich. Eq. (S. C.) 551; Weisberg v. Weisberg, 98 N. Y. Supp. 260. In Weisberg v. Weisberg a marriage between an uncle and niece was declared valid, the parties having lived together fourteen years. There was at that time no statute against such a marriage in New York. It is now forbidden in practically every state in the Union. Peck, Dom. Rel. 2. Although such a marriage is forbidden and declared void in some states, courts of many such states will uphold its validity, if it is valid where performed, as not being contrary to a settled state policy and affecting good morals. Harrison v. Harrison, supra; Schofield v. Schofield, 51 Pa. Super. Ct. 564. See comment on this case in 61 Univ. of Pa. Law Rev. 490. Contra, Hayes v. Rollins, 68 N. H. 191. In the case of United States v. Rodgers, 109 Fed. 886, a wife who was the niece of her husband naturalized here was refused admission to this country, the court holding such a marriage to be shocking to the moral sense and contrary to the policy of Pennsylvania laws. The fact that the parties have gone outside of the jurisdiction to marry in order to evade the laws of the state of their domicile has been held to make no difference. Schofield v. Schofield, supra.

POWERS—EFFECT OF COVENANT TO APPROPRIATE. A decedent, having an equitable estate for life, had power to make such disposition of the estate “for the benefit of himself and his children, by a last will and testament, or by an appointment in the nature of a last will and testament, as he may desire.” In 1905 he made a will in which he appointed $25,000.00 to the defendant in pursuance of a covenant that in consideration of $5,000.00 he would execute such appointment by an irrevocable will. Later he made a new will in which the power was executed in a manner inconsistent with the provisions of the contract. Held that the covenantee was not entitled to specific performance, and since the appointees received nothing that was the property of the donee, there was nothing in their hands that equity could charge with a trust. Farmer’s Loan & Trust Co. v. Mortimer, (N. Y. 1916) 114 N. E. 389.

Equity will not enforce specific performance of a covenant which the donee of a testamentary power makes to the effect that he will appoint in favor of certain objects, if he later makes appointments valid otherwise but inconsistent therewith. In Re Parkin, [1892] 3 Ch. 510; In Re Bradshaw, [1902] 1 Ch. 342; Wilks v. Burns, 60 Md. 64. But if an appointment is made in accordance with a prior contract, the fact that the donee is benefited by preventing a liability for breach arising, does not make the appointment bad. Coffin v. Cooper, 2 Dr. & Sm. 367; Palmer v. Locke, 15 Ch. D. 294. The reason underlying the rule is that to grant specific performance would enlarge a testamentary power into a power which could be exercised by deed, which would defeat the intention of the donor. Reid v. Boushall, 107 N. C. 345. Where one had an inchoate power to appoint by deed upon reaching a certain age, a covenant to appoint, made prior to attaining the prescribed age, was enforced by equity as a defective execution in Johnson v. Touchet, 37 L. J. R.
When, however, the power may only be exercised by will, the covenant to appoint cannot be said to be a defective execution, and will not be aided in equity. Gaskins v. Finks, 90 Va. 384, 19 S. E. 166. In Learned v. Talmadge, 26 Barb. 443, a conveyance was made by the donee of a power to one of the objects, and covenants were made that he would not make any disposition of the property by any will and that all of his interest was relinquished and extinguished. Nevertheless appointments subsequently made were held valid as against grantees of the covenantee. See also Re Collard and Duckworth, 16 Ont. Rep. 735. But the execution of a mortgage with full covenants of warranty by the donee was held to estop him from inconsistent dealings with the estate, and the appointees under the will had no further rights, in Langley v. Conlan, 212 Mass. 135, 98 N. E. 1064. Though an affirmative contract to appoint will not be specifically enforced, yet where the donee covenanted that he would not exercise his power so as to reduce the share which a particular beneficiary would receive on a default of appointment, it was held to be a release of the power to appoint, and the power thereafter could only be exercised subject to the fetter or limitation thus imposed by the negative covenant, and appointments made inconsistent therewith were set aside to such an extent as would satisfy the covenant. Re Evered, [1910] 2 Ch. 147. A release of a power can be made in England by virtue of statute, CONVEYANCING ACT, 1881, § 52. A power in gross might be released, but the court refused to consent to the proposition that the donee could by virtue of a "gainful agreement" bind himself to refrain from the exercise of a power, Thomson's Executor v. Norris, 20 N. J. Eq. 489, 528. The court in the principal case did not decide whether the contract was enforceable against the estate of the decedent, or void in toto.

SALES—DAMAGES FOR BREACH OF WARRANTY OF SEEDS.—Defendant sold Plaintiff melon seeds and expressly guaranteed them to be of a particular variety known as "Klekley Sweet." An examination of the seeds would not have disclosed whether they were of this brand or not. Plaintiff prepared soil and planted the seeds, which produced melons of a different and inferior variety; and plaintiff sued defendant for breach of warranty. Held, that the measure of recoverable damages was the value of a crop such as would ordinarily have been produced that year had the seeds been as warranted, less the value of the crop actually produced. Ford v. Farmer's Exch., (Tenn. 1916) 189 S. W. 368.

Where seeds are warranted to be true to name and a crop of an inferior quality is produced, it has generally been held that the measure of damages should be the difference between the value of the crop raised and the value of the crop which would have been produced had the seeds been as guaranteed. This is the rule followed in the principal case and is supported by Passenger v. Thorburn, 35 Barb. (N. Y.) 17; Schutt v. Baker, 9 Hun. (N. Y.) 536; Flick v. Wetherbee, 20 Wis. 392. Where no crop is produced at all, or if it is worthless, some cases allow us damages the expense of preparing the soil (less the general benefit to the land therefrom), the price paid for the seed, and the loss sustained from having the land lie idle. Phelps v. Elyria
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Milling Co., 12 Oh. Dec. 695; Vaughn's Seed Store v. Stringfellow, 56 Fla. 708. In following this rule practically the same result is obtained as is reached by the cases in the first class, since the loss sustained from having the land idle is usually equivalent to the expected profits. A large number of cases refuse to allow a recovery for losses due to the idleness of the land and reach a different conclusion from that of the foregoing cases. Ferris v. Comstock, Ferre & Co., 33 Conn. 513; Butler v. Moore, 68 Ga. 780; Reiger v. Worth Co., 127 N. C. 230.

Specific Performance—Of Building Contract.—The defendant construction company agreed to construct a drainage system for an organized district, and agreed to receive monthly payments as the work progressed. The first payments were to be in cash and the remainder in notes. After the work was more than half completed and the defendant had received all the cash under the contract, the defendant refused to proceed. The work was in imminent danger of being destroyed, and the surrounding lands injured by overflow. It appeared that it was practically impossible to get another contractor to complete the work within a reasonable time. Held, that upon a finding that the notes were amply secured the lower court properly decreed specific performance of the contract. Board of Commissioners v. Wills & Sons, (D. C. 1916), 236 Fed. 362.

It is often stated that equity will not enforce a building contract because to do so would require constant supervision by the court. Armour v. Connolly, (N. J. 1901) 49 Atl. 1117; LaHogue Drainage Dist. v. Watts, 179 Fed: 690. Fry, Specific Performance (5th Ed.) 47. However, as early as 1894, the court of chancery granted specific performance of a contract to build a house at the petition of the land-owner's heir. Holt v. Holt, 1 Eq. Abr. 274, p. 11. Specific performance is often granted in cases where the defendant has agreed to build a structure on his own land, more especially when the land is conveyed to the defendant by the plaintiff upon that condition. Murray v. N. W. R. R. Co., 64 S. C. 520, 42 S. E. 617; Parrott v. Atl. & N. C. R. R. Co., 165 N. C. 295, 81 S. E. 348. These cases show that there is no inherent disability in a court of equity, preventing it from granting specific performance of a building contract. In most cases where the structure is to be on the plaintiff's land the remedy at law is perfectly adequate, for the plaintiff can hire another to perform the contract and recover damages from the defendant in an action at law. In such cases specific performance is rightly refused. Likewise a court is justified in denying equitable relief where the contract is too indefinite, even when the remedy at law is inadequate. Ward v. Newbold, 115 Md. 689, 81 Atl. 793; see also Jones v. Parker, 163 Mass. 564. In the principal case, however, the remedy at law is clearly inadequate and the terms of the contract sufficiently definite to grant specific performance.

Tenancy in Common—Conveyance by Cotenant of Specific Property.—A tenant in common who owned an undivided five-eighteenths of a tract of land comprising ninety-nine acres, deeded twenty-seven acres of same to de-
fendant, describing the portion so conveyed by metes and bounds. Complainants, who are also part owners of the land, bring this suit against defendant alone for partition of such particular part. Held, defendant is entitled to have the entire tract valued, and have set apart to it, in severalty, such portion as represents five-eighteenths in value of the whole, and if upon such valuation it shall appear that the twenty-seven acres are not of greater value than five-eighteenths of the entire tract the decree will direct the allotment thereof to the defendant, or if a part thereof is found to be of such value, such part should be allotted. *Highland Park Mfg. Co. v. Steele*, 235 Fed. 465.

As to the exact interest which is passed by such a deed, the courts are not agreed. They do agree, however, that the grantee has no absolute right on partition to have the described land allotted to him, and that the determination reached must leave the rights of other tenants unprejudiced. Beyond this there is conflict. It was early held that a conveyance of this sort was absolutely void. *Griswold v. Johnson*, 5 Conn. 363, but that decision was later modified by the same court when it concluded that the deed would be validated if the other co-tenants choose to affirm it. In some jurisdictions the effect of the grant is contingent upon the result of the partition suit. If by chance the portion conveyed happens to be set off as the share of the grantor it passes, otherwise the grantee takes nothing. *Cressey v. Cressey*, 215 Mass, 65, 102 N. E. 314; *Kenoye v. Brown*, 82 Miss. 607, 35 So. 163; *Benedict v. Torrent*, 83 Mich. 181, 47 N. W. 129. Another view is that the grantee takes the interest of the grantor, whatever that may be. *Lessee of White v. Sayre*, 2 Ohio 110. The decision in the principal case is more favorable to the grantee than any of these, since he acquires the interest of his grantor, and unless other equities interfere is, upon partition, allotted the land described in his deed. This determination may be open to the objection that the equity of the grantee, in the land described, is given more weight than would be accorded a desire on the part of the grantor to be allotted some particular portion. This might lead to colorable conveyances. Such a possibility would be obviated by permitting the deed to pass the interest of the grantor, but denying it any influence on the result of the partition. The instant case is supported by the following: *Harrell v. Mason*, 170 Ala. 282, 54 So. 164; *Worthington v. Staunton*, 16 W. Va. 209; *Young v. Edwards*, 33 S. C. 404, 11 S. E. 1066; *Maverick v. Barney*, 88 Tex. 560, 32 S. W. 512; *Moonshine Co. v. Dunman*, 51 Tex. Civ. App. 159, 111 S. W. 161.

TRIAL—SEPARATION OF JURY AFTER FINAL SUBMISSION OF CASE.—In a civil case the jury stated to the associate, after the judge had left the court one evening, that they had agreed to a verdict on two counts but could not agree on the third, and they then separated for the night. Coming before the judge the next morning they gave a verdict on all three counts. Judgment was entered on the verdict so rendered and accepted. Held, that the verdict was valid inasmuch as no prejudice was shown. *Fanshaw v. Knowles*, [1916] 2 K. B. 539;
The precise point raised in the principal case apparently had never been passed upon definitely by an English court prior to this time. The counsel for the appellant urged that the rule applicable to criminal trials should govern the decision of this, a civil case. To quote from a recent leading case that rule is as follows: "If a juror after the judge has summed up in any criminal trial separates from his colleagues, and not being under the control of the court, converses or is in a position to converse with other persons, it is an irregularity which in the opinion of the court renders the whole proceedings abortive, and the only course open to the court is to discharge the jury and commence the proceedings afresh." *Rex v. Ketteridge, [1915] 1 K. B. 467.* The court deciding that case did not think it necessary to consider what had actually taken place, nor whether the irregularity had in fact prejudiced the prisoner. However, there was in that case no suggestion that this same rule would apply in the case of a civil trial. While, as stated above, this precise question was treated by the court as one of first impression, there is strong evidence that at an early date the strict rule applicable to criminal cases was relaxed under some circumstances insofar as civil trials were concerned. *Coke, Littleton, 227; 3 Blackstone, Comm., 377; Lord St. John v. Abbott, Barnes 441, 94 Eng. Rep. 994.* The principal case states definitely for the first time that "the rule is that when there has been a separation, that is a circumstance which with other circumstances ought to be taken into account and dealt with by the court." In the United States the general rule is that a separation in civil trials must be prejudicial to invalidate the verdict, even when the separation takes place before the jury have arrived at a verdict. *Spencer v. Johnson, 185 Mich. 85, 151 N. W. 684; Liverpool &c. Ins. Co. v. N. & M. Friedman Co., 133 Fed. 713, 66 C. C. A. 543.* It thus appears that the English Court of Appeal, without referring in any way to American decisions, has reached a conclusion identical with the rule which has always been in force in this country.

**Wills—Effect of Revocation Upon Failure of the Purpose for Which It Was Made.—** Under a marriage settlement for her life, with remainder as she should appoint, testatrix made an appointment for the benefit of her daughter, M., then later by codicil expressly revoked the same, and made a new appointment whereby the fund was to be held in trust for the benefit of the said M., for life, then to such other daughters of testatrix as should survive M. The new appointment in the codicil was void under the rule against perpetuities, and M. now seeks to determine whether the codicil, being void as an appointment, was also void as a revocation of the earlier appointment. *Held,* that the intention of the testatrix was not to revoke the prior appointment in any case, but only for the purpose of carrying out the altered appointment, and since the purpose of the revocation had failed, the revocation also failed. *In re Bernard's Settlement, [1916] 1 Ch. 552, 85 L. J. Ch. 414.*

Where a will or codicil is duly executed by a competent person, but its provisions cannot be given effect, as when void as a perpetuity, (*Altrock v. Vanderburgh, 25 N. Y. Supp. 851*), or a bequest to a charity which fails be-
cause of uncertainty, (Dudley v. Gates, 124 Mich. 440, 83 N. W. 97), or because not made a sufficient length of time before the death of the testator, (Price v. Maxwell, 28 Pa. 23), or if an appointment is made in excess of the power of the donee, (Colvin v. Warford, 20 Md. 357), the general rule is that a clause expressly revoking a prior will or provision is not affected by the failure of the disposition attempted to be made. Tupper v. Tupper, 1 Kay & J. 655; Melville's Estate, 245 Pa. 318, 91 Atl. 679, L. R. A. 1916 C. 98, and note. Where the revocation is not expressed, but merely implied from a provision in the later instrument which is inconsistent with the prior disposition, the revocation is only to such an extent as is necessary to give effect to the later provision, hence there is no revocation at all if the later provision is void. Austin v. Oakes, 117 N. Y. 577, 23 N. E. 193; Eli v. Megie, (N. Y. 1916), 113 N. E. 800, semble; Duguid v. Fraser, 31 Ch. D. 449, 55 L. J. Ch. 285. In the principal case, where the revocation was by express words, the court has advanced beyond the holding in Duguid v. Fraser, where the revocation was only by implication, and says: "It does not seem that the real point depends upon the question of whether there are words of direct revocation, or whether such words are absent."

See also Security Co. v. Snow, 70 Conn. 288, 39 Atl. 153, which is in accord with the principal case, but stands alone in this country. The question in these cases must not be confused with the question in Onions v. Tyrer, 1 P. Wms. 343; Rudy v. Ulrich, 69 Pa. St. 177, and Moore v. Rowlett, 269 Ill. 88, 109 N. E. 682, L. R. A. 1916 C. 89, and note, where the subsequent provision fails because of a defect in the execution of the later instrument, or in the capacity of the person, when it is void in toto, hence a clause expressly revoking the prior instrument falls with the devise.

Wills—Power of Sale Gives No Power to Mortgage.—It was provided in a will that the devisee of a life estate, the wife of the testator, had "the right to dispose of any property as she may think best for the purpose of paying all just debts or supporting or maintaining herself and children;" and under this power the widow executed a mortgage of the fee to the defendant. The children of the testator, who by the will were entitled to "the entire property remaining" at the death or marriage of the life-tenant, urge that the mortgage is not binding on their interest in the remainder. Held, that the mortgage in fee was void, since the power to sell did not include the power to mortgage, nor could she by sale or mortgage bind any interest in the estate except her own. Sheffield v. Greg, (S. C. 1916) 89 S. E. 664.

That a mere power to one to sell does not include a power to mortgage, is the general rule, as followed in the instant case, especially if the one having the power is a mere agent or attorney. Jeffrey v. Hursh, 49 Mich. 31, 12 N. W. 898. The executor with "entire management and control," does not have power to make a mortgage, (Price v. Courtney, 89 Mo. 387, 56 Am. St. 453), nor can a trustee with power to sell and invest the proceeds, make a mortgage (Hannah v. Carnahan, 65 Mich. 601, 32 N. W. 835). The power of the devisee of a life estate to sell a fee was restricted so as not to include a power to mortgage by the application of the broad general rule, in Hoyt
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v. Jaques, 129 Mass. 286, the court holding that "a power to sell imports a sale 'out and out' and will not authorize a mortgage, unless something in the will shows that a mortgage was within the intention of the testator." See also Bloomer v. Waldron, 3 Hill 361. Opposed to the general rule is Zane v. Kennedy, 73 Pa. 182, where the court holds that an "absolute and unrestricted power to sell includes a power to mortgage," on the theory that a mortgage is a conditional sale. The rule is not without its exception, for in Ball v. Harris, 4 Myl. & Cra. 264, it was said that "it had been settled since the decision of Mills v. Banks, 3 P. Wms. 9 in 1724 that where an estate is devised with a charge imposed, or a power to raise a sum of money, power to sell includes a power to mortgage. In Loebenthal v. Raleigh, 36 N. J. Eq. 169, a mortgage was allowed to be made where the power to sell was for the purpose of raising a sum sufficient to pay debts, and it appeared to the court that the "purpose could be answered better by mortgage than by sale." Where one is the devisee of a life estate and has the power to sell for "support and maintenance," many courts are inclined to modify the general rule and under the power of sale to permit a mortgage. In Hamilton v. Hamilton, 149 Ia. 331, 128 N. W. 380, the court says that a power to sell given to an agent, trustee, or attorney, which power is strictly construed, and generally held not to include a power to mortgage, is to be distinguished from a testamentary power, given not for the benefit and profit of the donor, but in furtherance of some benefit intended to be conferred on the donee; and unless the intention clearly appears otherwise, the authority to mortgage for the purpose expressed in the writing will be inferred. This modification has also been allowed by the courts in the cases of Kent v. Morrison, 153 Mass. 137, 26 N. E. 427, 10 L. R. A. 756; McCreary v. Bomberger, 151 Pa. 323, 24 Atl. 1066; Swarthout v. Ranier, 143 N. Y. 499, 38 N. E. 726. See also 20 Harv. L. Rev. 568, and 15 Mich. L. Rev. 331.

WILLS—SOLDIERS AND SEAMEN.—The privilege provided by §11 of the Wills Act of 1837, that any soldier being in actual military service or mariner being at sea may dispose of his personal estate as he might have done before the passing of the Act, was claimed for each of two unattested papers offered for probate. In the first case the deceased had volunteered and had been ordered to report for duty in the Naval Sick Berth Service. The writing was executed after receiving orders to embark but before he had actually joined the ship. Held, that the papers were inadmissible for probate, for, although the deceased was a seaman, he had not yet been at sea. Estate of Anderson, [1916] Pro. 49, 85 L. J. Pro. 21.

In the second case, a female nurse had been employed on a hospital ship under engagement with the War Office. When the writing was executed she was on shore leave but had received orders to embark. Held, that the paper was entitled to probate as the will of a soldier "being in actual military service." Estate of Stanley, [1916] Pro. 192, 85 L. J. Pro. 222.

The privilege of having an informal writing probated as a will of personality has been interpreted so as to be available not only to "mariners and seamen," both common seamen and officers, (Goods of Hays, 2 Curt. Eccl.
Rep. 338), whether engaged in the merchant marine or naval service, *(Hubbard v. Hubbard, 8 N. Y. 196)*, but also to anyone employed on the ship, for example, the ship cook, *(Ex Parte Thompson, 4 Bradf. 154)*, a female typist. *(In the Goods of Hale, [1915] 2 Ir. Rep. 362)*, and a female nurse, *(Estate of Stanley, supra)*; but not to one a passenger when the writing was executed, though by profession a mariner. *(Warren v. Harding, 2 R. I. 133)*. A seaman is “at sea” within the requirements of the statute, while in the course of the voyage, though the vessel may actually be in a port and the deceased on shore. *(Lay’s Goods, 2 Curt. Eccl. Rep. 375)*. A vessel lying in the Thames river preparatory to setting sail is “at sea.” *(Goods of Patterson, 79 L. T. N. S. 123)*; but where the ship remained in port for fifteen days after a sailor had signed articles, a writing executed during that time was not privileged since the deceased had not been “at sea.” *(Corby’s Goods, 29 Eng. L. & Eq. Rep. 604)*. Nor was a vessel “at sea” when lying on the Mississippi river above the ebb and flow of the tide. *(Givan’s Will, 1 Tucker 44)*. Where a soldier who had just entered the barracks attempted to make a will, it was held good because he had taken a step which brought him within the terms of the statute, even though he had not received orders to embark. *(Goods of Hiscock, [1901] Pro. 78, 84 L. T. N. S. 61)*. That orders for mobilization, without orders to embark, constituted a force in expeditione, was held in *(Gittward v. Knee, [1902] Pro. 99, 86 L. T. N. S. 119, 4 B. R. C. 895)*. A paper written by a soldier in camp before his company was mustered into the service of the United States, was held not entitled to probate in *(Van Deuser v. Gordon, 39 Vt. 111, and Pierce v. Pierce, 46 Ind. 86)*. Though at the time he had facilities for making a formal will, being in a hospital in the city of Washington, a soldier was in “actual military service” who had been fighting at the front, but was now unable to proceed with his company which was still in active service. *(Gould v. Stafford’s Estate, 39 Vt. 498)*. The distinction which seems to be recognized in this country is as stated in *(In re Smith, 6 Phila. 104)*, where a writing made by a soldier while home on a furlough, was offered for probate, and the court said, “The term ‘soldiers in actual military services’ includes those engaged in the active duties of the field, whether on the march, in temporary camp, the battle, siege, or bivouac, but can never apply to the soldier who is in regular quarters or at his customary home on leave of absence.”