the instrument, the better opinion is that that circumstance does not alter his rights or duties; as such a party has held himself out and obligated himself in a certain character, and has no just ground to demand or expect greater consideration than that legally incident to that character which he had assumed.' Section 1334."

The rule at law, and as between the immediate parties, is doubtless as thus stated by counsel and by the authorities cited; nevertheless, in equity the real relations of the parties to a paper may ordinarily be shown; and even in an action at law it is competent to show, as an excuse for not giving notice of dishonor to an indorser, that the paper was made for his accommodation. Edw. Bills, 453, 454, 638; 1 Pars. Bills, 557, 558; 2 Daniels, Neg. Inst. §§ 995*b*, 1085. The notes in question were all made by Mitchell for the accommodation of Crossette, Graves & Co., who, therefore, were not entitled to notice of protest or non-payment, and, for any reason disclosed in the record, are yet bound by paper; and there is no party to the controversy who can insist that the court should not look beyond the form of the paper into the real relations of the parties. This done, it is clear that, in respect to all these notes and drafts, Mitchell was, in fact, surety for Crossette, Graves & Co.

In respect to the alleged inconsistency between the unrestricted power of Mitchell, under the contract of agency, to dispose of the goods and the supposed trust, it may be conceded that the power was as broad as claimed, and that so long as the business was going on, Mitchell, while acting in good faith, had not only the right to sell, but to dispose of the proceeds as he chose; resulting, perhaps, in "the curious fact," as counsel call it, that, while conducting the business, Mitchell had power to increase the number of the beneficiaries of the trust and the amounts of the claims against the trust fund, and at the same time to diminish or even destroy the fund itself. But whether these things were so or not, need not be decided. If so, I am still not ready to concede that the trustee, in such a trust, might lawfully have disposed of the entire property for less than a fair price, or for a full price, without making provision for payment of the obligations which he had incurred under the agreement. A sale to a good faith purchaser in such case would, of course, be unassailable, but the proceeds, by the doctrine already stated, and in strict accord with the terms of the contract in question, would come under the trust,—a trust which the law raises, though the parties may not have intended it. This, it seems to me, would be so, even if the solvency of the debtor and surety remained unquestioned. But however this may be, when, as in this instance, such insolvency is shown, and the business of the agency must cease,—has ceased,—it cannot be permissible that the agent who has incurred liabilities for his principal, holding collateral securities against such liabilities, may apply the collateral to the payment of one of the obligations to the exclusion of others. In such a case "equality is equity," and there is no room for a preference, such

as is shown to have been attempted. The defendants should account to the plaintiffs for a proportionate amount of the sum realized from the goods so transferred. Decree accordingly.

CHICAGO, B. & Q. R. Co. *v.* WASSERMAN and others. (Original Bill.)[1]

WASSERMAN *v.* CHICAGO, B. & Q. R. Co. (Cross-Bill.)

(*Circuit Court, D. Nebraska.* January 12, 1885.)

1. WILL—REVOCATION BY BIRTH OF CHILD—COMP. ST. NEB. P. 229, § 148.
Where a testator devises all of his property to his wife, who is *enceinte*, and makes no mention in his will of his unborn child, on its face the will manifests no intention that such child shall not be provided for, and under the Nebraska statute such child will be entitled to the same share in the estate which he would have inherited if the father had died intestate.

2. SAME—EFFECT OF PROBATE—COMP. ST. NEB. CH. 23, § 143.
In Nebraska the probate of a will is conclusive only as to its due execution, and does not determine the title of property claimed under it.

3. SAME—CONDEMNATION OF LAND BY RAILROAD—REMEDY OF CHILD.
Where land in Nebraska has been condemned for right of way by a railroad company, and the award of damages paid to the widow and sole devisee of the deceased owner, whose will is revoked *pro tanto* by the subsequent birth of a child, and the estate has been settled, the rights of such child may be adjudicated in an action to quiet title instituted by the company, in which such child files a cross-bill praying that she be adjudged to be the tenant in common with the company, and a partition and accounting between them be decreed.

The original bill seeks to quiet the title of the railway company, complainant, to a portion of lots 5 and 6, in block 219, in the city of Omaha, Douglas county, in the state of Nebraska, now occupied and used by the railway company for a passenger station. The cross-bill of Anna Wasserman, an infant of the age of about 13 years, who appears by her guardian *ad litem*, prays that it be decreed that she is the owner in fee of an undivided half-interest in said real estate, and that partition thereof may be made between her and the railway company; and that an account, as between tenants in common, may be stated between the parties to the cross-bill.

The following are the agreed facts:

Andrew Wasserman died on the twenty-eighth day of June, 1870, seized of the premises in controversy, and left surviving him, his widow, Maria C., a son, Frank W. X., then five years old, and a daughter, Anna, the complainant in the cross-bill, who was born on July 7, 1870, nine days after her father's death; and these two children are the sole heirs at law of the deceased. Andrew Wasserman, the deceased, 10 days before his death, made his last will, which, after his death, was duly admitted to probate by the county court for said Douglas county, and letters testamentary issued to his widow, the executrix; and omitting the attestation, which is in legal form, the following is a copy of the will:

"I, Andrew Wasserman, of Omaha, Douglas county, Nebraska, considering the uncertainty of this mortal life, and being of sound mind and memory, do

[1] Reported by Robertson Howard, Esq., of the St. Paul bar.