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License--Licensor-s Liability to Licensee--Duty on Railroad Company

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regard to chattels, there must be an actual delivery of possession or a deed of gift. *Barnes* v. *Banks,* 223 Ill. 352; *Ross* v. *Milne,* 12 Leigh 204 (Va.); *Connor* v. *Trawick,* 37 Ala. 289. The same rule applies to gifts of choses in action represented by a specialty; and the delivery of such specialty must amount to a transfer of all the donor's control or dominion over the subject. In some cases where actual delivery of a chattel cannot be made, resort may be had to what has been called a symbolical delivery. *White* v. *Kilgore,* 77 Me. 571. A chose in action not represented by a specialty cannot be physically transferred. It has been held, therefore, that such a chose in action cannot be given away irrevocably. *Cook* v. *Lum,* 55 N. J. L. 373. However, an equitable chose in action, which is just as intangible, and delivery of which is just as impossible, may be given away without any formalities other than an expression of intent. *Harding* v. *Harding,* 17 Q. B. D. 442; *Wilt* v. *Hoffman,* 46 W. Va. 473, 33 S. E. 279. There seems to be no good reason for the distinction which exists between legal and equitable choses in action. The principal case is concerned with a legal chose, and is in accord with the settled law, but it would seem that such decision might be argued to be wrong on principle.

—A. W. L.

LICENSE—LICENSOR'S LIABILITY TO LICENSEE—DUTY ON RAILROAD COMPANY.—Plaintiff, an adult, not in the employ of the railroad company, was struck by a backing train and killed, while using a railroad track as a footpath for his own convenience elsewhere than at a public crossing. Two problems were presented. First, whether the railroad company had any duty to look out for the plaintiff. Second, whether the railroad company owed a duty after perceiving the plaintiff to do more than refrain from the infliction of wanton or wilful injury. *Held,* there was no duty to look out for plaintiff, but after he was discovered there was a duty on the defendant to use reasonable care to avoid injuring him. *Robertson* v. *Coal & Coke R. Co.,* 104 S. E. 615 (W. Va. 1920).

It is settled that the owner is under no duty to a bare licensee to keep the premises in safe condition. *Plummer* v. *Dul,* 156 Mass. 426, 31 N. E. 128. There is no commonly accepted rule in this country as to the duty of a railroad company to keep a

lookout for persons or animals on the track. The better view is that there is a duty to keep a lookout, but that such duty is subsidiary to the paramount duty to protect the passengers and property in the train, and the train itself. *The Cincinnati & Zanesville RR. Co.* v. *Smith,* 22 Oh. St. 227; *Bemis* v. *Connecticut & Paussumpsic RR. Co.,* 42 Vt. 375. The West Virginia court has consistently held that there is a duty on those in charge of the train to keep a reasonable lookout for animals and persons trespassing on the tracks. *Gunn* v. *Ohio River RR. Co.,* 42 W. Va. 676, 26 S. E. 546; *Stuck* v. *Kanawha & Michigan R. Co.,* 76 W. Va. 453, 86 S. E. 13. The principal case seems on this point, therefore, inconsistent with the better view, and irreconcilable with those West Virginia cases that hold there is a duty to keep a lookout. As to the second point, there are two views as to what duty is owed to a licensee after he has been perceived. The Massachusetts rule is that the only duty owed a licensee is to avoid the infliction of wanton and reckless injury. *Maynard* v. *Boston & Maine RR.,* 115 Mass. 458. The rule that a railroad company must, with the facilities at hand, and under the circumstances as they exist at the time, exercise reasonable care to avoid injury is followed in Virginia. *Washington & Old Dominion R. Co.* v. *Ward's Admr.,* 119 Va. 334, 89 S. E. 140; *Shiveley's Admr.* v. *Norfolk & Western R. Co.,* 125 Va. 384, 99 S. E. 650. The barbaric Massachusetts doctrine was followed in prior decisions of the West Virginia court. *Woolwine's Admr.* v. *Chesapeake & Ohio R. Co.,* 36 W. Va. 329, 10 S. E. 81; *Spicer* v. *Chesapeake & Ohio R. Co.,* 34 W. Va. 514, 12 S. E. 553; *Blagg* v. *Baltimore & Ohio R. Co.,* 83 W. Va. 449, 98 S. E. 526. The principal case, although it makes conflicting statements in the body of the opinion, clearly adopts in its syllabus the more humane rule of Virginia. —M. T. V.