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AGENCY—ACCOUNTING FOR PROCEEDS OF ILLEGAL CONTRACT OF SALE OF INTOXICATING LIQUORS.—Following the decision of the United States Supreme Court that the Wilson Act did not affect interstate shipments of liquor until final delivery by the carrier, *Rhodes* v. *Iowa*, 170 U. S. 412, (1898), Congress passed the Webb-Kenyon Act, 37 Stat. at L. 699 (1913). Meantime, in 1913, 35 Stat. at L. 1136, Sec. 239, it was enacted that it should be a penal offense for any carrier or other agent, in connection with the interstate carriage of intoxicating liquors, to collect the purchase price from the consignee, or in any manner act as agent of buyer or seller, except in the actual transportation or delivery thereof. After this act carriers and banks refused to act as collection agents in such sales, and dealers resorted to the plan of consigning liquor which had been ordered from prohibition states, to their own order, mailing the bill of lading to an agent, with instructions to deliver the same upon payment of the accompanying draft by the purchaser. In *Danciger* v. *Cooley*, U. S. Supreme Court, Adv. O. 139, Jan. 7, 1919, it was held that this was in violation of Sec. 239, *supra*, and of course illegal. The shipment was made before 1913, and so did not involve the Webb-Kenyon Act.

The Kansas Supreme Court, 98 Kan. 38, 484, from which this case was an appeal, had decided that the transaction was an illegal sale, and therefore the principal could not collect from the agent the proceeds of the violation of the law. On this point the Federal Court held the right of a principal to recover such money from an agent was a question of local law and could not be re-examined by the court.

It is a general rule that an agent cannot dispute his principal's title, and this is so even when the agent seeks to set up the illegality of the transaction. He cannot for that reason steal the money and set his principal at defiance. *Baldwin Bros.* v. *Potter*, 46 Vt. 402. But the courts are not in agreement on this matter, especially where the principal is engaged in a business that is against the public policy of the State. *Mexican Int. Banking Co.* v. *Lichtenstein*, 10 Utah 338 (a lottery business). The Kansas court agrees with this view and does not limit it to cases involving public policy. *Alexander* v. *Barker*, 64 Kan. 396.

BILLS AND NOTES—CERTIFICATES OF DEPOSIT.—A certificate of deposit was purchased by a bank 11½ months after its date. It was issued "subject to the rules of the Savings Department," as it showed on its face. It bore interest if left 6 months, but interest was to cease one year from date. *Held*, the certificate was negotiable and was taken by the bank in due course, since (1) subjecting it to the rules of the Savings department did not make it payable out of a particular fund nor deprive it of the requisite certainty, (2) although it was in effect a promissory note payable on demand, the reasonable time within which it was required to be presented was indicated by the time at which interest ceased, namely, 12 months from date. *White* v. *Wadhams*, (Mich. 1918) 170 N. W. 60.

The first point here decided, as to the effect of subjecting the certificate of deposit to the rules of the savings department, is one which does not seem to have been heretofore passed upon by any court of the last resort. But the decision is in harmony with the common financial practice. The second point, that the termination of the running of interest fixes the time within which it must be negotiated, is in accord with the general rule stated in the books that interest bearing notes do not call for such prompt presentation as demand paper which bears no interest. Daniel on Neg. Inst. (6th ed.) § 610; Byles on Bills *213; Randolph on Commercial Paper, § 1097. The case of *Kirkwood* v. *First National Bank*, 40 Neb. 484, involved exactly the same question upon a similar certificate of deposit, and the decision was the same.

CARRIER'S LIABILITY ON BILLS OF LADING FOR WHICH NO GOODS WERE DELIVERED—WHAT LAW GOVERNS.—The law's delays are not entirely of the past. On Jan. 7th, 1919, the United States Supreme Court pronounced what may be the final judgment on an action arising in June, 1900, *M. K. & T. Ry. Co.* v. *Sealy*, Adv. O. 123. Defendant at first insisted that a Missouri shipment was governed by Missouri and not Kansas law, the action having been brought in Kansas. It was not until 1913 that the defendant company claimed that the transaction was governed by Federal law. This was doubtless due to the fact that it was in that year that the case of *Adams Express Co.* v. *Croninger*, 226 U. S. 491, decided that by the Carmack Amendment Congress had shown its intent to take over the whole subject of limitation of liability by carriers of goods in interstate shipments, and that therefore all state laws as to such shipments were entirely superseded. The court held that the claim in this case could not be maintained, because the Federal question was not seasonably raised, and also because the Carmack Amendment does not apply to a shipment made six years before its passage. The Kansas court having three times decided adversely to defendant, 78 Kan. 758, 84 Kansas 479, 98 Kan. 225, the writ of error was dismissed.

As to the liability of the common carrier on fraudulent bills of lading, issued without receipt of any goods, see 16 MICH. LAW REV. 402, 411. The passage by Congress of the so-called Uniform Bill of Lading Act, the Pomerene Act of August 29, 1916, 39 Stat. at L. 538, has changed the common law rule, rigidly adhered to by about half the States and by the U. S. Supreme Court, *Shaw* v. *Ry.*, 101 U. S. 557, *Friedlander* v. *Ry.*, 130 U. S. 416, in favor of the negotiability rule of *Bank of Batavia* v. *R. R. Co.*, 106 N. Y. 195, which made the carrier liable on a bill of lading to a *bona fide* holder for value, notwithstanding no goods were received. As nearly half the States have placed on their statute books this bill of lading act, the prevailing rule in the United States now accords with the New York rule, and the decision of the Kansas court in the instant case. Plaintiff was allowed to recover of the carrier his advances on the bills of lading to the extent they had not been repaid, notwithstanding the bills covered 27 carloads of grain, not one bushel of which was ever shipped.

CARRIER'S LIABILITY—WRITTEN NOTICE OF CLAIM FOR DAMAGES.—That it is lawful for a common carrier of goods to stipulate for complete freedom

from liability, unless claim for damage is reported within a reasonable time after the consignee has notice of the arrival of the goods, has been many times held, from *So. Exp. Co.* v. *Caldwell,* 21 Wall. 264, to *St. Louis, I. M. & S. R. Co.* v. *Starbird,* 243 U. S. 592. If liability is to be claimed, it is only fair that the carrier should know of the claim while it is still possible to investigate the alleged damage. And it is now held that it is not unreasonable to require a written record of the claim. The case of *So. Pac. Co.* v. *Stewart, U. S. Sup. Ct., Jan.* 13, 1919, Adv. O. 176, is one of the belated cases arising under the Carmack Amendment of 1906, and before the Cummins Amendment of March 4, 1915. By this amendment interstate shipments after that date will be subject to the ninety day limit there provided for.

The bill of lading in question covered a shipment of cattle, and required claim for loss or damage to be made in writing within ten days after unloading the livestock. The Cummins Amendment makes unlawful any rule, contract or regulation for a shorter period for giving notice of claims than ninety days, and for the filing of claims than four months. But this shipment was under the Carmack Amendment, and plaintiff admitted that he had made no written claim within ten days. He denied that it was possible for him to determine the damage in that time, and claimed waiver of notice by the carrier in attempting to adjust the claim. The court below charged that if the defendant knew of the death of the cattle in transit as alleged in the complaint, then plaintiff was relieved from giving such notice as was required by the contract. It has often been held that there is no possible benefit to the carrier in receiving written notice of what it already knows, *Cockrill* v. *M. K. & T. Ry. Co.,* 90 Kan. 650, and this rule was approved in the instant case, both in the District Court and in the Circuit Court of Appeals, 233 Fed. 956. The Supreme Court, however, holds that the requirement that such notice be put in permanent form in writing is not unreasonable, and failure to do so defeats plaintiff's recovery.

The rule requires written notice that claims will be made, but allows to plaintiff the necessary time to determine what the loss will be before he files his bill for damages. By this rule the carrier escaped a liability for losses which seem to have been caused by outrageous and willful conduct in handling the cattle, but the ultimate advantage to the carrier may be doubted. It is such experiences as this on the part of the public that have caused much unfair legislation against the carrier, such for example as the ninety days required by the Cummins Amendment. After the expiration of three months with no notice of any claim it may be very difficult for the carrier to get the facts, and juries have a way of believing the evidence submitted by the shipper. Jurymen themselves have often had experiences with such claims.

It is doubtful whether such decisions as that in *Wells Fargo Exp. Co.* v. *Townsend,* Arkansas, June, 1918, 204 S. W. 417, can stand under the rule as above laid down. In that case the court found that a letter from the claim-agent suggesting that the shipper order a duplicate of the lost casting and furnish claim covering the value of the original was a waiver of the stipulation for written notice.

CARRIERS OF PASSENGERS—LIMITATION OF LIABILITY—CARMACK AMENDMENT.—It has often been held that a railroad company is not a common carrier, when it enters into a special contract to transport a circus train, and therefore a contract that the railroad company should not be responsible for damages arising from want of care in running the cars, or otherwise, is valid. *Coup* v. *Wabash Ry. Co.*, 56 Mich. 111. It has also been held that in dealing with human life the law will protect it equally whether the carriage is free, or for compensation. *P. & R. R. Co.* v. *Derby*, 14 How. 468. Many cases have supposed that contracts limiting such liability were invalid, even in the case of free passengers, *Williams* v. *Oregon S. L. R. Co.*, 18 Utah 210, but the weight of recent authority is the other way. *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440, reversing 116 Fed. 324. And such contracts have been upheld in the case of express messengers, news agents and sleeping car porters. *B. & O. Ry. Co.* v. *Voigt*, 176 U. S. 498. This is based on the principle that if a carrier is under no duty to carry, and may elect to refuse, then if he does carry he may do it on such terms as he may consent to, and refuse to carry unless he is released from assuming any liability for damages.

Nebraska is one of the states that refuses to permit this limitation, and in *Mancher* v. *C. R. I. and P. R. Co.*, 100 Neb. 237, held that notwithstanding contracts signed by a circus employee releasing and exempting the employer and the carrier from all claims for injuries however sustained, the carrier was liable to such employee for injuries caused by the negligence of the engineer of a train following the circus train. The Nebraska court did not hold that plaintiff, riding under this contract, was a passenger, but he was, at least, a licensee. The contract affecting human life would be strictly construed, and did not excuse the carrier from liability to one lawfully on the right of way and injured by its negligence. The defendant sought to carry this to the Federal court under the Carmack Amendment. But the United States Supreme court, Jan. 7, 1919, dismissed the writ of error on the ground that the Carmack Amendment deals only with the shipment of property. As to limitation of liability in the carriage of passengers the States are still "free to establish their own laws and policies and apply them to such contracts," in accord with the rule of *Pa. R. Co.* v. *Hughes*, 191 U. S. 477.

HIRE-PURCHASE AGREEMENT—CONVERSION—MEASURE OF DAMAGES.—One Miss Nolan held a piano from plaintiffs under a hire-purchase agreement, with option to purchase on payment of the last installment; title to remain in the vendor until such payment had been made. After several installments had been paid, Miss Nolan sold the piano to the defendant, making "a false statutory declaration that the piano was her property." She subsequently disappeared. Plaintiff sued in detinue and alternatively for conversion. The defendant paid into court the sum of 18*l*, the amount still due on the piano. *Held*, plaintiffs entitled to judgment for the return of the piano or the sum of 28*l*, its value. *Whiteley, Limited* v. *Hilt*, (1918), 2 K. B. 115.

By a perfectly logical course of reasoning the court arrives at a correct *legal* conclusion supported by the overwhelming weight of authority but hardly

in accord with that sense of justice and fair dealing which we ordinarily attribute to "the man in the street." The court says that if Miss Nolan had any interest in the piano it must be by virtue of the agreement alone, and inasmuch as she had repudiated the agreement by the fraudulent sale, she had at the date of the sale no interest in the piano which she could transfer to the defendant. This case is differentiated from *Belsize Motor Supply Co.* v. *Cox*, (1914), 1 K. B. 244 and *Donald* v. *Suckling*, (1866), L. R. 1 Q. B. 585, as in these cases the act of the conditional vendee was an injustifiable repledge of the chattel while in the instant case the act was a conversion and fraudulent sale. The result of the decision is, however, that the plaintiff receives about one-third more than the value of his chattel and this at the expense of an innocent vendee of the wrong doer, with the sorry consolation for the defendant that she has a right of action against the absconder. If the verdict of the lower court had been sustained, namely, that "the measure of damages was * * * the amount of the hire-purchase money remaining unpaid" the plaintiff would have received full compensation for what he had lost and the innocent defendant would not have been punished for the fraudulent act of her vendor. This conclusion is justified by the argument of the Ohio court in an analogous case: "The wrong doer * * * [is] estopped from setting up any claim by virtue of the wrong that he has done." 'Against the innocent purchaser from the [wrong doer] the original owner still has "title" to his [property].' But by virtue of what does he now have "title" to the [wrong doer's interest in the property].' "The estopped, so to call it, being created by fraud of wrong, exists only against the one guilty of that fraud or wrong, which the purchaser is not." *Railway Co.* v. *Hutchins*, (1877), 32 Oh. St. 584. Nevertheless the weight of authority is against the Ohio court (Cf. *Bowles Wooden Ware Co.* v. *United States*, (1882), 106 W. S. 432), and possibly the analogy between the cases may be called in question, so our instant case is still law whatever may be said as to its justice.

HUSBAND AND WIFE—CONVEYANCE TO THEM CREATING TENANCY IN COMMON.—By devise land came to "J. W. and to her husband, A. W., and to their heirs and assigns, as tenants in common, to have share and share alike." After death of J. W., her husband having predeceased her, her heirs instituted suit for partition, and a child of A. W. by a former marriage intervened claiming that as to one-half of the land the heirs of A. W. were entitled. *Held*, the devisees took as tenants in common and not as tenants by entireties. *Godman* v. *Greer*, (Del., Orphan's Court, 1918) 105 Atl. 380.

The court seemed to find a great deal of difficulty in arriving at a conclusion the soundness of which cannot admit of much question. Even without the Married Women's Acts a conveyance to parties then husband and wife did not inevitably create a tenancy by entireties. 1 *Preston on Estates*, 132; 2 Blackstone Comm. *182 (Sharswood's Note).—If Preston's view lacked the support of decisions squarely in point, at least there were none opposed thereto. As pointed out in his book, husband and wife were not so much *one* that they could not during the marriage relation own land as tenants in common. In this country there were a few decisions in which,

stressing the oneness of husband and wife too much, it was held no words in a conveyance to husband and wife could prevent them taking as tenants by entireties. *Dias* v. *Glover,* 1 Hoff. Ch. 71 (but see, *contra, Hicks* v. *Cochran,* 4 Edw. Ch. 107); *Stuckey* v. *Keefe,* 26 Pa. St. 397. On the contrary there were not lacking judicial declarations in accord with Preston's view. *McDermott* v. *French,* 15 N. J. Eq. 78; *Hoffman* v. *Stigers,* 28 Iowa 302, 310; *Brown* v. *Brown,* 133 Ind. 476. Since the Married Women's Acts there cannot be any question left. Even in Pennsylvania it is now held that a conveyance to husband and wife may create a tenancy in common. *Blease* v. *Anderson,* 241 Pa. St. 198.

INTERNATIONAL LAW—DIPLOMATIC PRIVILEGE—WAIVER WITH LEAVE OF SOVEREIGN.—Francisco Suarez died intestate in England in 1797 possessed of considerable property. Plaintiff and defendant each claimed to be one of the next-of-kin and entitled to share in the intestate's personality. In 1900 defendant obtained letters of administration and appointed plaintiff his attorney to collect moneys due to the estate abroad. In 1914 plaintiff issued an originating summons asking for an account and for the administration of the personal estate by the Court. Service of summons was accepted by defendant's solicitors and an appearance entered in due course. The first hearing was adjourned to enable counsel to ascertain whether defendant intended to claim privilege as Minister for Bolivia. Counsel informed the Court presently that defendant waived his diplomatic privilege. Later defendant's counsel wrote plaintiff's counsel that waiver of privilege had been authorized by the President of Bolivia. The order for administration was made. Plaintiff appealed from the order, defendant gave notice of a cross-contention, and the order was varied to give effect to the contentions of both parties. The accounts showed large sums due from defendant. Two sums were lodged in Court, one in pursuance to an order and the other voluntarily. Defendant also submitted to be surcharged with a large sum to be paid in instalments. He defaulted on the first instalment, and was personally served with an order to attend before the Master for examination as to his means. A supplemental order was made that defendant pay the entire amount into Court. The next day he left the country. Plaintiff took out a summons for leave to proceed to execution and to issue a writ of sequestration against the property of defendant. The application was refused on the ground of defendant's diplomatic privilege. The summons was permitted to stand over, however, with liberty to restore in the event of defendant ceasing to hold diplomatic office. Four months later the British Foreign Office informed plaintiff's counsel that defendant's appointment as Minister had been terminated. Plaintiff restored his summons, his application was granted, and defendant appealed. It was argued for defendant that the Diplomatic Privileges Act of 1708 made writ and process utterly null and void, and that a waiver of privilege, even with the sovereign's consent, could not confer a jurisdiction which did not exist. *Held,* that the order for the issue of the writ of sequestration was properly made. *In re Suarez* (1907), 87 L. J. Ch. 173.

Diplomats enjoy immunity from suit, even in cases where neither person nor property are immediately affected. *Magdalena Steam Navigation Co.* v. *Martin* (1859), 28 L. J. Q. B. 310. The immunity continues for a reasonable time after termination of the appointment to enable the diplomat to hand over the office to his successor and return to his country. *Musurus Bey* v. *Gadban* (1894), 63 L. J. Q. B. 621. The report of the Foreign Office as to the status of foreign dignitaries and their representatives is conclusive. *Mighell* v. *Sultan of Johore* (1893), 63 L. J. Q. B. 593 (status of foreign sovereign); *Foster* v. *Globe Venture Syndicate* (1900), 69 L. J. Ch. 375 (status and boundaries of foreign state). Lord Talbot's dictum that diplomatic immunity cannot be waived applies only to waiver without leave of the Sovereign. See *Barbuit's Case* (1737), Cas. t. Talb. 281. The Diplomatic Privileges Act of 1708 is merely declaratory of the common law, of which the law of nations is to be deemed a part. *Triquet* v. *Bath* (1764), 3 Burr. Diplomatic privilege under the law of nations may be waived with the permission of the diplomat's Government. The opinion suggests that the diplomat is the proper source of information with regard to this permission.

INTERNATIONAL LAW—REQUISITION BY FOREIGN SOVEREIGN—IMMUNITY FROM PROCESS.—The "Roseric," a privately owned ship, collided with a barge belonging to the libellants who subsequently attempted to enforce a lien through process and seizure. The ship was released on bond. It appeared from the statement of amici curiae (counsel for the British Embassy) that at the time of the collision the ship was requisitioned as a British transport and that the arrest would "interfere with the government business upon which said vessel is engaged." *Held,* that by rule of comity the vessel was exempt during its requisition. To permit the arrest would be inconsistent with the dignity and independence of sovereignty which must not be "hampered or interfered with in the use of such instrumentalities." *The "Roseric,"* 254 Fed. 854 (Dist. Ct. D., New Jersey, 1918).

The court refused to be led by the per curiam opinion in *The "Attualita,"* 238 Fed. 909, which did not recognize immunity for a ship in the employment of the Italian government, on the ground that the Italian government would not be liable for the wrong done by the vessel. That court failed to realize the hazard of preferring a local claim for damages over the public purpose of a foreign sovereign. As a rule the municipal courts are extremely careful to uphold the foreign sovereign in the protection of its public purposes as against the local demands for private redress. In *The "Parlement Belge,"* Ct. of Appeals, L. R. 5 Prob. Div. 197, the proceeding was in rem against a public mail-packet of the Belgian government. It was argued by the claimants that a proceeding in rem was against the vessel only and not against the sovereign. The court, however, realized that the property must be considered as property belonging to someone. The municipal principle as to proceedings in rem had to give way when the owner was a foreign sovereign. It could not be supposed that the sovereign was not indirectly impleaded. To attempt to exercise such authority would be "inconsistent with the independence and equality of the state which is represented by such owner."

The court went even farther and said that the declaration of the sovereign that the vessel was public "cannot be inquired into." In *The "Davis,"* 10 Wall. (U. S.), 15, an action in rem was allowed against a shipment of cotton, the property of the United States, on board a private vessel, since the property was not in the possession of the United States and process would not have to be issued against it. C. H. Weston in an article in 32 HARV. LAW REV., called "Actions Against the Property of Sovereigns" (Jan. 1919), at p. 266, assails the "possession" test and suggests the test of public purpose. He brings an analogy from the law of municipal corporations whose property is not exempt when owned for profit but is exempt when charged with a public purpose, viz., hospitals, fire engines, etc. No issue can be taken with the proposition that the property of the sovereign which is charged with a public purpose should be exempt from local process. But if he means to make the local courts the judges of the public purposes of sovereigns there can be no approval. The inevitable and accepted view is presented in Weston's paraphrase of the holdings of the courts on this question: "Sovereign authority would shrink to small proportions if not permitted to determine what uses of its property are public. To inquire into the use of property declared by a foreign sovereign to be public would be to flout the dignity of sovereignty which the courts have declared entitled to respect." It may be added that it would not only flout the dignity of sovereignty but would also "endanger the performance of the public duties of the sovereign." *Briggs* v. *Lightboats,* 93 Mass. (11 Allen) 157. The court in the principal case, however, attempts to include the case within the rule of *The "Davis,"* supra, by saying that the officers and crew became for the time being "the sovereign's instrumentalities and whatever possession of the ship they obtained by reason of this employment was the sovereign's possession while the requisition was in force." This reasoning is hardly necessary if the sovereign once declares the ship bound on a public purpose. But the decision is correct and the general principles governing it are unquestionably sound. See also *Vavasseur* v. *Krupp,* 9 Ch. D. 351; *The "Exchange,"* 11 U. S. (7 Cranch) 116; *The "Broadmayne,"* L. R. [1916] Prob. Div. 64.

NEGLIGENCE—SUBCONTRACTOR'S DUTY TO MAINTAIN SAFE CONDITIONS—INJURIES TO THIRD PERSONS.—Defendant had a contract with a building corporation to install the ornamental iron work in a certain building. This included the installation of the steel work of the inside stairways exclusive of the marble treads which were necessary to make the stairway complete. The proof showed that it was the universal custom as the construction progressed to use these staircases with the iron tread for workmen going up and down the building; and that the defendant had full knowledge of such actual use in this building. An employee of another contractor doing masonry work upon the building stepped upon a tread of one of these stairs, which fell by reason of the fact that it had not been properly bolted as it should have been. The action is for resulting injuries due to the alleged negligence of the defendant. *Held,* that the plaintiff could not recover because the defendant owed him no duty to make the stairway safe. "The

obligation did not rest upon the defendant to produce a stairway safe for travel, but merely that portion of a stairway which, when compelted by the work of someone else, would be a safe means of travel." Smith and Clarke, J. J., (*dissenting*) held that the defendant owed a duty to those who to his knowledge would make use of the stairway. *Brady* v. *Claremont Iron Works* (Supreme Ct. of New York, App. Div., Jan. 1919), 174 N. Y. Supp. 64.

In *Heaven* v. *Pender,* Ct. of Appeal, 11 Q. B. D. 503, an opposite conclusion was reached under facts materially similar to those in the principal case. The defendant, a dock owner, under a contract with a ship owner, supplied a stage to be slung outside the ship for the purpose of painting. The contractee's employee was allowed a recovery against the dock owner for injuries caused by the breaking of a defective rope. The defendant had no actual knowledge that the platform would be used by the plaintiff but the court concluded that he "must have known" if the matter had been considered at all. The court refused to limit the defendant's duty to the parties to the contract. The court said: "If a person contracts with another to use ordinary care or skill toward him or his property the obligation need not be considered in the light of a duty; it is an obligation of contract. It is undoubted, however, that there may be the obligation of such a duty from one person to another although there is no contract between them with regard to such duty * * * the existence of a contract between two persons does not prevent the existence of the suggested duty between them also being raised by law, independently of the contract, by facts in regard to which the contract is made and to which it applies an exactly similar but not a contract duty." In a word, the existence of a contract duty does not preclude the existence of a duty ex delicto contemporaneous with it and covering the same or a broader field. The rule laid down by the court is, indeed, a reasonable one: "Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." The same rule is expressed in *Sweeny* v. *Old Colony Ry.,* 10 Allen (Mass.) 368, 377. In the principal case the duty to the plaintiff seems clear. The knowledge of the future use imposed upon the defendant a duty to construct an uncompleted stairway as safe as an uncompleted stairway of that type should be—especially since no greater burden was imposed than that which the contract with the building corporation imposed, namely that due care be exercised in the construction of the stairway. The case would have been easily covered by the principle laid down in *McPherson* v. *Buick Motor Co.,* 217 N. Y. 382, decided in the Court of Appeals in the same jurisdiction. See also *Huset* v. *Case Threshing Machine Co.,* 120 Fed. 865; *Schubert* v. *Clark,* 49 Minn. 331, and the cases discussed in the opinions of the principal case.

NEGOTIABLE INSTRUMENTS—LIABILITY OF DRAWER OF BLANK CHECK.—Plaintiff signed a check made out by his confidential clerk. At the time, it

purported to be made out in figures for 2£, although nothing was written upon it in words. The figure 2 was so placed, however, that a figure 1 could be placed before it and a 0 after it. The clerk thus raised the figures to 120£, filled in words for that amount, cashed the check and absconded. Plaintiff sued for a declaration that the bank on which the check was drawn had no right to debit plaintiff's account by more than the 2£ for which the check was drawn when signed. *Held,* the bank was entitled to debit the full 120£. *London Joint Stock Bank* v. *Macmillan and Arthur,* H. of L., [1918] 1918 Ann. Cas. 777.

The court recognized two issues, namely, whether the plaintiff was guilty of negligence in signing the check as he did, and whether such negligence was a breach of duty between himself and the bank. Both issues were decided in the affirmative. The ultimate decision was based also on the principle that plaintiff was estopped to deny the authority of his agent to fill in as he did what was practically a blank check when signed. In *Commercial Bank* v. *Arden,* 177 Ky. 520 is was held that inasmuch as the Negotiable Instrument statute of Kentucky made void instruments which had been altered without the maker's consent, the maker owed no duty to the bank to use care in drawing instruments so that they could not be altered—an apparent non-sequitur. Most of the American authorities, however, are in harmony with the principal decision and impose upon the drawer of a check a duty to use due care in protecting the drawee. *Otis Elevator Co.* v. *First National Bank,* 163 Cal. 31; *Timbel* v. *Garfield National Bank,* 106 N. Y. S. 497. The principal case, in its recital of the various interpretations of *Young* v. *Grote,* 4 Bing. 253, is an interesting commentary on the mechanics of the law.

NUISANCE—FEAR—TUBERCULOSIS HOSPITAL—RESTRICTIVE COVENANTS.—Lands were leased with covenant by the lessee not to "exercise or carry on, or permit to be used, exercised, or carried on, upon the demised premises any noisy, noisome, or offensive trade or business, or use any part of the premises as a tavern or inn, or at any time during the term do or suffer to be done anything which might be hazardous or noisome or injurious or offensive to the lessor of his property, or to any of his tenants or undertenants." The lessee turned over the demised premises to be used as a hospital for children suffering from surgical tuberculosis. On application by plaintiffs as neighboring owners and entitled to the benefit of such covenant. *Held,* the covenant was not violated and no nuisance committed or threatened. *Frost* v. *The King Edward, etc. Assoc.,* (Ch. Div.), [1918] 2 Ch. 180.

The injunction was asked on the ground that "tuberculosis is an endemic and infectious disease and the hospital is a source of danger to the neighborhood." After hearing testimony of eminent authorities whose conclusions were all to the effect that the hospital was not a source of danger to the neighborhood and that there was no risk of infection from it to those living in its immediate vicinity, the court concluded as above stated. The fears of those in the neighborhood were found to be groundless. In *Stotler* v. *Rochelle,* 83 Kans. 86, an injunction against the establishment of a cancer hospital

in a residence district was upheld. The court said: "The question is not whether the establishment of the hospital would place the occupants of the adjacent dwellings in actual danger of infection, but whether they would have reasonable ground to fear such a result, and whether, in view of the general dread inspired by the disease, the reasonable enjoyment of their property would not be naturally interfered with by the bringing together of a considerable number of cancer patients in this place." To the same general effect are *Baltimore* v. *Fairfield Imp. Co.*, 87 Md. 352, where the placing of a leper for care and restraint in a residence neighborhood was enjoined; *Everett* v. *Paschall*, 61 Wash. 47, where it was held, partly, at least, under the influence of a statute, that the operation of a sanitarium for the treatment of pulmonary tuberculosis in a residence neighborhood was restrained, fear, very real though unfounded and unreasonable, on the part of the neighbors being considered sufficient to make out a case for relief. In this connection the statement by LORD HARDWICKE in *Anon.*, 3 Atk. 750, that "the fears of mankind, though they may be reasonable ones, will not create a nuisance," is interesting. *Board of Health* v. *North American Home*, 77 N. J. Eq. 464, very like the principal case in the character of disease treated, is in accord therewith.

PUBLIC UTILITY RATES—OBLIGATION OF CONTRACT RULE AS AGAINST THE COMPANY.—Webster in his dramatic appeal which suffused with tears the eyes of the great Chief Justice, and led to the decision in the *Dartmouth College Case*, 4 Wheat. 526, that a corporate charter is a contract, the obligation of which cannot be impaired without violating the constitution of the United States, saw only his beloved college, "one of the lesser lights in the literary horizon," which an adverse decision might put out. It is safe to say that neither he nor the Chief Justice, nor anyone else present on that occasion saw in the sweep of that decision how relatively insignificant on that day were the interests of Dartmouth College, or "all those great lights of science which for more than a century have thrown their radiance over our land." Actually that decision was of small moment to Dartmouth College, or to all the other educational institutions of the land. It was of tremendous importance in other directions not dreamed of by the actors in that historic scene. It came into full vigor only when the decision of *Munn* v. *Illinois*, 94 U. S. 113, made way for regulatory measures by states and municipalities over public utilities. As a result not a few of these have found themselves incumbered and embarrassed by contract rights and privileges freely and easily, and sometimes corruptly, granted to public service corporations by one generation, which the next would fain restrict or withdraw. Especially has this been the case with provisions as to the charges to be paid by the public for the service.

These agreements were often between the utilities and municipal and other subordinate bodies politic. Recent decisions that rate making is a legislative function that might be lodged with a municipality, but only by specific terms showing such grant, have enabled municipalities to escape restrictions they had assumed without this grant of power, and they have been glad to take

advantage of the way of escape from the burdensome agreements of their representatives. *Milwaukee Electric Ry. Co.* v. *R. R. Com. of Wis.*, 238 U. S. 174. So long as the rate revision was downward the public enjoyed the rule. But chickens tend to come home to roost, and this rule allowing a legislature to override an agreement made by a municipality is doing it. The last two years has seen an unprecedent upward turn in the curve of prices and rates. Federal commissions are permitting increases of state-fixed rates, 16 MICH. L. REV. 379, and state commissions are raising municipality-fixed rates. This revision upward, in the face of charter agreements, is not so agreeable to the public. The Supreme Court in *Englewood* v. *Denver and South Platte Ry. Co.*, U. S. Adv. O., Jan. 7, 1919, page 149, upheld the decision of the Colorado Supreme Court "that this town, at least, deriving its powers from legislative grant, could make no contract of this sort that was not subject to control by the legislature; that the Public Utilities Commission had been authorized by the legislature to regulate the matter in controversy; that it had done so; and that this proceeding should be dismissed." The result is that many municipalities seem to be in a position where their charter contract with public utilities is valid against, but not for them. The war conditions may soon pass, but if not the bigger question is not far away, viz., the effect against the state itself of charter provision as to rates which do not yield a fair return, or any return, on the value of the property devoted to a public use. Whatever agreements may have been made, public utilities cannot be permanently operated at a loss. What will become of these charter-fixed rates?

PUBLIC OFFICERS—RECESS APPOINTMENT—LIMITATION ON EXECUTIVE'S POWER.—The governor of Pennsylvania forwarded to the state senate the name of Daniel F. Lafean for confirmation as commissioner of banking for the regular term. The senate rejected the nomination and shortly after the final adjournment of that body the governor appointed Lafean to fill the vacancy in the office and to serve until the end of the next session of the senate. Lafean entered on the duties of his office, and the payment of the salary being refused him brought mandamus to compel the auditor general and state treasurer to approve and pay him the salary attached by law to the office. The defendants appealed from the decision of the trial court awarding a peremptory writ and the Supreme Court of Pennsylvania, with a court divided four to three, affirmed the decision. *Commonwealth ex rel Lafean* v. *Snyder*, (Pa., 1918), 104 Atl. 494.

The constitution of Pennsylvania contained the following common state constitutional provisions: The Governor "shall nominate, and, by and with the advice and consent of two-thirds of all the members of the Senate, appoint * * * such * * * officers of the commonwealth as he is or may be authorized by the Constitution or law, to appoint; he shall have the power to fill all vacancies that may happen, in offices to which he may appoint, during the recess of the Senate, by granting commissions which shall expire at the end of their next session; * * * if the vacancy shall happen during the session of the Senate, the Governor shall nominate to the Senate, before

their final adjournment, a proper person to fill said vacancy." A majority of the court reasoned that the constitution expressly authorized the governor to fill vacancies happening during the recess of the senate and did not expressly place any restriction on his choice in making such a temporary appointment. They refused to find that any such restriction was to be implied from the constitution. The minority judges dissented on the ground that the constitution by implication prevented the governor from appointing to office, for any portion of the term thereof, a person whom the senate had rejected for appointment to the same office for the full term. The majority opinion mentions but does not discuss the point as to when the vacancy occurred. There is slight authority to the effect that where a vacancy occurs before the adjournment of the senate, it is not a vacancy happening during the recess of the senate or, in other words, the office does not become vacant during the recess. *People* v. *Forquer* (1825), 1 Ill. 104. Other courts have taken the opposite and better view and held that though the vacancy first occurred during the session of the senate, it continues to exist or "happen" until filled, and the power of recess appointment therefore embraces the power to fill temporarily a vacancy which existed when the senate was in session and for some reason was not filled. *In re Farrow* (1860), 3 Fed. 112; *State* v. *Kuhl* (1889), 51 N. J. L. 191. It is therefore entirely probable that had this point been decided by the court in the instant case it would have been settled that the vacancy "happened" during the recess of the senate and the governor's power of appointment would have been upheld. On the main point discussed by the court in the instant case the majority of the court appear to have been right. The governor's power to nominate and, by and with the advice and consent of the senate, to appoint a person to fill an office for the full term is entirely separate and distinct from the governor's power of recess appointment. The mere fact that the two powers are conferred by the same section of the constitution furnished no reason for limiting one by the other. Nothing in the language of the section conferring these powers creates an implication that the governor's power of choice in making a recess appointment is limited by the senate's approval or disapproval of the person selected. As shown in the majority opinion in the instant case, the implication contended for by the minority judges is so doubtful that it has been found necessary to insert in many state constitutions express provisions to secure the same effect sought to be obtained by the implication contended for in this case. The power of the executive to appoint to office, during the recess of the senate, to fill a vacancy and serve until the end of the next session, a person who has been rejected for appointment to the same office for the regular term by the senate before its adjournment has been the subject of much speculation. This seems to be the first case in which the point is squarely decided.

SALES—RIGHT TO RESCIND FOR BREACH OF WARRANTY.—Action to rescind the sale of an auto truck for breach of warranty. *Held*, Appellee by using the truck a year, though intermittently complaining of defects, had waived his right to rescind. *International Harvester Co. of America* v. *Brown* (Ky. 1918), 206 S. W. 622.

In deciding that appellee had waived his right to rescind, the court necessarily assumes the right to have existed subsequent to the sale. By the weight of authority in this country and England, the rule on the right of a purchaser to rescind a sale on breach of warranty is as stated in *Thornton* v. *Wynn*, 12 Wheat. 184 and *Street* v. *Blay*, 2 B. & A. 456, wherein it was held that no such right existed in cases where title had passed to the vendee unless there had been fraud, or unless the right was given by breach of a condition subsequent. See 16 HARV. L. REV. 465, where the cases are collected and commented on by Professor Williston. Opposed to this is the case of *Bryant* v. *Ishberg*, 13 Gray 607, where the court came to the conclusion that * * * "a warranty may be treated as a condition subsequent at the election of the vendee, who may, upon a breach thereof rescind the contract and recover back the amount of his purchase money as in case of fraud." As to the status, strength and respective merit of the conflicting views in our courts, see a running discussion between Professors Williston and Burdick in 4 COL. L. REV. 2, 194, 265, wherein the former ably supports the Massachusetts rule and the latter strongly contends for the law of *Street* v. *Blay*. The instant case fails to state explicitly the court's conception of the stand taken by the Kentucky courts on the question. Inferentially it holds to the right to rescind. In the case of *Lightburn* v. *Cooper*, 1 Dana (31 Ky.) 273, the court decided that "a simple warranty and tender even though there has been a breach of the warranty, cannot operate as a rescission." No subsequent cases have been found overruling this case. Cases cited by the court in the instant case, where the right to return the goods was considered, contained provisions for rescission on breach of warranty. *Dick* v. *Clark Jr. Electric Co.*, 161 Ky. 622; *McCormick* v. *Arnold*, 116 Ky. 508, or for replacement of any and all defective parts, *Meek Coal Co.* v. *Whitcomb Co.*, 164 Ky. 833; or, as in *Yeiser et al.* v. *Russell & Co.*, 26 Ky. L. Rep. 1151, the breach went to a condition and was waived by retention of the goods. Unless, therefore, there was some provision in the contract of sale for returning the goods on breach of warranty omitted from the report of the case under discussion, the court's assumption that such right existed in Kentucky, was fallacious. Under the rule of *Lightburn* v. *Cooper*, the court would have arrived at the same conclusion on the ground that a mere breach of warranty and tender would not operate to revest the title in the seller, or if the matter be considered as breach of a condition, the acceptance and use beyond the time necessary for inspection would be deemed a waiver of the right to rescind and the vendee would be put to his action for damages for breach of warranty.

TRADE-MARKS—INDEPENDENT ORIGINATORS.—Complainant had built up, in Massachusetts and to a certain extent throughout the Union, a business which used the trade-mark "Rex" for medical preparations. Defendant, unaware of this, used the same word as a trade-mark for similar goods and had built up a local business in Kentucky. Complainant sued to restrain defendant from further use of the trade-mark "Rex" on the ground that it was an infringement. *Held*, the decree of the District Court should be reversed and an in-

junction denied. *United Drug Co.* v. *Theodore Rectanus Co.*, (Dec. 1918) 39 Sup. Ct. Rep. 48.

It was settled that complainant had been the first to use "Rex" as a trade-mark, but that defendant adopted it in ignorance of complainant's use. The patentee of an invention can restrain others from using his invention regardless of his own use or neglect to use. *Continental Paper Bag Co.* v. *Eastern etc. Co.*, 210 U. S. 405. The fact that the infringer of a patent monopoly believed himself to be the originator of the idea (*U. S.* v. *Berdam Co.*, 156 U. S. 552, 566) or that he did not know the idea was patented, is immaterial. *Royer* v. *Coupe*, 29 Fed. 358. Complainant contended that the first originator of a trade-mark is entitled to its exclusive use wherever his business comes into competition with others, citing *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460, *et al.* The gist of the decision in the principal case was, that adoption of a trade-mark secures no monopoly whatever, but merely creates a right in respect to a business; that where there is no business there is no right; and that defendant, having first built up the business to which the right appertained in the particular locality, had the prior right in that locality. It seems settled that there must be an actual use of the trade-mark to give any right to it. HOPKINS ON TRADE-MARKS, sec. 29. That territorial rights, as between originating claimants, depend on actual territorial use is supported by *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 415; *Gorham Mfg. Co.* v. *Weintraub*, 196 Fed. 957.

VENUE OF ACTIONS—LOCAL ACTIONS AGAINST MUNICIPAL CORPORATIONS.—Two counties, King and Pierce, undertook the improvement of a river, and by reason of their alleged negligence the property of a riparian owner in Pierce county was injured. The owner sued both counties in the court of Pierce county. *Held*, on objection by King county, that the action was brought in the proper place. *State ex rel* v. *Superior Court* (Wash. 1918), 176 Pac. Rep. 352.

The question was one of precedence between two rules, (1) that a municipal corporation must be sued in its own courts, and (2) that a local action must be brought where the wrongful act takes place. Here King county was being sued in Pierce county for a trespass to real property which occurred in the county of venue. The court held that a general rule of venue should be deemed to apply to municipal corporations as well as individuals unless they were expressly excepted. The statute fixing the venue for trespass to real property did not except counties, hence they were like individuals subject to suit where the injury took place.

This is the general rule. In *McBane* v. *People*, 50 Ill. 506, a general statute on change of venue was held to authorize carrying an action out of the defendant county, notwithstanding that by the terms of a special statute it could have been commenced only in the defendant's courts. In *Clarke* v. *Lyons County*, 8 Nev. 181, a general statute authorizing trial in a wrong venue where timely objections were not taken, was held to apply to counties. In *Baltimore City* v. *Turnpike Company*, 104 Md. 351, an action for trespass committed by a city upon land outside the city was held properly brought in

the jurisdiction where the land was located. The rule exemplified in these cases offers an interesting illustration of the strength of the local venue tradition of the common law,—a tradition which Lord Mansfield unsuccessfully tried to revise upon the principle that only proceedings *in rem* were essentially local. *Mostyn* v. *Fabrigas*, 1 Cowp. 161; Erskine's argument in *Doulson* v. *Matthews*, 4 T. R. 503. An action against a county of one State brought in the courts of another State, where the process of attachment is available would seem to present no difficulty. *Van Horn* v. *Kittitas County*, 28 Misc. (N. Y.) 333, affirmed, 46 N. Y. App. Div. 623.

WILLS—EXECUTORY DEVISE—REPUGNANCY—FAILURE OF PRECEDING INTEREST.—Testatrix by will gave her freeholds absolutely to A. "subject to the following bequests. * * * Secondly I desire that after my executor's (A's) death whatever of my freehold properties shall remain shall be given to" a named charity. *Held*, that if A had survived the testatrix the gift to the charity would have been repugnant and void and that A would have taken absolutely, but that, A having died in the lifetime of the testatrix, the doctrine of repugnancy did not apply, and the gift to the charity was accelerated and took effect. *In re Dunstan. Dunstan* v. *Dunstan*, [1918] 2 Ch. 304.

Where property is given by will to a devisee absolutely, any further disposition of such property is generally ineffective. A provision that if the first taker does not give the property away in his life-time or dispose of it by will, it shall not go to his heir-at-law or personal representative is repugnant and void; for what is once vested absolutely in a man cannot be taken from him out of the course of devolution at his death by any expression or wish on the part of the testator. It may happen, however, that the original gift never takes effect,—e. g., through the death of the devisee or legatee in the lifetime of the testator. The older cases made no exception in this situation. In 1855 Sir John Romilly, M. R., held that an executory bequest over in defeasance of a previous absolute bequest of personalty failed although the first legatee predeceased the testator. *Hughes* v. *Ellis*, 20 Beav. 193. The same view had been taken in *Andrew* v. *Andrew*, (1845) 1 Coll. 686 (consumable articles), and *Harris* v. *Davis* (1844) 1 Coll. 416, 9 Jur. 269; *Hughes* v. *Ellis* was followed in *Greated* v. *Greated* (1859) 26 Beav. 621. These cases were deservedly criticised by James, L. J., in *In re Stringer's Estate* (1877) 6 Ch. Div. 1, 14-15. As Justice James said, it is difficult to see why this principle should apply to a case "where the original gift never did take effect at all, because there is no repugnance. There may be repugnance between the gift over and the gift intended to be made, but I am not quite sure that that ought to be applied to a case, supposing the point arose, where there was simply the death of the person creating a lapse." So far as bequests of personalty are concerned, the modern doctrine was established in *In re Lowman* [1895] 2 Ch. 348. Lindley, L. J., said: " * * * where there are successive limitations of personal estate in favour of several persons absolutely, the first of them who survives the testator takes absolutely, although he would have taken nothing if any other legatee had survived and taken; or in other words, in the case supposed

the effect of the failure of an earlier gift is to accelerate, and not destroy, the later gift. * * * The doctrine of repugnancy has no application to gifts that fail; the doctrine does not come into operation until somebody takes, and it is only those limitations which defeat the interest some one takes that are void, on the ground that they are inconsistent with what is given to him." Lindley, L. J., expressly limited his decision to personal estate. The question therefore remained whether the same principle would apply to devises of land. The *dictum* of James, L. J., applied alike to land realty and personalty and Mr. Sweet expressed the opinion that when the point arose with regard to realty the courts would hold it subject to the same rule. 1 JARMAN, WILLS (ed. 6) 452. This problem seems to have been presented for the first time in the principal case. Neville, J., held that no sound distinction could be drawn between real and personal estate and did not hesitate to extend the doctrine of *In re Lowman* to real estate. The passing of another futile distinction is pleasant to record.