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AGENCY—AGENT'S LIABILITY FOR NEGLIGENCE.—The plaintiff, a dealer in fruit, entered into an agreement with a railroad company in which the carrier agreed to transport fruit from Texas to Iowa, the railroad undertaking to furnish the necessary refrigerator equipment for handling the shipments and to put ice into the cars at certain points along the line. The railroad company procured the defendant to furnish the cars required for handling plaintiff's shipments and to ice the cars as agreed between the plaintiff and the railroad company. The defendant negligently loaded and iced the cars containing a cargo of plaintiff's fruit, and as a result it was greatly damaged. *Held,* that the agent was guilty of misfeasance in the performance of its contract with its principal, and for this it was liable directly to the plaintiff. *Emery & Co.* v. *American Refrigerator Transit Co.* (Ia., 1921), 184 N. W. 750.

In passing upon the liability of the agent to third persons for negligence in the performance of duties devolving upon him by reason of his employment, three theories of liability have been evolved. Following a *dictum* of Lord Holt in *Lane* v. *Cotton,* 1 Ld. Raym. 646, it has been held that an agent is not liable to the third person for such negligence. *Murray* v. *Usher,* 117 N. Y. 572 (*dictum*); *Van Antwerp* v. *Linton,* 35 N. Y. S. 318; *Delaney* v. *Rochereau & Co.,* 34 La. Ann. 1123; *Albro* v. *Jaquith,* 4 Gray (Mass.) 99; *Feltus* v. *Swan,* 62 Miss. 415; *Henshaw* v. *Noble,* 7 Oh. St. 226; *Drake* v. *Hagan,* 108 Tenn. 265; *Labadie* v. *Hawley,* 61 Tex. 177. Other authorities, following what seems to be the reasoning of the principal case, adopt Lord Holt's *dictum,* in which he said that the agent was liable for misfeasance, and hold the agent liable when he has been negligent, on the theory that the negligence converts what otherwise would have been a proper performance of his duties into misfeasance. *Bell* v. *Josselyn,* 3 Gray (Mass.) 309; *Lottman* v. *Barnett,* 62 Mo. 159; *Southern Ry. Co.* v. *Rowe,* 2 Ga. App. 557; *Ellis* v. *McNaughton,* 76 Mich. 237; *Greenberg* v. *Lumber Co.,* 90 Wis. 225. The weight of modern authority comes to a similar result, but simply inquires whether the agent has exercised that degree of care in his actions which the law requires in the particular situation. *Lough* v. *John Davis Co.,* 30 Wash. 204; *Haynes' Admrs.* v. *C., N. O. & T. P. R. Co.,* 145 Ky. 209; *Schlosser* v. *G. N. R. Co.,* 20 N. D. 406; *Jacks* v. *Orth Lumber Co.,* 121 Minn. 461; *Rising* v. *Ferris,* 216 Ill. App. 252; *Mayer* v. *Building Co.,* 104 Ala. 611. The difficulties in determining whether the agent owes any duty to third persons. When the agent has been put in control of property, or given other powers which an independent actor would have, it should be held that he owes a duty to third persons to use due care in what he does, the same as any other individual. See 1 MICH. L. REV. 315, where a discussion of the principles involved will be found.

APPEAL AND ERROR—SETTLEMENT OF EXCEPTIONS BY STIPULATION OF PARTIES AFTER EXPIRATION OF TIME LIMIT.—After the time set by court rule for settling and filing a bill of exceptions, the appellant entered into a stipulation with the appellee to extend the time for so doing. When the record settled according to this agreement came before the court of error, the appellee moved to strike out the bill of exceptions on the ground that it had not been settled according to law. To have this point decided the United States circuit court certified the following question to the Supreme Court: "Is the bill of exceptions as above set forth settled and certified to this court in contravention of law in that the term had expired before the same was offered for settlement?" *Held,* that the exceptions could not be considered, on the ground that jurisdiction cannot be conferred on the courts of the United States by consent and the court rule was for the acceleration of procedure and could not be waived by the parties. *Exporters of Manufacturers' Products Co.* v. *Butterworth-Judson Co.,* U. S. Sup. Ct. Adv. Op. No. 390 (April 10, 1922).

By this judgment the Supreme Court has reversed its former practice of allowing delay in settling exceptions to be regulated by the parties. This practice was recognized by implication as late as the case of *Jennings* v. *Philadelphia Ry.,* 218 U. S. 255, in which relief was refused only because no actual consent was shown, the court saying: "There must be express consent, or consent which would equitably estop the opposite party from denying that he consented." And in *Waldron* v. *Waldron,* 156 U. S. 361, a case identical with the principal case except that in it consent was given during the term, it was held that consent would extend the time during which a bill of exceptions could be settled. As the theory of the instant case is that jurisdiction is given only by a strict compliance with the court rule, and there is in the rule no express exception made for the case of consent given during the term, it can make no difference whether it is given during the term or after the term has expired. The view which the Supreme Court has swung over to is sustained by the great weight of authority among the state courts. *Crowe* v. *Charleston,* 62 W. Va. 91, 3 Ann. Cas. 1110; *Perkins* v. *Perkins,* 173 Mich. 690. There are, however, scattered cases contrary to the proposition that strict compliance with the statutes regulating the time for exceptions is necessary for the appellate court to have jurisdiction of them. In New York, in the case of a delayed appeal, it was held that the court of appeal has general power to review judgments and that consent does not confer it but is merely a waiver of the right to insist that the time has passed for bringing the appeal. *Jacobs* v. *Morange,* 1 Daly (N. Y.), 523. In *Morrison* v. *Craven,* 120 N. C. 327, the court held in regard to a delayed docketing of an appeal that "Where the counsel waive the required diligence the court will not exact it." *Sleck* v. *King,* 3 Pa. St. 211, which involved a delay in taking appeal, lays down the rule that if the other party has appeared in court he cannot deny its jurisdiction. Coming to cases more directly in point, in *Perryman* v. *Burgster,* 4 Port. (Ala.) 505, the transcript was considered, although it was not filed in time. See also

State v. *Williams,* 64 Ind. 226. In *Steven* v. *Neb. Ins. Co.,* 29 Neb. 187, the transcript was filed too late, but the court received it, saying: "The district court has jurisdiction over the subject matter of the action, and by the defendant in error agreeing to a continuance of the cause it conferred upon that court jurisdiction of its person." In the last analysis, the question certified really resolves itself into an inquiry whether the time limit for settling exceptions is for the benefit of the litigants alone or is designed summarily to accelerate the course of judicial proceedings without reference to the convenience or wishes of the parties.

BILLS AND NOTES—PAYEE AS HOLDER IN DUE COURSE.—D made a note payable to P in payment for certain shares of stock purchased from M. The note was delivered to M, who thereafter sold it to P. In an action on the note it was *held,* the fact that P was the payee did not preclude him from being a holder in due course within the meaning of the Negotiable Instruments Law. *Bank* v. *Randell* (Neb., 1922), 186 N. W. 70.

The holding in the instant case turns upon the construction to be placed on the word "negotiate" as used in Section 30 of N. I. L., which provides: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder completed by delivery." Section 52 of the act, which defines holder in due course, prescribes that at the time the instrument was "negotiated" to him he must have had no notice, etc. The act also provides specifically that the payee is a holder (§ 191) and that every holder is *prima facie* a holder in due course (§ 59). It would appear elementary that such construction should be given ambiguous terms in the statute as will harmonize all the sections if possible. This can be accomplished by considering the first sentence of Section 30 as a complete definition of "negotiate" and the second sentence as illustrative of the usual methods of negotiation, but not necessarily the sole methods. If the payee is prima facie a holder in due course delivery to him by the maker or by a third person intrusted by the maker with the instrument must be a negotiation to him within the meaning of sections 30 and 52. Before N. I. L. it was well settled that the payee might be a holder in due course. *Armstrong* v. *Am. Bank,* 133 U. S. 443. The Nebraska court, however, had held to the contrary. *Camp* v. *Sturdevant,* 16 Neb. 693. Some courts have held that N. I. L. effected some change in this respect. *Vander Ploeg* v. *Van Zuuk,* 135 Ia. 350, L. R. A. (n. s.) 490, *note,* 6 MICH. L. REV. 77; *Bank* v. *Walch,* 76 Or. 272; *Bank* v. *Edwards,* 243 Mo. 553; *Bowles* v. *Clark,* 59 Wash. 336 L. R. A. (n. s.) 613, *note.* The Iowa and Oregon courts, however, have denied that a payee may never be a holder in due course. *Vander Ploeg* v. *Van Zuuk, supra; Simpson* v. *Bank,* 94 Or. 147. The prevailing view is that the statute has not changed the Law of Merchants. *Boston Steel & Iron Co.* v. *Steuer,* 183 Mass. 140; *Liberty Trust Co.* v. *Tilton,* 217 Mass. 462, L. R. A. 1915 B 144, *note; Ex Parte Goldberg & Lewis,* 191 Ala. 356, L. R. A.

1915 F 1157, *note; Johnston* v. *Knipe,* 260 Pa. 504. The situation under the English Bills of Exchange Act is somewhat in doubt. The Divisional Court in *Herdman* v. *Wheeler* [1902], 1 K. B. 361, held the payee not to be a holder in due course, and the Court of Appeal in *Lloyd's Bank* v. *Cooke* [1907], 1 K. B. 794, on almost identical facts reached the opposite conclusion basing their decision on the ground of estoppel. For the sake of uniformity, if for no other reason, it is gratifying to see Nebraska adopt the prevailing view under N. I. L. after being in the minority before the statute was adopted. For an interesting discussion of uniformity under N. I. L. see 59 U. OF PA. L. REV. 471.

BULK SALES ACT—TRANSFER TO CORPORATION ORGANIZED TO TAKE OVER AND CONTINUE THE BUSINESS—APPLICABILITY OF STATUTE.—The officers of an insolvent corporation organized a new corporation and transferred to the new corporation, which was organized to take over and continue the business, a substantial portion of the assets of the inslovent corporation, without complying with the Bulk Sales Act. *Held,* The transfer was within the Bulk Sales Act and void. *Keedy* v. *Stealing Electric Appliance Co.,* (Del. 1921), 115 Atl. 359.

But few cases have passed upon this phase of the question and they furnish a diversity of conclusion. Upon the one hand is the holding in *Maskell* v. *Alexander,* 100 Wash. 16 to the effect that the transfer of an entire business to a corporation organized to take over the business in consideration for stock in the new corporation is not a transfer within the Bulk Sales Act. This decision was upon the ground that the sale was not for cash, but for corporate stock, which was as available for the satisfaction of the claims of the creditors after the transfer of the merchandise as the merchandise was before. Wherefore the transaction did not violate the object of the law, which it was said was to prevent a vendor from selling his stock of goods, pocketing the proceeds, and leaving his creditors remediless. An inferior court in *West Shore Furniture Co.* v. *Murphy,* 141 N. Y. Supp. 835, assumed, as did the principal case, that the transfer was within the act. Evidently these courts interpret the statute strictly, and construe the act as an absolute prohibition against all sales not made in the ordinary course of business, instead of a prohibition against only those transfers which would work to the detriment of the creditors. This was the view taken by the court in *Marlow* v. *Ringer,* 79 W. Va. 568. In that case A and B having stocks of goods of equal value formed a partnership. As to whether this was a transfer within the statute the court said "this realignment of interest of course did not work any impairment or diminution in the value of the property that could be subjected to the payment of the transferor's debts. But as the statute expressly condemns as void the sale in bulk of any part of a stock of merchandise otherwise than in the ordinary course of trade, and in the regular and usual prosecution of the seller's business" the transfer was held to be within the statute. The Bulk Sales Act being in derogation of the common law and a restriction upon alien-

ation, it would seem that the Washington court has taken the better view in construing the act to be a prohibition against only such transfers as would work to the detriment of the creditor. Hence it would seem that a transfer to a corporation in return for a stock should not be within the statute for the debtor's property remains the same in value.

CONTRACTS—AGENCY—WHEN HAS A BROKER PERFORMED SO AS TO BE ENTITLED TO A COMMISSION?—Plaintiff, a broker, sued for his commission under an agreement by the terms of which he was to find a purchaser for land on or before March 14, 1915. On March 10th, plaintiff mailed a notice to defendant's intestate stating that he had procured a purchaser, and the prospective purchaser sent to the vendor an unqualified acceptance of his offer. Other efforts were made by the broker and prospective purchaser to notify defendant's intestate that the purchaser was ready, willing, and able to buy on the terms specified. The facts indicated that failure to complete the transaction was caused through the evasions of the vendor. *Held,* plaintiff was entitled to recover on the ground that his letter mailed March 10th was notice to defendant's intestate and binding on him from the time it was deposited in the mail. *Lingquist* v. *Loble* (Montana, 1922), 204 Pac. 170.

The court seems to indicate that the acceptance mailed by the broker within the time specified was essential to his right of recovery, and numerous cases are cited holding that an acceptance is binding from the time it is mailed. It would seem, however, that this principle of contract is not applicable to this case. The broker has very few of the characteristics of an ordinary agent. The agreement between broker and vendor is ordinarily susceptible of either one of two interpretations. The broker may be in the position of one to whom the vendor has made an offer of a unilateral contract. The owner offers to pay a commission if the broker will perform certain acts, i. e. find a purchaser. The broker under this interpretation does not agree that he will find a purchaser. He may, however, accept the owner's offer and thus change it into a binding contract by the performance of the act stipulated, MECHEM ON AGENCY, (Ed. 2), § 2429, or the agreement may be construed as a bilaterial contract, 20 MICH. L. REV. 788. If the first interpretation is adopted, then finding a purchaser would seem to constitute a sufficient acceptance of the offer, notice being essential only as a condition subsequent. See *Brown* v. *Smith,* 131 Mo. App. 59; *Veale* v. *Green,* 79 S. W. 731; *Cf. Bishop* v. *Eaton,* 161 Mass. 496. However, if the contract between the principal and broker be construed as bilateral, then the question arises has the broker sufficiently performed his undertaking so as to be entitled to a commission and was notice as given in his letter of March 10th essential to his cause of action. Even under this theory, it would seem that the notice within the time specified was not material. The understanding was that he find a purchaser within the time who was ready, willing and able to purchase. Where the understanding was to sell land within a specified time, it was held that if the buyer was actually found within that time although not reported to the principal until afterward, the broker

might, nevertheless, recover, the principal not having been prejudiced by the delay, *Schramm* v. *Wolff*, (Texas, 1910), 126 S. W. 1185. But assuming that under the bilateral theory notice of performance within the time specified is essential, it is well established that when performance is prevented by the acts of the principal, the cause of action is not defeated. *Lundell* v. *Schultz*, 186 Ill. App. 245, WILLISTON ON CONTRACTS, § 677.

CONTRACTS—ILLEGALITY OF "TYING CLAUSES" IN A LEASE OF MACHINERY UNDER THE CLAYTON ACT.—Defendant, through its patents, controlled a very large portion of the business of supplying shoe machinery. Shoe machinery was leased to shoe manufacturers upon conditions, some of which were (1) that the machinery would be used only on shoes upon which certain other operations were performed on other machines of defendant; (2) that if lessee failed to use exclusively certain kinds of machines made by defendant, lessor could cancel all leases; (3) that lessee should purchase all supplies from defendant; (4) that lessee should buy all additional machinery of a certain class from defendant; (5) that royalty should be paid on all shoes operated upon by machines of competitors. In a suit by the United States to restrain the defendant from making leases containing such restrictions, *held*, such restrictions were invalid under § 3 of the Clayton Act which makes it unlawful for persons engaged in interstate commerce to lease machinery, whether patented or unpatented, upon condition that the lessee shall not use machinery of the competitors of the lessor, where the effect of such lease may be substantially to lessen competition or to tend to create a monopoly. *United Shoe Machinery Corporation* v. *United States*, U. S. Sup. Ct. Adv. Op., No. 119, Oct. Term, 1921.

In the absence of the statute, leases of machinery containing "tying clauses" similar to those enumerated above have been upheld. *United Shoe Machinery Co.* v. *Brunet* [1909], A. C. 330; *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32. But the court in the principal case decides that such restrictions are prohibited by the Clayton Act for, though "the clauses enjoined do not contain specific agreements not to use the machinery of a competitor of the lessor, the practical effect of these drastic provisions is to prevent such use." The defendants' chief defense was that the Act is an unconstitutional limitation upon the rights secured to a patentee and is therefore a taking away of property without due process. But the Supreme Court has formerly held that a patent confers upon the patentee only the exclusive right to make, use, and sell the invention and confers no privilege to make contracts in themselves illegal. *Motion Picture Patents Co.* v. *Universal Film Co.*, 243 U. S. 502; *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20.

CRIMES—MENS REA.—Defendant was indicted for having sold a derivative of opium in violation of the federal Narcotic Act of 1914, 38 STAT. 785. He demurred on the ground that the indictment failed to charge that he knew the derivative to be such. *Held*, the statute did not make such knowledge

an ingredient of the offense and the allegation was not necessary. *United States* v. *Balint,* 42 Sup. Ct. 301 (March 27, 1922).

There is plenty of authority in accord with the principal case. Ignorance of fact and, therefore, absence of evil intent are no defense if the statute negatives that common law essential. *Com.* v. *Mixer,* 207 Mass. 141; *People* v. *Christian,* 144 Mich. 247; *Rex* v. *Wheat,* [1921] 2 K. B. 119, 20 MICH. L. REV. 108. The mere fact, however, that a statute does not contain the word "knowingly" or otherwise expressly require knowledge of fact, does not definitely indicate that knowledge is not an element in the crime. Such a requirement may be judicially implied. *Faulks* v. *People,* 39 Mich. 200; *Reg.* v. *Tolson,* 23 Q. B. Div. 168. Consideration of extrinsic circumstances is suggested in the latter case as a basis for interpretation of the statute. As to the constitutionality of statutes which negative knowledge as a necessary element in criminal liability, see, DUE PROCESS AND PUNISHMENT, 20 MICH. L. REV. 614.

DEEDS—MENTAL CAPACITY MAY EXIST THOUGH GRANTOR HAS NOT CAPACITY TO DO BUSINESS GENERALLY.—Grantor, a widow 93 years of age, made a deed of land to her two granddaughters, following a family consultation at which grantees were present. Plaintiff, grantor's guardian, sued in equity to set deed aside, alleging that grantor was mentally incompetent to execute a deed. *Held,* mental capacity may exist though grantor has not capacity to do business generally. *Sutherland State Bank* v. *Furgason* (Iowa, 1922), 186 N. W. 200.

The degree of mental capacity required to uphold a deed varies with the circumstances surrounding the conveyance, the requirement being that the grantor understand the transaction in hand in all its consequences. *Akers* v. *Mead,* 188 Mich. 277; *Chamberlain* v. *Frank,* 103 Neb. 442; *Swan* v. *Steven's Estate,* 206 Mich. 694. A distinction is to be noted between deeds in the nature of gifts or testamentary conveyances, and those resulting from an ordinary contract of sale. *Hamlett* v. *McMillin* (Mo., 1921), 223 S. W. 1069. The doctrine of the instant case is probably limited to the former, as capacity to do business generally is an ordinary test in cases of the latter type. *Porterfield* v. *Kuss,* (Mo., 1920), 226 S. W. 21; *Bordner* v. *Kelso,* 293 Ill. 175.

EVIDENCE—SHOULD JUDGE OR JURY DETERMINE WHETHER CONFESSION WAS VOLUNTARY?—Defendant was charged with murder, and on trial his confession was offered in evidence by the prosecution, and admitted by the court for determination of the jury as to whether it was voluntary. Defendant contended it was obtained by "third degree" methods, but the only evidential element raising any issue as to whether it was made freely and voluntarily was defendant's denial of any knowledge of it, or of having made or signed it. There was abundant evidence supporting the contention of the prosecution that it was made voluntarily by defendant. *Held,* assuming there was created a tangible doubt as to the voluntary character of the confession, it was proper for the court to admit it and leave the question to the jury. *People* v. *Utter* (Mich., 1921), 185 N. W. 830.

The principal case follows the general rule laid down by previous cases in Michigan, which is in accord with one line of authorities holding that when the evidence is conflicting as to whether a confession was voluntarily obtained, the question should be left to the jury under instructions to disregard the confession if upon all the evidence they believe it was involuntary. *People* v. *Biossat,* 206 Mich. 334; *People* v. *Lipsczinska,* 212 Mich. 484; *Commonwealth* v. *Piper,* 120 Mass. 185; *Williams* v. *State* (Texas, 1920), 225 S. W. 177; *Bonner* v. *State* (Ga., 1921), 109 S. E. 291. Directly opposed to that line of cases is the older and possibly more generally accepted doctrine that whether a confession was freely and voluntarily made is a matter of admissibility of evidence to be determined by the court, which doctrine is more in accord with the elementary principles defining the functions of judge and jury. WIGMORE ON EVIDENCE, § 861. See *Machen* v. *State* (Ala., 1920), 85 So. 857; *Hauk* v. *State,* 148 Ind. 238; *Ellis* v. *State,* 65 Miss. 44; *Biscoe* v. *State,* 67 Md. 6; *Stiner* v. *State,* 78 Fla. 647; *People* v. *Columbus* (Cal., 1920), 194 Pac. 288. Variations of the two rules are not infrequent as in *Commonwealth* v. *Sherman,* 234 Mass. 7, where it was held that the judge should first apply the rules of law to the confession in question, and after admitted by him, the jury should apply them again with power to reject the confession if not voluntary. To the same effect see *Wilson* v. *U. S.,* 162 U. S. 613. In *State* v. *Storms,* 113 Ia. 385, it was held that when the court is in doubt as to the voluntary character of the confession, it should be left to the jury. In *Burton* v. *State,* 107 Ala. 108, the court held that the jury should consider whether the confession was voluntary in passing on its weight, but once it was admitted by the court, the jury could not wholly neglect it, it not being their duty to determine the question of admissibility. In such a case the jury will consider the same facts as the court did, but with the purpose of determining credit rather than admissibility. In *State* v. *McDaniels* (N. M., 1921), 196 Pac. 177, the court held that the admission or rejection of a confession in the first instance is for the court, but if after its admission a conflict of evidence arises as to its voluntary character, the question of whether voluntary or not is for the jury. If the facts surrounding the confession are uncontroverted, the court should rule on its admissibility as a question of law, and under either of the two established rules the decision in the trial court is generally final, subject to reversal only if there is a clear error in the result.

JURISDICTION—TRESPASS TO REAL PROPERTY—LOCAL ACTION.—The plaintiff brought an action of trespass in Idaho for injuries caused to his land in Washington by acts of the defendant which occurred in the latter state. *Held,* (Rice, J. dissenting) an action of trespass is a local action and can be brought only in the state where the land lies. *Taylor* v. *Sommers Bros. Match Co.,* (Idaho, 1922) 204 Pac. 472.

The common law distinguished clearly between so-called transitory and local actions,—requiring the latter to be brought in the venue where the cause of action arose. As to the origin and development of the rule, see

article, 27 W. VA. L. QUART. 301. In *Mostyn* v. *Fabrigas,* (1774), 1 Cowp. 161, Lord Mansfield pointed out the lack of substantial difference between local and transitory actions where "the whole that is prayed is a reparation in damages, or satisfaction to be made by process against the person or his effects, within the jurisdiction of the Court." He also referred to cases at *nisi prius* involving injuries to foreign lands in which he, as judge, overruled the objection that the action being local, the English courts had no jurisdiction, his ruling being based "upon this principle, namely, that the reparation here was personal, and for damages, and that otherwise there would be a failure of justice". The English courts, however, declined to follow Lord Mansfield's suggestion. In *Doulson* v. *Matthews,* (1792), 4 T. R. 503, where trespass was brought in England for injuries to land in Canada, the court rendered the following opinion: "It is now too late for us to enquire whether it were wise or politic to make a distinction between transitory and local actions: it is sufficient for the courts that the law has settled the distinction, and that an action *quare clausum fregit* is local. We may try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local." Though the distinction between local and transitory actions was abolished in England by the Court Rules adopted in 1873, 36 & 37 Victoria, 1873, c. 66, Rules of Procedure, 28, it was subsequently held that trespass could not be brought in England for injuries to land in a foreign jurisdiction. *British South Africa Co.* v. *Companhia de Mozambique* [1893], A. C. 602. But see the opinion of the court which was reversed: *Companhia de Mozambique* v. *British South Africa Co.,* [1892] 2 Q. B. 406, 415. The language and logic of the opinion in *Doulson* v. *Matthews, supra,* rendered in 1792, expresses quite accurately the view supported by the great majority of American courts. The leading American case admits that the rule is technical. (Marshall, J.) *Livingston* v. *Jefferson,* 1 Brock 203, Fed. Cas. No. 8411. Though the common law rule has been severely criticised even by the courts adopting it, only one court has absolutely rejected it. In *Little* v. *Chicago, etc., Ry. Co.,* 65 Minn. 48, the court, quoting Lord Mansfield's opinion with approval, refuses to support the common law rule because "it is purely technical, wrong in principle, and in practice often results in a total denial of justice." In some states it has been abolished by statute. Consolidated Laws of New York, Real Property Law, § 536. The courts have grasped at straws to remove cases from the rule. See cases referred to in *Little* v. *Chicago, etc., Ry. Co., supra,* and the exceptions to the rule noted in the opinion in the principal case. In *Huntington* v. *Attrill,* 146 U. S. 657, the Supreme Court of the United States suggested that there was no inherent reason for viewing trespass to real property as local, and that the rule was based rather upon convention and custom than upon a fundamental want of jurisdictional power. See also *Peyton* v. *Desmond,* 129 Fed. 1.

LANDLORD AND TENANT—CREATION OF NEW TENANCY UPON WAIVER OF NOTICE TO QUIT.—A controversy arising between the defendants and sublessees over an increase in rent, defendants gave notice to quit, which notice

was cancelled by the defendants before its expiration upon agreement by the sub-lessees to pay the increased rent. *Held,* that the notice to quit determined the sub-lease, and that waiver of the notice with an agreement to go on at the increased rent created a new tenancy, thus constituting a breach of defendants' covenant in the head-lease not to sub-let without leave, and entitling plaintiffs, the head lessors, to reënter. *Freeman* v. *Evans* [1922], 1 Ch. 36.

The principal case is controlled by a *dictum* in *Blyth* v. *Dennett* (1853), 13 C. B. 178, and the decision in *Tayleur* v. *Wildin,* L. R. 3 Ex. 303. The decision there was that a notice to quit determines the tenancy upon the expiration of the notice, and a waiver of the notice creates a new tenancy taking effect upon the expiration of the old one. It was there said: "Whether the notice to quit is given by the landlord or the tenant, the party to whom it is given is entitled to insist upon it, and it cannot be withdrawn without the consent of both." But an invalid or insufficient notice will not determine the tenancy. *Holme* v. *Brunskill* (1878), 3 Q. B. D. 495. The above stated doctrine is adopted as the English rule by WOODFALL, LANDLORD AND TENANT, p. 443 [Ed. 20], and FOA, LANDLORD AND TENANT, p. 606 [Ed. 5]. Where the waiver comes after the date for the expiration of the notice, it is evident the only effect can be the creation of a new tenancy, but the Court of Appeal in Ireland declined to accept the doctrine that the only way to obviate the effect of a notice to quit was by the creation of a new tenancy, and in *Inchiquin* v. *Lyons,* 20 L. R. Ir. 474, held that a notice to quit which during its currency was abandoned by consent of the parties did not *per se* put an end to a tenancy from year to year. This view has much support in this country. TIFFANY, LANDLORD AND TENANT, § 205. And many cases, probably the majority, in this country say that the party giving the notice may waive it at his option before it has been acted upon. *Collins* v. *Canty,* 6 Cush. (Mass.) 415; *Whitney* v. *Swett,* 22 N. H. 10; *Supplee* v. *Timothy,* 124 Pa. St. 375; *Arcade Invest. Co.* v. *Gieriet,* 99 Minn. 277. But see *contra, Western Union Tel. Co.* v. *Penn. R. Co.,* 120 Fed. 362, in which the distinction was made that a withdrawal of a notice to quit was not, like a waiver of forfeiture, the act of one party, but required the assent of both. In the principal case the court admit the decision is technical, but justify it largely on the ground of redress to an injured third party, the defendants having violated the same covenant under their previous yearly tenancy. And in *Tayleur* v. *Wildin* the action was against a third party, guarantor of the rent. There is an attempt to reconcile these cases with *Inchiquin* v. *Lyons,* where the point was raised by the lessor, by saying that as between the parties and anyone else it may be quite right to consider the old tenancy at an end, but not as between lessor and lessee, since the effect of such holding would be to turn present tenants into future tenants and destroy valuable rights annexed to old tenancies. It would seem conducive to uncertainty and confusion to make the question depend upon whether or not the point was raised by a third party. The better rule would

seem to be that, where the notice is cancelled with the consent of both parties before the date set for its expiration, a new tenancy is not necessarily created.

NEGLIGENCE—RES IPSA LOQUITUR.—D laundry company was the lessee of P's premises, which were damaged by an explosion of the laundry boiler. D casualty company had inspected the boiler and issued a contract of insurance thereon to the laundry company. In an action against both it was *held,* the doctrine of *res ipsa loquitur* applied to the laundry company, which was in exclusive control of the boiler, but did not apply to the casualty company because it was not in control. *Kleinman* v. *Banner Laundry Company et al.* (Minn., 1921), 186 N. W. 123.

The fact that the Minnesota court applied the doctrine of *res ipsa loquitur* to a boiler explosion is of no particular importance in view of the same holding in an earlier case. *Fay* v. *Davidson,* 13 Minn. 523. For a collection of cases indicating that the modern tendency is to the contrary, see note in 113 Am. St. R. 986. The interesting point is the distinction made between the laundry company and the casualty company. The report does not indicate upon what theory the casualty company was joined in the action. It may have been for its own possible negligence in inspection, etc. *Van Winkle* v. *American Steam Boiler Co.,* 52 N. J. L. 240. If such was the case, the distinction appears to be sound. No inference of negligence can logically be drawn against it from the mere fact that the boiler exploded while in the exclusive control of another. Application of the doctrine would result in a finding of negligence, but would not determine whose negligence it was. However, the casualty company may have been joined as the real party in interest by virtue of the contract of insurance, the terms of which do not appear in the report. If this was the case, and the casualty company was liable for the negligence of the assured, the distinction which the court makes would appear to be erroneous. Although the cases are replete with declarations that the doctrine of *res ipsa loquitur* has no application unless the defendant was in exclusive control, yet in all these cases, so far as has been found, the negligence sought to be inferred was the negligence of the defendant. *McGillivray* v. *Grt. North. Ry. Co.,* 138 Minn. 278; *Transportation Co.* v. *Downer,* 11 Wall. (U. S.) 129; *Scott* v. *Dock Co.,* 3 Hurl. & C. 596. No case has been found in which the question has been squarely raised, but it is submitted that the doctrine is applicable on principle against anyone who is liable for the negligence of another if it would be applicable against that other.

SALES—RIGHTS OF THIRD PARTIES UNDER WARRANTIES.—In a suit by the vendee against the vendor for failure of vendor's warranty of title the court said by way of *dictum:* "Warranties of chattels are available only between the parties to the contract and not in favor of third parties." *Crocker* v. *Barron* (Mo., 1921), 234 S. W. 1032.

This statement has been generally held to express the law. 14 MICH. L. REV. 264; WILLISTON, CONTRACTS, § 998; WILLISTON, SALES, § 244; *Talley*

v. *Beever and Hindes,* 33 Tex. Civ. App. 675; *Carter* v. *Harden,* 78 Me. 528; *Smith* v. *Williams,* 117 Ga. 782; *Hood* v. *Warren* (Ala., 1921), 87 So. 524. However, some courts express a willingness to abandon the older view where the subvendee sues on a warranty of food. In *Chysky* v. *Drake Bros. Co.,* 182 N. Y. S. 459, where the plaintiff sued for injuries resulting from a mouth infection caused by a wire contained in a cake of the defendant's manufacture which the plaintiff had purchased through a retailer, the court said: "* * * I am of the opinion that the implied warranty of the defendant of the fitness of the cake for human consumption extended to the ultimate consumer of the cake * * * and that the implied warranty inured to the benefit and protection of the plaintiff, although there was no direct contractual relation between the plaintiff and the manufacturer of the cake." Statements to the same effect are found in the following: *Tomlinson* v. *Armour,* 75 N. J. L. 748 (diseased meat); *Parks* v. *C. C. Yost Pie Co.,* 93 Kan. 334 (decayed pie); *Catani* v. *Swift & Co.,* 251 Pa. 52 (trichinae in meat); *Ward* v. *Morehead City Sea Food Co.,* 171 N. C. 33 (decayed mullets); *Davis* v. *Van Camp Packing Co.* (Ia., 1920), 176 N. W. 382 (diseased meat in baked beans). But when we analyze these cases we find only *Catani* v. *Swift & Co., supra,* holding that the implied warranty makes the manufacturer absolutely liable without regard to negligence. Even in that case the court relies on cases decided upon tort liability. In all the other cases above cited the element of negligence was possibly present, so that we cannot say the courts' decisions were not influenced thereby. In effect, then, these cases may go no further than the negligence doctrine of *Thomas* v. *Winchester,* 6 N. Y. 397, where the manufacturer was held liable to the third party consumer. See also 18 MICH. L. REV. 436. Public policy, however, may justify the extension of the manufacturer's liability upon the implied warranty in food cases.

TRIAL—INSTRUCTION ON A LOWER DEGREE OF CRIME WHEN THERE IS NO EVIDENCE THEREOF IS REVERSIBLE ERROR.—The defendant was indicted for murder and was convicted of involuntary manslaughter. The defendant moved for a new trial on the ground that it was error for the court to submit the issue of involuntary manslaughter when there was no evidence whatever to indicate that the killing was unintentional. *Held,* reversible error. *State* v. *Pruett* (N. M., 1921), 203 Pac. 840.

Whether or not an instruction on a lower degree of crime, when there is no evidence thereof, is reversible error is in conflict. The majority of cases hold that such an instruction is reversible error. *Jordan* v. *State,* 117 Ga. 405; *Dichens* v. *People,* 67 Colo. 409; *People* v. *Huntington,* 138 Cal. 261. The theory upon which these cases proceed is that an instruction should be based upon the evidence. Otherwise there would be the anomaly of a man convicted and punished for an offense which the evidence totally fails to show was ever committed by him. The minority of courts, however, hold that such an instruction is one of which the defendant cannot complain. *State* v. *Quick,* 150 N. C. 820; *Bennett* v. *State,* 95 Ark. 100. In the last

case cited the court said "the defendant cannot complain of instructions that allowed the jury to find him guilty of a lower degree of homicide than he was really guilty of under the evidence, if guilty at all." It would seem that the rule which confines the instruction strictly to the evidence is the better, for an instruction in regard to a lower degree of crime, when not warranted by the evidence, would operate as an inducement to sentimental jurors to convict of one of those grades when they should convict the accused of the higher or acquit him altogether.

TRUSTS—GRAIN COMPANY HELD TRUSTEE OF PROCEEDS FROM SALE OF MORTGAGED GRAIN DELIVERED TO IT.—Grain was delivered to D, a grain company, by one who had previously mortgaged it to P. P notified D of its mortgage and directed it not to sell the grain nor pay the mortgagor for it. But D later sold the grain, retaining the proceeds of the sale. The mortgagor later became bankrupt and the referee in bankruptcy obtained a court order requiring D to pay over to him these funds as the property of the mortgagor. In a suit by P it was *held* that D had become a trustee of the funds for P and as such was liable to P for the loss, for if it had disclosed the fact that it was a trustee it would have defeated the attachment by the referee in bankruptcy. *Bank of Brookings* v. *Aurora Grain Co. et al.* (S. D., 1922), 186 N. W. 563.

In a prior hearing in the same court, 43 S. D. 591, 181 N. W. 909, it had been held that the grain company was a gratuitous bailee, not a trustee, and consequently not liable because it could not question the legality of the process by which the grain was taken from it. The basis of this holding was that the mortgagee had consented to the sale by the grain company, so the latter had done nothing wrongful. There was consequently nothing on which to base an involuntary trusteeship. Two justices dissented, and on the rehearing, here noted, their opinion was adopted by the majority of the court as being 'in all things correct." This opinion seems to be based on the premise that the sale by the grain company was not with the consent of the mortgagee. If the sale was made in violation of the mortgagee's rights it was a conversion; if in recognition of them, the grain company voluntarily became a trustee of the proceeds for the mortgagee. It would, perhaps, have been clearer simply to call it a case of constructive trust based on conversion. See BOGERT, TRUSTS, § 37. The holding seems sound, although trust principles are applied to a somewhat unusual case.

UNFAIR COMPETITION—FURNISHING MEANS TO RETAILER.—Complainant made a liquid preparation of quinine with the bitter taste disguised, and colored and flavored by chocolate. Through salesmen it was submitted to physicians, who came to prescribe it and their prescriptions were filled by pharmacists to whom it was sold by the complainant. Later the defendant began to make the same preparation, as it had the right to do, and though it did not sell the preparation as the complainant's it carefully selected a chocolate which gave it the same flavor and color. By representing that it could be used in filling prescriptions for the complainant's "coco-quinine"

and by selling it at a lower price, it induced pharmacists to buy and use it for that purpose. *Held,* that by such conduct the defendant made itself a party to the deception of the ultimate purchaser, and was chargeable with unfair competition, and that to prevent such deception it should be enjoined from using chocolate in its preparation. *Eli Lilly & Co.* v. *Wm. R. Warner & Co.,* 275 Fed. 752.

The unfair competition is in the deceit of the ultimate purchaser. It is no defense that the retailer is not deceived. *Lever* v. *Goodwin* [1887], 36 Ch. Div. 1; *George G. Fox Co.* v. *Glynn,* 191 Mass. 344, 9 L. R. A. (n. s.) 1096. See also *Federal Trade Commission* v. *Winsted Hosiery Co.,* cited in the following note. The precise question presented by the principal case is whether injunctive relief may be had against the manufacturer when the actual fraud is committed by the retailer. That this relief may not be had when he is unconnected with the fraud except for supplying the instrument with which it was committed was accepted in the case of *Hostetter* v. *Fries,* 17 Fed. 620, and in *Royal Co.* v. *Royal,* 122 Fed. 337, it was suggested, but not decided, that if tricky retailers, knowing better, represent the defendant's articles as the goods of the complainant, it is probably not a matter for which the defendant is responsible. The court in the principal case was careful to state that the question was not whether the defendant was responsible for the fraud of the retailers, but whether, in counseling fraud and supplying an innocent means, it was itself guilty of fraud. Some courts have held that it is enough to show that the defendant made it possible for the retailer to sell the goods in such a way as to deceive the ultimate purchaser. *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.,* 168 Mass. 154. For a collection of cases, see note to *George G. Fox Co.* v. *Glynn,* 9 L. R. A. (n. s.) 1096. The court's statement of the question in the principal case is due to the fact that federal courts adhere to the rule that a fraudulent intent is necessary in a case of unfair competition, and must be proved in order to claim the intervention of a court of equity. *Hires* v. *Villepuge,* 196 Fed. 890; *Elgin Watch Co.* v. *Illinois Watch Co.,* 179 U. S. 665, 674. A contrary view prevails in England and a number of the state courts. *Singer Mfg. Co.* v. *Wilson* [1877], 3 App. Cas. 376; *Wirtz* v. *Eagle Bottling Co.,* 50 N. J. Eq. 164. In accord with the principal case, holding that relief will be granted against the manufacturer if shown that his purpose in selling the retailer was to defraud the public, are *Coco Cola Co.* v. *Gay Ola Co.,* 200 Fed. 720 (beverage); *Royal Co.* v. *Royal, supra* (name); *Lever* v. *Goodwin, supra* (wrapper).

UNFAIR COMPETITION—PROTECTION OF THE PUBLIC.—Defendant sold to retailers underwear branded as "gray wool," "natural wool," and the like. Much of it contained, in fact, only a small percentage of wool. The Federal Trade Commission ordered defendant to cease using so deceptive brands. *Held,* the order was within the power of the Commission and valid. *Fed. Trade Com.* v. *Winsted Hosiery Co.* (U. S. Sup. Ct., April 24, 1922).

The defense was that only the public were deceived; that retailers knew

the brands to be inaccurate; that there was, therefore, no unfair competition and the Commission had no power to act. The early part of the Supreme Court's opinion suggests that the interest of the public might be sufficient basis for the order, but its validity is eventually predicated on the fact that by deceiving the public the defendant was in effect unfairly competing with other manufacturers. For comment on the decision in the court below as to the scope of the Commission's powers, see 20 MICH. L. REV. 122, 781, wherein the contrary decision of the lower court is adversely commented on.

WILLS—CONSTRUCTION—IF TWO CLAUSES ARE REPUGNANT, LATER CLAUSE CONTROLS.—Testator gave to his wife all his property to hold in trust for their granddaughter and adopted daughter, Margaret. Upon the death of his wife all the property remaining he gave to Margaret for her sole use and benefit. Finally, he named two persons guardians and administrators until Margaret should be twenty-one. It was adjudged below that these provisions were repugnant, that the later should prevail over the earlier, and that therefore the effect was to give the wife a life interest, with remainder over to Margaret. *Held,* that all could be reconciled, and that the property was given in trust for Margaret, the wife taking nothing. *Martin* v. *Palmer* (Ky., 1921), 234 S. W. 742.

It should be taken as a legal axiom that intent is the pole star in the construction of wills. Citations are not needed to the principles that this intent is to be gathered from the will as a whole, endeavoring, if possible, to give full effect to every part. If one construction will, while another will not, do this, the former is to be preferred, if possible. Usually, as in the principal case, the court is able to find a possible construction that does this, and there is no need to decide which of two clauses is to prevail. Often a later clause modifies or cuts down an earlier. *Greiner* v. *Heins* (Ind. App., 1921), 131 N. E. 20, in which this was not the case because the later clause was not clear. Sometimes the court resorts to implications to overcome apparent conflict. *Porter* v. *Union Trust Company,* 182 Ind. 637. This case, like the principal case, follows the usual statement that if two clauses of a will cannot be reconciled, and are equally specific, the later controls. This is sometimes put on the ground that we deal with a man's last will, and the latest clauses therefore control. But this is merely specious, for the whole will must be regarded as at one moment, viz., at the moment of its execution, the will of the testator, and no part is later in his intent than any other. The mere arrangement of the various paragraphs has no such significance as is often supposed. Indeed, in some jurisdictions the rule is stated to be that if different provisions are so repugnant that both cannot stand the first must prevail. *Hiller* v. *Herrick* (Ia., 1920), 179 N. W. 113. Whichever rule be adopted in the few cases in which reconciliation is not possible, it is a mere rule of convenience, and is not to be applied if from the whole will and the surrounding circumstances it appears that it would defeat the intention of the testator. That intent is to be gathered from the whole will. *Davis* v. *Kendall* (Va., 1921), 107 S. E. 751.

WILLS—REVOCATION BY MARRIAGE—STATUTE CONSTRUED.—The testator, a bachelor at the time of making his will, provided generaly in it that if he should marry, the person who should be his wife at the time of his death was to receive certain devises. Later he married and his wife survived him. By statute it was provided that marriage was a revocation of a prior will. *Held* (two justices dissenting), that the testator's subsequent marriage revoked the will under the terms of the statute. *Gillmann* v. *Dressler et al.* (Ill., 1921), 133 N. E. 186.

Under many statutes it has been held that marriage *per se* works a revocation of the will. *Hudnall* v. *Ham*, 183 Ill. 486; *Ingersoll* v. *Hopkins*, 170 Mass. 401; *McAnnulty* v. *McAnnulty*, 120 Ill. 26; *Stewart* v. *Mulholland*, 88 Ky. 38. And under such a statute as 1 Vict. in England it has been decided that a will is revoked even if made in contemplation of marriage and containing clauses by which provision is made for a wife in case of testator's death. *Francis* v. *Marsh*, 54 W. Va. 545; *In re Larsen*, 18 S. D. 335. Wills made in contemplation of marriage are, however, sometimes expressly excepted from the operation of the statute, especially if the fact appears on the face of the will. *Hoy* v. *Hoy*, 93 Miss. 732; *Ingersoll* v. *Hopkins, supra.* If the statute contains no such qualification, however, the court must hold that marriage is a revocation of a prior will. But the situation in Illinois is peculiar. The Statute of Wills provides for revocation by certain methods, and revocation by marriage is not included as one of the methods. But the Statute of Descent contains a section which ends with the statement that marriage shall be deemed a revocation of a prior will. These two statutes were considered in *Ford* v. *Greenawalt*, 292 Ill. 121, on which the dissenting justices rely in the principal case, and the statute was interpreted as meaning that a subsequent marriage should not be treated as a revocation of a will if the will showed a contrary intention and made provision for the changed condition. The majority opinion in the principal case recognized this rule, but stated that it did not apply to the facts of the principal case, where the devise was made to an uncertain and unidentified person if she should be testator's wife at the time of his death, while in *Ford* v. *Greenawalt, supra*, the provision was for a certain and identified person, if testator married her. This seems to be a very narrow distinction, and it is submitted that if the above rule of construction is applied in a case like *Ford* v. *Greenawalt, supra*, it should be applied in the principal case, because here also the testator plainly showed the intention that the instrument should continue to be his will by providing for the new relation.