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RECENT CASES

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ADMIRALTY—AFFREIGHTMENT CONTRACTS—INCOMPLETE VOYAGE.—NATIONAL STEAM NAVIGATION CO. v. INTERNATIONAL PAPER CO. (MARCH 13, 1917) C. C. A. (2D. CIR.) OCT. TERM, 1916, No. 204.—The respondent entered into an agreement with the libellant to ship paper to Greece on the latter's steamer and to prepay the freight in New York. The respondent having filled out the bills of lading, delivered them to the libellant for its signature. The ship sailed before the respondent took up the bills of lading and paid the freight. When one day out, fire was discovered and the ship and cargo became a total loss. The respondent, having refused to pay the freight, this libel was filed to recover the same by virtue of certain provisions in the bill of lading which stipulated that the prepaid freight was "wholly due upon receipt of the goods into the custody" of the libellant, or on the signing of the bills of lading, "the ship lost or not lost." *Held,* that the libellant could recover the full amount of the freight.

The American courts have not followed the law of England to the effect that freight prepaid by agreement cannot be recovered by the shipper and can be collected by the ship-owner in case of the loss of the goods, the rule being set out in the leading case of *Byrne v. Schiller* (1871) 1 Asp. Mar. L. Cas. 111. On the contrary, the general principle of our maritime law is that a contract for the conveyance of goods on a voyage is an entire contract, and unless it be completely performed by the delivery of the goods at the place of destination, no freight whatever is due. *Mitsui et al. v. St. Paul Fire & Marine Ins. Co.* (1913) 202 Fed. 26; cf. Sieveking, *The German Law of Carriage of Goods by Sea,* p. 293. For this reason, freight paid in advance can be recovered in the event of the non-completion of the voyage. *The Schooner Arthur B.* (1901) 1 Alaska, 403; *Chase v. Alliance Ins. Co.* (1864) 9 Allen (Mass.) 311. Exceptions to this rule may be made by mutual consent, and such an agreement may act as a waiver of any right of recovery for the uncompleted voyage. *The Tornado* (1882) 108 U. S. 342; *Griggs v. Austin* (1825) 3 Pick. (Mass.) 20. It seems to follow that the parties may stipulate that the freight shall be prepaid and become wholly due without right of recovery in the case of the loss of the ship, thus in effect, by agreement incorporating the English doctrine. *Portland Flouring Mills Co. v. British & F. M. Ins. Co.* (1904) 130 Fed. 860. And by "wholly due" would be meant a present liability to pay or "payable." *Yocum Admr. v. Allen* (1898) 58 Oh. St. 280; *Cutter v. Perkins* (1859) 47 Me. 557. The respondent's duty became affixed, therefore, prior to the loss of the ship and cargo.

A. S. B.

CARRIERS—CARRIAGE OF GOODS—LIMITATION OF LIABILITY.—HEUMAN v. M. H. POWERS CO. (1916) 162 N. Y. S. 590.—The plaintiff made a contract with the defendant, a general truckman, to remove some household effects. The liability of the truckman was fixed at $50 for the loss of any

article together with its contents. It did not appear that the consideration for such limitation of liability was a lower rate for cartage. One night, while the van containing the plaintiff's safe was in the defendant's storehouse, some of his employees stole valuable jewelry from the safe. *Held,* that the shipper could not recover more than the stipulated sum of $50. Smith and McLaughlin, JJ., *dissenting.*

It has been established as a general rule that the common-law liability of carriers as insurers may be reasonably limited by an agreement. *Ranchau v. Rutland R. R. Co.* (1898) 71 Vt. 142; *Wells v. Gt. Northern Ry. Co.* (1911) 59 Or. 165; *Mobile & O. R. Co. v. Hopkins* (1868) 41 Ala. 486. In some states a contrary holding is required by statute. *Davis v. Chicago, R. I. and P. R. Co.* (1891) 83 Ia. 744. Ordinarily it has been held contrary to public policy to permit a carrier to contract for exemption from the consequences of its own negligence or that of its servants or agents. *Railroad Co. v. Lockwood* (1873) 17 Wall. (U. S.) 357; *Welch v. Boston & A. R. R. Co.* (1874) 41 Conn. 333; *Chesapeake, etc., R. R. Co. v. Beasley* (1906) 104 Va. 788. A few jurisdictions have qualified this sound doctrine by peculiar holdings. In New York a distinction is drawn between negligence of the carrier itself, and negligence of its servants, allowing it to contract against the latter but not against the former. *French v. Buffalo, N. Y. & E. R. R. Co.* (1868) 43 N. Y. 108. Later cases go farther, and allow a carrier generally to contract even against its own negligence, if its intention is clearly and explicitly expressed. *Lynch v. N. Y. Cent. & H. R. R. Co.* (1915) 153 N. Y. S. 633; *Jennings v. Grand Trunk R. R. Co.* (1891) 127 N. Y. 438. But in these cases the shipper is given the choice of declaring the value of his goods, and paying a higher rate for greater protection, or of accepting a lower rate and lower liability. Such a modification of the general negligence rule seems to be well recognized. *Rose v. Northern Pac. R. R. Co.* (1907) 35 Mont. 70; *Mobile & O. R. R. Co. v. Hopkins, supra.* The principal case is a decided extension of the rule, for there the contract did not show that the consideration for the valuation at a fixed sum was a lower freight rate. No choice was given. The dissenting judges argued that as there was no such choice and as rates were not fixed on the value of the goods, the carrier should not be relieved from full liability. The same rules of public policy which apply in the negligence cases would seem to apply even more strongly in this case. Such contracts are not favored even by the New York courts. It is submitted that the dissenting opinion presents the stronger view.

S. J. T.

CARRIERS—PASSENGERS—PERSON BOARDING MOVING CAR WITHOUT KNOWLEDGE OF CONDUCTOR.—BERKEBILE V. JOHNSTOWN TRACTION CO. (1917) 99 ATL. (PA.) 871.—Without the knowledge of the motorman or the conductor the plaintiff claimed to have boarded a moving trolley car of the defendant, intending to pay his fare. Before he had paid his fare, the car was struck by another car and the plaintiff was injured. *Held,* that a nonsuit was wrongly directed, and that the question of whether or not

the plaintiff was a passenger should have been submitted to the jury with proper instructions.

The authorities declare that in order to create the relation of carrier and passenger, there must be an offer by the person to take passage and an acceptance of him by the carrier. *Hogner v. Boston El. R. Co.* (1908) 198 Mass. 260; *Devine v. Chi. City Ry. Co.* (1911) 162 Ill. App. 243. But the acceptance may be implied from slight circumstances. *Kane v. Cicero Proviso Electric Ry. Co.* (1902) 100 Ill. App. 18. If the car slows down in response to a signal from a bystander and the car is boarded while in motion, the one so boarding is a passenger and may recover for an injury then received because of the negligence of the company. *O'Mara v. St. Louis Transit Co.* (1903) 102 Mo. App. 202; *Nolan v. Metropolitan St. Ry. Co.* (1913) 250 Mo. 602. The act of stopping a car at a customary place is an implied acceptance of those waiting to enter. *Hull v. Terre Haute Electric Co.* (1905) 38 Ind. App. 43. Under such circumstances it is not necessary that the party should be seen. An effort has been made to distinguish such a case from one where a moving car is boarded without the knowledge of the company on the ground that it would be impossible to recognize all who might desire to enter. *Schepers v. Union Depot Ry. Co.* (1895) 126 Mo. 665. In the principal case the entry was made when the car was in motion and without the knowledge of the conductor, with the intention of paying the fare. If we adopt the fiction that stopping the car is an invitation to enter, we might carry it one step farther and hold that running cars through the city streets carries a similar invitation, provided a safe entrance is made and there are no rules of the company against getting on while the car is moving. Public policy dictates that the plaintiff should be considered a passenger and not a trespasser, the only alternatives, even though this is accomplished with some loss to strictly logical analysis.

J. E. H.

CHATTEL MORTGAGES—RENEWAL—NOVATION—LOSS OF PRIORITY.—FOY-ADAMS CO. v. SMITH (1917) 91 S. E. (GA. APP.) 242.—The plaintiff company sold certain chattels to one Tatum taking his purchase money note for the amount due, by the terms of which title was reserved in the plaintiff until payment of the debt. At a later date more chattels were sold to Tatum, the old note was cancelled and a new note taken covering both the amount of the old note and the value of the new purchase, title to all the chattels being expressly reserved in the plaintiff. Between the dates of the two notes the defendant became a purchaser for value of part of the property covered by the original note. For the conversion of that part the plaintiff brought this action. *Held,* that there was a novation which divested the title of the plaintiff as against the defendant.

Conditional sales of chattels have been frequently considered as chattel mortgages, at least in their general effect. Williston, *Sales,* sec. 579; Mechem, *Sales,* sec. 578. It is the generally accepted rule that a new mortgage on the same property and on generally the same terms as a

former mortgage is not a novation and does not forfeit priority as to intervening mortgagees or purchasers with notice. *Howard v. First National Bank of Hutchinson* (1890) 44 Kan. 549; *Hardin v. Elkus* (1898) 24 Nev. 329. This rule was recognized by the Georgia court. It is clear that the vendor could have preserved his position and precedence by keeping the two transactions separate, a mortgage for each. Shall he be penalized for merging the two without otherwise changing the terms of either? The outstanding objection to permitting it seems to be that such permission might sanction wilful "sweetening" of poor security by combining it with good security in one later mortgage at the expense of an intermediate mortgagee. The answer to such an objection in the absence of fraud is probably found by holding the property conveyed to the sub-vendee subject only to the encumbrance which it originally bore—the same as would have continued if no renewal had been granted. *Mayers v. McNeese* (1902) 71 S. W. (Tex. Civ. App.) 68. But after all, a conditional sale is not strictly a chattel mortgage. Williston, *Sales,* sec. 337; *Nichols v. Ashton* (1892) 155 Mass. 205; *Puett v. Edwards* (1915) 17 Ga. App. 645. And especially is this distinction to be noted since Georgia by statute throws the risk of loss upon a conditional vendor, contrary to the general rule. Ga. Code, sec. 4123; Williston, *Sales,* secs. 303-304. If the vendor bears this added burden, he might reasonably expect some compensating advantages. In the principal case the authorities cited by the court were all concerned with chattel mortgages, and in view of the facts above mentioned, it is submitted that these are not entirely in point. A brief analysis of a conditional sale it is believed will cast some light on the case. The purchaser gets among other things a power to divest the title of the vendor upon payment of the notes. The purchaser from the vendee, taking with notice, does not get legal title but does obtain a similar power to acquire title. It is difficult to see where, aside from fraud, he stands in a more favored position than the original vendee. If, then, the novation in the principal case is regarded as a sufficient performance of the condition of payment to divest the title of the vendor in that portion of the chattels which were resold, why would it not affect the whole lot in the same way? And if the title was ever divested, by what means was it restored to the original vendor? The intention of the parties as expressed by the contract was that title was reserved in the vendor, and this language is hardly susceptible of the interpretation that it was intended to pass and re-pass title as in a mortgage transaction. On the other hand, the result arrived at in the Texas case, *supra,* can probably be reached here without distorting the real intention of the parties. It would seem that the vendee could not, without actually paying the debt, transfer good title to his sub-vendee nor release the chattels from the condition precedent, but that he could and did place beyond his own power the possibility of further incumbering the particular chattels in which he had parted with all his interest.

M. S. B.

CONTRACTS—ASSIGNMENT—PERFORMANCE.—THE ROSENTHAL PAPER CO v. THE NATIONAL FOLDING BOX AND PAPER CO. (1917) 56 N. Y. L. J. 1439.—The plaintiff's assignor, the sole owner of a patent, agreed to give

the defendant a license to manufacture and sell the patented article within a specified time and territory, covenanting to "faithfully protect" against infringements. The defendant was to pay *pro rata* royalties on the number sold, the amount of which was to total a certain minimum sum *per annum*. During the specified time the patent and contract were assigned to plaintiff. The plaintiff sued for a deficit of the minimum sum. The defendant proved infringements. *Held*, that the contract was personal to the plaintiff's assignor and not assignable, and that by the assignment the assignor rendered the further performance of the agreement to protect the defendant impossible, and thereby discharged the defendant as to minimum royalties.

When personal performance is the essence of a contract, that is, a condition precedent to the assignor's rights, the contract cannot be assigned, and performance by the assignee will not enable him to enforce the rights. *Brit. Wag. Co. v. Lea & Co.* (1880) 5 Q. B. D. 149; *Robson v. Drummond* (1831) 2 B. & Ad. 303. Where personal performance is not the essence of the contract, that is, where it is not a condition precedent, the contract can be assigned and performance by the assignee will enable him to enforce the rights. *Sears v. Conover* (1866) 3 Key. (N. Y.) 113; *Tyler v. Barrows* (1868) 6 Rob. (N. Y.) 104. If the assignor's duty is such that his executor or administrator would be bound to perform it, then it is not personal, and a vicarious performance would be a fulfilment of conditions and would enable the assignee to enforce the rights. *Devlin v. Mayor* (1875) 63 N. Y. 8, 16; *Woods v. Ridley* (1854) 27 Miss. 119; *White v. Commonwealth* (1861) 39 Pa. St. 167. An assignment does not free the assignor from his liabilities and duties and impose them solely on the assignee. *Arkansas Valley Smelting Co. v. Belden Min. Co.* (1888) 127 U. S. 379. But if the assignee undertakes to enforce the right given to him by the assignor, he must show that all conditions precedent to the existence of such right have been performed either by the assignor or by himself. *Tolerton & Stetson Co. v. Anglo Cal. Bank* (1901) 112 Ia. 706; *Atlantic N. C. R. R. Co. v. Atlantic & N. C. R. R. Co.* (1908) 147 N. C. 368; *Rockwell v. Edgcomb* (1913) 72 Wash. 694. Hence, it is submitted that the decision in the principal case is correct, there being no performance on the part of either assignee or assignor of the conditions precedent to the right to royalties.

F. C. H.

CONTRACTS—CONDITIONS PRECEDENT AND SUBSEQUENT—BURDEN OF PROOF.—DAVID V. CITY NATIONAL SECURITIES COMPANY (1916) 161 N. Y. S. 174.—A assigned to the defendant certain accounts to be collected by the latter and paid over to third parties. If a certain event took place the defendant was then to reassign to A except that he was not to reassign unless the said third parties performed according to other conditions named in the agreement. The plaintiff received an assignment of the same accounts from A, and in this action sought to force the defendant to transfer them to him. He alleged generally that all conditions had been performed. *Held*, that the conditions were conditions subsequent and should have been pleaded and proved by the defendant.

A condition precedent is a condition which must be performed before a liability arises. *Van Buskirk v. Kuhns* (1913) 164 Cal. 472. This case also affirms the well-established rule that a condition precedent must be averred and proved by the plaintiff. A condition subsequent is a condition which is to be performed subsequent to the creation of the liability. Cf. *Semmes v. Hartford Insurance Co.* (1891) 13 Wall. (U. S.) 158. The burden of proving a condition subsequent is on the defendant. In many cases the courts have apparently mistaken a condition precedent for a condition subsequent. Typical of this class of cases are, *Gray v. Gardner et al.* (1871) 17 Mass. 188; *Moody Insurance Company* (1894) 52 Oh. St. 12; *Williams v. U. S. Mutual Accident Ass'n* (1895) 147 N. Y. 693. In all of these cases the courts placed the burden of proving performance of the condition on the defendant. It may be that in these cases the wording of the contract tended to confuse the courts, and especially in the insurance contracts where the words "but if" are often employed to introduce the condition. In the principal case, however, there are no misleading words in the agreement and it appears clearly that the defendant was to be under no duty to reassign to A unless, and until, the conditions named were performed. The conditions, though obviously subsequent to the formation of the contract, were clearly precedent to a right of action in the plaintiff, and were therefore conditions precedent. As such, the court should have placed the burden of pleading and proving them on the plaintiff. The true test as to whether a condition is genuinely precedent or subsequent is: Does the liability of the defendant arise before or after performance of the condition? If the former, it is a condition subsequent; if the latter, it is a condition precedent. The practical significance of the distinction is well shown in an able dissenting opinion by Mr. Justice Doe in *Kendall v. Brownson* (1869) 47 N. H. 186, 196. If the burden of proof is on the defendant, then in a case where the evidence is in equilibrium the defendant loses. The courts by mistaking a condition precedent for a condition subsequent may, under the existing rules of pleading, cause a defendant to lose a decision which he should justly win.

C. M.

CONTRACTS—EXCUSE FOR NON-PERFORMANCE—WAR AS CONTINGENCY BEYOND PROMISSOR'S CONTROL.—DUCAS V. BAYER CO. (1917) 163 N. Y. S. 32.—In June, 1914, the defendant agreed in writing to deliver to the plaintiff a certain amount of dyestuffs, stipulating that it should not be held accountable for delays due to contingencies beyond its control. After the outbreak of the war which finally cut off the supply, it had on hand, or received, more than enough goods to fully perform all written contracts. Instead of filling these it made a ratable distribution of the goods among all its regular customers. *Held*, that the contingency which actually caused the non-performance of the contract was not an inadequate supply of goods, but the *pro rata* distribution of such goods as defendant had.

The present war was held to be no excuse for the failure of a German firm to deliver to an American firm Belgian antimony according to agreement. *Richards & Co. v. Wreschner* (1915) 156 N. Y. S. 1054;

aff'd. 158 N. Y. S. 1129. Difficulty of performance, even though unforeseen, will not excuse a breach of contract; it must be shown that the undertaking cannot in any way legally be performed. *U. S. v. Gleason* (1900) 175 U. S. 588; *Lima Locomotive & Machine Co. v. National Steel Castings Co.* (1907) 155 Fed. 77; *Rowe v. Peabody* (1911) 207 Mass. 226. This is true even though the difficulty is due to war. *Smith v. Morse* (1868) 20 La. Ann. 220; *Elsey v. Stamps* (1882) 10 Lea (Tenn.) 709; *Jacobs v. Crédit Lyonnais* (1884) 12 Q. B. D. 589; *Ashmore v. Cox* [1899] 1 Q. B. D. 436. In the coke and coal business custom seems to have made a shortage of supplies or shipping facilities an excuse for non-performance on the part of the seller, provided he delivers a proportional amount to each of the buyers. *Oakman v. Boyce* (1868) 100 Mass. 477; *McKeefrey v. Connellsville Coke Co.* (1893) 58 Fed. 212; *Luhrig Coal Co. v. Jones & Adams Co.* (1905) 141 Fed. 617. But there must be no sales to new customers during the period of scarcity. *Jessup & Moore Paper Co. v. Piper* (1902) 133 Fed. 108; *Metropolitan Coal Co. v. Billings* (1909) 202 Mass. 457 (dicta in both instances). Even if the coal dealer has on hand a sufficient supply to fill his contract with the buyer, he is not bound in times of shortage to deliver to the buyer the whole amount of his order to the exclusion of other customers. *Garfield & Procter Coal Co. v. Penn. Coal & Coke Co.* (1908) 199 Mass. 22; *Metropolitan Coal Co. v. Billings, supra.* More in accord with the principal case, it has been held that the fact that a seller cannot supply all his customers at the same time will not excuse a breach of contract with any one of them. *Emack v. Hughes* (1902) 74 Vt. 382; *Seligman v. Beecher* (1908) 36 Pa. Sup. Ct. 475.

G. E. W.

CONTRACTS—OFFER—ACCEPTANCE AFTER REASONABLE TIME.—NATIONAL WATCH CO. v. WEISS (1917) 163 N. Y. S. 46.—The defendant, an attorney, offered by mail to assure payment of a judgment which the plaintiff had obtained against his client, if the plaintiff would extend the time of payment sixty days. An acceptance was sent after a reasonable time had elapsed. There was no reply by the defendant. The judgment was not paid. *Held,* that the failure by the defendant to reply indicated acquiescence and that, after the return of the execution against the client unsatisfied, the defendant was liable.

If the contract were unilateral the act of forbearance by the plaintiff would be considered adequate acceptance. *Strong v. Sheffield* (1895) 144 N. Y. 394. Yet the court construed the contract to be bilateral. The weight of authority in this country seems to be that a contract completed by acceptance after a reasonable time is void. *Ferrier v. Storer* (1884) 63 Ia. 484, 487; *Maclay v. Harvey* (1878) 90 Ill. 525; *Larmon v. Jordan* (1870) 56 Ill. 204. Yet the modern tendency appears to be that if the acceptance is made after a reasonable time has elapsed, the offeror must immediately, upon receipt of the letter of acceptance, notify the offeree that the offer was withdrawn in order not to be bound. *Phillips v. Moor* (1880) 71 Me. 78; *Morrell v. Studd* [1913] 2 Ch. 648; Pollock (1914) 30 LAW QUART. REV. 4; German Civil Code, sec. 149; Japanese Civil Code, art. 522; Swiss Code of Obligations, sec. 5.

F. C. H.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—ATTACHING BANK DEPOSIT OF NON-RESIDENT TO PAY ALIMONY.—PENNINGTON v. FOURTH NATIONAL BANK OF CINCINNATI (MARCH 6, 1917) U. S. SUP. CT., OCT. TERM, 1916, No. 147.—The wife of the plaintiff obtained in Ohio a valid decree of divorce. The plaintiff, being a non-resident, was served by publication only. In the divorce proceedings the wife, asking for alimony, joined the defendant bank in which the plaintiff had funds. The court enjoined the bank from paying out the funds and upon the favorable termination of the suit for the wife, ordered the defendant to pay over to her the sum deposited. Later by drawing a check, the plaintiff demanded the sum from the bank and upon the refusal of payment by reason of the court's order, claimed that he had been deprived of his property without due process of law in violation of the Fourteenth Amendment. *Held,* that the court had the power to appropriate for the purposes of alimony the plaintiff's personal property situated within the state.

If the defendant has property within the state, it would be competent to provide by law for the seizure and appropriation of such property, under a decree of the court, to the use of the complainant. Cooley, *Constitutional Limitations* (6th ed.) p. 584. The state through its tribunals may subject property situated within its limits and owned by non-residents to the payment of the demands of its own citizens against them. *Pennoyer v. Neff* (1877) 95 U. S. 714. Where property belonging to the husband and situated within the state is seized and brought within the control of the court by attachment or otherwise, constructive service confers jurisdiction to hold the property seized for the satisfaction of a judgment for alimony. *Twing v. O'Meara* (1882) 59 Ia. 326; *Wesne v. O'Brien* (1896) 56 Kan. 724. Moreover, a court has jurisdiction through constructive service even though no property has been seized and placed within its control and its judgment is valid and enforceable so far as property within the state can be subjected to its payment. *Harshberger v. Harshberger* (1868) 26 Ia. 503. It results that a personal decree for alimony based on such constructive service is valid against the property of a non-resident husband which may be found within the jurisdiction of the court and specifically proceeded against in the divorce proceedings. Such a decree may be satisfied therefrom as a proceeding *in rem. Goore v. Goore* (1901) 24 Wash. 139; *Murray v. Murray* (1896) 115 Cal. 266; *Harshberger v. Harshberger, supra.*

A. S. B.

CONSTITUTIONAL LAW—WORKMEN'S COMPENSATION ACT.—MOUNTAIN TIMBER CO. v. THE STATE OF WASHINGTON (MARCH 6, 1917) U. S. SUP. CT., OCT. TERM, 1916, No. 13.—The Workmen's Compensation Act of Washington, Laws of 1911, p. 345, requires employees in certain hazardous employments to contribute fixed sums based on their pay rolls to create a fund to reimburse all employees injured in such employments, without regard to negligence or common-law liability, and further provides that no employer shall exempt himself from the burden, or waive the benefits of the act, by any contract or regulation. *Held,* that this act was constitutional and did not violate the Fourteenth Amendment. White, C. J., McKenna, Van Devanter and McReynolds, JJ., *dissenting.*

The first Workmen's Compensation Act of New York, which was enacted in 1910, was held unconstitutional because an employer was made liable to injured employees regardless of the question of fault or negligence on the part of the employer. *Ives v. South Buffalo R. R. Co.* (1911) 201 N. Y. 271. But the California court refused to follow the decision in the *Ives* case and held the California act constitutional. *Western Indemnity v. Pillsbury* (1915) 151 Pac. (Cal.) 398. For a criticism of the *Ives* case, see 34 L. R. A. (N. S.) 162. The later New York act was held constitutional in a recent case, in which the Supreme Court of the United States said that the common-law rule confining the employer's liability to cases of negligence, the defenses of contributory negligence and assumed risks, are rules of law that were not beyond alteration by the legislature in the public interest. *New York Central v. White* (March 6, 1917) U. S. Sup. Ct., Oct. Term, 1916, No. 320. It has often been declared by the Supreme Court that no one has a vested interest in the common law. *Munn v. Illinois* (1877) 94 U. S. 113, 134; *Second Employer's Liability Cases* (1912) 223 U. S. 1, 50. The court in the principal case referred to the *White* case in considering the Washington statute and held that the latter did not violate the Fourteenth Amendment in making an employer liable regardless of fault or negligence. But the Washington act goes even further than the New York act, requiring the employer to make enforced contributions, whether injuries have befallen his own employees or not; in fact his contributions may compensate the injured employees of his negligent competitors. The state court sustained the law as a valid exercise of the police power. *State v. Clausen* (1911) 65 Wash. 156; *Mountain Timber Co. v. State* (1913) 75 Wash. 581. The court held, first, that the matter of compensation for accidental injuries with a resulting loss of life or earning capacity was of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through state agencies, *Lawton v. Steele* (1894) 152 U. S. 133, 136; second, that the tax was not excessive and so not a violation of the "due process" clause; third, that the burden was fairly distributed. The taxing feature of the act is very similar to the Oklahoma statute which levied upon every bank of the state an assessment for the purpose of creating a guaranty fund to make good the losses of depositors in insolvent banks. The Oklahoma act was upheld though the fund was created by a special assessment and not by general taxation. *Noble State Bank v. Haskell* (1911) 219 U. S. 104. For a discussion of the constitutionality of social insurance laws, see Corwin, Social Insurance and Constitutional Limitations (1917) 26 YALE LAW JOURNAL, 431.

J. I. S.

CRIMINAL LAW—RAPE—CONSENT BY INSANE WOMAN—DEFENDANT'S IGNORANCE OF INSANITY.—STATE V. HELDERLE (1916) 186 S. W. (Mo.) 696.—The defendant had intercourse with the prosecutrix, a girl of eighteen who had been feeble-minded since childhood. Prior to that time he had never seen her. She yielded an apparent consent and there was nothing in her demeanor from which he had or could have had knowledge of her mental condition. *Held,* that in order to convict for rape it was necessary to show such knowledge in the defendant. Blair, Bond, and Revelle, JJ., *dissenting.*

By analogy to the well settled rule that lack of knowledge of nonage is no defence, the dissenting judges were of opinion that the defendant's ignorance of the woman's mental condition was immaterial. A statutory definition of rape may make it necessary for the man to ascertain at his peril whether the woman is legally and mentally capable of giving consent. *People v. Griffin* (1897) 117 Cal. 583. And it is generally held without statute that if the woman is so idiotic as to be utterly incapable of expressing either assent or dissent, the crime is rape. *Reg. v. Fletcher* (1859) 8 Cox C. C. 131; *Reg. v. Barratt* (1873) 12 Cox C. C. 498; *Gore v. State* (1903) 119 Ga. 418. The degree of intelligence necessary to give consent may exist with an impaired and feeble intellect. *McQuirk v. State* (1887) 84 Ala. 435; *Adams v. State* (1911) 115 Pac. (Okl.) 347; *Morrow v. State* (1913) 13 Ga. App. 159. If the woman, though mentally diseased, yields from mere animal desire, it has been held not to be rape. *Reg. v. Charles Fletcher* (1866) 10 Cox C. C. 248; *Reg. v. Connolly* (1867) 26 U. C. Q. B. 317 (*semble*); *Baldwin v. State* (1883) 15 Tex. Ct. App. 275 (*semble*). Where the insanity is so marked as to be palpable, lack of knowledge of the woman's condition can be no defence. *State v. Tarr* (1869) 28 Ia. 397. If A aids B and C to commit a rape upon a woman whom A knows to be mentally incapable of consenting, it is immaterial whether B and C know her condition or not. *Caruth v. State* (1894) 25 S. W. (Tex.) 778. In putting the burden upon the state to prove both the mental incapacity of the apparently consenting woman and the defendant's knowledge of the fact, the principal case follows three earlier cases in the same jurisdiction. *State v. Cunningham* (1889) 100 Mo. 382; *State v. Warren* (1911) 232 Mo. 185; *State v. Schlichter* (1915) 262 Mo. 561. Cf. *Beaven v. Commonwealth* (1895) 17 Ky. L. Rep. 246.

G. E. W.

EVIDENCE—LOST ACCOUNT BOOKS—PROOF OF CONTENTS.—PERLEY v. MCGRAY (1916) 99 ATL. (ME.) 39.—The plaintiff's original books of account had been destroyed by fire. A so-called "ledger" which a witness testified to contain a true copy of all balances on the plaintiff's books was introduced in evidence to prove the balance due on account from the defendant. *Held,* that the ledger was admissible.

The general rule is that a book of accounts is admissible in evidence only when it is a book of original entry. *Frick v. Kabaku* (1902) 116 Ia. 494; *Kerns v. Dean* (1888) 77 Cal. 555; Chamberlayne, *Modern Law of Evidence,* sec. 3085. The first permanent record generally constitutes the original entry. *Kansas v. Stephenson* (1904) 69 Kan. 405. Accordingly, if the entries are made in a day book and then transferred to a ledger, the entries in the ledger are not considered original entries and are not competent. *Woodbury v. Woodbury* (1876) 50 Vt. 152. But the fact that such entries were made temporarily on rough pieces of paper or on a slate and then transferred to a book does not destroy the character of the book as one of original entries. *Taylor v. Davis* (1892) 82 Wis. 455; *Hall v. Glidden* (1855) 39 Me. 445. An exception is made to the general rule where the original books have been lost or destroyed. The rule allowing secondary evidence of the contents of the entries is

then applicable and copies of the original which are sworn to as true are admissible. *Hodnett v. Gault* (1901) 64 App. Div. (N. Y.) 163; *Hancock v. Hintrager* (1882) 60 Ia. 374. Thus a ledger like any other copy of original entries becomes competent evidence when the loss or innocent destruction of the book of original entry is established and a general balance may be introduced without introducing the separate items. *Rigby v. Logan* (1895) 45 S. C. 651. If the absence of the original is unaccounted for, or no explanation is given of its destruction, the copy is inadmissible. *Rouss v. McDowell* (1895) 88 Hun, 532; *Palmer v. Goldsmith* (1884) 15 Ill. App. 544. In admitting a copy much rests in the discretion of the trial judge. *Stephan v. Metzger* (1902) 95 Mo. App. 609. The principal case is in accord with the prevailing rule and in harmony with modern business methods.

S. J. T.

MASTER AND SERVANT—NEGLIGENCE—LIABILITY OF FATHER FOR SON'S NEGLIGENCE IN OPERATING PLEASURE CAR.—VAN BLARICOM V. DODGSON (1917) 8 DAILY RECORD (N. Y.) 56.—The defendant kept a motor car for pleasure purposes and convenience of his family. His adult son while operating the car with his father's permission, for his own pleasure and convenience, negligently drove over the plaintiff's intestate and killed him. *Held,* that the defendant was not liable for the negligence of his son as there was no agency established.

For a discussion of the principles involved in this case, see (1917) 26 YALE LAW JOURNAL, 327.

S. J. T.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY ARISING OUT OF EMPLOYMENT.—WALTHER V. AMERICAN PAPER CO. (1916) 99 ATL. (N. J.) 263.—A night watchman in a mill, while making his rounds, was struck over the head and killed by an employee of the same company who had entered the mill and hid himself without any intent to rob the office of the mill or to do any other mischief or crime except to rob the deceased. *Held,* that the deceased was not killed from an accident arising out of his employment under Workmen's Compensation Act (P. L. 1911, p. 134). Minturn and Kalisch, JJ., *dissenting.*

The language of the New Jersey act of 1911 is identical with the language of the English act of 1906 in that to warrant a recovery an employee must be injured by "accident arising out of and in the course of his employment." *Bryant v. Fissell* (1913) 84 N. J. L. 72. The terms "out of" and "in the course of" are not synonymous. *State ex rel. Duluth Brewing, etc., Co. v. District Ct.* (1915) 129 Minn. 176. If either of these elements is missing, there can be no recovery. *McNicol's Case* (1913) 215 Mass. 497. It has been said that under the New Jersey act an accident which is the result of a risk reasonably incident to the employment is an accident arising out of the employment. *Hulley v. Moosbrugger* (1915) 88 N. J. L. 161. But it is not necessary that it should be one reasonably to be anticipated as an incident to the employment. *Sponatski's Case* (1915) 220 Mass. 526. Ordinarily, assault by third persons cannot be considered as incidental to the employment, but

where the assault is one which might be reasonably anticipated because of the general character of the work, or of the particular duties imposed upon the workmen, injuries resulting therefrom may be found to arise out of and in the course of the employment. *Reithel's Case* (1915) 222 Mass. 163 (where the superintendent of a mill was killed while ejecting a trespasser); *Weekes v. Stead* (1914) 83 L. J. (K. B.) 1542 (where a superintendent was assaulted and killed by a man refused work); *Trim Joint Dist. School v. Kelly* (1914) 1915A Ann. Cas. (Eng.) 104 (where a school master was assaulted and killed by pupils); *Macfarlane v. Shaw* (1915) 52 Sc. L. Rep. 236 (where an iron-moulder was assaulted by a stranger); *Thorn v. Humm* (1915) 112 L. T. 88 (where a taxicab driver driving an officer to a fort late at night was shot by a sentry). In view of these cases it seems that the duties of and circumstances surrounding a night watchman might make such an accident as that in the principal case the result of a risk reasonably incident to the employment.

E. J. M.

STATUTES—"TRIAL MARRIAGE" IN NEW YORK.—MCCANN V. MCCANN (1917) 56 N. Y. L. J. 1849.—The plaintiff sued for the annulment of a marriage on the ground that she was only seventeen years of age when she married the defendant and had left him before reaching the age of eighteen, not having cohabited with him since that time. There was born of the marriage one child which is still living. *Held,* that under the New York Code of Civil Procedure the plaintiff was entitled to an annulment of the marriage.

"Trial marriages" in New York are not only permitted but encouraged under the code. Sec. 1743 provides: "An action may also be maintained to procure a judgment, declaring a marriage contract void and annulling the marriage for either of the following causes existing at the time of the marriage: (1) That one or both of the parties had not attained the age of legal consent." Sec. 15 of the Domestic Relations Law provides that where the man is under twenty-one years of age and the woman under eighteen, written consent of the parents is necessary before the issuance of a marriage license. By one section a marriage is absolutely void from the time its nullity is declared by a court of competent jurisdiction, if either party thereto is under the age of legal consent. *Kruger v. Kruger* (1910) 137 App. Div. (N. Y.) 289. By another section it is permissible to issue marriage licenses to such persons if their parents consent. This incongruity should be corrected by the legislature. That it is in fact "trial marriage" is shown by the number of cases in which annulment has been granted, though the marriage was with the consent of the parents and there was cohabitation. *Conte v. Conte* (1903) 82 App. Div. (N. Y.) 335; *Earl v. Earl* (1904) 96 App. Div. (N. Y.) 639; *Wander v. Wander* (1906) 111 App. Div. (N. Y.) 189; *Mundell v. Coster* (1913) 80 Misc. (N. Y.) 337. The principal case presents a practical state of affairs in that there is a child of the "trial marriage." *Quaere,* what is the status of the child, and who is liable for its support?

E. J. M.