RECENT CASES

CARRIERS—GOVERNMENTAL CONTROL—DEFENSE TO ACTION FOR INJURIES TO LIVE STOCK.—An express company as a common carrier under governmental control accepted horses for transportation. *Held:* The fact of governmental control of it and other carriers, on account of war, is not a defense to the consignee's suit for loss and depreciation of the shipment, caused by severe weather and delay in delivery. Clapp v. American Express Co., 125 N. E. 162 (Mass. 1919).

It has been held that military control of a railroad was no excuse for delay, when the road was still operated by the employees of the company and the government had in no way prevented the company from performing its contract in the usual time. Illinois Central Railroad Company v. McClellan, 54 Ill. 58 (1870). Military control of a road is no defense for delay where the government, through the military, required a railroad company to give preference to government freights, and so exercised the right of determining for what persons shipments should be made, but did not control the movement of trains. Illinois Central Railroad Company v. Cobb, Christy & Co., 64 Ill. 128 (1872). It has been held that orders proceeding from military authorities furnish an excuse to the extent that the delay is made necessary thereby, Illinois Central Railroad Co. v. McClellan, *supra;* unless the condition was known at the time of acceptance. Illinois Central Railroad Co. v. Cobb, *supra.* Where the fault of the carrier is the cause of the interruption of the transit by the authorities, it has no defense. Dunn v. Bucknall Bros., 2 K. B. 614 (1902), (carriage by shipowners of goods destined for an alien enemy).

Military control would justify the carrier in refusing goods for carriage. Illinois Railroad v. Ashmead, 58 Ill. 487 (1871); Illinois Central Railroad Co. v. Cobb, Christy & Co., *supra;* Same v. Hornberger, 77 Ill. 457 (1875); Phelps v. Railroad Co., 94 Ill. 548 (1880). Although the carrier under this circumstance may refuse to accept the goods, if it takes them into possession for the purpose of carriage, it will be considered as waiving this right and consenting to accept the goods upon the usual terms as to liability. Porcher v. Northeastern Railroad Co., 14 Rich. (Law) 181 (1867); Hannibal Railroad v. Swift, 12 Wall. (U. S.) 262 (1870). The principal case is in accord with the general authority.

CARRIERS—LIMITATION OF LIABILITY—EMBEZZLEMENT BY EMPLOYE.—Plaintiff in an interstate shipment of jewelry stated its value as $100, whereas it was actually worth $375. The package was stolen by an employee of the defendant carrier. *Held:* Plaintiff's recovery is limited to the valuation declared at the time of shipment. Henderson v. Wells Fargo Co., 217 S. W. 916 (Tex. 1920).

Prior to the passage of the so-called Carmack Amendment and the decision in Adams Express Co. v. Croninger, 226 U. S. 491 (1912), the conflict in views as to the extent of the right of a carrier to limit its liability in interstate shipments was due to the fact that the State Courts applied their own particular rules. However, since the decision in the Croninger case *supra*, the State Courts are bound by the Federal rules of liability. See note in 66 U. of P. Law Rev. 167.

No case similar on its facts to the principal case has been decided by the Supreme Court, but the doctrine that a common carrier may limit its liability even where there has been a wilful conversion by its servant is sustained by the reasoning in the case of Georgia, etc. Ry. Co. v. Blish Milling Co., 241 U. S. 190 (1916), to the effect that discriminations and rebates are forbidden, and that therefore a carrier may lawfully pay claims only to the extent that it is legally liable under the principles of the Supreme Court's decisions. In the principal case, the plaintiff having paid a certain rate to cover a loss of $100, to allow him to recover more would amount to a rebate.

CONSTITUTIONAL LAW—COMMERCE CLAUSE—VALIDITY OF STATE REGULATION OF SALE PRICE OF NATURAL GAS IN INTERSTATE COMMERCE.—The New York Public Service Commission, acting under the authority of a New York Statute, regulated the rates at which natural gas should be furnished in a New York city by the plaintiff gas company, a Pennsylvania corporation engaged in the transportation of gas by pipe lines fifty miles in length from its source of supply in Pennsylvania into New York, where it sold and delivered the gas to consumers. *Held:* The action of the New York commission was valid and did not violate the commerce clause of the Federal Constitution. Pennsylvania Gas Company v. Public Service Commission, Second District, New York,—U. S.—(Opinion by Mr. Justice Day, March 1, 1920).

The interstate transportation and subsequent sale of this natural gas by the same company constituted interstate commerce, according to the opinion of the Court, as distinguished from the retailing by local companies of natural gas brought from another state by a separate corporation, which had previously been held not a branch of interstate commerce in Utilities Commission v. Landon, 249 U. S. 236 (1919). But while conceding that the business constituted interstate commerce, the Court holds it so far local in character as to justify State regulation in the absence of action by Congress.

State legislation prohibitive of the transportation of natural gas has been held invalid as interfering with interstate commerce in a matter of national concern; West v. Kansas Natural Gas Co., 221 U. S. 229 (1911); Manufacturers' Gas and Oil Co. v. Indiana Natural Gas Company, 155 Ind. 545, 53 L. R. A. 134 (1900); as has also the prohibition of interstate commerce in other legitimate articles, *i. e.*, prohibition of importation and sale of beer in original packages, Leisy v. Hardin, 135 U. S. 100 (1889); prohibition of oleomargarine, Schollenberger v. Pennsylvania, 171 U. S. 1 (1897). So also State regulation of the price to be charged for interstate transportation service would ordinarily be unconstitutional for the same reasons; Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U. S. 557 (1886); Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204 (1893). However, in Port Richmond Ferry Co. v. Freeholders, 234 U. S. 317 (1917), the Court sustained State regulation of interstate ferry charges which had not been regulated by Congress.

The decision in the Pennsylvania Gas Company case, that regulation of the local sale price of gas piped from another state is of interstate commerce of local character not requiring uniform regulation and therefore subject to State legislation when Congress has not acted, is in accord with the accepted interpretation of the Commerce clause, even though such price regulation must necessarily affect the interstate transportation of the gas.

CONSTITUTIONAL LAW—TAXATION—STOCK DIVIDENDS UNDER THE INCOME TAX.—The Standard Oil Company of California, having fifty million dollars of outstanding capital stock, with an authorized capitalization of one hundred million dollars, and with its books showing some forty-five million dollars of undivided profits, declared a fifty per cent. stock dividend upon the cash value of which the plaintiff was assessed a tax under the Federal Income Tax Act of September 8, 1916. The Act provided, Part I, Sec. 2, (a): " . . . dividends . . . shall be held to mean any distribution made . . . by a corporation out of its earnings or profits . . . whether in cash or in stock of the corporation, which stock dividend shall be considered income, to the amount of its cash value." The plaintiff, having paid the tax under protest, sued the defendant collector to recover the tax alleging that stock dividends are not income within the meaning of the Sixteenth Amendment to the Constitution and that therefore the assessment was illegal by reason of its violating Art. I, Sec. 2 and Art. I, Sec. 9 of the Constitution of the United States.

Held: (Brandeis, Holmes and Day, J. J., dissenting): The assessment is invalid, as a stock dividend is only a bookkeeping rearrangement of the evidences of ownership in a fixed proportional share of the entire assets of the corporation. Only when there is a transfer of part of the corporate assets to a stockholder does he realize a profit or gain, which becomes his separate property and constitutes income derived from capital that he or his predecessor has invested, Eisner v. Macomber, 40 Sup. Ct. 189 (1920).

Mr. Justice Pitney in delivering the opinion of the court further stated that, in his view, any attempt to tax stock dividends as a tax upon the stockholder's share of the undivided profits of a corporation would be valid only as a direct tax on property that would require apportionment among the States because, under the decision of Pollock v. Farmers Loan & Trust Co., 158 U. S. 601 (1895), the profits or proceeds derived from realty or personalty are deemed direct taxes on property; and that this decision is not affected by the Sixteenth Amendment which applies only to income "and what is called the stockholder's share of the accumulated profits of the company is capital, not income. As we have pointed out, a stockholder has no individual share in accumulated profits, nor in any particular part of the assets of the corporation, prior to dividend declared."

Mr. Justice Brandeis, in his dissenting opinion, takes the opposite view on this point and deems that under the Sixteenth Amendment the Congress has the power to disregard the corporate fiction as regards taxation in such a situation by taxing as income the stockholder's *pro rata* share of the undivided profits. *A fortiori* it has the power to tax such *pro rata* share as has been actually earned and declared in the form of a stock dividend, Collector v. Hubbard, 12 Wall. 1, 17 (U. S. 1870).

Mr. Justice Brandeis also comes to a conclusion opposed to that of the majority in that he finds that a stock dividend has no essential or substantial difference in character from the numerous similar forms of distribution of corporate assets used in business today, all of which have been uniformly held to be income in the taxable meaning and, in accord with Mr. Justice Holmes, finds that the word income used in the Sixteenth Amendment was intended to include all the distribution methods in use and that it certainly included a standard form of distribution such as the stock dividend.

It should be noted that the argument of the court that stock dividends can only be taxed as direct taxes on property is based on decisions made prior to the adoption of the Sixteenth Amendment, and on the conclusion arrived at earlier in the opinion that they are capital and not income in regard to the tax in issue. It cannot therefore be said that the opinion is authority on the point, particularly as the sole decision on the point, Collector v. Hubbard, *supra*, was overruled by Pollock v. Farmers Loan & Trust Co., *supra*, only in so far as it upheld a tax on income, the objection to which has apparently been removed by the Sixteenth Amendment. It will be of interest to observe whether Congress will follow the suggestion of Mr. Justice Brandeis as to the mode by which it can lawfully impose a tax on stock dividends.

There seems to be only one flat decision holding that stock dividends are taxable as income when complicated by Constitutional limitations and even that case is under a State Constitution where no prohibition against direct taxation exists, Tax Commissioner v. Putnam, 227 Mass. 522, 116 N. E. 904 (1917). England, in the absence of such limitations, has held stock dividends taxable as income, Swan Brewing Co. v. The King, (1914) A. C. 231. In Earps Appeal, 28 Pa. 368 (1857), they were deemed income, in part, as between life tenant and remainderman. A dividend paid in the stock of another corporation has been held to be taxable income. Peabody v. Eisner, 247 U. S. 347 (1918). Stock dividends paid in the stock of the corporation itself where the corporation has received its own stock in payment of a debt, Green v. Bissell, 79 Conn. 547, 65 Atl. 1056 (1907); or by purchase out of its undivided profits, Leland v. Hayden, 102 Mass. 542 (1869), have been held income. Where the capital of a corporation is taxed upon a valuation derived from the earning capacity it is proper to include as income in this sense the par value of any stock dividends declared. People v. Glynn, 130 N. Y. App. Div. 332, 114 N. Y. S. 460 (1909), affirmed in 198 N. Y. 605, 92 N. E. 1097 (1910).

DAMAGES—RATE OF EXCHANGE.—The plaintiffs, an American firm, sued the defendants, an English Co., for failure to receive certain quantities of condensed milk in accordance with a contract. One of the questions involved was the amount of damages to be accorded in view of the falling rate of exchange between the time of the breach and that of the trial. *Held:* That the rate of exchange should be calculated as of the date of the judgment. Kirsch & Co. v. Allen, Harding & Co., Ltd., 122 L. T. 159 (Eng. 1919).

It is a universal principle that a judgment must be given in the currency of the forum for the value of the foreign money to which the plaintiff is entitled, and the only question is, at what time that value is to be determined. Pollack v. Colglazure, Sneed 2 (Ky. 1801); Benners v. Clemmens, 58 Pa. 24 (1868). In those cases in which actions have been brought on a contract to pay a certain sum of money in the currency of a foreign country, the courts generally have held, that the amount recoverable should be computed according to the rate of exchange prevailing at the time of trial or judgment, on the theory that the plaintiff thus obtains a sum of money in the currency of the forum which enables him to procure the exact amount to which he is entitled in the foreign currency. Marburg v. Marburg, 26 Md. 8 (1866); Comstock v. Smith, 20 Mich. 338 (1870); Hawes v. Woolcock, 26 Wis. 629 (1870). This rule is well illustrated in Robinson v. Hall, 28 How. Pr. 342 (N. Y. 1864), where the plaintiff

had loaned the defendant six pounds sterling in England to be repaid on arrival in New York City. The testimony showed that this amount was worth seventy-eight dollars on or about the day when the debt was payable, and sixty-seven dollars on the day of the trial. It was held that the latter sum was the true measure of damages. Likewise in a suit on a promissory note payable in certain railroad stock, the damages were given in the amount of the value of that railroad stock at the time of the judgment. Parks v. Marshall, 10 Ind. 20 (1857).

The same rule is followed in those cases where the suit is on a contract other than for the payment of money, as shown in Nickerson v. Soesman, 98 Mass. 364 (1865). In that case, the Court said, "The just rule is, that where a party has suffered a loss or injury through the fault of another, he should be allowed such a sum in the currency of the place where suit is brought, as most nearly approximates that which he would be entitled to recover in the country where the damage was sustained." And on theory it would seem that the principal case is correctly decided, for if one of the parties to an agreement fails to keep his contract, then in whatever country the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed. In Cockerell v. Barber, 16 Vesey 461 (Eng. 1810) the current value of the rupee at the time when the legacy should have been paid, governed the payment in English pounds sterling.

It is of interest to note that the Supreme Court of the United States in Birge-Forbes Co. v. Heye, 40 Sup. Ct. 160 (1920) decided that, in the absence of any evidence whatsoever as to depreciation in value of the German mark at the time of payment, the value of the mark should be taken at par.

DEEDS—CONSTRUCTION—WARRANTY AND QUITCLAIM DEEDS.—X, through whom the plaintiff claimed, owned a part of the land in question in fee. She executed a deed to the defendant which recited, "I bargain, sell and convey whatever interest I have in the said land; it being my sole property, and which I convey as feme sole. I warrant to defend the title to the land to the defendant against the lawful claims of all persons whatsoever." Later X inherited another portion of the land in question. The defendant claimed the land which X had inherited by the deed recited. *Held:* This was a warranty deed, and the plaintiff is now estopped from asserting the after-acquired title of X. (One justice dissenting) Jackson v. Lady, 216 S. W. 505 (Ark. 1919).

As a general rule a conveyance of all right, title and interest in land, unless a contrary intention appears, passes only such title as the grantor has, and the grantee does not acquire any rights which subsequently accrue to the grantor. 18 C. J. 316, and cases there cited. But whether a deed is a quitclaim or more depends on all the circumstances showing the purpose of the instrument. Tiffany, Real Property 862 and cases there cited; 18 C. J. *supra.*

In Reynolds v. Shaver, 59 Ark. 299, 27 S. W. 78 (1894) it was held that a deed which recited a "sale of all right, title and interest" and contained a warranty "to defend the land to the grantee" was only a quitclaim. And in Manson v. Peaks, 103 Me. 430, 27 N. W. 78 (1908) the words, "land being part of that bought by me from the town F" were construed to be mere words of description, and not a covenant of title. In the principal case, however, a conveyance of the grantor's interest, coupled with a warranty to defend it to

the grantee as in Shaver v. Reynolds, *supra;* and a descriptive clause of sole ownership as a feme sole, was regarded by the court as ambiguous and extrinsic evidence was permitted to prove this a warranty deed. Evidently the court is shifting somewhat from its position in Shaver v. Reynolds, *supra*, in order to give effect to the actual intent of the parties.

EVIDENCE—BOOKS OF ACCOUNT—CARD SYSTEMS.—A physician noted his charges to patients in a small book from which his sister daily transferred them to a card index system. In an action to recover from a decedent's estate for professional services, *Held:* Loose card systems are not admissible in evidence. Daniels's Estate, 77 Leg. Int. 134 (Pa. 1919).

The question as to whether book accounts are admissible to prove physician's charges has never been decided by an appellate court in Pennsylvania. Many courts of first instance have held such evidence is admissible. Moffat's Estate, 1 W. N. C. 518 (Pa. 1875); Haines's Estate, 10 Pa. Dist. Rep. 677 (1901); Kready's Estate, 21 Lanc. Law Rev. 13 (Pa. 1902); but dicta in other cases have indicated that such evidence would not be admissible. Foreman's Estate, 7 Pa. Dist. Rep. 214 (1898); Hall v. Smitheran, 26 Pa. Dist. Rep. 203 (1917). Other jurisdictions have received physicians' book accounts as evidence. Toomer v. Gadsdie, 4 Strob. 193 (S. C. 1850); and dicta in Temple v. Magruder, 36 Col. 390, 85 Pac. 832 (1906); Colburn v. Parrett, 27 Cal. App. 541, 150 Pac. 786 (1915).

A physician's call book is not considered as a book of original entry. Estate of Finch, 49 P. L. J. 179 (Pa. 1911); Estate of Claney, 51 P. L. J. 139 (Pa. 1913); nor is a printed diary with figures and symbols marked down in the blanks. Germans's Estate, 14 W. N. C. 193 (Pa. 1883). But entries in a book made from memoranda furnished by a person other than the one who keeps the books is considered as a book of original entry. Hoover v. Gehr, 62 Pa. 136 (1869); Philadelphia v. Tradesmen's Trust Co., 38 Pa. Sup. Ct. 286 (1909); provided the entry be transferred from the memoranda not later than the succeeding day. Forsythe v. Norcross, 5 Watts 432 (Pa. 1836).

Unconnected scraps of paper containing accounts of sales irregularly kept are not admissible, Thompson v. McKelvey, 13 S. & R. 126 (Pa. 1825); nor is a book admissible which contains no charges except those against the decedent. *In re* Fulton's Estate, 178 Pa. 78 (1896). But where it can be seen that the sheets are part of a book retained in compact form they have been held admissible. Pittfield's Estate, 64 P. L. J. 135 (Pa. 1915). And even original sales slips filed systematically are competent as evidence. Braddock Lumber Co. v. Hecht, 66 P. L. J. 668 (Pa. 1916). Furthermore it is generally held in other jurisdictions that loose leaf ledger systems are admissible as books of original entry. United Grocery Co. v. Dannelly & Son, 93 S. C. 580, 177 S. E. 706 (1912); Armstrong Clothing Co. v. Boggs, 90 Neb. 499, 133 N. W. 1122 (1912); L. R. A. 1916 B 634 note. A card system has also been held admissible in evidence. Haley & Lang Co. v. Vecchio, 36 S. D. 64, 133 N. W. 898 (1915).

The court in the principal case based its decision on *in re* Fulton's Estate *supra* which held that entries in a book in which no other accounts appeared were not admissible since it was not an account "kept in the regular routine of

business." However, the principal case appears to differ materially from this case, for although the accounts of only one person appear on each card, yet the cards are part of a record systematically kept in a method generally recognized in the commercial world. As has been said by one court: "The manner of keeping the accounts is the important consideration . . . to hold that they must be bound in book form is giving importance to form rather than substance." Graham v. Worth, 162 Ia. 383, 141 N. W. 428 (1913).

JURY—WOMEN NOT QUALIFIED BY SUFFRAGE AMENDMENT.—In application for mandamus to direct the commissioner of jurors to include women in the jury list, the petitioner claimed that the requirement that jurors be, *inter alia*, "male citizens" was eliminated by adoption of an amendment to the state constitution by which the franchise was extended to *all* citizens, the qualification of "male" being dropped. *Held.* Jury service, whether a right or an obligation, is not incidental to the right to vote and the prayer of the petition was therefore denied. *In re* Grilli, 179 N. Y. S. 795 (1919).

The common law jury consisted of twelve "free and lawful men, *liberos et legales homines*," 3 Blackstone's Commentaries, 352; and women were excluded from jury service because of their sex, *Id.* 362. The only exception to this was when the pregnancy of a woman was a material fact, as "when a widow feigns herself with child, in order to exclude the next heir, and a supposititious birth is suspected to be intended," or when the pregnancy of the female prisoner was claimed in a plea in arrest of execution, when a jury of twelve matrons was impaneled to determine the truth of such claim, 3 Blackstone's Commentaries, 362, and 4 *Id.* 395. See also Reg. v. Wycherley, 8 C. & P. 262 (Eng. 1838); State v. Arden, 1 Bay 487 (S. C. 1795); Holeman v. State, 13 Ark. 105 (1852); 9 Cent. L. J. 94, 48 Am. Law Rev. 280; 2 American State Trials, 196.

It is well settled that state laws fixing qualifications for jurors other than those fixed by the common law do not deny the right of trial by jury, where such right is preserved by the constitution, *in re* Mana, 178 Cal. 213, 172 Pac. 986 (1918); 24 Cyc. 186, 196; and it is competent for the state to make electors eligible for jury service regardless of citizenship, People v. Collins, 166 Mich. 4, 131 N. W. 78 (1911); and likewise may qualify citizens who are not entitled to vote, State v. Fairlamb, 121 Mo. 137, 25 S. W. 895 (1894). When the state law restricts selection of jurors to "electors" it is at least arguable that extension of the franchise to any new class of the community, as women, should *ipso facto* make its members eligible for jury service, and there is authority for such a view, Rosencrantz v. Ter. of Washington, 2 Wash. Ter. 267, 5 Pac. 305 (1884); Hayes v. Ter. of Washington, 2 Wash. Ter. 286, 5 Pac. 927 (1884), (these cases were overruled in Harland v. Ter. of Washington, 3 Wash. Ter. 131, 13 Pac. 453 (1887) but mainly on the ground that the act extending the franchise to women was unconstitutional). Where, however, as in the principal case, the jury is to be composed of "male citizens," "male electors," "men," etc., such a result is not to be justified. McKinney v. State, 3 Wyo. 719, 30 Pac. 293 (1892); People v. Lensen, 34 Cal. App. 336 (1917). But see Rose v. Sullivan, 185 Pac. 562 (Mont. 1919) where it was held that a constitutional amendment eliminating the word "male" from the constitutional qualification of voters, abolished every political distinction based upon the consideration of sex, and made women eligible for an office to be filled by "some male person."

But even in those states where it is admitted that women are qualified to serve on juries it is not unusual to exempt them from that duty solely because of their sex, *e. g.*, Kansas, General Statutes of Kansas, 1915, sec. 5812; Nevada, Statutes of Nevada, 1915, Ch. 66, p. 84; Utah, Compiled Laws of Utah, 1917, sec. 3599; Washington, 3 Rem. & Bal. Annotated Codes and Statutes of Washington, 1913, Ch. 57, p. 314.

LIFE INSURANCE—EXEMPTION FROM LIABILITY—INTERPRETATION OF WAR CLAUSE.—A life insurance policy of the defendant company exempted it from liability if the insured met "death while engaged in military or naval service in time of war, or in consequence of such service." The insured who was in the military service of the United States died from influenza while en route between military camps in the United States. *Held.* The insured's administrator could recover on the policy as the defendant was exempt only when death was caused by activities of an essentially military nature. Benham v. American Central Life Ins. Co. (No. 5), 217 S. W. 462 (Ark. 1920).

The rule that exemption provisions are strictly construed against the insurer is firmly established. Death by an overdose of morphine taken to relieve pain was adjudged not to be a death "caused or superinduced by the use of narcotics or opiates." Renn v. Supreme Lodge Knights of Pythias, 83 Mo. App. 442 (1900). Pneumonia was not considered a "pulmonary" disease under an exemption provision protecting the insurer when death resulted from any "pulmonary disease." Carson v. Metropolitan Life Ins. Co. of N. Y., 1 Pa. Super. Ct. 572 (1896).

In recent reports there have been several cases similar to the principal case and yet none so favorable to the beneficiary of the policy. Recovery was had upon a policy exempting the company from death "as a result of such (military) service," when the insured died from an accidental gunshot wound received in a military camp in the United States. Malone v. State Life Ins. Co., 213 S. W. 877 (Mo. 1919). In a case in which death was caused by a fall from a motorcycle one hundred miles behind "the front" in France, the phrases in the "war clause," "as a result, directly or indirectly, of engaging in such (military) work" prevented the exemption from applying. Kelly v. Fidelity Mutual Life Ins. Co. of Phila., 169 Wis. 274, 172 N. W. 152 (1919). The same court that decided the principal case in Miller v. Ill. Banker's Life Assn., 212 S. W. 310 (Ark. 1919) on account of the "war clause" containing the words "while in the service" exempted the insurer from liability when death resulted from pneumonia in a camp in the United States. Thus, with substantially the same facts, before the same court, the phrase, "while in military or naval service" was interpreted as referring to the period of service, and "while engaged in military or naval service" was interpreted as indicating acts of a military nature in pursuance of extra hazardous duty. It is a narrow line of differentiation.

MINES AND MINING—SURFACE SUPPORT—UPPER AND LOWER SEAMS OF COAL.—The owner of two seams of coal leased the lower without any express reservation of the right to support. While the lessee was removing pillars in the lower seam, thereby causing serious injury to operations in the upper seam,

the owner sold the upper seam, subject to the rights of the lessee of the lower. The conveyance recited that pillars were being removed below and provided that the purchaser should not be required to pay royalty for any coal lost as a result thereof. *Held:* (In affirming a decree restraining the removal of the pillars): The right to support was a proprietary right in the superincumbent mine and had not ben waived. Lennox Coal Co. v. Duncan-Spangler Coal Co., 265 Pa. 572 (1920).

The universal rule is that when the surface and the minerals below are divided into two separate estates, the owner of the surface has the right to support in the absence of an express or necessarily implied waiver thereof. Humphries v. Brogden, 12 Q. B. 739 (Eng. 1850); Marquette Cement Mining Co. v. Ogelsby Coal Co., 153 Fed. 107 (1918). The right attaches to the surface whether it be the estate granted or the estate reserved. Stonegap Colliery Co. v. Hamilton, 119 Va. 271, 89 S. E. 305 (1916). In many of the cases the right is spoken of as an easement appurtenant to the estate, Robertson v. Youghiogheny River Coal Co., 172 Pa. 566, 33 Atl. 706 (1896); but it is perhaps more correctly considered an absolute proprietary right, Youghiogheny River Coal Co. v. Allegheny National Bank, 211 Pa. 319, 60 Atl. 924 (1905); and a falling in of the surface due to removing the minerals is actionable regardless of the degree of care or skill with which they are removed. Berkey v. Berwind-White Coal Co., 229 Pa. 417, 78 Atl. 1004 (1911).

By the majority rule a lease or sale of all the underlying minerals does not constitute a waiver of the right to support. (See the cases cited *supra.*) In West Virginia the opposite rule prevails, Griffin v. Fairmont Coal Co., 59 W. Va. 480, 53 S. E. 24 (1905). In this case a most thorough exposition of the subject is to be found in the exhaustive dissenting and concurring opinions; and the case influenced though it did not exactly control the decision of the Federal Court in Kuhn v. Fairmount Coal Co., 179 Fed. 191 (1910.)

In the principal case the rule in regard to surface right of support is applied to the case of a superincumbent mine. In Yandes v. Wright, 66 Md. 319 (1879), in which the right of an upper mine to support from a lower was admitted, it was said, "Surface includes whatever earth, soil, or land lies above and superincumbent on the mine." There seems to be no reason why a mine owner should not be protected from the operations below to the same extent as is a surface owner; and it is good public policy so to protect him, especially in view of the possibility of a cave-in rendering the upper mine unworkable.

NEGLIGENCE OF MANUFACTURER—LIABILITY TO SUBVENDEE—REVERSAL OF ERROR—STARE DECISIS.—Plaintiff bought from a dealer a touring car which was negligently manufactured by the defendant company with a defective wheel, but which it put upon the market without knowledge of such a defect. The plaintiff sued the company for injuries resulting from the collapse of the wheel. Upon a former writ of error in the same case between the same parties the court decided that because there was no contractual privity between the parties the defendant company was not liable. *Held:* The former decision was so clearly erroneous and contrary to the interests of society as to justify its reversal notwithstanding the rule of *stare decisis.* Johnson v. Cadillac Motor Car Co., 261 Fed. 878 (1919); reversing 221 Fed. 801 (1915).

It is the majority rule that a manufacturer is not liable for injuries caused by defects in the negligent manner of construction, manufacture or sale of an article unless he is in contractual privity with the injured person. Bragdon v. Perkins-Campbell Co., 87 Fed. 109 (1898); Ford Motor Co. v. Livesay, 160 Pac. 901 (Okl. 1916); Travis v. Rochester Bridge Co., 122 N. E. 1 (Ind. 1919). There are several universal exceptions. The manufacturer is liable when he knows of the defect and conceals it from his vendee, for this is positive misfeasance; Schubert v. Clark Co., 49 Minn. 331, 51 N. W. 1103 (1892); but he discharges his duty of care when he makes known the defect to his vendee. Loop v. Litchfield, 42 N. Y. 351 (1870). If the article is imminently and inherently dangerous, and one which "preserves, destroys or affects human life," an affirmative duty of care is placed upon the manufacturer not to injure by his negligence *any person* using such article for its ordinary purposes. Huset v. Case Threshing Machine Co., 120 Tex. 805 (1903). This exception is usually, but perhaps arbitrarily, limited to explosives, firearms, drugs and foodstuffs. Thomas v. Winchester, 6 N. Y. 397 (1852); Elkins v. McKean, 79 Pa. 493 (1875).

Huset v. Threshing Machine Co., *supra*, a leading case upon this subject, assigns three reasons for the majority rule; first, that injury to anyone other than the immediate vendee cannot ordinarily be anticipated; second, that the immediate vendee is an independent responsible human agency who intervenes between the vendor and the person injured and "insulates" one from the other; third, that "a wise and conservative public policy" necessitates a limitation upon the manufacturer's liability. The unsoundness of the reasoning in this case, which is widely followed, has been ably demonstrated. Professor Bohlen's Affirmative Obligations in the Law of Tort, 44 Am. Law Reg. 337 (1905). And in the case of an injury to a subvendee the rule is especially harsh and the reasons stated above peculiarly inapplicable. It is illogical to say that injury to the ultimate purchaser is not the natural and probable consequence of the manufacturer's negligence. Certainly injury to the immediate vendee, the dealer who acquires the article to sell, not to use, is quite improbable. In fact, of all persons, injury to the ultimate purchaser is most probable. MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916). The intermediate act of sale on the part of the dealer, not being wrongful, cannot be said to insulate the manufacturer's act of negligence. Professor Bohlen's article, *supra*, p. 346. The net result is that although injury to the ultimate purchaser was more probable than to anyone else, he is remediless, for he cannot recover against the dealer in the absence of a warranty; Longmeid v. Holiday, 6 Exch. 764 (Eng. 1851); and the manufacturer is in actual practice answerable to no one for careless manufacturing. Such a situation, so favorable to the manufacturer and so harsh upon the ultimate purchaser, is hardly necessitated by a wise public policy.

The principal case follows the decision in MacPherson v. Buick Motor Co., *supra*, and adheres to a rule laid down in New York which is both reasonable and workable. It extends the rule as to articles imminently dangerous, to those articles which are in themselves usually safe, but which if negligently manufactured become imminently dangerous. Devlin v. Smith, 89 N. Y. 470 (1882); MacPherson v. Buick Motor Co., *supra*. In other jurisdictions the same result has been obtained by classing articles as imminently dangerous

because they actually turn out to be so in the particular instance; Pillars v. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918); Grant v. Bottling Co.. 176 N. C. 256, 97 S. E. 27 (1918); Herman v. Markham Air Rifle Co., 258 Fed, 475 (1918), commented upon in 68 U. of P. Law Rev. 191; or by artificially charging the manufacturer with knowledge of the defect, because he ought to have discovered a defect which made the article imminently dangerous. Olds Motor Works v. Shaffer, 145 Ky. 616, 140 S. W. 1047 (1911); Armstrong Packing Co. v. Clem, 151 S. W. 576 (Tex. 1912).

The court's reversal of its former decision on the same case between the same parties is contrary to the majority rule of *stare decisis*, which holds that such a decision is the law of that particular case and not subject to reversal. Bolton v. Hay, 168 Pa. 418, 31 Atl. 1097 (1895); Thomson v. Maxwell Land Grant Co., 168 U. S. 451 (1897). The more liberal view, however, permits such a reversal in the exceptional case where the court is convinced that its first decision was clear error and that adherence to it would be prejudicial to the interests of society. Cluff v. Day, 141 N. Y. 580, 36 N. E. 182 (1894); Penna. Co. v. Platt, 47 Ohio 366, 25 N. E. 1028 (1890). In the principal case such a reversal is indicative of the extent of the reaction of the court to the injustice and unreasonableness of the majority rule as to the liability of the manufacturer to the subvendee.

RESTRICTIVE COVENANTS—PARTIES WHO MAY ENFORCE.—A deed to a part of a large building property contained a covenant by the grantee that he and all persons deriving title under him would not, without the written consent of the grantors, "their heirs and assigns or the persons deriving title under them" carry on any trade except a coal business, and would not permit anything which might be a nuisance, annoyance, or disturbance to the grantors or persons deriving title under them. There were similar covenants in conveyances to other grantees. *Held:* The benefit of the covenant was not annexed to the land retained by the grantors nor to any part thereof, but passed by operation of law to their executors. Ives v. Brown [1919] 2 Ch. 314.

Where a part of a piece of land is conveyed subject to a "restrictive covenant not running with the land in law" such covenant is either personal to the grantor, Weber v. Landrigan, 215 Mass. 221, 102 N. E. 460 (1913), or for the benefit of the grantor's land or a particular part thereof, Bowen v. Smith, 76 N. J. Eq. 456, 74 Atl. 675 (1909). If intended for the benefit of the land retained by the grantor or a part thereof, a subsequent grantee of such part can enforce the covenant by injunction, though there had been no assignment of the benefit to him and though he may not have known of the covenant. See Pomeroy's Eq. Jur. 4th Ed. §§1693, 1696, and cases cited.

On the wording of the covenant a fine distinction is drawn between the principal case and the case of Rogers v. Hosegood, [1900] 2 Ch. 388, in which a covenant, to enure to the benefit of the grantors, "their heirs and assigns and others claiming under them to all or any of their lands adjoining or near the said premises," was held to run with the land. And the principal case follows Renals v. Cowlishaw, 9 Ch. Div. 125 (1876) in which the covenant was with the grantors, "their heirs, executors, administrators, and assigns," containing no words which would indicate that it was for the protection of adjoining land.

Both in this country and in England the existence of a general scheme for improvement, under which similar restrictions are imposed on the various grantees, indicates that the benefit of the restrictions was intended to be annexed to the land. Parker v. Nightingale, 88 Mass. 341 (1863); Nottingham Brick & Tile Co. v. Butler, L. R. 16 Q. B. D. 778 (1886). Where there is no such general scheme, the modern English rule seems to be that a restrictive covenant is personal to the covenantee, unless shown to be otherwise by the deed. Pomeroy's Eq. Jur. 4th Ed. §1696, note 17, quoting from Cozen-Hardy, M. R. in Reid v. Bickerstaff [1907] 2 Ch. 305, 320. In the United States a broader rule prevails and outside circumstances may show the intention, Ball v. Milliken, 31 R. I. 36, 76 Atl. 789 (1910), where property was restricted to the use of a blacksmith shop, by a covenant with the "grantor, his heirs, executors, and a signs," and it was held that the benefit ran with the land.

SALES—STRIKE CLAUSE—CAUSE BEYOND PARTIES CONTROL MUST BE PROXIMATE.—Defendant, a coal broker, contracted to supply plaintiff with definite amounts of coal from a certain mine at specified times. This contract was subject to strikes, car shortages and other causes beyond the control of the parties. Defendant to fulfill its contract with plaintiff contracted with the mine owners for the coal to be supplied on the dates plaintiff's contract became operative. Defendant broke the contract and sought to avoid liability by reason of strikes and car shortage at the mines from which the coal was to be procured. By reason of the strike the output of the mines was materially reduced. *Held:* The strike and car shortage was not the proximate cause of defendant's failure to deliver since defendant's failure to protect himself by adequate contracts or by purchase from the persons controlling the output was an intervening cause. DeGrasse Paper Co. v. Northern New York Coal Co., 179 N. Y. S. 788 (1919).

The general rule in these cases is that performance of the contract, usually in respect to delivery, may be excused because of strikes or other causes beyond the control of the parties, if a provision to that effect is expressed in the contract. Hill Coal & Coke Co. v. Empire Coal & Coke Co., 113 Fed. 256 (1902); City of Covington v. Kanawha Coal & Coke Co., 121 Ky. 681, 89 S. W. 1126 (1905). To avoid liability for failure to perform, the cause must be shown by the party in default to come clearly within the provision of the contract. Consolidated Coal Co. of St. Louis v. The Block and Hartman Smelting Co., 36 Ill. App. 38 (1890); Widman et al. v. Straukamp et al., 94 N. Y. S. 18 (1905).

In determining whether the cause for failure to deliver comes within the provision some courts have held that the word "strikes" includes any strike having a legitimate tendency to prevent the execution of the contract. This is the rule laid down by the court in Davis v. Columbia Coal Mining Co., 170 Mass. 391, 49 N. E. 629 (1898), when the railroad company seized coal shipped by the defendant to the plaintiff at a time when there was a general strike on in the anthracite regions of Pennsylvania. This view, however, seems to be a too liberal interpretation of the provision. The better view is that the strike or other cause must be the proximate cause of the failure to perform and so far beyond the control of the party in default as to make the performance impossible. W. K. Niver Coal Co. v. Cheronea S. S. Co., 142 Fed. 492 (1905); Smokeless

Fuel Co. v. Seaton & Sons, 105 Va. 170, 52 S. E. 829 (1906). Under this view the word "strikes" includes strikes at the seller's plants and general strikes if no independent causes intervene to cause failure of performance, Hesser-Milton-Renahan Coal Co. v. LaCrosse Coal Co., 114 Wis. 654 (1902). When the seller does not own the plant the strike must be beyond the control of the operators and shipments of the product or the output of the plant must be materially cut down to enable the party in default to excuse his failure within the provision. Smokeless Fuel Co. v. Seaton & Sons, *supra;* Cottrell v. Smokeless Fuel Co., 148 Fed. 594 (1906). While it is usual to expressly provide for shortage of cars in the provision, in the absence of an express stipulation to this effect, "other cause beyond the control of the parties" has been interpreted to cover car shortages which made shipments of the product an impossibility. Consolidated Coal Co. v. Mexico Fire Brick Co., 66 Mo. App. 296 (1896); Hatfield v. Thomas Iron Co., 208 Pa. 478 (1904).

In view of the character of the defendant's business in the principal case it is difficult to see how it could more adequately protect itself than by making the kind of contracts it did. The court seems to have gone rather far in holding that the strike and car shortage, which not only cut down the production of the mine but hindered the shipments of the coal, was not the proximate cause of the defendant's failure to perform.

WILLS—CONSTRUCTION IN PENNSYLVANIA—REAL AND PERSONAL PROPERTY.—The testator disposed of real and personal property in the following manner: after giving a life interest to his wife he directed his executors to divide his estate equally between his two sons and three daughters, the sons to receive their share and the daughters to receive the interest of their share during their lives, and if any of them should die without issue, their share to go to the remainder of the children above named then living, or their issue, if any, and if not any, then over. One son and one daughter predeceased their mother without leaving issue. On the death of the mother, the son and the two surviving daughters each claimed to be entitled absolutely to one-third of the entire fund. *Held:* The son took an absolute interest in one-third of the proceeds of both the real and personal property; and the daughters each took an absolute interest in one-third of the proceeds of the real estate and a life interest in one-third of the proceeds of the personal estate. Birely's Estate, O. C., Phila. Co., October Term, 1919, No. 123. (Unreported.)

It was conceded in the principal case that the son took an absolute interest in both the real and personal estate. The sole question that was presented to the court was whether, in construing the gifts to the daughters, the circumstance of the testator having dealt with both classes of property in the same words necessarily resulted in the construction that it was intended that the daughters should take the same interests in the personal property that they took in the real estate.

It is well settled that if the devise of the realty be considered separately the devisees would take an absolute interest. Heffner v. Knepper, 6 Watts 18 (Pa. 1837); Williams on Real Property 215, n. 1 (6th Am. Ed.). It is equally well settled that if the bequests of the personalty are construed without reference to the devise of the real estate the daughters are entitled to life interests only. Crawford's Estate, 17 Pa. Sup. Ct. 170 (1901).

The distinction in the rules applicable to real and personal property is founded in the fundamental difference in the legal incidents of their subject matters. *In re* Wynch's Trusts, 17 Jur. 588, 593 (Eng. 1853); s. c. on appeal, Ex Parte Wynch, 5 D. M. & G. 188, 214, 219–20, 225–6 (Eng. 1854). Accordingly, where both personal and real property are disposed of by the same words in the same will it is also a recognized rule of construction that the principles applicable to each class may be respectively applied to the property in that class. Forth v. Chapman, 1 P. Wms. 663 (Eng. 1720); Jackson v. Calvert, 1 J. & H. 230 (Eng. 1860).

In Pennsylvania, however, the law in such cases is by no means clear. The rule of Forth v. Chapman was said, by Duncan, J., in Train v. Fisher, 15 S. & R. 145, 148 (Pa. 1826), to have been "acknowledged, though not perhaps actually decided in our own courts," and it has been repeatedly approved of in similar language. Clark v. Baker, 3 S. & R. 470, 478 (Pa. 1817); Myers's Appeal, 49 Pa. 111, 114 (1865); Heiss's Estate, 1 Pa. C. C. 397 (1886). In Drennan's Appeal, 118 Pa. 176 (1888), it was held that an absolute interest in the personal property and a life interest in the real property were created by the same words. See also National Live Stock Bank v. Hartman, 8 Pa. Sup. Ct. 170 (1898). The decision was qualified, however, by the statement that where real and personal property are thus intermingled, a presumption arises that it was intended to give the same interest in the personalty as was given in the realty, but that this is merely a presumption which is rebutted when a contrary intent can be gathered from the whole will. On the other hand, in Robinson's Estate, 149 Pa. 418 (1892), the Supreme Court affirmed *per curiam*, an auditor's report in which it was ruled that "the testator having disposed of his personal property along with his real estate without distinction, the whole will be treated agreeably to the rules governing the disposal and distribution of real estate. Jarman on Wills, vol. 3, page 297; Mickley's Appeal, 92 Pa. 514; 141 Pa. 350." The authorities cited do not support the principle enunciated, and there is no further discussion of the matter either in the report, arguments of counsel, or the opinion of the court. The same rule is stated by way of dictum in Edwards's Estate, 227 Pa. 299 (1910). While Robinson's Estate, *supra*, would seem to be the governing case in Pennsylvania on this subject at the present time, reason and the weight of modern authority are both opposed to it, and it remains to be seen whether a rule of such far-reaching consequences will be engrafted on our law without a more thorough consideration and argument of the precise point raised in the principal case.