RECENT CASES

ACCORD AND SATISFACTION—OFFER OF PART IN SETTLEMENT—EFFECT OF ACCEPTANCE—The defendant, plaintiff's agent, sent to plaintiff a statement of account, stating that a check was enclosed in settlement of that account. After a *bona fide* dispute as to the amount due, and with knowledge that defendant claimed the amount of the check to be the true amount due, plaintiff cashed the check and sued for a balance claimed. The defendant claimed an accord and satisfaction. *Held:* Judgment for defendant. *Egan v. Crowther*, District Court of Appeals of California, August 5, 1925.

Where a claim is unliquidated, or in dispute, payment and acceptance, in satisfaction, of a sum less than that claimed, operates as an accord and satisfaction. *Nassoiy v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715 (1896); *Hull v. Johnson*, 22 R. I. 66, 46 Atl. 182 (1900). To achieve this result, the money must be offered in full satisfaction of the demand, and the accompanying acts and declarations must be such that the creditor must understand that he is to accept the money in full satisfaction only. *Steidtmann v. Joseph Lay Co.*, 234 Ill. 84, 84 N. E. 640 (1908); *Rose v. American Paper Co.*, 83 N. J. L. 707, 85 Atl. 354 (1912); *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034 (1893). If this has been done, there is a good accord and satisfaction, even though the creditor immediately notifies the debtor that the check is accepted only in part payment and demands the balance. *Barham v. Bank of Delight*, 94 Ark. 158, 126 S. W. 394 (1910). Where a dispute has arisen and a check is sent "in full"; *McKenty v. Oceanus Mfg. Co.*, 123 N. Y. Supp. 983 (1910); *Connecticut River Lumber Co. v. Brown*, 68 Vt. 239, 35 Atl. 56 (1895); or "to balance account"; *Lafrentz & Karstens Co. v. Cavanagh*, 166 Ill. App. 306 (1911); *Aydlett v. Brown*, 153 N. C. 334, 69 S. E. 243 (1910); it is held a good accord and satisfaction.

In the instant case, the fact that the dispute did not arise until after the check was sent was considered immaterial, as the plaintiff cashed it knowing that the defendant had offered it in full satisfaction. Two New York cases seem to require the controversy to have arisen first, and the check to have been sent expressly to settle the controversy. *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289, 51 N. E. 986 (1898); *Laroe v. Sugar Loaf Dairy Co.*, 180 N. Y. 367, 73 N. E. 61 (1905). It is believed, however, that these cases are distinguishable on their facts, and that the instant case is in accord with the generally accepted view, as shown in *Nassoiy v. Tomlinson, supra*.

BANKRUPTCY—LIABILITY TO INVOLUNTARY PROCEEDINGS—STATUS OF CO-OPERATIVE MARKETING ASSOCIATION—The defendant association was incorporated under an Indiana statute providing for the incorpation of non-profit, co-operative associations, and was engaged in co-operative marketing of dairy products. This was a petition for involuntary bankruptcy, the answer to which denied that the defendant association was subject to the provisions of the bankruptcy laws of the United States. *Held:* Petition dismissed. *In re Dairy Marketing Association of Ft. Wayne, Inc.*, United States District Court of Indiana, November 14, 1925.

The Bankruptcy Act of 1898, c. 541, § 4, 30 Stat. 547, as amended by the Act of 1910, c. 412 § 3, 4, 36 Stat. 839, provides that "any moneyed, business or commercial corporation except a municipal, railroad, insurance or banking corporation" may be adjudged an involuntary bankrupt. This provision is to be strictly construed and includes only such corporations as are clearly within the classes enumerated. *In re New York, New Jersey Ice Lines*, 147 Fed. 214 (C. C. A., 1906). Whether or not a corporation is subject to the Act depends upon the business it actually transacts and not on the powers granted by its charter. *In re Kingston Realty Co.*, 160 Fed. 445 (C. C. A., 1908). Where the business of a corporation includes some pursuits within and others without the operation of the Act, the principal business done determines the character of the corporation. *Cate v. Connel*, 173 Fed. 445 (C. C. A., 1909); *In re Quimby Co.*, 126 Fed. 167 (C. C. A., 1903); *In re Interstate Paving Co.*, 171 Fed. 604 (D. C., 1909).

There are no decisions construing the terms "moneyed, business or commercial corporations" as used in the present Act. The same words were, however, used in the Act of 1867, c. 176, § 37, 14 Stat. 535, and have been construed many times. Every corporation which transacts business for gain as its chief and ultimate purpose is a business corporation. *In re Radke Co.*, 192 Fed. 735 (D. C., 1911). The words "moneyed, business or commercial corporations" are intended to embrace all those classes of corporations that deal in or with money or property in the transactions of money, business or commerce for pecuniary gain. *Winter v. Iowa Ry.*, 2 Dill 487 (U. S. C. C., 1873). The essential element is the transaction of business for pecuniary gain. *Rankin v. Florida Ry.*, Fed. Cas. No. 11567 (D. C., 1868); *Adams v. Boston Ry.*, Fed. Cas. No. 47 (D. C., 1870); *In re Radke Co., supra;* BUMP, BANKRUPTCY, 792 (10th Ed., 1877).

In the instant case, while the defendant association bought and sold milk cans and dealt in other personal property, it was primarily engaged in the co-operative marketing of dairy products. The purpose of the association was the promotion of the common interests of the members, but the immediate object was not pecuniary gain. The decision therefore seems in accord with the intention of Congress, and justified by the authorities.

BANKS AND BANKING—DAMAGES FOR BREACH OF CONTRACT TO HONOR CHECK—MENTAL PAIN AND SUFFERING AS ELEMENT—The defendant bank agreed to honor the plaintiff's checks while he was on his vacation in California. Checks were subsequently dishonored, and plaintiff sued for the breach of the contract. The jury returned a verdict assessing damages for loss of expenses at $700. and for humiliation and mental suffering at $1000. The lower court set aside the item of damage for mental suffering. *Held:* Judgment reversed and cause remanded, with instructions to enter judgment upon the verdict in its entirety. *Westesen v. Clathe State Bank*, Supreme Court of Colorado, November 2, 1925.

Mental suffering, as an element of damage arising from failure to meet a contractual obligation, is usually regarded as too remote to be recoverable. *Smith v. Sanborn State Bank*, 147 Iowa 640, 126 N. W. 779 (1910); *American*

National Bank v. Morey, 113 Ky. 85, 69 S. W. 759 (1902). There are, however, special circumstances where recovery has been allowed. In *Western Union Tel. Co. v. Wells*, 50 Fla. 474, 39 So. 838 (1905), the defendant refused to pay over money to plaintiff in accordance with the contract, its agent knowing that failure to pay would result in the plaintiff traveling for twenty-four hours without funds. It was held that damages for mental suffering attendant on the physical discomfort which followed could be recovered.

The grounds of the present decision are that the defendant bank knew that the plaintiff intended to use his credit for vacation expenses; that the refusal to honor the checks left him without funds in a strange community; and that humiliation and mental suffering were therefore the natural and probable consequence of defendant's wilful act.

This case thus goes even farther than *Western Union Tel. Co. v. Wells, supra*, for here there is no physical injury—an element of damage which sounds more in tort than in contract. It has been held that substantial damages may be recovered for the failure of a bank to honor a check though no pecuniary loss be shown. *Patterson v. Marine National Bank*, 130 Pa. 419 (1889), 18 Atl. 632. It has also been held that damage to business reputation resulting from such dishonor will be compensated. *Spearing v. Whitney-Central National Bank*, 129 La. 607, 56 So. 548 (1911). But in no other case has mental suffering been allowed as an element of such compensation, and on its facts the instant case is *contra* to both the Kentucky and the Iowa cases cited above. In thus extending the basis of recovery, it is submitted, the court goes far toward allowing as an element of damage a condition hitherto regarded as too remote to be compensated.

CARRIERS—DUTY TO TRESPASSERS ON TRAIN—LIABILITY THROUGH NEGLIGENCE—Due to the failure of the defendant's engineer to observe a signal, the train which he was handling collided with one on which the plaintiff's deceased was a trespasser. *Held:* Recovery allowed. *Bremer v. Lake Erie & W. R. R.*, 148 N. E. 862 (Ill., 1925).

It is a well-accepted principle that a trespasser on the carrier's cars or premises is entitled to no protection from the carrier, except against wanton or willful injury to him, or in other words, that the carrier exercise ordinary care to avoid injuring him after discovering his presence. *Bjournquist v. R. R.*, 185 Mass. 130, 70 N. E. 53 (1904); *Van Ostrand v. R. R.*, 112 App. Div. 783, 99 N. Y. Supp. 548 (1906); *Schifalacqua v. R. R.*, 249 Pa. 602, 95 Atl. 260 (1915). See 10 C. J. 876.

The trespasser in the instant case was neither known nor expected to be on the train. Faced with a line of its own cases holding that knowledge of the trespasser's presence is necessary, the court draws a distinction between trespassers on tracks and similar property and trespassers on trains, and holds that the cases of the former class do not apply to the latter situation. It disposes of the second objection by simply disregarding it. It does so by a mere restatement of the duty which a carrier owes to expected trespassers.

After speaking of the presumption of willfulness and constructive willfulness, it states that "the observance of duty (to notice signals) was essential to

the safety of the trains and all persons and property on them." Liability is thus flatly placed on the ground of a duty towards trespassers, to use ordinary care in the operation of its trains whether their presence is known or not.

As has been pointed out by Professor Bohlen, the high degree of duty to use care imposed upon carriers is justifiable only on the ground that the relationship is one voluntarily entered into, from which the carrier receives a benefit. Bohlen, *The Basis of Affirmative Obligations in the Law of Torts*, 53 U. OF P. L. REV. 209, 220 (1905). To impose the duty to use care in a case like the present, when there is neither a voluntary relationship nor a benefit, seems to be an unwarranted extension of the carrier's liability.

CONTRACTS—TERMINATION—RIGHT OF ONE PARTY TO RESCIND WITHOUT MUTUAL ASSENT—The defendant railroad contracted with plaintiff township to share in the upkeep of a bridge used by the public and the defendant jointly. The defendant later gave up use of the bridge owing to its insufficiency to carry modern equipment. *Held:* Contract terminated when defendant was compelled to discontinue use of bridge, although plaintiffs did not assent thereto. *Readsboro v. Hoosac Tunnel & W. R. Co.*, 6 Fed. (2d) 733, (C. C. A., 1925).

A contract not calling for personal service or special confidence, in which the date of termination is not fixed, is presumed to be interminable and irrevocable, and unless that presumption is rebutted the contract is terminable only by mutual assent. *Llanelly R. R. v. London, etc., R. R.*, 7 Eng. and Irish App. 550 (1875); *Franklin Tel. Co. v. Harrison*, 145 U. S. 459 (1892); *McKell v. Chesapeake, etc., R. Co.*, 175 Fed. 321 (C. C. A., 1910).

But when, from the nature and purpose of the contract, it may be reasonably implied that the intention of the parties was that the contract should remain in force only so long as the parties shared the benefits to flow from it, then, when such benefit to one of the parties has ceased, he may terminate the contract upon reasonable notice, without the concurrence of the other. *Barney v. Indiana Ry.*, 157 Ind. 228, 61 N. E. 194 (1901); *Philadelphia & Reading R. R. v. River Front R. R.*, 168 Pa. 357, 31 Atl. 1098 (1895); *Stonega Coke & Coal Co. v. Louisville & N. R. R.*, 106 Va. 223, 55 S. E. 551 (1906).

It is submitted that the instant case was properly decided under this rule. The intention of the parties was clearly that the defendant, in return for the use of the bridge, which accelerated its deterioration, should share in the cost of maintenance. When, however, it became impossible, through economic exigencies, for the defendant to continue the use of the bridge it would be manifestly unfair to hold it bound by a contract the essence of which was mutual use and resulting mutual liability.

CRIMINAL LAW—CONFESSIONS TO ONE IN AUTHORITY—BURDEN OF PROOF TO SHOW VOLUNTARY NATURE—The defendant was accused of owning and operating a "moonshine" still. Over objection the prosecution offered in evidence a confession of the accused, without proof that it had been given voluntarily. The accused denied the confession and said, without contradiction, that he had

been beaten by his jailor for refusing to make such a statement. The court admitted the confession, and the defendant was convicted and appealed. *Held:* New trial granted. *State v. Zaccario*, 129 S. E. 763 (W. Va., 1925).

A confession made to one in authority is inadmissible unless made voluntarily but there is a conflict of authority as to the party upon whom falls the burden of proving the confession voluntary. Professor Wigmore believes that the more practical rule would be to receive confessions without question, unless they are shown to have been improperly induced. 2 WIGMORE, EVIDENCE, (2d ed., 1923) 215. See 16 C. J. 733, n. 94, for a list of jurisdictions accepting this rule. The majority of jurisdictions, including the Federal courts, however, hold that the prosecution in offering a confession must show that it was made without compulsion, at least from the person to whom it was made. *Hopt v. Utah*, 110 U. S. 574 (1884); *State v. Thomas*, 250 Mo. 189, 157 S. W. 330 (1913); *Thompson's Case*, 20 Gratt. 724 (Va., 1870).

In Pennsylvania, the question of the admissibility of a confession is primarily for the court, but it may properly be left to the jury, if there is conflicting evidence. *Commonwealth v. Shaffer*, 178 Pa. 409, 35 Atl. 924 (1896); *Commonwealth v. Spardute*, 278 Pa. 37, 122 Atl. 161 (1923). The question of which party has the burden of the proof does not seem to have arisen.

Wigmore, in *Confessions, A Brief History and a Criticism*, 33 AM. L. REV. 376 (1899), gives the historical reasons for the strictness of the limitations on the admissibility of confessions, and states his belief that with the disappearance of the reasons for the limitations the limitations should disappear also. The West Virginia court in the present case feels that good reason still exists for retaining the strict limitations. While on the surface Professor Wigmore's statement, that the accused should have the burden of the proof, because he knows best whether inducements have been offered, seems reasonable, still the person who obtains the confession is in just as good a position as the accused to know whether it has been offered. Moreover, since the statements of officers of the law are apt to carry greater weight than those of the accused, it is only just to place upon the former the duty of establishing the case.

HOMESTEAD LAW—NATURE OF VETERAN'S RIGHT—INTERPRETATION OF STATUTES—A Civil War veteran, entitled under Act of 1872, 31 Stat. 847, c. 338, § 1, U. S. Comp. Stat. § 4592, to a homestead entry of 160 acres, died having entered only eighty acres. Sections 2 and 3, U. S. Comp. Stat. §§ 4594, 4602, further provide that his widow, and at her death, his minor children through their guardian, should be entitled to exercise his right to enter the additional eighty acres, should he have failed to do so. No entry was made until after the widow was dead and the children were all of age. The children then made a joint assignment to the plaintiff, who finally made the entry. *Held:* The assignment operated to convey the right to enter the eighty acres. *Anderson v. Clune*, 46 Sup. Ct. 69 (1925).

The rule obtaining in the past was contrary to the instant decision. The Secretary of the Interior had decided that this right lapsed if not exercised or assigned by the soldier, his widow, or his orphan children before their majority.

46 L. D. 32 (1917). Both federal and state courts, however, had held before this that the right to enter the additional acreage was a property right and could be assigned before entry was made upon the land. *Webster v. Luther*, 163 U. S. 331 (1896); *Mullen v. Wine*, 26 Fed. 266 (C. C., 1886); *Barnes v. Poirier*, 64 Fed. 14 (C. C. A., 1894); *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284, 29 Pac. 640 (1892); *Webster v. Luther*, 50 Minn. 77, 52 N. W. 271 (1892); *Knight v. Leary*, 54 Wis. 459, 11 N. W. 600 (1882). The principal case merely takes the next logical step in holding that this right may be inherited—that it passes as other personal property, to the personal estate of the soldier immediately upon his death, subject only to the exercise of the rights given to the widow and the minor orphan children. Thus, of course, an assignment by the children after they had come of age would convey the soldier's right of entry.

Although this is a liberal interpretation, it is consistent with the spirit of the statute, and in line with the policy of favoring veterans and their families.

INCOME TAX—INSURANCE—WHAT RESERVE FUNDS ARE DEDUCTIBLE—RESERVE—In pursuance of the requirements of the Superintendent of Insurance of New York, the plaintiff insurance company made a net addition to its reserve funds to cover accrued but unsettled loss claims. The revenue collector refused to deduct such fund from the gross income of the company in order to determine the net sum subject to taxation. *Held:* The permitted deductions specified by Act of 1916, 39 Stat. 756, § 12, do not necessarily include everything which may be denominated reserve fund by state statute or officers. The reserve fund of the act does not include money held by a fire and marine insurance company to cover accrued but unsettled claims for losses. *United States v. Boston Ins. Co.*, 46 Sup. Ct. 97 (1925).

The Court states, as a reason for its holding, that the Act of Congress deals with reserves, not particularly in their bearing upon the solvency of the company, as the state statutes do, but only as they aid in determining what part of the gross income ought to be treated as net income for purposes of taxation. The court expressly adheres to and affirms the doctrine laid down in *McCoach v. Ins. Co.*, 244 U. S. 585 (1917). *Maryland Casualty Co. v. U. S.*, 251 U. S. 342 (1920), holds, contrary to the principal case, that a finding, that the Insurance Department of Pennsylvania, pursuant to statute, has at all time required the insurance company to keep on hand, as a condition of doing business in tnat state, assets (as reserves) sufficient to cover outstanding losses, justifies the deduction of this reserve as one required by law to be maintained. But, in commenting on that case, the court in the instant case says that the findings supply no adequate ground for a holding contrary to the general doctrine theretofore approved in *McCoach v. Ins. Co., supra.*

It would seem that the decision in the principal case is the correct one. The force of an express provision of a revenue law should not be controlled or abridged by consideration of the provision of a state statute, for if the differing rules of taxation among the states were to be followed the federal statute would not work uniformly throughout the domain in which it is to operate.

Boston R. Co. v. U. S., 265 Fed. 578 (C. C. A., 1920). Furthermore, there is a specific provision in the Act of 1916, *supra*, for deducting all losses actually sustained within the year and not compensated by insurance or otherwise. This is another indication that losses in immediate contemplation, but not as yet actually sustained, were not inended to be treated as part of the reserve funds.

INSOLVENCY—ASSIGNMENTS FOR BENEFIT OF CREDITORS—VALIDITY OF STIPULATION FOR RELEASE—The officers of a corporation became personally liable for the debts thereof through failure to comply with certain statutes. In a suit by the creditors to enforce this liability, the defendants plead an agreement by the creditors to release them from all liability in consideration of an assignment of all the corporate property for their benefit. *Held:* Such an assignment is void. *Simmons Hardware Co. v. Rhodes*, 7 Fed. (2d) 352 (C. C. A., 1925).

It is very generally held that an assignment by a debtor of part of his property for the benefit of creditors, with a stipulation for his release from further liability is fraudulent and void. Cases cited in 5 C. J. 1107; 14 COL. L. REV. 528 (1914). But as to the validity of an assignment by a debtor of all his property for the benefit of his creditors, with a similar stipulation, there is a decided conflict of opinion. In England, such a provision in an assignment for the release of the debtor has been upheld even against a claim of the Crown. *King v. Watson*, 3 Exch. 6 (1817); *Janes v. Whitebread*, 20 L. J. C. P. (N. S.) 217 (1851); 2 KENT, COMM. 693 (1851).

In the United States, however, the weight of authority has, within recent years, unquestionably inclined toward holding such assignments invalid. *Seale v. Vaiden*, 10 Fed. 831 (D. C., 1881); *Nelson v. Harper*, 122 Ark. 39, 182 S. W. 519 (1916). Some of the reasons generally assigned for their invalidity are that they operate as a method of compelling the creditors to give up some of their rights; *May v. Walker*, 35 Minn. 194, 28 N. W. 252 (1886); see *Halsey v. Whitney*, Fed. Cas. No. 5964 (1825); that the debtor is driving a bargain for his own benefit since he is absolutely discharged from his debts; *Hubbard v. McNaughton*, 43 Mich. 220, 5 N. W. 293 (1880); *Grover v. Wakeman*, 11 Wend. 187 (N. Y., 1833); that such an assignment will, in effect, result in a discharge of the debtor from his liabilities on better terms than insolvent laws permit to debtors applying for this benefit; *Sperry v. Gallaher*, 77 Iowa 107, 41 N. W. 586 (1889); *Henderson v. Bliss*, 8 Ind. 100 (1856); that it is contrary to the doctrine that payment of part of a debt, in the absence of any dispute as to the amount due, is no consideration for the release of the whole. *Henderson v. Bliss, supra.*

Courts upholding such assignments have done so on the ground that since a debtor has a right to prefer certain creditors, he may prefer those who shall give him a release. *Joel Bailey Davis Co. v. Augustus*, 105 Va. 843, 54 S. E. 985 (1906); *McMillan v. Holley*, 145 Wis. 617, 130 N. W. 455 (1911). Chief Justice Marshall and Judge Story, both with a great deal of reluctance, upheld these assignments on the ground of *stare decisis*. *Brashear v. West*, 7 Pet. 615 (U. S., 1833); *Halsey v. Whitney, supra.* In other jurisdictions, such releases are authorized or required by statute. *Kellog v. Cayce*, 84 Tex. 213, 19 S. W. 388 (1892); *McCord-Brady Co. v. Mills*, 8 Wyo. 258, 6 Pac. 1003 (1898).

Pennsylvania long upheld such assignments with stipulations for releases. *Brashear v. West, supra; Sheephanks v. Cohen,* 14 S. & R. 35. (Pa., 1825); *Mechanics Bank v. Gorman,* 8 W. & S. 304 (Pa., 1844). But they have since been made void by statute. Act of 1849, P. L. 412, § 4, Pa. St. 1920, § 12072.

The decision in the instant case is not only in accord with the weight of authority and, it is submitted, the better view, but is also eminently just, since there was an attempt there to make this assignment in order to avoid a liability imposed by statute.

INSURANCE OF AUTOMOBILES—REVOCATION OF LICENSE FOR WRITING OF POLICIES OUTSIDE STATE—The Palmetto Fire Insurance Company, a South Carolina Corporation, by contract with the Chrysler Sales Corporation, insured all Chrysler cars against fire and theft. The contract of insurance was made "to whom it may concern" and was delivered to the Chrysler Company in Detroit. A certificate of insurance is sent to the retail purchaser when he has bought the car. The Insurance Company was licensed to carry on insurance business in Ohio and New York. In each of these states, the Insurance Commissioner moved to revoke its license, and the company filed a bill to enjoin him from so doing. *Held:* (in Ohio) Injunction denied; revocation permitted. *Palmetto Insurance Co. v. Conn,* United States District Court for the Southern District of Ohio, Eastern Division, November 13, 1925; (in New York) injunction granted; revocation prevented. *Palmetto Insurance Co. v. Beha,* United States District Court for the Southern District of New York, November 10, 1925.

A State has the power to regulate insurance companies. *Nat. Union F. I. Co. v. Wanberg,* 233 U. S. 389 (1913); *People v. Formosa,* 131 N. Y. 478, 30 N. E. 492 (1892); *Commonwealth v. Trooman,* 164 Pa. 306, 30 Atl. 217 (1894). It may require a foreign corporation to take out a license or certificate, and may impose upon the license such terms or conditions as it may wish, provided the terms are not unconstitutional. *New York L. I. Co. v. Cravens,* 178 U. S. 389 (1900); *Commonwealth v. Maryland Fidelity Co.,* 244 Pa. 67 at p. 71, 90 Atl. 437 at p. 439 (1914); Pa. Act of 1921, P. L. 682, Art. III § 301, Pa. St. Supp. 1924 § 12490b-301. The license, if granted, may be revoked by the Insurance Commissioner who granted it, but his act may not be arbitrary. *People v. Insurance Commissioner,* 25 Mich. 321 (1872); *State v. Harty,* 276 Mo. 208 S. W. 835 (1918); Pa. Act of 1921, P. L. 789, Art. V § 501, Pa. St. Supp. 1924 § 12490a-501. Violations of the laws of the State or of the conditions attached to the license constitute valid reasons for revocation. The question in these cases was whether the act of the Commissioner was arbitrary.

The Ohio General Code (1910) § 5438 provides that no insurance company may write policies on property in that State, unless they are countersigned by an authorized Ohio agent, so that the State may tax them. The writing of this insurance in Michigan on automobiles which would eventually become property in Ohio, was a violation of this law and the revocation was proper. In New York, there was no such statute and, since the business was a lawful one, the mere loss of revenue to the State was no reason for revocation. The act of the Commissioner was held arbitrary and was enjoined.

The Ohio statute referred to *all* insurance companies. The Pa. Act of 1921, P. L. 682, Art. V § 501, Pa. St. Supp. 1924 § 12490b-501 is almost identical with the Ohio statute except that it applies to fire insurance companies only. But since the insurance sold by this company is partly against fire, it would come under this statute, and were this case to arise in Pennsylvania, it would probably be decided in accord with the Ohio decision.

This novel insurance idea has occasioned considerable litigation. New developments will be discussed in the next issue.

SALES—FUNGIBLE GOODS—PASSAGE OF TITLE—A, having 618 quarters of maize in defendant's warehouse, sold and gave a delivery order for 200 quarters to W, who resold and gave a delivery order to the plaintiffs. A ordered defendants to stop delivery and the plaintiffs bring this action for the goods and for damages for non-delivery on the ground that there had been a sale to them of the 200 quarters. *Held:* Judgment for defendants. *Laurie v. Dudin*, [1925] 2 K. B. 383.

The case of *Whitehouse v. Frost*, 12 East 614 (Eng., 1810) held upon similar facts that there was a sale. But the language of later cases disapproved that decision, although not clearly overruling it, the later cases being distinguished either on the ground that something remained to be done to the goods by the seller or on some other ground not always made clear in the cases. *Wallace v. Breeds*, 13 East 522 (Eng., 1811); *Austin v. Craven*, 4 Taunt. 644 (Eng., 1812). But *Whitehouse v. Frost, supra*, has long been regarded as having no weight in England and the instant case leaves no room for doubt upon that question.

The trend of the American cases, beginning with the leading case of *Kimberly v. Patchin*, 19 N. Y. 330 (1859), has been to allow the passage of title to a part of an undivided mass of fungible goods, where the intention of the parties is that title to the portion sold shall pass, the vendee becoming tenant in common of the whole mass with the vendor. *Cushing v. Breed*, 96 Mass. 376 (1867); *Westinghouse Co. v. Harris*, 237 Pa. 203, 85 Atl. 78 (1912); *Geoghegan v. Arbuckle*, 139 Va. 92, 123 S. E. 387 (1924). This view is codified in the *Uniform Sales Act*, § 6, and is not only a better interpretation of the intent of the parties but also is better adapted to the convenience of trade than is the English view.

STATUTE OF FRAUDS—ORAL AGREEMENT TO REPURCHASE STOCK—PART PERFORMANCE BY SALE—Plaintiff, by written order, purchased stock of a corporation, through the defendant, its agent and managing officer, in reliance upon the defendant's oral agreement to repurchase if plaintiff became dissatisfied. The stock was paid for and delivered. Plaintiff became dissatisfied, but defendant refused to repurchase. *Held:* The agreement was part of the original contract and the payment for and delivery of the stock took it out of the Statute of Frauds, *Sales Act* of 1915, P. L. 543, § 4, Pa. St. 1920, § 19652. *Roberts v. Cauffiel*, 6 Pa. D. & C. 706 (July, 1924).

The case was affirmed in 283 Pa. 64, 128 Atl. 670 (March, 1925), but § 4 of the *Sales Act* was not considered, having been declared unconstitutional in

Guppy v. Moltrup, 281 Pa. 343, 126 Atl. 766 (November, 1924). By Act of 1925, P. L. 310, § 4 of the *Sales Act* was amended so as to satisfy the constitutional objection. Thus the decision of the present case becomes of practical interest.

The weight of authority favors the enforcement of such oral agreements, but the cases advance two distinct theories. In one line of decisions, where the vendor is owner of the stock, it is held that the oral agreement is part of the original contract, but payment for and delivery of the stock takes the contract out of the Statute of Frauds. *Kuntzmann v. Petteys*, 74 Colo. 342, 221 Pac. 888 (1923); *Armstrong v. Orler*. 220 Mass. 112, 107 N. E. 392 (1915); *Johnson v. Trask*, 116 N. Y. 136, 22 N. E. 377 (1889).

Another line of decisions, wherein the defendant acted only as agent, but was an officer in the corporation whose stock he sold, adopts the theory that the oral agreement to repurchase is in the nature of a contract of indemnity, and as such is not embraced in the Statute of Frauds. *Schoeffer v. Streider*, 203 Mass. 467, 89 N. E. 618 (1909); *Trenholm v. Kloepper*, 88 Neb. 236, 129 N. W. 436 (1911); *Lingelbach v. Lukenbach*, 168 Wis. 481, 170 N. W. 711 (1919).

Since the facts of the present case fall within the second group of cases, it would seem that the theory adopted is opposed to that followed in the majority of decisions on similar facts.

TRUSTS—RULE AGAINST PERPETUITIES—MAINTENANCE OF MEMORIALS—The testator bequeathed £10,000 to trustees of a Masonic temple erected by him as a memorial to his son, the income to be used for "the maintenance and upkeep of the said Masonic temple—and the balance (if any) to be applied" to Masonic charities. *Held:* Entire gift void. *In re Porter*, [1925] 1 Ch. 746.

The trustees argued that, the temple being a memorial, the principle of the "tomb" cases applied by which the first part of the gift failing as a perpetuity, the whole gift should go to the charities. The court said a memorial is not a tomb, and refusing to extend the doctrine, avoided the whole bequest.

An American case with similar facts, involving a Masonic bequest, is in accord. *Mason v. Perry*, 22 R. I. 475, 48 Atl. 671 (1901).

Some American cases have held that the Masons are a charitable institution; *Savannah v. Solomon's Lodge*, 53 Ga. 93 (1874); *Indianapolis v. Grand Lodge*, 25 Ind. 518 (1865); but the weight of authority is the other way. *Bangor v. Masonic Lodge*, 73 Me. 428 (1882); *Mason v. Perry, supra.*

The rule against perpetuities can be avoided, and a bequest such as the above enforced, by a bequest to a charity on condition that the building be maintained, with a gift over to another charity in case of default. *In re Tyler*, [1891] L. R. 3 Ch. 252.

In the principal case it might have been argued that a memorial is a charity, and that therefore the entire gift was valid. *Smith's Estate, Walker's Appeal*, 181 Pa. 109, 37 Atl. 114 (1897), where the court said: "The memorial monument is for the beautifying and adornment of the city, and for these reasons alone the gift would be upheld as charitable."

The case is interesting because of the refusal to extend the "tomb" cases doctrine, and also because no argument was based on the memorial character of the temple making it a charitable use.