RECENT CASES

Actions—Time of Commencement—Plea of Pending Suit—The plaintiff instituted suit against the defendant for breach of contract, obtaining a writ on March 23, 1925. The writ was served on the same day. The complaint was filed on April 8. The defendant instituted a suit against the plaintiff upon the same contract on March 25. The summons and complaint were served March 26. The plaintiff pleaded in abatement the pending action. *Held:* The defendant's action is barred. *Jones Construction Co. v. Hamlet Ice Co.,* 190 N. C. 580, 130 S. E. 165 (1925).

The various jurisdictions are not uniform upon this question as to when a suit is commenced, and few, if any, advance reasons for their particular rule. A number of them follow the rule of the above case, that a suit is commenced when the summons or writ is issued. *Biddeford Bank v. Mosher,* 79 Me. 245, 9 Atl. 614 (1887); *Updike v. Broek,* 32 N. J. L. 105 (1866). Kentucky requires, in addition, that the complaint or petition be filed at the same time. *Loveland-Garrett Co. v. Day,* 30 Ky. L. R. 879, 99 S. W. 924 (1907). The Illinois rule is that the action is commenced when the writ is delivered to the sheriff for serice. *Pollock v. Kinman,* 176 Ill. App. 361 (1912). Other jurisdictions hold that the action is not pending until after the service of the writ or summons, or appearance by the defendant. *Perkins v. Perkins,* 7 Conn. 558 (1829); *Wray v. Wray,* 159 Iowa 230, 140 N. W. 414 (1913). Vermont follows this rule except where the Statute of Limitations is involved. *Tracy v. Grand Trunk Ry.,* 76 Vt. 313, 57 Atl. 104 (1904). Another state holds that the writ or summons in the suit must have been returned and entered into court before it can be pleaded. *Polsey & Co. v. White Rose Mfg. Co.,* 19 R. I. 492, 34 Atl. 997 (1896). A few states hold that an action is not pending, although a summons has been issued and served in such prior action, unless a complaint, petition, or declaration has been filed. *Fresno Milling Co. v. Manning,* 20 Cal. App. 766, 130 Pac. 196 (1912); *Hirsh v. Manhattan Ry. Co.,* 84 App. Div. 374, 82 N. Y. Supp. 754 (1903).

Pennsylvania is in accord with the principal case, holding that a suit is commenced when the writ is issued. *McClure v. McClure,* 1 Grant Cas. 222 (Pa., 1855).

Carriers—Excessive Freight Rates—Right to Recover Excess—The Interstate Commerce Commission decided that the defendant had charged excessive rates for shipment of the plaintiff's products. The plaintiff, the consignor, sued the railroad for that excess, and the defense was that the consignee, and not the plaintiff, was entitled to this amount, on the ground that the consignee was the party really damaged. By the terms of the contract of sale between the consignor and consignee, the goods were sold f. o. b. destination, but the consignee paid the freight, and remitted the balance of the price to the shipper. The contract also contained a clause to the effect that the price was based upon the present tariff freight rate, and in case this rate declined at the time of shipment, the buyer was to have the benefit of such decline, but if it advanced the buyer was to pay the advance. *Held:* The plaintiff could recover, as this payment of the freight charge was a part of the contract price of the product. *Louisville & N. R. R. v. Sloss-Sheffield Co.*, 46 Sup. Ct. 73 (U. S., 1925).

The basic rule in such cases is that the party who finally bears the freight charges is entitled to reparation. *Hygienic Ice Co. v. C. & N. W. Ry.*, 37 I. C. C. 384 (1915). And it is likewise settled that where goods are sold f. o. b. destination, it is ordinarily the seller who bears the freight, who suffers from the excessive charge, and who consequently is entitled to sue. *Hayden & Westcott Co. v. G. & S. I. R. R.*, 14 I. C. C. 537 (1908); *So. Pac. Co. v. Darnell-Taenzer Co.*, 245 U. S. 531 (1918); *Cent. Wis. S. Co. v. Director General*, 68 I. C. C. 409 (1922).

The provision in the contract in the present case is a common one in contracts of sale. Its effect upon the consignor's right to recover overcharges was definitely passed upon in *Baker Mfg. Co. v. C. & N. W. Ry.*, 21 I. C. C. 605 (1911), where it was held that the consignor must sue even where the contract contains such a stipulation for the same reason as given in the instant case and this has been consistently followed by the Commission. *Commercial Club v. Anderson & S. R. Ry.*, 27 I. C. C. 302 (1913); *Roxana Corp. v. Director General*, 74 I. C. C. 605 (1922).

However, there have been a few dissents from this view. In the instant case, Mr. Justice McReynolds dissented on the ground that, by the terms of the contract, the goods were really sold at a specified price, plus the cost of freight, which the consignee, not the consignor, paid. Accordingly, the excess was not borne by the consignor, and he should not recover. This would seem to be the more practical view, since it would eliminate further litigation by the consignee, to recover from the consignor the overcharges paid by the former.

CRIMINAL LAW—INSANITY AS A GROUND FOR RESISTING TRIAL—The accused was indicted for murder, and his counsel alleged that he was insane, resisting trial on that ground. *Held:* A preliminary hearing ordered to determine the present mental state of the prisoner. *State v. Noel*, 131 Atl. 70 (N. J., 1925).

The principle is well recognized that one who is insane at the time of his trial on a criminal charge cannot be tried during such insanity, even though he may have been admittedly sane at the time of the commission of the alleged offense. *Freeman v. People*, 4 Denio 9 (N. Y., 1847). The reason for this rule is obvious, since it would be manifestly unjust to try one who did not possess the adequate mental faculties necessary to aid in the preparation of his defense. This reason appears most vividly in a prosecution based largely upon circumstantial evidence, where the accused, because of his mental deficiencies, might be unable to present exculpatory facts. The rule, however, is not limited to such cases, but applies to all prosecutions. The courts, adhering strictly to the reason upon which the rule is based, inquire into the circumstances, and trial will not be postponed where the prisoner, although insane to some extent, is nevertheless sane enough to comprehend his situation and the nature of the proceedings, and possesses sufficient mentality to aid his counsel in presenting a rational defense. *United States v. Chisolm*, 149 Fed.

284 (D. C., 1906); *State v. Peacock,* 50 N. J. L. 34, 11 Atl. 271 (1887); *Freeman v. People, supra.* The test seems to be whether there is such mental impairment as will render it improbable that the accused will have a full, fair, and impartial trial. *State v. Arnold,* 12 Iowa 479 (1861). The mere fact that the mental deficiency is pronounced insanity by medical science is not conclusive. *Taylor v. Commonwealth,* 109 Pa. 262 (1885).

If a reasonable doubt arises at any stage of the proceedings, such doubt must be immediately settled before the trial may proceed. *State v. Arnold, supra; State v. Peacock, supra.* In Pennsylvania, however, by virtue of *Taylor v. Commonwealth, supra,* it would seem that once the prisoner has pleaded, the trial may not be discontinued, but that the question of sanity at the trial must be submitted to the jury along with the other evidence and issues. It is submitted that this rule is prejudicial to the prisoner, and that the better one is that proceedings be stayed until the prisoner's sanity has been determined.

Some jurisdictions vest the determination of sanity in the discretion of the court, which may determine it itself, or impanel a jury for that particular purpose. *State v. Peacock, supra.* Other states require a jury to pass upon the question. *State v. Arnold, supra.*

The almost universal acceptance of the general rule applied in the instant case substantiates its soundness.

GARNISHMENT—JURISDICTION—RIGHT TO ATTACH FOREIGN CORPORATION FOR DEBT OF NON-RESIDENT—The plaintiff proceeded against the defendant in Kentucky, as garnishee of a debt owing to the plaintiff by a resident of Tennessee. The defendant was a foreign corporation doing business in Kentucky. The claim of the non-resident against defendant arose out of a life insurance contract entered into in Tennessee. *Held:* The Kentucky court has jurisdiction of the garnishment action. *Metropolitan Life Insurance Co. v. Hightower,* 276 S. W. 1063 (Ky., 1925).

The case follows the Federal rule, which accepts jurisdiction on the ground that the defendant could be sued by the non-resident in Kentucky to recover the debt garnished by the plaintiff—it being a transitory action—and that the non-resident's creditor is subrogated to the rights of his debtor. *Harris v. Balk,* 198 U. S. 215 (1904). This view is supported by the weight of authority. *Lancashire Ins. Co. v. Corbetts,* 165 Ill. 592, 46 N. E. 631 (1897); *National Fire Ins. Co. v. Chambers,* 53 N. J. Eq. 468, 32 Atl. 663 (1895); *Wiener v. American Ins. Co.,* 224 Pa. 292, 73 Atl. 443 (1909).

In taking this position, the courts either ignore or dismiss as immaterial the question of the situs of the debt garnished. It is even said that an intangible chose in action such as a debt has no situs, but accompanies the creditor everywhere. *Wiener v. American Ins. Co., supra.* The logical difficulty which this holding entails is apparent, when it is remembered that in all these cases the creditor of the debt garnished is outside the jurisdiction of the court. If the situs of the debt is to be considered as at all material to the question of jurisdiction, these cases can be maintained only on the theory that the situs of the debt is at the domicile of the debtor. The general, rule, however, is that the situs of the debt is at the domicile of the creditor. See *Douglass v. Phoenix Ins. Co.,* 138 N. Y. 209, 219, 33 N. E. 938, 940 (1893).

And if the situs of the debt is immaterial, there would seem to be little left on which to base the assertion of jurisdiction. The fact that the creditor of the garnishee might come into the jurisdiction to sue should be immaterial, for he has not done so, and until he does there is no tangible right to which the plaintiff can be subrogated.

The difficulties herein mentioned are recognized in *Cohn v. Enterprise Dist. Corp.*, 214 App. Div. 238, 212 N. Y. Supp. 39 (1925), where the court refused to permit the attachment of a debt owed by a foreign corporation to another foreign corporation doing business in New York, where the plaintiff sued. The case is based on the proposition that the situs of a debt is at the domicile of the creditor, for it is in his hands only that it represents something of value. Therefore, when suit is brought at the domicile of the debtor, there is nothing on which the court can base jurisdiction. As mentioned above, the decision is opposed to the weight of authority, but it has the support of several well reasoned opinions. *Wilmington Nat. Bank v. Furtick*, 16 Del. 35, 42 Atl. 479 (1899); *Kuehn v. Nero*, 145 Wis. 256, 130 N. W. 56 (1911); *Goodhue v. O'Leary*, 17 Queb. Super. 201 (1900). Although the law is probably too well settled in accord with the Federal rule in other jurisdictions to be changed now, it is submitted that the New York case represents the sounder view of the question.

INSURANCE—MUTUAL LIFE ASSURANCE—VALIDITY OF BY-LAWS AS TO APPEAL TO COURTS—The by-laws of the New Era Association provided that its cabinet should have power to pass upon all death claims. The decision of the cabinet, upon the evidence presented by the beneficiary, was to be final unless an appeal was taken to a board of arbitration, consisting of five members, two to be appointed by the cabinet, two by the claimant, and a fifth member by these four. From this board an appeal could be taken to the senate, and unless such appeal was taken no suit at law or in equity should be begun by the beneficiary. Suit by the plaintiff, without having appeared before the cabinet or appealing from its decision. *Held:* Such by-laws are unenforceable. *Benza v. New Era Association*, Appellate Court of Illinois, December 12, 1925.

That parties cannot contract to oust the courts of their jurisdiction is well settled. *Reed v. Washington Ins. Co.*, 138 Mass. 575 (1885); *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N. W. 406 (1889). See 74 U. OF P. L. REV. 89 (1925). Hence, an agreement that the decision of the tribunals of an insurance company shall be final, and that no appeal can be taken to the courts of law, is not enforceable. *Grimibley v. Harrol*, 125 Cal. 34, 57 Pac. 558 (1900); *Railway Passenger Assn. v. Tucker*, 157 Ill. 194, 42 N. E. 398 (1895); *Prader v. National Assn.*, 95 Iowa 149, 63 N. W. 601 (1895). But an agreement to resort to tribunals within an order, before taking an appeal to the courts, is not such a contract, and has generally been upheld. *Kelly v. Brotherhood*, 308 Ill. 508, 140 N. E. 5 (1923); *Reed v. Washington Ins. Co., supra; Mentz v. Ins. Co.*, 79 Pa. 478 (1875). Such an agreement, instead of attempting to oust the jurisdiction of the courts, does in fact contemplate the exercise thereof, and is also in line with the modern tendency to stimulate arbitration. See 74 U. OF P. L. REV. 83 (1925).

In general, a contract between a society and the insured is to be construed most strongly against the society and in favor of the insured. *Supreme Sitting v. Stein,* 120 Ind. 270, 22 N. E. 136 (1889). Therefore, when, by the terms of the contract, the insured has merely a right to submit his claim to arbitration before suing in the courts, he need not do so, but may seek his remedy in the courts of law in the first instance. The language must be clear that he has agreed to exhaust the remedies offered by the order before suing at law, for the courts to enforce it. *Roxborough Lodge v. Hocking,* 60 N. J. L. 439, 38 Atl. 693 (1898); *Gray v. Chapter Gen. A. K. St. J. & M.,* 70 App. Div. 155, 75 N. Y. Supp. 267 (1902); *Bartlett v. L. Bartlett Co.,* 116 Wis. 450, 93 N. W. 473 (1902). So also, when the remedy within the association is not adequate or is burdensome, or when the society has violated its own regulations, or has improperly dismissed an appeal, the claimant need not exhaust the remedies of the association, but may begin his suit in the courts. *Schmidt v. Abraham Lincoln Lodge,* 84 Ky. 490, 2 S. W. 156 (1886); *Weiss v. Musical M. P. Union,* 189 Pa. 446, 42 Atl. 118 (1899); *Neto v. Conselho Amore da Sociedade,* 18 Cal. App. 234, 122 Pac. 973 (1912). Nor can the Association pass upon a pure question of law, this being properly the function of the courts only. *Smith v. Preferred M. A. Assn.,* 51 Fed. 520 (C. C. A., 1892); *Brown v. Supreme Court I. O. O. F.,* 34 *Misc.* 556, 70 N. Y. Supp. 397 (1901).

In the present case, none of these objections to enforcement of the by-laws appears. The court seems, therefore, to have misinterpreted them. In no other way does the decision appear to be capable of explanation, being on its face contrary to the law of Illinois as well as to the great weight of authority.

MASTER AND SERVANT—FAMILY PURPOSE DOCTRINE—The plaintiff was struck by an automobile owned by the defendant for her use and that of her son. The son had taken the car, with the defendant's permission, to go to the theatre. When the accident happened a friend of the son, who was neither related to the defendant nor had permission from her to drive, was driving it negligently. *Held:* Defendant liable. *Thixton v. Palmer,* 276 S. W. 971 (Ky., 1925).

The authorities are still hopelessly irreconcilable on this question of the "family automobile" owner's liability. See 71 U. OF P. L. REV. 65 (1922). A recent Oklahoma case expressly rejects the "family purpose" doctrine; *Traber v. House,* 240 Pac. 729 (Okla., 1925); and during the same year Arkansas and Kansas also took this stand; *Johnson v. Newman,* 271 S. W. 705 (Ark., 1925); *Daily v. Schneider,* 118 Kan. 295, 234 Pac. 951 (1925). Within the past five years the following jurisdictions also have held that ownership of the car, plus permission to use it, are insufficient to make the owner liable: Massachusetts, Maryland, Missouri, Montana, New York, Ohio and Pennsylvania. Cases holding the owner liable have appeared in Connecticut, Iowa, Nebraska, North Carolina, Oklahoma, Washington and West Virginia.

The leading Pennsylvania case is *Markle v. Perot,* 273 Pa. 4, 116 Atl. 542 (1922), which holds there must be a real master and servant relation. But if the car is driven with the owner's permission, by a minor under sixteen years of age, which violates the Act of 1919, P. L. 678, Pa. St. 1920, § 973, the owner is absolutely liable for the minor's negligence. *Laubach v. Colley*, 283 Pa. 366, 129 Atl. 88 (1925).

In the past ten years several states have passed statutes whose general tenor is to make the owner absolutely liable for the negligence of a person who drives the car with the owner's consent. Some statutes limit the liability to where the driver is a minor. States which have such legislation include California, Iowa, Michigan and New York. For the last see Laws of 1924 c. 534.

But no common law case has ever gone as far as the Kentucky court goes in the principal case. The court argues that the negligence of the friend was the negligence of the son, who was on the rear seat and permitted the friend to drive. The court then says that as the defendant would be liable for the son's negligence, she is equally liable for that of the son's friend.

On the general question, it would seem that legislation is the proper means through which to extend the owner's liability. Decisions based on an attentuated theory of agency (as the principal case), or on the argument that in seeking his own pleasure the son is using the car for the very purpose for which it was bought, are both illogical and unconvincing.

MORTGAGES—PRIORITY OF STATE TAX CLAIMS OVER PURCHASE MONEY MORTGAGE—The Commonwealth claimed priority in the proceeds of a sheriff's sale of property held in the name of the Consolidated Rubber Company, for state taxes due on the corporation's capital stock, under the Act of 1911, P. L. 955, § 1, Pa. St. 1920, § 20529, which provides that "all state taxes . . . settled against any corporation . . . shall be a first lien upon the . . . property of such corporation . . . ; and whenever the . . . property of a corporation . . . shall be sold at a judicial sale, all taxes, . . . due the commonwealth shall first be allowed and paid out of the proceeds of such sale, before any judgment, mortgage, or any other claim or lien against such corporation." The property in question was sold under a *fi. fa. sur* judgment entered on a warrant of attorney accompanying a bond, which in turn accompanied a purchase money mortgage given by the rubber company to the plaintiff. *Held:* The Commonwealth was entitled to priority for its taxes. *Harper v. Consolidated Rubber Co.*, 284 Pa. 444, 131 Atl. 356 (1925).

The lower court, citing *Sweeney v. Arrowsmith*, 43 Pa. Super. 268 (1910), held that the mortgagor's estate in the land was merely an equity of redemption, since the mortgage was given for purchase money, thereby conveying title back to the mortgagee immediately; and that this equity of redemption was not such property as would come under the statute. 13 Westmoreland L. J. 165 (Pa. C. C., 1925). The rule seems fairly well settled in Pennsylvania that, as between the parties, the title to the mortgaged premises is in the mortgagee in so far as it is necessary to render the instrument effective as a security, but as to other parties the mortgagor is regarded as the owner, and the mortgage a mere incumbrance and accessory to the debt. W. H. Lloyd, *The Mortgage Theory in Pennsylvania*, 73 U. OF P. L. REV. 43 (1924). The state in the present case is a third party. However, it was not necessary for the decision of the case to determine what kind of an estate was in the mortgagor,—all that was necessary to decide was whether or not it was such property as to come under the Act.

It is certain that what was sold at the sheriff's sale was all the right, title, and interest that the mortgagor had, and this was sold as belonging to the rubber company. The Supreme Court held that what the sheriff sold,—whether it was title or merely the equity of redemption,—was property of the corporation, and since the Act says merely "whenever the *property* of a corporation shall be sold," the state taxes were entitled to priority. *Sweeney v. Arrowsmith, supra,* was distinguished on its facts, since in that case the mortgage was not given by the corporation, but by a predecessor in title, and the mortgage was foreclosed on a *sci. fa.,* and not as here where the property was sold on an execution under a *fi. fa.* on the bond, indicating that the mortgagee was levying on the property as that of the corporation.

The case is of practical importance since it gives rise to the necessity of another precaution to be taken in the creation of corporation mortgages, *viz.,* the mortgage should stipulate for the annual production of receipts for all corporation taxes as well as taxes assessed against the mortgaged premises. In view of the narrow distinction between *Sweeney v. Arrowsmith, supra,* and the instant decision, it might be well to insert into every mortgage a clause for the production of state as well as local taxes.

PARTNERSHIP—DISSOLUTION—RIGHTS OF A DECEASED PARTNER'S ESTATE—One of the two members of a partnership died, and the survivor continued to carry on the business, without the consent of the deceased partner's administratix. This bill was brought by her for the deceased's share in partnership assets, and for interest. From a decree for the plaintiff as an ordinary creditor of the defendant, the plaintiff appealed, alleging that the decree should have made the partnership assets subject to the claim, and not have given merely a personal judgment against defendant. *Held:* Decree modified accordingly. *Froess v. Froess,* 284 Pa. 369, 131 Atl. 276 (1925).

By common law, in the absence of an agreement to continue the business, the estate of a deceased partner had the right to an immediate liquidation by the surviving partner, who was trustee of the partnership property for this purpose, with no right to continue the business. *Booth v. Parkes,* Beatty 444 (Ire., 1829); *Andrews v. Stinson,* 254 Ill. 111, 98 N. E. 222 (1912); *Fried v. Burk,* 125 Md. 500, 94 Atl. 86 (1915). The *Uniform Partnership Act,* § 42, provides: "When any partner retires or dies, and the business is continued under any of the conditions set forth in § 41 (1, 2, 3, 5, 6), or § 38 (2b), without any settlement as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such person or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option, in lieu of interest, the profits attributable to the use of his right in the property . . ." The conditions referred to in § 41, *etc.,* provide only for those cases in which a retired or deceased partner (or his legal representative) assigns his interest to the remaining partner, or wrongfully causes a dissolution, or is expelled.

The court, in its opinion, treats § 42 as being applicable to the case, and then, being confronted with the words "ordinary creditor," says that they mean an ordinary creditor of the pre-existing partnership and for that reason the plaintiff has a right against the assets of the partnership. But it would seem that § 42 does not apply, and, since the case is not covered by the Act, the common law rule should remain in force, which would also have allowed the decree prayed for. Under the construction of the Act in this case, however, some difficulty might well arise in a case in which there had been an assignment to the survivor, it being the obvious intention of the Act that in that event the deceased's estate should be merely an ordinary creditor of the survivor.

SALES—IMPLIED WARRANTY—CONTRACT VOID BY STATUTE.—The defendant manufactured soft drinks and sold them to retailers. The plaintiff purchased a bottle on Sunday from the retailer, and became sick from drinking it, because of flies contained therein. Plaintiff sues to recover on an implied warranty of the fitness and purity of the drink. *Held:* The implied warranty runs with the sale and passes with the title, and where a sale on Sunday is made void by statute, a participant in the sale cannot recover. *Grapico Bottling Co. v. Ennis,* 106 So. 97 (Miss., 1925).

At common law contracts entered into on Sunday were valid, and the doctrine that contracts made on Sunday are void depends alone on statutory enactments. *Bertram v. Morgan,* 173 Ky. 655, 191 S. W. 317 (1917). In accord with the principal case it has been held that, where a sale is consummated on Sunday, an action for breach of warranty will not lie. *Murphy v. Simpson,* 14 B. Mon. 419 (Ky., 1854); *Finley v. Quirk,* 9 Minn. 194 (1864); *Lyon v. Strong,* 6 Vt. 219 (1834). But, in the instant case, had the plaintiff based his cause of action on the theory of negligence, the only ground on which the defendant contended it might be liable, he would have recovered, under the weight of authority, if negligence of the defendant had been proved. *Louisville Ry. Co. v. Frawley,* 110 Ind. 18, 9 N. E. 594 (1886); *Piollet v. Simmers,* 106 Pa. 95 (1884); *Hoadley v. Int. Paper Co.,* 72 Vt. 79, 47 Atl. 169 (1899). The above courts give as a reason for their view that such violation of a Sunday law by the person injured is not the efficient or proximate cause of the injury, nor an essential element of the cause of action; and that the time when the injury was inflicted is only an incident and not the foundation of the action.

It is submitted that the decision in the principal case is correct, in so far as the action is based upon an implied warranty. And the majority view as to recovery on the theory of negligence seems sound inasmuch as persons who violate the Sunday laws are answerable to the state or parties injured by them, and they should also be entitled to the protection of the law against the wrongful acts or culpable negligence of others.

SALES—"SALE OR RETURN" CONTRACT—LIABILITY FOR LOSS DURING RETURN.—The plaintiff company sold to the defendant a quantity of clothes on a "sale or return" contract. The defendant alleged the shipping of a part of these goods to the plaintiff, in return. The plaintiff never received them and sued for their price. *Held:* Judgment for plaintiff. The title remained in the defendant until the goods were actually in the hands of the plaintiff. *Johnson v. Curlee Clothing Co.,* 240 Pac. 632 (Okla., 1925).

A "sale or return" contract vests title in the vendee subject to the condition subsequent of "return," which when performed serves to revest title in the vendor. *McKinney v. Bradlee,* 117 Mass. 321 (1875); *Keohane v. Quinn,* 18 Pa. Super. 443 (1901); *Uniform Sales Act,* § 19, Rule 3 (1). Consequently, destruction of the goods, even by accident, while title is in the vendee, is the vendee's loss, since it makes impossible the performance of the condition subsequent which would free him of his duty to pay. *Sturm v. Boker,* 150 U. S. 312 (1893); *Strauss Saddlery Co. v. Kingman & Co.,* 42 Mo. App. 208 (1890); *Taylor v. Tillotson,* 16 Wend. 494 (N. Y., 1836). The one American decision opposed seems to give the "sale or return" contract the same effect as the "sale on approval" contract. *Lyons v. Stills,* 97 Tenn. 514, 37 S. W. 280 (1896). The latter is distinct, in that title remains in the vendor until there is an acceptance. *In re Hill Co.,* 123 Fed. 866 (C. C. A., 1903); *Hunt v. Wyman,* 100 Mass. 198 (1868); *Uniform Sales Act,* § 19, Rule 3 (2). The English courts seem to prefer the view that no such contract vests title in the vendee until he is finally bound, *i. e.,* all such contracts are "sale on approval" contracts. *Head v. Tattersall,* L. R. 7 Exch. 7 (Eng., 1871); *Elphick v. Barnes,* 5 C. P. D. 321 (Eng., 1880). *Sale of Goods Act,* 1893, § 18, Rule 4. The vendor would therefore suffer the loss by accident. *Weiner v. Gill,* 74 L. J. K. B. 845 (Eng., 1905); *In re Hill Co., supra; Glasscock v. Hazell,* 109 N. C. 145, 13 S. E. 789 (1891).

In determining the liability in this case the major problem is what amounts to a "return." The court thinks it to mean, as defined in the dictionaries, a turning back to the same place or putting into actual possession of vendor. The exact point involved seems never to have been adjudicated, but the decision may be supported by analogy to *Chase v. Union Stone Co.,* 63 How. Pr. 336 (N. Y., 1882), which differs in being a "sale or exchange" situation. The other possibility is that "return" is a relinquishment of control by vendee in consigning the goods into a channel where under normal circumstances it would get to the vendor. The latter view is supported by analogy to the general presumption that title is in the consignee in a vendor to vendee consignment. *Elliott v. Howison,* 146 Ala. 568, 40 So. 1018 (1906); *Carthage v. Munsell,* 203 Ill. 474, 67 N. E. 831 (1903); *Mitchell v. Baker,* 208 Pa. 377, 57 Atl. 760 (1904); *Uniform Sales Act,* § 19, Rule 4 (2). Since this presumption is rebuttable by the proof of a different intention, the meaning of "return" seems a matter of the intention of the parties, a question of fact properly to be left to the jury.

TAXATION—EXEMPTION OF FOREIGN SOVEREIGNTIES.—The French Government, through the instrumentality of a New York corporation, purchased land in New York City for use in storing war materials. The war ended shortly thereafter, and the major part of the land was never used for war purposes, but was rented to private persons. The city assessed taxes against the land from the date of the purchase in 1918 until 1925, when this suit was brought to remove those claims as clouds on the title. *Held:* Bill dismissed. *Republic of France v. City of New York,* Supreme Court of New York, New York County, December 29, 1925.

Under principles of international comity, the persons and premises of ambassadors are immune from taxation, attachment or suit. 1 HYDE, INTERNATIONAL LAW, 757 (1922). The same is true of battleships of friendly sovereigns which come into our harbors. *Schooner Exchange v. McFadden*, 7 Cranch 116 (U. S., 1812). The same principle was applied in Kentucky to personalty owned by the French Republic. *French Republic v. Board of Supervisors*, 200 Ky. 18, 252 S. W. 124 (1923), 33 YALE L. J. 208 (1923). The court in that case said: "If one nation enters the territory of another with its consent, for the purpose of mutual intercourse, it does so with the implied understanding that it does not intend to degrade its dignity by placing itself and its sovereign rights within the jurisdiction of the other, and we know of nothing more calculated to degrade the dignity of an independent nation than for another to attempt to exercise over it the sovereign right of taxation." Another reason for declaring the tax invalid in that case was the impossibility of collection, since the property taxed had been taken out of the jurisdiction and the only means of collection would be arbitration or war.

In the instant case, the court refused to extend immunity to realty, in the absence of express statutory exemption. It held that the tax did not interfere with the sovereign use of the property and could be enforced. Undoubtedly the tax could be indirectly enforced by maintaining it as a lien, which would probably prevent the sale of the property until payment, but it is difficult to see how it could be otherwise enforced without some form of attachment which even the New York court thinks would be an interference with sovereign rights.

The indignity imposed upon a sovereign nation, which the Kentucky court found so important, is not considered in the instant case. This would, however, seem to be worthy of attention, especially since such cases must necessarily be of infrequent occurrence, so that the loss in revenue would be comparatively unimportant. This property was purchased during the war by an ally of the United States and the purpose was unquestionably governmental. It would not be stretching the historical precedent too far to hold such property exempt for at least a reasonable time after the end of the war. Notice could be given that if the property were not disposed of after the lapse of such time taxes would be assessed. If after such notice the property continued to be devoted to money-making purposes, and no attempt made to dispose of it, the court would be justified in finding that the foreign nation did intend to submit its sovereignty to the "indignity" of taxation.

VENDOR AND PURCHASER—RESTRICTIVE COVENANT AGAINST SALE OF LIQUOR—MARKETABLE TITLE.—In a contract for the exchange of properties, a marketable title was stipulated on each side. One of the properties was restricted against the sale of intoxicating liquors on the premises. *Held:* The title to the property was not marketable, since this restriction was an encumbrance. *Genske v. Jensen*, 205 N. W. 548 (Wis., 1925).

A restriction against such a use of the property as would amount to a nuisance seems not to be an encumbrance on the title, since the restriction is no greater than that imposed by law. Thus the title to a city lot restricted against use for cemetery purposes was held marketable nevertheless, such use apparently having been declared a nuisance by city ordinance. *Floyd v. Clark*, 7 Abb. N. C. 136 (N. Y., 1879). But a restriction prohibiting "any noxious, offensive, or dangerous trade or business" was held to encumber the title, because uses not nuisances were fairly included in the prohibition. *Dieterlen v. Miller*, 99 N. Y. Supp. 699, 114 App. Div. 40 (1906). Although it has never been so stated, in terms, the test would seem to be, not simply whether the particular use is prohibited by law, but whether it amounts to a nuisance at common law or by statute law—in other words, whether the adjoining property owners are given greater rights over the property in question by the restrictive covenant than they already have at law. Thus tested, the instant decision is correct. The sale of intoxicating liquors is not of itself a nuisance. And it may be said further that such sale is not absolutely forbidden by the Volstead Act, since it provides for such sale by particular agencies under certain conditions.