RECENT CASE NOTES

ALIENS—NATURALIZATION—RIGHT OF APPEAL. The petitioner applied to the city court of Meriden, Connecticut, for citizenship. The petition was denied and he appealed. The United States intervened and moved to dismiss the appeal, on the ground that the city court was *pro tanto* a Federal agent, and that no appeal had been provided for by the Naturalization Act. Act of June 29, 1906 (34 Stat. at L. 596). *Held,* that the appeal should be allowed. *In re Fordiani* (1923, Conn.) 98 Conn. ———.

It is now well settled that no appeal lies from a hearing on naturalization before a federal court. *United States v. Dolla* (1910, C. C. A. 5th) 177 Fed. 101; *United States v. Nugenbauer* (1911, C. C. A. 3d) 221 Fed. 938. The United States may nevertheless bring an independent suit to cancel any certificate obtained by fraud or misrepresentation. Sec. 15, Act of June 29, 1906, *supra.* Such action is not considered an appeal. *United States v. Simon* (1909, C. C. D. Mass.) 170 Fed. 680; *Johannessen v. United States* (1911) 225 U. S. 227, 32 Sup. Ct. 613; *United States v. Ginsberg* (1916) 243 U. S. 472, 37 Sup. Ct. 422. Where the petition is brought to a state court there is conflict. One view advanced is that when such court assumes jurisdiction it acts in the capacity of a federal agent and therefore no appeal lies. *State v. Superior Court* (1913) 75 Wash. 239, 134 Pac. 916; *In re Wilkie* (1922, Calif.) 208 Pac. 144. The majority view, and the one adopted by the instant case, contends that the right of appeal still exists. *United States v. Gerstein* (1918) 284 Ill. 174, 119 N. E. 922; *United States v. Breen* (1909) 135 App. Div. 824, 120 N. Y. Supp. 304; *United States v. Daly* (1909) 32 App. D. C. 525. Although in the latter cases the government has always been the appellant, the principle should also operate in favor of the petitioner. The government is under no duty to confer citizenship. *United States v. Shanahan* (1916, E. D. Pa.) 232 Fed. 169. But when a Naturalization Act is passed, the applicant by conforming to its requirements acquires a right. *In re Fordiani, supra.* The state court in exercising jurisdiction adopts exclusively its own method of procedure. Thus the hearing is judicial in nature. *State v. District Court* (1921) 61 Mont. 427, 202 Pac. 387; *United States v. Hrasky* (1909) 240 Ill. 560, 88 N. E. 1031. And the decision of the court is a judgment which cannot be attacked collaterally. *Re O'Sullivan* (1909) 137 Mo. App. 214, 117 S. W. 651; *Rockland v. Hurricane Isle* (1909) 106 Me. 169, 76 Atl. 286. Nor can the court's discretion be questioned in a federal court. *In re Norman* (1919, D. Mont.) 256 Fed. 543. There seems to be no ground, therefore, for assuming that the state court should be considered a federal agency merely for the purposes of naturalization when it follows its own procedure in all other respects. As the right of appeal is merely an incident of such procedure, the instant decision is sound.

BILLS AND NOTES—CHECKS—REVOCABILITY OF CERTIFICATION.—A trade acceptance was accepted payable at the defendant bank, and there certified when presented by the indorsee of the drawer. The defendant, claiming mistake, gave notice of revocation and refused to pay. The only deposits of the acceptor subject to draft in this manner were insufficient to meet the present acceptance. But the total deposits were sufficient. After revocation these were applied to meet notes of the acceptor's held by the bank. *Held,* that since the bank would have violated no duty to its depositor by paying the draft and reimbursing itself from such of its deposits as might be required, the certification could not be revoked. *National Bank of Commerce v. Baltimore Commercial Bank* (1922, Md.) 118 Atl. 855.

Making an acceptance payable at a bank is equivalent to the acceptor's order on the bank to pay the same. N. I. L. sec. 87 (Minn. Gen. Sts. 1913, sec. 5899, *contra*); *Baldwin's Bank v. Smith* (1915) 215 N. Y. 76, 109 N. E. 138. Certification of such order, as of a check, would be equivalent to acceptance. N. I. L. sec. 187; see *Riverside Bank v. First Nat. Bank* (1896, C. C. A. 2d) 74 Fed. 276. An acceptor is bound to know the state of his drawer's account. N. I. L. sec. 62. And there can be no revocation after delivery. *Trent Tile Co. v. Fort Dearborn Nat. Bank* (1892) 54 N. J. L. 33, 23 Atl. 423. Or even, apparently, after notification. N. I. L. sec. 191. If payment is made without acceptance, there can be no recovery for mistake of fact as to the sufficiency of the drawer's funds or as to his having stopped payment. *Citizens' Bank v. Schwarzchild & Sulzberger Co.* (1909) 109 Va. 539, 64 S. E. 954; *Nat. Bank of N. J. v. Berrall* (1904) 70 N. J. L. 757, 58 Atl. 189. Various reasons have been assigned: (1) lack of privity between the payer and payee; (2) the desirability of closing transactions at a definite time; (3) lack of true mistake, the bank being free to refuse payment; (4) helplessness of the payee in guarding against the occurrence; (5) the policy of putting the risk upon banks. *Citizens' Bank v. Sulzberger, supra.* Certification is in legal effect the bank's contract to keep the account "good." *Willets v. Phoenix Bank* (1853, N. Y. Super. Ct.) 2 Duer, 121. When procured by the payee, it has the effect of discharging the drawer, being thus a novation. *First Nat. Bank v. Leach* (1873) 52 N. Y. 350; N. I. L. sec. 188. The effect is similar to that of a cashier's check or bank note. See *Willets v. Phoenix Bank, supra.* It is said that at common law revocation for mistake was possible before loss to the holder. In the upper courts only one decision to this effect has been found. *Second Nat. Bank v. Western Nat. Bank* (1879) 51 Md. 128 (following a *dictum* in *Irving Bank v. Wetherald* (1867) 36 N. Y. 335); see *Mt. Morris Bank v. Twenty-third Ward Bank* (1902) 172 N. Y. 244, 64 N. E. 810; *Brooklyn Trust Co. v. Toler* (1892, Sup. Ct.) 65 Hun, 187, 19 N. Y. Supp. 975, *aff'd* 138 N. Y. 675, 34 N. E. 515; *Security Savings & Trust Co. v. King* (1914) 69 Or. 228, 138 Pac. 465. Lower court decisions in accord: *Dillaway v. Northwestern Nat. Bank* (1899) 82 Ill. App. 71; *Baldinger v. Mfrs'. Citizens' Trust Co.* (1915, Sup. Ct.) 156 N. Y. Supp. 445; see (1917) 29 HARV. L. REV. 549. The Negotiable Instruments Law has incorporated *Price v. Neal* in sec. 62. See (1922) 31 YALE LAW JOURNAL, 522. The aim of the Negotiable Instruments Law to do away with these peculiar *dicta* on revocation of certification as distinguished from acceptance seems clear. Sec. 187. As for the instant case, the reason for the existence of a power to revoke being inability to charge the drawer, the old rule would in any case fall with its reason. Moreover the overdraft having induced the error may properly be regarded as a special order countermanding general orders to pay out of particular funds only.

CARRIERS—MISQUOTATION OF INTERSTATE RATES.—The plaintiff ordered an interstate shipment of fruit diverted to a new point upon the statement of the defendant's agent that the "through" rate would be charged. At the new destination the defendant charged the scheduled "local" rate as fixed by the Interstate Commerce Commission, which was in excess of the rate previously quoted. The plaintiffs refused to pay these charges, and the defendant sold the fruit. In a suit for conversion the plaintiff contended that the defendant was estopped from collecting more than the quoted rate. *Held,* (one judge *dissenting*) that the plaintiff could not recover. *Willson v. American Ry. Express Co.* (1922, App. Div.) 197 N. Y. Supp. 600.

The question involved does not concern estoppel but rather a phase of the limitation of free contract between carrier and shipper. The power to fix transportation rates has been given to the Interstate Commerce Commission. Act of Feb. 4, 1887 (24 Stat. at L. 379); *Taenzer v. Chicago, R. I., & P. Ry.* (1911,

C. C. A. 6th) 191 Fed. 543. A misquotation will not excuse either the collection or the payment of the scheduled rate approved by the Interstate Commerce Commission, as the effect would be to charge less than the required rate. *Louisville & Nashville Ry. v. Maxwell* (1915) 237 U. S. 94, 35 Sup. Ct. 494; *St Louis I. Mt. & S. Ry. v. Wolf* (1911) 100 Ark. 22, 139 S. W. 536; *Atchison, Topeka & Sante Fé Ry. v. Robinson* (1914) 233 U. S. 173, 34 Sup. Ct. 556; 38 L. R. A. (N. S.) 351, note. Redress is not allowed the shipper for a misquotation of rates as it would open the way to rebates and discriminations. *Texas & Pacific Ry. v. Mugg* (1905) 202 U. S. 242, 26 Sup. Ct. 628; *Poor v. Chicago, Burlington & Quincy Ry.* (1907) 12 I. C. C. 418; Barnes, *Freight Rates and Charges* (1922) sec. 605(a). But Congress has imposed a penalty accruing to the United States for such misquotations. Act to Regulate Commerce, Amendment of June 18, 1910 (36 Stat. at L. 539, 548). But where the rules for the determination of the rates are ambiguous, or require a construction for their application to particular facts, and no construction has been approved, the carrier might be held to the interpretation of its agent. See *Chicago, R. I., & P. Ry. v. Dodson* (1910) 25 Okla. 822, 832, 107 Pac. 921, 925. The dissenting opinion adopts this suggestion but fails to demonstrate the ambiguity of the rules in the instant case. The decision of the majority is in accord with the prevailing tendency to restrict the field of free bargaining between carriers and shippers. *Boston & Maine Ry. v. Hooker* (1914) 233 U. S. 97, 34 Sup. Ct. 526; *American Ry. Express Co. v. Lindenburg* (1923, U. S.) 43 Sup. Ct. 206; see (1923) 32 YALE LAW JOURNAL, 500.

CONSTITUTIONAL LAW—POWER OF COURTS TO REVIEW ADMINISTRATIVE DECISIONS.—The Immigration Act provides that the decision of the Secretary of Labor shall be final in any deportation case. Act of Feb. 5, 1917 (39 Stat. at L. 874, 890). And it empowers the Commissioner General of Immigration, under direction of the Secretary of Labor, to establish rules and regulations for carrying out its provisions. *Ibid.* at p. 892. One of the rules thus established provides that the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued. The relator was ordered deported for a violation of the act based on his own admission. The procedure prescribed had been disregarded. On petition for a writ of *habeas corpus* he was discharged. *Held,* that the District Court had jurisdiction to review the case. *Sibray v. United States* (1922, C. C. A. 3d) 282 Fed. 795.

Aliens have the constitutional right under the Fifth Amendment not to be deprived of life, liberty, or property without due process of law. *Colyer v. Skeffington* (1920, D. Mass.) 265 Fed. 17; *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 6 Sup. Ct. 1064. Thus the decisions of administrative tribunals are reviewable where the proceedings appear to have been unfair, or the requirements of due process have not been observed. *Chin Yow v. United States* (1908) 208 U. S. 8, 28 Sup. Ct. 201; *Gegiow v. Uhl* (1915) 239 U. S. 3, 36 Sup. Ct. 2; *Ex parte Radivoeff* (1922, D. Mont.) 278 Fed. 227. As pointed out in the *Chin Yow* case, the cause is not remanded by such proceedings, but is finally determined by the court of review. In England under similar acts, the findings of administrative bodies are not reviewable. See (1921) 30 YALE LAW JOURNAL, 426. The instant case prescribes a sensible limitation on the scope of power of an administrative body, and illustrates the tenacity with which the courts cling to their jurisdiction over legal questions. For a discussion as to the extent of recognition given to decisions of administrative bodies, see Grimm, *Administrative Determinations* (1918) 3 ST. LOUIS L. REV. 140.

CONTRACTS—REAL ESTATE BROKERS—EXCLUSIVE AGENCY.—The defendant gave the plaintiff, a real estate broker, the exclusive privilege to sell certain property for an indefinite time. The plaintiff advertised and listed the property, and

eighteen days later produced a prospective purchaser. The defendant had previously sold the property through another agent, without having notified the plaintiff. The plaintiff sued for his commission. *Held,* that the plaintiff could recover without being compelled to show that the prospective purchaser was able to buy. *Robertson v. Wilson* (1922, Wash.) 209 Pac. 841.

The ordinary real estate brokerage agreement is merely an offer, and can be accepted only by complete performance, that is, by presenting a purchaser ready, willing, and able to buy at a time before the revocation of the offer. *Cadigan v. Crabtree* (1901) 179 Mass. 474, 61 N. E. 37; *Colburn v. Seymour* (1904) 32 Colo. 430, 76 Pac. 1058; *Bodine v. Penn Lumber Co.* (1917) 128 Ark. 347, 194 S. W. 226. There is a conflict as to whether notice is necessary to revoke, or a sale through another agent will in itself operate as revocation. *Haggart v. King* (1920) 107 Kan. 75, 190 Pac. 763; *United States Farm Land Co. v. Darter* (1919) 42 Calif. App. 292, 183 Pac. 696. But such presentation is essential to the creation of a binding contract, and constitutes acceptance, consideration, and performance all in one. An exclusive agency agreement for a fixed time, however, becomes irrevocable as soon as the broker has performed substantial acts in reliance upon it. See L. R. A. 1917 E, 1040, note. The theory most often advanced is that such efforts in themselves constitute consideration and acceptance, and raise a binding duty on the part of the principal not to revoke or sell through a third party within the time limited, and to pay the agreed commission in case the broker performs. *Cloe v. Rogers* (1912) 31 Okla. 255, 121 Pac. 201; *Braniff v. Baier* (1917) 101 Kan. 117, 165 Pac. 816; *Hardwick v. Marsh* (1910) 96 Ark. 23, 130 S. W. 524; see (1922) 31 YALE LAW JOURNAL, 674; COMMENTS (1919) 28 *ibid.* 575. By analogy to similar situations, this result may be justified upon several theories: (1) There is an implied promise not to revoke in consideration of such efforts. *Elkins v. Board of Commissioners* (1912) 86 Kan. 305, 120 Pac. 542; Page, *Contracts* (2d ed. 1920) sec. 130. Such promise being normally implied in fact. (2) There is an implied promise by the broker to use his best efforts to effect a sale as consideration for the promise of the owner. *Gilmore v. Samuels* (1909) 135 Ky. 706, 123 S. W. 271. (3) The owner is bound by estoppel. See Ashley, *Offers Calling for a Consideration Other than a Counter-Promise* (1910) 23 HARV. L. REV. 159. (4) After such efforts have been made, the agent's power to accept becomes, by implied agreement or construction of law, irrevocable. Corbin, *Offer and Acceptance* (1917) 26 YALE LAW JOURNAL, 169, 187. Only a few cases require complete performance (presentation of a purchaser ready, willing, and able to buy) before revocation as a condition precedent to the duty to pay commission in cases of this type. *Auerbach v. Internationale Wolfram Lampen Aktien Gesellschaft* (1910, S. D. N. Y.) 177 Fed. 458; see *Wiggins v. Wilson* (1908) 55 Fla. 346, 45 So. 1011. Consequently, by showing his exclusive agency for a fixed time and his efforts thereunder, the broker can here establish a binding conditional duty on his principal. See Corbin, *loc. cit.* Sale through another agent is repudiation and breach, but it is still a condition precedent to the duty of the defendant to pay damages, for the plaintiff to show either that he had fully performed, or that he would have performed but for the repudiation which excused him. *Strasbourger v. Leerburger* (1922) 233 N. Y. 55, 134 N. E. 834; *Dosch v. Andrus* (1910) 111 Minn. 287, 126 N. W. 1071. To prove that he had performed, it would be necessary to show presentation of a buyer who was ready, willing, and able to buy. *Colburn v. Seymour, supra.* But to prove his own ability to perform within the time limited, it would not be necessary to show that any *particular* buyer was ready, willing, and able. Such proof might be made by evidence of general market conditions. *Blumenthal v. Bridges* (1909) 91 Ark. 212, 120 S. W. 974; *McLane v. Maurer* (1902) 28 Tex. Civ. App. 75, 66 S. W. 693; *Hollweg v. Schaefer Brokerage Co.* (1912, C. C. A. 6th) 197 Fed. 689. A very small minority has held that a breach by the owner throws upon him the burden of proving the

broker's inability, but the reverse is the better rule. See *Norman v. Vanderberg* (1911) 157 Mo. App. 488, 138 S. W. 47. The instant case differs from the above only in that it is an exclusive agency agreement for an indefinite time, and the court by implication writes in the words "for a reasonable time." *Cf.* (1918) 28 YALE LAW JOURNAL, 67. But it seems that the instant decision is correct in holding that ability to buy on the part of the prospective purchaser need not necessarily be shown if the plaintiff has otherwise established that he is able to perform and that he would have performed within a reasonable time.

FUTURE INTERESTS—GIFT TO CLASS—CONTINGENT REMAINDER.—A conveyed to B in fee, but if B died without children then to the other children of A "or, in case of their death, then to their children share and share alike." A grandchild of the grantor, after the death of his father attempted to convey his interest by warranty deed to C and predeceased B. On the death of B without issue, the plaintiff, as sole heir of C, claimed an undivided interest in the land. *Held,* (one judge *dissenting*) that as the grandchild had but a contingent interest which failed upon his death before the life tenant the plaintiff could not recover. *Dean v. Wall* (1922, Ga.) 115 S. E. 78.

A conveyance or devise of real estate in fee with a proviso that, upon definite failure of issue, the property shall go to another, creates a determinable fee in the grantee, and in the second taker an executory interest necessarily contingent. *Pugh v. Allen* (1920) 179 N. C. 307, 102 S. E. 394; *Lee v. Roberson* (1921) 297 Ill. 321, 130 N. E. 774. But in the instant case it seems that the executory limitation was a gift to a class comprised of the other children of the grantor or their children in case of their death before the testator. *Prima facie,* a gift to persons who are included and comprehended under some general description and bear a certain relation to the grantor, or have some common relation to each other, is a class gift. *Blackstone v. Althouse* (1917) 278 Ill. 481, 116 N. E. 154; *Kingsbury v. Walter* [1901, H. L.] A. C. 187; Kales, *Estates Future Interests* (2d ed. 1920) sec. 553 *et seq.;* L. R. A. 1918B, 234, note. In the absence of an expression clearly showing an intention to the contrary the membership of a class is fixed at the time the conveyance became effective, whether by deed or will, and here properly included the three other children who survived the grantor. *Himmel v. Himmel* (1920) 294 Ill. 557, 128 N. E. 641; *Close v. Benham* (1921) 97 Conn. 102, 115 Atl. 626; *Ware v. Rowland* (1847, Ch.) 2 Phil. 635; 20 A. L. R. 356, note. Thus at the death of B without issue the other three children of the grantor or the children of any deceased were entitled to equal shares. As one of the children had died during the lifetime of B, his only child, the grantor of the plaintiff's predecessor, became entitled to his father's interest. *Branton v. Buckley* (1911) 99 Miss. 116, 54 So. 850. The interest thus taken by the grandchild of the grantor, since it was contingent on B's death without issue, could perhaps not be alienated, but upon the death of B without children would pass by warranty deed under the doctrine of estoppel. *Pitzer v. Morrison* (1916) 272 Ill. 291, 111 N. E. 1017; *cf. Newlove v. Mercantile Trust Co.* (1909) 156 Calif. 657, 105 Pac. 971; see Freund, *Three Suggestions Concerning Future Interests* (1920) 33 HARV. L. REV. 526. In the instant case it seems that the dissenting opinion, though its reasoning may be open to question, reaches the correct result.

INSURANCE—FORFEITURE FOR BREACH OF CONDITION—VOID AND VOIDABLE CONSTRUED.—Under a life insurance policy issued by the defendant, the insured had the power to withdraw in cash his equity and accrued surplus after ten premiums had been paid during a fifteen year tontine period. It was provided that the policy should become "void" on default of any premium, subject however to the privilege of the insured to demand, within six months, a paid-up policy for a

lesser amount. After paying six premiums, the plaintiff defaulted and failed to exercise his privilege within the limited time. The defendant marked the policy as lapsed, and without notifying the plaintiff credited him with a period of term insurance which was not provided for by the original policy. After the expiration of the tontine period, the plaintiff, upon tendering back premiums and interest thereon, sought to withdraw the equity and surplus which would in due course have accumulated. *Held,* that "void" as used in the condition of forfeiture meant "voidable"; that the crediting of the plaintiff after his default, with the period of term insurance, showed an intention to keep the original policy in force and that the plaintiff could therefore recover under it. *New York Life Ins. Co. v. Lahr* (1923, Ind.) 137 N. E. 673.

Under an unqualified stipulation that a breach of condition shall cause an obligation in a policy to become void, the occurrence of a breach should of itself totally extinguish such obligation. *Home Life and Acc. Co. v. Haskins* (1922, Ark.) 245 S. W. 181; Vance, *Insurance* (1904) 373. But many cases, of which the instant one is an example, hold that as a matter of law "void" means "voidable," *i. e.,* that a breach of condition merely gives the insurer a power to avoid his undertaking. *Mutual Life Ins. Co. v. French* (1876) 30 Ohio St. 240; Ewart, *Waiver Distributed* (1917) 194. It is recognized that any language in a policy showing that the parties intended to use "void" as "voidable" will be so construed. *Robinson v. Western Assurance Co.* (1914, D. C.) 211 Fed. 747. But effect will be given to a deliberate choice of a word. *Dressler v. Commonwealth Life Ins. Co.* (1921) 105 Neb. 669, 181 N. W. 543. Presumptively "void" means exactly what it connotes, but no absolute meaning can soundly be assigned to it as a matter of law. The entire contract must be considered. *Phoenix Ins. Co. v. Shulman Co.* (1919) 125 Va. 281, 99 S. E. 605. A similar rule is applied in determining the meaning of the word in statutes. *Wiley v. Wiley* (1919, Ind. App.) 123 N. E. 255. From the report of the principal case, there appears to be no reason for finding that the insured, after default, had any interest other than a privilege to claim a smaller paid-up policy, which privilege later expired by its own limitation. And even assuming that the policy became merely voidable upon default, it seems difficult to support the conclusion that the gratuitous grant of term insurance, not provided for by the original policy, showed an intention to keep the original policy in force. *Elms v. Mutual Benefit Life Ins. Co.* (1921, Mo. App.) 231 S. W. 653.

LANDLORD AND TENANT—OWNERSHIP OF GROWING CROPS—PRIORITY OF LIENOR OVER LANDLORD.—The plaintiff did work on growing crops for one Chung, a tenant of the defendant company. At the end of his period of employment he filed notice of a claim of a statutory lien upon the crops. In an action to foreclose the lien, the defendant answered that it had entered on the premises upon forfeiture of Chung's lease prior to the filing of the lien, and that consequently title to the growing crops had passed to the defendant company. *Held,* that the plaintiff could foreclose. *Paik v. Chung* (1923, Wash.) 211 Pac. 729.

The tenant's ownership of growing crops is a legal power by severing them to make them his personalty. 1 Tiffany, *Real Property* (2d ed. 1920) sec. 263. This power is lost when the term is brought to an end by re-entry of the landlord for condition broken, and the ownership in the growing crops passes to the landlord. *Debow v. Colfax* (1828) 10 N. J. L. 128; *Myer v. Roberts* (1907) 50 Or. 81, 89 Pac. 1051; 2 Tiffany, *Landlord and Tenant* (1912) 1406, 1640. Thus the purchaser of growing crops before the tenant's default is in no better position than the tenant. *Debow v. Colfax, supra;* but see *Nye v. Patterson* (1877) 35 Mich. 413. Nor is a mortgagee protected against the landlord entering on breach of condition. *Gregg v. Boyd* (1893) 69 Hun, 588, 23 N. Y. Supp. 918. But the farm laborer's lien is often made superior to a prior chattel mortgage of the crops

by statute. *Watson v. May* (1896) 62 Ark. 435, 35 S. W. 1108; *Chapman v. Averill Co.* (1915) 28 Idaho, 121, 152 Pac. 573. In such a case the vendee of crops without notice also takes subject to the lien. *Powell v. Smith* (1896) 74 Miss. 142, 20 So. 872. In the instant case the court correctly held that a landlord succeeding to ownership by forfeiture is in no better position than a mortgagee or vendee. The best interests of agriculture are secured by making the farm laborer's wages surely payable out of the crops, whoever their owner may be. Similarly the lien of a seed grain note is preferred over an ordinary chattel mortgage. *Endreson v. Larson* (1907) 101 Minn. 417, 112 N. W. 628. By the better view the same rule of policy has often prevailed to give the repairman a lien superior to that of a prior chattel mortgagee. See (1923) 32 YALE LAW JOURNAL, 623.

MORTGAGES—EJECTMENT OF MORTGAGEE IN POSSESSION AFTER DEFAULT.—The defendant sold and conveyed to the plaintiff a tract of land, accepting in return a bond and mortgage as security for the purchase price, the defendant retaining possession under a written lease. The plaintiff having defaulted on the mortgage before the expiration of the lease, the defendant instituted foreclosure proceedings. With this suit pending, the defendant refused to vacate the premises after the lease had expired, whereupon the plaintiff brought an action of ejectment in a Magistrate's Court. The defendant contended that he, as mortgagee in possession after default, could not be ejected until the debt was paid. *Held,* (two judges *dissenting*) that the plaintiff could not recover. *Pearce v. Dunn* (1923, S. C.) 115 S. E. 621.

In jurisdictions retaining the common-law theory of a mortgage the right of a mortgagee in possession after default is well settled. *Weathersbee v. Goodwin* (1918) 175 N. C. 234, 95 S. E. 491; *Brown v. Loeb* (1912) 177 Ala. 106, 58 So. 330. This is true also in those jurisdictions which hold that the mortgagee acquires a legal title upon default of the mortgagor. *Wilson v. Reed* (1917) 270 Mo. 400, 193 S. W. 819; *Wells v. Kemme* (1916) 145 Ga. 17, 88 S. E. 562; *Cohn v. Plass* (1915) 85 N. J. Eq. 153, 95 Atl. 1011. The problem affords greater difficulty, however, where the lien theory has been adopted. It has usually been held that the mortgagee in possession at the time of default may retain such possession until the debt is paid. *Becker v. McRea* (1908) 193 N. Y. 423, 86 N. E. 463; *Stouffer v. Harlam* (1903) 68 Kan. 135, 74 Pac. 610; *La Point v. Sage* (1916) 90 Vt. 560, 99 Atl. 233. Some of the states that follow this doctrine require only that the mortgagee's possession be obtained "lawfully" or "rightfully." *Caro v. Wollenberg* (1913) 68 Or. 420, 136 Pac. 866; *Burns v. Hiatt* (1906) 149 Calif. 617, 87 Pac. 196; *Pettit v. Louis* (1911) 88 Neb. 496, 129 N. W. 1005. Others require that the possession be obtained with the assent of the owner of the legal title. Thus a mortgagee in possession as purchaser under void foreclosure sale may be ejected. *Bilger v. Nunan* (1912, C. C. A. 9th) 199 Fed. 549; *Herman v. Cabinet Land Co.* (1916) 217 N. Y. 526, 112 N. E. 476. Although a number of theories as to the basis of the doctrine have been advanced, probably the most satisfactory one lies in the desire of the courts to suppress useless litigation. See 3 Tiffany, *Real Property* (2d ed. 1920) 2427; (1916) 15 MICH. L. REV. 58. For a discussion of the development of the doctrine in New York, where it originated, see (1908) 8 COL. L. REV. 486.

SALES—BREACH OF WARRANTY—REMEDIES OF BUYER.—The plaintiff agreed to sell the defendant an asphalt mixer, and warranted it as to structure and output. The defendant agreed to return the machine if defects should develop. The machine was below the warranted standard, but the defendant retained it, and used it to complete a paving contract which imposed a penalty for delay beyond a certain day. In a suit for the purchase price, the defendant counterclaimed

for damages. *Held,* (one judge *dissenting*) that the defendants could recover on the counterclaim. *Austin Co. v. Tillman Co.* (1922, Or.) 209 Pac. 131.

A buyer may refuse to accept a chattel not conforming to the contract, but a retention after delivery with use inconsistent with ownership in the seller constitutes an acceptance. *Wolf Co. v. Monarch Refrigerating Co.* (1911) 252 Ill. 491, 96 N. E. 1063; Uniform Sales Act, sec. 48. Such acceptance of itself does not waive the buyer's remedy for defective performance. *Yellow Jacket Co. v. Tegarden Bros.* (1912) 104 Ark. 573, 149 S. W. 518; *Hauss v. Surran* (1916) 168 Ky. 686, 182 S. W. 927; *contra: Patrick v. Norfolk Lumber Co.* (1908) 81 Neb. 267, 115 N. W. 780; see Williston, *Sales* (1909) secs. 485-489. Several remedies are available to the buyer for a breach of warranty. He may have an action or counterclaim for damages, or recoupment in an action for the price. *Mondel v. Steel* (1841, Exch.) 8 M. & W. 858; *Parry Mfg. Co. v. Tobin* (1900) 106 Wis. 286, 82 N. W. 154; Uniform Sales Act, sec. 69; but see *Impervious Products Co. v. Gray* (1915) 127 Md. 64, 96 Atl. 1. There is a sharp conflict as to whether a breach of warranty also entitles a vendee to rescind an executed contract of sale in the absence of fraud, where such a power has not been expressly reserved. *Street v. Blay* (1831, K. B.) 2 Barn. & Adol. 456; *Wirth v. Fawkes* (1909) 109 Minn. 254, 123 N. W. 661; *Klock v. Newbury* (1911) 63 Wash. 153, 114 Pac. 1032; Williston, *op. cit.* sec. 608. The parties may, moreover, provide for an exclusive remedy for breach of warranty. *Helvetia Copper Co. v. Hart-Parr Co.* (1919) 142 Minn. 74, 171 N. W. 272. But unless the intention to make a given special remedy exclusive is clear, it will be treated as cumulative and permissive. *Mayfield v. Richardson Co.* (1921) 208 Mo. App. 206, 231 S. W. 288; *Feeney & Bremer Co. v. Stone* (1918) 89 Or. 360, 171 Pac. 569. And even where the contract limits the buyer's remedies, a failure on the part of the seller to perform conditions precedent to the operation of such a limitation defeats the limitation. *Warder v. Robertson* (1888) 75 Iowa, 585, 39 N. W. 905; *Nunn v. Brillhart* (1921, Tex. Civ. App.) 230 S. W. 862. In the instant case, the court fairly interpreted the provision as to return to apply to defects arising, or discoverable, only after the machine was tested for use. Substantial performance of the agreement to deliver a machine as described was then a condition precedent to the operation of the limitation. Furthermore, it seems that an agreement to return for defects does not clearly indicate an intent to exclude all other remedies, and should be construed as cumulative. On either ground the decision of the instant case is correct.

STATUTE OF FRAUDS—STATEMENT OF THE CONSIDERATION IN THE MEMORANDUM—EVIDENCE OF CUSTOM.—The plaintiff contracted to sell and the defendant to buy sugar. The memorandum stated "50 barrels or equivalent, basis 22.50, price 22.50." Subject to necessary substitutions the defendant had the choice of grade until a certain date, after which the plaintiff had the choice. The plaintiff sued to recover the difference between the market and contract prices because of the defendant's refusal to accept the sugar. *Held,* that since the memorandum did not state the price, it was within the Statute of Frauds. *Franklin Sugar Refining Co. v. Howell* (1922, Pa.) 118 Atl. 109.

Under the Statute of Frauds, where the consideration is agreed upon it must be stated in the memorandum. *Stapleton v. Muscogee Guano Co.* (1922, Ga.) 114 S. E. 906; *contra: Williams v. Robinson* (1882) 73 Me. 186. Where not agreed upon a reasonable consideration is understood. *Hoadly v. McLaine* (1834, C. P.) 10 Bing. 482. In some jurisdictions statutes expressly provide that the memorandum shall state the consideration. Ala. Code, 1907, ch. 90, sec. 4289; *Rains v. Patton* (1914) 191 Ala. 349, 67 So. 600. Other statutes say that the consideration need not be stated. Ky. Sts. 1915, ch. 27, sec. 470; *Ewing v. Stanley* (1902, Ky.) 69 S. W. 724. Executed consideration need not be specified.

Sayward v. Gardner (1892) 5 Wash. 247, 31 Pac. 761; Williston, *Sales* (1909) sec. 103. In such a case the phrase "for value received" is enough to satisfy the statute. *Cheney v. Cook* (1856) 7 Wis. 413. The consideration may be computed from the statements made. *Tracy v. Aldrich* (1921, Mo.) 236 S. W. 347. Also the memorandum may refer to other writings for its determination. *Manufacturers' Light & Heat Co. v. Lamp* (1921, Pa.) 112 Atl. 679. Parol evidence of the custom or usage of the trade may be introduced to explain an ambiguous statement of the consideration. *Spicer v. Cooper* (1841, Q. B.) 1 Gale and D. 52; *Salmon Falls Mfg. Co. v. Goddard* (1852, U. S.) 14 How. 446; see (1921) 30 YALE LAW JOURNAL, 761. In the instant case admittedly 22.50 meant 22½ cents a pound, but the price of the varying grades was not shown. A reference to the price-list or proof of a custom of the trade to incorporate it in the contract would have made the memorandum good. The strict adherence to the usual rules seems sound.

SURETYSHIP—APPEAL BONDS—LIABILITY OF SURETY WHEN APPEAL IS ABANDONED.—The plaintiff recovered a judgment against the Kansas City Railway Company. The latter, with intent to appeal, filed a *supersedeas* bond with the defendant as surety and served a notice of appeal upon the plaintiff's attorney. No such notice was ever filed in the higher court. Thereafter the company abandoned the appeal. The plaintiff sued the defendant on the bond. The latter contended that there was a failure of consideration because the appeal was never perfected. *Held*, that the plaintiff could recover. *Tackett v. United States Fidelity & Guaranty Co.* (1923, Kan.) 212 Pac. 357.

The contract of the surety has been generally held to be *strictissimi juris*. *Kirschbaum v. Blair* (1898) 98 Va. 35, 34 S. E. 895; *First National Bank v. Goodman* (1898) 55 Neb. 419, 77 N. W. 757. In some jurisdictions the actual commencement of the appeal is a condition precedent to the duty of the surety to pay. *Woodle v. Settlemeyer* (1914) 71 Or. 25, 141 Pac. 205. But the modern tendency seems to be toward increasing liberality. Thus where the bondsman undertakes the duty to pay unless the appellant should "prosecute the appeal with effect," an abandonment of the appeal, or a failure to prosecute, does not discharge the surety. *Illinois Surety Co. v. Hendrick* (1916) 170 Ky. 347, 185 S. W. 1125; *Dry Goods Co. v. Livingston* (1901) 16 Colo. App. 257, 65 Pac. 413. The reason advanced is that although literally the appeal has not been prosecuted, yet the principal in the bond has received the consideration stipulated for, that is, a stay of execution. *Healy v. Newton* (1893) 86 Mich. 228, 55 N. W. 666; *Dry Goods Co. v. Livingston, supra*. And the appeal is prosecuted with effect where a material part of the judgment is reversed, although the whole may not be. *Schutze v. Dabney* (1918, Tex. Civ. App.) 204 S. W. 342. The same liberality of construction is applied when the bond is conditioned upon payment of the judgment if it should be "affirmed." Thus failure to perfect the appeal operates as such affirmance. *Jones v. First National Bank* (1918, Okla.) 171 Pac. 848; *Calbreath v. Coyne* (1910) 48 Colo. 199, 109 Pac. 428. And the surety is still bound where, by an agreement made in good faith between the parties to the suit, the appeal is discontinued. *First Nat. Bank v. Stevens Land Co.* (1912) 119 Minn. 209, 137 N. W. 1101; *Howell v. Alma Mill Co.* (1893) 36 Neb. 80, 54 N. W. 126; *contra: Foo Long v. American Surety Co.* (1895) 146 N. Y. 251, 40 N. E. 730. The same result obtains where for some reason the appeal is dismissed. *Grossman v. Cohen* (1917) 207 Ill. App. 156; *Peck v. Curlee Clothing Co.* (1917) 63 Okla. 61, 162 Pac. 735; *contra: Hill v. Keller* (1911) 157 Mo. App. 701, 137 S. W. 573. But the surety is not liable if the appeal is dismissed because of insufficiency of the appeal bond. *Bortree v. Dunkin* (1912) 20 Wyo. 376, 123 Pac. 913; *Manning v. Gould* (1882) 90 N. Y. 476. Where, as in the principal case, the appeal is abandoned, the judgment is held to be "affirmed" within

the meaning of the bond. *Champomier v. Washington* (1847) 2 La. 101; *McConnel v. Swailes* (1840, Ill.) 2 Scam. 571. This view coincides with the modern tendency. The court points out that the surety is not in fact unduly prejudiced, as he ordinarily has no control over the principal's procedure on appeal and he is liable even when the appeal is defective or entirely dismissed. A liberal construction therefore seems desirable.

TORTS—NEGLIGENCE—LANDLORD'S LIABILITY FOR INJURIES TO THIRD PERSONS.—The plaintiff, a lodger of the defendant's tenant, was injured due to a defect in a stairway reserved by the defendant for the use of all the tenants. She sued for damages. *Held,* that, the plaintiff, being a mere licensee, could not recover. *Fairman v. Perpetual Investment Society* [1923, H. L.] 1 A. C. 74.

The English tendency is to deny relief in cases of this type. In this country a landlord owes to members of the household and business visitors of the tenant a duty to keep parts of the premises reserved for all the tenants and in his control, such as stairways and hallways, reasonably safe for their use. *Beaulac v. Robie* (1919) 92 Vt. 27, 107 Atl. 107; *Miller v. Hooper* (1921) 119 Me. 527, 112 Atl. 256 (tenant's daughter); but see *Kirby v. Tirrell* (1920) 236 Mass. 170, 128 N. E. 28 (duty merely to keep in same condition as at time of letting). The duty is said to extend to all persons lawfully upon the premises "in the tenant's right." *Karp v. Barton* (1912) 164 Mo. App. 389, 144 S. W. 1111 (boarder); *Henkel v. Murr* (1883, N. Y. Sup. Ct.) 31 Hun, 28; see *Gleason v. Boehm* (1896) 58 N. J. L. 475, 34 Atl. 886. It is often said to include social visitors of the lessee. *Loucks v. Dolan* (1914) 211 N. Y. 237, 105 N. E. 411. The landlord's liability to third persons is sometimes based on the leasing contract with the tenant. *Coupe v. Platt* (1899) 172 Mass. 458, 52 N. E. 526. The sounder tendency, however, and that supported by the weight of authority, bases the liability on the possession of the premises by the landlord and the fact that he ought reasonably to expect the plaintiff to use them; so that the court puts him in the position of an invitee. *Brown v. Pepperdine* (1921, Calif. App.) 200 Pac. 36; *Buda v. Dzuretzko* (1915) 87 N. J. L. 34, 93 Atl. 83; see *Gallagher v. Murphy* (1915) 221 Mass. 363, 108 N. E. 1081. It is difficult to reconcile these decisions with the English rule that one who invites a social guest to his home owes only the duty to warn him of known, concealed defects. *Southcote v. Stanley* (1856, Exch.) 1 H. & N. 247.

WILLS—FAILURE OF DONEE TO EXERCISE POWER OF APPOINTMENT.—The testator devised his residuary estate to the defendant trust company to pay the income thereof to his wife during her life and in the event of the sale of certain property during her life, "the proceeds of such sale to be paid over on her death to such *one* of my nephews of my own blood as she may by her will direct." The wife died without exercising the power of appointment and the plaintiff, the sole heir at law, claimed an intestacy as to such proceeds. *Held,* (one judge *dissenting*) that an imperative special power in trust was created and that the court would exercise the power in favor of all of the nephews equally. *Waterman v. N. Y. Life Ins. & Trust Co.* (1922) 204 App. Div. 12, 197 N. Y. Supp. 438.

There is a settled presumption against intestacy, and especially so where there is a residuary clause. *In re Peck's Estate* (1922, Vt.) 118 Atl. 527; *Industrial Trust Co. v. Gardner* (1922, R. I.) 117 Atl. 541; see (1917) 26 YALE LAW JOURNAL, 423. Consequently no intestacy arises where the donee of a power of appointment dies without exercising it and the donor's intention to benefit an individual, or a class of individuals, is clear. *Hazard v. Bacon* (1920, R. I.) 108 Atl. 499; *Miller v. Brinton* (1920) 294 Ill. 177, 128 N. E. 370. The power in the instant case was limited to appointment among nephews of the donor's own blood. That clearly indicated an intention to benefit a class, or at least a member of a

class. It follows that the power is an imperative one, since the fact of its exercise was not left to the donee's discretion. Being imperative, it was a power in trust which a court of equity would exercise if the donee failed to do so. Cleveland, Hewitt & Clark, *Probate Law & Practice of Connecticut* (1915) 622; *Hazard v. Bacon, supra; McGaughey's Adm'rs. v. Henry* (1954, Ky.) 15 B. Mon. 383; *Hughes v. Footner* [1921] 2 Ch. 208. It has been suggested that equity neither compels the exercise of a power by a donee who fails to exercise it, nor does it exercise it for him, but it declares that there is an implied gift to the objects of the power. Gray, *Powers in Trust* (1911) 25 HARV. L. REV. 2. In the principal case, the power given was to pay over to one of the nephews of the testator's own blood. Since it became impossible to carry out this particular intention of the testator, the court rather than declare an intestacy, correctly chose to carry out his general intention in favor of the class. See N. Y. Cons. Laws, 1909, ch. 52, sec. 160.

WILLS—REALTY—REMAINDER IN ISSUE OF LIFE TENANT NOT IMPLIED FROM A GIFT OVER ON DEFINITE FAILURE OF ISSUE.—A life estate in realty was devised to the plaintiff, with a gift over on her death without issue. There was no disposition of the remainder in case issue should survive. This action was brought to quiet title based upon quitclaims from the children of the life tenant and the devisee of the contingent remainder. *Held,* that the plaintiff had only a life estate, and that no remainder to her issue was to be implied. *Hunt v. Miller* (1922, Neb.) 190 N. W. 583.

In Nebraska the words "die without issue" import a definite failure of issue. *Schnitter v. McManaman* (1909) 85 Neb. 337, 123 N. W. 299. Where these words denote an indefinite failure the devisee for life takes an estate tail under the rule in *Shelley's Case,* usually enlarged to a fee simple by statute. 1 Tiffany, *Real Property* (2d ed. 1920) 68; see *Beilstein v. Beilstein* (1899) 194 Pa. 152, 45 Atl. 73. But the heirs at law are favored and their estate is not divested by implication unless the inference is inevitable. *Bond v. Moore* (1908) 236 Ill. 576, 86 N. E. 386; see 15 L. R. A. (N. S.) 73, note; L. R. A. 1917A, 1213, note. Accordingly the English and most of the American courts are unwilling to imply a remainder in the issue of a life tenant from a gift over on definite failure. *Scale v. Rawlins* [1892, H. L.] A. C. 342; *Bond v. Moore, supra;* COMMENT (1909) 3 ILL. L. REV. 590; 1 Jarman, *Wills* (6th ed. 1910) 674. There is some authority to the contrary. *Clase v. Farmer's Loan and Trust Co.* (1909) 195 N. Y. 92, 87 N. E. 1005; *Mitter v. The United Hydraulic Cotton Press Co.* (1885) 75 Ga. 540; see *Wine v. Markwood* (1878, Va.) 31 Gratt. 43; *Bentley v. Kaufman* (1877, Pa.) 12 Phila. 435 (personalty). The courts usually seize upon trifling expressions to support the implication. *Kendall v. Kendall* (1882) 36 N. J. Eq. 91 (ultimate devisees were the heirs); *Hauser v. Craft* (1904) 134 N. C. 319, 46 S. E. 756; *Estate of Blake* (1910) 157 Calif. 448, 108 Pac. 287; *Kinsella v. Caffrey* (1860) 11 Ir. Ch. 154 (death of the issue before reaching majority); see *Ball v. Phelan* (1908) 94 Miss. 293, 49 So. 956. The conclusion reached in the instant case is undoubtedly in accord with the prevailing judicial opinion, but it may be questioned whether the erstwhile important rule favoring the heir should now be regarded as sufficient to bar the easily implied remainder to the life tenant's surviving issue.