RECENT CASES.

CONSTITUTIONAL LAW.

Illegal Combinations: Validity of Contracts

The Supreme Court of the United States, in *Continental Wall Paper Company* v. *Voight and Sons Company*, 29 Supreme Court Reporter, 280, decided that a combination, illegal under the Sherman Anti-Trust Act, cannot collect a debt arising out of a contract made with one of its constituents.

(For a full discussion of the principles involved see note, p. 459, of this issue.)

Labor Contracts

The Code of Alabama renders it a criminal act for a laborer, who enters into a contract for labor and thereby obtains money, to refuse to carry out the contract. In *Alonzo Bailey* v. *Alabama*, 29 Supreme Court Reporter, 141, the United States Supreme Court refused to take jurisdiction of the case because it was prematurely appealed. The case is now pending, after a final conviction, before the Supreme Court of Alabama.

(For a full discussion see note, p. 464, of this issue.)

Interstate Commerce: State Courts

The Supreme Court of the United States in *Missouri Railroad Company* v. *Larabee Flour Company*, 211 U. S. 627, sustained the power of the State courts to enforce by mandamus the common law duty of a carrier not to discriminate in supplying cars for interstate shipments at an established station.

(For a full discussion see note, p. 475, of this issue.)

Cancellation of Permit to do Intrastate Business

The State of Texas in 1889 and in 1903 passed laws known as the anti-trust laws whereby it became unlawful to combine to create, or to do acts which tended to create, or carry out restrictions in trade or commerce, or to fix, maintain or increase the prices, or to prevent or lessen competition, etc. The appellant had entered into certain contracts with other corporations and individuals for the purpose of suppressing competition and monopolizing the trade, but these contracts had been entered

CONSTITUTIONAL LAW (Continued).

into before the passage of these anti-trust laws by a predecessor of the appellant, and the appellant in stepping into the shoes of this predecessor had assumed these contracts and carried them out after the passage of the laws. The Court of Civil Appeals of Texas, sustained the lower court which had assessed a fine of $1,623,500 and which had also ordered the appellant's permit for doing business in the state to be cancelled, in accordance with the penalties provided in the statutes. The Court also appointed a receiver to take charge of all the property of the corporation which was located in Texas. The case was taken to the Supreme Court of the United States, where the decision of the state court was affirmed. It was decided that the laws were not retroactive in effect because they applied to contracts which were carried out after their passage, although the contracts had been entered into before; also, that the fines were not excessive in view of the fact that the property of the company amounted to over forty million dollars; and lastly, that the laws were not unconstitutional. *Pierce Oil Co.* v. *State of Texas,* 29 Sup. Ct. 220.

The case is interesting as upholding the constitutionality of laws which may drive a corporation out of business within the limits of a state as far as intrastate business is concerned, and is further of interest in the method employed for the purpose, namely, the appointment of a receiver who can take over all the property within the state.

CRIMINAL LAW.

On a recent indictment for murder in Texas, the facts were that B and C were in a house with the door closed. A shot through the door and killed C. *Held,* (1) that if A intended to shoot B and by mistake shot C, it was only murder in the second degree even though it would have been murder in the first degree had he killed B, and (2) that an intentional shooting into a house for the purpose of killing an inmate is burglary. *Holland* v. *State,* 115 S. W. 48.

First Degree Murder: Express Malice Against the Individual: Burglary

I. This decision brings up a difference in the statutory requisites of murder in the first degree in the several states which is often overlooked. In the majority of jurisdictions the statutes provide that all murder perpetrated by means of poison, or lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or in the perpetration of

CRIMINAL LAW (Continued).

arson, rape, robbery, or burglary, shall be murder in the first degree, and under such statutes express malice against the deceased is not required. *Comm* v. *Breyessee,* 160 Pa. 451, (1894); *State* v. *Payton,* 90 Mo. 220, (1886).

The Texas statute however substitutes express malice in the place of wilful, deliberate, and premeditated killing, and the decision therefore is undoubtedly sound. *McCoy* v. *State,* 25 Tex. 33; *Ake* v. *State,* 30 Tex. 466, (1867).

II. The conclusion that an intentional shooting into a house for the purpose of killing an inmate is burglary seems sound on principle (Bishop on Criminal Law, II, § 94), for the entry of the bullet is intended to accomplish a felony; but the authorities are uncertain on the question. 1 Hale, P. C.555; I Hawk, P. C. 132; 2 East, P. C. 490.

EASEMENTS.

Business Invitees

Where a private way *ex necessitate* exists for the benefit of leasehold premises and where there was some evidence that the plaintiff had, previous to the time in question, been visiting the tenant periodically for the purpose of collecting from him, as they fell due, installments on the purchase price of furniture bought by the tenant, the question arose whether on the time in question he had the right to use the said way for the same purpose. It was held *inter alia* (1) that such previous use by the plaintiff, in connection with the contract made, might afford an inference that the plaintiff was authorized by the tenant to visit him for that purpose; (2) that the mere desire of the plaintiff to go to the house of the tenant to collect a bill would not be either legal cause or good excuse for so doing. *Tutweiler Coal, Coke & Iron Co.* v. *Tuvin,* 48 So. 79 (Ala., 1908).

A right of way, appendant or annexed to, an estate, may be used and enjoyed by those who own or lawfully occupy any part of the dominant tenement for any purpose to which it may from time to time be legitimately applied. Only those who may be properly regarded as trespassers on the dominant estate can be excluded. *Gunson v. Healy,* 100 Pa. 42, (1882).

The enjoyment of a way of necessity is ordinarily limited only by the necessity for its use in connection with all lawful uses of the land to which it is appurtenant. *Whittier* v. *Winkley, et al.,* 62 N. H. 338 (1882).

EASEMENTS (Continued).

All persons having occasion may, with the permission of the owner of the way, transact business with him by passing to and fro over the way. *Shreve* v. *Mathis*, 63 N. J. Eq. 171, p. 178 (1902).

The existence of an implied license by the tenant is a question of fact for the determination of the jury. *Knowles* v. *Dow*, 2 Foster, 387 (N. H. 1851); *Walter* v. *Post*, 13 N. Y. Super. Ct. 363; 4 Abb. Prac. Rep. 382, p. 388 (1857). For an extreme case in which the evidence was held sufficient to support an inference that the plaintiff was a business visitor on the land, see *Thornton* v. *Maine State Agricultural Society*, 53 Atl. Rep. 979 (Me., 1902).

EQUITY.

Continuing Trespass

The jurisdiction of Equity to restrain trespass by municipal and other corporations upon private property has always been recognized. Most of the illustrations of this power, beginning with the early one of *Hughes* v. *Trustees of Modern College*, 1 Vesey, Sr. Rep. 188, have been cases in which officials were restrained from actual physical appropriation of the plaintiff's property, either because they were exceeding their powers, or the statute authorizing the taking was unconstitutional. *Belknap* v. *Belknap*, 2 Johns. Ch. 463; *McArthur* v. *Kelly*, 5 Ohio, 139. Within recent years, however, new conditions have arisen and cases of trespass have called for equity jurisdiction, though no attempt was made to appropriate permanently the plaintiff's land. The clearest instance of this state of facts is to be found in the continued interference by police in private activities. Practically all the cases have arisen in New York, and the question seems not entirely settled. It has been met only once in the Court of Apepals in the case of *Delaney* v. *Flood*, 183 N. Y. 323, which case is unfortunately not conclusive as its decision has been interpreted in two opposite ways by the lower courts in later decisions. On the one hand it has been held that *Delaney* v. *Flood* must be decided strictly on its facts, and that its refusal to grant an injunction arose from the language of the statute governing Raines Law Hotels, and other quasi-illegal resorts that were required to hold a license. *Hale* v. *Burns*, 101 App. Div. 101; *McGorie* v. *McAdoo*, 113 App. Div. 271, etc On the other hand a number of cases have held that the Delaney case rejected the

EQUITY (Continued).

idea of equity interference in trespass of this kind, and that plaintiff's remedy was strictly at law. *Eden Musee Co.* v. *Bingham,* 125 App. Div. 780; *Olympic Athletic Club* v. *Bingham,* 125 App. 793; *Stevens* v. *McAdoo,* 112 App. Div. 458. It will thus be seen that the various appellate courts have differed in their reading of the original case.

The latest decision on the subject has come from the Supreme Court. In this case the Fairmont Athletic Club maintained sparring exhibitions which they claimed were free and for their members alone. The police authorities however charged that an admission, &c., was taken and that the exhibitions were for the public. They therefore without warrants for arrest, stationed officers in the club-house at every exhibition and every business meeting, until the club, in order to obtain relief sued in equity. The Court granted the desired injunction on the grounds of (1) irreparable damage; (2) multiplicity of suits; and (3) the impossibility of estimating damages in an action at law. *Fairmont Club* v. *Bingham,* 113 N. Y. Supp. 905.

The decision stands clearly for the proposition that *Delaney* v. *Flood* (*supra*) applied only to the particular facts in that case. It also differentiates the cases holding the opposite view by the statement that in those cases no trespass was threatened, and that the act sought to be restrained was the making of an arrest in a lawful manner. It seems difficult to accept this interpretation of the matter, since the facts of the case in hand are exactly parallel to those differentiated, and since, finally, the language of the late case of *Suesskind* v. *Bingham,* 125 App. Div. 787, seems utterly incompatible with such interpretation. There is no question, however, that the majority of Appellate Court cases indicate a tendency to take jurisdiction under such a state of facts as this; and the present case, representing as it does the view of one of the higher courts, is probably an indication of the view that will be taken of the matter when it is finally decided, as it undoubtedly must be by the Court of Appeals.

EQUITY (Continued).

Parol Trust: Statute of Fraud

Where property was left to B on a parol trust for A, and A was also heir of testator, and hence the *cestui que* trust of either the express or, if the express trust failed, a resulting trust, the Statute of Frauds was thought to be of no avail. *Ballinger* v. *Ballinger*, 99 Pac. 196 (California).

(For a further discussion see note, p. 468, of this issue.)

EVIDENCE.

Comment on Prisoner's Failure to Call his Wife as a Witness

In a prosecution for assault and battery the Supreme Court of Mississippi held that the district attorney's comment on the failure of the prisoner to put his wife on the stand as a witness, if he wanted the circumstances of the trouble investigated, as the State could not have made her a witness, was reversible error. *Johnson* v. *State*, 47 Southern, 897.

At common law a wife or husband could not, except in a few cases, testify either for or against each other, and where this rule is still in force it is obviously error to allow the prosecution to comment on the absence of such witness *Graves* v. *U. S.*, 150 U. S. 118, (1893).

In most jurisdictions, however, it is provided by statute that a wife or husband may be called by the prisoner. In England comment by the prosecution on the failure to produce such a witness is forbidden (61, 62 Vict., C 36, sec. 1), and in Mississippi, though there is no such provision in the statute (Code of 1906, § 1916), the law is well settled, in accord with the case under discussion, that such comment is reversible error. *Johnson* v. *State*, 63 Miss. 313 (1885); *Cole* v. *State*, 75 Miss. 142 (1897).

In Pennsylvania the rule is *contra* (*Comm.* v. *Weber*, 167 Pa. 153, 1895), and the question reduces itself to whether the general unfavorable inference drawn from the failure to produce available evidence must in this instance vanish, as being inconsistent with the full exercise of the defendant's privilege to call his wife or not as he sees fit. This question, which is closely analagous to the privilege against self incrimination provided for by statute in almost all jurisdictions, has usually been answered in the affirmative, it being held that the allowance of such an inference would amount to a destruction of the privilege, and that "the law, in permitting husbands and wives to testify on behalf of each other, cannot

EVIDENCE (Continued).

have contemplated that any moral coercion should enable others to force them into the witness box." *Knowles* v. *People*, 15 Mich. 408, 413 (1867). However, as pointed out by Mr. Wigmore (Evidence, § 2243), "whether this conclusion is inevitable is at least open to argument. The argument against it is that there is no actual coercion and no actual denial of the privilege, but merely a dilemma and an option, which are created not by any direct attempt to break into the privilege, but by the accidental coincidence, upon the same piece of testimony, of two independent principles of law, neither one of which should be made to yield rather than the other."

Admissibility of Past Similar Offences

Appellant was convicted of killing a horse by poison. Exceptions were taken to the admission of evidence of the death, a short time previous of two other horses belonging to the prosecutor. *Held*, where the evidence of another offense proves an element of the one for which he is on trial, or the motive for committing the acts constituting the crime charged, and such independent offences in connection with the one charged, were committed by the accused for some particular purpose which he intended to accomplish, such evidence is admissible. *Jaynes* v. *People*, 99 Pac. 325 (Colorado).

The general rule is that evidence of previous crimes is not admissible to prove a given crime, and the Court recognizes this rule in making the above exception. There are, however, three purposes for which such evidence is admissible: first, to prove knowledge; second, to prove intent, the act being admitted; third, to prove design. Under the facts of the case at bar the evidence could not have been admitted to show a knowledge of the poisonous nature of the drug, as in *R.* v. *Dossett*, 2 C. & K. 307, for it only appeared that the horses had been poisoned, and not that the prisoner had done the poisoning. Since by statute, however, it was necessary for the act to be wilful, the evidence would have been admissible as tending to negative the hypothesis of accident, even though the prisoner had not yet been connected with the former poisoning; for this would fall under the doctrine of "anonymous intent" as in *R.* v. *Flannagan*, 15 Cox Cr. 403. And finally the evidence unquestionably would have been ad-

EVIDENCE (Continued).

missible to show a general design to injure the prosecutor, since the former poisonings formed parts of a chain of acts to "get even" with the prosecutor (as elsewhere testified). The leading case sustaining this position is *Commonwealth* v. *Robinson,* 146 Mass. 571.

Presumptions: Possession of Stolen Property

On appeal from a conviction for robbery, the Court held: The possession of stolen property shortly after the commission of the offense is *prima facie* evidence of guilt. After its introduction the burden of proof does not shift to the defendant. Such evidence authorizes but does not require a conviction. *People* v. *Deluce* (Ill.), 86 N. E. 1080 (1909).

The opinion of the Court is a very clear statement of the law, on a confused and much mooted question. In speaking of the possession of stolen property the language of presumptions has been much used, and it has, in many instances, been difficult to determine the exact meaning of such expressions as "*prima facie* evidence of guilt," or "presumptive evidence of guilt." As used in some cases the meaning appears to be that the burden of proof is shifted, and that if this burden is not satisfied a conviction must follow. *State* v. *Kelly,* 50 La. Ann. 597. Roscoe's Crim. Evid. (12th Ed.), 19. Most cases, however, seem to repudiate a rule of presumption in so strict a sense, and lay down the doctrine that the fact of possession of stolen property is evidence on which the jury *may* convict, but that its weight and effect is always a question of fact for them. *Reg.* v. *Exall,* 4 F. & F. 922; *Miller* v. *People,* 229 Ill. 376.

Stated in terms of burden of proof this rule amounts to this: When the prosecution has proved the possession of stolen property shortly after the offense, the burden of introducing evidence is satisfied and the case can go to the jury. The burden of proof has not shifted, however, in the sense of that expression, that the party introducing the evidence must succeed in the event of no further evidence being introduced on the other side.

EVIDENCE (Continued).

Relevancy: Condition of Property

Unsympathetic critics have censured the judiciary for a certain clumsiness in their literary expression. They charge the bench with an almost meticulous regard for accuracy, in the pursuit of which laudable though mundane object, a judge will spare neither his vocabulary nor his readers. As a consequence the perusal of a Supreme Court opinion is exhausting to the reader's mind, since it puts each fact forward with severe accuracy, and contains none of that haunting allusion and suggestiveness that make the pages of Pater and Meredith so fascinating to the lovers of educative literature. It is unfortunately true that most judicial opinions leave little for the reader to imagine; but it is refreshing to record that the failing is not universal. A recent Alabama decision has so stated the facts of the case that after a certain amount of study one may still interpret them in several ways; and has complimented possible readers by supposing they are aware of various circumstances that alas they know not of. *Home Ice Co.* v. *Howells Mining Co.*, 148 So. 117.

The facts of the case were briefly these: The Mining concern sued the Ice company as purchaser of a lot of coal. The defendant pleaded that the quality of the coal was so equivocal as not to cover the freightage defendant had agreed to pay, and the actual value of the coal was thus put in issue. The judge of the lower Court instructed a finding for the plaintiff if the defendant bought "run of mine" coal, notwithstanding it may not have been the best quality of coal as set up in the special pleas; and judgment was given for the plaintiff. Certain evidence was excluded by the judge, and defendant assigned this as one of his grounds of appeal. In regard to this matter the Court uses the following language:

"The quality of the coal was an issue in the case, and the witness, Boseman, testified as to the coal used by him for the Pure Milk Co., some of which was returned to defendant. It is true that it was not a part of the coal involved, but if it was exactly the same kind of coal, the defendant should have been permitted to prove this fact, as this proof would have rendered the testimony of Boseman of some value as to quality, etc."

We are unfortunately not in the confidence of the Court as to the identity of Boseman and the Pure Milk Co., nor do we know where the latter bought the coal, or from whom. It was returned to the defendant, and it is possible to imag-

EVIDENCE (Continued).

ine the Ice company as a retail dealer in coal, and as having sold part of the coal in question to the dairy in question, though other evidence would tend to show that all the worthless coal was used by defendant, presumably to get it out of the way. If the coal purchased by the Milk company had come from the same lot or car as defendant's, testimony as to its value would be relevant. Greenleaf: Evidence, 52. If on the other hand, it could merely be shown that the coal was purchased from the same vendor, the fact would seem irrelevant and likely to mislead the jury, unless it could be proved conclusively to have been of exactly the same quality as the coal in question. *Preston* v. *Dunham,* 52 Ala. 217.

The present case is not unlike that of *Holcomb* v. *Hewson,* 2 Camb. 391, in which a brewer tried to prove the good quality of the beer sold to the defendant by witnesses who testified that the beer they had bought from the same brewer was good; and the evidence was held to be irrelevant. The probable meaning of the language used in the present case is that the coal used by the Milk Company was either part of the lot sold to the defendant, or, what is more probable, coal of exactly the same quality, or from the same car or heap. If so, the statement that evidence tending to show the value of exactly the same kind of coal, was clearly in line with the authorities and decisions. *Preston* v. *Dunham,* 52 Ala. 217; *Denver Co.* v. *Reynolds,* 72 Fed. 464.

Res Gestæ: Dying Declarations

Defendant was convicted of the murder in the second degree of one Swearingen. He admitted stabbing deceased while both were in deceased's field. Deceased's wife was permitted to testify, *inter alia,* that on the day her husband was killed she was at home sweeping; that the first information she had of her husband's being hurt was when she heard him holloa; that she recognized his voice and started for the door, before reaching which she heard him again; that she ran down to the field, and saw deceased coming toward the house and defendant going toward his house; that she got to the gate which was about fifty yards from where deceased had been plowing; that deceased in answer to her inquiry as to what was the matter, said "Oh Bill has cut me." The deceased then made to his wife further statements concerning the stabbing.

The evidence further showed that deceased was bleeding a good deal and in a few minutes complained of being sick

EVIDENCE (Continued).

and then became cold. He lay down and asked for his father and brothers saying that he wanted to tell them good-by, and died in a few minutes thereafter.

The Court held (1) that this was a narration of a past transaction and not a part of the *res gestae;* (2) that whether declarations were made under a sense of impending death is a preliminary question of fact for the trial Judge and his finding will not be overturned where there is evidence to support it. *Jones* v. *State* (Ark.), 115 S. W. 166 (1909).

There are two views (1) that only such declarations are admissible as grow out of the principal fact or transaction, illustrate its character, are contemporary with it and derive some degree of credit from it. [*Lund* v. *Tynsborough,* 9 Cush. (Mass.) 36 (1857), p. 42]; (2) that any statement though narrative of a past recurrence is admissible if made while the immediate results of such occurrence are still apparent and so soon after as to be made under the overpowering influence of it and so practically without an opportunity for invention. *Com.* v. *Werntz,* 161 Pa. 591 (1894). See also article on Res Gestae, by Mr. Francis H. Bohlen, 51 Am. Law Reg. 187.

The earlier Arkansas cases seem to favor the second view. *Railway Co.* v. *Leverett,* 48 Ark. 333 (1886); *Ft. Smith Oil Co.* v. *Slover,* 58 Ark. 168, p. 180 (1893).

It is not necessary that declarant state at the time he makes the declaration that he does so under the sense of impending death, but such apprehension may be shown from the surrounding circumstances such as his evident danger, etc. *Newberry* v. *State,* 68 Ark. 355, p. 357 (1900).

LIBEL.

Privileged Publication: Public Character

In the case of *Tanner* v. *Embree,* 99 Pac. 547, the Supreme Court of California held, that a newspaper editor stands in no better position than any other member of the community, so far as claiming privilege to publish statements of a defamatory character about a candidate for office is concerned.

(For a full discussion see note, p. 469, of this issue.)

NEGLIGENCE.

In the case of *Lyttle* v. *Denny*, 222 Pa. 395, the plaintiff was a guest at the defendant's hotel and was injured by the collapse of the folding bed in which he was sleeping. At the conclusion of the plaintiff's testimony the trial Judge entered judgment of compulsory non-suit because plaintiff had not shown what was wrong with the bed and the reason for its falling. From the judgment of non-suit plaintiff appealed. *Held*, that the facts in this case show a *prima facie* case of negligence upon the part of the defendant sufficient to go to the jury, and the inference of negligence must stand until overthrown by countervailing proof. Folding-beds do not collapse when they are in proper condition, and if the bed was not in proper condition that is evidence of negligence and the burden is then upon the defendant to show no negligence.

Liability of Inkeeper for Injury Caused to Guest by Collapse of Folding-bed

This case comes within the rule laid down in *Scott* v. *London Docks*, 3 Hurlst & C. 596, where the principle is stated as follows, "Where the thing is shown to be under the management of defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from want of care." The duty of an innkeeper to his guests is to see to it that care is taken to make premises safe. This duty is not satisfied by the mere exercise of personal care on the part of defendant, but he must see to it that anyone to whom he intrusts the work uses reasonable care. The degree of care has in some cases been declared equal to that of a common carrier of passengers but this view is not now generally accepted as law. The common carrier must use greatest possible care because of the dangers of his business, but the innkeeper's business not being fraught with such dangers he is only required to use ordinary care.

Beale on Innkeepers, § 162-166.

NEGOTIABLE INSTRUMENTS.

Under an indictment for forgery, it was proved that defendant delivered a forged check with the name of the payee blank, in payment for a piano. The defense was raised that, on account of the incompleteness of the instrument, it was not a check within the meaning of the California code. In answer to this defense the Court held that defendant's delivery of the incomplete paper carried with it an implied authority to fill it up, that the exercise of that authority dated

Blank Name of Payee of Check: Negotiable Instruments

NEGOTIABLE INSTRUMENTS (Continued).

back to the time of delivery, and that therefore the delivery of the blank instrument constituted the crime charged. *People* v. *Graham* (Cal.), 99 Pac. 391.

The Negotiable Instruments Law has not been enacted in California, and the above decision undoubtedly represents the American view of the subject before the passage of that Act. *Overton* v. *Matthews*, 35 Ark. 136; *Breckenridge* v. *Lewis*, 84 Me. 349; *Rich* v. *Starbuck*, 51 Ind. 87. This doctrine was based on the decision of Lord Mansfield, in *Russel* v. *Langstaffe*, 2 Doug. 514. That case, however, was apparently not followed in England (*Awde* v. *Dixon*, 6 Exch. 869; *Hatch* v. *Searles*, 2 Small & G. 147), and the recognized rule before the Bills of Exchange Act was that one who took incomplete paper had only a *prima facie* authority to fill it up, and that the limits of such authority could be shown by the maker, except as against a *bona fide* holder for value without notice of the incompleteness. This rule was not changed by the Bills of Exchange Act. *Smith* v. *Prosser*, L. R. 1907, 2 K. B. 735.

In the United States the same rule now exists under the Negotiable Instrument Law, which has been construed as changing the law on this subject as laid down in the previous decisions. *Guerrant* v. *Guerrant*, 7 Va. L. Reg. 639; *Boston Steel & Iron Co.* v. *Steuer*, 183 Mass. 140. As a result the law under the Negotiable Instruments Act is that one who takes incomplete paper is put upon inquiry as to the authority of the person entrusted with the incomplete instrument.

PLEADING.

Right of Assignee to Sue

The Supreme Court of Vermont, in *Barre Granite Co.* v. *Fraser*, 71 Atlantic, 828, held that although B assigned a contract with A to C, and A subsequently promised to pay C, if C performed, C had not the right to sue in his own name for the sum due.

(For a full discussion see note, p. 472, of this issue.)

SALES.

Vendor's Estoppel Against Sub-Vendee

Plaintiff sold machinery to one H on credit, title to remain in the plaintiff till payment; a bill of lading was made out to H, c/o defendant. The defendant bought from H for value, and had the machinery installed, being ignorant of the conditions of the sale. The plaintiff proved his claim as a creditor of H who had become bankrupt, and received payments on this claim, but now seeks to hold defendant for conversion. *Held,* plaintiff is bound by his election to sue H, for the contract price. Furthermore since the machinery was consigned to H who was engaged in the business of furnishing and installing such machinery on lands of others, and nothing indicated that title had been reserved by consignor, who knew that the machinery was to be installed for defendant, and become permanently affixed to his land, plaintiff cannot recover from defendant, a purchaser for value without notice. *American Process Co.* v. *Florida Brick Co.,* 47 South. 942 (Fla.).

The Court decided the case chiefly on the fact that the plaintiff was barred in this suit by his previous election of remedies; but the estoppel of the vendor brings up an interesting distinction in the law of sales. Mere possession by a conditional vendee, is never considered as sufficient to estop the vendor, even against a purchaser for value without notice. *Marvin Safe Co.* v. *Norton,* 48 N. J. L. 410; but the doctrine has long been established that in case of possession by one whose common business it is to sell, without any limitation having been put on his authority, a *bona fide* purchaser will be protected. *Pickering* v. *Busk,* 15 East, 38. And this is also true where the goods were bought only to be resold. Mechem on Sales, Vol. I, p. 601. In the case at bar the Court introduced still another element to fortify the position of the defendant, namely, the fact that the vendor knew that the article was to be affixed to the sub-vendee's land. This fact as a ground of estoppel comes more properly under the law of fixtures, and though the Court cited no case in support of the proposition, yet the case of *Jenks* v. *Colwell,* 66 Mich. 420, is a direct authority.

Breach of Contract

A entered into a contract with B for the sale of lumber to the latter. The terms of the contract arranged for shipment in instalments, each instalment to be met by vendee's note at sixty days. Several loads were shipped as per contract; then the shipments became tardy, and B constantly notified A to ship him the lum-

SALES (Continued).

ber. It appears from the uncontroverted evidence, however, that the initial breach was made by the vendee in falling behind in his payments for the purpose of seeing whether A would ship all the lumber; and that further shipments had been purposely withheld by A until those payments should be met. A now sues B for the balance due on lumber shipped; B pleads never indebted, but that A was indebted to him for the lumber withheld, the value of which had since risen. The Court in finding for the vendor, A, held that if he had not performed his contract as promptly as required, and refused to ship any more lumber under it, B, the vendee, could have abandoned it and sued for damages for the breach, but that he could not stand on the contract and insist on further shipments, when he was in default in making payments that were past due under it, at least without tendering these payments. *Harris Lumber Co.* v. *Wheeler Co.*, 115 S. W. 168.

The decision here is in harmony with those of similar cases. See *Nichols* v. *Scranton*, 137 N. Y. 471; *King* v. *Paist*, 161 Mass. 449. In *Rugg* v. *Moore*, 110 Pa. 242, in which the facts were identical with those of the case in hand the Court arrived at precisely the same conclusion in this language: "He (the plaintiff) paid the first draft and refused to pay the second draft, because he wanted to see whether defendants had shipped or would ship all the corn. This was not a sufficient reason for refusing to pay after he had accepted and received the corn. If then, the contract required payments on deliveries, and plaintiff wilfully refused payment, according to the contract, he thereby authorized defendants to rescind at their option."

Perhaps the most concise statement of the law as applied to this case may be found in the following extract:

"If the breach of condition of part payment is the result of accident or oversight, or is attended by other facts and circumstances which are inconsistent with an intention to abandon the contract, and which incline one to presume that the buyer intended to fully perform this contract, then the failure to pay an instalment at the agreed time does not work a forfeiture of the whole contract, but by tender of the future instalments of payments he may claim the benefits of the sale. But if the acts of the buyer in failing to make the payment of an instalment, clearly indicate his intention to abandon the contract, as where the refusal to pay is wilful, and not through a misunderstanding or accident, the entire contract is to be

SALES (Continued).

forfeited, and the seller cannot thereafter be compelled to perform the contract." Tiedemann on Sales, 210.

Here the failure to pay as admitted by B was not accidental but intentional, as shown by his own evidence. There was no tender to A of part-one payment, but an intentional withholding of same to compel the other party to perform; and it is well that a party who is himself in default, and without any offer to repair such default, cannot insist on performance by the other party as a condition precedent to his performance. *Spencer Med. Co.* v. *Hall,* 78 Ark. 336; *Dunham* v. *Pettee,* 8 N. Y. 512.

SURETYSHIP.

In the case of *French, Finch & Co.* v. *Hicks,* 114 S. W. 691, a bond which upon its face called for three securities was only signed by two sureties and then delivered by obligor to obligee. At the trial the sureties proved a parol agreement between themselves and the obligor that there were to be three sureties. The obligee at the time the bond was delivered to him by obligor had asked no questions about it nor did the obligor notify him of the parol agreement with the sureties.

Parol Conditions Outside the Bond

Held, that where the bond is perfect on its face the surety cannot escape liability by proving a parol condition with the obligor, but where the bond as in this case calls for three sureties and only two have signed the obligee had no right to assume that the two had annexed their signatures without condition and should have investigated.

"If there are names of persons appearing on the body of the bond or names of persons erased from the body of the bond, which erasure was visible to the obligee at the time of delivery it is sufficient to put him on notice." *Arkansas* v. *Churchhill,* 48 Ark. 426.

"It must not be supposed however that a surety is not bound whenever names appear in the body of the instrument which are not appended as signatures thereto, nor is there any presumption raised that those who have signed imposed any conditions that others should sign." Childs on Suretyship, 39. See also *People* v. *Stacey,* 74 Cal. 373.

The general rule seems to be that the parol agreement must be proved by the surety and in the absence of any express notice, there must have been some stipulation in the instrument itself or some erasure which would lead a prudent man to ask questions about the signatures of the sureties.

TRADE-MARKS.

A Family Surname Not a Valid Trade-Mark as Against Others of Same Name

The complainant and defendant were both in the business of manufacturing ink, mucilage, etc. Complainant had registered as its trade-mark under the Act of February 20, 1905, c 592, par. 1, the single word "Davids" in ordinary large type. Said word had been in use by complainant and its predecessor for more than ten years before the passage of the Act. Complainant's custom was to place said word at the top of its label, words indicating the character of the goods, such as "Ink," "Paste," etc., in the middle of its label, and its own name, "Thaddeus Davids Company, New York" at or near the bottom of the label. The words on the defendant's label, as well as their arrangement, were the same as on complainant's label with the exception that defendant's name "Davids Manufacturing Company" in prominent type was substituted for complainant's name. The name "Davids" is the surname of the members of complainant's company and of each of the defendants.

The Court held (1) that section 2 of the Act, providing that nothing shall prevent the registration of any trade-mark used by the appellant or his predecessor or assigns in commerce * * * for ten years next preceding the passage of the Act, did not make a surname a valid trade-mark which did not before constitute a valid trade-mark; (2) that since every man is entitled to use his name reasonably and honestly in every way, and cannot be obliged to abandon or unreasonably restrict such use, a family name is not the subject of a valid trade-mark as against others of the same name. The Court does not decide whether it would have been valid against persons of another name. *Thaddeus Davids Co.* v. *Davids, et al.*, 175 Fed. 792 (Circ. Ct. S. D. N. Y., 1908).

This decision is not within those cases which hold that an injunction will issue, defendant's use of his own name being an unusual one in the trade [*Royal Baking Powder Co.* v. *Royal*, 122 Fed. 337 (1903)], or because defendant so used his name in connection with other parts of complainant's trade-mark as to deceive the public, [*Clark* v. *Clark*, 25 Barb. 77 (1857)]; but seems to show a disinclination on the part of the courts to follow the decision in *Baker* v. *Sanders*, 80 Fed. 889 (C. C. A., 1897), where the injunction issued to enjoin defendant or at defendant's option, decree to be modified to require the affixing upon every package sold, in type as prominent as the title, of the statement that "W. H. Baker is distinct from and has no connection with the old established chocolate manufactory of Walter Baker & Company," the complainant.

TRUSTS.

Perpetuities: Trust to Take Care of Burial Ground

Testatrix in her will left a sum of money in trust to be put and kept at interest, and such interest to be annually expended in the care of the family burial lot, where she was to be buried. *Held:* A perpetual trust cannot be created to take care of a private burial lot, unless the creation of such a trust is authorized by statute. *Mason* v. *Bloomington Library Ass'n,* (Ill.), 86 N. E. 1044.

The law will not allow the creation of a perpetual trust since it "would stop commerce and prevent the circulation of property." *Johnson* v. *Holifield,* 79 Ala. 423. But charitable trusts constitute an exception to this rule, since the public has an interest in their objects. However here has been considerable difficulty in determining what is a charitable trust. The prevailing opinion is that a charitable trust is one in favor of a class, that could not be enforced by any individual of that class. So it has universally been held that a trust like that in the principal case is not a charitable one, and is therefore void under the rule against perpetuities. *Piper* v. *Moulton, 72* Me. 155; *Bates* v. *Bates,* 134 Mass. 110.

In many states statutes have been enacted authorizing the creation of such trusts. As a rule the trustee must be some public official body, such as the town council.

Under such a statute in Rhode Island, it was recently decided that the trust was valid though the council refused to accept the legacy, and the court declared itself unable to compel it to do so. *Rhode Island Hospital Trust Co.* v. *Town Council of Warwick* (R. I.), 71 Atl. 644.

UNFAIR TRADE COMPETITION.

Boycotts: The Meaning of "Unfair" as Used by Labor Unions

The plaintiff, a proprietor of a lumber yard, refused to discharge a non-union laborer in his employ. The defendant, the Building Trades Council, thereupon ordered out all union men in the plaintiff's employ, and notified employers of union labor who dealt with the plaintiff that he had been "placed on the unfair list of the Building Trades Council," and that "union men cannot work for or handle any material furnished by said Parkinson until further notice."

Held, that "unfair" as used by labor unions does not mean that the employer is guilty of fraud or dishonesty, but merely that he has refused to comply with the conditions upon which

UNFAIR TRADE COMPETITION (Continued).

union men will consent to remain in his employ or handle materials produced by him; that therefore the defendant was employing lawful means to obtain a lawful end and an injunction should be refused. *Parkinson* v. *Building Trades Council*, 98 Pac. 1027.

In construing the meaning of any word it is always necessary to pay especial regard to the circumstances under which it was uttered. Thus, as was pointed out in *Gray* v. *Building Trades Council*, 91 Minn. 171 (1903), whether a notification that an employer is "unfair" "would in any case amount to a threat or intimidation must be determined from all the facts and circumstances of each particular case." In the case under discussion the construction of the word "unfair" seems sound; but even if the court had read into it a more radical meaning the result woud probably have been the same as other passages of the notice doubtless contained moral intimidation. The court, however, adopts the dissenting opinion of Holmes, J., in *Vegelahn* v. *Guntner*, 167 Mass. 92 (1896), that harm may be intentionally inflicted in free competition "by the withdrawal, or threat to withdraw, such advantages from third persons who have a right to deal or not to deal with the plaintiff, as a means of inducing them not to deal with him, either as customers or servants," thus bringing California in line with New York and other jurisdictions which refuse an injunction against a boycott by moral intimidation. Cf. *Sinsheimer* v. *United Garment Workers*, 77 Hun, 215; *National Protective Ass'n* v. *Cummings*, 170 N. Y. 320; *Foster* v. *Protective Ass'n*, 78 N. Y. S. 860.