RECENT CASES

AGENCY.

Purporting to be agents for ship owners to be named later, plaintiffs made a contract with defendants to carry a certain cargo of timber to London at a certain rate. In reality plaintiffs were not acting as agents, but as principals in the transaction. Later, assuming to act as agents for defendants, plaintiffs made another contract, with certain shipowners to carry said cargo at a somewhat lower rate than that agreed upon with defendants. The cargo was carried to its destination. Defendants, contending that, as plaintiffs had made the contract as agents, they were estopped from suing as principals upon the contract, refused to pay the higher rate. Held that, as plaintiffs had in fact no principals, they were entitled to sue upon the contract and recover the freight reserved thereby. *Harper and Co.* v. *Vigers Brothers,* (1909) II K. B. 549.

Right of Agent to Sue as Principal

The generally accepted doctrine is that every man is entitled to the credit and character of the person with whom he deals, and he has a right to determine who this person shall be. Therefore, where a principal is named, the defendant, who may have dealt upon the faith and credit of the named principal, cannot be compelled to accept the credit of another. *Rayner* v. *Grote,* 15 Mees. & W. 359. But where the principal is unknown or unnamed, the defendant cannot be held to have contracted on the credit of a person whom he did not know, and as he must be liable to some one, he cannot be prejudiced by being held liable to agent as principal. *Schmaltz* v. *Avery,* (1851) 16 Q. B. 655.

In the case at bar the principle in *Schmaltz* v. *Avery, supra,* the authority of which was seriously drawn in question, was applied and reaffirmed. If anything, this case is stronger in its facts than *Schmaltz* v. *Avery,* where the contract was still executory and suit was brought to compel performance. In *Harper & Co.* v. *Viger Bros.,* the contract had been executed and suit was brought for the price. The defendants had received the benefit of the contract. It seems it must be immaterial whom they paid. The controlling question ought to be, Has the defendant been prejudiced? If so, the plaintiff should be estopped from substituting himself as principal after having avowed that he was acting as agent. But if the defendant has not been injured, he ought to be liable on the contract. At all events the case is of importance as serving to crystallize the law upon a very interesting point, upon which up to this time there has been very little authority.

BANKRUPTCY.

The plaintiff, the wife of a voluntary bankrupt, brought two actions against her husband's trustees in a state court, one to recover property alleged to have been wrongfully converted by the trustee, the other for damages sustained by the alleged misconduct of the trustee in seizing the property. On motion of the trustee, the Court granted an injunction against the prosecution of the first suit, but denied it in the

Action Against Trustee

BANKRUPTCY (Continued).

second. *Berman* v. *Smith,* 171 Fed. (1909) 735. When the property has come within the jurisdiction of the Court of Bankruptcy all questions concerning the title to the property will be determined by it. Such property is protected from interference by process of a state court, *Murphy* v. *Hofman Co.,* 211 U. S. 562. Replevin will not lie in a state court to recover the property, *In re. Russell,* 41 C. C. A. 323; *Freeman* v. *Howe,* 24 How. (U. S.) 450; *White* v. *Schloerb,* 178 U. S. 542. However, trover will lie. *In re Spitzer,* 66 C. C. A. 35; *In re Cauter,* 58 C. C. A. 260. The distinction is that by the action of replevin the property is seized and taken from the possession of the court, which under *Freeman* v. *Howe, supra,* is protected from such interference. Trespass will lie in a state court against a Marshall for the wrongful seizure of goods under a warrant. *McLean* v. *Mayo,* 113 Fed. 106; *Leroux* v. *Hudson,* 109 U. S. 468. In practically all cases where the property is wrongfully taken from the court's jurisdiction, return of such property may be enforced by summary proceedings, *White* v. *Schloerb, supra; Whitney* v. *Wenman,* 198 U. S. 539.

CARRIERS.

Rates of Fare

A contract between a city and a street railway company provided that "the present rates of fare" could be changed "but only with the consent of both parties." The "present rates of fare" were five cents for a continuous ride on a sale of tickets at the rate of six tickets for twenty-five cents, and free transfers at certain places both on the cash fares and on the tickets. Without the consent of the city the company made a rule by which transfers were issued only to persons paying a cash fare, and not to those paying fare by tickets.

The Court concludes that the sale of six tickets for twenty-five cents did not constitute a rate of fare of four and one-sixth cents, and therefore that the rule abolishing free transfers on tickets did not constitute a change in the rate of fare. The reasoning by which this conclusion is reached comprises the following steps:

(*a*) One ticket cannot be purchased for four and one-sixth cents. Six must be purchased.

(*b*) Therefore, beside the price of the ticket the company gets advance payment without paying interest.

(*c*) This advantage may be considered as equivalent to the amount abated in price.

(*d*) This advantage is at the cost of the purchasers of the tickets.

(*e*) Therefore the strip-tickets, so-called, are an adjustment on the basis of a five-cent fare, for the purpose of affording convenience to the public.

The Court further supports the above conclusion by showing that no other intention can reasonably be ascribed to the company than that the sale of tickets should constitute an adjustment on the basis of a five-cent fare. For, it is argued, it cannot be contended that the company was gratifying "a generous impulse prompted by an over-abundant income." Neither could their object have been to increase their revenues through enlarged traffic, for the sale of strip-tickets would not enlarge the traffic. And it is equally impossible to consider that they meant to give the advantage of a reduction in fare to those who could spare twenty-five cents at one time. There-

CARRIERS (Continued).

fore, continues the Court's argument, the first conclusion must be the correct one.

The whole argument is unsatisfactory. In the first place there is no justification for the assumption that the advantage gained by advance payment is equivalent to the abatement in the price of a ride. That step is a strained one, evidently utilized for the purpose of reaching a particular conclusion.

The secondary argument, in support of the conclusion, consists in an elimination of all other possible views of the relation of the strip-tickets to the five-cent fare. The first and last of these need no comment. As to the second, it is submitted that the most usual and reasonable motive in offering such an opportunity as a sale of six tickets for twenty-five cents is to enlarge revenues by increasing traffic, and yet the Court, in the most summary way, says that it cannot be supposed that this was the object of the company.

The grounds of the decision must certainly be considered doubtful. *City of Phila.* v. *Phila. Rapid Transit Co.* 73 Atl. 923, 1909.

CORPORATIONS.

Rights of Preferred Stockholders in Surplus Dividends

In a recent Pennsylvania case where the question was raised as to whether preferred stockholders could participate in the surplus profits remaining after the preferred dividend and an equal dividend on the common stock had been paid, it was held that where there was no express stipulation in the contract to the contrary, the preferred stockholders should share equally with the holders of the common stock in these profits. They stand in exactly the same position as regards the corporation and outside creditors, except that the former are entitled to their guaranteed dividends, before any dividend can be paid to the latter. *Sternbergh* v. *Brock,* 225 Pa. 279. The exact case as presented here has rarely arisen, chiefly because in most certificates of stock there is an express provision as to whether the preferred stockholders are entitled to anything beyond their guaranteed dividend or not. In *Scott* v. *Baltimore & Ohio R. R.,* 93 Md. (1901) 475, practically the same question came up and the opposite conclusion was reached. The underlying ground of the decision was that the investing public assume and understand that preferred stock is limited to its specified dividend, when there is no express provision one way or the other. It would seem on principle that the decision of the Pennsylvania case is the sounder one. "A share of stock is a share of stock, whether preferred or common, and there is nothing in the word 'preferred' which restricts or cuts down the rights which at common law are inherent in all stock." 1 *Cook on Corporations,* Sec. 269, note. Moreover, it is settled law that on dissolution holders of both kinds of stock share equally in the assets remaining after the debts have been paid, even when such assets are in excess of the par value of the stocks held. *Gordon* v. *Richmond, Fredericksburg & P. R. R. Co.,* 78 Va. (1884) 501. It would seem that the same rule ought to be applied in the distribution of assets before as well as after dissolution. The law in Pennsylvania is settled by our principal case and *Fidelity Trust Co.* v. *Lehigh Valley R. R.,* 215 Pa. (1906) 610. Elsewhere it may still be considered an open question.

CRIMES.

Intent in Assault

On an indictment for assault with intent to kill, the refusal of the lower court to charge the jury that the essence of the crime, as alleged in the indictment, was the felonious, malicious and wilful intent, and that if they should find from the evidence that the prisoner did not assault the said person as alleged in the indictment they should acquit him, was held correct by the Criminal Court of Appeals of Oklahoma in the case of *Tyner* v. *United States,* 103 Pac. 1057, 1909.

This is contrary to the current of authority, which holds that it is necessary in order to convict one of the crime of assault with intent to kill, to find that the defendant had the specific intent to take the life of the contemplated victim. *Simpson* v. *State,* 59 Ala. 1, Mikell's Cas. 345; *Rex* v. *Duffin, Russ & R.* 365, 1818, Mikell's Cas. 167; *Rex V. Holt,* 7 Carr. & Payne, 518, 1836, Mikell's Cas. 169; *Barcus* v. *State,* 49 Miss. 17, 1873; *State* v. *Reed,* 40 Vt. 603, 1868; *Reg* v. *Donovan,* 4 Cox. C. C. 401, 1850; Bishop's Criminal Law, 8th Ed., § 741.

HUSBAND AND WIFE.

Tenancy by Entireties

A husband and wife held land under a deed "as joint tenants with fee to the survivor." The husband conveyed his interest in the tract to one S. In an action by S for partition of lands, the wife objected on the ground that the estate held by her and husband was a tenancy by the entirety; that, therefore, the husband was without power to convey and conveyance to S was void. The Court held, (1) by the Civil Code of California, tenancy by entirety was not recognized; (2) if it were, the deed in question created merely a simple joint tenancy. *Swan* v. *Walden,* 103 Pac. (Cal., 1909) 931.

The estate of tenancy by entirety was based upon the common-law fiction of the unity of husband and wife and was held to exist wherever, if the marriage relation were not present, the holders would be simply joint tenants. The theory was that the spouses were seized, not of the moieties, but of the entireties, and, unlike joint tenancy, where an estate by entirety obtained, neither spouse could convey his or her interest so as to affect the right of survivorship in the other.

The law in the United States is by no means uniform upon the subject of entireties. Some courts, as Ohio, never recognized the doctrine. Others have abolished it by statute. Still others prefer to follow the rule laid down by Indiana in *Thornburg* v. *Wiggins,* 135 Ind. (1893) 173, which, while recognizing and preserving such tenancies, permits the establishment of a joint tenancy only, with the rights of partition incident thereto, if adequate language indicating an intention to create such a tenancy is employed in the deed. Such a rule the California court in *Swan* v. *Walden, supra,* intimates it would be inclined to follow, if the question were not already definitely settled by the code.

In Pennsylvania, on the other hand, tenancy by entirety exists with all its common law incidents. Though the grant is to husband and wife "as tenants in common, and not as joint tenants," they are still regarded in law as holding by entireties. *Stuckey* v. *Keefe,* 26 Pa. (1857) 397; *Branberry's Estate,* 156 Pa. (1893) 628. Nor in Pennsylvania, contrary to the rule prevailing in many states, is the unity of husband and wife, in regard to their joint property, in any way affected by acts relating to the separate property of married women, nor by acts

HUSBAND AND WIFE (Continued).

abolishing survivorship among joint tenants. *Diver* v. *Diver,* 56 Pa. (1867) 106.

See further, Pepper & Lewis's Digest of Pa. Decisions, Vol. 8, Col. 13,954.

INJUNCTIONS.

Unfair Trade Competition

Where the A. Co., for their own advantage, used various means to solicit customers under contract with B, a rival power supplying company, *inter alia,* offers of exceptional economic advantages and also offers to indemnify; the B Co. was held entitled to an injunction to restrain the A. Co. from making the offers to indemnify the former's customers against breaches of their contracts, but the prayer was denied as to the solicitation of B's customers through persuasion by false statements and offers of economic advantage. *Citizen's Light, H. & P. Co.* v. *Montgomery L. & W. P. Co.,* 171 Fed. (C. C. 1909) 553.

That the intentional procurement of a violation of another's contractual rights is unlawful was recognized in the English law in *Lumley* v. *Gye,* 2 E. & B. 215 (1853). The enticement of servants had long been held an actional wrong to the master at common law. *Adams* v. *Bafeald,* 1 Leo. 240. A master-jobber may have an action against one who procures his journeymen to abandon uncompleted work, *i. e.,* to leave before the completion of their contracts. *Hart* v. *Aldridge,* 1 Cowp. 54. And the rule is recognized as late as 1847. *Hartley* v. *Cummings,* 5 C. B. 247. The same underlying principle was applied to the intentional procurement of breaches of contracts for personal services in *Lumley* v. *Gye, supra.*

The rule was adopted in America in *Walker* v. *Cronin,* 107 Mass. 555 (1871), and it is now well recognized that its application is not limited to contracts for personal services alone. *Beattie* v. *Callanan,* 81 N. Y. Sup. 413 (1903). On facts parallel to the principal case offers to indemnify against actions for breaches of contracts with the complainant were restrained in *American Law Book Co.* v. *Edward Thompson Co.,* 84 N. Y. Sup. 225 (1903). So also, threats of violence and intimidation to induce a breach of another's contract with the plaintiff were held illegal and were restrained. *Knudsen* v. *Benn,* 123 Fed. 636. The same result is reached when the means used is threats of business loss, or other economic pressure. *Temperton* v. *Russell,* 1893, 1 Q. B. 715; *Gatzow* v. *Brening,* 49 L. R. A. (Wis. 1900) 475; *Beattie* v. *Callanan, supra.* Therefore, so far as the action of the court is concerned in restraining the defendant company from making offers of indemnity to the complainant customers to induce them to break their contracts, the principal case would seem to be in accord with the authorities.

But it has been held that though the means used are but offers of economic advantage in the sense of better goods and better rates, the intentional inducement of a breach of a known contract with the plaintiff may give a right to an action at law and will be restrained in equity. In a leading English case, peaceful persuasion and offers of higher wages gave a right to action. *Bowen* v. *Hall,* 6 Q. B. D. 333. To the same effect is a case in New York, where the contract was not for services of any kind but for the exclusive handling of certain dress patterns. *Standard Fashion Co.* v. *Seigel-Cooper Co., and The Butterick Publishing Co.,* 157 N. Y. 60 (1898). A rival may lawfully solicit the future business of the complainant's customers, but an action will lie if therein he induces them to break existing contracts, though equity may not, on

INJUNCTIONS (Continued).

the particular facts, interfere by the restraining writ. *Proctor and Collier Co.* v. *Mahin,* 93 Fed. (1899) 875. In a New Jersey case the Court of Chancery has gone so far as to restrain "in any manner" the defendant from acting to induce third persons to break their contracts with the complainant. *Jersey City Printing Co.* v. *Cassidy,* 63 N. J. E. 759. Inducing by mere peaceful persuasion the breaking of contracts with the plaintiff, will be enjoined under a statute held to be declaratory of the common law. *Southern Ry. Co.* v. *Machinists' Local Union,* 111 Fed. (C. C. 1901) 49. Moreover, the means used in the leading case on the rule, *Lumley* v. *Gye,* was but peaceful persuasion and offers of economic advantage.

The weight of authority would therefore seem to be against the ruling of the Court in our principal case in its refusal to restrain peaceful persuasion and offers of economic advantages intended to induce breaches of contract. The cases do not seem to have raised any question as to the means employed. The famous dissenting opinion of Coleride, J., in *Lumley* v. *Gye,* was not as to that point of objection, nor of Coleridge, the younger, in *Bowen* v. *Hall,* the two cases which have established the whole doctrine in England. It is, perhaps, conceded that a case might arise where the motive of the defendant would furnish him an excuse, but that motive is not one of self-advancement at the expense of the broken contract with the plaintiff. *Bowen* v. *Hall; Walker* v. *Cronin, supra.* Nor on the facts of these cases, does there seem to be a sound distinction between the means used. The gist of the defendant's wrong is the intentional inducement of a breach of another's contract.

Mandatory Injunction: Supervision of the Court

In the case of *McCabe* v. *Watt,* 73 Atlantic (Pa.), 453 (1909), the Court was asked to compel the owner of a coal mine to extinguish a dangerous mine fire. It appeared that $35,000 had been spent unsuccessfully in an effort to put out the fire, and after a year an a half of work, the attempt had been abandoned.

An injunction was refused on the ground that too great an amount of supervision by the Court would be required. Justice Elkin said: "It will require the employment and supervision of a large force of men for a long period of time. Skillful and experienced men must be employed to direct the work, all of which involves the doing of something from day to day for an indefinite period, and this is what the Courts have said will not be undertaken in the enforcement of their decrees, and, if foreseen, no such decree will be entered."

This is a well-known principle of equity jurisdiction. See *Iron Age Publishing Co.* v. *Western Union Telegraph Co.,* 83 Ala. 498 (1887), in which Court said it couldn't undertake the collection of news for the Associated Press for an indefinite period, and *Ross* v. *Union Pacific Railway Co.,* 1 Woolworth, 26 (1863), in which Court said it could not supervise the building of a railway. In the latter case there is an excellent review of the cases.

Injunction to Restrain Action in Foreign Court

In *Van Bermuth* v. *Van Bermuth,* 73 Atl. (N. J. Ch. 1909) 1049, the complainant filed a bill in equity to restrain the respondent from prosecuting a suit for separation in New York. Both the parties were residents of New Jersey. Complainant petitioned for a divorce *a vinculo matrimonii* on the ground of desertion. The respondent filed an answer and a cross petition and later brought an action in New York for separation. The injunction was granted on the ground that

INJUNCTIONS (Continued).

the suit in New York was unnecessarily oppressive to the complainant, that the respondent could obtain all the relief asked for in New Jersey, and on the general ground that the New Jersey court had first acquired jurisdiction. Although at one time such an injunction was refused, *Love* v. *Baleer,* 1 Ch. Cas. 67, on the ground that an English court had no authority to bind a foreign tribunal, the decision and the reasoning of this case are now completely overthrown and the doctrine is established in favor of granting the relief. (Story, Eq. Jurisp., § 899.) The courts in granting the relief do not assume to bind a foreign court. But the power over persons within the jurisdiction and amenable to process is inherent in courts of equity, and it is upon this ground that the jurisdiction is exercised. Obedience to its orders is enforced by process *in personam.*

In the case at bar the Court, in issuing the injunction, was clearly sustained by former decisions of the same court and by abundant authority in other states. A review of the cases shows that the relief has been granted to prevent vexatious suits. *Keyser* v. *Rice,* 47 Md. 203; where the foreign suit is designed to avoid domestic laws. *Margarum* v. *Moon* (1902), 63 N. J. Eq. 586, 53 Atl. 179; *Cole* v. *Cunningham,* 133 U. S. 107; to restrain foreign action in administrative proceedings. *Baillie* v. *Baillie,* L. R. 5 Eq. 175; in insolvency proceeding, *Deleon* v. *Faster,* 4 Allen, 545, 7 Allen, 57; in attachment cases, *Keyser* v. *Rice,* 47 Md. 203, and in divorce cases, *Huettinger* v. *Huettinger,* 43 Atl. (N. J. Ch. 1899). It seems that, except under very exceptional circumstances, the parties must be residents, and that the domestic court has first acquired jurisdiction of the case. *Harris* v. *Pullman,* 84 Ill. 20, 1876.

MASTER AND SERVANT.

Assumption of Risk: Master's Promise to Repair

In the case of *Brousseau* v. *Kellogg Switchboard Co.,* 122 N. W. (Mich. 1909) 620, a distinction between promises to repair simple and complicated machinery, affecting the servant's assumption of risk was under discussion.

The mechanism in question was a pair of tongs used in connection with a hoist in loading logs on a railroad freight car. It was the plaintiff's duty to attach the tongs to the logs and, as the tongs were dull, the logs were apt to slip out while being hoisted in the air. As this was dangerous to the plaintiff, who was working beneath the hoist, he notified the defendant, who promised to have the tongs sharpened. Relying on this promise, the plaintiff kept on working and was struck by a falling log, which slipped out of the tongs.

Since the machinery in need of repair was simple machinery, it was contended that a reliance on the promise to repair did not suspend the plaintiff's assumption of the risk of the employment.

The Court, however, refused to recognize any distinction between simple and complicated machinery and held the plaintiff's assumption of risk was suspended by the promise. In some jurisdictions the principle contended for is recognized, notably in Illinois. *Webster Mfg. Co.* v. *Nisbett,* 205 Ill. 273 (1903), *Morden Frog Works* v. *Fries,* 228 Ill. 246 (1907). A New York case also hints at the same result. *Marsh* v. *Chickering,* 101 N. Y. 396 (1886). A better view, it would seem, is that the difference between simple and complicated machinery does not affect the assumption of risk, but goes to the question of contributory

MASTER AND SERVANT (Continued).

negligence. See *Hotel Co.* v. *Kaltenbrun,* 80 S. W. (Ky.) 1163 (1904), in which Court said "difference between a simple and a complex machine vanishes when the servant fully understands it is dangerous to further use it."

MUNICIPAL CORPORATIONS.

In *Commonwealth* v. *Maletsky,* 89 N. E. (Mass.) 245, the defendant appealed from a conviction for violating a municipal ordinance. This provided that no one should use any building for the purpose of picking, sorting, or storage of rags without a permit from the chief of the fire department. The ordinance was held unconstitutional, as it vested the arbitrary power in an administrative officer of permitting or refusing to permit, the carrying on of a business lawful in itself and not prohibited by legislation. This follows the doctrine announced in *Yick Wo.* v. *Hopkins,* 118 U. S. (1885) 356, where the ordinance was to prevent the carrying on of certain laundries in San Francisco without a permit. It was there said that in so far as an ordinance restricts the absolute dominion of an owner over his business, it should furnish a uniform rule of action, and its application cannot be left to the arbitrary will of the governing authorities. There is another line of cases which come to a distinctly opposite conclusion. In *St. Louis* v. *Fischer,* 194 U. S. (1903) 361, an ordinance was sustained which prohibited the establishment of cow stables in the city without a permit from the council. It was held that the fact that this ordinance gave the council power to discriminate against one man and in favor of another would not render it void, as the Court was bound to assume that such discrimination will be made in the best interests of the public. A similar ordinance as to the keeping of swine within the city limits was upheld as constitutional in *Quincy* v. *Kennard,* 151 Mass. (1890) 563. It would seem, therefore, that the right of the municipality to vest in its council or some municipal officer this arbitrary discretion by an ordinance, depends largely on the nature of the business to be engaged in. Where it approaches in its nature to a nuisance and the ordinance is passed in good faith for the preservation of the public health, it will generally be upheld. But where the business is not harmful by nature and especially where there is an apparent underlying object of unfair discrimination, it will not be upheld. *Austin* v. *Murray,* 33 Mass. (1834) 121. The avowed purpose of the ordinance in *Yick Wo.* v. *Hopkins, supra,* was to drive the Chinese out of the laundry business.

Ordinance: Regulating Business

NUISANCE.

The playing of baseball on Sunday, in a park maintained by a corporation for gain, was enjoined as a nuisance at the suit of private citizens in the recent case of *McMillan* v. *Kuehnle,* 73 Atl. 1054 (N. J.), 1909. This is not a new case in New Jersey, but follows and tends to strengthen the case of *Seastream* v. *New Jersey Exhibition Co.,* 58 Atl. 532, 1904.

Sunday Baseball

The steps by which the courts of New Jersey have established this principle are progressive. In the case of *Cronin* v. *Bloemecke,* 43 Atl. 605, 1899, and *Gilbough* v. *West Side Amusement Co.,* 53 Atl. 289, 1902, the courts followed the ruling in the English case of *Walker* v. *Brewster,*

NUISANCE (Continued).

L. R. 5 Eq. 25, 1867. And held, that where one is carrying on a business which is the means of gathering together a large crowd of disorderly persons, who are a nuisance to the surrounding residents, he may be restrained at the suit of one of these residents. It was further determined that what may not constitute a nuisance through the week may nevertheless amount to a nuisance on Sunday. Hence equity would restrain by preliminary injunction the playing of baseball on Sunday in such a way as to amount to a nuisance.

This principle was further extended when Vice Chancellor Pitneg in *Seastream* v. *New Jersey Exhibition Co., supra,* restrained the playing of Sunday baseball entirely. *Dunham* v. *Binghamton Baseball Association,* 89 N. Y. Supp. 762, 1904, and *Commonwealth, ex rel.,* v. *Rothrock,* 2 Northampton County Reports, 249 (Pa.), 1890, are in accord.

SURETYSHIP AND GUARANTY.

Liability of Surety for Nonpayment of Material Men

The surety on the bond of the Neafie and Levy Ship and Engine Building Company, which had contracted with the United States for the construction of four steel vessels for planting submarine mines; the bond being conditioned, *inter alia,* that the contractor should "promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in such contract," as required by Act of Aug. 13, 1894, C. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), is not released from liability to a sub-contractor by the taking by the latter of a note from the contractor for his claim due in three months, but which did not mature until final settlement had been made between the contractor and the United States and a few days after receivers in insolvency had been appointed for the contractor. The materials in question, viz., four feed-water heaters, for use in said boats, were furnished to the contractor on March 4, 1904. The notes were accepted by the material man, the use-plaintiff in this action, on September 15. 1904, and fell due on December 15, 1904. The date of the final payment by the Government was November 3, 1904.

United States to use of Griscom-Spencer Co. v. *U. S. Fidelity and Guaranty Co.* (C. C. E. D. Pa. Aug. 16, 1908) 71 Fed. 268.

As this case has been appealed comment is deferred.

For other decisions involving the liability of the surety on bonds required by the Act of Aug. 13, 1894, to be given by contractors on government contracts see:

U. S. to use, etc., v. *U. S. Fidelity and Guaranty Co.,* 171 Fed. 247 (1909); *Guaranty Co.* v. *Pressed Brick Co.,* 191 U. S. 416 (1903); *U. S.* v. *American Bonding and Trust Co.,* (1898) 32 C. C. A. 420, 89 Fed. 925 (4th Circuit); *U. S. to use, etc.,* v. *Hazzard,* 53 N. Y. App. Div. (Hun.) 410 (1900).

Necessity of Notice to Guarantor of Acceptance

In order to obtain credit for a corporation, two of its officers guaranteed plaintiff payment in full for all goods sold by him to the corporation. The guaranty was expressed to be in consideration of the sum of one dollar paid to the guarantor by the guarantee, the receipt of which was therein acknowledged. *Held,* that such a contract was not a mere offer of guaranty requiring notice of acceptance, but was complete from delivery and sale of goods in reliance thereon.

SURETYSHIP AND GUARANTY (Continued).

Bond v. *John V. Farewell Co.*, 172 Fed. 58. In England the law is settled that in all guaranty contracts notice of acceptance is unnecessary. *Oxley* v. *Young*, 2 H. Bl. 613. The majority of American jurisdictions take the opposite view. *Lee* v. *Dick*, 35 U. S. (1836) 482. *Central Bank* v. *Shine*, 48 Mo. (1871) 456. However, it is generally settled that the recital of a consideration obviates the necessity of acceptance, and our principal case is in strict accord with rule. *Davis* v. *Wells, Fargo & Co.*, 104 U. S. (1881) 159. The recited consideration, though merely nominal, is regarded as conclusive evidence that the guaranty has been made with the assent of the guarantee, communicated to the guarantor. To work this result the consideration must move not from the party guaranteed but from the guarantee himself to the guarantor. And this must affirmatively appear in the contract or the guarantee is not relieved of the necessity of giving notice of acceptance to the guarantor. *Barnes Cycle Co.* v. *Reed*, 84 Fed. (1898) 603; *Davis* v. *Richards*, 115 U. S. (1885) 524.

TORTS.

Right to Set Spring Guns to Prevent Statutory Burglary

It being burglary by the Code of Alabama to break and enter a store with felonious intent, one who is injured by the discharge of a spring-gun while so entering a store, has no right of action against the owner. *Scheuermann* v. *Scharfenberg*, 50 So. Rep. (Ala. 1909) 335.

A full discussion of the principle here involved, although as matter of dictum, resulted in the same conclusion in *State* v. *Moore*, 31 Conn. 479. A man may do indirectly what he may do directly. Therefore the right to set spring guns is dependent upon the existence of a right to shoot in one who is present. *Johnson* v. *Patterson*, 14 Conn. 1.

The law will justify the taking of life, when it is done from necessity to prevent the commission of certain forcible and atrocious felonies, 1 East. P. C. 271; *Oliver's Case*, 17 Ala. 587, of which burglary is one. *Idem;* Foster C. L. 259. And the doctrine applies equally to offenses made burglary by statute. *State* v. *Moore, supra; Pond* v. *People*, 8 Mich. 150 (1860). Therefore, since an attempt like the present is burglary in the State of Alabama, 1907 *Code*, one present would have been justified in using a deadly weapon, if necessary to prevent the felony. *Storey* v. *State*, 71 Ala. 330; *People* v. *Cook*, 39 Mich. 236; 33 Amer. Rep. 380. But in order to prevent the commission of the felony, one has no right to use more force than is reasonably necessary for that purpose. *State* v. *Harper*, 51 S. W. (Mo. 1899) 89; *Horton* v. *State*, 35 S. E. (Ga. 1900) 659. The use of deadly weapons under the rule, is only justifiable when reasonably necessary and from the law's interest in human life, is the ultimate right. *Weaver* v. *State*, 19 Tex. App. 547. The defendant must show this necessity to establish his defense. *Burton* v. *Commonwealth*, 66 S. W. (Ky. 1902) 576. Therefore, as he can do indirectly only what he can do directly, can he resort to the use of deadly weapons without showing that their use was from all the circumstances of the case reasonably necessary? Or shall he, by absenting himself, be allowed to make immediate use of the highest right the law gives him, but which is his to use only when a reasonable man would have thought it necessary?

TORTS (Continued).

There seems to be no authority to support the affirmative. In criminal law it is at least manslaughter to unnecessarily kill in resisting an attempt by the deceased to commit any felony. *Perugi* v. *State,* 80 N. W. (Wis.) 593. In civil actions, justifiable resistance made by unnecessarily excessive force, becomes unjustifiable. 1 *Cooley Torts,* 190. If unnecessary and excessive, an action will lie. *Dole* v. *Erskine,* 35 N. H. 503. The question of necessity and of excessiveness is one of fact. I *Cooley Torts.* 195. The defendant would seem, therefore, to have been entitled to a charge to the jury on the point of necessity.

That the Court failed to discuss this question or to act upon it may be due to a desire to give an owner a practical latitude in the protection of his property when absent.

This may be a proper business administration of the law, but the doubt that remains, even in this view of the case, is, that the defendant's justification for the use of deadly weapons, and *a fortiori* for a killing, is to prevent the forcible felony and not to protect his property, for on the latter ground the law is clear that one may not take life. *Commonwealth* v. *Drew,* 4 Mass. 391; *State* v. *Shipley,* 10 Minn. 223.

Liability of a Witness in a Civil Action for Perjury

A civil action was brought by a party to a former action against a witness therein, alleging wilful and false testimony, resulting in the plaintiff's defeat. In affirming judgment of nonsuit it was held that such an action did not lie, unless there is a statute giving the remedy. (*Godette* v. *Gaskill,* 65 S. E. (N. C. 1909) 612.

This decision is sound. (*Cunningham* v. *Brown,* 18 Vt. 123, 46 Am. Dec. 140; *Smith* v. *Lewis,* 3 Johns (N. Y.) 165; *Barber* v. *Lesiter,* 7 C. B. U. S. 188. And this is true of subornation of perjury. 1 Cyc. 687. The proper procedure is by indictment for perjury. *Barber* v. *Lesiter, supra.* The reason for the rule is stated by Redfield, J., in *Cunningham* v. *Brown, supra,* that to allow the action would virtually put it in the power of every suitor to re-examine every suit and to try the witnesses for perjury by instituting against them a civil suit. See also, Freeman on Judgments §289.

TRADE-MARKS.

Assignment of Business: Reservation of Trade-mark Rights

A, trading as the W. Co., acquired a trade-mark. Under a verbal contract, the business of the W. Co. was transferred to B, A agreeing that while he should remain in B's employ, B would have the use of the trade-mark. A left B's employ and B continued to use the trade-mark. *Held,* B had no right to the trade-mark after A left his employ. *Nelson* v. *J. H. Winchell Co.* 89 N. E. (Mass. 1909) 180.

The right of the vendor of an established business to reserve the trade-mark property thereof, is here raised apparently for the first time. One may sell his general property and make valid special reservation of a part thereof. Does the nature of an impersonal trade-mark raise an exception to the general rule? In answering it is pertinent to examine the relation of the trade-mark to the business in which it is acquired.

There is no exclusive ownership of the symbols which constitute a trade-mark apart from the use and application of them. The right to their exclusive use and application in a particular business is the

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subject of the property therein. *Leather Cloth Co.* v. *Amer. Leather Cloth Co.*, 10 Jur. N. S. 81. A trade-mark has no separate abstract existence, but is appurtenant to the goods designated. *Paul Trade-Marks*, §18. When the good will in a business ceases to be of value, *ipso facto* the exclusive right to use the trade-mark, which is the property in it, ceases. *Royal Baking Powder Co.* v. *Reynolds*, 70 Fed. 376, Affirmed 55 U. S. App. 575. Nor can a trade-mark, aside from the business in which it is used, be assigned and a good title given to it. *McVeagh* v. *Cigar Factory*, 32 Pat. Off. Gaz. 1124, which is summarized in the rule that a trade-mark cannot be conveyed in gross. *The Fair* v. *Morales*, 82 Ill. App. 499. Thus the legal existence of a trade-mark necessarily requires a conception of it as an adjunct to the business in which it is used.

The result is the general rule that a sale of the business in which an impersonal trade-mark has been acquired, carries with it the right to the exclusive use of the mark. *Williams* v. *Farrand*, 88 Mich 473; although it is not mentioned in the transfer of the business. *Fish Bros. Wagon Co.* v. *La Belle Wagon Works*, 82 Wis. 546. And after such a sale, although no mention be made of the trade-mark, the vendor may be restrained from making further use of the trade-mark. *Shipwright* v. *Clements*, 19 Wkly. Rep. 599 (1871). In apt words it is said that the business is the substance and the trade-mark the shadow, and the shadow cannot be separated from its substance. *Falk* v. *American West Indies Trading Co.*, 180 N. Y. 445.

These authorities, which are not questioned save by anomalous cases, see *Note*, 1. L. R. A. N. S. 704, support the statement that a trade-mark cannot be assigned independently, and that a sale of the business *per se* conveys title to the impersonal trade-mark therein. But authority is silent as to the right to sell the business and not the trade-mark.

Lord Chancellor Westbury says it should not be understood that the business might be sold in one lot and the trade-mark as a separate lot, nor could they be sold to different persons. *Hall* v. *Barrows*, 10 Jur. N. S. 55. Likewise the question is approached when it is stated that the right to the exclusive use of a word or symbol as a trade-mark, is inseparable from the right to make or sell the commodity which the mark has been appropriated to designate. *Atlantic Mill Co.* v. *Robinson*, 20 Fed. 217. To the same effect are dicta in several cases. "It may be stated as a general principle that the trade-mark cannot be separated from the good will." *Prince Mfg. Co.* v. *Prince's Metallic Paint Co.*, 20 N. Y. Supp. 462. See the discussion in *Chadwick* v. *Corell*, 23 N. E. (Mass.) 1068 and *McVeagh* v. *Cigar Factory*, *supra*. So the question may be said to be doubtful.

The decision in the principal case on the particular facts would seem correct. By the contract that was made, the vendee of the business impliedly agreed not to use the trade-mark after the vendor left his employ. Whether until that time he was a licensee or a vendee of the trade-mark rights, is uncertain and undecided. But he contracted to cease using it when the other left him and there would seem no difficulty in enforcing the contract. But it does not follow from the complainant's success here that he would have succeeded against any other persons who might seek to use the mark in question. From the cases cited, he would probably not do so. His success would depend upon his ability to show an exclusive right to the use. But that exclusive right to use the mark does not exist apart from the busi-

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ness in which it is used. *Witthaus* v. *Braun,* 44 Md. 303. In *Gear* v. *Kenyon,* 10 Hawaiian 162, a vendor of the business failed to restrain the use by third persons of the name of that business and it was said, "Property in a trade-mark cannot be retained independently of the article which it symbolizes."

WILLS.

Rights of Life Tenant in Legacy of Consumables

A farmer bequeathed all his personalty, some of which was specifically mentioned, as houses, cattle, furniture, etc., to his wife for life, remainder to his son. In order that his rights might not be prejudiced by the consumption and deterioration of the personalty, the remainderman filed a bill praying that the property be sold, the income from the proceeds secured to the life tenant, and the principal reserved for him. *Held,* that the wife was entitled to use for her own benefit the personal property, consuming such articles as could not be otherwise enjoyed, and that the remainder, if any, passed to the son only upon her death.

Underwood v. *Underwood,* 50 So. (Ala. 1909) 305.

At common law there could be no limitation over of a chattel devised, but the donee of a life estate in personalty took absolute title, the remainder being void both in law and equity. Later, however, equity treated such limitations good as executory devises.

The majority of courts,, in dealing with goods consumable in the use, now draw a distinction between a specific and a general or residuary bequest. Where the bequest is specific, the general rule is that the life tenant takes an absolute title to the chattels, or at least that his estate is not answerable to the remainderman for such as are consumed by him. *2 Kent. Com.* 353. *Randall* v. *Russell,* 3 Meriv. 194. But where the bequest is general or residuary, unless there is an indication of an intention on the part of testator that the life tenant should enjoy the property in specie, the personalty should be sold, and only the income from the proceeds will be enjoyed by the life tenant, the principal being reserved for the remainderman. *Woods* v. *Sullivan,* 1. Swan. 507. *Bartlett* v. *Patton,* 33 W. Va. (1889) 71.

There is also respectable authority for the view that, regardless of the nature of the bequest, whether specific or general, a life tenant takes absolute title to consumables. *Seabrook* v. *Grimes.* 107 Md. (1908) 410; *Holman's Appeal,* 24 Pa. (1854) 174.

But whether in this particular case the bequest is treated as specific or general, the conclusion remains the same. The case turns upon the question of the intention of the testator, which can be sufficiently gathered from the general tenor of the will, and on the ground of intention alone, the decision must be regarded as essentially sound and just.