RECENT CASES.

ACCOUNT—PENNSYLVANIA PRACTICE ACT, 1915—An action of account being brought, it was *held,* that account is not assumpsit and hence not within the Practice Act. Masitis v. St. Vincent Society, 25 D. R. (Pa.) 991.

The Practice Act applies to actions of assumpsit and trespass only. P. L. 1915, 483. By the Act of May 25, 1887, P. L. 271, the actions of assumpsit, debt and covenant are to be sued in the name of assumpsit. Account is not included.

On showing accountability, the plaintiff could sue in debt or account by 1597. Account originally lay against bailiffs. Y. B. 43 E. III, F. 21, pl. 11. It was extended to guardians in socage by statute. Y. B. 21 E. IV, 10, pl. 30, and to receivers by a fiction that the defendant was the plaintiff's bailiff. Y. B. 41 E. III, 10, pl. 5. Later the distinction between debt and account, strictly made in the earlier cases, Y. B. 6 H. IV, 7, pl. 33, began to break down, Y. B. 18 E. IV, 23, pl. 5, and, finally, where the defendant was accountable, the plaintiff had an option of debt on account. Lincoln v. Topliff, Cro. El. 644 (1597); Clark's Case, Godbolt 210 (1612). Indebitatus superseded debt, and after doubt, Hussey v. Fiddall, 12 Mod. 324 (1699), it was held that indebitatus would not lie against a factor on evidence of accountability. Lincoln v. Parr, 2 Keble 781 (1671). This was overruled by Lord Mansfield in Dale v. Sollet, 4 Burrow 2133 (1767).

Pennsylvania seems to allow indebitatus to lie on evidence of accountability, Giles v. McKinney, 6 W. & S. 78 (1843), by taking the "money had and received to the plaintiff's use" count literally. See C. C. Langdell, 2 Harv. L. R. 241, 254, 255. In the absence of any equity court, the scope of the action of account was widened, James v. Browne, 1 Dallas 339 (Pa. 1788), but debt, account and assumpsit seem to have been allowed at the plaintiff's option when the defendant was accountable. Bredin v. Dwen, 2 Watts 95 (Pa. 1833). It is only when the accounts are very complicated or when other equities intervene, Stitzer v. Fowler, 214 Pa. 117 (1906), that assumpsit is not allowed; then the remedy must be a bill in equity for an accounting. Reeside v. Reeside, 49 Pa. 332 (1865); Burton v. Trainer, 27 Pa. Super. 626 (1905).

Though the existence of the two actions for the same situation does not preclude the possibility of account being brought, yet, unless the plaintiff has distinctly labelled his action as account, it should be construed as debt, since by section 19 of the Practice Act the defendant may be obliged to account in an action of assumpsit.

See also Crawford D. Hening, 43 U. PA. L. REV. 764; J. B. Ames, 3 Sel. Essays Anglo-American Legal His. 259, 295; M. C. Klingelsmith's Statham, note, p. 20.

BANKS—DEPOSITS—RELATION OF BANK AND DEPOSITOR—A depositor died leaving an insolvent estate, the bank holding certain notes of his not due at the time of his death *Held:* The bank can apply the balance of the deposit as it existed at the depositor's death towards debts due from him to the bank. Laighton *et al. v.* Brookline Trust Co., 114 N. E. 671.

It is the universal rule that the relation of bank and depositor is that of debtor and creditor, the property in the money deposited becoming vested in the bank. Tallapoosa County Bank v. Salmon, 68 So. 542 (Ala. 1916); Town of East Chester v. Mt. Vernon Trust Co., 159 N. Y. S. 289 (1916); Minn. Mut. Life Ins. Co. v. Tagus State Bank, 158 N. W. 1063 (N. D. 1916). The bank may apply deposits on notes due from the depositor, permission to do this being implied from the relation. Shuman v. Citizens' State Bank of Rugby, 169 S. W. 777 (Ark. 1914); Desha Bank & Trust Co. v. Quilling, 176 S. W. 132 (Ark. 1915); Gunn v. Stockyards State Bank, 155 Pac. 796 (Kan. 1916). The bank's right of application, however, does not prevent the depositor from applying his deposits differently, for the contract is that the bank will honor the depositor's checks. First Natl. Bank v. Hall, 119 Ala. 64 (1898). In order for the bank to set off deposits the debts must be mutual, Niblack v. Park Natl. Bank, 169 Ill. 517 (1897); Smith v. Sanborn State Bank, 147 Ia. 640 (1910); and this right of set-off exists against the executor or representative of the depositor. Little's Adminr. v. City Natl. Bank of Fulton, 115 Ky. 629 (1903). To apply a deposit to an indebtedness, the indebtedness must be due and payable, Dougherty v. Central Natl. Bank, 93 Pa. St. 227 (1880); Gibbons v. Hecox, 105 Mich. 509 (1895); but if the debtor is insolvent the weight of authority favors the set-off of unmatured debts, Nashville Trust Co. v. Fourth Natl. Bank of Nashville, 91 Tenn. 336 (1891), and see cases collected in note in 15 L. R. A. 711.

CARRIERS—FEDERAL EMPLOYERS' LIABILITY ACT—WHEN IS AN EMPLOYEE ENGAGED IN INTERSTATE COMMERCE?—A fireman of a switching engine was killed while moving an intrastate car. The Court of Appeals of Kentucky treated this as conclusive that he was not injured while engaged in interstate commerce. *Held:* This was error, "for if . . . this movement was simply for the purpose of reaching and moving an interstate car, the purpose would control and the business would be interstate. The difference is marked between a mere expectation that the act done would be followed by other work of a different character, . . . and doing the act for the purpose of furthering the later work." Louisville & Nashville R. R. Co. v. Parker, 37 Sup. Ct. Rep. 4.

The nice questions arising of whether an injury to a railroad employee comes within the Federal Employers' Liability Act, and the tests which have been suggested for determining them are discussed by note writers in 63 U. PA. L. REV. 900 and 64 *Ibid.* 312.

As pointed out in the principal case, where the act which the injured person was doing at the time of the accident was for the purpose of furthering the later work of interstate commerce, the case comes within the act, as the following illustrates: A fireman oiling his engine by which an intrastate train containing two cars from without the state was to be drawn. North Carolina R. R. Co. v. Zachary, 232 U. S. 248 (1914). A brakeman placing two intrastate cars on a siding before proceeding with his train on the interstate journey. New York Central v. Carr, 238 U. S. 260 (1915). A brakeman uncoupling two intrastate cars preparatory to placing two interstate cars on a private switch. Pennsylvania Co. v. Donat, 239 U. S. 50 (1915). Running an

engine destined beyond the state on an order between two points within the state. Rock Island Ry. v. Wright, 239 U. S. 548 (1916); Hein v. Great Northern R. R. Co., 159 N. W. 14 (N. D. 1916). A brakeman on an intrastate train which has one car loaded with interstate freight. Waters v. Guile, 234 Fed. 532 (1916). A car repairer working on an interstate car temporarily stopped in the yards. Norfolk & W. Ry. Co. v. Shorts, 171 Ky. 647 (1916). Switching a train in which there is one interstate car, Whalen v. N. Y., *etc.*, R. R. Co., 159 N. Y. S. 244 (1916); and this applies if the switching crew is moving empty interstate cars of another company in the common yards. Ruppel v. New York Central, 171 App. Div. 832 (N. Y. 1916). Switching a refrigerator car from an ice house to a warehouse, where it was to be loaded with freight for points outside the state. Aldread v. Northern Pacific Ry. Co., 160 Pac. 429 (Wash. 1916). Removing intrastate cars from a repair siding preparatory to placing interstate cars on it. Bolch v. Chicago, *etc.*, Ry. Co., 90 Wash. 47 (1916). A hostler walking through the yards after having fitted out an interstate engine. Hinson v. Atlanta, *etc.*, Air Line Ry. Co., 90 S. E. 772 (N. C. 1916). A switchman switching a car to be taken to another place to be loaded with interstate freight. Christy v. Wabash R. R. Co., 191 S. W. 241 (Mo. 1917).

But where the present work was intrastate with a mere expectation that later work will be interstate, the case does not come within the act. As a switching crew delivering cars from one part of the city to another. Illinois Central R. R. Co. v. Beherns, 233 U. S. 473 (1914). Or a brakeman on his way to requisition supplies for a subsequent uncertain trip. McBain v. Northern Pacific Ry. Co., 52 Mont. 578 (1916).

Further annotations on this subject will be found in 63 U. PA. L. REV. 458 and 64 *Ibid.* 752.

CORPORATIONS — *Ultra Vires* ACTS — NECESSITY OF RETURN OF PROFITS DERIVED TO MAKE DEFENSE AVAILABLE—Bill in equity to cancel bonds issued in payment of corporate notes, on the ground that their issue was *ultra vires.* No offer was made to return the notes. *Held:* As long as the corporation retains the profits of a transaction, it will be estopped to set up the fact that it was *ultra vires.* Wrightsville Hardware Co. v. McElroy, 98 Atl. (Pa.) 1052.

Though the defense of *ultra vires* is looked on with great disfavor in some jurisdictions, it is generally admitted where the act is expressly prohibited by the charter or a statute, Kilbourn City v. So. Wisconsin Power Co., 149 Wis. 168 (1912), or the contract is purely executory. Savannah Ice Co. v. Canal-Louisiana Bank, 12 Ga. App. 818 (1913). When the contract has been fully executed by both parties, as a general rule the courts will not interfere. Parish v. Wheeler, 22 N. Y. 494 (1860).

It is when the contract has been executed on one side only, or where benefits have been received under it that the difficulty arises. In many jurisdictions in such cases an action can be maintained against the corporation on the contract, the corporation being estopped to deny liability, Kellogg-Mackay Co. v. Havre Hotel Co., 199 Fed. 727 (1912); and an offer to repay premiums paid on an *ultra vires* contract of insurance will not make the defense admissi-

ble after the loss has occurred. Denver Fire Ins. Co. v. McClelland, 9 Col. 11 (1885).

But the weight of authority is that an *ultra vires* contract cannot be the foundation of an action, and either party may set up that defense. Davis v. Old Colony R. R. Co., 131 Mass. 258 (1881). The party who has paid the consideration may, however, recover it back in an appropriate action. Rankin v. Emigh, 218 U. S. 27 (1909). No amount of performance can, under the rule in these states, give the contract any validity. Ogdensburg R. R. v. Vermont R. R., 4 Hun 268 (N. Y. 1875). But in accordance with the rule in the principal case, no recovery can be had by either party unless the benefits received by that party are first returned to the other. Madison Ave. Church v. Oliver Street Church, 73 N. Y. 82 (1878).

EVIDENCE—BEST EVIDENCE—PRESUMPTION FROM FAILURE TO PRODUCE—In a proceeding to deport a Chinese person, the only evidence introduced was a sworn statement that accused had been seen in Mexico within three years, the identification of accused being made by a photograph, though it might as easily have been made in person. No other investigations were made. *Held:* Since better evidence of accused's presence in Mexico might easily have been procured and was not, it is presumed that had it been produced it would have been unfavorable to the case. Backus v. Owe Sam Goon, 235 Fed. 847.

The so-called "best evidence rule" applies only to those cases where proof of a fact is required to be of a certain character, no other proof being admitted, unless absence of required proof is explained; but the reason of it applies equally to other cases, and so where inferior evidence of a fact is produced, though it is admissible, the unexplained failure to produce better evidence raises the presumption that if it were produced, it would prove unfavorable, if not adverse, to the case. Clifton v. U. S., 45 U. S. 242 (1846). Though it is generally said that a "presumption" of unfavorableness is raised, what is meant is merely that the jury may draw inferences against the party failing to produce the better proof. Hall v. Vanderpool, 156 Pa. 152 (1893); Sugarman v. Brengel, 68 App. Div. 377 (N. Y. 1902). But see *contra,* Union Trust Co. v. McClellan, 40 W. Va. 405 (1895), and Cooper v. Upton, 65 W. Va. 401 (1909).

The following cases are illustrations of the circumstances which warrant a jury in drawing strong inferences against the party at fault: U. P. Ry. Co. v. Botsford, 141 U. S. 250 (1890), unreasonable refusal to show wounds in an action for personal injuries; Norguet v. Paramount Worsted Mills, 177 Fed. 970 (1910), non-production of available witnesses; Rice v. Com., 102 Pa. 408 (1883), failure of prosecution to call available witness to corroborate doubtful testimony; Wolff v. "The Vaderland," 18 Fed. 733 (1883), failure to preserve available evidence; Stephenson v. Kilpatrick, 166 Mo. 262 (1901), failure of a party charged with fraud to testify in his own behalf, and Fountain v. Calla-way Co., 144 Ga. 550 (1914), failure of a party to produce evidence in his exclusive control.

The silence of the accused as to a matter of which he has knowledge does not, however, authorize a finding against him where there is a total lack of affirmative proof. Corbin & Co. v. U. S., 181 Fed. 296 (1910). And where

a witness is equally accessible to both parties, but is called by neither, no inferences may be drawn. Fitzpatrick v. Boston Elevated Ry. Co., 112 N. E. 94 (Mass. 1916). So also in such case, no inference is to be drawn against one party because the witness was called by the other. Gibson v. Mining Co., 156 Pac. 56 (Cal. 1916).

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY ARISING OUT OF THE EMPLOYMENT—A night watchman was killed and robbed by a fellow-employee, no attempt being made to rob the mill. *Held:* The death did not arise out of the employment. Walther v. American Paper Co., 99 Atl. (N. J.) 263.

It is now settled, both in England and America, that an assault on an employee is an accident within the terms of the compensation acts. Trim Joint District School v. Kelly, [1914] W. C. & Ins. C. 359 (Eng.); Western Indemnity Co. v. Pillsbury, 151 Pac. 398 (Cal. 1915); *In re* Heitz, 112 N. E. 750 (N. Y.).

The difficult question is whether the assault arises out of the employment. The general rule is that there must be a causal connection between the conditions under which the work must be performed and the resulting injury. *In re* McNicol, 102 N. E. 697 (Mass. 1913). This causal connection exists when there are risks incident to the employment likely to lead to assaults. Nisbet v. Rayne, [1910] L. R. 2 K. B. 689 (Eng.), (cashier); Anderson v. Balfour, [1910] Ir. Rep. 497 (Ireland), (gamekeeper); State *ex rel.* v. District Court, 158 N. W. 713 (Minn. 1916), (bartender). It has been held, that the risk of being shot is not incidental to the ordinary employment of a night watchman. *In re* Harbroe, 111 N. E. 709 (Mass. 1916). In such cases, it seems, a distinction is to be made when robbery is attempted on the property of the employer. Schmoll v. Brewing Co., 97 Atl. 723 (N. J. 1916), and see the principal case.

Where the assault is by an intoxicated stranger, it is held not to arise out of the employment, even though the employee at the time is in control of and is protecting his employer's property. Mitchinson v. Day Bros., 6 B. W. C. C. 190 (Eng. 1913). But if the assault is committed by a choleric drunken fellow-employee, the case is distinguished from an assault by a drunken stranger or a sober fellow-employee, and is held to arise out of the employment. *In re* McNicol, *supra*. This is also true where the assault is the remote cause of the injury, and the employee's situation, as required by his employment, is the proximate cause. Shaw v. McFarlane, 8 B. W. C. C. 382 (Scot. 1914).

In general, the injury received from an assault by a fellow-employee does not arise out of the employment. Shaw v. Wigan Coal Co., 3 B. W. C. C. 81 (Eng. 1909); Hulley v. Moosbrugger, 95 Atl. 1007 (N. J. 1915). But if the assault is due to the employee's desire to have the employer's work done correctly, it does so arise. *In re* Heitz, *supra*. If the employer engages in an altercation, and the employee goes to his aid, the consequent assault is held not to be an injury arising out of the employment. Collins v. Collins, [1907] 2 Ir. Rep. 104 (Ireland); Clark v. Clark, 155 N. W. 507 (Mich. 1915). The same rule applies if the employer attacks the employee. Blake v. Head, 106 L. T. 822 (Eng. 1912).

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—WALKING ON RAILROAD TO WORK—A workman was injured while walking to work on a railroad, which was the shortest way to the place of employment, and a way sanctioned by the employer, although the employer did not own the railroad. *Held:* The injury arose out of and in the course of the employment. Fox v. Rees, 115 L. T. Rep. (Eng.) 358.

It is difficult to formulate a general rule in cases where the employee is injured while on his way to or from work. It has been held that the injury does not arise in the course of the employment, if the employee is injured on premises not owned by or under the control of the employer, even though he has been instructed to go to and from work over that way. Holmes v. Mackay, 80 L. T. Rep. 831 (Eng. 1899); De Constantin v. Public Service Com., 83 S. E. 88 (W. Va. 1914). But *cf.* the principal case. This is all the more so if the employee contributed to the injury by incurring additional risks, such as boarding a moving train. Jibb v. Chadwick & Co., 112 L. T. Rep. 878 (Eng. 1915). Generally, if the accident occurs on the premises of the employer and the employee is using the customary way, the injury is compensable. Gare v. Norton Hill Colliery Co., 2 B. W. C. C. 42 (Eng. 1909); De Mann v. Hydraulic Engineering Co., 159 N. W. 380 (Mich. 1916). However, it seems that the accident must happen in close proximity to the place of actual employment, and the way must be a way continuous over the employer's premises. Gilmour v. Dorman, Levy & Co., 4 B. W. C. C. 279 (Eng. 1911). Some courts refuse compensation even though the injury arises on the employer's premises, provided the employee could have taken a different route. Hilk v. Blair, 148 N. W. 243 (Mich. 1914).

The mere fact that the employer prepared the path on which the accident occurred does not render the injury compensable. Walters v. Stanley Coal Co., 4 B. W. C. C. 303 (Eng. 1911). The tendency seems to be toward the doctrine of the principal case. When an employee is actually going to his work upon a road provided by the employer, or permitted by him, and is actually within the premises, any accident there occurring arises out of the employment. Nicol v. Young & Co., 8 B. W. C. C. 395 (Scot. 1915). But if the employee is on the employer's premises and deviates from the straight path for purposes of his own, any injury received does not arise out of the employment. Benson v. Lancashire Ry. Co., 89 L. T. Rep. 715 (Eng. 1904). If there is only one way of approach, the injury is compensable, whether the way is under the control of the employer or not. *In re* Sundine, 105 N. E. 433 (Mass. 1914).

The Pennsylvania Act of June 2, 1915, P. L. 738, makes provision for compensation for injury received on the premises of the employer, under certain conditions.

PROPERTY—HUSBAND AND WIFE—POWER OF HUSBAND TO MORTGAGE PROPERTY HELD AS TENANTS BY THE ENTIRETIES—Realty with a house was conveyed to a married couple. The house was damaged by fire and the husband refused to use insurance money to repair, whereupon the wife brought a bill in equity to compel the husband to permit the application of this fund for repairs. *Held:* Husband's rights to the rents and profits of estates held by

the entireties were by his common law marital rights and not by reason of the tenancy. Masterman v. Masterman, 98 Atl. (Md.) 37.

At common law any land conveyed to a married couple was held as tenants by the entireties and neither party had the power to alien the land and cut off the right of survivorship. Chandler v. Cheney, 37 Ind. 391 (1871); Simpson v. Biffle, 63 Ark. 289 (1876). In McCubbin v. Stanford, 85 Md. 378 (1897), a mortgage executed by the husband was not permitted to be foreclosed against the wife. Evidence that the husband paid for land conveyed to the husband and wife does not avoid the estate by entireties. White v. Woods, 106 N. E. 536 (Ind. 1914). A judgment against the husband is no lien on property held by entireties, Jordan v. Reynolds, 105 Md. 288 (1907); but a joint judgment is effective, Frey v. McGraw, 127 Md. 23 (1915).

The husband may lease the land, which lease is valid during husband's life, Pray v. Stebbins, 141 Mass. 219 (1886); Bank of Greenville v. Gointo, 161 N. C. 341 (1913); due to husband's common-law right to rents and profits. The modern enabling statutes do not in general affect estates held by entireties and do not give the wife a right to crops grown thereon. Morrill v. Morrill, 138 Mich. 112 (1904). The husband's grantee's rights do not include the cutting of timber, it being part of the freehold. Bynum v. Wicker, 141 N. C. 95 (1906). In Ewen v. Hart, 166 S. W. 315 (Mo. 1914), a husband's license to lay a sewer was upheld, but see, *contra*, Wright v. Cottrell, 139 N. Y. S. 564 (1913).

Generally, any land conveyed to a married couple is held by the entireties, Chandler v. Cheney, *supra*, but in Speas v. Woodhouse, 77 S. E. 1060 (N. C. 1913), a partition deed by the wife's brother to the husband and wife was held to give the wife the entire estate, though she and her privies may be estopped to deny the estate by entireties. Yokley v. Superior Drill Co., 26 Ky. L. R. 302 (1904). A conveyance granting specified shares to a husband and wife does not create the estate by entireties, Blease v. Anderson, 241 Pa. 198 (1913); or if intention of creating a tenancy in common is apparent. Holloway v. Green, 83 S. E. 243 (N. C. 1914). A deed to a married couple under a void marriage seemingly results in a tenancy in common. Butler v. Butler, 157 N. Y. S. 188 (1915).

Certain states by statute have abolished all concurrent estates except tenancies in common. Conn v. Boutwell, 58 So. 108 (Miss. 1912). Some courts hold that the enabling statutes break down tenancies by entireties. Kerner v. McDonald, 60 Neb. 663 (1900); Michigan State Bk. v. Kern, 155 N. W. 502 (Mich. 1915).

See also articles in 58 U. PA. L. REV. 176 and 61 U. PA. L. REV. 476.

PROPERTY—TENANCY IN COMMON—ACQUISITION OF TAX TITLE BY ONE TENANT—TIME FOR REDEMPTION BY COTENANT—Plaintiff, former owner of undivided one-eighth share in mining property, filed a bill to be adjudged owner against defendant company, former owner of other seven-eighths share, which had bought in plaintiff's share five years after a tax sale to the county. *Held:* Rule prohibiting one tenant in common from acquiring adversely cotenant's interest does not apply where the interests of the tenants in common are separately taxed and in general only gives delinquent tenant

the right to redeem within a reasonable time. Hanley v. Fed. Mining & Smelting Co., 235 Fed. 769.

The general rule is that one tenant in common in buying in any outstanding title claims is presumed to act for the benefit of all his cotenants. Davis v. Chapman, 24 Fed. 674 (U. S. C. C. 1885). This rule is only one of presumption and does not apply where an express agreement permits such a purchase. Waters v. Kopp, 34 App. D. C. 575 (1910). The general rule has been applied even where half of the title purchased was for the use of a third party, Field v. Farmers' Bank, 110 Ky. 257 (1901); or where the tenant purchaser was not in possession at any time tax accrued and owed his cotenants no special duty, Duson v. Roos, 123 La. 835 (1909); or where tenant purchased from mortgagee of property who bought it in at foreclosure sale, Eckert v. Schmitt, 110 Pac. 635 (Wash. 1910); or where the wife of tenant in common is the purchaser being deemed a cotenant by dower. Trumbull v. Bruce, 117 Pac. 472 (Wash. 1911). In Wilson v. Linder, 21 Idaho 516 (1912), it was held that the general rule applied to remaindermen in common. In Biggins v. Dufficy, 262 Ill. 26 (1914), it was held that purchasing tenant did not even acquire color of title, but it is generally held that the delinquent tenant has no enforceable rights without tender of his proportional contribution, Morris v. Roseberry, 46 W. Va. 24 (1899); Allen v. Allen, 114 Wis. 615 (1902); and after refusal to contribute the purchasing tenant has the benefit of the Statute of Limitations. Phillips v. Wilmarth, 98 Iowa 32 (1896). The right to redeem must be exercised within a reasonable time. Starkweather v. Jenner, 216 U. S. 524 (1909); Brown v. Howard, 264 Mo. 466 (1915).

In Bennett v. Land Imp. Co., 23 Col. 470 (1897), it was held that where there was no particular duty to cotenants to pay taxes one tenant could buy in title for his own benefit. The rule does not apply to judicial sales. *In re* Reynolds' Estate, 239 Pa. 314 (1913); Plant v. Plant, 154 Pac. 1058 (Cal. 1916).

PROPERTY—WILLS—GIFT TO ILLEGITIMATE CHILD—A testator, knowing his mistress to be enceinte, made a codicil to his will which provided for any other children he might have by her in addition to those already *in esse*. A son was born after the testator's death, who claimed under the codicil. *Held*: This was a gift to an illegitimate child defined by a reference to paternity and was invalid for uncertainty. *Re* Homer, 115 L. T. R. (Eng.) 703.

The principal case is in accord with the general rule that if the illegitimate children are defined with reference to their paternity, the gift will fail for uncertainty. It would necessitate an inquiry into the access or non-access of others, the profligacy or immorality of the woman, signs of race or caste or blood. *In re* Hastie's Trusts, 35 Chan. Div. 728 (Eng. 1887); *Re* Loveland, 94 L. T. R. 336 (Eng. 1906). However, a gift to illegitimate children not born at the date of the will, but to be born during the lifetime of the testator, is good if they can be ascertained without inquiring into the fact of paternity. Occleston v. Fullalove, L. R. 9 Ch. App. 147 (Eng. 1872); *Re* Loveland, *supra;* 2 Jarman on Wills, 1748 (6th edition). A gift to the future illegitimate child of a woman, if born in the lifetime of the testator, is valid, for no reference to the parentage is necessary. Estate of Frogley (1905), P. 137 (Eng.); 2

Jarman on Wills, 1764 (6th edition). See Professor Scott, Control of Property by the Dead, P. 634, *supra.*

The American authorities, though few in number, are in accord with the rule of the principal case. When sufficiently designated, an illegitimate child *in esse* or *in ventra sa mere* may take by will. Dunlap v. Robinson, 28 Ala. 100 (1856); Hughes v. Knowlton, 37 Conn. 429 (1870); Kingsley v. Broward, 19 Fla. 722 (1883). "Children" *prima facie* means legitimate children. Gates v. Seikert, 157 Mo. 1065 (1900); Bealafeld v. Slaughenhaupt, 213 Pa. 565 (1906). In England slight peculiarities are allowed to show that by "children" the testator meant to include his illegitimate children. *Re* Loveland, *supra;* O'Loughlin v. Bellew (1906), 1 Ir. 487. "All the children of her body" was held to include illegitimate children in Sullivan v. Parker, 113 N. Car. 301 (1893).

SALES—CHATTEL MORTGAGES—STATEMENT OF CONSIDERATION—SUFFICIENCY—Where a mortgagor of chattels gave a bill of sale thereto, stating the consideration to have been paid, and was given a check which she cashed in the presence of mortgagee's clerk, paying over a portion to mortgagee for a debt not yet due, it was *Held:* That the consideration was not truly set forth within the English Bill of Sales Act. Parrone v. Equitable Investment Co., Ltd., 115 L. T. 194.

In England the bill of sale is used as a chattel mortgage. The Bill of Sales Act (1878), Amendment Act (1882), 45 and 46 Vict. C. 43, Sec. 8, provides that "Every bill of sale . . . shall truly set forth the consideration." Similar provisions are found in the American Chattel Mortgage Acts. Ohio Stat., Sec. 4154, "Must state the amount secured"; Rev. Laws, Ch. 102, Sec. 53, Mass. "Must state amount of loan with substantial accuracy"; N. J. P. L. 1902, p. 487, Sec. 4. "Must state amount of consideration and as nearly as possible amount due and to grow due thereon," Md. Stat. 1846, Sec. 271.

The English construction is strict. If the bill of sale is given to secure a loan arising at the time of the giving of the bill, the retention by the bill-holder of part of the money for a debt not yet due does not constitute payment and the bill of sale is voided if that money was stated as part of the consideration. Richardson v. Harris, 22 Q. B. D. 268 (1889), overruling *In re* Haynes, 15 Ch. Div. 42 (1877). Payment to a third party at mortgagor's request, or the settling of accounts already due is a good payment. *Re* Harmony & Montague Co., L. R. 8 Ch. App. 407 (1873). Giving a check to mortgagor is good payment if the mortgagor has the complete control of the proceeds for an appreciable period, even though there is a collateral agreement to repay the proceeds to the mortgagee. Thomas v. Searles, 2 Q. B. D. 408 (1891). There must be no possibility of duress as in the principal case. *Re* Davies, 77 P. T. R. 567 (1897).

The American construction is more liberal. The actual value of the consideration need not be shown, and part thereof may be for future advances. Buck v. Buck, 122 Pac. 466 (Cal. 1912). If the affidavit mistakes the consideration, but the annexed mortgage itself is accurate, the transaction will not be voided. Metropolitan Co. v. Albrecht, 70 N. J. L. 149 (1903). *Contra:*

Denton v. Griffith, 17 Md. 301 (1861). If the affidavit states "for money paid in hand," and the real transaction was the cancelling of a debt, the mortgage is avoided. Denton v. Griffith, *supra*.

The mortgaged goods must be described also, but it is sufficient if the description is such as to render the goods capable of identification or put a purchaser upon inquiry. Greiss v. Wilkopp, 12 Circt. Ct. R. 481 (Ohio 1891); Morrison v. Elzy, 190 Ill. App. 372 (1914).

SURETYSHIP—INDEMNITY AGAINST LIABILITY AND INDEMNITY AGAINST LOSS—A surety bond conditioned "to indemnify and save harmless . . . from any pecuniary loss resulting from the breach of any of the terms of the contract" is one of indemnity against actual pecuniary loss, and the fact alone that liability was incurred does not give rise to a cause of action against the surety. Hoffman Co. v. Title Guaranty & Surety Co., 99 Atl. (Pa.) 414.

"Where the indemnity is against liability, there is a right of recovery as soon as liability is incurred; where it is against loss by reason of liability, there is no right of recovery until a loss occurs." Faulkner v. McHenry, 235 Pa. 298 (1912). In the first case, the indemnitee can recover as soon as his liability is fixed. Illinois Surety Co. v. Maguire, 150 Wis. 544 (1912). In the other case, actual damage or loss must be alleged and proved before a right of action accrues. Jenckes v. Rice, 119 Ia. 451 (1903); Gould v. Tilton, 161 Ill. App. 142 (1911). Entry of judgment against him does not give the indemnitee a right to recover; it must be paid. Puget Sound Co. v. Insurance Co., 52 Wash. 124 (1909). But such loss may occur by the complete failure of one party to carry out his agreement. Elmohan Co. v. People's Surety Co., 217 N. Y. 289 (1916).

As shown by the principal case, the important question in these cases is the construction of the contract. The many cases which have arisen are because of the uncertain language used. It is not difficult to express the real intention and make the contract certain by using appropriate phraseology. See Poe v. Philadelphia Casualty Co., 118 Md. 347 (1912).

TORTS—SLANDER—PRIVILEGE—BANKRUPT CREDITORS' MEETING—At a meeting of creditors of a bankrupt for the purpose of electing a trustee, slanderous statements were made about one of the candidates for the position. *Held:* This was a judicial proceeding and the statement being relevant, was absolutely privileged. Rogers v. Thompson, 99 Atl. (N. J.) 389.

The rule that statements made in the course of judicial proceedings are absolutely privileged, if relevant to the subject under discussion, is generally followed in the United States. Cooley v. Galyon, 109 Tenn. 1 (1903). This privilege attaches to complaints made to a magistrate or sheriff in instituting a criminal prosecution, Laing v. Mitten, 185 Mass. 233 (1904); statements in the pleadings and answers in a civil suit, Gains v. Aetna Ins. Co., 104 Ky. 695 (1898); statements in petitions addressed to the court, Buohs v. Bacher, 6 Heisk. 395 (Tenn. 1871); Rosenberg v. Dworetsky, 139 App. Div. 517 (N. Y. 1910); statements in the judicial opinion, Valesh v. Prince, 159 N. Y. S. 598 (1916), and statements in counsel's brief presented to the appellate court. Sickles v. Kling, 60 App. Div. 515 (N. Y. 1901).

It has been held that an investigation by a grand jury is a judicial proceeding, Schultz v. Strauss, 127 Wis. 325 (1906); as are also the deliberations of the trial jury. Dunham v. Powers, 42 Vt. 1 (1869). An investigation by a legislative committee was held to be a judicial proceeding. Sheppard v. Bryant, 191 Mass. 591 (1906). On the other hand, it has been held that an investigation conducted by a committee of the Board of Aldermen of a municipality is not. Blakeslee v. Carroll, 64 Conn. 223 (1894). These cases are distinguishable, the powers granted the committees being somewhat different. Absolute immunity was extended to statements made in the course of an investigation by the board of trustees of a college into the character of its president, on the ground that there was no difference between such a proceeding and a trial in a court of justice. Gattis v. Kilgo, 128 N. C. 402 (1901). But in England the rule is strictly limited to judicial bodies established by law. Royal Aquarium Soc. v. Parkinson (1892), 1 Q. B. 431.

See article by Van Vechten Veeder in 9 Col. L. R. 463 at 483, *et seq.*

TORTS—TRADE BOYCOTT—A shoemaker was expelled from the union. In order to discipline him, the union procured his discharge and prevented him from obtaining employment elsewhere. *Held:* This is an illegal boycott and the shoemaker can recover damages. Shinsky v. Tracey, 114 N. E. (Mass.) 957.

It is generally accepted that a workman can recover against a union which procures his discharge by threats or intimidation. A discussion of the leading cases will be found in an article by William Draper Lewis, "Trade and Labor Disputes," 53 Am. Law Reg. 465 (1905). The doctrine, however, is not without qualification. In some states, it has been held that the purpose of the boycott must be clearly illegal, or there is no redress. Davis v. United Portable Hoisting Engineers, 28 App. Div. 396 (N. Y. 1898); Association v. Cumming, 65 N. Y. S. 946 (1900). If the purpose is illegal, then a strike for a closed shop will be enjoined. A strike to close a single shop may be legal, but a strike to close all the shops in the community is against public policy and illegal. Schwarcz v. International Garment Workers' Union, 124 N. Y. S. 968 (1910). It has been held that a strike is legal, and consequently it is legal to threaten to strike. If the workman is discharged in consequence of the threat, he has no remedy. Kemp v. Division No. 241, 255 Ill. 213 (1912); but see the dissenting opinions.

If the workman is expelled from the union contrary to the by-laws, and in consequence is discharged from his employment, he can recover damages from the union. Brennan v. United Hatters, 73 N. J. L. 737 (1906). In the principal case, the injured workman had been expelled from the union, and the discharge was in the nature of punishment. The court took the view that the union cannot discipline workmen after their connection with the union has been severed.

The principal case is in accord with the Massachusetts doctrine and the weight of authority. Lucke v. Clothing Cutters' Assembly, 77 Md. 396 (1893): Plant v. Woods, 176 Mass. 492 (1900); Erdman v. Mitchell, 207 Pa. 79 (1903); Carter v. Oster, 134 Mo. App. 146 (1908).

TRUSTS—CHARITIES—WANT OF TRUSTEE—Property was bequeathed to two trustees to be appointed by a synod, an unincorporated organization, to be used in educating young ministers. *Held:* The bequest is invalid; there is no one to enforce the trust. Ewell v. Sneed, 191 S. W. 131 (Tenn.).

The principal case is against the overwhelming weight of authority, the almost universal rule being that equity will not suffer a charitable bequest to fail for want of a trustee. Attorney-General v. Goodell, 180 Mass. 538 (1902); Sawyer v. Dearstyne, 139 N. Y. S. 955 (1912). Thus, a provision that a trustee be elected by "the people" was upheld. Heuser v. Harris, 42 Ill. 425 (1867). The cases do not depend on the statute, 43 Eliz., Chap. 4, nor on the existence of the *cy pres* doctrine, nor on any prerogative power. It has been held that the appointment of a trustee in order to save a charitable trust is merely the exercise of the ordinary jurisdiction of a court of equity. Hitchcock v. Board of Home Missions, 259 Ill. 288 (1913); Eccles v. R. I. Hospital Trust Co., 98 Atl. 129 (R. I. 1916). Where there are statutes providing for the appointment of a trustee, they are considered merely declaratory of the common law. Frazier v. St. Luke's Church, 147 Pa. 256 (1892).

In the principal case, the reasoning is that the trust fails because there is no officer in the state who can enforce the trust. In Maryland the same result is reached, but largely because the beneficiary is not definitely determined and the statute, 43 Eliz., Chap. 4, is not in force. State v. Trustees of M. E. Church, 28 Md. 338 (1867). Some of the Virginia cases are in accord with the principal case. Gallego v. Attorney-General, 3 Leigh 450 (Va. 1832). Due to the influence of Vidal v. Girard's Executor, 2 How. 127 (U. S. Sup. 1834), there are strong dicta in later cases looking in an opposite direction. Episcopal Society v. Churchman's Rep., 80 Va. 718 (1885). But see Fifield v. Van Wyck, 94 Va. 557 (1897).