RECENT CASES

BILLS AND NOTES—LIABILITY OF INDORSERS OF NON-NEGOTIABLE NOTES—*A* made a non-negotiable note to *B*. *B* indorsed "Pay to the order of *C*." *C* indorsed to *D*. All the transfers were for value. The note was not paid on maturity and *D* brought suit against *B*. *Held:* *B* was liable as indorser. *Neutzel v. Mackie*, 253 Pac. 166 (Cal. 1922).

Courts are not agreed as to the extent and nature of the liability of a transferor of non-negotiable paper on his indorsement. One line of authority holds that the indorser intends to make himself liable in some capacity and accordingly these courts construe his contract of liability to be that of a surety,[1] while others that of a maker or guarantor.[2] Another view considers that the mere indorsement shows no intention to assume any liability,[3] but is merely an assignment of the indorser's rights in the instrument.[4] However, if from the nature of the indorsement an expressed intention to assume liability can be inferred, these courts will give such effect to the indorsement. Thus if the note is indorsed "to order" or "to bearer" or similar expressions it will be presumed that the indorser intended to assume a contract of liability.[5] But if the note is merely indorsed in blank, no such construction will be given to the indorsement.[6] In the principal case and in another recent case,[7] it was contended that by such indorsements the notes were rendered negotiable. Where the note was indorsed in blank, the argument was that by indorsing in blank, the note became payable to bearer by section 9 (5) of the *Negotiable Instruments Law*.[8] In the principal case, it was contended that the holder could write over the signature of the indorser any contract consistent with the character of the indorsement.[9] The courts in both instances promptly refuted the argument by calling attention to the fact that the *Negotiable Instruments Law* deals only with negotiable instruments and not with non-negotiable paper. These decisions seem proper.

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[1] Bank of Luverne v. Sharp, 152 Ala. 589, 44 So. 871 (1906); Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741 (1910).

[2] Sweester v. French, 54 Mass. 262 (1847); Seymour v. Van Slych, 8 Wend. 421 (N. Y. 1832); Johnson v. Lassiter, 155 N. C. 47, 71 S. E. 23 (1911).

[3] Kendall v. Parker, 103 Cal. 319, 37 Pac. 401 (1894); Citizens' Nat'l Bank v. Piollet, 126 Pa. 194, 17 Atl. 603 (1889); Shafftal v. McDaniel, 152 Pa. 598, 25 Atl. 576 (1893).

[4] Platte Plow Co. v. Beard, 27 Okla. 239, 110 Pac. 752 (1910).

[5] Brenzer v. Wightman, 7 Watts & S. 264 (Pa. 1844); Kline v. Keiser, 87 Pa. 485 (1878); Carruth v. Walker, 8 Wis. 252 (1860).

[6] South Bend Iron Works v. Paddock, 37 Kan. 510, 15 Pac. 574 (1887).

[7] Foley v. Hardy, 253 Pac. 238 (Kan. 1927).

[8] NEGOTIABLE INSTRUMENTS LAW § 9 (5), "The instrument is payable to bearer when the only or last indorsement is in blank."

[9] NEGOTIABLE INSTRUMENTS LAW § 35, "The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser any contract consistent with the character of the indorsement."

CONTEMPT—USE OF THE POWER TO PROTECT A PRISONER'S RIGHT OF PRIVACY—At the opening of a sensational murder trial the presiding judge issued an order prohibiting the taking of photographs in the court or its precincts during the conduct of the trial. Prior to this, the judge, in chambers, had been disturbed by the noise accompanying the photographing of the accused, against his will, in the corridor. The judge called the photographer before him and ordered him to surrender the plate. The latter deliberately deceived the judge by giving up a blank plate. During the course of the trial another photographer secretly took several snapshots in the courtroom. Subsequently all the pictures were published in a newspaper. *Held:* The photographers and those who, with knowledge, authorized the publication of the pictures were guilty of contempt of court. *Ex parte Sturm,* 136 Atl. 312 (Md. 1927).

This decision involves, primarily, the consideration of two questions: the prisoner's right of privacy, and the court's protection of the right by the exercise of its contempt power. The first question has come up on several occasions in a somewhat different form in the so-called "rogues' gallery" cases, where one accused of crime has been forced to submit to the making and filing of his photograph for police records. These cases have usually held that such taking and using of a prisoner's picture is permissible after conviction.[1] If there has been an acquittal it has been decreed that the picture must be destroyed, on the theory that the right of privacy of the accused has been invaded.[2] However, as the pictures in the principal case were not used for police purposes, the "rogues' gallery" cases are not in point. Consequently, the prisoner's right of privacy must be determined by reference to the cases where the subject of the picture has been an ordinary citizen. Many courts have recognized this right of privacy, and have held that the unauthorized publication of one's picture is a violation of the right.[3] In the principal case the right was upheld practically without discussion. Since the prisoner was in custody, and therefore unable to defend himself against the actions of the photographer, it was quite proper for the court to intervene in his behalf and so protect him, by any reasonable means, from such obnoxious publicity.[4] Both the attempted confiscation of the negative, and the order issued at the opening of court seem a proper and sound exercise

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[1] Hodgeman v. Olsen, 86 Wash. 615, 150 Pac. 1122 (1915).

[2] Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905), on second appeal, 117 La. 708, 42 So. 228 (1906); Schulman v. Whitaker, 117 La. 704, 42 So. 227 (1906).

[3] There are two theories. That it is a "personal right" was held in Pavesich v. New Eng. Life Ins. Co., 122 Ga. 190, 50 S. E. 68 (1904). That it is a "property right" was held in Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1910). Some courts have refused to recognize the right on any theory: Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902); Henry v. Cherry, 30 R. I. 13, 73 Atl. 97 (1909); Hillman v. Star Publishing Co., 64 Wash. 691, 117 Pac. 594 (1911).

[4] Howard v. State, 237 Pac. 203 (Ariz. 1925); OSWALD, CONTEMPT (3d ed. 1910) 45.

of the court's discretion.[5] Therefore, the wilful deceit practiced on the judge and the deliberate violations of his orders were clearly contempts of court.[6] It was a novel, but commendable, use of the contempt power.

EMINENT DOMAIN—COMPENSATION—DAMAGES FOR LOSS OF GOOD-WILL—The plaintiff had been engaged in business at a particular location for a number of years and had built up, as an attribute of that location, a valuable good-will. The state under eminent domain proceedings took the property for public use paying only the market value. The plaintiff now sues for payment of damages for the destruction of the good-will. *Held:* The plaintiff cannot recover. *People v. Johnson & Co.*, 219 N. Y. Supp. 741 (1927).

Good-will has been defined by courts,[1] text writers,[2] and lexicographers.[3] The definitions, while differing in phraseology, all recognize that location is an important element of good-will. This was conceded in the principal case, but, nevertheless, the court refused to award any damages for its destruction. The court is not alone in this view. It is uniformly held in the United States that the loss or diminution of the good-will of a business, caused by the condemnation of the land on which the business is located, is not an element of damages or compensation.[4] The decisions rest on he reasoning ha such loss is a *damnum absque injuria*,[5] or else that any damages awarded would be of too speculative a nature. Upon analysis, it seems that the reasons assigned are more specious than real. Good-will, like any other intangible item of property, may be difficult to evaluate, but the difficulty is only a technical one at best. While courts refuse to allow anything for the loss of good-will,[7] yet they rec-

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[5] Cabot v. Yarborough, 27 Ga. 476 (1858); West v. State, 1 Wis. 209, 235 (1853); RAPALJE, CONTEMPT (1887) 11.

[6] *Re* Chiles, 22 Wall. 157, 168 (1874); *Re* Cohen, 5 Cal. 494 (1855); RAPALJE, *op. cit supra* note 5, 45.

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[1] "Good-will is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." STORY, PARTNERSHIP, (7th ed. 1881) § 99, approved in Metropolitan Bank v. St. Louis Dispatch Co., 149 U. S. 436, 446 (1893).

[2] "Good-will consists of three things, the natural advantages of the site, the erection of a suitable building or structure with its proper mechanical equipment and the good reputation that results from skillful, enterprising and honest management of the business." HOPKINS, TRADEMARKS (4th ed. 1924) 218.

[3] "Good-will is the degree of favor enjoyed by a particular shop or trade as indicated by its custom." 4 CENTURY DICTIONARY (1914) 2574.

[4] United States v. Inlots, Fed. Cas. No. 15,441 (1873); Williams v. Commonwealth, 168 Mass. 364, 47 N. E. 115 (1897); Cox v. Philadelphia, etc., R. R., 215 Pa. 506, 64 Atl. 729 (1906).

[5] Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392, 153 Pac. 705 (1915).

[6] Banner Mill Co. v. State, 240 N. Y. 533, 148 N. E. 668 (1925).

[7] 2 LEWIS, EMINENT DOMAIN, (3d ed. 1909) 1276.

ognize if the particular use to which the property is devoted has continued for a long time and has imparted to the property a peculiar value for that use, as for a hotel, it is proper to show the fact and to take it into consideration in fixing the damages.[8] This is in effect, allowing recovery in a situation that often resembles good-will. Both English and Canadian courts have allowed recovery for the loss of good-will, on the ground that good-will is part of the owner's interest in the premises.[9] It is submitted that such decisions recognize the true nature of good-will.

INTOXICATING LIQUORS—POSSESSION FOR NON-BEVERAGE PURPOSES—PENNSYLVANIA ACT OF 1923—Defendant was indicted for illegally possessing intoxicating liquor in violation of the Pennsylvania Act of 1923,[1] known as the *Snyder Act*. After the Commonwealth proved the possession, the defendant, admitting the purchase of the liquor without a physician's prescription, explained that it had been obtained and was used solely for medicinal purposes. The trial court instructed the jury that this explanation did not constitute a defense when the defendant admitted that he had not procured the liquor on a physician's prescription. *Held:* The charge was prejudicial. The defendant was entitled to an acquittal if he could satisfy the jury that he did not possess the whiskey for beverage purposes. *Commonwealth v. Berdenella,* Supreme Court of Pennsylvania, decided March 14, 1927, reversing *Commonwealth v. Berdenella,* 87 Pa. Super. 594 (1926).

The judge's charge had been sustained in the Superior Court on the ground that a liberal interpretation of the *Snyder Act* should be made, and that court in effect, held the provisions of the *Volstead Act*[2] should be read into it. In reversing this judgment, the majority[3] of the Supreme Court reasoned that this was not a prosecution under the *Volstead Act,* nor a proceeding charging illegal holding under that legislation. It was a prosecution under the Pennsylvania statute. This statute is penal and must, therefore, be strictly construed. Although section 1 of the *Snyder Act* states that it is enacted in the exercise of power granted in the Eighteenth Amendment to the Constitution, it nowhere attempts to incorporate the criminal provisions of the *Volstead Act.* The correctness of the trial court's ruling must, therefore, be determined from the express provisions of the Pennsylvania statute. Nowhere in the Act is the illegal acquirement of liquor made an offense, but the crimes defined deal solely with the manufacturing, selling, or offering to sell, bartering, furnishing, possessing or delivering of liquor for *beverage* purposes. Section 13 of the statute does not justify the ruling of the trial court, as contended by the Common-

[8] King v. Minneapolis, etc., Ry., 32 Minn. 223, 20 N. W. 135 (1884).

[9] Senior v. Metropolitan, etc., R. R., 2 H. & C. 258 (1863); White v. Public Work Commissioners, 22 L. T. (N. S.) 591 (1870); *Re* McCauley, 15 Ont. Rep. 416 (Canada 1889). *Cf.* Newark v. Cook, 133 Atl. 875 (N. J. 1926).

[1] Act of 1923, P. L. 34, § 3, Pa. Stat. (Supp. 1924), § 14098a-3.

[2] 41 Stat. 305, Title II, § 6, p. 310, U. S. Comp. Stat. (1925) § 10138½c.

[3] Schaffer, Walling and Simpson, JJ., dissented on the ground expressed in the decision of the Superior Court.

wealth, for that section is headed "Evidence and Pleadings," and defines no criminal offense whatsoever. Moreover, the title of the *Snyder Act* is: "Concerning Alcoholic Liquors—Prohibiting the manufacture, advertising, furnishing, traffic in and possession of intoxicating liquors for *beverage* purposes . . .," and it is well settled that it could not constitutionally be enforced except as to matters set forth in the title, or germane thereto. The defendant, therefore, can be convicted solely of the crime of possessing intoxicating liquor for beverage purposes. And, although section 13 of the Act provides that proof of the possession by the defendant shall be *prima facie* evidence that it was secured for beverage purposes, the defendant had a right to rebut that statutory presumption.[4] He should have been permitted to do so, and the trial court should have charged the jury that it was a good defense if he could satisfy them that he did not possess the whiskey for beverage purposes.

See the comment on the Superior Court's decision in this case in 75 U. OF PA. L. REV. 187 (1926).

MASTER AND SERVANT—THE FAMILY PURPOSE DOCTRINE—The defendant purchased an automobile for the use of himself and family. His son, who was nineteen years of age and a licensed driver, used the car to attend a dance. An accident occurred in which the minor son of the plaintiff, who accompanied the defendant's son, was killed as a result of the latter's negligence in operating the car. *Held:* Parent not liable. *Piquet v. Wazelle,* Supreme Court of Pennsylvania, decided March 14, 1927.

This decision following the recent cases of *Markle v. Perot*[1] and *Calmon v. Sperry*[2] definitely indicates the complete rejection of the family purpose doctrine by Pennsylvania.[3] The discussion provoked by this pressing subject has resulted in the crystallization of two opposing views, one view adopting the family purpose doctrine, the other rejecting it. Those courts which adopt the doctrine do so on the theory that the car is provided for the members of the family and when the son uses it for his own pleasure he is acting as the agent or servant of his father in the course of his employment.[4] This peculiar fiction, at once illogical and unconvincing, arose out of the necessity of establishing a master-servant relationship as a basis of liability.[5] The other view supported by the principal case logically reasons that inasmuch as the son is entirely on a frolic of his own there is no basis for applying the doctrine of *respondeat supe-*

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[4] New Hampshire v. La Pointe, 81 N. H. 227, 123 Atl. 692, 31 A. L. R. 1212, n. 1222. See also 33 C. J. 743.

[1] 273 Pa. 4, 116 Atl. 542 (1922).

[2] 276 Pa. 273, 118 Atl. (1923).

[3] See 71 U. OF PA. LAW REV. 65 for a review of the Pennsylvania cases prior to *Markle v. Perot, supra* note 1.

[4] Graham v. Page, 300 Ill. 40, 132 N. E. 817 (1921); King v. Smythe, 140 Tenn. 217, 204 S. W. 296 (1918); Jones v. Cook, 90 W. Va. 710, 111 S. E. 828 (1922).

[5] SALMOND, THE LAW OF TORTS (4th ed. 1915), 91.

rior and consequently no liability.[6] The consideration of policy and public expediency may well call for the result reached under the family purpose doctrine but the remedy should be with the legislature rather than the courts.[7]

PARTNERSHIP—PARTNERSHIP AT WILL—RIGHT OF PRE-EMPTION—Two persons entered into a partnership agreement for a period of three years. The defendant was given the right to purchase the interest of the plaintiff in the firm at any time during the term. This right was not exercised by the defendant until the term had long expired, the association in the meantime having been extended as a partnership at will. *Held:* The pre-emptive clause was not inconsistent with a partnership at will and was carried into the agreement as extended. *Corr v. Hoffman,* 219 N. Y. Supp. 656 (1927).

When an agreement of partnership for a specified term is continued thereafter by mutual consent, such provisions as are not inapplicable to a partnership at will are carried forward as provisions of the new agreement.[1] As a general rule, a clause giving a right of pre-emption to one of the partners is not in itself inconsistent with the incidents of a partnership at will, and is therefore operative after the termination of the partnership originally contemplated.[2] It has been said[3] that such an arrangement is in reality a mode of winding-up which is not less applicable to a partnership at will than to a contract having a definite term of duration. But in a particular case the right of pre-emption may be specially conditioned as to be applicable only at the expiration of the original agreement, or it may be created in such terms as to show that the agreement was that it should apply solely at the expiration of the original contract. No American cases have been found on this point although there are several English cases. Thus, where one of the clauses provided that if *A,* one of the partners, predeceased *B* during the term, *B* should have the option of purchasing *A's* interest, or of continuing it in the business, it was held the pre-emptive clause was not carried over into the subsequent partnership at will because the second alternative was obviously inapplicable to a partnership at will.[4] In another case,[5] it was agreed *inter alia* that three months at least before the expiration of the contract of partnership, the partners should ascertain whether all were willing to continue the concern, and if not, those who desired to retire were to so

[6] Arkin v. Page, 287 Ill. 420, 123 N. E. 30 (1919); Doran v. Thompson, 76 N. J. L. 754, 71 Atl. 296 (1908); Van Blaricom v. Dodgson, 220 N. Y. 111, 115 N. E. 443 (1917).

[7] For a discussion of this phase of the subject see 8 A. B. A. J. 359 (1922).

[1] ENGLISH PARTNERSHIP ACT, 1890, § 27; UNIFORM PARTNERSHIP ACT, § 23 (1). This was also the common law. Bradley v. Chamberlin, 16 Vt. 613 (1844).

[2] Cox v. Willoughby, 13 Ch. D. 863 (1880); Brooks v. Brooks, 85 L. T. R. 453 (1901); McGown v. Henderson, 1914 S. C. 839 (Scot.); LINDLEY, PARTNERSHIP (9th ed. 1924) 499.

[3] Neilson v. Mossend Iron Co., 11 App. Cas. 298, 309 (1886).

[4] Murphy v. Power, 1 Ir. Ch. 68 (1923).

[5] Neilson v. Mossend Iron Co., 11 App. Cas. 298 (1886). See also Cookson v. Cookson, 8 Sim. 529 (Eng. 1837).

declare, and sell out to the remaining partners. This clause was held inconsistent with a partnership at will wherein a partner may retire instantly provided he acts in good faith. In the instant case there were no special conditions of this nature to modify the general rule of law which was applied.

PARTNERSHIP—TRANSFER OF FIRM PROPERTY TO ONE PARTNER—BULK SALES ACT—A partner sold out his undivided one-half interest in the stock and other assets of the firm to his co-partner. The parties did not give the notice to creditors required by the *Bulk Sales Act*,[1] which Act, it is contended, governed the sale. The trustee in bankruptcy of the retired partner seeks to compel the purchasing partner to account for the value of the selling partner's interest in the stock and fixtures at the time of the sale. *Held:* The sale does not come within the *Bulk Sales Act*. *Schnoeppel v. Pfannensteil*, 253 Pac. 567 (Kan. 1927).

Bulk Sales Acts have been adopted in practically every state in the union. Their general purpose is to protect the creditors of merchants from a secret sale of the whole or large part of a stock of goods by a debtor who subsequently absconds with the proceeds. The cases involving a sale of a partner's interest and its status under such acts are few and unharmonious. Georgia and Indiana courts have reached the same conclusion as that of the principal case.[2] These decisions proceed on the theory that the Bulk Sales Act being in derogation of the common law right of alienation, should be strictly construed and then point out that a sale of a partner's half interest is not within the letter of the law. The court in the instant case reached its conclusion on a different theory, it being confronted with the Code provision[3] that all sections of the Code were to be liberally construed, thus expressly abrogating the aforementioned rule of construction. The majority of the court, after pointing out the lack of harmony in the existing decisions, felt that those holding the negative of the proposition were better supported, because, (1) the remedies of the creditors were not impaired by the sales, and (2) the wording of the Act contemplates an actual physical delivery of possession to a stranger. The dissenting opinion reasoned that the statute was just as necessary to protect the creditors of a part owner of a stock of goods as those of a full owner. The conclusion of the majority that a sale of a partner's interest does not affect the remedies of his individual creditors, it is submitted, is open to question. Before the sale, the interest of such a partner was generally subject to a charge to the extent of the interest of the partner in the surplus above firm liabilities.[4] After the sale, individual creditors of the retiring partner have no rights at all in the former firm prop-

[1] KANS. REV. STAT. (1923) c. 58, § 101. "The sale or disposal of any part or the whole of a stock of merchandise or the fixtures pertaining thereto, otherwise than in the ordinary course of trade or business, shall be void as against the creditors of the seller, unless the purchaser receives from the seller a list of names and addresses of the creditors of the seller . . ." ,

[2] Taylor v. Folds, 2 Ga. App. 453, 73 S. E. 761 (1907); Fairfield Shoe Co. v. Olds, 176 Ind. 526, 96 N. E. 592 (1911).

[3] KANS. REV. STAT. (1923) c. 58, § 102.

[4] Brown, Janson & Co. v. Hutchinson Co., 1 Q. B. 737 (1895); UNIFORM PARTNERSHIP ACT § 28.

erty, nor can they charge any interest therein, since full legal and equitable title rests in the purchasing partner.[5] To some extent then, (and in some cases it may be very material), the remedies of the creditors of the partner who has disposed of his interest have been impaired by the sale. The secret impairment of the remedies of creditors is precisely what the Bulk Sales Act seeks to prevent. The second reason advanced by the court is merely a paraphrase on the doctrine of the Georgia and Indiana cases, namely, that the situation does not come within the letter of the law. A Tennessee case,[6] which is *contra* to the principal one, attempts to distinguish the contrary decisions on a difference in the wording of the statute. A legislative determination of the problem is sorely needed to untangle the enigma.

PRINCIPAL AND SURETY—RIGHTS OF A SURETY ON A PAROL PROMISE OF INDEMNITY—STATUTE OF FRAUDS—The defendant orally promised to indemnify the plaintiffs for any loss they would suffer by going surety on supersedeas bonds of his sons. The plaintiffs, on default of the sons to prosecute their appeal, were compelled to pay their judgments. The father, being sued jointly with the sons, defends on the ground that his promise comes within the Statute of Frauds denying a cause of action upon an oral promise to answer for the debt or default of another. *Held:* A promise of indemnity is not within the Statute of Frauds. *Dyer v. Staggs,* 290 S. W. 494 (Ky. 1927).

"Upon no subject, perhaps, has there been more diversity of judicial decision."[1] The divergence continues, no doubt, because of the conflicting decisions of the leading cases of *Thomas v. Cook*[2] and *Green v. Cresswell.*[3] In the former, which is the majority rule,[4] it was held that a promise of indemnity is not within the Statute of Frauds as "answering for the debt or default of another." In the latter case the court held a promise of indemnity is within the

[5] *Ex parte* Ruffin, 6 Ves. Jr. 119 (Eng. 1801); Warner v. Woodworking Co., 210 Fed. 12 (1913); Green v. Whaley, 271 Mo. 636, 197 S. W. 355 (1917).
[6] Howell v. Howell, 142 Tenn. 31, 215 S. W. 278 (1919).

[1] Strong, J., in Maule v. Bucknell, 50 Pa. 39 (1865) at 51.

[2] 8 Barn. & Cres. 722 (1828). (Here *A* orally promised to indemnify *B* if the latter would join him as surety on a bond payable to *X*.)

[3] 10 Ad. & Ell. 453 (1839). (Here *A* promised to indemnify *B* if the latter would go surety on *X's* bail bond.) Authorities disagree whether or not this case necessarily overruled Thomas v. Cook, *supra* note 2. It has been pointed out that in Thomas v. Cook, the promise was made by one already liable as surety and that the promise, therefore, was not one to "answer for the debt, default or miscarriage *of another person*" as provided for in the Statute of Frauds, but a promise to answer for the *defendant's own default.* E. C. Arnold, *Indemnity Contracts and the Statute of Frauds,* 9 MINN. L. REV 401, 405 (1925). However, it has also been stated that the distinction fails in so far as the rule of Green v. Cresswell asserted that the defendant's promise of indemnity was collateral to the third party's implied liability and so must be regarded in direct conflict with Thomas v. Cook. 1 BROWNE STATUTE OF FRAUDS (5th ed. 1895) § 161a.

[4] Wolthausen v. Trimpert, 93 Conn. 260 (1919); Hawes v. Murphy, 191 Mass. 469, 78 N. E. 109 (1906); Tighue v. Morrison, 116 N. Y. 263 (1889).

statute if such promise is collateral to the coexistent obligation of the principal to the promisee. In the principal case, when the plaintiff promisee signed as surety for the sons upon the father's request there arose an implied obligation on their part to reimburse their surety if he (the surety) were damnified by reason of their default. The oral promise of the defendant to indemnify the plaintiff, under the minority view,[5] following *Green v. Cresswell*,[6] would then be a collateral undertaking to answer for the default of another and, therefore, would come within the statute. The courts, following the rule of *Thomas v. Cook*, go on the theory that the coexistent obligation of the third party is not independent of the promisor's undertaking, but arises only as an incident of it. Therefore, not being collateral to any obligation having an independent existence, before, or after, or contemporaneous with the oral promise of indemnity, it was not within the statute. If it can be found that the undertaking by the promisor was to subserve his own interest, or that the promisor was primarily liable to the promisee without regard to the concurrent obligation of the third party to the promisee, then even the courts under the minority view hold that the undertaking would be an original one, notwithstanding its effect would be to pay the debt of another.[7] Or if the promise of the defendant was made to the debtor, it is well settled that such agreement is not within the Statute of Frauds.[8] Here the obligation of the third party was truly but a mere incident to the defendant's promise.

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[5] Posten v. Clem, 201 Ala. 529, 78 So. 883 (1918); Hartley v. Sandford, 66 N. J. L. 627 (1901); Nugent v. Wolfe, 111 Pa. 471, 4 Atl. 15 (1886).

[6] Green v. Cresswell, *supra* note 3, was thought to have been overruled by Reader v. Kingham, 13 C. B. N. S. 343 (1862) and as such was dealt with in Wildes v. Ludlow L. R. 19 Eq. 198 (1874). Whatever doubt may have existed was dispelled after the decision of that case, for by it the doctrine of Thomas v. Cook was reaffirmed.

[7] Kirby v. Kirby, 248 Pa. 119 (1915). In Nugent v. Wolfe, *supra* note 6, it was said at 480, "On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute." In Maule v. Bucknell, *supra* note 1, it was said at 52, "Where the contract shows an intention of the parties that the new promisor shall become the principal debtor and the old debtor become but secondarily liable . . . the promise is not within the statute."

[8] It has been held that the promise of indemnity was made to the surety as a debtor. To quote, "This is a promise by the defendant to another to pay his debt, or, in other words, to save him from the performance of an obligation (which he assumed as surety) which might result in a debt. But it is a promise to the debtor to pay his debt, and thereby to relieve him from the payment of it himself, which is not within the Statute of Frauds." Adrich v. Ames, 9 Gray 76 (Mass., 1857). *Cf.* May v. Williams, 61 Miss. 125 (1883), where the court at 132 said, "It cannot be said that the promise to indemnify the surety is made to him as debtor and not as creditor. . . . It is only when the promisee has changed his relationship of debtor to the state (the fourth party to whom as surety he became liable when the third party defaulted) and assumed that of creditor to his principal, . . . that a right arises to go against the guarantor on his contract. It is to one who is under a conditional and contingent liability that the promise is made; but it is to him as creditor, and not as debtor, that a right of action arises on it."

SEARCHES AND SEIZURES—ADMISSIBILITY OF EVIDENCE ACQUIRED BY A SEARCH WITHOUT WARRANT—While making a search of certain premises under a search warrant, a sheriff smelled fumes of mash coming from a barn nearby on the premises of the defendant. Without a warrant for these latter premises, he entered the barn and found a still in operation. Defendant was indicted for the misdemeanor of possessing mash fit for the manufacture of intoxicating liquor. A conviction is appealed from on the ground that all the evidence obtained through the search and seizure should have been suppressed because the search was in violation of article 1, section 9 of the Oregon constitution.[1] *Held:* Conviction affirmed. *State v. Lee,* 253 Pac. 533 (Ore. 1926).

Courts have differed widely in their allowance of the right to search without warrant. The common law prohibited all searches without warrant, except those in connection with a legal arrest.[2] But since the Constitution of the United States, like that of Oregon, prohibits only unreasonable searches, it has been held that the reasonableness of the search and not the presence or absence of a warrant is the test of the legality of the search.[3] The federal rule in regard to the search of automobiles has been definitely settled in the case of *Carroll v. U. S.,* in which it was held that a federal officer without a warrant has the right to search an automobile when he has probable cause to believe an offense is being committed against the *Prohibition Act.*[4] But the language of the court carefully limits the right to the search of vehicles which can be quickly moved out of the district, recognizing a difference in the cases of "stores, dwellings or other structures in respect of which a proper official warrant readily may be obtained."[5] The principal case holds that where an officer has probable cause to believe a violation of the prohibition law is being committed, he has a right to search premises without a warrant. The argument of the court was that a crime was being committed in the officer's presence. And they said that an officer should be able to search without a warrant in the same way that he is allowed to arrest without a warrant where a crime is committed in his presence. The court's position is sustained by other cases,[6] although it has been recently pointed out that the law never gave the right to arrest without warrant for a misdemeanor unless it was a breach of the peace,[7] and the same reasoning applies to searches. Searches are arbitrary and dangerous to the

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[1] "No law shall violate the right of the people to be secure in their persons, papers, houses and effects against unreasonable search and seizure; and no warrant shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the person or thing to be seized," a provision similar to the Fourth Amendment to the Constitution of the United States.

[2] *In re Swan,* 150 U. S. 637 (1893); People v. Halveksz, 215 Mich. 136, 183 N. W. 752 (1921).

[3] Moore v. State, 138 Miss. 116, 103 So. 485; CORNELIUS, SEARCH AND SEIZURE (1926) § 49. *Cf.* Skipworth, *The Law of Search and Seizure,* 3 ORE. L. REV. 179 (1924).

[4] 267 U. S. 132, 39 A. L. R. 790 (1925).

[5] *Supra* note 4, at 153.

[6] McBride v. U. S., 284 F. 416 (C. C. A. 5th, 1922); U. S. v. Apple, 1 F. (2d) 493 (D. C. Mont. 1924).

[7] Bohlen, *Arrest With and Without a Warrant,* 75 U. OF PA. L. REV. 485 (1927).

interests of the individual,[8] and the principal case seems extreme when it is considered that a search warrant could be obtained without danger of the offender's escape. The case further seems questionable by calling the barn a distillery, and thus overcoming the difficulty as to searches of a "dwelling," which has always been given special protection, and which includes all buildings in the curtillage.

VENDOR AND PURCHASER—OPTION—EFFECT OF EXERCISE OF OPTION ON INTERVENING THIRD PERSONS—One Heald in 1921 leased a part of her building to *C*, the lease providing that *C* or its successors and assigns could purchase the property within five years. This lease was duly executed and recorded. In 1924 Heald leased another portion of the building to the defendant. Plaintiff, as assignee of *C's* lease, exercised the option in 1925 and purchased the property, the deed not being taken subject to the defendant's lease which had not yet expired. The plaintiff declined to recognize the defendant's lease and upon the latter's refusal to agree to a new lease brought this action of ejectment. *Held:* For defendant. *Durfee House Furnishing Co. v. Tea Co.*, 136 Atl. 379 (Vt. 1927).

An option to purchase is generally defined as a contract by which an owner agrees with another person that he shall have the privilege of buying his property at a fixed price within a specified time.[1] It consists of two elements: (1) the offer to sell, which does not become a contract until accepted, and (2) the completed contract to hold the offer open for the time specified.[2] The contract of sale only arises upon the exercise of the option and may generally be enforced either by a decree for damages or specific performance.[3] Furthermore, according to the weight of authority, the mere option before acceptance does not vest any interest in the property in the optionee, and the contract of sale takes effect from the date of acceptance which causes it to come into existence.[4] Some courts, however, hold that the optionee obtains an equitable interest in the property by the option, and that the contract upon acceptance relates back to the date of the opinion, so as to make the optionee owner as of that date.[5] However, one who purchases an interest in the property without knowledge

[8] Youman v. Commonwealth, 189 Ky. 152, 224 S. W. 860, 13 A. L. R. 1303 (1920); COOLEY, CONSTITUTIONAL LIMITATIONS (1890) 367.

[1] Black v. Maddox, 104 Ga. 157, 30 S. E. 723 (1898); Ide v. Leiser, 10 Mont. 5, 24 Pac. 695 (1890).

[2] *Ibid.*

[3] 1 AMES, EQUITY JURISDICTION (1904) 431, n. 2; 36 CYC. 625 and cases in footnotes.

[4] Strong v. Moore, 105 Ore. 12, 207 Pac. 179 (1922); Edwards v. West, 7 Ch. D. 858 (1878).

[5] People's St. Ry. Co. v. Spencer, 156 Pa. 85, 27 Atl. 113 (1893). For further cases both ways see 39 CYC. 1238, n. 19. One of the results of the minority holding is that if the property having been insured against is burned, and the option is exercised and a conveyance made after the loss, the purchaser is entitled to the moneys due on the insurance, being considered as the owner *ab initio*. People's St. Ry. Co. v. Spencer, *ibid.* However, under the majority view the proceeds are given to the optionor as against the optionee. *Supra* note 4.

of the existence of the option and before it is exercised will not be affected by the subsequent acceptance.[6] But it is well established that a purchaser with knowledge of an outstanding valid and enforceable option for the sale of the property to another will take subject to it, and specific performance of the contract may be decreed against him.[7] An option to purchase land may be recorded and when so recorded amounts to notice of its existence as to a subsequent purchaser.[8] This would appear to be the position of the parties in the principal case since the defendant acquired its rights after the lease containing the option was recorded, and therefore is regarded as taking with knowledge of an outstanding right in the plaintiff to purchase the property and consequently should take subject to this right.[9] The plaintiff having legal title at the time of the suit should succeed.

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[6] 28 L. R. A. (N. S.) 523, note; 27 R. C. L. 342.

[7] Forney v. City of Birmingham, 173 Ala. 1, 55 So. 618 (1911); Cummins v. Beavers, 103 Va. 230, 48 S. E. 891 (1904). See discussion in 28 L. R. A. (N. S.) 523, note.

[8] Fields v. Vizard Invest Co., 168 Ky. 744, 182 S. W. 934 (1916).

[9] The court in the principal case reached its conclusion on the ground that it did not recognize the doctrine of "relating back," and even applying that doctrine the plaintiff could at most only get an equitable interest in the property whereas only legal title was to be considered in an action of ejectment and that was only acquired by exercising the option after the defendant secured its lease. However, since the defendant is charged with knowledge of the record, it would seem that his rights should be subordinated to the rights of the plaintiff whenever they are exercised, and if this is so, there seems to be no necessity for using the doctrine of "relating back." Assuming that the decision of the court is correct, because of the nature of the action, there would seem to be no reason why a court of equity should not lend its aid in the protection of the plaintiff's rights.