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RECENT CASE NOTES

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ADMINISTRATIVE LAW—POWER OF BOARD OF HEALTH TO LOCATE PESTHOUSES—CANNOT CREATE NUISANCE.—The owner of private property sought to enjoin the board of health from locating a pesthouse in a residential district, although the board under a city charter had discretion in its location. *Held,* that the injunction should be granted. *Birchard et al. v. Board of Health of City of Lansing et al.* (1918, Mich.) 169 N. W. 901.

This case illustrates the principle that apparently unlimited powers granted to administrative boards cannot be exercised to create private nuisances, unless the statute under which they act expressly so requires or unless the power is otherwise impossible of exercise. *Metropolitan Asylum Dist. v. Hill* (1881, H. L. Eng.) 6 A. C. 193, 212; *Mayor of Baltimore v. Fairfield Improvement Co.* (1898) 87 Md. 352, 39 Atl. 1081. Where the power can be exercised without creating a nuisance the discretion is limited to that extent. *Barth v. Christian Psychopathic Hospital Asso.* (1917) 196 Mich. 642, 163 N. W. 62. Had the pesthouse been in existence, a newcomer to the neighborhood could probably not have complained. See *Upjohn v. Board of Health of Richland Township* (1881) 46 Mich. 542, 9 N. W. 845. But how long it must have been in continuous operation before private persons are estopped from enjoining it as a nuisance does not appear to be settled. It will necessarily depend considerably upon the facts.

ALIEN ENEMY—DISABILITY TO SUE—PLEADING IN DEFENSE.—In an action by a person alleged to be an alien enemy the plaintiff's disability was not pleaded by the defendant, but was brought out in cross-examination only. *Held,* that the defense not having been pleaded as a part of the record, was inadmissible. *Heiler v. Goodman's Motor Express Van & Storage Co.* (1918, N. J. Ct. Err.) 105 Atl. 233.

While this ruling was *dictum* only, the point has but rarely come up in recent years. See COMMENTS, p. 680, *supra.*

ALIEN ENEMY—PARTNERSHIP—ACTION IN NAME OF FIRM WITH ONE ENEMY PARTNER NOT INHIBITED.—A partnership consisting of five British partners and one German, the latter domiciled in Germany, brought an action to recover a pre-war debt due the firm. The partnership having been dissolved by the war, the action was incidental to the effort of the British partners to get in the assets for purposes of liquidation. The defendant pleaded in abatement the alien character of one of the co-plaintiffs. *Held* (Lords Atkinson and Sumner *dissenting*) that the action should not be stayed. *Rodriques v. Speyer Brothers* (1918, H. L.) 119 L. T. Rep. 409.

See COMMENTS, p. 680, *supra.*

CONTRACTS — ILLEGALITY — CONFESSED JUDGMENT — EQUITABLE RELIEF. — The plaintiff, in consideration of the defendant's promise to procure a divorce, agreed to pay her a monthly sum, and to confess judgment for $35,000. as collateral security. The defendant secured the divorce, collected several payments, and then remarried. Further payments being refused, the defendant entered judgment on the confession and levied execution. The plaintiff sued, asking an injunction against proceedings on the execution, and further relief. *Held* (two judges *dissenting*) that the execution should be vacated and the defendant enjoined from enforcing the judgment. *Schley v. Andrews* (1919, N. Y.) 121 N. E. 812.

Contracts made in consideration of divorce fall among those held void as against public policy. *Pereira v. Pereira* (1909) 156 Cal. 1, 103 Pac. 488; *cf.* also (1915) 24 YALE LAW JOURNAL, 348. Where the parties are *in pari delicto* neither law nor equity will aid either, when the agreement has been wholly executed. *Platt v. Elias* (1906) 186 N. Y. 374, 79 N. E. 1. Nor, it seems, may property be recovered which has been transferred in part execution of the agreement. *Booker v. Wingo* (1888) 29 S. C. 116, 7 S. E. 49. And so far as the latter is wholly executory, the courts refuse all aid in its enforcement. See (1919) 28 YALE LAW JOURNAL, 502; (1917) 27 *ibid.* 273. Difficulty arises only where the execution or enforcement is still partial. Where judgment has been entered for one party to the illegal contract—at least where it was by confession, so that the other has not truly had his day in court—the judgment may be opened to permit defence. *Fields v. Brown* (1900) 188 Ill. 111, 58 N. E. 977; *Bredin's Appeal* (1879) 92 Pa. 241, 37 Am. Rep. 677. And there is authority for staying execution proceedings, as in the principal case. *Given's Appeal* (1888) 121 Pa. 260, 15 Atl. 468. To refuse such a stay would indirectly give judicial aid of a kind from which either wrong-doer may well be barred. And allowing an apparent obligor to take the initiative in equity by enjoining suit on a note, may be explained as in effect merely one form of defence. See *Booker v. Wingo, supra. Quaere:* Whether negotiation of such a note would be enjoined, or the note impounded and cancelled; such action would seem to overstep the general rule outlined above. But at least one court has gone far in aid of a wrong-doing obligor. A mortgage had been given, with power of sale; sale under the power was enjoined, as likely to create a cloud on title, and the mortgage was cancelled. *Basket v. Moss* (1894) 115 N. C. 448, 20 S. E. 733. As to recovery by the "dupe" against the "knave," though the transaction was illegal, see (1918) 27 YALE LAW JOURNAL, 1090; also (1915) 24 *ibid.* 255.

CRIMINAL LAW—CRIMINAL RESPONSIBILITY FOR ACT OF SERVANT.—The New York Labor Law (Consol. L. 1909, ch. 31, sec. 162) prohibited the employment of child labor. The penal statutes (Consol. L. 1909, ch. 40, sec. 1275) provided that violation of the Labor Law should be a crime punishable by *fine* for the first offense, which for second offense might be followed by *imprisonment.* The defendant, a corporation engaged in selling milk, was prosecuted for violation of the Labor Law by one of its servants, a wagon driver, who employed a boy to watch his bottles. The defendant had prohibited such hiring by its servants but had not adequately supervised the enforcement of its rules. *Held,* that the defendant was guilty, since the Labor Law imposed a non-delegable duty to suffer no violation of its provisions which could be prevented by reasonable regulation; and since, further, a duty to make reparation to the state for the wrongs of servants, when not carried beyond the payment of a moderate fine, is a reasonable regulation of the right to do business by proxy. *People v. Sheffield Farms—Slawson-Decker Co.* (1918, N. Y.) 121 N. E. 474.

It is the general rule that the master is not criminally liable for the acts of his servants unless committed by his command or with his assent. 26 *Cyc.* 1546. Quite frequently, however, statutes impose non-delegable duties upon the master or principal when public health, morals, etc., are involved, and supervision is difficult. *State v. Fagan* (1909) 24 Del. (1 Boyce) 45, 74 Atl. 693. The violation of such duties by a servant without the knowledge or even against the direct orders of the master may subject the master to criminal liability. *State v. Gilmore* (1908) 80 Vt. 514, 68 Atl. 658, 41 L. R. A. (N. S.) 786; 13 Ann. Cas. 324, note (sale of intoxicating liquor to a minor); *Tenement House, etc. v. McDevitt* (1915) 215 N. Y. 160, 109 N. E. 88, Ann. Cas. 1917A 455 (use of house by lessee, for prostitution); *Brown v. Foot* (1892, Q. B.)

66 L. T. Rep. (N. S.) 649, 17 Cox C. C. 509 (milk adulteration by servant); *State v. Mason* (1894) 26 Ore. 273, 36 Pac. 130, 26 L. R. A. 779 (libel published without knowledge of newspaper owner). In such cases no criminal intent is necessary. That the master is a corporation does not, therefore, relieve it. 7 Labatt, *Master and Servant*, 7932; Laski, *Vicarious Liability* (1916) 26 YALE LAW JOURNAL, 105, 130. Such absolute liability must depend upon the wording and purpose of the statute. 7 Labatt, *op. cit.* 7892. These statutes are not open to constitutional attack,—at least unless the fine is grossly disproportionate. *Ibid.* 7927; *New York Cent. & H. R. R. v. United States* (1909) 212 U. S. 481, 29 Sup. Ct. 304; see *Waters-Pierce Oil Co. v. Texas* (1908) 212 U. S. 86, 111, 29 Sup. Ct. 270. But the limit of criminal liability in all such cases has been a money fine, or confiscation of the property involved. *United State v. Brig Malek Adhei* (1844, U. S.) 2 How. 210, 233; *cf.* for a common procedure *Chase v. Proprietors, etc.* (1919, Mass.) 122 N. E. 162. It has been intimated, however, that imprisonment of the master might be sanctioned, at least where the law provides for imprisonment, on default of payment of a fine. See *Pearks, Gunston etc. v. Southern Counties Co. Ltd.* [1902] 2 K. B. 1, 11. And the question may well come up in a stronger form in case of prosecution for a second offense under the statute involved in the instant case. Although the majority refused to pass on this point, Crane, J., in a special concurrence indicated his strong opinion that such imprisonment could not be imposed. Even should the court decide to the contrary, it is difficult, in the absence of express direction, to see how such a penalty could be enforced against a corporation.

ESTOPPEL BY MISREPRESENTATION—EFFECT OF RECORDING ACTS—FAILURE TO RECORD EQUITABLE CLAIM.—The defendant permitted the record title to certain land to stand in the name of another. This other was to the defendant's knowledge engaged in a business which required the incurring of debts. The persons who were so extending credit relied upon the record and also upon the statement of the holder of the record title that he owned the property in question. The holder of the record title when faced with bankruptcy proceedings conveyed the property to the defendant. The trustee in bankruptcy brought the present action to recover it for the benefit of the creditors. *Held*, that he was entitled to the relief asked. *Bergin v. Blackwood* (1919, Minn.) 170 N. W. 507.

See COMMENTS, p. 685, *supra*.

HUSBAND AND WIFE—FRAUDULENT CONVEYANCE IN CONTEMPLATION OF MARRIAGE—RECOVERY OF DOWER RIGHT.—A widowed father conveyed all his property to his son without consideration. At the time, he was considering re-marriage, and although he had no particular woman in mind, his motive in making the conveyance was to deprive any future wife of her marital rights in his property. Twenty-two months later he married the plaintiff, and lived with her for more than a year until his death. The plaintiff widow brought a bill in equity, setting out these facts and praying that the deed to the son be set aside, and that she recover her dower and homestead rights. *Held*, that a demurrer to the bill had been improperly sustained. *Jarvis v. Jarvis* (1919, Ill.) 122 N. E. 121.

Equity has always enforced a wife's marital rights in property which her husband conveyed upon the "eve of marriage" with the intent to defraud her. *Roberts v. Roberts* (1917) 131 Ark. 90, 198 S. W. 697; *Deke v. Huenkemeier* (1913) 260 Ill. 131, 102 N. E. 1059. Fraudulent intent must appear. A genuine desire to make reasonable provision for children by a former wife validates the conveyance. *Goff v. Goff's Exrs.* (1917) 175 Ky. 75, 193 S. W. 1009; *Kinne v. Webb* (1893, C. C. A. 8th) 54 Fed. 34. Also the conveyance must have been

made upon the "eve of marriage" or "in contemplation of marriage." The interpretation of these phrases has undergone a marked change. Formerly, the wife could not recover unless the conveyance had been made during the engagement period or, at least, during the courtship. *Butler v. Butler* (1879) 21 Kan. 521; *Gainor v. Gainor* (1868) 26 Ia. 337, overruled in *Beechley v. Beechley* (1907) 134 Ia. 75, 108 N. W. 762; *cf. Allen v. Allen* (1912) 213 Mass. 29, 99 N. E. 462. The principal case represents the modern interpretation that the conveyance is invalid even if made before acquaintance with the wife, provided the husband's intention, at the time, was to defeat the marital rights of any person he might later marry. *Higgins v. Higgins* (1905) 219 Ill. 146, 76 N. E. 86; *Beechley v. Beechley, supra.* This extension has led to a change of view as to origin. Under the earlier rule, the right seemed to spring from the peculiarly confidential relationship between persons already affianced, a relationship in which the law imposed a duty to refrain from any act exhibiting bad faith. *Ward v. Ward* (1900) 63 Oh. St. 125, 57 N. E. 1095. This reason loses its true ring when the parties may, at the time of the conveyance, be utter strangers. Of late, therefore, the courts have been reasoning on the analogy of a voluntary conveyance, with the intent to defraud future creditors, by one who contemplates contracting debts. *Deke v. Huenkemeier, supra; McAulay v. McAulay* (1913) 96 S. C. 86, 79 S. E. 785. It would seem that the principal case can best be supported on this ground.

LIBEL AND SLANDER—LIABILITY OF CORPORATION.—The manager of the defendant corporation accused his predecessor, the plaintiff, of theft of property belonging to the corporation, and directed a search of his goods. The plaintiff joined the corporation and its manager as co-defendants in an action for slander. *Held,* that both defendants were liable, the corporation because its agent had acted within the scope of his employment. *Cotton v. Fisheries Products Co.* (1918, N. C.) 97 S. E. 712.

Distinction is no longer made between the liability of a corporation and of a natural person for the torts of agent and servants. *Goodspeed v. East Haddam Bank* (1853) 22 Conn. 530; *Denver & R. G. Ry. v. Harris* (1887) 122 U. S. 597, 7 Sup. Ct. 1286. That corporations of earlier days were in general exempted from such liability may be explained by their being then mostly of a public or charitable nature; a ground no longer applicable. See 7 R. C. L. 682. Some recent writers, admitting that private corporations can be held for most torts, would make an exception of slander, on the ground that one cannot slander by deputy. Townshend, *Slander and Libel* (4th ed., 1890) 474; Jaggard, *Torts,* 170; *contra,* Newell, *Slander and Libel* (3d ed., 1914) 436. This hardly seems tenable. The rule that a slanderer is not liable for repetitions by his hearer is wholly a limitation imposed by policy on a liability which would normally otherwise exist. But suppose the slanderer expressly authorized a repetition to a third party; or suppose he drilled an innocent person who was ignorant of the language, and got such person to publish the words: would he not be answerable for the slander in the repetition? There is more foundation for the limitation imposed by some courts, that the corporation is not to be held for mere loquacity in its agents, and is not liable unless it has authorized or ratified the particular act of uttering the slander. *Behre v. National Cash Register Co.* (1897) 100 Ga. 213, 27 S. E. 986; *McIntire v. Cudahy Packing Co.* (1913) 179 Ala. 404, 60 So. 848. But so long as the law is settled the other way, for individuals and corporations, in other torts generally and even in libel, there seems to be little reason to make a lonesome exception of spoken defamation. *Hypes v. Southern Ry.* (1909) 82 S. C. 315, 64 S. E. 695, 21 L. R. A. (N. S.) 873. The more consistent view is that of the instant decision, for which there is ample authority. *Payton v. People's Credit Clothing Co.*

(1909) 136 Mo. App. 577, 118 S. W. 531; *Waters Pierce Oil Co. v. Bridewell* (1912) 103 Ark. 343, 147 S. W. 64. On the master's criminal liability for the acts of his servant, see *supra, sub tit.* CRIMINAL LAW; on damages for slander see (1918) *27* YALE LAW JOURNAL, 701.

POLICE POWER — CONTAGIOUS DISEASES — COMPULSORY PHYSICAL EXAMINATION.—Acting under general statutory powers to safeguard the public health, a local board of health adopted a rule that persons suspected of having venereal disease should be detained for physical examination, including the "Wasserman test," which involved taking a blood-sample; if the examination disclosed infection, the infected person was to be restrained at a house of detention until the city's physician authorized release. The plaintiff, arrested on a charge of lewdness, was held for examination under the above ruling, on order of the board. He instituted proceedings in *habeas corpus. Held,* that the restraint amounted to deprivation of liberty without due process of law. *Wragg v. Griffin* (1919, Iowa) 170 N. W. 400.

The principal case presents the question as to how far liberty and privacy of the person may be encroached upon under the police power in the interests of public health. Under proper statutes, general vaccination may be ordered by a board of health, when deemed advisable. *Herbert v. School Board* (1916) 197 Ala. 617, 73 So. 321. For failure to submit, a penalty or a quarantine may be imposed. See 12 R. C. L. 1287, 1290. Such quarantine seems ample to prevent contagion; and forcible vaccination has never been upheld in this country. See 17 L. R. A. (N. S.) 709, note; 25 L. R. A. 152, note. In this connection see also *Rhea v. Board of Education* (1919, N. D.) 171 N. W. 103, noted next month, RECENT CASE NOTES, *sub tit.* STATUTORY CONSTRUCTION. There is no question that persons known to have venereal, or any other contagious or infectious disease, may be subjected to quarantine, under criminal penalty. See 12 R. C. L. 292; 26 L. R. A. 489, note; Cal. Pen. Code 1909, sec. 394. And a person suffering from disease may have his liberty infringed in other ways. *Peterson v. Widule* (1914) 157 Wis. 641, 147 N. W. 966, Ann. Cas. 1916B 1040 (male, to procure marriage license, must file physician's certificate of freedom from venereal disease); (Ind.) Burns' Ann. St. 1914, secs. 2250, 2251 (epileptic forbidden sexual intercourse). But doubt arises regarding forcible detention, on mere suspicion, for purposes of examination. Compulsory denuding of the person has been held unconstitutional where its purpose was to secure evidence which might lead to restraint of liberty, or to punishment. *State v. Height* (1902) 117 Ia. 650, 91 N. W. 935; 5 Jones, *Evidence,* 344; but see *O'Brien v. State* (1890) 125 Ind. 38, 25 N. E. 137. But it may be questioned whether detention under quarantine is sufficiently in the nature of a penalty to bring this case within the law on self-incrimination. And the court intimates that had the legislature expressly permitted such action as that of the board, it might have been valid. The independent acts of a board of health, however, are limited to such as are essential to protect the public. *State v. Speyer* (1895) 67 Vt. 502, 32 Atl. 476; *Wong Wai v. Williamson* (1900, N. D. Cal.) 103 Fed. 1; see also Freund, *Police Power,* 133, 138. Physical examination on suspicion may come to be considered essential; but the principal case seems decidedly more in keeping with our traditions in not allowing this power to a board of health until the legislature has spoken clearly. It is worth note that this practice, though applied to prostitutes these many years, was only questioned when the shoe began to pinch a man.

RECEIVERS—ALLOWANCE OF CLAIMS.—One English, having contracted with the United States to erect buildings on a military reservation in Arizona, gave bond, with the Ætna Indemnity Company of Connecticut as surety, as required by Act of Congress of August 13, 1894, ch. 280, amended by Act of February 24,

1905, ch. 778, 33 Stat. L. 811 (U. S. Comp. St. 1916, sec. 6923). English having completed his contract but failing to pay certain persons supplying labor and materials used in the construction of these buildings, suit was brought on the bond in their favor as provided in the Statute, in the United States District Court in Arizona. Thereafter the Superior Court for Hartford County, Connecticut, appointed a receiver over the Indemnity Company. The receiver proceeded to liquidate the affairs of the Company and, under authority of the court of the receivership, defended the Arizona suit in the name of the Company and later agreed to a judgment against the Company. Subsequently the judgment holders made application to the court of the receivership to intervene and present their claims, which application was denied, no appeal being taken. Thereafter they again made application to the same court, reciting the facts more fully and asking that the receiver be ordered to report their claims. The receiver objected, contending that the claims were not presented within the time limited for presenting claims to the receiver, that the receiver as distinguished from the Company was not bound by the Arizona judgment, that the court of the receivership need not recognize in any case, and could not thus summarily be forced to recognize, a foreign judgment secured subsequent to the date of the receiver's appointment, that no matured claim against the Company existed at this date and that the denial of the previous application had made the question *res adjudicata*. *Held*, that the receiver should report the claims as allowed, since the actions of the receiver in connection with the Arizona suit, done under authority of the court of the receivership, were sufficient to dispense with formal presentation of the claims to the receiver, and had resulted in an adjudication of the amount of the claim made in the proper court specified by the Act of Congress and assented to by the court of the receivership; and since the claim was matured though unliquidated at the date of institution of the receivership and the question was not made *res adjudicata* by the denial of the previous application. *Burford-Burmister Co. v. Ætna Indemnity Co.* (1919, Conn.) 105 Atl. 470.

The Ætna Indemnity Company was surety on the bond of one Caldwell, trustee for the benefit of creditors of a building trust company in Kentucky. Caldwell having converted funds of the trust, suit was instituted on the bond in a Kentucky court in 1903 against him and the Indemnity Company. Judgment was rendered in favor of the plaintiff and all parties appealed. Thereafter the Superior Court for Hartford County, Connecticut, appointed a receiver over the Indemnity Company, and the receiver, under authority of the court of the receivership, defended the action on appeal in the name of the Company. A new trial was ordered which resulted in a larger judgment in favor of the plaintiff. Plaintiff then applied to the court of the receivership, asking that the receiver be ordered to report his claim for the full amount thereof as an allowed claim. The receiver contended that the claim was contingent when the receiver was appointed, that no claim was presented to the receiver within the time limited for presenting claims, and that the claim was based upon a foreign judgment rendered subsequent to the receiver's appointment. *Held*, that the application should be granted; the claim being matured though unliquidated at the date of the receiver's appointment, and the receiver's authorized defense of the Kentucky action making unnecessary any other presentation of the claim, and making the resulting judgment binding as to the validity and amount of the claim. *Husbands v. Ætna Indemnity Co.* (1919, Conn.) 105 Atl. 480.

See COMMENTS, p. 673, *supra*.

RECEIVING STOLEN GOODS—OBTAINING PROPERTY UNDER FALSE PRETENSES—STATUTORY LARCENY.—F fraudulently induced a broker to loan money on

forged stock certificates. The broker turned his check over to his bank, which in turn created a deposit credit for F in a New York bank. The accused, knowing of the fraud, received money drawn by F from this account, and was indicted under the New York statute for receiving stolen goods. *Held,* that the accused was not guilty, as the identity of the property taken from the owner had been entirely destroyed. *People v. Hanley* (1919, App. Div.) 173 N. Y. Supp. 692.

New York, by statute, has made the obtaining of property under false pretenses, larceny. N. Y. Penal Law, sec. 1290. It seems that only such property as is a subject of larceny can be obtained by false pretenses. *State v. Klinkenberg* (1913) 76 Wash. 466, 136 Pac. 692. But the New York statute has extended such "property" to cover "any . . . thing in action, evidence of debt or contract or article of value of any kind." Sec. 1290, *supra.* This language has been held to cover such instruments as are not merely evidential, like a common receipt, but are operative in character. *People v. Griffin* (1869, N. Y.) 38 How. Pr. 475; *cf. State v. Scanlon* (1903) 89 Minn. 244, 94 N. W. 686. So a check; and in the instant case the broker was induced to draw and part with a check to his bank. This would seem to make out the crime under the Alabama law. *Clark v. State* (1916) 14 Ala. App. 636, 72 So. 291 (person fraudulently induced to give a suretyship bond to a third party, which he had to pay). But the New York statute has been construed to apply only to instruments complete before they were "obtained" by the accused; and not to cover fraudulently procuring such an instrument to be made and delivered, even to oneself. *People v. Deinhardt* (1913, N. Y.) 179 App. Div. 228, 166 N. Y. Supp. 502 (deed). Hence, in the principal case F obtained both the bank credit and its proceeds without larceny, and held the "legal title" thereof. Like any defrauder, he might have been charged by the person defrauded as constructive trustee of whatever he had received in exchange for the property obtained by fraud. *Farwell v. Kloman* (1895) 45 Neb. 424, 63 N. W. 798; see *American Sugar Co. v. Fancher* (1895) 145 N. Y. 552, 40 N. E. 206. And statutes have made trustees—in New York "trustees of any description"—guilty of larceny for intentional conversion. N. Y. Penal Law, secs. 1290, 1302; R. I. Genl. L. 1909, ch. 345, sec. 16. But whether constructive trustees would be held to fall under the language of these sections may well be doubted. If not, the principal case is clearly sound; as such an interpretation would be necessary to convict of receiving *stolen* goods, even if the accused had received the identical "trust" *res*—the claim against the bank—instead of its proceeds.

SPECIFIC PERFORMANCE—MUTUALITY OF OBLIGATION.—L had contracted to exchange his land in Illinois for R's land in Canada. L then made a contract with K for the sale of the Canada land to be received from R: K to buy on certain terms, but to have the power of annulling the contract by defaulting and forfeiting $500 liquidated damages. As security to K, L "assigned" his contract with R to a stakeholder. This suit was brought by K and the stakeholder to compel specific performance (1) of R's contract with L; (2) of L's contract with K. *Held,* that the plaintiffs were not entitled to relief, since as to them the contracts were not "mutual in obligations and remedy, and enforceable by either party." *Lunt et al. v. Lorscheider et al.* (1918, Ill.) 121 N. E. 237.

Equity should grant the plaintiff specific performance of a bilateral contract unless, *after the defendant's forced performance,* the plaintiff's own obligation will remain unperformed and is of such a nature that the defendant will still, *on grounds independent of mutuality,* be refused specific performance. See COMMENT (1917) 27 YALE LAW JOURNAL, 261. This doctrine covers the almost universal rule that a plaintiff, though his own promise is oral, may have specific performance if the defendant has signed the memorandum. *Western Timber*

Co. v. Kalama River Lumber Co. (1906) 42 Wash. 620, 85 Pac. 338. So even in the state of the instant case. *Ullsperger v. Meyer* (1905) 217 Ill. 262, 75 N. E. 482. And married women, and infants upon reaching majority, may have specific performance, although equity would not so have aided the other party. *Fennelly v. Anderson* (1851) 1 Ir. Ch. 706, and *Mullens v. Big Creek Gap Coal Co.* (1895, Tenn. Ch. App.) 35 S. W. 439 (married women); *Clayton v. Ashdown* (1714) 9 Vin. Abr. 393 (infant). And where the plaintiff, although not specifically compellable, has already in fact fulfilled his obligation, equity will grant him specific relief. *Topeka Water Supply Co. v. Root* (1895) 56 Kan. 187, 42 Pac. 715 (personal services exchanged for land). Similarly one whose own faulty title precludes him from specific performance may yet be compelled to convey. See *Jasper v. Wilson* (1908) 14 N. Mex. 482, 492, 94 Pac. 951. And so with one who has agreed to loan on an insurance policy, although he could not have forced the other party to borrow. See (1918) 27 YALE LAW JOURNAL, 1083. The decisive factor is the condition of the defendant *after* the decree; in the last case suit on the debt at law is in effect specific enforcement of repayment. Nor should it be of consequence that the plaintiff had by the contract a power and privilege—i. e., "option"—to terminate his obligation; and this view the Supreme Court has recently adopted. *Guffey v. Smith* (1914) 237 U. S. 101, 35 Sup. Ct. 526. If the defendant secures or has assurances of securing every thing for which he contracted, he has in fairness no ground for objection. Hence equity, in England and many of our states, enforces his obligation. *Lumley v. Wagner* (1852, Eng. Ch.) 1 De G. M. & G. 60; *Zelleken v. Lynch* (1909) 80 Kan. 764, 104 Pac. 563. So in the principal case, although neither R nor L had specific remedy against the plaintiffs, each seems amply protected. To obtain relief against R under the assignment or against L on his contract, the plaintiffs must tender performance of every condition precedent bargained for. In refusing relief the court mechanically follows the old formula of mutuality as given in Fry, *Specific Performance* (4th ed., 1903) 203, obscure though it is in principle, and artificial in extent. While it is still impossible to determine the arithmetical weight of authority, it is believed that the tendency toward casting aside this formula is fast gaining way. See COMMENT, *supra; Pucini v. Bumgarner* (1918, Okla.) 175 Pac. 537.

SURETYSHIP—SUBROGATION OF CREDITOR TO INDEMNITY BOND GIVEN TO SURETY BY A STRANGER.—The plaintiff, having sued as creditor of W, attached certain chattels. To dissolve the attachment W filed a surety bond signed by the Illinois Surety Company. This surety company first obtained a bond of indemnity from the defendant. Later the surety company became insolvent, and the plaintiff claimed to be subrogated to its rights against the defendant, created by the indemnity bond. *Held,* that the plaintiff was not entitled to subrogation. *Dinsmore v. Sachs* (1919, Md.) 105 Atl. 524.

There are many cases holding that a creditor is subrogated to the rights of his surety with respect to securities given to the surety by the principal debtor. *Maure v. Harrison* (1692) 1 Eq. Cas. Abr. 93, pl. 5; Ames, *Cases on Suretyship,* 620, and note. There are some limitations on this rule. See *Jones v. Quinnipiack Bank* (1860) 29 Conn. 25. There are two theories on which the creditor's foregoing right of subrogation is based. (1) The surety is frequently said to hold the security as a trust fund for payment of the creditor's claim against the principal debtor. *Moses v. Murgatroyd* (1814, N. Y.) 1 Johns. Ch. 119. This theory is not always approved, even where the securities in question were deposited by the principal debtor himself. It is certainly not applicable in a case like the present where the securities are deposited by a stranger solely for the purpose of indemnifying the surety. *Hampton v. Phipps* (1882) 108 U. S. 260; *Hasbrouck v. Carr* (1914) 19 N. Mex. 586, 145

Pac. 133. (2) The second theory is that the surety holds the securities in order to be sure of *exoneration* (and not merely *reimbursement*), and the best way to secure this is to let him assign the securities to the creditor, or to let the creditor himself collect by direct action. This theory is not generally adopted, but if it is sound it would apply in the present case. No fund was deposited by the defendant with the surety company, as a trust fund, nor was the defendant's promise made to the surety company as *trustee*. Nevertheless, if the defendant's promise to the surety company was to save it harmless, to exonerate and not merely to reimburse, then the performance of the promise involves a payment directly to the creditor. The creditor might well be regarded as a third-party beneficiary. Complete exoneration of the surety company requires full settlement with the creditor, the fact that the surety company is insolvent being immaterial in this respect. This would perhaps be otherwise if the surety company has been totally dissolved. See *Hasbrouck v. Carr, supra.* On this theory, the rights of both the surety company and the creditor will be fully vindicated by action in the creditor's name against the defendant, without reference to the complexities of subrogation. To this action the surety company should be made a party.

TORTS—INJURY CAUSED BY FRIGHT—DAMAGES.—The defendant's chimpanzee escaped, entered the plaintiff's house and attacked her children. The plaintiff drove the animal away but became hysterical and ill because of fear for her own and children's safety. She sued the owner of the animal for the injuries caused by the fright. *Held,* that the plaintiff could recover. *Lindley v. Knowlton* (1918, Cal.) 176 Pac. 140.

No recovery can be had for pure fear not resulting in bodily effects. *Chittick v. Phila. Rapid Transit Co.* (1909) 224 Pa. 13, 73 Atl. 4; *Reed v. Ford* (1908) 33 Ky. L. Rep. 1029, 112 S. W. 600, 19 L. R. A. (N. S.) 255. Nor where the fear is wholly for the safety of a third person. *Sanderson v. Northern Pacific Ry.* (1902) 88 Minn. 162, 92 N. W. 542. By the weight of authority, fear for one's self which is followed by bodily suffering is ground for the recovery of damages. *McGee v. Vanover* (1912) 148 Ky. 737, 147 S. W. 742; *Samarra v. Allegheny Valley St. Ry.* (1913) 238 Pa. 468, 86 Atl. 287; *Denver R. Co. v. Roller* (1900, C. C. A. 9th) 100 Fed. 738; *contra, Mitchell v. Rochester* (1896) 151 N. Y. 107, 45 N. E. 354. Also fear may be considered as an operative element and affect the amount of damages when it results either from or in physical suffering, or produces a visible injury to the nervous system. *Watson v. Augusta B. Co.* (1903) 124 Ga. 121, 1 L. R. A. (N. S.) 1178, 110 Am. St. 157; *Conley v. United Drug Co.* (1914) 218 Mass. 238, 105 N. E. 975. On remoteness of mental anguish as barring recovery, see (1916) 25 YALE LAW JOURNAL, 243; on mental suffering for desecration of the dead, see (1916) 28 *ibid.* 508, and CURRENT DECISIONS, *infra, sub tit.* TORTS.

TORTS—LABOR UNIONS—BANNERING AND STRIKE—"RIGHT TO WORK IN ONE'S OWN BUSINESS."—The constitution of the defendant union excluded all theatre owners. The plaintiff, a theatre owner, insisted upon operating his own moving picture machines part of the time, to save expense. To force him to employ union men to do this work the union men ceased to work for him and the defendant union published in the official labor paper that the plaintiff was "unfair," and caused a banner bearing that message to be paraded in front of the theatre. The plaintiff, whose business fell off in consequence, applied for an injunction *pendente lite.* It was refused and the plaintiff appealed. *Held,* that the desire to force the plaintiff to replace his own services in his own business with those of the defendant's members was not such a motive as justified the defendant's acts injuring the plaintiff's business; but that the

trial court had acted within its discretion in refusing the injunction *pendente lite*. *Roraback v. Motion Picture Operators' Union of Minneapolis* (1918) 144 Minn. 481, 168 N. W. 766.

A union is privileged to use lawful means to procure the discharge of a non-union worker when the sole motive is to secure the work for themselves. The discharged employee has no right of action against the union. *National Protective Assn. v. Cummings* (1902) 170 N. Y. 315, 63 N. E. 369; *Shinsky v. O'Neil* (1919, Mass.) 121 N. E. 790, discussed in (1919) 28 YALE LAW JOURNAL, 611. Nor has the employer any right that the union shall not take such action. *Steffes v. Motion Picture Machine Operators' Union* (1917) 136 Minn. 200, 161 N. W. 524; but see *Snow Iron Works v. Chadwick* (1917) 227 Mass. 382, 116 N. E. 801. But the principal case maintains that where the plaintiff plays the double role of workman and employer and is working in his own business, the union may not force him to desist. This doctrine may be sustained upon a ground which the court does not consider, viz., that inasmuch as the defendant will not allow him to become a member of their union, they should not be permitted to ruin his business because of his non-membership. *Lucke v. Clothing Cutters, etc.* (1893) 77 Md. 396, 26 Atl. 505. The majority opinion argues that the plaintiff's rights against the defendant arise from the Bill of Rights and the Fourteenth Amendment. These certainly confer an *immunity* upon all citizens, from certain interferences by state *governmental* agencies. But such immunity does not carry with it, as a logical necessity, *rights* in one citizen against *other individuals*. *Civil Rights Cases* (1883) 109 U. S. 3, 3 Sup. Ct. 18; see Cook, *Privileges of Labor Unions* (1918) 27 YALE LAW JOURNAL, 779, commenting on *Hitchman Coal and Coke Co. v. Mitchell* (1917) 245 U. S. 229, 38 Sup. Ct. 65, Ann. Cas. 1918B 461. It may well be that public policy at times requires the co-existence of such rights with the immunities in question, but the fact should be borne in mind that the requirement is not one of logic, but one of policy, to be determined in each case.

TRUSTS—MASSACHUSETTS BUSINESS TRUSTS NOT "ASSOCIATIONS" UNDER INCOME TAX ACT.—Certain mills and other property in Massachusetts were partly conveyed, partly leased, to a Massachusetts corporation. The reversion of the property leased was conveyed to trustees, who executed a declaration of trust: declaring that they held the reversion and all other property received under the trust for the benefit of the *cestuis* (who should be trust beneficiaries only, without partnership, association or other relation whatever *inter sese*) upon trust at the discretion of the trustees to convert the same into money and distribute the net proceeds to the then holders of the trustees' certificates, within twenty years after the death of specified persons. In the meantime the trustees were to have the powers of owners; they were in their discretion to distribute net income to the certificate holders or apply it to capital. The powers of the certificate holders were limited to consenting: to any increased remuneration of the trustees, to any filling of vacancies among the trustees, and to any modification of the terms of the trust. The trustees' receipt provided that the holder was to have no interest in any specific property. The stock of the lessee corporation was also left in the trustees' hands; but the trustees' function was not to manage the mills, but only to collect the rents and income. The income of this lessee corporation had been taxed in the hands of the corporation, but an additional tax was levied on the income from the shares held by the trustees, as on income of an "association" under the Income Tax Act of October 3, 1913, ch. 16, sec. II, G (a), 38 Stat. L. 114, 166, 172, taxing the income of "every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships." The trustees brought suit

to recover the amount of the tax so levied. *Held,* that they might recover, as the trust was not a "joint-stock association" within the Act. *Crocker v. Malley* (March 17, 1917) U. S. Sup. Ct. Oct. Term, 1918, No. 649.

See COMMENTS, p. 690, *supra.*

WILLS—JOINT AND MUTUAL—CONTRACT NOT TO REVOKE.—The plaintiff and his wife executed a joint and mutual will devising all the property owned by them jointly or severally to the survivor. Before and after the execution, the plaintiff purchased property, taking the title to part in his wife's name and to the remainder in their names jointly. The wife later secretly made another will, leaving her entire estate to the defendants, her son and daughter by a former marriage. The later will having been admitted to probate, the plaintiff brought this action in equity against the devisees to enforce the terms of the prior will. *Held,* that the plaintiff was entitled to such relief. *Hermann v. Ludwig et al.* (1919, App. Div.) 174 N. Y. Supp. 469.

Equity will enforce the terms of a joint and mutual will which was made pursuant to a contract by both parties not to revoke the same, although the deceased has done so by a later will. *In re Hoffert's Estate* (1917) 65 Pa. Super. Ct. 515; *Bower v. Daniel* (1906) 198 Mo. 289, 95 S. W. 347. The theory is that the will itself is revoked, being an ambulatory instrument, but equity enforces the contract by imposing a trust on the devisees of the later will according to the provision of the earlier one. See COMMENT (1918) 27 YALE LAW JOURNAL, 542. The question in the principal case is whether such a contract has been established. Although a joint and mutual will might well be in itself sufficient evidence of a contract not to revoke, the rule seems settled to the contrary. *Buchanan v. Anderson* (1905) 70 S. C. 454, 50 S. E. 12; *Estate of Crawley* (1890) 136 Pa. 628, 20 Atl. 567. But such a contract may be established if there are in addition circumstances and indirect evidence other than the will itself. See *Edson v. Parsons* (1898) 155 N. Y. 555, 567; 50 N. E. 268. So in the principal case. And where the survivor has taken benefits under the mutual will and later revoked, the courts require less outside evidence to find a contract; for it would be inequitable for the survivor to benefit and not comply with his agreement. *Rastetter v. Honinger* (1915) 214 N. Y. 66, 108 N. E. 210; *Frazier v. Patterson* (1909) 243 Ill. 80, 90 N. E. 216. Also, there is authority that either party is privileged to rescind the contract and revoke, if he does so during the lives of both by sufficient notice. See *Stone v. Haskins* [1905] P. 194; *Duvale v. Duvale* (1896, Ch.) 54 N. J. Eq. 581, 588; 35 Atl. 750. But no such notice was given in the instant case. Therefore, the court seems justified in its decision, since the circumstances strongly indicated a contract, and the equities of the case were strongly in favor of the plaintiff.