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## PARTY WALLS.

RIGHT TO BUILD WALL IN PART ON NEIGHBOR LOT.

The second section of the act of Feb. 24th, 1721,[1] enacts that "The surveyors or regulators [of Philadelphia] upon application to them made, shall have full power and authority to enter upon the land of any person or persons in order to set out the foundations, and regulate the walls to be built between party and party, which foundation shall be laid equally upon the lands of the persons between whom such party-wall is to be made." Similar legislation exists as to cities of the second class[2] and of the third class.[3] Boroughs likewise are authorized by ordinance to permit the building of party-walls. In the absence of legislation, the owner of one lot has no right to plant the wall adjoining his neighbor, in part on that neighbor's lot.[4] "The regulation of party-walls" says Mitchell J., "is a very ancient form of exercise of the police power, and came to Pennsylvania from the customs of London, like so many other parts of our early law. * * * But such regulation, as it exists in this and most other states is an interference with the rights and enjoyment of property, sus-

[1]3 Stewart's Pardon 2836. The act of Ap. 8, 1872, regulated the subject in Pittsburg; Hoffstot v. Voight, 146 Pa. 632.

[2]Stewart's Purdon, 3123.

[3]3 Stewart's Purdon, 3123.

[4]Euwer v. Henderson, 1 Penny. 463. (New Castle). The owner of the invaded lot may compel the removal of the wall from his ground or could use it without compensation. The buiding on lot *b* having made use of a wall on lot *a*, in Reading at a time when there was no statute or ordinance on the subject, the rights of the owner must be determined by common law principles; McManus v. McIlvaine, 2 Woodw. 146. Cf. Ritter v. Sieger, 105 Pa. 400 (Allentown).

tainable only on the police power, and therefore to be governed and measured by the strict extent of the statutory grant."[5] Trunkey J., was of the opinion, in 1885, that the party-wall legislation had "proved a just and beneficial rule for owners of adjoining lots."[6] The right to throw a portion of the wall upon the neighbor lot "arises out of a provision of the law," says Clarke J.,[7] "to which all owners of real property in the city of Philadelphia are subject and in reference to which all conveyances of land, whether in fee or for years, must be supposed to have been made and accepted."

OBJECTS OF THE LEGISLATION.

The object of party-wall legislation is obvious. It saves in cities and boroughs, the consumption of an unnecessary amount of space in division walls. It subjects these and all walls to the supervision of officers, so as to secure to walls the necessary strength and prevent fires and collapses, with incidental loss of property and life.[8]

AMOUNT OF INVASION OF NEIGHBOR LOT.

The act of 1721 directs that the foundation of the division wall "shall be laid equally" upon the lots. But the first builder might choose to erect a very thick wall, for objects of his own, and when a wall of that thickness would probably be of no future advantage to the owner of the next lot. There ought therefore to be some limit to thickness of party-walls or to the amount of space beyond the division line, which they should be permitted to cover, without the consent of the owner of the next lot. The act of 1721 gave to the surveyors or regulators the power to determine what should be the breadth or thickness of the walls.[9] The act of May 7th 1855, first limited the right of encroachment. A lot of the width of 16 feet or less, it ordained should not

[5]Hoffstot v. Voight, 146 Pa. 633. An act giving Allentown the power to legislate for party-walls, is considered in Giess v. Schatt, 14 C. C. 177.

[6]Western Nat. Bank's Ap. 102 Pa. 171.

[7]Barnes v. Wilson, 116 Pa. 303. The legislation is "no invasion of the right of property," Lowrie J.; Evans v. Jayne, 23 Pa. 34.

[8]Bowers v. Supplee, 11 Phila. 223. The 8th section of the act of June 7th 1895, P. L. 155 entitled "an act regulating the construction, maintenance, alteration and inspection of buildings and party-walls in cities of the 2d class" is constitutional. The first builder may by contract preclude his compelling compensation from the subsequent builder; Shenk v. Pittsburg Club, 45 Pitts. L. J. 464.

[9]Vollmer's Appeal 61 Pa. 118; Kirby v. Fitzpatrick, 168 Pa. 434.

be encumbered by more than 9 inches of the stone foundation wall, or more than 4½ inches of the brick wall. In no case should any party-wall be placed on the adjoining lot more than 10 inches for the stone wall, and more than 6½ inches for the brick wall. The act also determined the minimum thickness of party-walls, which was to be determined by the height and width of the building. The act of 11 April 1856, regulated the thickness by the height alone of the building. Within these limits the amount of encroachment in any case, is determined by the regulators (or inspectors.) The "first builder" has never had the right to decide it.[10] The regulators may authorize and require a wall thicker than the minimum; e. g. a wall thirteen inches thick, the first builder desiring to build one of only 9 inches.[11] Although the ideal of a party-wall expressed in the act of 1721, is one which rests equally upon the two lots,[12] it is evident that when the wall exceeds certain thicknesses, more of it must rest on the first builder's lot than upon the adjacent one. If A's lot is more than 16 feet wide, e. g. is 10½ feet wide, the owner of the next lot may occupy 6½ inches of it, although if A s lot were only 16 feet wide or less, the party-wall could not occupy more than 4½ inches of it.[13]

WHEN WALL OVERREACHES TOO MUCH.

If the wall is being built too much upon the next lot, the owner of that lot may secure an injunction against the continuance of the erection.[14] But after the completion of the wall, the courts are reluctant to order that it be taken down. The foundation was properly laid. The brick wall erected on it however, was at some places ⅜ of an inch too far over, and at other places ¾ to ⅞ inch. The wall was not perpendicular. The adjoining owner had however used it, and the buildings on both lots [erected at the same time] were under roof. He was remitted to his

[10]Kirby v. Fitzpatrick, 168 Pa. 435; Vollmer's Appeal, 61 Pa. 118; Mayer's Appeal, 73 Pa. 164; Derringer v. Augusta Hotel Co., 155 Pa. 609; Lukens v. Lasher, 10 Dist. 385, 202 Pa. 327. Six and one-half inches was the maximum encroachment in Chester, under its charter; May v. Prendergast, 12 C. C. 220.

[11]Bowers v. Supplee, 11 Phila., 223.

[12]Beaver v. Nutter, 10 Phila. 345.

[13]Morris v. Balderston, 2 Brewst. 459.

[14]May v. Prendergast, 12 C. C. 220; Chester. The law requiring the wall not to cover more than [illegible] inches of the next lot, one covering five inches was enjoined.

remedies at law.[15] The wall was put 2½ inches further upon the next lot than the law allowed. A bill was filed by B, owner of the next lot, to compel the removal of the encroachment but it was compromised. Testimony was taken as to the amount of damage suffered by B. It resulted in an award of $1000; and the decree provided that the payment of the $1000 should not be construed to convey to A, the defendant, any title to the ground encroached upon. Subsequently B conveyed his lot to C with a covenant of warranty. C upon this covenant could recover damages which in the absence of other evidence would be taken to be $1000, the amount which B had recovered from A.[16] A wall extended ⅛ of an inch too far on the next lot. In order to strengthen the wall, the builder braced it by inserting 65 iron rods or bolts, extending through it and projecting 1¾ inches, and each fastened by a nut and a star-shaped plate 9¾ inches in diameter. A demurrer to the bill, asking for an injunction was sustained, because there was an adequate remedy at law.[17]

NEW WALL.

The fact that an existing wall invades only 4½ inches, does not make it unlawful for the owner of one of the lots, desiring to erect a hotel nine stories high, to tear down the party wall and erect another which will encroach to the maximum of 6½ inches. The court will therefore not enjoin against the building of the second wall.

AGREEMENT FOR GREATER INTRUSION.

The owners of the adjacent lots may agree that the wall, erected by A, one of them, shall be put farther within B's lot than he would have a right by law to put it. They may agree, e. g. that A, who is about to erect a house on his lot, may build an alley 30 inches wide, one-half of which shall be on B's lot. This requires that for the first story, the party-wall shall be more than 15 inches over the division line. The wall for the second and third stories, is at the normal position. When, later, B erects a

[15]Mayer's Appeal, 73 Pa. 164.

[16]King's Estate, 18 W. N. 155 affirmed in Edmund's Appeal, 19 W. N. 59. By accepting the $1000, B had authorized the encroachment.

[17]Walsh v. Luburg, 10 C. C. 641.

[18]Deringer v. Augusta Hotel Co., 155 Pa. 609; Bailey's Appeal 1 W. N. 350.

house, using the alley wall, he must pay for it as well as for the upper portion of the party-wall.[19]

WALL NOT AS FAR OVER AS PERMISSIBLE.

If the foundation of a wall erected by the owner of a lot, A, is partly on the next lot, owned by B, the wall erected upon it is a party-wall, with the incident that B can use it, although it is wholly within A's lot,[20] *a fortiori* if it is in part over the division line, though not so far over as the law permits.[21] This would be so, whether the foundation was as much on the next lot as the law allowed, or not.[22]

WALL NOT OVER AT ALL.

Can A, one of two owners of adjacent lots, by building the wall towards B, his neighbor's lot, wholly within his own lot, destroy the right of B to a party-wall? If he cannot, B must have the right either to have the wall already built condemned and removed, (a right which Paxson J., seems have thought to exist)[23] to make place for the party-wall, or B must have the right to use this wall, as if it were a party-wall, a right the existence of which Sharswood J., seems to assert.[24] "Every owner of a lot of ground in Philadelphia" said Trunkey J., "has a statutory right to make a party-wall between himself and his neighbor, and may enter upon the adjoining lot for that purpose, not going beyond the prescribed limit. His right cannot be taken from him by the adjoining owner building exclusively upon his own land, either to the line, or a short distance therefrom."[25] Finletter J., has said that "The law compels the first builder to erect the wall partly upon the adjoining land and thereby and for that purpose, gives him an easement thereon."[26] If A's wall is farther from the division line than a party-wall erected by B might lawfully extend B doubtless could not build up to and thus use this wall. Thus, if A builds a house whose wall is four feet from the division line, B could not build up to that wall, but he could build a party-wall

[19]Haines v. Dripps, 2 Pars. 236.

[20]Western Nat. Bank's Appeal, 102 Pa. 171; Milne's Appeal, 81 Pa. 54; Lukens v. Lasher, 10 Dist. 385, 202 Pa. 327.

[21]Milne's Appeal, 2 W. N. 513.

[22]Western Nat. Bank's Appeal, 102 Pa. 171.

[23]Milne's Appeal, 2 W. N. 513.

[24]Milne's Appeal, 2 W. N. 513.

[25]Western Nat. Bank's Appeal, 102 Pa. 171.

[26]Mc Gettigan v. Evans, 8 Phila. 264.

placed in part on A's lot.[27] There are however announcements of a contrary view. Whether, a wall being wholly on A's lot but upon the division line, B the owner of the next has a right to use it as a party-wall, is made by Potter J., to depend on A's intention, in erecting the wall, as to its being a party-wall.[28] Paxson J., said that if the wall stood wholly on A's land, the owner of the next lot would have "no right to use the wall with or without compensation."[29] The better view is that first expressed. If A builds a wall wholly upon his own land, but so near to the division line that B would have a right to project his party-wall to it, were the wall not there, he may regard this as a party-wall, whatever A's intention was in building it.[30]

NO RIGHT TO PARTY-WALL.

It has been occasionally said that A has no right to use a portion of B's ground for a party-wall, when there is no sufficient likelihood that this wall will be of use to B. A singular application of this principle appears in Rodearmel v. Hutchison.[31] A had erected a front building to the division line. This building was 30 feet deep. He erected a back building, but narrowed it, so that its wall, facing B's lot, stood 6 feet from the division line. B subsequently erected a house whose back and front parts were of equal width. The front was 36 feet deep. Oddly, Pearson J., held that B could build the party-wall back six feet to accommo-

[27]Monroe v. Conroy, 1 Phila. 441. Apparently a wall wholly on A's land, which was insufficient for B's purposes was ordered by the inspectors to be taken down by B, owner of the next lot, in order that B might erect a more suitable party-wall, Childs v. Napheys, 112 Pa. 504. In Bowers v. Hatch, 15 Phila. 163, A was building a side extension to his house. The inspector complained to the Common Pleas that he was erecting said wooden extension "to the party line without the necessary and proper party-wall;" said extension being built to the party line without a party or fire wall between it and the adjoining property."

[28]Bright v. Allan, 203 Pa. 394.

[29]Ritter v. Sieger, 105 Pa. 400. See, also, Harrison v. Bank, 13 Super. 274; Beaver v. Hutchison, 2 Pears. 325.

[30]Ewing P. J., held in Masonic Fund Society v. Hamilton, 32 Pitts. L. J. 386, that, when A had erected a substantial wall wholly upon his own ground at the boundary, B, the owner of the next lot, could not take down this wall and erect a party-wall, one-half on A's lot. The act of April 8th 1872 P. L. 986 was not intended to cover such a case. It would be unconstitutional if it were.

[31]2 Pears. 325. An opinion on the same question was withheld by Parsons J., in Sutcliff v. Isaacs, 1 Pars. Eq. 494.

date the front of his house, but could not prolong the wall for the accommodation of the back portion. Yet the six feet extension would be of no more use to A, than the still greater extension. In another case[32] he applied the same principle. A owned a lot, fronting on X street, and running back to an alley. B owned a lot also fronting on X street, and running back to the alley. But it was bounded at one side by Y street, and at the other by A's lot. A had a dwelling on his lot, fronting on X street, as also had B. B subsequently built a house facing on Y street, upon the rear of his lot and he proposed to build its western wall in part on A's lot. The court decided that he had no right, since there was no probability that the wall would ever be used by A. On the other hand, cases have recognized that buildings erected on the rears of lots were entitled to part-wall.[33] A having a house, on the front of his lot, D erects a printing establishment on the rear of the next lot, planting the wall in part on both lots.[34]

In places with respect to which there is no party-wall legislation, there is perhaps no right in A owning a lot to use a wall erected wholly on B's lot, as a party-wall, unless it has been obtained by grant from B, or unless it has been used so long and adversely, as to constitute a prescription. In Harrison v. Bank[35] a house was erected on lot X, in 1831, by the owner. The west wall was wholly on the lot. Four years later, the owner of the lot Y to the west, built a house thereon, similar in material and other respects, to the house on X, and using the west wall on X as its east wall, fastening the timbers of the roof together with an iron strap, inserting the beam on the third floor in the wall, and attaching it to a like beam in the next house, by an iron strap. He interlocked the front wall of the house with the wall of the nex' thus making a solid and continuous front for the two houses. The owner of X sold it to C in 1839, and C sold it to D in 1866, and D sold it to E, in 1899. E began to tear down the building, and its west wall, with a view to the erection of a larger and better building. The owner of Y filed a bill to restrain the removal of the wall, alleging that it had become a party-wall. A preliminary injunction granted was dissolved. It was said by

[32]Whitman v. Shoemaker, 2 Pears. 320.

[33]Datz v. Phillips, 137 Pa. 203. No right to put windows in the party-wall.

[34]McCall v. Barrie, 14 W. N. 419; McCall's Appeal, 16 W. N. 95.

[35]13 Super. 274.

the Superior Court that the right to use the wall as a party-wall depends on grant or prescription. There was no evidence of a grant, nor that the use of the wall was merely permissive. Possibly the evidence in a suit between the original owners of the buildings would have put on E, the defendant, the burden of proving that the use of the wall was not under a claim of right. But whether when E bought lot X, he was bound to know of the use which the plaintiff had been making of the wall and that he had by prescription or otherwise acquired a right to the continued use of it was not sufficiently clear to warrant the reversal of the dissolution of the injunction.

PRELIMINARY TO BUILDING.

The 4th section of the act of April 15th 1782, penalizes the commencement of the erection of a party-wall in Philadelphia, before the boundaries of the lot shall be adjusted and marked out by the regulators. The 1st section of the act of Feb. 24th 1721 directs that the surveyors or regulators upon application to them shall have full power and authority to enter on lands, in order to set out the foundations, and regulate the walls to be built between party and party. The court will enjoin the construction of a party-wall, before a survey has been made by a regulator.[36] If however the wall is erected, the owner of the next lot will doubtless have a right to use it, but not without making compensation.[37] If the permit obtained authorizes a wall of a certain thickness, the erection of a wall of a greater thickness will be a trespass. The land improperly covered by the wall, may be recovered in ejectment.[38]

DECISION OF THE REGULATOR.

Under the act of 1721, the decision of the regulators, unless appealed from, was final as respects the location of the wall,[39] and its thickness.[40] A mistake by them would not change the

[36]Sutcliff v. Isaacs, 1 Pars. Eq. 494.

[37]In Ritter v. Sieger, 105 P. L. 400, A having built a wall over upon B's lot, it was said that perhaps B could have used the wall without compensation But it does not appear that there was legislation under which a party-wall might have been erected in Allentown.

[38]Kirby v. Fitzpatrick, 168 Pa. 434.

[39]Godshall v. Mariam, 1 Binn. 352; Sutcliff v. Isaacs, 1 Pars. Eq. 494. If the decis on were not conclusive, it is said that the wall might be pulled down, which would be an intolerable hardship. Witman v. Shoemaker, 2 Pears. 320; Rodearmel v. Hutchison, 2 Pears. 324.

[40]Western Nat. Bank's Appeal, 102 Pa. 171.

character of the wall.[41] An appeal to the common pleas is provided for by that act, and by the act of April 15th 1782.[42] In cities of the third class, Pearson J., remarks, the decision of the regulator is not conclusive, as it is in Philadelphia.[43] "What would be the right of either owner if the foundation were mistakenly placed by the regulators, or by act of the owners, so far from the line as to leave room to build a party-wall on the line," was left unanswered by Trunkey J., in Western National Bank's Appeal.[44]

APPEAL FROM REGULATORS.

The appeal under the act of 1721 and 1782 for Philadelphia, and under the act of March 9th 1781 for the Northern Liberties[45] was to the common pleas. Under the act of 1782, it was held that on an appeal, ejectment was the proper mode of trying the title.[46] Under the act of May 20th 1857, respecting tearing down party-walls which are insufficient for a new building about to be erected the appeal was not to the common pleas but to the board of surveyors,[47] according to the provisions of the act of April 11th 1856. P. L. 320. If the common pleas has jurisdiction at all, it is only to enforce the decision of the inspectors by restraining the owner who objects to the tearing down of the wall, from hindering it.[48] So, under the act of April 5th 1849, the decision of the surveyor as to the taking down of the party-wall, would not be appealed to the common pleas. That act provided for the execution of the order by the sheriff, upon a writ issued from the common pleas.[49] Pending the appeal from an order of the inspectors that a party-wall be taken down, the court will refrain from dissolving an injunction already granted.[50]

INSPECTORS INJUNCTION.

The inspector who has required a wall of certain thickness may obtain an injunction against the erection of one of a less

[41]Western Nat. Bank's Appeal, 102 Pa. 171.
[42]3 Stewart, Purdon, 2838.
[43]2 Pears. 320; 2 Pears. 324.
[44]102 Pa. 171.
[45]Godshall v. Mariam, 1 Binn. 352.
[46]Wells v. Fox; 1 Dall. 308.
[47]Magrath v. Cooper, 10 W. N. 173.
[48]Childs v. Napheys, 112 Pa. 504.
[49]Evans v. Jayne, 23 Pa. 34.
[50]Magrath v. Cooper, 10 W. N. 173.

thickness.[51] In Bowers v. Hatch[52] he obtained an injunction against the extension by X, from the side of his house to the division line, of a wooden structure "without the necessary and proper party-wall provided for by the act of assembly."

ADVANCING TO THE STREET.

In Duncan v. Hanbest[53] on a certain lot X, was a house whose front stood 30 inches back of the building line. Prior to 1805 a house was erected on the adjoining lotY, whose front likewise receded 30 inches. Other houses were similarly set back. Fifty years later, the owner of X obtained authority from the city surveyor to move his front to the building line, and to extend the party-wall, which covered 4½ inches of Y. The supreme court at *nisi prius,* enjoined against the building of the wall upon Y. Knox J., conceded that there was no sufficient evidence that the space of 30 inches had been dedicated to the public; that the right to advance the front was an incident of ownership, and is not lost by non-use; but that the defendant had no right to use any part of Y, for the lateral wall, apparently because the thus extended wall would be of no use to the owner of Y who did not desire to move his front. "Instead therefore of being benefitted by the extension of the wall" says Knox J., "they (the plaintiff, owner of Y) would be injured by it, and they are unwilling that any portion of the wall should be placed upon their ground. Under these circumstances, I am of the opinion that the defendant has no legal right to extend the party-wall upon the plaintiff's land and that any extension of his building, defendant may make, must be confined exclusively to his own lot." This decision is apparently repudiated in Western National Bank's Appeal[54] where the stories of two adjacent buildings, above the first, had receded 28 inches from the building line, and from the front of the first story. The owner of one tore it down, and made the new building come out for its entire height to the building line. It was held that he had a right to extend the party-wall to that line. The master thought that the doctrine of Duncan v. Hanbest, "was opposed to the intent as well as the letter of the law." The supreme court affirmed the defendant's right thus to extend the party-wall.

[51]Bowers v. Supplee, 11 Phila. 223.
[52]15 Phila. 163.
[53]2 Brewst. 362.
[54]102 Pa. 171.

WALL SOLID—WINDOWS.

When A builds a wall in part on B's lot, under the statutory power, he undertakes to build a wall that shall possess certain characteristics. It should be made perpendicular. It should have the width prescribed; and be built of good material. It must be solid, that is, openings must not be left in any part of it, in order to admit light, and air to the building. The court, at the instance of the owner of the next lot, on which the wall intrudes, will enjoin against the making,[55] or if made, against the continuance of the openings, that is, will require that they be filled with a solid wall.[56] This will happen, although the window frames are wholly within A's line[57] and although being made to open like doors, they open inwards[58] and although, the foundation extending over B's line, the wall put on it is wholly within A's.[59] The right to complain of the windows may be lost by entering into an agreement concerning them, and by the plaintiff's nonperformance of what he has agreed to do, so that closing the windows would be inequitable.[60] But it is not lost by a toleration of the windowsfor a long period of years.[61] It is said that if A, in building the wall, did not intend to encroach on B's land, the wall, although it does in fact encroach, is not a party-wall; that so much of the wall as encroaches can be removed, and that then windows can be maintained in the wall,[62] and when the wall is wholly on A's land, he may maintain windows in it. B's only remedy for the annoyance of his lot's being overlooked from the windows would be his erection, on his own ground, of a fence or wall.[63] A is allowed to cause rectangular recesses to be made at intervals, and to put windows in the three walls of these recesses. The wall was made solid from one end to the other to the height of 16 feet. This height was increased to six stories

[55]Vansyckel v. Tryon, 6 Phila. 401.

[56]Vollmer's Appeal, 61 Pa. 118; King's Estate, 18 W. N. 155; Vansyckel v. Tryon, 6 Phila. 401; Pile v. Pedrick, 167 Pa. 296.

[57]6 Phila. 401.

[58]Vollmer's Appeal, 61 Pa. 118.

[59]Milne's Appeal, 81 Pa. 54.

[60]Datz v. Phillips, 137 Pa. 203.

[61]Milne's Appeal, 81 Pa. 54. The windows could be closed by the neighbor after they had been used 75 years. A bill to prevent the closing was dismissed; Roudet v. Bedell, 1 Phila. 366.

[62]Pile v. Pedrick, 167 Pa. 296.

[63]Pearson P. J., 13 Phila. 502; Milne's Appeal, 81 Pa. 54.

except at three places, which were 40 and 50 feet apart. The first of these openings was 20 feet wide, the second and third 12 feet wide. The wall was doubled back at these openings, 9 feet, and windows put into the three walls of these wells. An injunction against the construction was refused.[64] Openings not designed for windows are also forbidden. To the height of an existing party-walls, B made an addition of 40 feet, leaving three openings, one above the other, each 9 feet wide and 10 feet high. The court compelled B to fill up these openings, on the complaint of A.[65] The existence of slits for ventilation in the upper part of the wall of a music hall, did not justify the use of it by the owner of the adjacent lot without compensation.[66] B may give a license to A to put windows in the party-wall erected by him, until B shall desire them filled. Such license is revoked by B's conveyance of his lot.[67]

REMEDIES FOR IMPROPER INVASION OF ADJACENT LOT.

If for any reason A's invasion of the lot of his neighbor B, in the erection of a wall is unathorized by law, B has appropriate remedies. If the wall is about to be erected under an unfounded claim of right to make it a party-wall,the erection of it may be enjoined at the suit of B.[68] Ejectment may also be employed to recover the possession of land improperly covered by a wall built thicker than the regulator has allowed.[69] But, when it would be a great hardship to the builder of the party-wall, to compel him to take it down, and the injury can be compensated in damages the court will refuse to require the wall to be taken down. This was so in a case where the foundation required by law had not been given to the wall, the wall had consequently settled and spread so that tie bolts etc., were necessary which projected over the next lot.[70] If the regulator having fixed the line at B's request A, owner of the next lot on being notified expresses satisfaction with any line the regulator may fix and directs B to erect

[64]McCall's Appeal, 16 W. N. 95.

[65]Bedell v. Rittenhouse Co., 5 Dist. 689.

[66]Oakes v. Senneff, 4 W. N. 413.

[67]Vollmer's Appeal, 61 Pa. 118. B asking for an injunction, the burden of proving the license is on A.

[68]Rodearmel v. Huthcison, 2 Pears. 324; Whitman v. Shoemaker, 2 Pears. 320; Wistar's Appeal, 6 W. N. 140; Western Nat. Bank's Appeal, 102 Pa. 171.

[69]Kirby v. Fitzpatrick, 168 Pa. 434.

[70]Mulligan v. Fitzpatrick, 10 C. C. 179.

upon the line, he will be estopped, after the party-wall is erected, from denying that it is at the proper place, and from recovering the land upon which it is erected.[71]

[71]Marsh v. Weckerly, 13 Pa. 250

PARTY-WALL BY PRESCRIPTION.

If a wall has been used by houses on both sides of it, as a part thereof, for a period of 21 years, or longer, the wall becomes a party-wall, whether it is equally or unequally upon the lots, or is wholly upon one of them. A wall thus becoming a party-wall by prescription, has the attributes of other party-walls. It can be ordered down, by the surveyors, when the owner of one of the houses desires to tear it down and erect another, the wall being found inadequate, or he can make use of it if adequate for his new house, no less than of the one replaced by it.[72] If A in erecting his house, by mistake plants the wall diagonally across the line dividing his lot from B, so that the front portion of the wall is wholly on A's lot, and the rear portion wholly on B's and B subsequently erects a house using this wall, and increasing its height slightly at the same time, after more than 21 years, in making alterations in the house, he may increase the height of the division wall. It was said by Woodward J., that B owned so much of the wall as was on his lot; that, as he had used the part on A's as a part of his house, he had more than an easement in it; it had become common property. Hence B might increase the height of it, even in the absence of any party-wall legislation.[73]

PARTY-WALL BY AGREEMENT.

The parties who own contiguous lots may agree to bestow upon a wall the properties of a party-wall, when there is no legislation which authorizes one of them to build a wall partly on the land of the other, or when the wall in contemplation has

[72]McVey v. Durkin, 136 Pa. 418. Hence it is no trespass to have torn down a part of the wall found inadequate for the new building, and to use for the new building the other portion of the old wall. Cf. Western Nat. Bank's Appeeal, 102 Pa. 171; Harrison v. Bank, 13 Super. 274.

[73]McManus v. McIlvaine, 2 Woodw. 146. A party-wall is owned in fee one-half by the owner of one of the lots, and the other half by the owner of the other lot. If A owns two lots and builds houses upon each at the same time, making a division wall, the longitudinal centre line of which is not exactly coincident with the division line of the lots, and subsequently sells one of these lots he must be understood to convey up to the centre line of the wall, so as to make the grantee owner in fee of one-half of the wall; Medara v. DuBois, 187 Pa. 431.

not been erected in part on both lots. Thus, no law authorizing a party-wall, A may agree with his neighbor B that he A, shall erect a wall in part on B's land, and that B, on subsequently using it, shall make compensation to A. Though oral, if this license is acted on by A, it is irrevocable. B later sells his lot to C, who using the wall, gives his bond for one-half of the value of the wall. C becomes insolvent and B again becomes owner of the lot by purchasing it at sheriff's sale. This does not reimpose on B the duty of paying A for the wall. C and not B had made use of the wall. The claim for compensation was merged in the bond, and not revived against B by his repurchase.[74] A owning a lot on which was a house whose wall, next to B's lot to the east, is wholly on A's lot, agrees in writing with B, to grant, bargain and sell to B the "equal undivided half of the wall." The agreement further stipulated that B should have the right to break into the wall to the depth of 4½ inches, for the support of joists and girders, and to plaster against the wall, and to raise it above the roof. It was held that B, who subsequently to the erection of a house, making use of the wall, desired to change its front, by making it of stone, might take out the bricks of the party-wall to the middle line, and extend the stone front to that line.[75]

TAKING DOWN INSUFFICIENT WALL.

The act of May 20th, 1857, P. L. 500, makes it the duty of the inspectors of buildings in Philadelphia, on the application of any person who is about to erect on his lot a new building, "to examine all such party or division walls upon or adjoining said

[74]Euwer v. Henderson, 1 Penny. 463.

[75]Nightingale v. Wood, 1 North 201. A having built a foundation which he intended to be wholly on his own land, but which projected one and ⅜ inches over the division line, the wall above it being wholly upon his land, offered to his neighbor B to make it a party-wall, if he would consent to the continuance of windows in the 3d and 4th stories. He declined to consent. B filed a bill to compel the removal of the wall. The master found the intrusion, and that it could not be rectified by removal of the wall, without consent of the building inspectors. They subsequently consented. The court decreed that A have leave to remove the portion of the wall that was on B's ground, but stipulated that there should be no entering upon B's ground, or digging into it. B refused permission to enter his land and chop off the projecting stones of the foundation. The wall had threfore, to be taken down and rebuilt. A division of the costs of the case was decreed. Affirmed; Pile v. Pedrick, 167 Pa. 296. Williams J., says the wall was not a party-wall, apparently, because it was not *intended* to be placed on B's land.

lot of ground, and which shall have been erected prior thereto, and if deemed and adjudged by them to be insufficient and unfit for the purpose of such new building about to be erected, such party or division walls shall be removed and taken down by the last builder, the cost and expense of that removal, together with the cost and expense of the new wall or walls to be erected in lieu thereof, shall be borne and paid exclusively by him." The act provides for an appeal from the inspectors to the board of surveys.

THE WALL TAKEN DOWN.

This act applies not merely to party-walls, but also to "division walls;" not only to walls "upon" but wall "adjoining said lot." A owning two lots upon which he simultaneously erects buildings, conveys these lots to different persons. Forty years after, the owner of one of the lots desires to erect a larger building. The inspectors deeming the frame partition between the back buildings insufficient, may order it to be taken down, and the person who has procured the order commits no trespass in taking down the wall or partition.[76] The wall does not need to be a party-wall, to stand in part upon both lots.[77] The act of April 5th 1849, P. L. 411, provided for the removal of party-walls, and was applicable only to party-walls in the strict sense, walls "built half on each side of the line of the lots."[78] The wall between the front parts of the houses being stone, and that between the back parts being frame, the inspectors may, when the owner of one of the lots desires to tear down his house and erect another, order down the frame partition, only.[79]

ORDERING DOWN ALLEY WALLS.

B, one of the owners of two adjacent lots, desires to tear down the party-wall and erect a higher building. There is an alley between the houses. The inspectors condemn the wall, and order a stronger wall created. The wall stands upon the arch of the alley, whose two legs are condemned as insufficient also, B may tear down both legs of the arch, and erect others. They are a part of the party-wall. The power to order down the wall includes the power to order down these legs.[80]

[76]McVey v. Durkin, 136 Pa. 418; Childs v. Napheys, 112 Pa. 504. See Western Nat. Bank's Appeal, 102 Pa. 171.

[77]Hurlburt v. Firth, 10 Phila. 135.

[78]Evans v. Jayne, 23 Pa. 34.

[79]McVey v. Durkin, 136 Pa. 418.

[80]Helwig v. Schenck, 7 Phila. 389.

AT WHOSE COST.

The act of May 20th 1857 requires the person who causes the wall to be condemned to remove it at his own expense. The 4th section of the act of April 11th 1856, supplementary to the act of April 21st 1855, requires building inspectors, on the request of 2 citizens to inspect *all* walls deemed dangerous, and, if found dangerous, to order the removal at the expense of the owner of the wall. This did not authorize such an order, at the instigation of the owner of the next lot who desired to erect a building that would require a better wall, the wall ordered to be removed being entirely safe and suitable for the purposes of its owner. The 4th section was "obviously intended to secure the safety of the community, by causing dangerous walls to be renewed; not to enable parties who desired to change or make use of their neighbor's walls to compel them to pull them down or alter them to suit their purposes."[81] Compelling him who causes the wall to be taken down to bear the cost is, thinks Lowrie J., "the best protection against the abuse of the right."[82] The next owner is not compellable to pay for the new wall until he makes some use of it different from the use he has been making of the first one.[83]

PREMISES IN POSSESSION OF TENANT.

The party-wall, which is insufficient for the uses of the owner of the next lot may be ordered down, and he may be authorized to take it down under the act of 1857, although the house, of which it is a part is in the occupancy of a tenant, and although the house will be made untenantable, because of exposure to wind and rain, the cutting of water and gas pipes, and the flues for heating the house. The enforced vacation of the house by the tenant will be no defence to an action for the rent.[84]

NECESSITY OF ORDER OF BUILDING INSPECTORS.

The owner of the lot on which the new building is to be erected, has no right to tear down the party or division wall, until the building inspectors have ordered that it be torn down. If they

[81]Ferguson v. Fallows, 2 Phila. 168. The owner of the wall denied that it was a party-wall and that the neighbor had a right to use it. This question he was entitled to have fairly tried. He cannot be deprived of it, by proceeding under the 4th section. An injunction against the continuance of the wall was dissolved.

[82]Evans v. Jayne, 23 Pa. 34.

[83]Hoffstot v. Voight 146 Pa. 632, Pittsburg.

[84]Barnes v. Wilson, 116 Pa. 303.

have made no order, *a fortiori* if they have refused to make the order, the person applying for it will be enjoined from taking down the wall, if he threatens or begins to do so. Although a second application to the inspectors is made, and they change their minds, and grant the order to remove the wall, if the owner of the wall appeals to the board of surveyors, the injuncton will be continued until its decision is rendered.[85] If the inspectors order the wall to be taken down, he who procured the order may take it down. He needs no order of the court. If he is obstructed the court will aid him by injunction, or if the interference amounts to a breach of the peace the offending party may be bound over to keep the peace.[86] Probably, he will be liable if he inflicts any unnecessary injury to his neighbor,[87] but, in an action against him for forcible entry and damage to building, a nonsuit was properly granted, it appearing that the entry was for the purpose of placing supports under the floors of the plaintiff's building, which was done without objection by plaintiff, and that the removal of the wall was by the direction of the building inspectors; there being no evidence that it was negligently done, or unnecessarily delayed, in that any avoidable inconvenience was caused to the plaintiff.[88] The owner of the next lot though he may not recover for the ordinary annoyance, inconvenience and dirt resulting from the erection of the adjoining building, may recover compensation for any special injury.[89]

SUBSEQUENT USE OF NEW WALL.

If the new wall erected by B is higher and longer than the old, and the owner of the next lot, A, subsequently tears down his building, and erects a larger, and in so doing uses the whole of the new party-wall, he must pay half of the value.[90]

[85]Magrath v. Cooper, 10 W. N. 173. In Deringer v. Augusta Hotel Co., 155 Pa. 609, B was tearing down his building, and the party-wall. Whether the inspectors had authorized it, does not appear. A, the owner of the next lot and house, asked for an injunction against encroaching more on his land than the former wall did. The injunction was refused. B was not compelled to confine the encroachment of the second wall to that of the first.

[86]Childs v. Napheys, 112 Pa. 504

[87]Cf. McVey v. Durkin, 136 Pa. 418.

[88]Buck v. Weeks, 194 Pa. 522. The bearing of the act of June 8th 1893, P. L. 360 was not considered.

[89]Swisher v. Sipps, 19 Super. 43.

[90]Bailey's Appeal, 1 W. N. 350.

LEGAL OBSTACLE TO USE OF PARTY-WALL.

Perhaps when there is a legal obstacle to the use by B of a wall as a party-wall, A, the owner of the next lot has no right to erect a wall in part on B's lot. Prior to the act of April 28th, 1870, which fixed the south line of Chestnut Street 26 inches south of the former line, and required all buildings thereafter erected, to observe this line, A and B had adjacent lots with buildings on them. A wall 7 or 8 feet high stood in part on A's and in part on B's lot. B tore down his building, and erected a new one, the front of which was upon the new line of the street. In doing so, he tore out the western longitudinal half of the wall, which rested on his lot. A attempting to rebuild the wall between the front of B's building and the original line of Chestnut Street, was enjoined.[91]

INCREASES OF PARTY-WALL.

A party-wall having been erected, the owner of one of the lots may tear down his building, and erect a higher and longer and in so doing he may increase the height and length of the party-wall, and invade the next lot to the extent to which the law allows invasion by a party-wall.[92] If the owner of lots X and Y has erected a wall intended to be a division wall and it has been used by subsequent owners of the lots for more than 21 years, as a party-wall, it must be considered a party-wall, and although it is wholly on lot X, the owner of lot Y may heighten it from 3 to to 12 feet and may remove joists and insert them at different places, these acts not materially increasing the burden on the wall, nor weakening it.[93] The front of a party-wall having been made to recede 2 feet 4 inches from the building line of the street, the wall being erected by the owners of the two lots, when A, the owner of one of these lots subsequently tears down his building and puts up a new one, he may extend the party-wall up to the true building line.[94]

[91]Wistar's Appeal, 6 W. N. 140.

[92]Western Nat. Bank's Appeal, 102 Pa. 171. In McManus v. McIlvaine, 2 Woodw. 146, the court refused to enjoin against an increase by 4 feet of the height of the party-wall, finding that it was by consent. Cf., Pratt v. Meigs, 2 Pars. Eq. 302.

[93]Bright v. Allen, 203 Pa. 394. The owner of a house tears it down, and erects another as part of a hotel. He increases by 40 feet the height of the party-wall to the west. His right to do so seems not to be questioned; Bedell v. Rittenhouse Co., 5Dist. 689.

[94]Western Nat. Bank's Appeal, 102 Pa. 171.

WALL BUILT WHOLLY ON LAND OF BUILDER.

When the owner of two lots erects a house or other building on one of them, the wall between the lots is not a party-wall in the statutory sense. It has not the legal incidents of such a wall.[95] If he subsequently conveys one of the lots by a boundary over which the wall stands, he is said to convey so much of the wall as stands over that boundary. From this it is concluded that since the grantee owns that portion of the wall, he has a right to use it when he erects a house, without making compensation,[96] unless indeed he has agreed thus to pay for it. In that case, he must pay, according to his agreement, when he uses it.[97] When the owner of two lots with houses on them, with a common division wall, conveys one of the lots described by course and distance, and the lot as described, does not go to the middle line of the wall, the grantee will nevertheless acquire the ground up to that middle line. The wall, as a monument will control course and distance, and its middle line will be protracted to the rear of the lot, as its boundary.[98]

ACQUISITION OF BOTH LOTS BY SAME PERSON.

If after the erection of a building on each of two contiguous lots belonging to different persons, with a wall between them which is wholly on one of the lots, they are acquired by the same person who afterwards sells one of them, he does not destroy the right to the continued use of the wall, as a party-wall.[99]

PERMITTED USES OF PARTY-WALL.

The first builder who puts the division wall, in part, upon his neighbor's lot, cannot make as full a use of the wall as he could if it were not a party-wall. It is elsewhere seen that he cannot so construct it as to furnish him light and air through windows. If the party-wall is higher than the house on the next lot, the builder of it cannot use the part of it above the next house

[95]Voight v. Wallace, 179 Pa. 520; Mulligan v. Baylie, 11 Dist. 311; Doyle v. Ritter, 6 Phila. 577. In Wistar's Appeal, 6 W. N. 140, a wall 12 feet high and 13 inches thick, was said not to be a party-wall. It was apparently not part of a building.

[96]Doyle v. Ritter, 6 Phila. 577; Voight v. Wallace, 179 Pa. 520; Mulligan v. Baylie, 11 Dist. 311.

[97]Voight v. Wallace, 179 Pa. 520.

[98]Medara v. DuBois, 187 Pa. 431. Hence, the grantee, having got what he expected, will be compelled to pay the purchase money. Cf. Warfel v. Knott, 128 Pa. 528.

[99]Western Nat. Bank's Appeal, 102 Pa. 171.

tor the painting of a sign upon it.Despite the objection to the next owner's bill, asking for an injunction, that the matter was too trivial to aturact the notice of a court of equity, and despite the affidavit that the painting would not injure the plaintiff, an injunction was granted.[1] However, A having eerected a party-wall, which he was about to paint, the court dismissed a bill of the owner of the next lot, (alleging that the paint would prevent the adhesion of plaster to the wall, in case he should want to plaster against it) on the ground that there was an adequate remedy at law.[2] In Bedell v. The Rittenhouse Co.[3] there was a party-wall between houses of which one belonged to A and the other to the east to B, B also owning the premises further to the east, an apartment hotel, intending to incorporate into it the lot on the west. He tears down the house on it, and erects one 40 feet higher, correspondingly increasing the height of the party-wall. B conveys the thus enlarged hotel to C, who paints on the party-wall, above A's house, a large sign, the letters being 4 or 5 feet high. This sign causes annoyance to A, because it makes people think that A's house is a part of the hotel. Sulzberger J., enjoined the continuance of the sign.

CONTRACTUAL PROHIBITION OF PARTY-WALL.

A, in granting a lot to B, while retaining the next lot, may covenant for a passageway or alley along the line of division but upon the retained lot, and so preclude B from erecting a party-wall that would interfere with this passageway.[4]

MERCANTILE LIBRARY COMPANY V. UNIVERSITY OF PA.

Lot A belonging to the plantiff, faces upon the west side of Tenth Street, its south line being some distance north of Chestnut Street. The plaintiff has laid out on the southern edge of the lot an alley 16 feet wide, which he has bound himself to allow the owners of lots on Chestnut Street, east of lot B, belonging to defendant, to use. This alley is curbed and paved with cobble stones. In

[1]Wistar v. Baptist Publication Society, 2 W. N. 333.

[2]Walsh v. Luburg, 10 C. C. 641. In City v. O'Brien an action for debt for a penalty for the constructing of a party-wall in a certain prohib'ted way the defendant's plea that the city's officers agreed to permit the construction, was held bad, on demurrer.

[3]5 Dist. 689. An iron beam being a part of the party-wall, the court did not compel the removal of it, and the substitution of some other material.

[4]Hurlburt v. Firth, 10 Phila. 135.

1870 an opera-house was erected on B, facing on Chestnut Street. On its rear, a stone foundation wall was built, which is since found to project a few inches upon the side of A. Upon this foundation a brick wall was built wholly within the north line of lot B. Between its pilasters, the wall receded four inches and in these receding parts were windows and doors. The owner of A files a bill in 1902 to compel the closing of the windows and doors, and to prohibit egress from the building upon the alley on lot A or ingress into it from that alley. The bill was dismissed. Mestrezat J., affirms several principles. A party-wall does not need to rest equally upon the two lots. It may be wholly on one, and still be a party-wall, if it was *intended* so to be by the builder, or is subsequently treated as such by the owners of the lots. The owner of a lot is not precluded from erecting a party-wall because the owner of the next lot has already erected a division wall wholly upon his own land. The wall erected on B was not a party-wall, although its foundation projected across the line, because the projection was not intended, and a party-wall was not intended. Evidence that it was not intended, is the existence of the alley and of the duty of the owner of it, to allow it to continue as such. The builder on B did not anticipate that the wall would ever be used by the owner of A. There was no agreement that it should be a party-wall. Plaintiff did not regard it as such for he did not call in the proper officers to locate the line. Defendant also did not call them in. The knowledge of the exact location of the line was difficult. Not being a party-wall, the maintenance of doors and windows in it will not be enjoined. The remedy for the intrusion of the wall is at law. If the doors are used for trespassing upon the alley the remedy is at law. It is not intimated that the owner of A might hereafter use the wall. It is said that he could erect a party-wall, notwithstanding that the wall on B exists.

[*Concluded in March number*].

# MOOT COURT.

## IN RE MARY JOHNSON'S ESTATE.

**Conditional Divorce—Remarriage.**

STATEMENT OF FACTS.

Mary Hendricks was, July 11, 1900 married to John Anderson. For his desertion she, in Sept. 1903, began proceedings in divorce which were ended by a decree entered Jan. 11, 1904 divorcing her on condition that she pay the costs of the proceeding. A year later, not having paid the costs she married Wm. Johnson. She lived with him until Jan 13, 1908 when she died. Her personal estate for distribution in the Orphans' Court is $10,000. Wm. Johnson claims it as husband. There are no children and no creditors.

BROWN for the Claimant.

A proviso in a decree of divorce suspending the decree until the costs are paid is a nullity. Mickle vs. Alabama, 21 So. Rep. 66; Confer's Est., 17 D. R. 742.

KINARD for the Defence.

The conditions in a decree of divorce must be complied with, or the marriage relation continues. Moore vs. Moors, 121 Mass.232.

OPINION OF THE COURT.

BUTLER, J.—The law authorizing the courts to grant decrees of divorce not only specifies the causes or grounds for which divorces may be obtained, but also specifies two distinct classes of divorce: One from the bonds of matrimony, the other from bed and board. After a divorce from the bonds of matrimony, the person to whom has been granted the divorce may, as a rule, marry again, and in the life-time of the person from whom he or she was divorced.

In a divorce from bed and board only, however, the right or privilege of either party to the divorce proceedings to marry again during the life time of the party from whom the divorce was obtained, is not sanctioned by the law of this commonwealth.

In the case of Mary Johnson's Estate now before the court for consideration, there is involved a proper, legal distribution of property amounting in value to the sum of ten thousand dollars, the whole of which is claimed by a William Johnson as husband of the said Mary Johnson he alleging that her marriage to him after her divorce from her first husband, John Anderson, was a valid contract of marriage.

There is no evidence before the court as to the character of the divorce whether from the bonds of matrimony or from bed and board. The court has to assume, without evidence, that Mary Johnson was divorced from the bonds of matrimony subject to a condition, namely: that she pay the costs.

This condition is directly opposed to the act of 1815 sec. 12, which

enacts, "that the court may award costs to the party in whose behalf the decree or sentence (that is, of divorce) shall pass, or that each party shall pay his or her own costs, but the act does not authorize the imposition of all the costs upon the successful party.

Also in the case of Shoop's Appeal, 34 Pa. 233, where A sued B for divorce, a decree granting a divorce was made which ordered A to pay the costs. On appeal, the decree was reversed on the ground that under the act of Mar. 13th 1815, the court only had power to award costs to the successful party, or to order each party to pay his and her own costs.

Again in Brinckle v. Brinckle, 6 W. N. C. 123, it was held that the successful party is entitled to costs.

Also in the case of Mickle v. State of Alabama, 21 Southern Reporter, where at the end of a decree of divorce the court added "this decree however, is suspended until the costs are paid, and then to be in full forec and effect." It was held that, "the supension or proposed suspension of the decree, added by way of postscript after the solemn, deliberate adjudication that the bonds of matrimony be dissolved * * * * * was not within the jurisdiction of the chancellor, and is a mere nullity." Chief Justice Brickell then added "Justice is not the subject of bargain and sale, and cannot be granted or decreed because the parties are or are not of ability to pay the costs. When a final decree is rendered, granting relief, the costs, whichever party is decreed to pay them, must be collected by the usual process of the court."

It was also held by Judge Butler, in the case of Baker v. Baker, 26 Pa. Superior 553 that a decree of divorce having appearance of a final judgment cannot be attacked, collaterally, because the decree had been entered before the costs were paid.

This court is of the opinion that the condition attached to the decree divorcing Mary Johnson from John Anderson was void; that her nonperformance of the condition had no effect upon her divorce; that her marriage to William Johnson was legal, and therefore William Johnson was her legal husband and is entitled to his share in the distribution of his wife's estate.

## OPINION OF SUPERIOR COURT.

If the decedent was, at the time of the marriage contract with Johnson, already the wife of Anderson, that contract was a nullity: Johnson is not her husband, nor entitled to any portion of her estate.

On the other hand, if the decedent had been at the time of the attempted marriage with Johnson, already divorced from Anderson, the marriage was valid, and Johnson is entitled to the whole of her personal estate.

Proceedings for a divorce from Anderson had been begun in Sept. 1903 on the ground of his desertion. The last act done in these proceedings was the entry of a decree Jan. 11th 1904, divorcing the libellant from Anderson, "on condition that she pay the costs of the proceedings."

There was no warrant in the law for this decree. The act of March 13th 1815, directs that the court may award costs to the party in whose behalf the sentence or decree shall pass, or that each party shall pay his or

her own costs. It has no power to assess the costs of the libellee upon the libellant. Shoop's Appeal, 34 Pa. 233.

Again there is no power in the court to condition the degree upon the payment of the costs. The costs are incident to an absolute decree. The court, in assumpsit, could not suspend its judgment on the payment of costs; nor condition an injunction on such payment. The judgment, the decree, is entered, and thereupon the costs fall upon the proper party. The ordinary remedy for costs, is a *fi. fa,* an example of which is found in Brinckle v. Brinckle, C. W. N. C. 205, or an attachment. Mickle v State of Alabama, 21 So. 66.

But, this is not an appeal from the decree in the divorce proceedings and it cannot be here annulled or changed.

The question is, has the court decreed a divorce of the Andersons? There is not here an absolute decree written by the judge and delivered by him to the prothonotary with a direction to him not to enter it upon the record until the costs are paid. Perhaps until such entry it would not be deemed a decree; Baker v. Baker, 26 Super. 553, whereas after such entry, though in violation of the instruction, it would be so decreed.

The only decree entered is that the parties be divorced on condition that the libellant pay the costs, that is, do a future act. Until that act is done, no separation is intended. The court ought to have intended to separate them at once, but it did not. The intention that a result shall follow hereafter, if a certain event happens is not the intention that it shall happen at once. If then the decree is to be collaterally treated as if it had been what it ought to have been, but was not, the court sitting in the collateral proceeding, is virtually making the decree that ought to have been made, but was not made.

The statutes of Massachusetts and some other states, provide for a decree *nisi* in divorce proceedings. If within six months after publication or other notice, no one presents a valid objection to an absolute decree, such decree is entered. But it has been uniformly held that the decree *nisi* works no divorce. If a party, after such provisional decree marries in good faith, the marriage is a crime; it is void. Moors v. Moors, 121 Mass. 232; Graves v. Graves, 108 Mass. 314; Edgerly v. Edgerly, 112 Mass. 53. In Cook v. Cook, 144 Mass. 163, the libellant was entitled to a decree absolute on Nov. 20th. Anticipating that it would be obtained, she arranged for a second marriage on the evening of that day. Her attorney failed to obtain the decree on that day, but obtained it on Nov. 21st. The marriage however proceded. The man to whom she was thus married, subsequently filed a libel and procured a decree that the marriage was a nullity.

The decree must be accepted as it is. It ordains the divorce on the condition that the costs be paid. They have not been paid. The divorce has then not taken place.

If the libellant was not pleased with the decree in that form, she should have had it corrected by the court of common pleas itself or upon appeal. It remains unreversed and unchanged.

The result is perhaps regrettable. At least Johnson will regret it, although the next of kin may find solace for his distress, in their own gain. He might have seen that the costs were paid, and so completed the divorce

and he might then have married the decedent again. His good faith is entirely immaterial. Laws are not abolished by the good faith of those who violate them. He could have been convicted of fornication and she of adultery and bigamy, despite their innocence of intent. Moors v. Moors, 121 Mass. 232; Com. v. Thompson, 11 Allen, 23.

If the court desires to give to its officers a better security for their fees than the law has given them, it is not compelled to enter a conditional decree. It may deliver a decree, absolute in form, to be entered by the officer only after the costs are paid; or it may in some way declare its intention not to enter a decree until the costs are paid, and then to enter it, and it may await the actual payment of the costs before entering the decree. These methods are doubtless irregular and illegal. But, if the court enters a decree conditioned on the payment of the costs such decree has no effectiveness until the fulfilment of the condition. It may by a proper proceeding, be set aside, and an unconditional decree entered. Or, the decree's validity being unattacked, its condition may be fulfilled.

As then the only decree in the record conditions the legal separation on an event that has not yet happened, Mrs. Anderson is still undivorced. Her attempted marriage with Johnson is a nullity.

It may be said in respect to Confer's Estate, 17 Dist. 742, that the decree there was not conditional. It was that the parties are divorced and separated; that they shall be at liberty to marry again. After this decree was the statement that it was not to be entered until the payment of all the costs. Where the decree was written, whether the paper on which it was written, was filed, whether the court regarded the writing as the decree, or only the entry of it in the docket by the prothonotary, does not distinctly appear. The court seems to find that the proviso about entering the decree was separable from it and a nullity, and that the decree must be accepted as unmodified by it. But, in the case before us, the decree was in its terms conditional. There was no unconditional part separable from a conditional part.

Decree reversed.

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## COMMONWEALTH vs. WM. HARBISON.

**Competency as a Witness of a Very Young Child. Religious Opinion of Witness.**

STATEMENT OF FACTS.

Wm. Harbison is indicted for the murder of John Kingston. The only witness to the killing was Sarah Kingston, a daughter of the deceased, who was, at the time of the killing six years old, and at the time of the trial six years and nine months old. To the Court's inquiry she said she would be bound to tell the truth if she swore, but she had not heard of the survival of the soul after death. Her parents were Universalists. She did not know of God whom it was her duty to please, and who would be displeased if she spoke falsely. She was sworn, and testified that Harbison killed her father giving the circumstances.

WOHL for Commonwealth.

SPENCER for Defendant.

ZERBY, J.—The question to be decided here is whether this child of the age of six years and nine months is competent, under the circumstances, to testify. After a careful examination of the case we believe that she is. Although there are no statutes on the question in this State, the general rule is that if the trial Judge upon examining the infant, is satisfied as to the intelligence of the infant and its comprehension of an obligation to tell the truth, this is sufficient, and the infant may be sworn.

The whole purpose of the trial is to ascertain the truth and the oath is in pursuance of that object. If the witness understands that this is demanded and that punishment will follow its violation, it is sufficient. Comm. vs. Furman 211 Pa. 549. In the case at bar, upon the examination by the trial Judge it was shown that the infant clearly comprehended the difference between truth and falsehood and had a perfect understanding of its obligation to tell the truth. This is all that the law requires.

In regards to the contention as to the religious beliefs of the child, we fully concur with the following quotation from 211 Pa. 549; It seems to us that the crude and shadowy beliefs of small children concerning God and the hereafter, are so uncertain, that the tests, based on religious instruction, even though given by the trial Judge himself, are of little or no moment, and should rather be discarded than followed in this enlightened age.

The admissibility depends on the sense and reason the infant possesses of the danger and impiety of falsehood, which is to be colleced from his answers to questions propounded to him by the Court. See Wigmore's Cases No. 61, 159 United States 523.

In answer to the defendant's second and third points, we conclude that to our minds this infant showed sufficient intelligence and mental development to entitle her to be sworn and any distorted conceptions and any wrong impressions, which she may have by reason of an overwrought imagination, can be quite easily dispelled and corrected by cross-examination, which is one of the principal purposes of this method of procedure. By means of the cross-examination it is quite possible to bring out all the facts of the killing in a clear and concise manner, without any distortion of the same, and from these facts it would be for the jury to decide whether the killing was justifiable and in self-defense. Justice can not be allowed to go by default on the simple supposition of what might have been the state of circumstances surrounding the killing, but on the contrary it is adminstered from the facts as brought out at the trial on the witness stand by competent witnesses, which we believe to have been done in the case at bar, since we fully consider the infant a competent witness. See 2 Brews., 404, and therefore the motion for a new trial is dismissed.

## OPINION OF SUPERIOR COURT.

The common law admits no one to testify, except under oath. The only relaxation of this principle, in Pennsylvania, has been made in favor of persons who conscientiously refuse to take an oath. Sarah Kingston did not decline to take an oath, but was sworn.

An oath is an appeal to God; Blair v. Seaver, 26 Pa. 274; Com. v. Winnemore, 2 Brewst. 378; Cubbison v. McCreary, 2 W. & S. 262. "It necessarily implies on the part of the witness, his belief in a Supreme Being. * * Without such belief the person cannot be subject to that sanction which the law deems an indispensable test of truth. It is not sufficient that the witness may believe himself bound to tell the truth out of regard for the good of society merely, or through fear of punishment for perjury if he testify falsely." Cubbison v. McCreary, *supra*. Witnesses, 45 *et seq.*

This is the ancient law, and no legislation has changed it. The act of May 32d 1887 P. L. 158, declares that with certain exceptions, "all persons," in criminal cases, "shall be fully competent witnesses," but it has not been understood to dispense with the oath or with the religious presuppositions of the oath.

The necessity of testifying under oath, extended to the testimony of young children. In Rex v. Brasier, 1 Leach, C. L. 199, it was unanimously held, Brasier being tried for assaulting a child under 7 years of age, with the intent to commit rape "No testimony whatever can be legally received except upon oath, and that an infant, though under the age of seven years may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath * * * * but if they are found incompetent to take an oath, their testimony cannot be received." Best correctly says that this case "settled the modern law and practice relative to the admissibility of the testimony of children." Evidence, 153. Unfortunately while in England it is no longer necessary for the child to be sworn; Stat. 32 & 33 Vict. C. 68, s. 4, there is in Pennsylvania no similar statute. Nor have the courts professed to have the power to repeal the ancient law. Com. v. Capero, 35 Super. 392.

The learned court below relies upon Commonwealth v. Furman, 211 Pa. 549. But, that is scarcely to be dignified with the role of overturning a century old rule of the common law. The opinion is a so called opinion "per Curiam." The child's testimony, admitted by the trial court, says the writer, "was not material to the establishment of the prisoner's guilt, and had no practical bearing on it." Sarah Kingston was the "only witness to the killing," and her testimony therefore was indispensable to the conviction. In the Furman case no inquiry was made concerning the witness' knowledge of God. He was asked whether he knew what would "become of" him, where he would "go,' if he told an untruth. He said yes, but apparently explained no further. He did not disavow knowledge of the existence of God. Sarah Kingston "did not know of God whom it was her duty to please" by telling the truth. She lacked then the psychological postulate of an oath. She ought not to have been sworn; and therefore, her testimony ought not to have been heard.

That she did not know of a state of existence *post mortem* did not disqualify her.

The law requiring an oath doubtless ought to be changed. It operates, in so far as it works at all—to exclude from the witness box, truthful persons; while it admits annually hundreds of perjurers. For sundry reasons,

the belief in God professed by the witness, has slight deterrent effect upon him. He falsely professes the belief, or he but vaguely and hazily apprehends the object of his faith; or he thinks God is not listening; or he believes himself to have some talisman by which he can propitiate the divine anger, etc., etc. The time has fully come to abolish the requirement of an oath, not merely in cases in which the witness, believing in God, thinks that he has forbidden swearing, but in all cases whatsoever.

But the legislature ought to do the abolishing and not a court. The abolition ought to be effected consciously, deliberately, professedly and not surreptitiously nor by an unauthoritative decision.

It is abhorrent to see a man guilty of a murder committed in the presence of a child only, escape for that reason. But it is more abhorrent to permit a new law *ex post facto* to be applied to his case. The neglect of the legislature or of the courts to ameliorate the law in advance of the crime, is a bad reason for injecting an innovation into the midst of the trial by a judge to whom the state has not intended to delegate its legislative power.

Judgment reversed.

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## JACOB HARMON vs. GEORGE TOPLIFF.

### Money Lent to be Used on a Wager.

STATEMENT OF FACTS.

Topliff about to make a bet of 1000 dollars on the election for president, but having no money, asked Harmon for it, telling Harmon the use he intended to make of it. Harmon, a close friend, dissuaded him from making the bet, but, not successful, lent him the money, taking his note at three months. The money was in fact not used for the bet, but for some business purpose. Topliff defends on the ground that the object of the borrowing, known to Harmon, was to bet on the election.

McWHINNEY for Plaintiff.

WOODWARD for Defendant.

MOYER J.—Upon this statement of facts we think the plaintiff should recover. Almost the entire argument of the defendant is based upon the assumption that the Pennsylvania statutes against wagering on elections apply to this case; and that the plaintiff acted in violation of these statutes.

The statutory law of Pennsylvania against wagering on elections is as follows:

"Wagering or betting on the event of an election, held under the constitution or laws of the United States, or the constitution or laws of this Commonwealth, are hereby prohibited, and all contracts or promises founded thereon are declared to be null and void." Act of Mar. 24th, 1817, Section I.

"If any person or persons shall make any bet or wager upon the result of any election within this Commonwealth, or shall offer to make any such

bet or wager, either by verbal proclamation thereof, or by any written or printed advertisement, challenge or invite any person or persons to make such bet or wager, upon conviction thereof, he or they shall forfeit and pay three times the amount so bet or offered to be bet."

Act of July 2, 1839, Section 115, also sections 116, 117, and 118 of the same act.

In Webster's Unabridged Dictionary we find that, "wagering is the staking or pledging of something upon the event of a contest, or on some question that is to be decided, or on some casuality." In Brua's Appeal, 55 Pa. 294, Thompson, C. J., remarked: "Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another, is gambling, and demoralizing to the community." In the case before us' Harmon made the loan of money to Topliff independent of any wager or bet; he was not to secure any advantage or gain from any bet which Topliff might enter into, nor suffer any loss from the same; and furthermore, the loan was not only made before any bet was entered into, but the facts show us that ultimately no bet was made—Topliff used the money for some business purpose. The loan was not made with the express purpose that it was to carry some specific bet into execution; but made only on the assertion that it would be bet on the election. Harmon had this knowledge and that was all, and, moreover, he had attempted to dissuade the defendant, his friend, from betting, but was unsuccessful. From these facts, it is impossible for us to see how it can be held that the loan made by Harmon was a waver, or was founded on a wager; in consequence of which the statutes before referred to, will not apply. Scott v. Duffy, 14 Pa. 18.

In Waugh v. Beck, 114 Pa. 422, the court held that, "one who knowingly and with the purpose of furthering a gambling transaction in purchasing commodities on margin, lends money to another, he cannot recover it. It is not enough to defeat recovering by the lender that he knew of the borrower's intention to use it in a gambling transaction, in purchasing commodities on a margin, he must know that the borrower was purposing such use of the loan and must have been implicated as a confederate in the transaction though not necessarily for gain." The defendant goes so far as to say, that under the ruling in the above case, the court might feel constrained to allow a recovery, but that there is a clear distinction where the act for which the money was advanced contemplated the violation of statutory law. We believe we have, already shown fully that this contention of the defendant, that the statutes against wagering on elections apply here, is erroneous.

The vital distinction in this case is to be made between the act of loaning money with an express understanding and intention that it is to be used in betting or wagering, and the act of loaning money with mere knowledge that it is to be so used. In the first case, clearly, the money can not be recovered; but in the second instance, there is an absence of guilty purpose, and there may even be a solicitation to keep the other party from an illegal act, and such is the case before us. "It does not follow that a lender has a guilty purpose merely because he knows or believes that the borrower has. There may be a visible line between the motives of the

two. If it were not so, men would have great responsibilities for the motives and acts of others. A person may loan money to his friend,—to the man, and not to his purpose. He may not be willing to deny his friend, however much disapproving his acts. In order to find the lender in fault, he must himself have an intention that the money shall be illegally used. There must be a combination of intention between lender and borrower—a union of purposes." Tyler v. Carlisle, 79 Maine, 210.

We agree that it seems to be the purpose of our legislature and courts of law to discourage the pernicious practice of betting on elections, and to leave parties who chose to embark into contracts of this kind to recover as they can according to the code of honor under which they originated. Most certainly such ought to be the law. Too often does betting reach such abnormal proportions as to taint and corrupt the very elections themselves. Nothing should be striven for more zealously by a government such as ours than the purity and integrity of the public franchise. But the spirit of animosity to election betting can not come to judgment here. We are unable to see how the transaction between Harmon and Topliff can be framed into the similitude of a wager. We believe that we have clearly shown that this loan was independent of any wager, and although made with knowledge that it was to be so used, persuasion was exerted to discourage such venture. And who dare say, but that this persuasion by Harmon, was not the final influence that kept Topliff from betting? Are we to leave such a person at the mercy of a would be rogue? No. Honor and good faith seem to require that the money loaned should be repaid. And we have not been informed, by the defendant, of a statute or decree which prevents it.

Judgment is hereby entered for the plaintiff to the sum of one thousand dollars.

OPINION OF SUPERIOR COURT.

The act of March 24th 1817 prohibits wagers or bets upon elections national or state, and adds "all contracts or promises founded thereon are declared to be entirely null and void." Because thus void, it has been held that when the money bet is still in the hands of the stakeholder, it can be recovered, even after the issue of the election has been decided, by the loser, from the stakeholder. McAllister v. Hoffman, 16 S. & R. 147; Forsht v. Green, 53 Pa. 138. If one of the primary offenders can thus recover the money, staked by him, it would be singular, if one who has lent to him the money, which he has staked could not recover it from him; a *fortiori* the money which thus borrowed, with the intention to stake it, is subsequently not used in betting at all.

It has been held that A, who lends money to B with knowledge that B intends to use it in gambling, may recover it from B, unless, in addition A *intended* that B, should thus use the money; Waugh v. Beck, 114 Pa. 422. In a sense, when A does an act with knowledge that a certain effect will result he intends that effect. But, he may not desire that effect. He may deprecate it. He does the act not because he wishes to achieve effect X, but because he aims at something else, which he would, were it practicable, prefer to effect, without incidentally effecting X. When that is the fact A in a stricter sense of the word, may not be said to *intend* X.

Harmon did not lend the money to Topliff in order that Topliff should bet. He deprecated; and advised against the betting. So far as appears, he would have more willingly lent the money, if Topliff had wanted it for some other purpose. Harmon did intend that Topliff should have the $1000. He did not intend that Topliff should use it in betting, but only that he should be *able*, if he would, to use it in betting; but with the wish that he should abstain from such a use.

Thinkers who have troubled themselves with the invention of theodicies have made a similar discrimination. The Creator has put certain powers in man, among them, the power to kill, lie, cheat. He must have intended man to have the power, which he has thus conferred. Being prescient, he has also foreseen what bad uses man would make of this power; that he would kill, lie and cheat. But, this gift or loan of power with knowledge that it would thus be used, does not justify the attribution to the Almighty of the *intention* that man should thus use it. If we can exonerate the Creator of the sins of the creature, despite his having made those sins possible with knowledge that he was making them possible, we ought to be able to hold Harmon guiltless of Topliff's bet, despite his foreknowledge of it.

Had Topliff actually made the bet, Harmon could we think, have recovered the money. But the bet was not made. The money was used legitimately. *A fortiori* should Harmon be able to recover it.

The unusually complete and able briefs of the counsel and the lucid discussion of the learned judge, are worthy of commendation.

Judgment affirmed.

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## SARAH MALLORY vs. LIFE INSURANCE CO.

### Stipulation in Life Insurance Policy against Suicide.

STATEMENT OF FACTS.

The defendant issued to John Mallory a policy for $10,000 containing the condition that "the death of the assured shall not occur by his own hand." Policy was payable to his widow if she survived. He died having purposely killed himself while in a fit of melancholia by means of a pistol inserted into his mouth and then discharged.

SPENCER for Plaintiff.

COHEN for Defendant.

WANNER J.—The decision of this case rests upon the construction to be given to the word melancholia. Bouvier's Dictionary defines melancholia as an ancient term for the word monomania. It bore this name because it was always supposed to be attended by dejection of mind and gloomy ideas. The term melancholia at the present time, is applied generally to persons contemplating suicide.

It is well settled that the condition contained in this policy is valid and binding. A well taken exception to the rule is in the case of insanity which deprive the victim of his knowledge of the nature and consequences of the act of taking his life.

The plaintiff relies on 120 U. S. 527 to found a recovery in this case. A glance at that case reveals that it is not applicable to the one in hand. The policy in that case was to insure against accidental injury which had to be the sole and proximate cause of the disability or death. The policy further excluded recovery in case of death by disease, fever, or self-destruction. It appeared, however, that the assured was insane, another distinction from the case in hand. The case of American Life Insurance Co. v. Isett's, Adm's 74 Pa. 176, cited by the paintiff is another case of insanity.

Melancholia or monomania which Bouvier regards as interchangeable terms cannot be classed with insanity. The words imply a mania on one particular point or idea, of one who is regarded as sane in all other respects. A man thus afflicted may be and often is a very good citizen. No man is perfect and it may be conceded that all men have peculiarities which may be magnified into manias so as to baffle a jury in a civil suit like this. What protection would the Life Insurance Companies have, if the law allowed a recovery, against a stipulation to the contrary, whenever a case of melancholia was established. It is popularly supposed that a person had been afflicted with melancholia whenever he takes his own life.

Melancholia in itself does not often bring about suicide, it being superinduced by financial distress, business reverses, disappointment in love affairs, or the like. It is not fair virtually to hold that life insurance companies insure a happy career to the assured.

To allow a recovery in case of suicide, against which the policy did not assume the responsibility, the authorities are uniform in declaring that the act must have been involuntary, and of such a nature that the victim was unable to understand the natural and probable consequences of his act. Take the case of a suicide now, he is abject in spirits and wants to avoid the trials of life: to accomplish his end he deliberately takes his life. Who will argue that that is not a voluntary act? Again take this case where the deceased fired a revolver into his mouth, a very vital point. Who will say that he did not know the nature and consequence of his act; if the deceased had fired into his hand or foot, the contention would not be in vain. At common law, a suicide's estate was forfeited to the state. This harsh rule of law has since been repudiated. Suicides, as a rule, shock the community and would be prevented with zeal whenever possible. Public policy requires that suicides should be held in check by any legitimate means. To allow a voluntary suicide to recover in this case and thus increase his estate would be to foster suicide and work injustice to life insurance companies as well.

Therefore in view of sound reason, public policy and the uniformity of the authorities judgment must be for defendants.

## OPINION OF SUPREME COURT.

The defendant assumed no liability, if the death of the assured should occur "by his own hand." This expression applies to a death caused by the assured irrespective of the agency employed to effect it, to a death by poison, Hartman v. Keystone Ins. Co., 21 Pa. 466, by shooting, etc.

But, the self-killing must be by a responsible agent. If it occurs in

consequence of an insanity that is incompatible with responsibility, it is not considered as within the condition of the policy, 4 Cooley Briefs on the Law of Insurance, 3242, 3243.

Self-killing by an insane person does not defeat the policy, unless it stipulates that such self-killing, even by an insane person, shall have that effect.

The only question before us is as to the irresponsibility of the assured for the suicide. He purposely killed himself; that is, he desired to kill himself; he selected the means, and applied them, in order to effectuate that object, and the object was thus accomplished. He understood then the acts that he was doing, and the expectable sequences. He supposed that the discharge of a pistol into the mouth would destroy him. He was not therein mistaken.

There are some cases that intimate that the person who kills himself or another, must in order to be responsible, know the *moral* quality of the act; that is, apparently that the act is reprehended by the moral law, or by God. See Ins. Co. v. Isett's Adm. 74 Pa. 176, where a decision is not given. It does not appear what the opinion of John Mallory was as to the moral character of the act of self-destruction. He may have believed it innocent or even praiseworthy. He may have believed it wicked. Melancholia does not so constantly involve a perversion of the judgment as to the moral quality of acts as to warrant the inference that Mallory's judgment was perverse and that he did not entertain the prevailing notion concerning the ethical quality of the deed. So far as appears then, he had the sane man's knowledge both of the qualities of the physical act, of its physical consequence, viz death, and of its moral quality.

The existence of irresponsibility has been recognized in this state, even when the patient is capable of knowing and knows both the physical and and moral qualities of the act; its probable effects; the moral quality which the opinions of men ascribe to it; and even when the act is done in order to produce these probable effects. There may be in the opinion of Gibson, C. J., Com. v. Mosler, 4 Pa. 264, and of Ludlow J., Sayers v. Com. 88 Pa. 291, an "irresistible inclination" to do an act, even a homicidal act, which will exempt the doer from the guilt which would ordinarily attend the commission of it. See Trickett Crim. Law, 1076 *et seq.*. If criminal liability for the killing of a human being may be thus deleted it would properly follow that an act of self-destruction, perpetrated under the "irresistible inclination," should not be imputed to the suicide, so as to annul or avoid the policy issued upon his life, although in American Life Ins. Co. v. Isett's Adm. 74 Pa. 180, the trial court evidently thinks that the only insanity that would preserve the liability of the company, in a case of suicide, would be the insanity expressed in a non-perception of the causal relation between the act done and death, and in an inability to form an intelligent intent to take one's life. "If" said Mayer P. J., as Murcur J., paraphrases his doctrine, "the insured possessed sufficient mental capacity to form an intelligent intent to take his own life, and was conscious that the act he was about to commit would effect that object it avoided the policy."

That an insane impulse putting self-killing beyond the power to resist may make suicide ineffectual to discharge the policy, has been recognized;

4 Cooley, Briefs on the Law of Insurance, 3246. Hunt J., was of opinion that if "the suicide is committed when the patient is not able to understand the moral character, the general nature consequences and effect of the act he is about to commit, *or* when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable." Mut. Life Ins. Co. v. Terry, 82 U. S. 580.

An exculpating insanity cannot be inferred from the mere fact of suicide; Colonial Trust Co. v. Hoffstot, 219 Pa. 497; 4 Cooley, Briefs etc., 3257. Mallory's self-murder however occurred while he was "in a fit of melancholia." There is evidence independent of the suicide, of his melancholia. Might the jury have safely inferred the causal relation of the latter to the former? "Suicide is an ever-present danger in melancholia. More suicides occur in this disease than in any other form of insanity, and a large proportion of all cases of suicide occur in melancholiacs. Suicide, in fact, is a logical sequence of melancholia. It is a result to which the disease directly tends." 1 Wh. & Stille's Medical Jurisprudence, 633. Melancholia then often does superinduce suicide. We think the question ought to have been submitted to the jury whether Mallory was at the instant of killing himself without the power to refrain. The delicacy of such a question we freely concede. What is power? By what indications does it reveal itself? How can we ever know whether, at the moment of willing act X, there was a power to have willed act Y; or to have refrained from willing any act at all? The courts however, have assumed that there is in the normal man a power, at any instant, to will alternately, that there are forms of abnormality in which this power is lost; and that jurors are able to say in particular cases, whether the power existed or not.

The objections to allowing a recovery are strongly stated by the learned court below. They are serious. But the company can escape the risk by expressly refusing to insure against death, when caused by one's self, whether the causal act was induced by insanity or not. Not having so stipulated, should it be exempt, when the self-killing is an irresponsible act? It is true that the act is "voluntary" if by voluntary is meant "purposed." Mallory conceived his death, wished it, resolved to produce it, selected shooting himself in the mouth as the means, and accordingly shot himself. But these events are not inconsistent according to some authorities, with an inability to avoid doing them. Behind them may have lain an irresistible impulse. Whether there actually lay such impulse, some one must decide. The facts developed warranted and required the submission to the jury of the decision of the question.

Judgment reversed with *v. f. d. n.*