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EDITORS:
HARTLEY L. REPLOGLE
CLAIR N. GRAYBILL
HARRY E. MCWHINNEY

BUSINESS MANAGERS:
JAMES F. SHIPMAN
J. CLARENCE FUNK
BENJ. J. H. BRANCH

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PARTY WALLS.

AMOUNT OF COMPENSATION.

The act of 1721 declares that the first builder shall be reimbursed one moiety of the charge of such party-wall, or for so much thereof as the next builder shall have occasion to make use of, * * * the charge or value thereof to be set by the said regulators." The act of March 6th, 1820, in regard to the District of Kensington, says that the first builder shall be reimbursed "one moiety of the value of" the party-wall, or of such part thereof as the second builder uses "the value thereof to be fixed by any one or more of the regulators, or by arbitrators mutually chosen." The terms used in the statutes are "charge" and "value," of the wall. It does not distinctly appear that it has been assumed that the first builder is in any case entitled to one-half of the cost to him of the wall. He might have made a reckless contract for the wall, and paid for it an excessive price. What would have been the fair cost of the wall, if cost is the standard of the compensation to be paid, would doubtless be the cost in question. Perhaps the actual cost would be *prima facie* evidence of the fair and proper cost. There may be a very long interval between the erection of the wall by A and the later use of it by his neighborB, and the cost of the erection of the wall at the later period might be greater or less than the actual cost of it. When B uses the wall, must he pay one-half of what such a wall would cost if then erected, or one-half of what it did cost A? Distinct answer to

the question it is difficult to find. In Sauer v. Monroe,[1] it seems to be assumed that the first builder would be entitled to recover one-half of the cost of the wall, if the wall had been properly built. Black C. J., endorses the "principle" adopted by the trial court, which he apparently understands to be that the second builder shall pay one-half of what the wall is "worth to himself, and not an equal share of its cost." The instruction of the trial court was sufficiently vague. The jury were told to "estimate the *value* of the party-wall," and also the damage sustained by the second builder, in consequence of the leaning of the wall over upon his lot and to deduct this damage from the value. For the difference the defendant would be liable.[2] It would seem that the second builder should pay one-half of what would be the cost of such a wall, if erected by himself at the time he wants to use it.

COMPENSATION FOR FRACTIONAL USES.

The second builder may use the entire wall. He must then pay one-half of its value. If he uses only a part of the wall he pays for one-half of the value of this part. "Thus, if the wall is 100 feet high, as modern buildings not unfrequently are, and the adjoining owner only desires to use 40 feet of it, he is only liable for four-tenths of one-half of the cost of the wall, and he cannot be called upon to pay that, till he begins to make actual use of it."[3]

COMPENSATION. WHAT REGARDED AS WALL.

The parties owning contiguous lots may by agreement, authorize one of them, in erecting the division wall, to deviate from the standard prescribed by statute. The statute requires the wall if built on the neighbor's lot to be confined to a certain distance from the division line and to be continuous to its top. The parties may agree that it shall be otherwise. They may agree, e. g., that A, (one of them) may make an alley which shall

[1] 20 Pa. 219. In Hoffstot v. Vought, 146 Pa. 632, Mitchell J. says that the second builder pays one half of the "cost" of so much of the wall as he uses. The wall being less than six months old, when the second builder used it one half of its "cost" seems to be regarded as what he should pay; Bailey's Appeal, 1 W. N. 350.

[2] The wall had been perpendicular at first, but settled afterwards so that it leaned at the top several inches over the proper boundary of a party wall.

[3] Hoffstot v. Vought; 148 Pa. 632. Mercantile Library Co. v. University of Pennsylvania, cited at the end of the first article, is in 220 Pa. 328.

encroach 15 inches upon B's lot, and embrace 15 inches of A's lot; and that the party-wall shall rise from the top of the alley, in the normal position of a party-wall. The wall and alley being thus built, when B subsequently builds against A's house, and the alley, he must pay one-half of the value, not only of the wall above the alley, but also of the alley wall and, if B has assigned his lot to C, who builds the house, C must thus pay for the party-wall.[4]

WALL IMPERFECT.

The party-wall may be defective in various ways, and the defects may influence the amount of compensation to be paid for its use. The wall may not be solid but have openings in it, to admit light, or air. Thus on lot *a* stood a Music Hall, one of whose walls rested in part on lot *b*. This wall, above the line of the tiers of seats within the hall, was pierced by long narrow slits for ventilating the Hall. The owner of the lot *b* used a part of the wall. The measurer to whom the matter was referred, valued the portion of the wall used, making "allowance for certain defects and the cost of repairing them" and awarded $233.14. The court ratified the award.[5] The party-wall, in settling overhung the vacant lot from 1½ inches to 2 inches. The building inspector condemned the wall and ordered it to be underpinned before it should be used. Pursuant to this order, the first builder conferred with the neighbor, who proposed to use it, about the necessary repairs and agreed that the latter should have these repairs made, and have done whatever was necessary to render the wall safe. Work was accordingly done at a cost of $90.60 which defendant paid. The plaintiff's claim for the half of the value of the wall was $107.37. He was allowed to recover only the difference betwen these two sums.[6] A party-wall having settled and overhung the vacant lot, the owner of the wall was allowed to recover from the owner of the vacant lot who used it, one-half of what it was worth to the latter; "The jury" says Black C. J., "were allowed to deduct the damage from his part of its *price*." What was in fact done, was to deduct the damage arising from

[4]Haines v. Drips, 2 Pars. 236. It does not appear whether defendant was required to pay one half of the value of both the alley walls, or only of the one resting on his ground. They were both parts of the party wall, and equitably should be paid for equally by the adjoining owners.

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

[6]Eppelsheimer v. Steel, 21 W. N. 380.

the undue encroachment of the wall, from the "*value* of the party-wall used by the defendant."[7]

WHO ASCERTAIN COMPENSATION.

The value of the wall, says the act of 1721, is "to be set by the said regulators." The act of 1720, concerning Kensington, says the value shall be "fixed by any one or more of the regulators, or by arbitrators mutually chosen." Of this provision of the act of 1720, Black C. J., remarked that he would not say that it might be disregarded in all cases; "but where the last builder breaks into and uses the wall without notice to the other party of his intention to do so, he must be considered as declining to choose arbitrators, and as waiving his right to a decision by the regulators." The jury in the trial of the action for compensation, must then ascertain it.[8] The parties referred the matter to a measurer, who measured and valued the portion of the wall used, making allowance for necessary repairs of defects. The court required payment of the amount thus found.[9] In Fidelity Co. v. Hafner[10] the plaintiff's declaration averred that the "proper surveyor and regulator duly set the charge and value" of the part of the wall used by the defendant, "of which the defendant had notice." The plaintiff, in Bailey's Appeal[11] had the *cost* of the new party-wall calculated and apportioned by the measurers of the Bricklayer's Society. The court enjoined against the use of the wall until payment of this amount.

WALL NOT A PARTY-WALL. COMPENSATION FOR USE.

If a wall erected by A is in part on what is now B's lot, and is nevertheless not a party-wall, B, owning the ground beneath a part of the wall, may use without compensation, so much of this wall as is within his own boundaries. Thus, A erects a house on his land, owning land to the east of it. He conveys the land to the east, including a strip 3 inches wide in front and 2½ inches wide in the rear, on which the wall rests. This wall, when erected was not a party-wall,[12] for a party-wall is one which when built, is built in part on the land of another than the "first builder." So

[7]Sauer v. Monroe, 20 Pa. 219.

[8]Sauer v. Monroe, 20 Pa. 219.

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

[10]6 Super. 48.

[11]1 W. N. 350.

[12]Amer v. Longstreth, 10 Pa. 145; Oat v. Middleton, 2 Miles, 247; Finley v. Stuebing, 38 Leg. Int. 386; Beaver v. Nutter, 10 Phila., 345.

much of it as stands on the ground whose ownership has since been separated from that of the house, becomes the property of the owner of that ground. As owner, he can use it without making compensation to the owner of the house of which it was a part. His ownership of the ground "certainly confers" says Bell J., "a right to use so much of the wall as is erected upon his ground, for any purpose that may be useful to him, in the same manner as if he himself had built it." He may break into it, in order to rest his joists.[13] It is possible however, for A having erected a building on a part of his lot to convey the vacant part and so much more as lies under one-half of the eastern wall, and to stipulate that the grantee shall not make use of this wall without making compensation. Such a stipulation virtually makes the wall a party-wall. If A subsequently conveys the building to X who is also the owner of the vacant piece, the right to compensation passes to X, and is therefore merged.[14]

WHEN COMPENSATION SHOULD BE MADE.

The act of 1721 requires that compensation shall be made "before such next builder shall in any wise use or break into the said wall." Before using the wall therefore the "next builder" must make compensation.[15] If he begins to use it before making compensation, the continuance of the use may be enjoined at the suit of the owner of the party-wall until the compensation is made.[16] A similar principle is embodied in the act of May 8th, 1872, with respect to Pittsburg, which authorizes an injunction against the use of the wall before the making of compensation.[17] Parties may agree to erect a wall on the edge of their lots, A to erect the first story, B, the second, and A and B the third. If, A building

[13]Amer v Longstreth, 10 Pa. 145, Oat v. Middleton, 2 Miles, Geiss v. Schadt, 14C. C. 177; Finley v. Stuebing, 38 Leg. Int., 386, [S. C.]; Norris v. Adams 2 Miles, 337; Doyle v. Ritter, 6 Phila. 577; Milligan v. Baylie, 10 Dist. 311. A different view is held by Finletter J. in McGittigan v. Evans, 8 Phila. 264. A owning two lots and erecting on one a house whose eastern wall rested in part on the other lot, sold both lots to B. B conveyed the vacant lot to C. The court enjoined C. from using the wall until he had made compensation to B.

[14]Voight v. Wallace, 179 Pa. 520, Cf. Milligan v. Baylie, 11 Dist. 311.

[15]Ingles v. Bringhurst, 1 Dall, 341. Miller's Appeal, 81 Pa. 54. Lukens v. Lasher, 10 Dist. 385; McCall v. Barrie, 15 W. N. 28.

[16]Beaver v. Nutter, 10 Phila. 345; McGettigan v. Evans, 8 Phila. 264; Oakes v. Senneff, 4 W. N. 413.

[17]Hoffstot v. Voight, 146 Pa. 632.

the first story of the wall, B refuses to build his part, A may complete the wall, and by injunction prevent B's use of the wall until he compensates A for the money spent in doing what B contracted to do.[18] Nothing prevents B's paying A for the party-wall, before B makes use of it; but, since the act of 1849, B would have to pay again, on his using the wall, to any person to whom A might have conveyed his lot and building, without reserving the right to the compensation.[19]

SUCCESSIVE USES.

As the second builder is required to compensate the first builder for only so much of the wall as he uses, it follows that, on the use of one part, a duty of making compensation will arise for the use of that part. When, at some later time, another part of the wall is used, there will again spring up the duty of paying for this additional use, and so on.[20] If a wall, already up is taken down by the owner of one of the lots because it is not sufficient to support the new and larger building that he is about to erect, the owner of the next lot makes the same use of the new wall as he made of the old, without falling under a duty to pay for it,[21] but if at any time he increases the height or depth of his building or erects in its stead, a higher or deeper building, he will then become bound to pay for the use of the wall.

ASSUMPSIT TO ENFORCE PAYMENT.

If the use of the party-wall is made without prior giving of compensation, the person entitled may bring an action of assumpsit.[22] In Ingles v. Bringhurst,[23] an *indebitatus assumpsit,* Shippen J., said that "perhaps" [instead of suing in trespass] the plaintiff might waive the trespass and bring an action on the implied assumption, for money paid for the defendant's use." The plaintiff failed in that case, because he had sued the grantee of the person who had made the use of the wall.

TRESPASS.

The person who begins to use a party-wall before he has acquired the right to use it by tendering compensation, is a tres-

[18]Masson's Appeal, 70 Pa. 26.

[19]In Hart v. Kucher, 5 S. & R. 1, payment was made 26 years before the wall was used.

[20]Cf. Hoffstot v. Voight, 146 Pa. 632.

[21]Hoffstot v. Voight, 146 Pa. 632.

[22]Fidelity Co. v. Haffner, 6 Super, 48; Wetherill v. Horan, 5 C. C. 190; Haines v. Drips, 2 Pars, Eq. 236; Voight v. Wallace, 179 Pa. 520.

[23]1 Dall. 341.

passer,[24] and he can be sued as such. In Ritter v. Sieger [25] the action of trespass *quare clausum fregit* was sustained. It was held that the defendant was liable not merely for the cutting of holes in the wall, which did no serious injury, but for the further use of the wall, for appropriating it to the use of the new building by building against it, which was a trespass of a permanent character. If there are circumstances of aggravation, vindictive damages may be recovered, but in their absence, the court properly confines the jury to compensation.[26]

ON WHOM IS THE OBLIGATION.

The act of 1721 directs that the first builder "shall be reimbursed one moiety * * * or so much thereof as the next builder shall have occasion to make use of before such next builder shall in any wise use or break into the said wall." This language puts on the "next builder" who uses or breaks into the wall, the duty of making compensation. After the "next builder" has erected his house, incorporating the party-wall into it, that wall may be said to be used daily by him, or his tenant, or his grantee But this use is not that which the statute contemplates. If, A and B owning adjacent lots, A erects a party-wall over their division line, and B subsequently incorporates the wall into a house which he erects, and B's interest is sold by the sheriff or otherwise, to C, who continues to use the house, this use does not make C liable to the "first builder."[27] Passively enjoying the benefits of the wall is not using it. Even an open lot is sheltered by the wall. It serves to keep off trespassers. But for the owner of the vacant lot to suffer the benefit, does not compel him to pay for the wall.[28] Continuing an old use, is not a using which involves liability to make compensation. If, e. g. a wall has already existed, which has been incorporated into the houses of both A and B, and A,

[24]Ingles v. Bringhurst, 1 Dall. 341; Masson's Appeal 70 Pa. 26; Ritter v. Sieger 105 Pa. 400.

[25]105 Pa. 400.

[26]Id; Amer v. Longstreth; 10 Pa. 145.

[27]Lea v. Jones, 209 Pa. 22; Ingles v. Bringhurst; 1 Dall. 341; White v. Snyder, 2 Miles, 395; Euwer v. Henderson, 1 Penny. 463.

[28]Wetherill v. Horan, 5 C. C. 190; Thayer J. suggested that the use must not be such in the "general sense" of that word. Otherwise, if the owner of the vacant lot piled up boxes against the party-wall he would become liable for compensation. The use must be for the support of a structure, a building. Heiland v. Cooper 38 W. N. 560.

finding the wall insufficient for a new building which he is about to erect, removes it, and erects another, B has a right without compensation to make the same use of this, as of the original wall. Supporting in the new wall the beams of B's pre-existing building in the same manner and to the same extent as they were supported in the old, is merely the continuance of the old use.[29] However, if A tears down a wall [apparently it was wholly on the land of his neighbor B] and erects a new wall, thicker, higher and longer than the former, and after the completion of A's building, B tears down his building, and erects one as large as A's, thus using all the wall, he is bound to pay one-half of the value of the whole wall, because B would have been compelled to erect such a wall had A not already erected it.[30]

TRANSFER OF LIABILITY.

The owner of the lot, in the building upon which the party-wall is used, is liable, although the contractor who is erecting it has agreed to defray the cost of the wall. The contractor, in using the wall, is his agent.[31]

ESTATE OF PERSON LIABLE.

The person who makes use of a party-wall, is usually the owner in fee of the next lot. But a disseisor, having no other title than his possession, would doubtless be liable. A lessee for a term of years, may build the next house and use in so doing, the party-wall, and become liable to make compensation.[32] An agent of the owner may probably become liable. The father of the owner, erecting a house on the lot, inserts joists in the wall and uses it otherwise. He would be liable.[33] The husband of the owner of the vacant lot, if he causes the erection of a house thereon, and the use of the party-wall, is personally liable for the compensation.[34]

[29]Hoffstot v. Voight, 146 Pa. 632. Possibly if B instigates the tearing down of the old wall and the building of a new, he will be liable at once to pay for it, but simply making a suggestion after A has resolved to tear down the wall which results in A sinking the new wall two feet deeper, will not impose liability on B to pay for the same use of the new wall as of the old.

[30]Bailey's Appeal, 1 W. N. 350. B also gained from the fact that the new wall while 22 inches thick, projected only 6 1/2 inches upon B's lot. The first builder may by contract preclude his receiving compensation from the second builder; Shenk v. Pittsb. L. J. 464.

[31]Davids v. Harris 9 Pa. 501.

[32]Fidelity Co. v. Hafner, 6 Super. 48.

[33]Ritter v. Sieger, 105 Pa. 400.

[34]Davids v. Harris, 9 Pa. 501.

TO WHOM THE COMPENSATION BELONGS.

The 2nd section of the act of Feb. 24th, 1721 enacts that the "first builder [that is, the owner who erected the party-wall] shall be reimbursed one moiety of the charge of such party-wall, or for so much thereof as the next builder shall have occasion to make use of," etc. This language justifies the interpretation that the courts put upon it, and which held that only the "first builder" could maintain a suit for the compensation, or was entitled to recover it. His right did not pass to a grantee of the house of which the wall was a part, unless it was expressly assigned to such grantee.[35] But, the right, like any other chose in action, might be assigned by the "first builder." In 1858 Sharswood J., remarked that it was not uncommon in Philadelphia for the "first builder" to agree with the contractor for the erection of the house, that, as part of his compensation, the contractor should have the right to receive compensation for the future use of the party-wall.[36] But it is needless to say in the absence of such an agreement, the contractor obtained no right to this compensation.[37] The contractor or other assignee of the right would sue in the name of the assignor, the "first builder."[38] To the grantee of the house might also be assigned the right to compensation, before the act of April 10th, 1849.[39]

RIGHT TO COMPENSATION PASSES TO GRANTEE

The 4th section of the act of April 10th, 1849[40] enacted that "In all conveyances of houses and buildings, the right to and compensation for the party-wall built therewith, shall be taken to have passed to the purchaser, unless otherwise expressed, and the owner of the house for the time being, shall have all the remedies in respect to such party-wall as he might have in relation to the house to which it is attached." Apparently, it was the intent of the act to operate on conveyances made subsequent to its passage

[35]Hart v. Kuchcr, 5 S. & R. 1. Todd v. Stokes 10 Pa. 29. Dannaker v. Riley, 14 Pa. 435; Pratt v. Meigs, 2 Pars. Eq. 302; Vollmer's Appeal. 61 Pa. 118.

[36]Roberts v. Bye, 30 Pa. 375; Haines v. Drips, 2 Pars. Eq. 236; Todd v. Stokes, 10 Pa. 155.

[37]Brierly v. Tudor, 2 Am. L. J. 191; King, P. J.; Eichert v. Wallace, 2 Am. L. J. 326.

[38]Roberts v. Bye, 30 Pa. 375; White v. Snyder, 2 Miles, 395,

[39]White v. Snyder, 2 Miles, 395.

[40]Mulligan v. Bayleé, 11 Dist. 311.

Although, the first builder having conveyed prior to its passage, the party-wall was not used by the owner of the next lot until after its passage, the grantee had no right to the compensation. It remained with the "first builder."[41] *A fortiori,* if the use of the wall by the next owner as well as the conveyance by the "first builder" preceded the 10th of April, 1849, the act of that date had no application.[42]

MODE OF CONVEYANCE.

The right to the compensation for a use yet to be made of the wall passes with the conveyance by the first builder of the house and lot. It passes when his interest is sold from him adversely by the sheriff.[43]

WHEN RIGHT CEASES TO RUN WITH THE LAND.

The right to compensation runs with the lot and house of which the party-wall was a part, so long as that right is immature; that is, until a right to sue has arisen on account of an actual use of the wall by the neighbor, but no longer. The matured right to sue does not pass, unless it is expressly assigned to the grantee. The adjoining owner uses the party-wall, Oct. 4th, 1901. The "first builder" conveys his house Nov. 30th, 1901. The right to recover the compensation for the use of the party-wall did not pass to the grantee.[44]

ACT OF 1849 APPLIES TO CONTRACTUAL PARTY-WALLS.

The act of 1849 applies to walls whether they have been erected adversely, or by an agreement, under which a right to compensation for their use arises. Thus, A, owning a piece of land, on the east end of which was a brick building 20 feet wide, built a warehouse against it to the west with side walls 22 inches thick. He then conveyed to X the easterly part, with a width of 20 feet and 11 inches thus including the ground on which the eastern half of the eastern wall of the warehouse stood, the deed

[41]Bell v. Bronson 17 Pa. 363.

[42]Dannaker v. Riley, 14 Pa. 435. The act of 1849 was passed pending an appeal from a judgment for the compensation for the use of the wall.

[43]Oats v. Middleton 2 Miles, 247. The right passes by an allotment in partition of the land to one of several cotenants; Norris v. Adams, 2 Miles, 337.

[44]Lea v. Jones 209 Pa. 22 affirming 23 Super. 587 reversing 11 Dist., 496 Cf. Enwer v. Henderson, 1 Penny. 463; Bloch v. Isham, 7 Am. L. Reg. N. S. 8; Ingles v. Bringhurst, 1 Dall. 341.

however, stating that no use was to be made of this wall by X, his heirs or assignees, until $1950.75, one-half of the cost of this wall, should be paid to A, his heirs or assigns. Subsequently A conveyed the warehouse lot, to the middle line of the eastern wall to Z. The same year X conveyed to Z. Later Z used the eastern wall of the warehouse. Z was under no duty to pay $1950.75 to A. A's right to this money had passed by the conveyance to Z. Says Fell J., the wall became a party-wall by agreement. By reserving the right to compensation, A and X invested the wall "with the statutory incident of a party-wall." The act of 1849 passed the right to the compensation to Z.[45]

RESERVATION OF THE RIGHT.

The act 1849 directs that the right to compensation shall pass, with the conveyance by the first builder or his successors of the house containing the party-wall "unless otherwise expressed." The grantor may have already transferred the right to compensation, before making the conveyance. He may, e. g. in his contract with the builder for the erection of the house, have agreed that the builder shall have the right to receive the compensation for the future use of the wall. One who acquired the house and party-wall with knowledge of this contract would take subject to it; but one purchasing the house without knowledge of it, would become entitled to the compensation, rather than the builder. If A was the original owner of the house, and conveyed it to B, who had notice of A's agreement with the contractor, and B in turn conveyed it to C, who had no notice of that agreement, the next user of the wall would have to compensate C.[46] who would have paid B for the house including the wall. B therefore would be compelled to pay the contractor as for money received by B to his use.[47] As the party-wall is real estate, it seems to be assumed that the right to compensation for its use is also real estate.[48] At least it is said that thesolemnities necessary to pass an interest in land must be observed in reserving the right to the compensation. A buys under a written agreement from B a lot, and contracts with B, that B shall erect on it a house. The house was built and the lot conveyed to A, without reservation of the

[45]Voight v. Wallace, 179 Pa. 520.
[46]Knight v. Beenken, 30 Pa. 372.
[47]Roberts v. Bye, 30 Pa. 375.
[48]Wilson v. Demott, 15 Leg. Int. 270.

party-wall. B erecting a house on the next lot, used the wall. It would not be shown by B, that B had retained the right to compensation for the party-wall, by proof that prior to and at the time of his conveyance to A, A had admitted that B was to have the party-wall. When the first builder sells, properly reserving the party-wall, he, and not his grantee is entitled to compensation for its subsequent use, and he may enjoin the owner of the next lot against that use until compensation is made[49] or recover the compensation by an appropriate action. If A in granting the house to B, reserves the right to compensation from the owner of the next lot for the future use of the wall and in ignorance of such reservation the latter pays for it to B, he may recover the money thus paid from B.[50]

MERGER—COMPENSATION.

When after A erects a house, whose western wall is made to stand in part on B's lot to the west, A acquires this western lot, he does not destroy, it is said, his right to compensation for the subsequent use of this wall by one to whom he later conveys the western lot. A owns a lot with a house on it, whose west wall is in part on the next lot. He subsequently acquires the next lot. He then conveys the lot with the house on it, reserving the west party-wall. Allison P. J., thought[51] that he was entitled to compensation from the grantee of the western lot, on his making use of the party-wall. But, the grant of the western lot, according to the cases just considered, made the grantee an owner of so much

[49]Beaver v. Nutter, 10 Phila. 345. In Thomas v. Saving Fund Co. 7 Dist. 375 A, having erected a house and party wall, conveys it to B, reserving the right to compensation for the wall. A then sold the next lot which was vacant to X, with the right to use this wall. B conveyed his house and lot to C who apparently had no notice of the reservation. During C's ownership X made use of the wall. C had prior to concluding the purchase obtained an insurance against liens and encumbrances. He could not recover on the policy for his inability to recover the compensation. Why C could not enforce the right to compensation does not appear.

[50]McKibben v. Doyle, 173 Pa, 579.

[51]Beaver v. Nutter, 10 Phila. 345. While the right to the party wall was reserved at the sale of the house, it does not appear that at the sale of the vacant lot to the west, there was any reservation of the right to use the wall. In VanGunten v. Parks, 25 W. N. 527 A erected a house with a party wall. He then bought the next lot. The ownership of the first lot passed to X, and that of the other lot to Y. On Y's use of the wall, X could recover compensation.

of the wall as stood on it. Why then was he as owner, not entitled to use it?

WALL ERECTED AT JOINT EXPENSE.

The owners of adjacent lots may agree, that one of them A, shall erect a house, and that both shall pay for the party-wall. If the payment is accordingly made, the subsequent use of the party-wall by the owner of the vacant lot, would not oblige him to make compensation.[52] The owner of two adjacent lots in Meadville agreed that A one of them should build the foundation for a division wall; that the other B, should erect the wall upon it to the height of 14 feet, that A should continue it 14 feet higher, B paying 50 cents per thousand for the bricks used, and that the 3rd story part should be erected at their equal expense. A refusing to build the second 14 feet of the wall B could complete the wall, and restrain by injunction A from using the wall until he had made compensation.[53] In New Castle, A owning a lot, and C the next of which B was tenant for a term of 20 years, the three parties covenanted to erect a party-wall. C agreed that whenever he should use it, he would pay, at the commencement of his use, one-half of what the part of the wall so to be used, was reasonably worth. The parties were to agree upon its worth, or if that was not practicable, arbitration was to be resorted to. C would be enjoined from using the wall, before having agreed with A and B as to the worth of the part of the wall he was about to use, or submitted the matter to arbitration.[54]

MODE OF USE.

The affidavit of defense in a suit for compensation for use of the party-wall, admitted that defendant used the wall, that the roof erected by him is supported by light pieces of scantling, the timbers or ends of which rest in small holes about two inches in the wall, extending along the wall its whole length. This, said Beaver J., "is a clear admission of such a use of the wall as makes him liable. * * * The defendant's entire structure, at least upon the one side, depended upon his own admission entirely upon the party-wall."[55] A owning one lot, B owned two adjacent lots

[52]Hart vs. Bucher, 5 S. & R. 1.

[53]Masson's Appeal, 70 Pa. 26.

[54]Hileman v. Hoyt, 23 C. C. 533.

[55]Fidelity Co. v. Hafner, 6 Super. 48. The facts are not further stated

contiguous to it. The middle lot was vacant. On it B erected a frame structure, the roof of which covered the entire space between the building on A's lot and that on B's lot. This roof rested on wooden frame work and supports, and against A's building. A was held entitled to recover a moiety of that part of the party-wall built by A, although there was no physical attachment of B's structure and the wall.[56] Cutting into the party-wall for the insertion of girders and lintels, is using it.[57] Possibly would plastering against it.[58] In Heiland v. Cooper[59] a suit for use of a party-wall against B it was shown that B erected a wooden shed 80 feet long, 14 feet high at the sides. It was covered by a roof that extended from the party-wall of plaintiff to the party-wall on the opposite side. The roof rested on a wooden frame work, and on supports entirely on B's lot. The shed was not enclosed on either side. The roof was covered with felt. Plaintiff testified that it was fastened with pitch against his wall. B testified that the shed was of no use to him and had been erected to avoid a disput with the plaintiff about drainage. He stated that the upright supports of the roof were one-half inch from the wall; that the wall was not broken or used; that the edge of the roof was not fastened to the wall; that at a few places, in applying pitch, the wall unintentionally became daubed, and that the sky could be seen between the wall and the structure. The court charged that, to make the defendant liable, he must have used the wall for the support of his building he must have broken into the wall, or must have made use of it by some permanent physical attachment. The verdict being for the defendant a new trial was refused.

ADDENDUM.

In Bright v. Morgan[1], A owned a house, whose west wall was wholly on lot X. A also owned a strip 3 feet wide, west of this wall, which was used for an alley. Later A conveyed the strip to B, owner of the lot to the west. B in 1856 enlarged the building on his lot causing it to stand over and embrace the

[56]Allen v. Cass, Stauffer Co., 1 Dist. 832. Facts not further given.

[57]Retter v. Sieger, 105 Pa. 400.

[58]Walsh v. Luburg, 10 C. C. 641. The next owner sought to enjoin the "first builder" from painting the wall, because, painted, it would not adnere to the plaster. The court refused the injunction, thinking an action for damages an adequate remedy. But compare Wistar v. Baptist Publication Society, 2 W. N. 333.

three feet. In doing so, he inserted joists into A's west wall, and he also extended the wall vertically in making his building four stories high. In 1905 the then owner of lot X, tore down the building upon it, except the west wall, and erected another, of which this wall became a part. In 1896 the then owner of the lot to the west increased the height of the building on it, and the height of the wall between it and X, and inserted and supported additional joists therein. There was no agreement which gave B or his successors, the right to use this wall. It was held, that the right to continue to use it as it had been used between 1856 and 1896, was acquired by prescription, but that no right to use it to any different extent was acquired. The owner of X, filing a bill in 1905, not to compel the owner of the adjacent lot to remove the additions made to the wall in 1896, but to enjoin him against further aggressions, an injunction against any future use of the wall in excess of the present use, was issued. This case virtually asserts that a wall, which, when built by the owner of the land on which it stands, and of adjacent land, is not a party wall, does not become such, by the subsequent separation of the ownership of the land on which it stands, from that of the land immediately contiguous to it; and that the owner of such contiguous land has no right to use the wall without the consent of its owner, and that the toleration of one use of it, or even a second larger use of it; does not oblige the owner to tolerate a still larger use of it. In Sharples v. Boldt[2] A owned a lot and B the next lot to the east. On A's lot was a building with a party wall. B erected a building on his lot, but its west side was 20 feet from the east side of A's lot, and therefore made no use of the party wall. B however dug his cellar below the line of the bottom of the party wall. In doing so, he owed no duty but to dig his cellar with proper care. He presented his plan to the Bureau of Building Inspection, which directed him to underpin the party wall, and to increase the thickness of the underpinning wall in proportion to the increased depth of the cellar excavation. In building this wall, B built the underpinning wall almost altogether on A's lot. It extended at the top, 2 feet 2 inches beyond the limit permitted by the act of May 7th, 1855, and it increased in thickness downwards. The east side of the underpinning wall was vertical, and was 4 inches west of the eastern vertical surface of the party wall. Except

[1]218 Pa. 178. [2]218 Pa. 372.

5 inches, the whole of the underpinning wall is west of the centre of the party-wall and is of the average depth of 30 feet. A by bill asked for and obtained a decree that the underpinning wall, so far as it existed for more than 10 inches in thickness on A's lot, was a violation of his rights, and should be removed. The decree was reversed. The building inspector did not prescribe the extent of the invasion of A's lot, but as the underpinning was for his benefit and not that of B, B could not be compelled to put it on his own land. He could legitimately infer that it was to be on A's. The additional thickness is no present detriment to A. It has become his, and he can do in the future with it as he chooses. At most, B's act was a technical trespass done under the supposed compulsion of law, i. e. of the 24th section of the act of May 5th, 1899[3].

[3]Mitchell C. J., proceeds to say that, under the evidence, the plaintiff was not entitled to damages even nominal. But no decree for damages was made in the court below. The weight of the evidence was that A knew what B was doing and assented to it. That the plaintiff was the committee of a lunatic led to no different result from that which would have been reached had the owner been *sui juris*.

MOOT COURT.

COMMONWEALTH vs. SHORTER.

Larceny of the Wife's Chattels by the Husband.

STATEMENT OF FACTS.

Shorter took and carried away the gold watch of his wife, with the intention of depriving her thereof permanently.

COLLIER, for the Commonwealth.

Where by statute the husband's interest in his wife's goods and chattels is abolished, he may commit larceny by taking them. Beasley vs. State, 138 Ind. 552.

COOK, for the Defendant.

Statutes securing the property of married women to themselves do not so far destroy the relation of husband and wife as to render either guilty of larceny by converting the goods of the other. 18 A. & E. Enc. of Law 512.

EASTER, J.—Larceny is the taking and removing by trespass, of the personal property of another, which the trespasser knows to belong either generally or specially to another, with the intent of depriving him of his ownership therein.

At common law the husband and wife are regarded as one person and the legal existence of the wife is merged into the husband. 18 A. & E. Encyc., 790. 52 Barb. (N. Y.) 128.

In consequence of the intimate legal relationship created by marriage, the wife or husband can never commit the trespass necessary in larceny, by taking the husband's goods. 2 Bishop's Crim. Law, Sec. 855.

As a result of the marital relation the wife is generally unable to act as a feme sole and the common law disabilities exist as to the person and property of married women, except to the extent of changes by the legislature in express terms or by reasonable construction. 15 A. & E. Encyc., 790. Such statutes confer rights to make contracts, to make wills, acquire and hold property, to be sole traders, to act as agent in a fiduciary capacity, and to act sui juris.

At common law a husband could not commit larceny in respect to the chattels of his wife, for the plain reason that all chattel property of a woman vested, on her marriage, in her husband.

The power granted by modern statutes to acquire and hold property as a feme sole, would seem to imply that the wife should have the same rights in the protection of the same, by herself, as the feme sole.

It has been held that statutes securing the property of married women to themselves do not, so far, abrogate the relation of husband and wife as to render either guilty of larceny by converting the goods of the other. 18 A. & E. Encyc., 512.

There are statutes, which, in defining larceny, are so comprehensive as to sever completely the unity of husband and wife and make it the crime of larceny for a husband to take his wife's property, where a taking under the same circumstances from another person would be larceny.

The counsel for the Commonwealth argues that under the married woman's act of June 8, 1893, P. L. 344, Sec. 1, "that the wife has such rights over her separate property that the taking of it by the husband would constitute larceny." The statute says she has the same right *to control* her property as if unmarried and it would seem to imply that she has entire control over it, but we cannot construe the statute to the extent that it says, she may bring a charge against the husband so as to maintain that the taking was larceny. We invoke the aid of the doctrine which holds "that statutes securing the property of married women to themselves do not so far destroy the relation of husband and wife as to render either guilty of larceny by converting the goods of the other." We come to the conclusion that the statutes of Pennsylvania do not so far destroy the unity of husband and wife as to render either guilty of larceny by the taking of and depriving the other of his property, notwithstanding the statute gives her absolute power to control and dispose of her property. The courts are adverse to the revoking of principles of law that have been handed down from remote times to the present and sustained by decisions of the courts.

In Comm. vs. Hartnett, 3 Gray, (Mass.) 450, the defendant, who had stolen an article from her husband, was adjudged to be guilty of simple larceny, that is, for a theft, not aggravated by being taken from a person, nor by being committed in a dwelling house or other building as prescribed by their revised statutes and she was not liable for the punishment of larceny therein described. In the same case it was decided that the property stolen must be such as is usually under the protection of the house, deposited therein for safe custody, and not things immediately under the eye or personal care of some one who happens to be in the house.

Manning vs. Manning, 79 N. C. 293, (65 L. R. A., 778) gave the wife the right to have the rents and profits from her property which her husband unlawfully withheld from her; they were not living together at the time, as the husband was living with another woman, and the crime of adultery alone would sustain a conviction in this respect.

In Comm. vs. Jones, 61 L. R. A., 777, the court says, under code of 1883, that when the action concerns the wife's separate property she may sue alone and may sue her husband in regard thereto. The wife would not by rules of evidence be permitted to testify against her husband and her testimony would be necessary to convict.

In summing up, we may say that there is no statute in Pennsylvania which must be so construed that the husband can be held guilty of larceny of his wife's personal property. The legal unity of husband and wife has been severed to a great extent but not to the extent that the husband will be convicted.

The rule and laws adopted in codes of other states do not apply in this state.

Judgment arrested.

OPINION OF SUPERIOR COURT.

That a wife could not at common law steal the property of her husband seems to have been well established; 25 Cyc. 31; 1 Wharton Crim. Law, 798; State v. Banks, 48 Ind. 197. The reason assigned is not always the same. It is sometimes said to be that "they are but one person." 1 Wharton, 798; Hawkins P. C. 1 lib. ch. 33, sect. 32. At other times that "the husband by endowing his wife at the marriage with all of his worldly goods, gives her a kind of interest in them." Hawkins, P. C. *ibid.* Lord Campbell also says that the wife has a "property in her husband's goods." Regina v. Featherstone, Dearsly, 369. In Com. v. Hartnett, 3 Gray, 450, it was said that the heavier penalty for stealing in a building, could not be imposed on a woman who stole the goods of X in the building of her husband, for her husband's building "is the same as her own." Of course, if they are one person, neither can steal from the other, for so to do implies duality. Neither could kill, or assault the other, or libel the other, or burn the property of the other; the husband could not be accessary to a rape upon the wife, etc., etc. Some of these conclusions from the conception of unity have been drawn, while others have been illogically declined. An amusing instance of the willingness of judges to cite the

principle, as if it had a meaning and at the same time to reject it, is that of Lord Campbell who, in Regina v. Featherstone, Dearsly, 369, after saying that the wife could not steal her husband's goods on "the principle" that the husband and wife are, in the eye of the law, one person, adds "but this rule is properly and reasonably qualified when she becomes an adulteress. She thereby determines her quality of wife, and her property in her husband's goods ceases." But can she indeed recover her existence lost in that of the husband by an act of adultery? Only the law by divorce can effect that miracle of revitalization and resurrection. Indeed how a woman who has ceased to exist, can commit adultery, is one of the marvels of the metaphysics of the mediaeval law. In Lamphier v. State, 70 Ind. 317, the suggestion is made that the wife, living with the husband, has possession of his goods by reason of the marriage relation, and hence, cannot steal them; since stealing involves the unlawful gaining of the possession.

Modern legislation has diminished the rights of the husband over the wife's property; but not hers over his. He must still support her. He still "endows" her with his goods in making a contract of marriage. Perhaps we are warranted in saying that a wife is still unable to steal the property of her husband.

The question immediately before us is can a husband steal the personal property of the wife which is in her possession, of which he, without her consent, deprives her of the possession, with the intention to deprive her permanently of it.

He might think, from the relation between himself and her, that what was hers was his. His taking would then not be *animo furandi.* But we are to assume that he harbors no such mistake. He knows that what he is taking is hers not his and that he is doing a wrong act in taking it, and that every fact exists which would make his act a larceny unless the relation alone of husband to wife precludes his larceny of her chattels.

At common law, the husband could not commit larceny of his wife's goods. A sufficient reason was that the wife had no goods. What she had at the time of marriage, had become his and ceased to be hers. What fell to her after marriage, passed instantaneously from her to him. An absurd reason was invented for this transmission of the wife's ownership to the husband. "This depends" says Blackstone, 2 Comm. 433, "entirely on the notion of the unity of person between husband and wife; it being held that they are one person in law, so that the entire being and existence of the woman is suspended during coverture or entirely merged, incorporated in that of the husband." If this were so, she could not be murdered except in the murder of the husband. A rape upon her, was impossible for she had become he. She could no more own land than chattels; and the fee in land, which she formerly had, would be his, not hers. She could not be divorced except by the mutilation of the one person, who was the husband. But the law did not consistently ignore the separate existence of the wife. She could be murdered, even by her husband, and he could be punished for the act, that is, in killing her he

killed a part of himself, and to avenge the wrong, the state or kingdom killed the other part. The husband could even be an accessary before the fact to the rape of his wife. In short, the conception of unity was artificial: logically applied, it would have led to absurd and abhorrent results. It was therefore invoked sometimes and sometimes defied.

The modern law has still further broken away from this conception. Its chief corollory at common law was that the wife's property because the husband's. This principle is now wholly abandoned. The wife now has the same right and power as an unmarried person to acquire, own, possess, control, use, lease, sell or otherwise dispose of any property of any kind Act June 8th, 1893, P. L. 344. Marriage does not draw the ownership away from the woman and deposit it in the man. The great reason then for holding a husband incapable of committing larceny with respect to the wife, has disappeared; she has property, as if unmarried. No interest therein vests in the husband. He has the physical power to take it out of her possession. He can as well intend to permanently deprive her of it as to so deprive any other person. He can know the law, and therefore know that the relation of husband does not entitle him in the least to interfere with her property. Why then should an exception in his favor, an exemption from criminal liability be invented? We say invented, for it has not yet existed. The time never was in the history of English law that if a husband stole the property of his wife he should not be deemed a thief. Formerly the law made it impossible for a woman to own property. It followed, of course, since there was no property there could be no theft of it. But if, the wife now owning property, it cannot be criminally taken by the husband, it must be for some reason not yet recognized as valid.

The principle of the unity of the husband and wife exhausted itself when it made impossible the wife's ownership of chattels.

It is true that the wife has not yet all the remedies for vindicating her ownership against the husband, that she would have against another person. Unless she is deserted by him, she can probably maintain no common law action against him for it. She cannot support her right as against him by her testimony. But, criminal prosecutions are in the name of the state. The state is interested in the prevention of thefts. It furnishes a machinery for their repression. It would largely nullify the policy of the act of 1893, which preserves for a wife her property if, even when taken by the husband selfishly, cruelly, neither she can recover it or damages for the taking, nor does the state hold a penal liability *in terrorem* over him.

In several states whose legislation resembles that of Pennsylvania, it is held that a husband may be guilty of larceny of the wife's goods. Beasly v. State, 138 Ind. 552; Hunt v. State of Arkansas, 65 L. R. A. 71. In England, says A Century of Law Reform, England, 1901, "The married woman's property act, 1882, has for the first time brought within the reach of the criminal law a husband who, in the act of deserting his wife, steals her separate property, and a wife can in similar circumstances be

prosecuted for stealing her husband's property. This would, of course, have been impossible at common law." Whether it would have been supposed in England, that notwithstanding the recent enlargement of the property rights of a wife her chattels could have been taken by the husband without any criminal liability but for the provision referred to, which restricts that liability to cases of desertion, does not appear. We have no such statutory provision here. We think a sound policy requires that the property rights of the wife shall not be nearly wholly defenseless, as they would be if the husband were liable neither civilly nor criminally for improperly and fraudulently taking the wife's chattels.

The question has not been considered in Pennsylvania. In Commonwealth v. Levinson, 34 Super. 286, it might have been but was not. In some states a result different from the one reached by us, has been announced, 25 Cyc. 31. In Thomas v. Thomas, 51 Ill. 162, a proceeding by the husband for a divorce, one of the grounds of divorce alleged was the commission by the wife of the larceny of a watch. Whose watch it was, did not distinctly appear. If the watch was the husband's, the court says, the taking of it "would not even under that law [the act of 1861] be held larceny. That act has not so far destroyed the relation of husband and wife as to render either guilty of larceny by converting the property of the other." But, the provisions of the act of 1861 are not given, and as the court proceeds to state, it was not the commission of a felony, but the conviction of it, that justified a divorce under the law, and the wife had not been convicted of any larceny.

We are obliged therefore to reach a conclusion different from that attained by the learned court below.

The record is remanded with direction to the court below to enter judgment on the verdict.

SARAH ORLOFF vs. JNO. TAVOLVISK.

Base Fee—Conditional Limitation—Remarriage of Widow.

STATEMENT OF FACTS.

John Orloff devised to his wife, the plaintiff, his house and lot, by these words: "I give my house and lot to my wife and her heirs, unless she shall marry again. If she marries, I give them to my brother Jacob and his heirs." Not having remarried, the plaintiff, twenty years after her husband's death, contracts to convey to the defendant for $6000. Defendant, doubting the title, refuses to accept it. Having tendered the deed, plaintiff brings this action.

HOWER, for the Plaintiff.

KING, for the Defendant.

OPINION OF THE COURT.

BRANCH, J.—The phrase "to my wife and her heirs," creates a fee

in the wife. This, however, is followed by, "unless she shall marry again." This proviso makes her estate one on condition, so it is what is known in the law as a base fee. See Tiedeman on Real Property, 3rd ed., Chap. x. By the same authority it is not an estate on limitation; but the devise over is a conditional limitation, sec. 211; and it takes effect as an executory devise. See Tiedeman, chap. xv.

Counsel, in their briefs, contend altogether with respect to the nature of the estate granted and to the validity or invalidity of the condition attached to Mrs. Orloff's estate; so a reference to the latter may not be amiss. By the civil law all restraints upon marriage were invalid; and Chief Justice Gibson ascribes this to the fact that "the Romans were driven by waste of life in their ceaseless wars * * * to force the growth of the population by concubinage as well as marriage, and by the imposition of a mulct upon celibacy." At an early date, in England, the ecclesiastical courts had sole control of legacies; so, as they had adopted the civil law, all restraints upon marriage were illegal and void as to gifts of personalty. Gradually the rigor of this rule has been relaxed until, in England and in this country, when personalty is bequeathed on limitation or on condition with limitation over on marriage, the legatee takes an estate during widowhood. But when personalty is bequeathed on condition subsequent against marriage the condition is invalid. Vide opinion of Mitchell, C. J., in Holbroke's Estate, 213 Pa., 93. But such a condition is valid if there is but a restraint against marriage with a certain person or a class of persons or if the restraint is reasonable as to time. Those interested should see the argument of Mr. Hare in M'Ilvaine vs. Gethen, 3 Wharton 575, and Gibson's opinion in Comm. vs. Stauffer, 10 Pa. 350. But the civil law rule has never applied to devises, so the condition in this case is valid and on the marriage of Mrs. Orloff her estate ceases. Comm. vs. Stauffer, 10 Pa. 350; Lancaster vs. Flowers, 198 Pa. 614; Scott vs. Murry, 218 Pa. 186; and Redding vs. Rice, 171 Pa. 301.

While not mentioned in the briefs, a question has been raised as to the Statute of Frauds. That statute created a rule of evidence; but it has been waived here by the person to be charged, the defendant. He is in court admitting that the contract was made, but that he doubts the title.

Mrs. Orloff, having tendered the deed, is in a position to get judgment for the purchase money, unless her title is not what it should have been; and that raises the principal point in this case, although not touched upon by counsel. Plaintiff has contracted to convey. What? That does not affirmatively appear. It may have been her interest or it may have been the title. In the absence of anything to the contrary, we must assume that it was the latter. When we contract to convey the title, the law assumes that we have contracted to convey a fee simple. See Burk vs. Bear, 3 Clark 355; Leslie vs. Morris, 9 Phila. 110; Jones vs. Gardner, 10 Johns. 266.

Courts of law inquire whether the title is good or bad, so that, had Mrs. Orloff, having a good title, brought this action at common law, there is no doubt but that she could recover. But in this state equity is part of

the law, and as this is essentially an action for specific performance, this case must be decided on equitable principles. What these principles are will be seen from the following expressions: "But the equity doctrine is, that a title is not to be forced upon a purchaser, which is not so free from difficulty as to law or fact, that on a resale an unwilling purchaser shall be unable to raise any question, which may appear to a judge sitting in equity, so doubtful, that a title involving it ought not to be enforced." Nicol vs. Carr, 35 Pa. 381. "If there be color of an outstanding title which may prove substantial, though there is not enough in evidence to enable the chancellor to say so, a purchaser will not be held to take it and encounter the hazard of litigation with an adverse claimant," per Sterrett, C. J., in Bately vs. Foerderer, 168 Pa. 350. "A decree of specific performace is of grace, not of right. It will never be made in favor of a vendor, unless he is able to offer a title marketable beyond a reasonable doubt, nor against a vendee where he is able to show any circumstances which would make it unconscionable to do so," per Paxson, J., in Mitchell vs. Steinmetz, 97 Pa. 251. See also Holmes vs. Woods, 168 Pa. 530; Dalzell vs. Crawford, 1 Pars. Eq. 45; and Stoddart vs. Smith, 5 Binn. 365. While the cases in which these expressions were made were cases in which that which made the title doubtful was already in existence, as where the title is derived under partition proceedings, the legality of which is questioned, or under tax sale, nevertheless reasons as potent exist here. If we find for the plaintiff, we force on Tavolvisk a title which is liable to be divested at any time until Mrs. Orloff dies without having had a second husband. It is a title which may involve him in litigation, for Jacob Orloff is very likely to assert his title on Mrs. Orloff's marriage. During her life, any man of ordinary prudence would hesitate to accept the title from Tavolvisk, and this justifies any court in refusing to enforce the contract. As we have said, Mrs. Orloff's interest is a base fee, and Jacob Orloff has a contingent interest, so the case is as strong as that of Jones vs. Gardner, *supra*, a case where, with a contingent interest outstanding, there was held to be no clear and absolute title.

Judgment is accordingly entered for defendant.

OPINION OF SUPREME COURT.

The able opinion of the learned court below makes an extended discussion by us unnecessary. As that court has said, the devise confers a fee upon Mrs. Orloff, but a fee subject to defeasance, should she remarry. This condition subsequent is valid. Mrs. Orloff has not remarried although 20 years have elapsed since her husband's death. What her present age is does not appear. It matters not, except as it might lessen the probability of a remarriage. But, probable or not, remarriage remains possible throughout her whole life. One who obtained a conveyance from her, would take the land subject to the risk of loss of it by her second marriage. The contract of Tavolvisk was for a good fee absolute. He cannot be compelled to accept, and pay for any other fee.

Judgment affirmed.

HAND vs. SCOTT.

Replevin—Tender of the Vendor's own Promissory Note as part Payment.

STATEMENT OF FACTS.

Scott purchased a horse from Long for $150. Long received $50 and took Scott's note payable in 30 days. The horse was delivered to Scott, but Scott failed to pay the note when due. Hand purchased the overdue note for $95. He then offered Scott $155 for the horse and Scott accepted the offer. He then tendered Scott $55 in cash and the $100 note but Scott declined to deliver. Continuing the above tender, Hand brings replevin for the horse.

DAY for the plaintiff.—Bush vs. Bender, 113 Pa. 94, and Welsh vs. Bell, 32 Pa. 12.

HESS for the Defendant.

HOWER, J.—This was an action of replevin brought by Hand against Scott to recover a horse which the former had bought from the latter. "To replevy is when a person distrained upon applies to the sheriff or his officers and has the distress returned into his possession." 3 Bl. 12. But instead of confining the use of this writ to the recovery of property held by the landlord for rent arrears, its use has been extended and, in some of the United States, it is allowed and used as a remedy whenever one man claims goods in the possession of another and seeks to recover them specifically. Weaver vs. Lawrence, 1 Dall. 156. Therefore, this action will lie if the goods belong to Hand. Miller v. Warden, 111 Pa. 300.

But let us notice the transaction between Scott and Hand. Hand contracted with Scott for the horse and the consideration agreed upon was $155. There was nothing said as to how it should be paid. Hand now tenders $55 in cash and Scott's note for $100 which he had given to Long in part payment for the horse and which was now overdue. Scott refused to deliver the horse. When no agreement was entered into to the contrary, cash is understood. Welsh vs. Bell, 32 Pa. 12; also lower court's charge in Bush v. Bender, 113 Pa. 94, which was approved by the Supreme Court. ....

If the seller understood it to be a sale for cash and the buyer understood it to be in payment of a debt, the minds of the parties did not meet and there was no agreement or contract of sale. Wabash vs. Bank, 23 Oh. 311. Therefore replevin will not lie since there was no binding sale.

However, Hand contends that Scott's note for $100 was a valid tender of the balance of the debt; and we agree if there had been such a contract entered into by which the creditor's note was to be a part of the purchase price, then the tender would have been a proper one and replevin would lie. But intention or agreement to take the note must be shown, which was not done in this case. Kemp v. Watt, 15 Mees. & W. 672. And without such an agreement the tender of a creditor's own promissory note then due or overdue is insufficient. Am. and Eng. Ency. vol. 28, page 26. Hamer v. Fisher, 58 Pa. 453; Bush v. Bender, 113 Pa. 94. It has been

held in Windle vs. Moore, No. 2, 1 Chester Co. 409, that in an ordinary purchase it is implied that the price shall be paid in money at the time of delivery of the goods and when the vendee refuses to pay money and tenders in payment a note of the vendor to a third person this constitutes a fraud upon the vendor.

Hand had purchased this overdue note from Long and by so doing must now collect it from Scott but that is another matter. Because he bought the note is no reason why he should perpetrate a fraud upon the defendant. As was said in Bush v. Bender, supra, "The ingenious device to which he resorted to compel the application of the value of the horses on the notes which he held against the other party, cannot receive the sanction of law."

Therefore, the vendor may refuse to deliver without payment. Ward v. Shaw, 7 Wend. 404; and as long as something remains to be done by the vendee, he cannot maintain replevin. Strong & Co. v. Dinning et. al., 175 Pa. 586.

Judgment accordingly for the defendant.

OPINION OF SUPERIOR COURT.

The sale by Scott to Hand was for $155. Nothing was said indicating that the ownership was to pass prior to the tender of the payment. The transfer of ownership was therefore conditional on such tender. If the tender actually made was such as Scott was bound to accept, the estate passed with it; Hand became the owner, and could enforce his ownership by means of the action of replevin. Tiffany Sales, 365.

Was Scott bound to accept the things tendered? He owned the horse, and could retain it or not, as he chose. The fact that he was in debt; or that he was in debt for it, did not restrain this power. He could have sold it back to Long, or he could have sold it to Hand, in payment of the price which he had agreed to pay to Long but had not yet paid. He has not chosen to do this. Neither Long nor Hand could have lawfully taken the horse for payment of his claim without Scott's consent, except by means of an execution sale.

The sole question then is, did Scott, when he made the contract to sell the horse to Hand for $155 mean, and did Hand understand him to mean, $155 in money? There can not be two opinions as to the proper answer. One hundred and fifty-five dollars does not mean $55, and a note of some one, even of the vendor's own making, for $100. Hand had ingeniously contrived a plan which he supposed would procure for him the horse and thus pay the note of Scott, without Scott's assent to such payment. But a man cannot thus lose his property without his own co-operation, even when the loss of it would not be without compensation to him, in that a debt which he owes, would be thus extinguished. The case of Windle v. Moore, No. 2, 1 Chest. 409, cited by the learned court below, is very similar to the case before us. The vendee refused to give back the horse, when the vendor declined to take his (the vendor's) own note in payment, and the vendor was permitted to recover the value of the

horse, as damages in an action of trover and conversion. In Bush v. Bender, 113 Pa. 94, the horses, retained by the vendee under like circumstances, were recovered by the vendor in an action of replevin

The lucid opinion of the learned court below makes further discussion unnecessary.

Judgment affirmed.

COMMONWEALTH vs. BROWN.

Kidnapping—Murder of Second Degree.

The facts are stated in the opinion of the court.

BELL for the Commonwealth.

Kidnapping is a felony in Pa. Act Feb. 25, 1875, P. L. 4.

BRUCE, for the Defendant.

OPINION OF THE COURT.

BROWN, J.—According to the facts of the case Brown was engaged in kidnapping a child with intent to extort money for the child's restoration. He, finding that it was necessary to subdue the child by force, applied such force as was necessary to accomplish his intention. Although the force used was not such as would ordinarily cause death or great bodily harm, the child died as a result thereof.

The question in this case seems to be whether Brown is guilty of the homicide which resulted from the commission of the crime above stated.

It is very evident that the defendant is not guilty of murder in the first degree, as the statutory definition of first degree murder does not include the crime of kidnapping. Then also this was not a deliberate and premeditated killing. Penna. vs. Lewis, Addison 278.

We do think however that Brown is guilty of second degree murder and in order to show this we will have to take three successive and distinctive steps.

First, by the 1st section of the Act of April 4, 1901, it is declared a felony for any person to take or carry away, or decoy or entice away, or secrete any child or person, with intent to extort money or any other valuable thing for the restoration or return of such person." There is no doubt that this case is embodied in the statute first quoted and therefore is a felony.

Our second step is to show that the defendant is guilty of the crime resulting from the perpetration of this felony. By the doctrine of constructive intent, where a person acting with a view to the commission of a felony commits another criminal act which he did not intend, he is criminally responsible for the resulting criminal act. Clark's Criminal Law pages 54 and 191.

Now that we have shown the defendant guilty of the resulting crime, we will show that the crime is murder and that the defendant is punishable for murder in the second degree. It is also stated on page 191 of

Clark's Criminal Law, that when the resulting crime is homicide the offender is guilty of murder. At common law, homicides might be murder, though those who committed them had no intention either to kill or cause grave bodily harm. Trickett's Criminal Law, vol. 2, page 819.

Since we have shown the resulting crime to be murder it must be murder of the second degree as shown in the first part of this opinion.

We might say incidentally, that the fact that the force employed by Brown was not such as would ordinarily cause death or great bodily harm has no weight in the case. The fact that the act committed was a felony is sufficient. Of course if this had been Brown's intention it would have strengthened the case and perhaps made him guilty of murder in the first degree. But since this fact was unknown to him, we cannot see where it adds any force whatever.

OPINION OF SUPERIOR COURT.

The learned court below has concluded that Brown cannot be convicted of murder of the first degree. The death of his victim was not intended by him, nor was it the result of the perpetration of a rape, robbery, burglary or arson. If murder at all, it is murder of the second degree.

At common law "the state of mind involved in the attempt to commit a felony (any felony) constitutes malice aforethought (implied), so that death resulting, although entirely unintended, will be murder." 1 McClain, Crim. Law, 294.

The attempt has been made in recent times, to qualify this doctrine so as to require that the death should be "naturally consequent upon the felony committed." 1 McClain Crim. Law, 295, and Wharton has stigmatized as "incompatible" "both with logic and with humanity" the doctrine that a man is guilty of murder, who causes the death of another, while doing an act which is defined as a felony, although it would not probably result in death or serious bodily harm to another. He asserts that "if a man should now be tried for a homicide which, though consequent on killing a tame foul [in the effort to steal it] was not only unintended by the defendant but was in no way a natural or probable result" he would be held guilty only of manslaughter. 1 Wharton Crim. Law, 345. He concedes however that the common law rule was that a killing incident to a felony, whether intended or not, whether foreseeable as not unlikely or not, was murder. We see no sufficient reason for rejecting this rule.

The statute law of Pennsylvania makes a killing which is incidental to a rape, an arson, a robbery, a burglary, a capital offence, whether the doer had or not reason for suspecting that death might ensue. Arson and the other three felonies can be committed by one who firmly believes that injury to a human being will not, cannot follow. If death in fact follows, he is responsible as for a murder.

If then responsibility as for murder, follows in a death produced by one of these four felonies, without regard to its anticipableness, its likelihood why should the anticipableness of the death be insisted on, in the case of a felony of another class?

Even if we adopt the principle that only acts of a high turpitude, followed by death, should involve the doer in the guilt of murder, that high turpitude is visible in the act of the accused. That act is looked on by the legislature as extremely base and as needing severe punishment for its repression. It can be punished by an imprisonment of 20 years. Murder of the second degree receives a like punishment. What more base and atrocious, than to kidnap a child, deprive it of the society of its parents and friends, expose it to abuses of various sorts, at the hands of vile persons, and thus to treat it, for the purpose of extorting money from the anguished love of its friends?

Kidnapping was not a felony at common law, and it is suggested that when the early judges laid down the principle that a killing resulting from the commission of a felony was murder, they had in mind the felonies then recognized. They doubtless had such felonies in mind. It would not follow that they would have said, had a statute-made felony been brought to their attention, that the principle would not extend to such a felony. (State v. Smith, 32 Me. 369. People v. Enoch, 13 Wend. 159), although crimes of small as well as of great gravity and turpitude being classed as felony, by reason of the place e. g. a state penitentiary, in which the imprisonment is to be suffered, the court might refuse to extend to such of them as were of small gravity the principle that an ensuing death would make the perpetrator a murderer. Cf. Powers v. Commonwealth, (Ky.) 61 S. W. 735.

The kidnapping was not merely a felony. It was a felony of grave turpitude. Its perpetration implied great hardness of heart, towards the victim and its friends, and a repulsive sordidness. We promote the object of jurisprudence by holding that one who, in committing the abduction kills he child is guilty of the murder of it, whether he might have or ought to have, forseen that death would probably result or not.

Judgment affirmed.

WILLIAM HIPPLE vs. JOHN SEBASTION.

Assumpsit—Guarantor or Surety not Liable where a new Note is given.

STATEMENT OF FACTS.

Hipple loaned $2000.00 to Templeton on Templeton's presenting to him a paper executed by Sebastion, reading thus, "If William Hipple loans $2000.00 to Jared Templeton on his promissory note, I will pay that note, if it shall not be paid when it falls due." When the note fell due Templeton begged for time, Hipple agreed to accept a new note for the $2000.00 payable sixty days after date, and to deliver up the first note. The old note was given up and the new note executed. When the new note fell due, it was not paid. Assumpsit on Sebastion's contract.

FETTERHOOF, for the Plaintiff.

KING, for the Defendant.

OPINION OF THE COURT.

WOODWARD, J.—We are clearly of the opinion that the plaintiff is not entitled to recover in this action. This is an action upon a contract of guarantee, for Sebastion was a guarantor, and not a surety, as contended by the learned counsel for the defendant. Bouv. Law Dictionary page, ——; Reigart v. White, 52 Pa. 440; Woods v. Sherman, et al., 71 Pa. 100; Riddle v. Thompson, 104 Pa. 330; Mizner v. Spier, 96 Pa. 533.

Were we disposed to rest on the technicality we might give judgment for the defendant in this instance because the facts do not show that he was ever notified by William Hipple that the offer to guarantee payment of Templeton's note had been accepted or acted upon. It seems to be well setled that where there is an offer of guarantee, in order that the guarantor may become liable thereon there must have been sufficient notice to the proposed guarantor that his offer had been accepted and relied upon. "Where there is a mere offer to guarantee, notice of acceptance is requisite, and notice of acceptance will not be presumed, in the absence of evidence, however probable the fact of knowledge of such acceptance may be." Patterson v. Reed, 7 W. & S. 144; Coe et al. v. Richmond, 110 Pa. 367; Evans & Co. v. McCormick, 167 Pa. 247; Unangst v. Hibler, 26 Pa. 150; Kellog v. Stockton, 29 Pa. 460.

But we are disposed to rest our decision upon the broader ground that Hipple in extending time to Templeton, in accepting the new note, and surrendering the original one, consummated a new contract, to which Sebastion was in no way a party. The law is uniformly jealous of the interests of both sureties and guarantors, and we feel that it would be extending the liability of a guarantor entirely too far to require him to pay a defaulted note, of which he had no notice, and against which he had no means of guarding himself, because of such lack of knowledge.

"Yet such a guarantor is a species of surety, and is discharged from his liability if the creditor did, by a subsequent valid contract give time to the principal." Campbell v. Baker, 46 Pa. 243.

'When the terms of a contract have been varied without his consent, it is prima facie, but not conclusive evidence of injury, and the effect is to throw the onus probandi on the creditor, who is bound to prove that, notwithstanding the change in the terms of the agreement, no injury resulted to the guarantor." Fullmer v. Dale, 9 Pa. 85.

"The contract of a guarantor, in general, is to be construed strictly in his own favor, and any variation from the exact liability assumed by him will amount to a discharge." Randolph on Com. Paper 1318.

Therefore the acceptance of the new note, and surrender of the old, constituted a payment and satisfaction of the note on which Sebastion was liable as guarantor, and he is not liable now for the money which was voluntarily loaned by Hipple on the strength of the new note from Templeton. 7 Cyc. 1011; Cake v. Leb. First Nat. Bank, 86 Pa. 303.

And we direct judgment to be entered for the defendant, and that the plaintiff pay the costs of this action.

OPINION OF SUPREME COURT.

The note of Templeton, was at maturity surrendered to him by the payee, Hipple, who, instead of it, accepted a new note. From these acts, the extinction, the payment, of the first note might legitimately be inferred. Sebastion's engagement was to pay "that note" if it should not be paid when it fell due. Payment may be by any means which the creditor chooses to accept; namely, goods, land, other secureties for the payment of money. Hipple chose to accept a second note, as a substitute for the first. The first note having been thus paid, no duty remained on the part of Sebastion.

The learned court below has treated Sebastion's undertaking as a guaranty. In the stricter sense a guarantee is an undertaking to pay the money, if the primary debtor does not pay and further if he is insolvent, so that the creditor cannot obtain payment by timely suit. In this sense, Sebastion is more than a guarantor. He promises to pay the note "if it shall not be paid when it falls due." He could be sued instantly upon the maturity of the note, were it not then paid, whether Templeton was solvent or insolvent; whether from Templeton payment could by action have been secured or not. His liability is indistinguishable from that of a surety. Cf. Campbell v. Baker, 46 Pa. 243.

But, whether surety or guarantor, Sebastion had a right to pay Hipple, on the maturing of the note, and to sue Templeton instantly for reimbursement. With this right Hipple cannot properly interfere. He has interfered with it, by postponing his own right to sue on the note, even if he has not extinguished that note. He has bound himself to extend the time until the maturity of the second note. If Sebastion chose to pay Hipple before that time, he would have no right to sue Templeton until the lapse of the period of the second note. During the longer time, the financial state of Templeton might undergo deterioration; the risk of which Sebastion would have been, if consulted, unwilling to undergo. This prolongation by Hipple of Templeton's time for payment, would discharge Sebastion, even if the first note had not been discharged. Campbell v. Baker, *supra.*

The learned Court below has found that the offer of Sebastion being a guaranty, Hipple should have informed him betimes, that it had been accepted and acted upon by a loan of the money to Templeton. It matters, not, we think, whether we term Sebastion's offer that of suretyship or of guaranty. Hipple had not bound himself to make the loan. He might not make it. Knowledge that he had made it, in reliance on Sebastion's offer, might have been useful to the latter, just as useful, if a surety as if a guarantor. Failure to give the notice, reasonably promptly, after acting upon the offer (if notice of the intention to act upon it had not been given) would discharge Sebastion. Acme Mfg. Co. v. Reed, 127 Pa. 359. Quod non apparet non est. It is not shown that notice was given to Sebastion. Notice, then, was not given to him. For this reason, as the learned court below has decided, there can be no recovery.

Judgment affirmed.

WILLIAM WALES vs. JOHN JANEIRO.

Replevin—Cash Sale—Waiver of Cash Payment.

STATEMENT OF FACTS.

Wales sold a bicycle to Janeiro for $50 cash, and sent it by a boy to the house of the latter with directions not to leave it, unless he got the money. Janeiro paid the boy $40 and said he would pay the rest in 3 days. Wales, disappointed, sent a note at once demanding a return of the bicycle, and tendering the $40. To this Janeiro said he would call in 2 days and pay. A week elapsed when Wales sending back the $40, began this replevin for the wheel which Janeiro in the meantime, had been daily using.

COOK, for the Plaintiff.

JONES, C. A., for the Defendant.

OPINION OF THE COURT.

CARL, J.—The conditions under which Wales may bring an action of replevin to recover the specific property in this case are that he must show title general or special to be in him and that he has the right of possession. We think he lacks these requisites.

In the contract of sale the stipulation as to cash payment is a condition precedent and title to the property will not pass prior to delivery until this condition either has been complied with or waived. If the goods are delivered the presumption is that the condition is waived. In some cases it is even held that title actually pases and not that there is a mere presumption of waiver. (Welsh v. Bell, 32 Pa. 17; Mackenass v. Long, 83 Pa. 158). However, in the present case since delivery was made upon receipt of only a part of the purchase price, contrary to the vendor's instruction, he certainly had a right to disaffirm. He does this by making an immediate demand for payment. He thus rebuts the presumption of waiver. At this stage Wales undoubtedly could have maintained an action of replevin as title had not passed.

Wales undoubtedly could have maintained an action of replevin as title had not passed.

In answer to Wales's demand, Janeiro makes a counter proposal to pay the balance in two days. Wales does not persist in his demand; he does not bring action but permits Janeiro to retain possession and to use the wheel not only for two days but for one week. We think in absence of anything in rebuttal this indicates the intention on the plaintiff's part to give credit to Janeiro. If credit is given this is a waiver of the condition of payment, and the contract of sale passes both property and the right of possession. Benjamin on Sales, p. 353. Therefore, as Wales lacks the requisites to bring and maintain the action of replevin, the verdict should be for the defendant.

We can see no grounds whatever for the plaintiff's contention that there was fraud.

OPINION OF SUPERIOR COURT.

The sale was for cash. So understood Janeiro. So understood Wales. Wales had not changed his intention when he despatched the boy to deliver the bicycle. He told the boy not to deliver it, unless he got the money. When Wales learned that the boy had left the cycle, upon securing but $40, he at once tendered back the $40, and demanded the cycle. Janeiro refused to accept the money or deliver the wheel, saying to the messenger, that he would in two days, pay the remainder of the price. Up to this stage in the transaction, nothing indicates an intention in Wales, to waive the right to be paid in cash and to give credit to Janeiro. Wales in no way assented to the proposal to keep the bicycle and pay in two days. What further happens? Doubtless Wales might have attempted to take, and possibly might have taken the wheel by force. Leedom v. Phillips, 1 Y. 527; quoted in French v. Lewis, 218 Pa. 141. But surely he was not bound to do so, on pain of losing to Janeiro, the ownership of the thing. He did not endeavor to seize the wheel, but, after a week elapsed, instituted the action of replevin.

The learned court below thought not only that this delay pointed to a decision, for a while, however brief, on Wales' part, to give credit to this vendee, but that it, the court, was competent to draw the inference of such decision. In this we think it was in error. A specific state of mind was to be inferred from a week's inaction, after the refusal of Janeiro to return the wheel after demand. That inaction is variously explainable, and what is the proper explanation it is the function of the jury, not of the court to determine. It is even doubtful whether the jury should be permitted, without additional evidence, to say that the intention not to enforce the condition, but to give credit, existed.

The law will not say that, whatever may have been Wales' intention, he lost the right to enforce the condition by a 10 days' delay. It must be remembered that there are here no creditors of Janeiro; no purchasers from him. He is not to be rewarded for his tergiversations by being made the owner of the bicycle, because Wales did not instantly seize it, or begin replevin for it.

That if possession of a thing is retained by its vendee in violation of a condition of the contract whose non-fulfillment has prevented the passing of the ownership, the vendor may recover it by replevin, is not questioned. French v. Lewis, 218 Pa. 141; Henderson v. Hauck, 21 Pa. 359.

The case in French v. Lewis, *supra*, differs materially from the present. The vendor allowed the carriages to remain with the vendee more than two months before bringing replevin. A note for the price was accepted on the condition that it would be discounted at a bank. It was found that it could not be so discounted.

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