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Subsbription $1.25 per annum, payable in advance.

DECLARATIONS TO PROVE PARTNERSHIP.

PLAINTIFF BEING A PARTNER.

An action, e. g. for the price of goods sold, may be brought by A. The defendant can defend a recovery by A, by showing that the goods belonged to the firm of A. & B, and that the price if the purchase was made at all, was payable to A & B. That B. is partner with A, the defendant may show, by a letter or other statement of A, which tends to establish the partnership; e. g. letters to third persons, in which goods are ordered by A, and which are subscribed A. & B. [Wolle & Kern] but declarations of B, in respect to the ownership of the goods, in the store in which A is doing business, made in A's absence, are not receivable, in order to prove the joint ownership of the goods. That there was other evidence of the same fact, and therefore that this evidence of B's declaration was corroborative (and not sole) does not justify its admission. Gibson C. J. professed himself unable to "conceive how a thing can be evidence to corroborate, which is not evidence of itself." The admissibleness of B's declaration presupposes that sufficient evidence has been given independent of it, that he is a partner[1].

[1]Wolle v. Brown, 4 Wh.365. In a suit by A v. B, A suing as the agent of his father X, B, for the purpose of proving a partial payment, (but not apparently, to defeat a recovery because the proper parties were not plaintiffs) proved that X was in partnership with Y, and that he had made a payment to Y who, in the receipt stated that the payment was on account of store-bill of Laferty & Chambers (Y & X). This being a declaration by Y of the partnership if followed by admissions of X. would prove the partnership; Chambers v. Davis, 3 Wh. 40.

PARTNERSHIP AMONG DEFENDANTS.

When a plaintiff sues two or more persons as partners, the burden is upon him to prove that they all were partners in the transaction upon which the suit is based, not only when that transaction was contractual in nature[2] but probably even when it is of the nature of a tort[3]. Otherwise there can be no recovery against any. Statements of third persons, out of court, not subject to the sanction of an oath and of cross examination, are of course, not receivable. The attempt is not infrequently made however, to establish the partnership by means of the declarations of the defendants, or some of them. As the relation of partners between the defendants is not even provisionally established, by the record allegations of the plaintiff, and as until their relation is established, it would violate the principle that one man may not be affected by the unsworn statements of another, it is evident that a partnership between two or more defendants cannot be established by the declaration of one of them, that the others are partners with himself[4]. This declaration however might be sufficient, as against himself, to prove the relationship, provided that there is other evidence sufficient as against the other defendants, to prove it. If two are sued, and are making defence, the aggregate evidence must be sufficient to support a judgment against both, so far as the jointness of the contract is concerned. If then the admission of B that he is partner with A, is not combined with evidence, valid as regards A, that he is partner with B, there can be no judgment against even B. Sometimes the partnership between A and B is expressly or tacitly admitted or even asserted by A. In that case, B's admissions of the partnership would be sufficient to support a verdict that it exists. Thus a bill of sale of an interest in a business being made to X, that Hill owned it, and was therefore partner, may be shown by his statement that X appeared in the bill of sale, as a mere trustee for him[5]. Proof of B's admission that he is part-

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[2]Welsh v. Spealman, 8 W. & S. 257.

[3]Folk v. Scheaffer, 180 Pa., 613.

[4]Walker v. Tupper 152 Pa. 1. The court properly instructs the jury that the declaration of one defendant as to the existence of a partnership is evidence only against himself. Lenhart v. Allen 32 Pa., 312. Bowers v. Still, 49 Pa., 65. Crosgrove v. Himmelrick, 54 Pa., 203. Edwards v. Tracy, 62 Pa., 374. Schull's Appeal 115 Pa., 141. Haughey v. Strickler, 2 W. & S. 411.

[5]Hill v. Voorhies 22 Pa., 68; Waddell's Appeal, 167 Pa. 473. Chambers v. Davis, 3 Wh. 40.

ner with A, may be followed with A's admission that he is partner with B. A's admission affects him only, B's affects him only; but the consequence is that both are affected by evidence that they are partners and the jury may, hence, find in the verdict that they are such[6].

FORM OF THE ADMISSION.

The receivable admissions of one that he is a partner with the other defendants, may it is needless to say, have been orally made[7]. They may be found in a letter[8]. A letter, e. g. written by Trego, one of the defendants, may be signed by him Trego & Henderson [the other defendant][9]. It is not necessary that the letter should have been addressed to the plaintiff. Addressed to others, it may as distinctly admit a partnership of the writer with the other defendants, as if sent to a plaintiff. It must be remembered that it is not necessary, in proving the partnership of the defendants, to prove it by acts or admissions that would constitute an estoppel[a]. The admission of the partnership does not need to be explicit. "If they were any, even the slightest evidence" says Sergeant J. they are admissible[10]. But the remark, oral or written, may not justify the interpretation that it concedes a partnership, as when in purchasing goods from the plaintiff for the price of which the suit is brought, A, one of the two defendants, when asked to whom the goods should be charged, says, "you may charge them either to me or to Samuel [the other defendant] it is immaterial which." In this there is nothing amounting to an assertion of partnership, but rather the reverse." It gives simply the option to charge one or the other but not both[11].

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[6]Drennan v. House, 41 Pa. 30; Edwards v. Tracy, 62 Pa., 374; Johnston v. Warden, 3 W. 101. Reed v. Kremer, 111 Pa., 482; Welsh v. Speakman, 4 W. & S., 257.

[7]Schall v. Miller, 5 Wh. 156. Johnston v. Warden, 3 W. 101; Crossgrove v. Himmelrich, 54 Pa. 203.

[8]Edwards v. Tracy, 62 Pa., 374. Trego v. Lewis, 58 Pa,.463; Spencer v. Campbell, 9 W. & S. 32.

[a]Entwisle v. Mulligan, 22 W. N. 125. Hence the admission may be shown although it was not known to the plaintiff when he gave credit to the defendants.

[9]Trego v. Lewis 58 Pa. 463. Porter v. Wilson, 13 Pa., 641.

[10]Given v. Albert, 5 W. & S., 333. Cf. Edwards v. Tracy, 62 Pa., 374.

[11]Given v. Albert, 5 W. & S., 333.

RECEIPTS.

The fact that A in receiving payment from a third person, has given to the latter a receipt signed, A, B & Co., may be used by the plaintiff as an admission by A that he is a partner with B and the other components of the company. Similar receipts for payments by the same person, signed by B, may be admitted to prove B's partnership with A, etc.[12]. A receipt for payment of goods, stated, in the receipt to have been bought of Lafferty & Chambers, and signed by Lafferty, is a declaration by him, of the partnership[13]. Accepting a receipt from a vender of goods as sold to William Speakman & Son, would be in the nature of an admission by the party accepting that there was a firm of that kind, and if now the son accepted such a receipt, and now the father, these several acts would be evidence that they were partners[14]. In an action against Jacob, Ephraim and Amos Frick, trading as Jacob Frick, Ephraim, by affidavit denied the partnership. There had been frequent sales by the plaintiff to Jacob Frick, and payments by Jacob Frick, for which receipts were probably given. The trial court remarked in its charge, "Where are the receipts? If these were produced they might throw light upon the subject. * * * They would show, if produced, how the defendants dealt with the plaintiffs, whether as partners or as individuals." That is, the dispute being whether, "Jacob Frick" is an individual or a partnership, the failure of the defendants, sued as partners, to produce the receipts, is a species of confession that, if produced, they would show the partnership[15].

ADMISSION BY ONE, OTHER ACTS BY ANOTHER.

If proof of a partnership between A and B is attempted by proof of A's admission of it, it is not necessary to complete the proof by B's admission. B's admission would be sufficient,[16] but so would any act of his, from which a partnership with A could

[12]Haughey v. Strickler, 2 W. & S. 411.

[13]Chambers v. Davis, 3 Wh. 40. From the receipt and other evidence of declarations by Chambers that he was partner with Lafferty, the partnership could be found by the jury.

[14]Welsh v. Speakman, 8 W. & S. 257.

[15]Frick & Barbour, 64 Pa. 120.

[16]Taylor v. Henderson, 17 S. & R. 453. Johnston v. Warden, 3 W, 101. Haughey v. Strickler, 2 W. & S. 411. (Receipts by each of the four defendants.

be legitimately inferred. Proof of "acts" as well as proof of declarations of the others is constantly spoken of as sufficient.[17]

EVIDENCE OFFERED SERIATIM.

It is not practicable to offer at the same moment the evidence of the acts or declarations of several defendants, indicative that they are partners, unless each of these acts or declarations were participated in by all. Hence the declarations of A. as defendant, may be proved before that of B. Even when in a suit against five, service on two of them has not been had, the acts or admissions of those served, may be proved, before those of the two not served. "The acts or declarations of each," says Sharswood J. "must in the nature of things, be given in evidence separately and successively; otherwise nothing of the kind would be available but a joint declaration by all together. Practically it would exclude all such evidence. If A admits that he is a partner with B, and B admits that he is a partner with A, it is evidence of a partnership as to both and it matters not which declaration is first offered"[18].

EVIDENCE INTER SESE.

When the defendant desires to defeat the action of the plaintiff on the ground that they were partners, and that the money for which, as a loan, the plaintiff sues, was his contribution to the firm, the partnership may be proved by the declarations of the plaintiff. In the distribution of the estate of B, deceased, A claims to have loaned him $2000. The opponents of the claim alleges that A and B were partners, A furnishing the money, viz: the $2000. and B the skill and labor. To prove the partnership the separate declarations of A and B, that they were partners, were receivable. Satisfied of the existence of the partnarship, the claimant was awarded nothing, because the orphans' court has no jurisdiction until the affairs of a partnership are settled[19].

INSTRUCTION OF COURT.

The court when it receives the declaration of one defendant, as evidence of the partnership, will instruct the jury that that

[17]Edwards v, Tracy, 62 Pa. 374. Crossgrove v. Himmelrich, 54 Pa. 203, Haughey v. Strickler, 2 W. & S. 411. Johnston v. Warden. 3 W. 101. Reed v. Kramer, 111 Pa. 482.

[18]Edwards v. Tracy, 62 Pa. 374. Johnston v. Warden, 3 W. 101. Chambers v. Davis, 3 Wh. 40.

[19]Waddell's Appeal, 167 Pa. 473.

declaration or act cannot prove, as against the other defendants, their partnership with the declarant. In Lenhart v. Allen[20] the court received proof of the declarations of Lenhart, one of the defendants, as to the persons composing the firm, stating that it would instruct the jury that this evidence could only affect Lenhart. The supreme court presumed that the instruction was given.

HOW THE QUESTION MAY ARISE.

In the distribution of the proceeds of an execution sale of property the question may arise whether the property belonged to A. or to A, B and C, as a partnership trading as A & Co. A confessed judgment to his individual creditors, who levied on the property. Then creditors of A & Co. issued executions under the act of 1869, and attached the same property, which was subsequently sold on the executions. B and C claimed for wages under the act of 1872. A declaration in writing by A that he would continue a business which in conjunction with another, from whom he now separated, he had conducted "admitting A (Arthur Sheffington) and B (Frederick A. Reinstein) to interests from this date" was advertised. The real agreement between A and these persons made them employes entitled to a salary of $2500 and $2000 per year, respectively, and, should the net profits of the business exceed $25000 per year, additional salaries equal to 7½ per cent of the excess of the profits over $25000. The property therefore was that of A as an individual. Creditors were bound to inquire what was meant by admitting "to interests," and doing so, they would have learned the fact that B and C were not partners. No act or word of A could estop them from denying the partnership. Their own acts or words did not estop them[21].

SUITS OF VARIOUS SORTS.

The question of partnership, to be proved by acts or declarations of the alleged partners, ordinarily arises in suits against the firm; e. g., a suit on a promissory note purporting to be made by the Cool Spring Furnace Co., against four persons, alleged to compose that so-called company[22], on a note with the

[20]32 Pa. 312; Bowers v. Still. 49 Pa. 65; Crossgrove v. Himmerlich. 54 Pa. 203. Edwards v. Tracy, 62 Pa. 374. Scull's Appeal 115 Pa. 141.

[21]Scull's Appeal 115 Pa. 141.

[22]Taylor v. Henderson 17 S. & R. 453.

names of Holland & Porter, as makers, but written by Holland[23] a suit for wages, against four persons as partners the only question disputed being whether the fourth person was a partner with the other three[24] an action for the price of labor performed in repairing a mill belonging to two defendants[25], a suit against three, for damages for the non-delivery by the three defendants, as vendors, of hay for which the plaintiff had paid, the defence denying a partnership[26], an action for the price of goods sold to five persons as partners, the controversy being as to whether two of them were dormant partners or not partners at all[27].

WHEN TRIAL PROCEEDS AGAINST ONE PARTNER ALONE.

It is only when the trial proceeds against two or more partners, that the principle applies that the declaration of one of them, that he is a partner with the others is not sufficient to sustain a judgment even as to him. This is because the judgment must be against all, in the absence of defences peculiar to one or more, such as coverture, infancy, discharge in bankruptcy, the statute of limitations, etc., and it cannot be against all, unless there is sufficient evidence of the partnership against all. However, in Welsh v. Speakman[28] the debt had been contracted, it was alleged, by William Speakman and his son, trading as William Speakman & Son. William had died. At law the debt survived to the son. The son however was insolvent, and this gave right to the creditor to sue the executors of William Speakman (without joining the son). Rogers J. seems to doubt whether proof of an admission by William Speakman, alone, would be sufficient, characterizing it as "a point by no means clear." He says that whether sufficient or not, no objection could exist to the further proof of admissions by the son. Such proof, he suggested would "strengthen" the plaintiff's case, and it was wrong to exclude it. When the action is against three, and the writ is served upon all but one of them only appears and pleads, there

[23]Porter v. Wilson, 13 Pa. 640.

[24]Lenhart v. Allen, 32 Pa. 312.

[25]Bowers v. Still, 49 Pa. 65 They were not partners, but the question was whether they made the repairs jointly.

[26]Crossgrove v. Himmelrich, 54 Pa. 203.

[27]Edwards v. Tracy, 62 Pa. 374. Reed v. Kremer, 111 Pa. 482. Haughey v. Strickler, 2 W. & S. 411. Johnson v. Warden, 3 W. 101.

[28]8 W. & S. 257. In a joint action a joint liability must be shown though only one of the defendants has been served with the process. Schoneman v, Fegley, 7 Pa. 433.

must be an interlocutory judgment by default taken against the non-appearing defendants, and the verdict against the appearing one will admeasure the indebtedness against the other two. There will be, finally, a judgment against the three for the same sum. Hence, the evidence at the trial must be sufficient to sustain a verdict against the three. It must also be sufficient to sustain a verdict against the defendant A who has pleaded. The acts and declarations of his co-defendants being given in evidence by him, to disprove the partnership[29] the plaintiff could prove their other acts and declations to establish its existence[30].

ADMISSIONS NOT EXCLUDED BY ARTICLES.

For the plaintiff, suing a partnership, it is seldom practicable to command the articles of agreement between the defendants. Even when the plaintiff proves that before the partnership between the three defendants commenced, an agreement was drawn up between them in writing, he is not, it seems, giving notice to the defendants to produce it, and they not producing it, precluded from proving the partnership by the admissions of the parties, as to the existence of it. Such admissions are not admissions of the contents of the agreement. The agreement if produced, might show a special partnership; but the plaintiff could show by the defendant's declaration, that they had afterwards formed by parol a general partnership; or had acted as if general partners. "Amongst the numerous actions brought against partners" said Tilghman, C. J., "I have seldom known the partnership proved [by the plaintiff] by the production of the writing[31]". The written agreement may not establish a partnership between the defendants, and yet their acts and declarations, indicative of a partnership may be proved when the defendants have, as to the plaintiff, imposed on themselves by estopping facts, the liabilities of partners[32].

ADMISSION AT TRIAL BY ONE.

At the trial one or more of the defendants may admit the partnership with the other defendants. Then proof of the ad-

[29]Perhaps, says Kennedy J., he had no right strictly to do so.

[30]Nelson v. Lloyd, 9 W. 22.

[31]Widdifield v. Widdifield, 2 Binn. 245.

[32]Edwards v. Tracy, 62 Pa. 374. Those not partners may estop themselves by words or acts from denying that they are partners. Cf. Reed v. Kremer, 111 Pa. 482.

mission of the others will be sufficient to support a verdict for the plaintiff[33].

JOINT ADMISSION.

The articles of agreement for a partnership executed by all the defendants, would be a joint declaration by them of the relation, and could, of course, be used as such by the plaintiff suing them. A book to which all the defendants have had access or in which they have made entries, may indicate that they treated themselves as partners of each other. Four persons having been united in business, and one of them, D, having retired, the book kept by the four could be put in evidence, in a suit against the other three, for a transaction arising since the retirement of D., as indicative that the other three still continue together[34].

INTERPRETING THE ADMISSION.

Declarations of a defendant are admissible, but not the inferences of the witness from what he has heard the defendant say. It was improper to allow a witness to say of a defendant, "but the whole course of his remarks led me directly to the inference, that he himself was the real owner of the establishment and that the sons were associated with him for the purpose, perhaps, of giving them better standing in society, and putting them forward in business"[35].

TACIT ADMISSION UNDER RULE OF COURT.

A rule of court may say that if A and B are sued as partners, the partnership will be considered as admitted, unless denied by affidavit. If one of the defendants files a denying affidavit, and by plea also denies the partnership, but, at the trial counsel for the defendants obtains leave to withdraw, and withdraws the plea, and the court states at the time, that it understands the withdrawal of the plea to admit the partnership, and no objection to this interpretation of the act is made, the partnership will properly be considered admitted[36].

EXPLICITNESS OF ADMISSION.

The admissions may have various degrees of distinctness. It is not necessary in order that they may be received, that they

[33]Entwisle v. Mulligan, 22 W. N. 125. Batdorf v. Farmer's Nat. Bank, 61 Pa., 179.

[34]Frick v. Barbour, 64 Pa. 120.

[35]Given v. Albert, 5 W. & S. 333.

[36]Gay v. Waltman, 89 Pa. 453.

be very explicit. A admits that he is a partner with B. Subsequently A and B come to the plaintiff and say "we want ploughs", (things for the price of which the action is brought). Although this does not conclusively prove that B is a partner with A, the jury may not improperly infer the partnership from it[37]. The son of William Speakman conducted a store. Goods marked William Speakman & Son are sent to it from time to time, by vendors, William Speakman being often at the store, and probably seeing the goods thus marked. This is a species of admission by him that he is partner with the son[38]. In a suit against three upon a promissory note signed Kalbach & Landis, the effort was to show that Abraham Landis was a member of the firm. Plaintiff proved that he had said he "was interested in the firm of Kalbach & Landis." Although he did not by these words indicate how he was interested the jury might consider them, in conjunction with other evidence. It was competent to offer the books of the firm in evidence, showing a payment of a dividend of $1100 to Landis[39].

BELIEVING PART AND DISBELIEVING PART.

It may be proved that A has declared that he had been a partner with B. but that his connection ceased on a certain day. The jury may believe the first part and disbelieve the last part of the statement, in a suit by one who becomes a creditor of the alleged firm, after the day of the alleged dissolution. Or, even if the jury believes the entire statement, A may be liable, because of want of notice of the dissolution, to the creditor[40]. The continuance of the partnership, A & B after the sale of its store to a new firm B & C, may be indicated so as to bind A for a note executed by B in the firm name, four months after the sale of the store, by the fact that the new firm collected debts due to A & B, and paid debts owing by them, under circumstances showing the assent of A., as also by the fact that three years after the sale of the store (the date of the alleged dissolution of A & B,) a note

[37]Johnston v. Warden, 3 W. 101.

[38]Welsh v. Speakman, 8 W. & S. 357. So, the testimony of X that he attended the store for William Speakman and that goods frequently came to it marked William Speakman & Son.

[39]Thommon v. Kalbach, 12 S. & R. 238. By admitting an interest in the firm, it is said that Landis authorized the use of the books, the entry in which would tend to show what sort of interest he had.

[40]Thommon v. Kalbach 12 S. & R. 238.

was drawn by B, in the name of A. & B, and that A made a partial payment of it[41].

DECLARATIONS OF ONE PARTNER, AS AFFECTING OTHER PARTNERS.

The relation of partnership confers on one partner the right to do sundry things for all. He may make contracts; discharge debts, etc. In negotiating with external persons, he may make pertinent representations, which will be imputed to all the partners. After evidence has been given, of a partnership between A & B, the admission of A not made in the presence of B that the items of plaintiff's claim against A and B are correct is receivable; although, there having been service only on B, the judgment must be against him alone[42], that is, an admission of a past fact, viz, the purchase by the firm of certain articles, at certain prices, by one partner, is receivable to affect the other partner. In Spencer v. Campbell[43] an action on the case against a firm of four persons for the killing of the plaintiff's horse by an explosion of a boiler which defendants negligently continued to use, despite its insecurity, a letter of one of the defendants containing averments of imperfections of the boiler was admitted apparently to show knowledge of these imperfections. Gibson, C. J., contents himself with the observation "the admissions of a defendant are evidence against himself, even when he is jointly sued", implying, seemingly, that they could not weigh against the other defendants, and therefore that in such an action a judgment might go against one defendant, although no similar judgment went against the other. In an action of trespass against a firm for personal injuries to an employè, it was found that one of the defendants had made statements which the jury was asked to interpret into admission of carelessness. The trial court admitted the evidence "as affecting the party making the alleged statement". The admission of the evidence was held to be erroneous, because it did not justify the interpretation that it admitted negligence, tacitly conceding, so it seems, that had it properly borne that interpretation, it would have beed receivable, and it would have affected all the defendants; for Fell, J., remarks that the "error in admitting it was not cured by limiting its effect to the party

[41]Brown v. Clark, 14 Pa. 469.

[42]McCoy v. Lightner, 2 W. 347.

[43]9 W. & S. 34. The letter showed the knowlege of the notes. Was his knowledge to be deemed that of the firm?

who made the statement. As the action was against the firm, there could practically be no such limitation[44]".

WAIVING THE STATUTE OF LIMITATION.

A new promise by one partner tolls the statute of limitations as to all the partners[45]. After dissolution of the partnership one of the former partners cannot by a settlement with the creditor, or otherwise, make admissions that will bind the others[46] unless probably, the partner had authority to liquidate the business. A non-liquidating-partner, (the firm become insolvent, and its property in the hands of a trustee,) cannot so admit a debt as to toll the statute of limitations[47] but the liquidating partner may by partial payment of a debt or otherwise, revive the debt, as against all the partners[48]. Under the act of April 14th, 1838, which authorizes a firm to sue another firm although both firms contain the same person, as a member, declarations of this member may be given in evidence by either firm[49].

[44]Folk vs. Schaffer, 180 Pa., 613. Cf. Simons v. Oil Co., 61 Pa. 202.

[45]Oakley v. Keerl, 1 Am. L. J. 473.

[46]Tassey v. Church, 4 W. & S. 141. Hogg v. Orgill, 34 Pa. 344. Here the admission was by one of the defendants who was not served with process.

[57]Levy v. Cadet, 17 S. & R. 126. Reppert v. Colvin 48 Pa. 248.

[48]Houser v. Irvine 3 W. & S. 345. Kauffman v. Fisher, 3 Gr. 302. Campbell v. Floyd, 153 Pa. 84.

[49]Tassey v. Church, 4 W. & S. 141.

MOOT COURT.

WILLIAM ACTION V. HENRY PLATO.

Agency--Ratification--Sale of Land.

BRANCH for the Plaintiff.

DAY for the defendant.

STATEMENT OF FACTS.

Action owned a tract of land which he carved into burial lots, selling the lots to various persons. Through his agent, Stauffer, an oral sale was made to Plato for $50. Plato since buried two members of his family in the lot. No deed has ever been tendered. Action, repudiating Stauffer's sale for $50 and alleging that his authority was to sell for $75, and that Plato knew this, sues in assumpsit for $75.

OPINION OF THE COURT.

KINARD, J.—Assuming that a contract of sale has been made by the agent to Plato,—and we think there has not been—we are unable to see how the plaintiff can maintain an action to compel performance by the other party without first performing or offering to perform his part of the contract. In this case no definite time has been set by the contract for performance, but, as is said in Eberz v. Heisler, 12 Pa. Supr. Ct. 388, the covenants for conveyance and for payment are mutual and dependent and a tender of deed by the vendor or payment by the vendee is a condition precedent to an action for the enforcement of the contract; and in Irvin v. Bleakley, 69 Pa 28, the court held that the period for performance having passed, the time for performance became indefinite, but mutual and dependent whenever it should occur, and whichever of the parties first desired to enforce performance was bound to regard his part of the contract as a condition precedent and to perform the same in order to enable him to proceed to enforce the contract. Boyd v. McCullough, 137 Pa. 7; Knerr v. Bradley, 105 Pa.; 90. S. C. 120 Pa. 552.

Applying these principles to this case, we think that tender or an offer thereof by Action, constituted a condition precedent to plaintiff's action, and, having failed to perform such condition, this action cannot be maintained and judgment of non-suit must be entered against him.

Had the plaintiff, in fact, tendered the deed for this land, is there a contract of sale actually existing between these parties upon which he could collect? We have failed to discover any. In the first place, without a ratification by the principal of the agent's act, there has been no contract of sale whatever. Action has agreed to sell this plot of ground for $75, and has authorized his agent, Stauffer, to secure purchasers for that price. Stauffer has found a man, Plato, who is willing and offers to pay $50 for the plot, and Stauffer agrees to let him have it for that amount, without procuring the assent of the principal, and Plato takes possession of the land. Under no theory of the law, so far as we have discovered, can these

facts be said to constitute a contract between the principal and Plato. It is a fundamental principle of the law of contracts that acceptance of an offer must coincide in every detail with the offer itself and any deviation therefrom is fatal to the acceptance, and any change in the consideration will be taken as a new offer and ineffectual to bind either party unless accepted by the other party. McClure v. Times Publishing Co., 169 Pa. 213. Clements v. Bolster, 6 Pa. Super. Ct. 411; Joseph v. Richardson, 2 Pa. Super. Ct. 208; Railway v. Rolling Mill Co. 119, U. S. 149. In Railway Co. v. Rolling Mill Co. the court said "An acceptance upon terms varying from those offered is a rejection of the offer and puts an end to the negotiations, unless renewed by the proposer, or he assents to the modification suggested." This is elementary law and needs no further discussion. The question now to be determined is, what has the principal, the plaintiff, done, concerning the offer of the defendant?

Having discovered what his agent had done and the terms of the sale, two courses were open to the plainiiff. He could have ratified the contract of sale as made, and collected the amount therein agreed upon, viz: $50; or, he could have repudiated the contract in its entirety and brought ejectment for his land, He has done neither of these absolutely, but is attempting to take advantage of his agent's contract so far as it is beneficial to him and to repudiate the part which does not coincide with his interests. This he cannot do. The law will not allow a principal to claim so much of a contract as is beneficial and repudiate the rest. Eberts v. Selover, 44 Mich. 519; Penna. Natural Gas Co. v. Cook, 123 Pa. 170; Siemens Gas Lamp Co. v. Horstmann, (Pa. 1889) 16 Atl. Rep, 490; I Am. & Eng. Ency. of Law 1192; James v. Nat. Building Assn. 9 W. N. C. 325; Mundorf v. Wickersham, 63 Pa. 87.

But the learned counsel for the plaintiff contends that the defendant having entered into this contract, knowing that it was beyond the agent's authority and, at the time, knowing the exact extent of his authority and, in addition, going into possession as he has done, has taken the case out of the rule of Eberts v. Selover, supra; and that, to compel the plaintiff to take back the land in its altered condition would work an injury upon the plaintiff and, for that reason, he should be allowed to recover what the defendant impliedly promised to pay when he contracted with the agent, viz: $75. This we are unable to concede. We do not feel justified in saying that, when Plato agreed with Stauffer, the agent, to pay $50 for the land, he impliedly promised to pay $75, because he knew that to be the extent of the agent's authority. A contract will not be implied contrary to the terms of an express contract concerning the same subject matter, Duncan v. Keiffer, 3 Binn. 126; Brose's Estate, 155 Pa. 619. We think it would be going entirely too far, in view of these cases, to hold that Plato in this case impliedly promised to pay $75 in the face of an express promise to pay $50, simply because of his knowledge of the agent's authority. Counsel has cited us no cases in support of this contention and we have been unable to find any.

But it is argued by counsel for the plaintiff that, even tho he can recover his land in ejectment, the fact that the defendant has gone into possession and buried two members of his family therein renders it unsalable

and worthless in his hands and for that reason the acts of the agent and Plato should be construed to be an implied contract and he be allowed to recover in this action thereon. It may be true that, by reason of defendant's acts, this plot will not be worth $75 on the market, but we do not think that fact to be any justification for making a change in the law of contracts at this time. There are other means whereby the plaintiff can get compensation for any injury suffered. His remedy is an action against the agent. He had authorized his agent to sell for a certain price, which instructions the agent has violated and he is, therefore, liable for any damages resulting therefrom.

In Whitney v. Merchants' Union Express Co., 104 Mass. 152, the court said, "It is the first duty of an agent, whose authority is limited, to adhere faithfully to his instructions in all cases to which they can be properly applied. If he exceeds, or violates, or neglects them, he is responsible for all losses which are the natural consequences of his act." Steel v. Ellmaker, 11 S. & R. 86; Fifth Nat. Bank v. Ashworth, 123 Pa. 212; Reynolds v. Rogers, 63 Mo. 17. In addition to this, the Court, in Hegenmyer v. Marks, 37 Minn. 6, cited in Huffcutt's Cases on Agency, held that when an agent is guilty of bad faith, and a third party purchases with notice of same, he becomes a party thereto and the contract may be rescinded. From this it will be seen that the plaintiff can get ample redress for any injury caused by the acts of the agent and Plato and that his remedy is an action for damages.

The attention of the court has been called to several other points by the argument of counsel, but, in view of the conclusion reached, we think any further discussion of them is rendered unnecessary. We have been asked by the learned counsel for the plaintiff to enter a judgment for the plaintiff conditioned upon his delivery of the deed, but we think the cases cited in our discussion on that matter of tender will support our conclusion and we therefore direct that judgment of nonsuit be entered against the plaintiff and that he pay the costs to this point.

OPINION OF SUPERIOR COURT.

Discussion of the questions involved in this case additional to that of the learned court below would be entirely superfluous.

Judgment affirmed.

WM. STILL v. WM. McGREGOR.

Negotiable Instrument---Certainty as to time of Payment.

STATEMENT OF FACTS.

A note of the following form, dated Jan. 13, 1906, was drawn by William McGregor: "Six months after date or sooner if Jno. Thompson or order should demand it, I promise to pay Jno. Thompson or order $1,500.00 value received". Thompson endorsed it March 17, 1906 to William Still.

The defense is that the consideration for which the note was given has failed; that is the note was given for four horses which were to be delivered on April 1st, 1906, but which never have been tendered or delivered.

YARNALL for Plaintiff.

JACKSON for Defendant.

IN ASSUMPSIT.

DIPPLE, J.—This is an action of assumpsit to recover the value of a promissory note and the defense is that the consideration for which the note was given has failed.

The case seems to hinge upon whether the instrument is a negotiable promissory note or not. It contains language sufficient to make it one, but it may contain too much. It contains the words "or sooner if John Thompson or order shall demand it". The addition of some words beyond what are necessary to constitute a negotiable promissory note, does not destroy its character as such. One question is whether the words "or sooner if John Thompson or order shall demand it", can be construed to mean any certain time or a time fixed by some event which must inevitably happen.

The general rule, to be extracted from the authorities, undoubtedly requires that to constitute a valid promissory note, it must be for the payment of money at some fixed period of time, or upon some event which must inevitably happen; that it is not such a note if it purports to make the note depend upon a contingency or uncertainty. Nor is it sufficient that the contingency does in fact happen afterwards upon which the payment is to become absolute. Yet it is an equally well settled rule of commercial law that it may be made payable at sight or at a fixed period after notice, or on request, or on demand without destroying its negotiable character. In Jordan & Tate 19 Ohio, 586, it was ruled that the negotiable character of a promissory note is not affected by the fact that is made pay able by its terms on or before a future day therein mentioned.

To constitute a negotiable promissory note, the time, or the event, for its ultimate payment, must be fixed and certain; yet it may be made subject to contingencies upon the happening of which, prior to the time of its absolute payment, it shall become due. The contingency depends upon some act done or omitted to be done by the maker or upon the occurrence of some event indicated in the note and not upon any act of the payee, whereby the note may beeome due at an earlier day. Of course the note to be negotiable must be for the payment of money at a fixed period, or an event which must inevitably happen. In 74 Pa. 13 a note was "Twelve months after date (or before if made out of the sale of a machine), I promise to pay J. F. Huston or bearer," and the learned Court ruled this to be a negotiable note. Now here was a contingency or period fixed for payment which would inevitably happen. It is the same in the case just pleaded. Thompson or any other person holding the note from him was sure to demand payment some time. It was held in Zimmerman v. Anderson 17 P. F. Smith 421, that the addition of "waiving the right of appeal, and all valuation, appraisement, stay and exemption laws" did not destroy the negotiability of the note.

The defendant's counsel cites 133 Mass. 151, but in that case the note

was different. It stipulated a contingency for payment that naturally would not inevitably happen and does not seem to be in line with the present case. This case also discusses Clayton v. Gosling 5 B. & C. 360 and Judge Allen held that a note payable on, or after a certain period after presentment or actual demand made, is negotiable, because the presentment or demand being an act of the holder in making the note, and necessary to give it effect is deemed a certain event.

111 Mass. seems to support the defendant, but in this note there was a stipulation which provided "it is agreed that this note may be paid at any time before maturity and that the rate of 18% per annum shall be deducted till due". This stipulation gives the maker the right to pay the note at any time before its maturity at his option, and such payment would discharge the contract. It renders the contract uncertain and contingent both as to time of payment and the amount to be paid, and is inconsistent with the essential character of a negotiable instrument. But that case is not in accord with the present case.

There must be the following requisites in a negotiable promissory note: (1) It must be in writing and signed by the maker or drawer. (2) It must contain an unconditional promise or order to pay a sum certain in money. (3) It must be payable on demand or at a fixed determinable time. (4.) It must be payable to order or bearer. (5) Where the instrument is addressed to the drawee he must be named or otherwise indicated therein with reasonable certainty. This note contains all the necessary requisites to make it a a negotiable note.

The Act of 1901, Sec. 4., Art. 3 reads "That a negotiable note must be paid on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain". The court is of opinion that the note was a negotiable note and the plaintiff can recover notwithstanding the fact that the horses were never delivered.

Judgment for plaintiff.

OPINION OF SUPERIOR COURT.

Had the note been made payable on demand it would have been negotiable. Had it been made payable in six months, it would likewise be negotiable. It is virtually made payable on demand within six months, and at the end of six months absolutely. Why should this alternative interfere with negotiability?

To be negotiable, an instrument, says the act of 1901, must be payable on demand, or at a fixed or determinable future time and an instrument is payable at a determinable future time, which is expressed to be payable "on or before a fixed or determinable future time specified therein". The note in suit is expressed to be so payable.

The fact that the payee has the option to demand payment before the expiration of the six months, does not, we think, prevent the note's being negotiable.

Being negotiable, the defence to the note, viz: failure of consideration, is not available against a *bona fide* endorsee, becoming such within the six months.

Judgment affirmed.

J. WEBSTER v. COLEMAN.

The Violation of a City Ordinance not Negligence Per Se.

STATEMENT OF FACTS.

Webster's automobile was standing in front of a store in the borough, at 9 o'clock in the evening. Although the borough ordinance required all automobiles to carry both front and rear lights, his had neither. It was illuminated however by lights of store and street and was easily visible. Coleman's automobile ran into it and injured it. Penalty for violating ordinance was $10. Non suit.

HOFFMAN for Plaintiff.

LEWIS for Defendant.

OPINION OF COURT.

ORCUTT, J. The lower court nonsuited the Plaintiff on the ground that the violation of on ordinance is negligence and therefore a bar to plaintiff's recovery. We are of the opinion that the violation of an ordinance is not negligence in itself and that the plaintiff should have recovered damages for the injury inflicted by defendant. Defendant contends that the violation of the ordinance was contributory negligence and is an absolute bar to his recovery.

From the facts it appears that Webster's automobile was clearly visible, and from that, had the defendant used ordinary care he could have seen the automobile and avoided the accident; but since he did not use ordinary care, he is trying to set up the defense that plaintiff was violating an ordinance when the accident occured. If the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution on the part of defendant, the remote negligence of plaintiff is no defense. Proximate cause may be defined as where the injury must be the natural and probable consequence of the negligence, such a consequence as under all the circumstances might have been forseen. It is very clear that the plaintiff could have foreseen the danger and that his act was not the proximate cause but the remote cause.

Ordinarily, the existence of negligence is a question of fact for the jury but when the facts are uncontroverted their legal effect is a question of law for the court, 120 Pa. 559. It is generally decided by the question: did the plaintiff's negligence directly contribute in any degree, to the production of the injury? At the time the injury was done, the defendant was under a duty of care towards plaintiff notwithstanding the latter's misconduct; and, had he exercised that care he could have seen the automobile, as it was clearly visible, and no injury would have befallen the plaintiff, so the proximity cause of the injury was defendant's negligence. The violation of the ordinance by plaintiff was at most a cause of the danger and not a cause of the injury.

The violation of a city ordinance is not of itself evidence of negligence on the part of plaintiff, 165 Pa. 118, in which case the defendant Co. caused the death of plaintiff's child, while their train was run at an excessive speed

prohibited by a city ordinance, yet that was not of itself negligence but the jury might consider it in determining whether or not the train was negligently run. It is the same in this case. The fact that the plaintiff did not have front or rear lights was not of itself negligence, yet it might be considered in determining whether or not the automobile was placed negligently in front of the store. The automobile was visible and plaintiff had no reason to believe that it was in a dangerous position and in fact he had reason to believe that it was clearly visible and safely placed. The defendant does not claim that the placing of the automobile was negligence, and the last case cited holds that such act is not negligence of itself.

In 81 Pa. 194, it appeared that if Co. had complied with the ordinance the accident would not have happened, and it held Co. liable; but it does not appear in this case. that if plaintiff had complied with the ordinance the injury would not have occurred, but it is reasonable to infer that since defendant did not avoid the accident when the automobile was visible, by exercising due care, he could not have avoided it if the lights had been on, if the exercised te same gross negligence. Also in 191 Pa. 345 the plaintiff recovered for defendant's negligence although he (plaintiff) was violating an ordinance at the same time the injury happened.

In 92 Pa. 475, plaintiff, who was riding upon the rear platform of a street car, was struck by a car following. The court held, that in riding in that place he was not guilty of contributory negligence, although the accident would not have occurred had he not been in that position, yet the position was but a condition and not the cause of the injury, as the danger was so remote that plaintiff was not bound to guard against it. No matter how negligent I may have been in placing myself in a particular position I can recover for injuries inflicted on me by a party who could have avoided injuring me by the exercise of the ordinary care which is usual with prudent persons under the circumstances. 92 Pa. 475.

We are of opinion that the doctrine of Gannon v. Wilson, cited by counsel for plaintiff, applies to this case. We disaffirm the first, second and third points of defendant and affirm the fourth point for the above reasons and cases. Judgment reversed.

OPINION OF SUPREME COURT.

That the plaintiff, in not having lights, in violation of the ordinance exposed himself to be run into with impunity, can scarcely be contended. It is for the borough to cause him to be punished, not for the defendant. The defendant was negligent in running into the automobile. Did the plaintiff's failure to have light, contribute to the collision? So far as appears, it did not. The collision was not due to the absence of lights from the plaintiff's automobile. There would have been no collision, had the plaintiff's automobile not been standing where it was, but it is not suggested that it was negligent to permit it to stand there.

Judgment affirmed.

ARTEMUS STONAL v. FRANCIS FRASCATI.

Ferocious Dogs—Owner's Liability for Damages.

STATEMENT OF FACTS.

Frascati owned a dog which never attacked a human being unless he was incited so to do by some other human being. Two years after Fraccati acquired the dog, a friend of Frascati, Giovanni Lione, one day, hissed him thoughtlessly upon Stonal, whom he bit severely. Frascati was not present.

MOFFETT for the plaintiff.

HANKEE for the defendant.

OPINION OF THE COURT.

LOKUTA, J. To sustain an action to recover damages for injury committed by a dog, in the absence of the owner and without his agency, it is necessary to prove the mischievous propensity of the dog and that the owner had notice thereof. Henry v. Mulhern, 1 Dist. Rep. 607.

From the facts of the case it can be safely inferred that the dog had a propensity to bite, when incited, and that the owner had knowledge that the dog would bite under such circumstances. It is also evident from the fact that the dog had bitten people before from the statement, that the dog would bite in case he was incited to do so.

The owner of a dog is bound to secure him in all events, and if the mode of securing be insufficient he is liable. Mann v. Weiand, 81½ Pa. 243.

In this case it cannot be said, that the owner secured the dog sufficiently when he left him in Lion's possession, for such a dog should be allowed no freedom whatever, if the owner has knowledge of the propensity of the dog to bite under any circumstances.

That the owner was negligent in leaving the dog with Lione is evident from the facts of the case and hence he is liable.

If it was Lione's duty to care for the dog while in his possession, he can be held in no other relation to the owner than that of a servant, and as an authority that the owner is liable in this case we submit the doctrine in Mann v. Weiand, 81 1-2 Pa. 243: "If an injury is caused by the joint acts of a driver and a defendant, it is no defense to the action, if the plaintiff is guilty of no negligence."

Applying this doctrine to this case, Lione is in a similar position to that of the driver, namely, servant; and, therefore, the joint acts of the owner in leaving the dog with Lione and Lione's act of inciting the dog, are not a defense, because the facts do not show that the plaintiff was guilty of negligence.

Notice of a single act of mischief is sufficient evidence of the owner's knowledge of the animal's mischievous disposition. 2 A. & E., Encyc. of Law 374.

Every person is held to be of common vigilance and care and if he has reason to believe from the knowledge of the ferocious nature or the propensity of the dog, that there was ground to approhend that he would bite

under some circumstances, the duty of restraint is attached and to omit it is negligence. 2 A. & E. Encyc. of Law 274.

As stated before, it is evident from the facts of the case that the dog would bite if incited to do so. The owner, therefore, had knowledge of the propensity of the dog and it was his duty to restrain him. By failing to do so he was negligent and is liable for injury suffered.

OPINION OF SUPERIOR COURT.

The act of April 14, 1851, P. & L. Dig. 1655, declares that "The owner or owners of any dog or dogs shall be liable for all damages done or caused to be done by every such dog or dogs, in any action of trespass *vi et armis*, in the name of the person or persons injured" etc.

This liability is put on the owner of the dog. It does not seem to be conditioned upon the owner's knowledge of the vicious propensities of the dog. The object of the legislature seems to have been to make owners of dogs responsible for any damages done by them.

Frascati may fairly be inferred to have known that his dog attacked human beings, if incited to do so by others. He must have known that it was always possible for some one thus to incite him.

Frascati was not present, when the biting occurred. That however is immaterial. His responsibility reposes on the fact that as owner, he was harboring a dog which, if urged, would bite persons. Cf. Clark v. Banks, 10 Forum, 108.

Judgment affirmed.

IN RE: ESTATE OF JOHN HOLMES, DECEASED.

Will to Charities—What Constitutes an Attesting Witness.

STATEMENT OF THE FACTS.

Holmes made a will February 11, 1906, disposing of all his property to charities. He made another July 13, 1907 otherwise disposing of it. On October 3d, 1907, he destroyed the second will, intending that and thinking that the first will would thereby operate. He died Dec. 25, 1907. The will of Feb. 11, 1906 was offered for probate. It was executed without any subscribing witnesses. That of July 13th, 1907, had such subscribing witnesses. The register admitted the will to probate. Appeal to the Orphans' Court.

HOWER for Plaintiff.

Flinthan v. Bradford 10 Pa., 82. Irwin's Estate 206 Pa.

JENKINS for Defendant.

Paxson's Estate 22 1 Pa. 98. Huffeld's Estate 5 Phila. 219.

OPINION OF THE COURT.

McCLINTOCK, J.—A revocation of a later will of itself revives and restores an earlier one preserved by the testator and leaves it with the same force and effect as if the later will had never existed. Flintham v. Bradford, 10 Pa. 82.

This and other cases make it patent that the will of July 13, 1907, revoked by its destruction, revived the prior one, if valid. The only question to be decided here is whether the prior will, dated February 11, 1906, is valid, or whether Homes died intestate.

The former will gave all the property of the decedent to charity, and its validity depends upon whether or not it conforms to the requirements of the Act of April 26, 1855, P. L. 332, which provides that "No estate, real or personal, shall be bequeathed, devised, or conveyed to any body politic or to any other person in trust for religious or charitable uses except such be done by deed or will attested by two credible and at the same time disinterested witnesses, at least one calendar month before the decease of such testator or alienor, and all dispositions of property contrary hereto shall be void and go to the residuary legatees or next of kin, or heirs-at-law."

This will was republished by the testator by his destruction of the later one more than one calendar month before his death. So the remaining point to consider, is the attestation. There were no subscribing witnesses to the will, but we must presume from the facts stated, that there were at least two witnesses to the will. If the act of 1855 meant "subscribing witnesses" the alleged will cannot stand, otherwise it is valid. "A will containing a charitable or religious bequest, to be valid, must be executed precisely according to the statute. The purpose of the act was to establish a higher degree of proof as to the execution of a will containing a charitable or religious bequest than for other wills, and also to require such a will to be executed at a time when the testator might be in full possession of his faculties, and not influenced by unscrupulous or designing persons when he was in the immediate presence of death." Irwin's Estate, 206 Pa. 1.

The established rule in Pennsylvania is that a will not making a gift to a charity need not have subscribing witnesses. Havard v. Davis, 2 Binney 25; Clingen v. Micheltree, 31 Pa. 25; Rose v. Quick, 30 Pa. 225; Carson's Appeal, 59 Pa, 496; Frew v. Clark, 80 Pa. 170; Schock's Appeal, 88 Pa. 111.

The Act of April 26, 1855, was taken from the English act of 1 Vict. 26, and was copied almost verbatim. The English statute provides that the "witnesses shall attest and shall subscribe their names," to a will making a gift to charity, and the fact that the word "subscribe" is left out of our statute would seem to indicate that the legislators intended to omit it, believing attestation without subscription sufficient. Had they meant to require subscription they surely would have so specified in the statute.

The last case on the subject, and in fact the only one which the court has discovered holding that there must be subscribing witnesses to a will making bequests to a charity is that of Paxson's Estate, reported in 221 Pa. 98, in which Mr. Justice Mitchell, quoting the new Oxford Dictionary, says that to attest is "to bear witness, to testify, to certify formally by signature." This certainly is not the meaning usually given to the word. Attestation is the act of the senses, subscription of the hand; one is mental, the other mechanical. To attest a will is to know that it was published as such and to be able to certify to the facts required by statute to constitute an actual and legal publication. To subscribe is to write ones name on the paper for identification. There may be be an attestation without subscription. Swift v. Wiley, 1 B Monro 114. To attest means to bear witness,

to attest, to sign below. This view has been taken in many Pennsylvania cases and by other dictionaries in use when the act was passed. It seems that to arrive at the intention of the makers of the act, we should interpret its meaning according to the meaning of its words when it was formulated, and not by meanings which have grown up since.

It is true that a will which is subscribed is easier and more convenient to prove, but it was not the expressed intention of the Legislature to require subscriptions to a will bequeathing to charity, especially when such provision was left out of the act copied from one which contained it.

Therefore, if there were attesting witnesses to the will, interpreting the word attesting as has been done above, and we must presume there were, the will of February 11, 1906, is valid, and the appeal is dismissed.

OPINION OF SUPREME COURT.

The will of July 13th, 1907, "otherwise disposed" of the testator's property than did that of Feb. 11th, 1906. It therefore revoked the earlier will. When on October 3d, 1907 the testator destroyed the will of 1907, he revived that of 1906. Lawson v. Morrison, 2 Dall. 286; Fintham v. Bradford, 10 Pa. 82, That of 1906 is therefore entitled to probate, if it has been properly executed. It was signed at the end thereof, but, under the act of April 25th, 1855, that is not sufficient. It must have been executed a calendar month before death, and it must have been attested by two crediable and at the time disinterested witnesses. The will of Holmes was executed by him more than a calendar month before his death.

It has however not been attested, prior to his death, and such attestation is equally indispensable.

Much ingenuity has been expended in the court below to establish the position that an attesting witness does not need to be a subscribing witness. We are not convinced by the considerations called to notice. It doubtless is true that the word attest has several senses. What word has not? It may mean witnessing, that is, noticing a fact at its occurrence, at the instance of one who will be interested at some later time in proving that fact. It may mean this and the further act of putting one's name upon a document, in order to indicate that one is to establish the fact, when its establishment shall be necessary.

"Attestation," says the Standard Dictionary, is "the subscription by a person of his name to a written instrument, to signify that the same was executed in his presence, or that it is correct," Black's Law dictionary defines attesting witness as "one who signs his name to an instrument at the request of the party or parties for the purpose of proving and identifying it." Attestation, says 4 Cyc. 888, is "the act of witnessing the signature of an instrument and subscribing the name of the witness in testimony of such fact." Abbott; Law Dictionary; the Amer. & Eng. Enc. Vol. 3, 276 make attestation include subscription. One of the senses of attest given, is "to signify by subscription of his name that the signer has witnessed the execution of a particular instrument." The Century Dictionary describes an attesting witness "a person who signs his name to an instrument to prove it, and for the purpose of identifying the maker or makers."

There is no violent departure, then, from usage, when the expression of the act of 1855" attested by two credible and at the same time disinterested witnesses" is interpreted to mean subscribed by them. "An attesting witness" says, Mitchell C. J. "under this statute, means a subscribing witness." Paxson's Estate, 221 Pa. 98. If two witnesses of the execution are to be required, it is better to insist upon their subscription of the document.

Decree reversed.

HENRY THORPE v. AMOS DOOLITTLE.

Employment of Minors—Acts of Assembly—Contributory Negligence,

STATEMENT OF FACTS.

Doolittle conducted a business in which machinery was employed. An Act of Assembly forbade under penalty, the employment, in certain businesses, one of which that of Doolittle's was, of minors under 19 years of age. Thorp who was 18 years and 6 months of age was employed by Doolittle and was injured in consequence of his own negligence. He was as intelligent as ordinary persons 25 years old. This is an action against the employer, the only grounds of which is that Doolittle violated the statute in employing Thorpe,

ZERBY, for the Plaintiff.

WANNER, for the Defendant.

OPINION OF THE COURT.

CASE, J. This action was brought by the plaintiff under an act of assembly which forbade under penalty the employment in certain busiinesses, one of which defendant was engaged in, of minors under 19 years of age. The first question is, whether it is in the power of the Legislature to fix an age limit below which children shall not be employed in dangerous kinds of work and whether an employer who violates same shall be prohibited from setting up contributory negligence as a defense.

In 218 Pa. 311 the court said: "After full consideration we are of the opinion that the Legislature under its police powers, could fix an age limit below which boys should not be employed, and when an age limit is so fixed an employer who violates the act by engaging a boy under the statutory age does so at his own risk, and if the boy is injured while engaged in the performance of the prohibited duties for which he was employed, his employer will be liable in damages for injuries thus sustained and the employer cannot set up contributory negligence." The case of Stehle vs. Jaeger automatic Machine Co. decided as late as 1908, and reported in 220 Pa. 617 holds the same. The learned counsel for the defendant concedes that the plaintiff had the ordinary intelligence of a person 25 years of age. In 218 Pa. 311 the court said: "When the Legislature definitely established an age limit under which children should not be employed, the

intention was to declare that a child so employed did not have the mature judgment experience, and discretion necessary to engage in that dangerous kind of work." Were a minor of 19 years, with the intelligence of a man of 30, to make a contract for something the law did not hold minors liable for, we are sure no court in this enlightened country would not hold that simply because the minor had the judgment and discretion of a man who had attained his majority, he was in the same degree liable. Whatever of merit there may have been in the two Pa. cases cited by the learned counsel for the defense, 4 Pa. Dist. 194 and 134 Pa. 208, they have been overruled by the two cases cited for the plaintiff. Binding instructions are therefore given for the Plaintiff.

OPINION OF SUPREME COURT.

The statute involved in this case is one of a large class enacted under the impulse of a pseudo-philanthropy. The state finds it easy to say to a minor, to a woman, that he or she shall not work in certain ways, nor for longer than certain periods, nor at certain times. It little recks that in thus prohibiting the exercise of his or her wage-earning power, it is, in many cases compelling him or her to suffer want of food, clothing, housing, and other necessaries. It costs little to say to a human being, you shall not earn a livelihood so, or so or so, when the prohibition does not need to be accompanied by the discovery to the prohibited person of another way in which he can earn as much.

Henry Thorpe was 18 years and 6 months old. He was as intelligent as a man of 25 years. He desired to earn a living and to gain proficiency in the handling of the machinery of the defendant. So far as we know, other means of livelihood were not at hand. At all events, he prefered this one. The state steps in and says to him, "you must not do this work for six months longer". He replies "but who is to give me my board and my clothes, for these six months? Who is to repay me for enforced idleness during these six months?" The state in its lordly and despotic way, replies, "that is no concern of mine. Enough that I tell you that you must not do *this* work."

The state excuses itself, for such legislation, by saying that it is actuated by benevolence; nay, it plumes itself upon its humanitarianism. It stolidly refuses to see that if it were really benevolent, it would trouble itself to procure permissible employment as a substitute for that which it forbad. To do that would cost it trouble, and money. To prohibit costs only the salaries of the legislators, and of their agents. It is cheaper to penalize specified activities than to procure opportunities for those which are allowed.

Let it not be said that the statutes in question forbid the employer, but not the employe. It is quite clear that if the former cannot employ the latter, the latter cannot be employed by the former.

The legislature should not in its incoherent way arrogate to itself the right to play the role of father and mother, for the subjects of the state. The people have their own livings to make. The legislators will not make them for them. They must develop their own faculties, indulge their own tastes, discover their own aptitudes, and that is tyranical legislation that takes from them the power thus to do.

How long may this tutelage, attempted by this legislature, last? During a man's whole lifetime? Until he is 30; or 21? For many purposes, the common law has denied to persons under the age of 21 years, the legal power to do many things. But why must the range of their disability be increased by statute? Youths have been compelled to learn trades, and earn their support; and any legislature that restricts the scope of their choice, reduces them to a partial servitude. Some boys of 18 have more strength of muscle, and of brain than men of 25. Nineteen is a late age for the commencement of the learning how to handle machinery. It is unreasonable, arbitrarily to require the attainmentof that age, before a youth may begin to use his faculties in the way in which he desires to use them. Thus to deprive him of his liberty and his property is to deprive him of them, "without due process of law." If nature endows a youth of 18 with the intelligence of a man of 25, it ought not to be for a callous and heedless legislature to deprive him virtually of that dotation, at least without furnishing him with an equivalent. We are unwilling to concede that the power to prohibit a boy of 15 from doing some kinds of work embraces the power to prohibit his doing any kinds; or that the power to prohibit other kinds to boys of less than 15, is the right to prohibit the same kinds to boys of less than 19.

The learned court below has decided that the mere fact that the employer has employed a boy under 19, makes him liable for any injury to the boy; that such employment is on his part *ipso facto* negligence. It has also held that the contributing negligence of the boy does not prevent a recovery. In so holding it has support in Lenehan v. Pittston Coal Mining Co., 218 Pa. 311; Stehle v. Jaeger Auto. Mach. Co., 220 Pa. 617. In the former case, a recovery was permitted to the parent of the boy, although he had probably begged the defendant to accept the boy. It is due to the learned court below to say that the constitutionality of the statute was not disputed before it, and that its attention was directed exclusively to the effect of the statute upon liability for an injury irrespective of actual (as contrasted with constructive) negligence on the part of the employer, and of negligence on the part of the employe.

Judgment reversed.