Volume 16 | Issue 1

1-1911

Dickinson Law Review - Volume 16, Issue 1

DICKINSON LAW REVIEW

Vol. XVI OCTOBER, 1911 No. 1

EDITORS:
EMILIO MARIANELLI
ROBERT J. PUDERBAUGH
JOHN EYSTER MYERS

BUSINESS MANAGERS:
GEORGE B. STEVENSON
JOHN H. MCKINNEY
SETH TAYLOR STUGART

Subscription $1.25 per annum, payable in advance.

THE EVIDENCE ACT OF 1887.

THIS act was drawn up by a gentleman who at the time was a judge in an important judicial district of the state of Pennsylvania, and who ever since has continued to fill either a state or a Federal judicial position. Thus drawn up by him, it was submitted to a large number of lawyers, more or less prominent in different parts of the state, for suggestions and criticism. The manner of its elaboration, therefore, would seemingly have justified the expectation that it would be found to be a nearly perfect piece of legislation,—an expectation, however, which, in some important respects, must be declared to have been disappointed.

The act has certain structural defects. Its author intended to make a sharp division between provisions in respect to civil and provisions in respect to criminal proceedings. The 1st section declares that all persons shall be competent witnesses "in any criminal proceeding." The 2nd section names exceptions (*a*) of one convicted of perjury; (*b*) of spouse as against spouse; (*c*) of spouse as to confidential communications of spouse; (*d*) of attorney with respect to communications of client. The 3rd section provides for the use of former testimony in criminal cases. The act in the 4th section begins to deal with evidence in civil cases. In the 5th section it repeats almost verbatim most of the above provisions concerning incompetency. In the 9th section it allows the use of former testimony in civil cases. At least one-fourth of so much of the act as precedes the repealing clauses, could have been saved, had this attempt to make separate and parallel enactments for civil and criminal cases been omitted. Nor would clearness have been sacrificed.

Had the act said, no one convicted of perjury shall be competent to testify except in cases criminal or civil, the object of which is to permit, or prevent, or redress injury or violence, etc., it would have been clear. Had it said, Husband and wife shall be incompetent to testify against each other, in any civil proceeding except one for divorce, etc., or in any criminal proceedings for desertion and maintenance, or for bodily injury, etc., done or threatened: in prosecution of any person for adultery with husband or wife, the wife or husband may prove the fact of marriage; had it said, neither in criminal nor civil proceedings shall husband or wife be competent or permitted to testify against each other, etc.; nor to testify to confidential communications, etc., it would have been as intelligible.

Nor is the separate treatment of the two classes of cases consistently adhered to. Section 10 abandons the policy, in saying that "any competent witness may be compelled to testify in any proceeding civil or criminal." The combination of the two classes would have been quite as feasible elsewhere.

The title of the act indicates that it concerns itself with the competency of witnesses and the rules of evidence. The first section declares that except in certain cases, "all persons shall be fully competent witnesses in any criminal proceedings before any tribunal." But the cases mentioned are not exceptions to competency. They are the preliminary hearing before a magistrate; *habeas corpus* to decide whether bail ought to be received; *habeas corpus* to determine whether the detained person ought to be further held, and hearings before the grand jury. In none of these cases, says the section, "shall evidence for the defendant be heard." But that is not because any witness is incompetent, but because the evidence is irrelevant. The object of the proceeding is to find out, not whether the accused is guilty or not, but that the evidence at the command of the Commonwealth justifies the commitment, the denial of bail, the further detention until trial, the submission of the case in the form of an indictment, to a petit jury. As the law, which has nothing to do with the subject of evidence, decides that in these inquiries only the Commonwealth's evidence may be heard, evidence for the defendant is not heard; the exclusion of it has nothing to do with the competency of the witnesses. The accused himself, if he chose to testify against himself in the proceedings, would be heard. The reason he is not heard, when

he offers to testify for himself, is, that the object of the particular inquiry does not make the evidence relevant. In these inquiries, the tribunal does not strive to learn whether the accused is guilty, but whether the Commonwealth has weighty enough evidence to justify the petit jury's investigation, or to justify the refusal to enlarge the accused on bail. The so-called exceptions in section 1 to the competency of persons in criminal cases, are not, therefore, genuine exceptions. The author of the bill might just as well have added as an exception to the principle, "All persons shall be fully competent witnesses," the proviso that they have testimony to offer which shall be relevant. There are eight millions of people in the State, but while they are competent for the most part as witnesses, not more than five or six of them would in any particular criminal case, know anything which would be pertinent. They could not testify, not because they are incompetent, but because they do not know anything that bears on the issue.

The first true incompetency mentioned is that based on perjury. It is unfortunate that this exception was retained. It was formerly thought that one who committed grave crimes,—treason, felony, or crimes involving a readiness to deceive courts and judges, were too untrustworthy to have their testimony heard or considered. The author of this act of 1887 was willing to give up this notion as erroneous, except with regard to one crime. But why make this exception? Does perjury show more clearly a readiness to deceive than all other crimes? When forgery is committed, it is intended to deceive somebody; the person who accepts the forged document, thinking it genuine; the court and jury who may be called to pronounce upon its genuineness. These are breaches of trust and confidence that as clearly show disregard of the obligation to tell the truth as does perjury. The retention of perjury as a disqualification is arbitrary. All perjuries are not of equal turpitude. Some imply a comparatively low degree of baseness. The perjury that is committed to save a father or son from death is surely not to be compared with the perjury committed by a person in comfortable circumstances to obtain a paltry dollar or two.

The perjury precludes the convicted person from testifying though his sentence has been complied with; though ten or twenty or fifty years have elapsed since the conviction; though

changes in age, circumstances, education, have wrought voluminous changes in the mental and moral character.

The height of absurdity is reached when it is held that a pardon of the crime of perjury obliterates the incompetency.[1] A pardon may be granted on many grounds. It is clear that if, the moment before the pardon, the criminal was unfit to be believed, he is not morally any better the moment after. The pardon would have very little significance even if it indicated the opinion of the pardoner, that the subject had become truthful and would not commit perjury again, but it does not flow from any such opinion. There is no possible connection between the fitness of a man who has once committed perjury, and been found to have committed it, to be trusted, and the fact that he has secured a pardon, unless the pardon has been granted because of the weakness of the evidence on which the conviction rested, or because of evidence of subsequent reformation.

The act of 1887 recognizes that serving the sentence does not improve the character. It is equally plain that getting a pardon from the custodians of the pardoning power, neither improves it nor furnishes the most meagre evidence that it has been improved.

In England and some of the American States, the entire incompetence, based on conviction of crime, has been swept away. It ought to have been swept away by the act of 1887.

In 1843, Lord Denman's Act, often recited, "Whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present laws, and it is desirable that full information as to the facts in issue both in criminal and in civil cases should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment in the credit of the witnesses adduced and on the truth of their testimony," proceeded to enact that "no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence." The exception of the crime of perjury is founded on a shallow psychology, but even if the perjurer were somewhat less worthy of belief than the murderer, the thief, the forger, the obtainer of money by false pretense, the user of false weights and measures, the tribunal ought to be presumed to have discretion enough to appraise the value of the testimony of a witness, however discredited by his past crimes.

[1]Diehl v. Rodgers, 169 Pa. 316.

Not content with continuing the disqualification of the perjurer, subornation of perjury is made to have the same effect by the awkward phrase "which term [perjury] is hereby declared to include subornation of perjury." Why did the writer not say simply, "A person who has been convicted . . . of perjury, or of subornation of perjury"?

The common law treated convictions of crime in other jurisdictions as not as gravely impeaching veracity, as convictions here, and the act of 1887 maintains the distinction. A foreign conviction will lessen credit, but not work incompetency. The conviction of perjury which disqualifies must have been "in a court of this Commonwealth." Is this distinction, based on the thought that a crime committed in New York or Maryland is not as bad as the same crime committed in Pennsylvania? or on the thought that we cannot feel quite as sure that a conviction in these states will be just, as that one here will be? or in the thought that the disqualification is a part of the punishment and that one state will not punish crimes committed in another?

With a characteristic naiveté, the common law and the act of 1887 allow a convict (of perjury) to testify that he or his property has been injured, for the purpose of obtaining redress from or imposing punishment upon, the tortfeasor. He may be heard and believed, when he accuses another of hurting himself, but not when he accuses another of hurting a third person. Will he be less disposed to lie, in his own case, than in the case of another? If he may be the only possible witness in his own case, he may be the only possible witness in the case of others. The law maker is willing because the perjured person might possibly be without remedy in an actual case of hardship, to run the risk of his fastening an unjust charge or liability upon another by a fictitious accusation. He is not willing to run the same risk in order to avoid possible injury to a third person.

Section 3 provides for the use of the former testimony of a witness. It provides that "whenever any person has been examined as a witness . . in any criminal proceeding conducted in or before a court of record, and the defendant has been present and has had an opportunity to examine or cross-examine, if such witness afterwards die, etc., notes of his examination shall be competent evidence upon a subsequent trial of the same criminal issue, but for the purpose of contradicting a witness, the testimony given by him in another or in a former proceeding may be orally proved."

The use of former testimony in similar cases, had been allowed in Pennsylvania, before the year 1887, but it had not been understood that that testimony must have been given in a "court of record." It was receivable, though delivered before the committing magistrate or justice of the peace."[2] The language of the act of 1887 shows that either its author was forgetful of this fact, or that he intended to change the law by restraining the use of former testimony to such as had been delivered in a court of record. It is singular that, despite the language of the act, it has since been held that not only testimony given in a court of record, e. g., at a former trial,[3] but that given before a committing magistrate[4] may be proved. Indeed, Fell, J., remarking that the act of 1887 does not sanction the use of former testimony which was not given in a court of record, seems to think that such testimony, delivered before a justice, is nevertheless receivable.[5] Yet, clearly, the author of the act and the legislature intended to define the circumstances in which former testimony might be received, and, impliedly to forbid the use of it in other circumstances. The act is defective in thus putting an unwise restriction on the use of such evidence, and the courts are possibly warranted in *pro tanto* nullifying it.

Whether the act wisely requires proof of the former testimony to be made by notes thereof may be a question. The act makes no difference in this respect between criminal and civil proceedings. It had been understood in Pennsylvania that in civil cases at least the oral evidence of any who had heard the former testimony, would be receivable.[6] It will be difficult logically to distinguish between civil and criminal cases, upon the language of the act of 1887, but the former practice will be overthrown in civil cases, if only notes shall be held to be admissible evidence of the former testimony. It is regrettable that the act leaves the law infested with this uncertainty.

Distinguishing between former testimony used as evidential of the facts averred in it, and former testimony used to show incongruity between it and the present testimony of the witness, the 3rd section, concerning criminal, and the 9th section concerning civil cases, add "but for the purpose of contra-

[2]Brown v. Commonwealth, 73 Pa. 321.
[3]Commonwealth v. Cleary, 148 Pa. 26.
[4]Commonwealth v. Keck, 148 Pa. 639.
[5]Commonwealth v. Lenousky, 206 Pa. 277.
[6]P. & L. Dig. Dec. 9784.

dicting a witness, the testimony given by him in another, or in a former [in the 9th section another a former] proceeding may be orally proved." This is a pretty distinct implication that, in the other case, the former testimony may not be orally proved.

Why was this distinction made? The aim of the law should be to secure reliable evidence. Is then the destruction of the force of the testimony of a witness, by evidence of prior contradictory statements of so little importance that untrustworthy evidence of those prior statements may be employed, while the testimonial use of the former testimony is of so much greater importance, that a superior kind of evidence of the contents of such testimony must be employed? To smash the evidence of an important witness by proof of his contradiction of himself, may be as serious as to use the former testimony as independent evidence. It must be remembered that, for the purpose of contradiction, declarations, whether as a witness or otherwise, whether sworn or unsworn, whether made in court or *in pais*, are receivable, and when they were not made as a witness, they could not well be proved by notes.

The clause (*b*) of Section 2 declares that husband and wife shall not be "competent or permitted to testify against each other, or in support of a criminal charge of adultery," committed by or with the other. From this language might be inferred that the consent of the spouse against whom the testimony is offered, would not justify the court in receiving it. In clause (*c*) there is a prohibition of testimony by husband or wife to confidential communications, but it is qualified by the phrase "unless the privilege be waived upon the trial." In clause (*d*) counsel, it is said, shall not be competent or permitted to testify to confidential communications of the client, unless "this privilege be waived upon the trial by the client." Are we to read a similar exception, not expressed, into clause (*b*)? If not, can any good reason be urged for allowing confidential communications between wife or husband to be devulged, while absolutely forbidding other testimony against either by the other? It requires much astuteness to detect the justification of this diversity. The carelessness with which the act is drawn is displayed in the omission to say, in clause (*c*) by whom the "privilege" is to be waived, while in clause (*d*) it seems to be assumed that it is necessary to state that the waiver must be by the "client." The client being dead, would the waiver by the executor or administrator or by the heir be effectual?

Precisely what the "privilege" is, which is to be waived, is not clear. No "privilege" has been mentioned; only a prohibition. Doubtless the "privilege" intended is the right of the party to be injuriously affected by the evidence, to have it excluded, a right which is not expressed and which, therefore, "this privilege" does not properly express.

Precisely why the last exception to the incompetence of husband or wife to testify against the wife or husband, is made, is hard to divine. If the husband is on trial for adultery his wife may prove the fact of his marriage, in order to make his conviction possible, but she may not prove the adulterous act itself. Proving both is necessary to a conviction. Why having allowed the wife to testify to the first, boggle at her testimony as to the second? Proving the marriage is not, *ipso facto*, blackening his character it is true, but the proof is made in order to blacken his character by the supplementary testimony of other witnesses.

Section 4 begins to deal with the competency of witnesses in civil proceedings. In any civil proceedings before any tribunal of this Commonwealth, . . no liability for costs, nor right to compensation as executor, administrator, or other trustee, nor any interest merely in the question, "nor any other interest or policy of law, except as is provided in Section 5 of this act, shall make any person incompetent as a witness."

Exclusions of witnesses always rest on some "policy" of the law. It was the "policy" of the law not to receive evidence that will probably be perjured, hence, not to receive the testimony of a party in support of his cause, or of any person whose testimony will promote his own interests. Hence, also, husband or wife was not allowed to testify for wife or husband. Greenleaf assigns as reasons for this "the identity of their legal rights and interests." Phillips, on Evidence, quoted by Clark, J.,[7] says: "They cannot be witnesses for each other because their interests are absolutely the same; they are not witnesses against each other, because this is inconsistent with the relation of marriage and the admission of such evidence would lead to dissension and unhappiness and, possibly, to perjury." Clause (*c*) of Section 5 expressly forbids a spouse's testimony against a spouse. But there is no prohibition of a spouse's testimony for a spouse. The foundation for such a prohibition at common

[7]Bitner v. Beone, 128 Pa. 567.

law was, as Phillips remarks, the absolute sameness of their interests. This reason, if ever true, is true no more. The wife's property is hers, not the husband's. His property is his, not the wife's. The interest of sympathy, of dependence, never was a disqualifying interest. A son or daughter could testify for a parent, despite the competent dependence on the parent, or the most intimate and affectionate relation between them. The wife has dower rights in her husband's land; and the husband the estate of courtesy in his wife's land. Each can do what he or she chooses with the personalty, prior to death. In so far as the interest in the dower or courtesy is concerned, the act of 1887 makes provision to exclude wife or husband, in the cases in which the husband or wife would be excluded, when it excludes, besides the surviving party to a thing in action, "any other person whose interest shall be adverse" to the right of the deceased party.

The will of the legislature expressed as clearly as possible that no interest, no policy of law, shall exclude a witness except as provided in section 5, "shall make any person incompetent as a witness," has been overridden by the courts. They have said that the policy of transferring the incompetency of one spouse to the other, shall be a policy of law. In Bitner v. Boone,[8] Clark, J., says that if the husband must be excluded on account of interest, so also must the wife be excluded, on account of her unity of interest with him." But where is the interest? The answer is, "Although each may not be said to have any direct interest during coverture, she has, nevertheless, an indirect interest derivative from her husband." What is this interest? The son or daughter will, in some circumstances, derive something from the parent. Does this disqualify? The justice concludes a feeble argument for his decision by remarking: If the legislature had intended to change the law in this respect, against the theory of both the common and the statute law, and the habit of centuries, it is reasonable to suppose that the change would not have rested upon any mere implication, but would have been expressed in plain words." The change *has* been expressed in plain words. The act of 1887 was intended to put an end to the "habits of centuries" concerning excluding evidence that might be of value. It says no interest of liability for costs, of right to compensation as trustee, nor

[8]128 Pa. 567.

any other interest or policy of law'' except as is provided in section 5 of this act, shall make any person incompetent as a witness. And section 5 makes incompetent one convicted of perjury, the husband or wife, as to confidential communications, husband against wife, and *vice versa*; attorney as to confidential communications, and when one party to a thing in action is dead, the surviving party or any other person whose interest is adverse. When the wife's testimony in ejectment, will promote her dower right, she is incompetent under this clause. If she will have no legal right over the thing sued for, by or against the husband, she will not have an adverse interest, more than son or daughter. Boone v. Bitner has, however, been followed without further consideration in a good many cases,[9] and it has therefore written an important exception into the statute.

[9]Examples are Sutherland v. Ross, 140 Pa. 379; Myers v. Letts, 195 Pa. 595.

[CONCLUDED IN NEXT ISSUE]

MOOT COURT

COMMONWEALTH v. TOLMAN.

Use of Book Found on Prisoner as Evidence Against Him.

Marianelli for plaintiff.
McKinney for defendant.

OPINION OF THE COURT.

LONG, J.—The crime Tolman is indicted for is larceny. When the officer arrested him he rummaged through his pockets and found a book in which Tolman kept a diary. In this diary was the criminating evidence, the admission of which was objected to by the defendant Tolman. The evidence was that on a day named he had visited the store of X and had found there certain articles which he secretly took. This evidence was admitted against the objection of the defendant and a verdict of guilty followed. We are now asked to grant a new trial.

The question here to be decided is: Did the court err in admitting this diary in evidence?

In the fourth and fifth amendments of the United States Constitution there is a provision that persons, papers and effects shall be secure against unreasonable searches and seizures, and that no person shall be compelled in a criminal case to be a witness against himself. The Pennsylvania Constitution also provides that no person on trial for a criminal offense shall be compelled to give evidence against himself.

The leading case on this question is Boyd v. U. S., 116 U. S. 616. This case held that the seizure or compulsory production of a man's private papers, to be used as evidence against him in a prosecution for a crime, penalty, or forfeiture is prohibited by the United States Constitution.

It appears very plainly that both the seizure and the admission in evidence of the defendant's private diary are prohibited by both the Federal and the State Constitution.

There is an exception to the rule in some states in cases where the evidence objected to as incriminating evidence is to produce *identification.* In People v. Gardner, 144 N. Y. 119, there is an example of this exception where a defendant in a criminal trial was required to stand up in court to be identified, this was held *not* to be a violation of the rule that no person shall be required to give evidence against himself in a criminal case. But see Cooper v. State, 86 Ala. 610.

Of such a nature is the only Pennsylvania case relied upon by the counsel for the Commonwealth. The case is Commonwealth v. Roddy, 184 Pa. 274. The defendants in this case, after their arrest were brought to the place where the robbery was alleged to have been committed, and there, in the presence of and at the request of the person robbed, masks were put on the faces of the defendants against their wills for the purpose of identification. The evidence in this case was admissible. In the case at bar there is no question of identification.

There is another exception to the rule. If one on trial for a crime has made a voluntary confession or admission of the crime and this is shown the defendant can no longer claim the privilege as to incriminating himself.

The main contention is that the written admission in the diary of the defendant is a voluntary admission and that by making such voluntary admission the defendant has lost his right to the privilege.

But are these admissions in the diary of the defendant voluntary admissions within the meaning of the term? The mere writing of admissions in a diary and the writer holding them only for his own private satisfaction, and not voluntarily disclosing them to any other person, is not such a voluntary admission as would estop the defendant from claiming his privilege.

Confessing a thing to oneself is not the sort of voluntary confession the law interprets as a voluntary confession. In order that a confession be such a voluntary confession it must be made voluntarily to another.

Judgment reversed and a new trial granted.

OPINION OF SUPERIOR COURT.

To the immunity of an accused person from furnishing evidence against himself, there are some exceptions. The defendant will not be allowed to absent himself from his trial, in order to prevent identification of himself by witnesses. Being present he would not be permitted to mask his face. Witnesses may be directed to look at him, and say whether he is or is not, the man whom they saw perpetrate the crime, or whom they present at a place, presence at which conduces to show guilt of the crime. Cf. 3 Wigmore p. 3123.

The courts of Pennsylvania are not always squeamish about compelling a prisoner to perform acts which will assist in identifying them as guilty. On a trial for murder, the prisoner was asked to pronounce certain phrases which the perpetrator of the crime had uttered when committing it, in order to facilitate the witness' identification of him. This, says Sterrett, J., is not compelling him "to give evidence against himself." "The sole object of the request was to afford the witness, Mrs. Sharpless, then on the stand, an opportunity of seeing the prisoner and hearing the sound of his voice" etc. To say that this was a violation of the bill of rights, says the justice, "would in my judgment be a strained construction of that instrument." Johnson v. Commonwealth, 115 Pa. 369.

At other times the courts are more punctilious in favor of the accused. They will not, whether at the trial for the offense (Boyle v. Smithman, 146 Pa., 255; Logan v. R. R. Co., 143 Pa. 403;) or in some preliminary proceeding (Horstman v. Kaufman, 97 Pa. 147), compel the defendant to testify to facts, or to produce books, which may be used, either at the same investigation, or in a later one to incriminate him. Had prisoner or his counsel been compelled by the trial court to produce the book for use against the former, it would doubtless have been error. Com. v. Meads, 11 Dist. 10.

It might have been supposed, *a priori*, that if the courts would refuse to compel a person to produce a document if it tended to incriminate him, especially if he were the defendant on trial for the crime which the

document would be used to prove, they would not sanction the use of such documents, if taken forcibly from the accused by the administrative agents of the law. There is not much difference between the court's directly exerting the pressure on the accused to produce the incriminating article, and accepting from policeman or constable, the fruits of a pressure exerted by them. Yet, it is a commonplace of the law, that if officers take the tools of a burglar, or a highwayman, a pistol, or a knife adapted to wound or kill from an accused person, the fact that he was in possession of them and they themselves, may be exhibited in evidence against him. Indeed Sterrett, J., argues in Johnson v. Commonwealth, *supra*, to the propriety of asking Johnson to speak in court in order that a witness might identify his lisping, from the right to search for stolen property on the person or premises of the suspected, and to use the discovery of it as evidence of guilt. Wigmore points out that an illegality even, in the mode of obtaining evidence, has not been held to exclude it, except in the case of Boyd v. United States, 116 U. S. 616, and a few cases following it. Judicial opinion he says "has generally refused to accept its pronouncement." 3 Wigmore 3127. In that case the immediate question before the court was the legality of an order of the court, requiring the defendant to produce a paper, on pain of having his guilt assumed. Whatever else was in it was dictum.

Had the officer rummaged through the pockets of the defendant and found a knife, pistol, etc., or letters addressed to him showing that he was in a plot to steal, the articles thus found could have been used against him. Even papers written by himself, if not testimonial in character, could have been used against him. The letters obtained contained testimonial statements, that is, assertion of facts. We can see no substantial difference between the two sets of papers. The criminal significance of a non-testimonial paper may be as clear and impressive as that of a testimonial paper. What reason is there for saying that a paper of the former class though forcibly taken from the prisoner, can be employed, if one of the latter cannot be?

The learned court below suggests that evidence for identification of the prisoner is distinguishable from other evidence and that for that purpose, evidence compelled from the prisoner may be properly employed. But, to identify the prisoner with the criminal is as important as to prove any element of the crime. If a man can be compelled to furnish proof of his being the person who is shown by other evidence to have committed a crime, he could scarcely complain of being also obliged to furnish evidence of the criminal fact.

In Commonwealth v. Roddy, 184 Pa. 274, the prisoners were obliged, virtually, by the officer, to put on masks, in a certain way, in order that the victim might, in his dying declaration, identify them. Probably, the court itself would have done so, at the trial. Williams, J., was willing to concede that the use of the mask was under the circumstances "questionable."

In Commonwealth v. Fisher, 221 Pa. 538, letters written by a prisoner, awaiting trial for murder, to his wife, containing admissions were, in some way, obtained by the district attorney and put in evidence. The only objection that the supreme court seemed to feel, was, that they had

been obtained from the wife, with her consent, and that she was virtually testifying to confidential communications of her husband and testifying against him.

The letters, considered as confessions, were not objectionable. They were not written under the influence of hope or fear improperly engendered. That a confession is obtained by trick, by the basest treachery, indeed, is no obstacle to its use, for when the state is pursuing criminals, it does not indulge in sentimental finesse. Waging war on those whom it regards as its enemies, it deems it entirely honorable to use the basest service of the basest men. It will not disdain to convict a man even of a capital offence, by the testimony of men who have attained their information, by the grossest falsehood and imposture, and who in communicating it have been guilty of the meanest treachery.

Unable to draw a clear line between many compulsions of a prisoner to furnish evidence against himself, which are habitually perpetrated and the particular compulsion in question, we must conclude that if any legal wrong was done to the accused, in taking his letters from his pocket, it did not make illegitimate the use of them as portions of the evidence against him.

TILGHMAN v. INSURANCE CO.

FACTS.

The policy on which the action is brought stipulated that it was to become void should there be any "increase of risk within the control or knowledge of the insured." The plaintiff conspired with another to set fire to the building, but, before their intention could be carried out the building was accidentally burned.

McCall for plaintiff.

Routh for defendant.

OPINION OF THE COURT.

STUGART, J.—The case at hand resolves itself into two questions:

1st.—Is a conspiracy an act?

2nd.—Does a conspiracy to burn a house increase the risk of the insured?

In answering the first question we must say that a conspiracy is the agreeing of two or more persons to carry out some criminal or fraudulent act, to injure or defraud some person or persons, and cannot be called an act; it is merely an intent until they proceed with the intention of carrying it out. The insurance company in this policy says, "any act done to increase the risk," therefore we construe the word "act" to mean an "overt act" something realized by motion. No cases can be cited that construe the word "act" other than an overt act, and a conspiracy is not an overt act.

9 Cyc. 590. 27 Pa. 339. 2 Watts 23.

It is a well settled rule of construction that words will be construed most strongly against the person or party that used them. And in this case the Insurance Company used the words, therefore the plaintiff

should have the benefit of the doubt. In answering the second question if there was a conspiracy to burn the house there was no act done to accomplish that end. Clark on contracts, p. 233 says: "It is essential in order to sustain an action of deceit or to give a party the right to avoid a contract on the ground of fraud that he shall have been injured or prejudiced by the fraud."

8 Cyc. 651, and 111 Pa. 335, hold that a conspiracy to injure one in his trade or business by fraud or misrepresentation is actionable only where it results in injury.

5 W. N. C. 537. A contract in writing will as between two interpretations be given that which seems to be nearest the literal meaning of the terms.

Therefore as a conspiracy is an unfulfilled intent to do something and as there was no act to do that something we think that there was no risk. Just because Tilgman and his servant talked about burning down the house to collect the insurance it cannot be said that the risk was made greater. This universe is kept up not by that which people say they are going to do but what they *do*.

The court is of the opinion that the defendant cannot nullify the policy and that the plaintiff is entitled to judgment.

OPINION OF SUPERIOR COURT.

The policy was to become void, if there should be an "increase of risk by any means within the control or knowledge of the insured."

A risk is the conduciveness of the situation in which the property is to the burning of it. If oil is stored in it, one of the conditions for a destructive fire is furnished. So, if fire is carelessly manipulated on the premises; if a business is conducted upon it, which frequently engenders conflagration.

The exposedness of the premises to invasion by men who seeing it unwatched and unoccupied, may be tempted to set fire to it, is apparently not a risk, so that the vacation of the house is not an increase of risk; 19 Cyc. 726. [But Trunkey observes in Ins. Co. v. Usaw, 112 Pa. 80, "Perhaps the risk was increased when the house became tenantless."] A vacant house does not take fire more readily than an occupied one, but the probability of successful efforts to burn it is increased.

In a sense when a man has formed the design to burn a house, and is in a position to execute it the danger of fire is increased. Purposed fires do not occur till the purpose is formed and a considerable percentage of purposes go into deed. Remembering the principle, mentioned by the learned court below, that "this policy is to be interpreted most strongly against the company whose contract it is," Tool Co. v. Assurance Co., 132 Pa. 236, we adopt the view taken in the trial court, and also in Ampersand Hotel Co. v. Home Ins. Co., 198 N. Y. 495. Gray, J., there said, "Here though the conspiracy, as we must assume, was entered into, it was to execute a plan of defrauding the insurer. The conspiracy did not come to a head. The property and the contract to insure it were unchanged and unaffected by what was a mere proposal to affect them. The purpose to burn up the property never had ceased to be a purpose within the domain of thought. * * * As the trial judge well

suggested, the conspiracy remained but a mental conception. It was not the cause of the fire and it had no connection with it."

It is not necessary, going thus far with Gray J., that we should accept his further logic: "The defendant could not sue for damages by reason of the conspiracy, and if that be true, I think it could not set it up as a defence to the performance of the contract."

Affirmed.

DRENNAN'S EXR'S v. JNO. MULFORD.

Liability of Surety. Statute of Limitations. Right to Reimbursement.

FACTS.

John Mulford wishing to borrow $500 went to his friend Thos. Drennan and induced him to endorse a promissory note of which he Mulford was maker as accomodation endorser. Mulford then went to Adrian Maxwell and obtained the money on the note.

No payment of interest or principal was made upon this note for more than six years after the date of maturity nor was any liability ever admitted in regard to payment of it by Mulford or Drennan.

Five years and eleven months after the endorsing of the note Drennan died. The laws of the state suspend the running of the time within which an action must be brought for 18 months after the death of the person against whom an action exists and 3 months after the death of Drennan, Maxwell brought suit against Drennan's estate and recovered judgment for principal and interest.

Drennan's executors bring action against Mulford for reimbursement and Mulford sets up as a defence that at the time of the bringing of the action against Drennan's estate, which was 6 years and 2 months after the cause of action had accrued, no action could be maintained against him and that he therefore is not liable. Note for 5 days. Time of bringing action is limited to six years by statute.

McCall for plaintiff.

O'Hara for defendant.

ROGERS, J.—In the case before us the relation of the plaintiff's decedent to Maxwell and Mulford, was the same as in Shamburg vs. Abbot, 112 Pa. 6, which holds: "Whenever one person is legally bound to pay a proper debt of another, the former, in a certain sense occupies the position of surety for the latter, and if surety pays he has a right of action against the principal." The defendant's argument in the case is that the statute of limitations began to run when the note was made and the plaintiff contends that the surety's right of action does not accrue until he has paid the debt of his principal and therefore that he has six years after he pays the note.

Against a claim upon a principal debtor, by surety who has paid the debt, the statute of limitations runs, not from the time when the debt was due, but from the time when the surety paid it.

Thayer vs. Daniels, 110 Mass. 345.

Trickett on Law of Limitations in Pennsylvania.

The plaintiff's right of action is based on a contract implied by law and if the debt he pays is protected by any collateral of his principal, he is assigned the collateral as he is substituted in the place of the creditor or payee. This is to give the surety who pays, all remedies that the creditor has against the principal.

Fairies vs. Cockrill, 28 L. R. A. 528.

The right to substitution is founded upon a mere principle of equity and benevolence, and not necessarily upon either priority or contract between parties. 6 Watts 221; 72 Pa. 102.

The next question to be considered is, if the debt of the debtor is paid by the surety which thereby extinguishes the old debt, what does the payer sue on?

In Faries vs. Cockrill, 28 L. R. A. 528, it was held that he must sue on an implied promise. In Shamburg vs. Abbott, 112 Pa. 6, it was held, "That the right of action may sometimes be asserted by an independent suit and at other times in the form of subrogation."

It is held in 7 Cush. 253, where a note was paid by a surety, the debt became extinguished and that the only way the surety could bring action was to claim the amount of the maker, for the money paid by request and for his use.

In the present case the surety in an obligation has been required to pay it and the payee's rights against the principal debtor have been barred by limitation. But it is held in Faries vs. Cockrill, 28 L. R. A. 528; 20 Ohio 337, and Willis vs. Channing, 90 Tex. 617: that this does not preclude the sureties from recovering against the debtor as their right rests on the implied contract between the principal and surety. Therefore as there is no bar to an action for recovery by plaintiff, he should be allowed to recover.

Judgment for plaintiff.

OPINION OF SUPERIOR COURT.

The note was payable in five days. More than six years had run since its maturity, when the action was brought against Drennan but, he having died, and therefore the statute of limitations being suspended for 18 months, this action was in time against him. An action begun simultaneously against Mulford, by the creditor Maxwell, would have been too late. Drennan's executor having suffered a judgment against him, which he has since paid, is not precluded from seeing Mulford at any time within six years from such payment, and though the suit will be begun more than six years since the creditor could have sued him. The statute of limitations runs against the surety's action against the principal only from the time at which he made the payment not from the time when the principal became suable by the creditor. 11 P. & L. Dig. Dec. 18786; Levering v. Rittenhouse, 4 Wh. 130; Taylor v. Gould, 57 Pa. 152; Wheatfield Township v. Brush Valley Township, 25 Pa. 112; Child's Suretyship, 313; 25 Cyc. 1113; Trickett, Limitations, 268, 271; Martin v. Frantz, 127 Pa. 389.

The question presented in this case arises from the fact that when the action was brought against the surety, the plaintiff, the statute of

limitations had barred an action by the creditor against the defendant. If the creditor could not then have compelled the defendant to pay, had the surety a right to pay, and thus subject the defendant to an obligation from which, so far as the original creditor was concerned, he was exempt?

We do not think that if the discharge of the defendant from the necessity of paying the creditor, discharged the surety also, he could nevertheless choose to pay, and pay, and thus recreate an obligation upon the principal. Had both been discharged by the lapse of time, the law would not allow the surety being honest to pay the debt and then compel the principal to be honest likewise. Wheatfield Township v. Brush Valley Township, 25 Pa. 112. A voluntary payment by the surety, though prompted by the highest ethical considerations, can give origin to no right against the principal. If then, the surety *could* have successfully defended the suit by Maxwell against him, he cannot recover in this action. Could he have thus defended?

The only ground of defence would have been that the statute of limitations made the success of a suit by the creditor against the principal impossible. This would probably not have been a successful defence. Certain statutes prescribe a time in which claims must be presented against a dead man's estate. Unless so presented they are barred. Yet, it has been held that this bar, so far as the estate of a dead principal is concerned, is no obstacle to a suit against the living surety, and hence is no obstacle to a recovery of the surety against the principal's estate. Sibley v. McAllister, 8 N. H. 389; Hooks v. Branch Bank, 8 Ala. 580; Childs' Suretyship, 309. The surety may be liable, because his absence from the state has arrested the running of the statute of limitations, while the statute has barred the creditor's action against the principal. The surety, upon paying, may recover indemnity from the principal. Childs' Suretyship, 309; Cf. Peaslee v. Breed, 10 N. H. 489; Martin v. Frantz, 127 Pa. 389. It follows that the decision of the learned court below is correct, and its judgment must be affirmed.

GIBSON v. GIBSON.

Testamentary Exclusion of Heirs—Restraint on Alienation—Bill for Specific Performance.

STATEMENT OF FACTS.

The testator, Gibson, bequeathed all his personal estate to his wife, and then provided, inter alia, as follows: "Also to my children, Mary and Jane, all my real estate lying in the counties of Cumberland and York, share and share alike. My sons shall have no share therein, they already having received their full share of my estate. Mary and Jane shall have no power to sell any of the land herein devised to them." John and William, the two sons of the testator, have contracted, to convey a half interest in a farm in Perry County, of which the testator was owner at the time of his death, to Mary and Jane, in return for their conveyance

to the sons of a Cumberland County farm, received by them under the above will. The widow has agreed to join in both conveyances. The sons seek specific performance.

Puderbaugh for plaintiff.

Stevenson for defendant.

OPINION OF THE COURT.

MARSHALL, J.—Upon the facts in this case we think it quite fair as suggested by the plaintiff to assume that the land belonging to John and William Gibson which they are attempting to convey descended to them either (1) under another portion of the will or (2) by the intestate laws of the state. It is highly probable that the testator in his will did not provide for the disposition of the land in Perry County. See Act 1833, P. & L. Dig. Col. 2708. We therefore hold in any case the plaintiff has such land and title thereto which could be conveyed.

As to the provision in the will against alienation of the estate devised to the daughters, Mary and Jane, we hold such provision to be absolutely void. We think from the wording of the will and the intention of the testator that a fee simple was devised to the daughter. And it has been held that right of alienation is an inherent and inseparable quality of the estate in fee simple and a condition against all alienation in a grant or devise of such estate or a provision forbidding all alienation is void as repugnant to the estate granted or devised. 64 Pa. Yard's Appl; 53 Pa. 311, Kipper's Appl; 48 Pa. 211, McClenken's Appl.

The defendant's contention that only a life estate was given is without foundation as we think the construction of the will clearly shows the devising of a fee and not a life estate. True it that is a partial restraint may be had or put upon the land even "during life of any person" as held in Kaufman v. Burgett, 195 Pa. 274, but upon all the evidence and apparent intention of the testator we hold that a fee was devised to the daughters and the provision against alienation is void.

We are now to consider what we deem the only vital point in the case, whether or not this agreement was in writing and properly signed. 11 A. & E. Cy. of Law 561, it is said: "A contract for the exchange of lands is as much within the statute of frauds as a contract for the sale of land." For a sale of land the contract must be in writing and signed by the vendor. Everhart v. Dolph, 133 Pa. 628. Now considering an exchange of land where land is the subject matter and consideration of both conveyances we think the contract should be in writing and signed by *both* parties on the ground of mutuality of remedies. There is no case in Pennsylvania exactly on this point but we think if such a case should arise it would be decided on the equitable principle stated.

If this contract were in writing and signed as stated we feel that the decree must be given for the plaintiff, but if on the other hand it lacks the essential principles the decree must be refused.

We will say though, to show the law of Pennsylvania on the subject of parol contracts for the exchange of land that if the parol agreement is established by clear, precise and indubitable evidence and consummated by actual possession it is not within the Statute of Frauds. Mass. v. Culver, 54 Pa. 414; 195 Pa. 245, Germyn v. McClure; 38 Pa. 60, Taylor v. Hen-

derson. But nothing was done in the case at bar to indicate a part performance.

We are not inclined to treat the contract as a written one according to the facts given, especially so when as here it would have to appear to be signed by both parties. It must be treated as a parol agreement.

On this ground only do we refuse specific performance to the plaintiff.

Verdict in favor of defendant.

OPINION OF SUPERIOR COURT.

If, as the learned court below assumes, the contract to reciprocally convey the pieces of land was oral, compulsory performance of it would be to nullify the statute of frauds. No circumstances are disclosed, which exempt a contract from the operation of that statute. It applies to contracts for the exchange of lands, as well as to contracts for the conveyance of land for some other consideration than land; 20 Cyc. 225.

Were the obstacle consisting of the parol nature of the contract overcome, there would be no difficulty in the way of compelling performance. The sons are the plaintiffs. They are aware of the restrictions in the testator's will, upon the daughters' power to aliene. If they choose to accept an imperfect title, the imperfection of it is not a sufficient reason for denying to them what they desire. The court's decree, followed by obedience to it, will not nullify the will of the testator, if, otherwise, that will can be carried out.

The learned court below has, however, correctly concluded that the restriction is void. The "bequest" to the daughters Mary and Jane of "all my real estate lying in the counties of Cumberland and York, share and share alike," was a devise of a fee.

The restraint is expressed thus: "Mary and Jane shall have no power to sell any of the land herein devised to them." It lasts, then, not for a few years; not until the happening of a certain event, whose nature would make reasonable the power to alienate upon its occurrence; but during the lives of the daughters. It is therefore wholly void. 11 Forum, 75.

Appeal dismissed.

BOOK REVIEWS.

Law for the American Farmer, by JOHN B. GREEN, of the New York Bar. The Macmillan Company, 66 Fifth Avenue, New York; 1911.

We took up this book with a certain prepossession unfavorable to it. An examination of it however, has surprised us with the amount of legal information, tersely and lucidly told, on all the subjects that can interest the farmer as such. The mode of acquiring a farm, the title to the farm, adverse possession of the farm, its boundaries, its appurtenances and easements which

affect it, farm workers, waters on the farm, irrigation, laws concerning pure milk and pure food, crops and other farm produce, live stock, contracts of various sorts, sales, warranty, factors, common carriers, insurance, are some of the topics dealt with. Each legal principle is supported by an authority in the notes. The book, the price of which $1.50 gives an immense amount of information of which even the attorney might not be unwilling to avail himself in an emergency. The book is superior, we think, to any of its class that has ever passed under our notice. It is bound in cloth, and is published as one of a series, known as the Rural License Series, by the well known publishers, the Macmillan Company.

Handbook of the Law of Partnerships, including Limited Partnerships, by EUGENE ALLEN GILMORE. West Publishing Company; St. Paul, Minn., 1911.

The Hornbook Series, published by the West Publishing Co. had already embraced a work on partnership by William George. The present book although originally designed to be a new edition of George's, is really an independent work. Of George's text, it substantially retains but two chapters out of eleven. The learning and experience of Prof. Gilmore, of the law school of the University of Wisconsin are a guaranty that this treatise is well adapted to the needs no less of students than of practitioners. The type is good and the citations are numerous. The substance of the work is well distributed although some of the titles of chapters seem to be merely alternate forms of the same thing. When we learn "what constitutes a partnership" (chap. 1) we are apt to learn also about the "formation and classification" (chap. 2) and the "nature and characteristics" (chap. 3) of a partnership. In chapter 5 we have an excellent presentation of the powers of partners. Equally satisfactory are the chapters on the partnership liability, the relations of partners *inter se*, and the remedies of creditors. The possible actions between partners and between partners and extraneous parties, are well explained in chapters 8 and 9. There is an important discussion of limited partnerships in the final chapter. We note on page 200 a statement of the doctrine of Doner v. Stauffer, for whose inaccuracy, if there be inaccuracy, the writer of the opinion, rather than Prof. Gilmore, is responsible. The opinion is indeed one of the most elusive and inconsequent discussions to be found in our reports. The book is well worthy of a place in the Hornbook series.

A Concise Law Dictionary, by FREDERIC JESUP STIMSON, revised by HARVEY CORTLANDT VOORHEES, 1911; Little, Brown & Co., Boston.

This is, as it professes to be, a concise dictionary of 346

pages, in the size and shape of the Students' Series. Nearly 2000 important words have been added to the original work, and the correctnes of the claim made for the new addition, that "no other Law dictionary contains so many definitions and translatons of French and Norman-French law terms" may be assumed. Under the word court appears an admirable discussion, in 14 pages, of the various English and American courts. Very useful is the list of abbreviations, under that word, covering over 50 pages. Of much utility to the law student, is a table of British Regnal Years, found at the end of the book. The very reasonable price, $3.00, makes the purchase of the book possible to many who would hesitate to spend twice or four times that sum, on a bulkier book. The type is very clear and the paper excellent, features indeed of all the publications of Little, Brown & Co. The size and shape of the book render it very convenient to handle. References to it can be made much more quickly than to larger volumes. We can cordially commend Stimson's Law Dictionary not merely to lawyers but especially to students of law.

Commentaries on the Law of Municipal Corporations, by JOHN F. DILLON, LL. D. Fifth Edition. 1911. Little, Brown & Co., Boston.

It is 39 years since the first edition of this work appeared, and during all that time, it has maintained a unique place in the estimation of the profession. Its author, once a circuit Judge of the United States, later Chief Justice of the State of Iowa, still later, a leading practitioner of the American Bar, and a professor of law in Columbia University, is well known to every lawyer, as a jurist of comprehensive learning and much literary power. The fourth edition was embraced in two volumes. The text of this, the fifth, covers in four volumes 3064 pages. A fifth volume of 738 pages is wholly taken up with a table of over 40,000 cases, (494 pages) and an index. The matter in the new edition is two and one half times as much as that of its immediate predecessor. New chapters have been added on Municipal Trading, Municipal Ownership of Public Utilities, Grants of Franchise to Corporations and Individuals, Obligations of the grantees of such franchise; Purchase of works of Company by the Municipality; Rights of Municipality and grantee at the expiration of the franchise, Duties to Consumers, Regulation of rates. All of these topics have grown to be of vast importance in the last decade. The discussions of Limitations of Indebtedness, of constitutional prohibition of special legislation concerning corporations, of the ordinance-power, of municipal bonds, and other contracts, are voluminous and thorough. We have been deeply interested by the treatment of the eminent domain, the applicability of the statute of limitations to municipalities,

their liability for mobs, riots, the torts of their officers. Procedural subjects have not been neglected. There are important chapters on Mandamus, Quo Warranto, Remedies in Equity. Chapter XIV of 150 pages, is an extraordinarily able discussion of the subject of special assessments on property holders, for local improvements of various sorts. Taxation is treated in a chapter of 180 pages. The amount of work expended on this new edition may be in part realized,, when we think that it contains 2200 pages more than the 4th edition, and that it cites 20,000 additional cases.

During the 39 years of its existence, Dillon on Municipal Corporations has, as Justice Bradley remarked, "come to be indispensable both to the lawyer and to the judge." It is said that of 472 decided cases on municipal corporations taken at random from the Reports, the earlier edition was cited in 400 cases.

The typographical execution of the book is admirable. The binding is one of the most handsome that we have seen. The publication of this great work, so soon after that of Wigmore's colossal and unrivalled book on Evidence, displays an enterprise on the part of the long famous Boston publishers, an appreciation of the higher needs of the profession of the law, that are worthy of all admiration and deserve the plaudits of the bar.

The Construction and Interpretation of the Laws, by HENRY CAMPBELL BLACK, M. A. 2d edition. West Publishing Company, St. Paul, Minn., 1911.

A somewhat careful examination of the second edition of Mr. Black's work on the interpretation of laws, has convinced us not simply of its decided superiority to the first edition, but of its great worth as an authority upon its important theme. In the 624 pages, which compose the book we have been particularly struck with those which are devoted to the Construction of Constitutions, the general principles of statutory construction, the literal and grammatical construction, extrinsic aids to construction, retrospective interpretation, mandatory and directory statutes and amendatory and amended acts. The author insists on the principle not always remembered, unfortunately, that "it is not permissible, under the pretence of interpretation, to make a law different from what the law-making body intended to enact." His remarks on "equitable construction" are very judicious. The section on clerical errors and misprints contains a collection of cases in which the courts have variously corrected the language of statutes; e. g. by making county read "city," by striking out the word "not", by substituting "or" for "on" and "on" for "or", by substituting the word "utters" for "alters," even in the definition of a crime in a criminal statute, etc. Under the subject of extrinsic aids to

interpretation, a remarkably good chapter, it is interesting to a Pennsylvania lawyer to find noted the fact that Chief Justice Gibson, in considering whether a certain act repealed another, referred to his having been a member of the legislature which passed the later act, wherefore he said "I know that no repeal was in fact contemplated." There is a noteworthy precision in the statements of the principles which are necessarily conceived with a certain vagueness. There are few which it would be necessary to criticize. A proposition on page 620 that federal courts will adopt the settled construction by state courts of state statutes, "without inquiry as to its soundness, unless some question of federal law is involved" might seem to imply that, in that case, the federal courts would reject the "settled construction" of the state courts; an implication which, we think, is not warranted by the attitude of the federal courts.

We cordially commend this book to the practitioner, not less than to the student of law.

Law Office and Court Proceedure, GLEASON L. ARCHER, LL. B., 1910; Little, Brown & Co., Boston.

On a former occasion we called attention to this very interesting and suggestive book, The first part deals with the action of the attorney before drawing the writ; the second with matters occurring after the issue of the writ but before trial; the third with the trial, and the fourth with proceedings after verdict. These parts are full of wise counsel, tersely and vividly given with illustrations which make it concrete and realistic to a high degree. The first chapter, on The Client and his Story, begins with a caution against giving hasty advice, and strikingly inculcates the lesson, which inexperienced practitioners often much need to learn, that they should "rarely if ever, venture to decide a question of any importance, without first consulting authorities." Among the more important chapters are those which treat of the direct examination of witnesses and of cross-examination. These are followed by several "illustrative examinations," covering 50 pages, the careful study of which will well repay the reader. The perusal of the text of this book, containing somewhat more than 300 pages, will reward even the most experienced practitioners. To the beginner, a careful consideration of all the sage suggestions with which the book abounds, must be of very great value. We know no other book with the same general aim, that approaches this in interest, and practical utility.