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THE EVIDENCE ACT OF 1887.

[CONCLUDED.]

Clause (*e*) of Section 5 contains an exception to competency in civil cases, of which there is no analogue in respect to criminal proceedings. A party to a thing or contract in action may be dead. His right may have passed to his executor or administrator; to his heir, to his alienee. In such a case says the clause, the "surviving or remaining party" or any other person whose interest shall be adverse to the right of the deceased shall be incompetent, with respect to any matter occurring before the death of the deceased party.

A contract is made between A and B. In any controversy between them respecting it, each is competent to testify. If A dies, B becomes incompetent! Why this surprising result? Was it not bad enough that A's knowledge ceased to be available? Why broaden the evils wrought by death by determining that B's knowledge shall also cease to be available? A's death has given to B a chance to perjure himself without A's contradiction. It shall be assumed that B will avail himself of this chance if allowed to testify at all. Such was the consideration which induced judges of a former age to refuse to hear parties, or interested witnesses. They will probably testify falsely. Hence they shall not testify at all.

The estates of the dead would be in peril, if surviving antagonistic parties could testify, say the defenders of the disqualification of the survivor. But justice is not on the side of a man because he has died. Perhaps his cause was bad. Had he survived he could not have made it appear good, except by perjury. But his death has silenced the living man, so that he

cannot honestly support his better cause. In order to spare the estates of the dead from spoliation through false evidence, it is necessary to expose the estates of the living to spoliation, through the rendering unusable of true evidence. Wigmore pertinently remarks,[1] "The argument of the latter passage [a quotation from the opinion of Haymond, J., in Owens v. Owens, 14 W. Va. 88 that a contrary rule would place in great peril the estates of the dead] sufficiently typifies the superficial reasoning on which the rule rests. Are not the estates of the living endangered daily by the present rule which bars from proof so many honest claims? Can it be more important to save dead men's estates from false claims than to save living men's estates from loss by lack of proof? The truth is that the present rule is open, in almost equal degree, to every one of the objections which were successfully urged nearly a century ago, against the interest-rule in general."

The rule which allows parties to a contract to testify when all are alive, gives unequal opportunities to them. One is shrewd, skillful, bold, ready to commit perjury; the other is dull, an unskillful speaker, timid, conscientious. Why not disqualify one party if the other is ascertainable to be his decided inferior as a witness?

A has a claim against several parties. One of these dies, but the others survive. Because the dead man's interest in the partnership property will be affected by A's recovery, he must not testify, and the surviving parties even, must enjoy the benefit of his incapacity.[2] They can testify for themselves and for the deceased, without necessarily qualifying A. The joint parties might be twenty as well as two or four, the living owners of nineteen twentieths, or the joint owners might have unequal interests; the owner of one thousandth only, dying, and the owner of the other 999 thousandths surviving, yet the survivor will get as benefit from the death of the owner of the twentieth or of the thousandth, the closing of the mouth of the opposite party, whose claim may thus be made incapable of establishment, however just.

The provision of clause (*e*) by which incompetency from interest is preserved, has led to much quibbling, and given rise to much appellate litigation. When A deals with B, through

[1] 1 Evidence, 707.

[2] Lockard v. Vare, 230 Pa. 591.

B's agent C, the death of C, who only besides A knows what the transaction was, does not close the mouth of A. A can testify without the check of possible contradiction by the only other person, now dead, who knows the transaction. In this respect the courts bow humbly to the letter of the statute.[3]

If A makes a contract with B, for the payment by B of a sum of money to C, the death of A, the source of C's right, is said not to preclude B from exploding C's claim by his testimony. Yet A only knew the facts, being a party to the transaction, and his death has withdrawn the only available evidence not in the control of B.[4]

Clause (*e*) excepts the case of claiming by devolution from the general provision in it for incompetency. In issues *devisavit vel non* or in other inquiries respecting the property of a deceased owner, the parties claiming it by devolution on the death of the owner, all persons are declared to be fully competent witnesses. This is an abandonment of the principle that the law must artificially redress the inequality between parties, arising from the death of one of them. Consider the issue *devisavit vel non*. One of the contestants claims as heir. About his being this there can be no dispute. The other claims through the will. The legatee is himself dead, and his administrator is concerned to establish the will. The death of the legatee may make important evidence in support of the will impossible. The heir may fabricate evidence showing fraud on the testator, his unsoundness of mind, etc. There is no equality.

The obscurity of the statute is illustrated by the inability of the courts to arrive at any clear views upon it. In issues *devisavit vel non*, the contestants are always, on one side the legatees or devisees, who claim under the will; and on the other side, the next of kin or heirs who claim despite the will. In such an issue, the act expressly says that all persons shall be competent witnesses. In other issues concerning the property of the dead, when parties claim by devolution, they are competent witnesses. In Munson v. Crookston[5] there was an ejectment by the devisee of Agnes Crookston, against her husband who claimed to be tenant by the curtesy, and refused to abide

[3]American Life Ins. Co. v. Shultz, 82 Pa. 46; Hostetter v. Shalk, 85 Pa. 220.

[4]Hamill v. Royal Arcanum, 152 Pa. 537.

[5]219 Pa. 419.

by the will. It was necessary for the plaintiff to prove that he was not entitled to curtesy. He attempted to do this by proof that Crookston had deserted his wife for a year or more. Crookston was allowed to testify, as to matters that had occurred during his wife's lifetime, and he recovered. The supreme court, affirming the judgment because the plaintiff had not given evidence sufficient to establish the desertion, said that Crookston should not have been allowed to testify. The reason is remarkable. The husband was claiming by descent. The plaintiff was claiming under the will; "that is, by purchase." "Had the plaintiff claimed as heir or next of kin" says the court, "he would have claimed by devolution, as the husband did, and both would have been competent witnesses under the exceptions quoted. But as the case stands, their claims are of different classes, and they are not within the exception of the statute." Yet, as we have said, on every issue *devisavit vel non*, one party claims under a will, and the other under the intestate law. It is impossible to understand the consistency of such a decision, with the statute.

We may adopt the opinion of Prof. Wigmore: "As a matter of policy [the question is only one of policy] this survival of the now discarded interest-qualification is deplorable in every respect, for it is based on a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a confused mass of barren quibbles over the interpretation of mere words."[6] He suggests that instead of disqualifying the survivor, it would be better to require that his testimony should have some corroboration, as in Canada and New Mexico, or to allow the use of any extant writings or declarations of the deceased party on the subject in issue, as in Connecticut and Oregon.

The 6th section enacts that any witness who is incompetent by reason of interest, shall "become fully competent for either party by a release or extinguishment in good faith of his interest." Why he should become competent for the party to whom his interest was antagonistic, by losing the antagonism, is not very clear. As he was already competent to testify for such party, the expression that he shall become so, by release etc., is not very felicitous.

[6] 1 Evidence, 708.

The antagonistic interest renders the witness incompetent to testify in such a way as to support that interest. The removal of that interest ought to remove the incompetency. The interest of the witness may be of different sorts, and an interest of one sort may be removed in one way, and, of another sort, in another way. The interest may be a right to land, chattels, money. That interest could be extinguished by releasing the land or chattels, or the debt, to the party against whom the interest operates. The creditor could release to his debtor, and so extinguish the debt. The dominant owner of land could release an easement to the servient owner. A legatee could release the legacy to the executor.[7] The right might be transferred to another and thus the adverse interest of the witness be ended. A son e. g. may assign to another, his interest in his father's estate, and so lose the interest.[8] One entitled to money which is charged on land may transfer his claim.[9] One entitled to share in a fund, may assign his share.[10] One partner may transfer to the other partner, his interest in a debt due the firm.[11] The interest may be in land. One of two cotenants, may assign his fractional right to the other.[12] It is possible for a witness to have several distinguishable interests which are adverse. The extinction of one, not extinguishing the others, would leave the witness still disqualified. A, during his life, had transferred by gift, land to his son B. After A's death C sued the executor for a debt existing when the gift was made. B has two separate interests to defeat the action. If it is defeated the estate of A, in which he will share, will be larger. He will also be able to keep the land given to him. His transfer of his share in the estate, leaves him still interested to prevent recovery, in order to preserve the land. Hence to complete his rehabilitation, it would be necessary for him to cease to be interested in the land as well as in the estate left by A. To assign the share in the latter would not be enough.[13] A

[7]Walls v. Walls, 182 Pa. 226; Cobb v. Cobb, 4 Super. 273.

[8]Semple v. Callery, 184 Pa. 95 Cf. Verstine v. Yeaney, 210 Pa. 109.

[9]Miller v. Withers, 188 Pa. 128.

[10]Gunster v. Jessup, 196 Pa. 548. The payee of a note may transfer the note without liability for the collection of the amount, and so become competent to prove its genuiness; Fritz's Estate, 3 Super. 33.

[11]Darragh v. Stevenson, 183 Pa. 397.

[12]Turner v. Warren, 160 Pa. 336; Parry v. Parry, 130 Pa. 94.

[13]Keener v. Zartman, 144 Pa. 179.

may have a right to share in the assets of an insolvent corporation. He may also have made himself liable to its creditors. His transfer of his right to share the assets, would leave untouched his liability, which only creditors could release. Hence he is not rendered competent to testify for the assignee of the corporation in a suit on the official bond of officers, success in which will increase the assets, and thus lessen the amount of debts for which he will be liable, by his assigning his right to share in the assets.[14]

The interest may be in the form of a liability which the testimony of the witness will obliterate, or prevent from maturing. If A transfers a chattel, impliedly warranting his title, his testimony in a suit involving the title of his vendee, may produce a verdict which will prevent his liability on the warranty from maturing. In order to obliterate his interest, a release from his obligations as warrantor, would have to be made by the vendee.[15]

The act of 1887 speaks of a "release or extinguishment in good faith of his interest." In Darragh v. Stevenson[16] the observations of Mitchell, J., showed that he was disposed to put so illiberal an interpretation on these words, as would have made an assignment a non-permissible mode of rehabilitation. A release or extinguishment, he discovers, is not an assignment. But, satisfying himself that the expression in "good faith" could not be appropriate to a release or extinguishment, but would be appropriate to an assignment, he concludes that the language of the act "seems to imply some latitude in the sense in which these words were used." Since the aim of the act was to restore A's competency by his divesting himself of any interest that could be promoted by his testimony, and since this divestiture is as complete when the interest has passed to another, as when it is abolished by release, in which case another as really gains an advantage, as in the case of an assignment, the judicial scruple seems somewhat fastidious. We may accept it as law that an assignment, not less than a release, which leaves no interest in the witness, will restore his competency.[17]

[14]Gunster v. Jessup, 196 Pa. 548.

[15]Cf. Smith v. Rishel, 164 Pa. 181.

[16]183 Pa. 397.

[17]Verstine v. Yeaney, 210 Pa. 100. Turner v. Warren, 160 Pa. 336. Parry v. Parry. 130 Pa. 94. Semple v. Callery, 184 Pa. 95. Miller v. Withers, 188 Pa. 128.

The release or extinguishment must be made in "good faith." It is conceivable that a release should be drawn up, in order to impose on the court, for the purpose of inducing it to admit the releasee as a witness, and not for the purpose of really putting an end to the obligation or liability released. Such a release would be held to be wanting in "good faith." But, the courts have gradually reached the conclusion, after much oscillation, that an assignment or release is wanting in good faith, if, although really intended to terminate or pass the interest, it would not have been made had it been possible for the witness otherwise to have testified. Releasing or extinguishing in good faith, says Mitchell, J., "means that it shall not have been done merely to evade the disqualification of the law."[18] The law says one who *is* interested at the time of being invited to testify adversely to the dead person, shall be incompetent. To get rid of this interest, in order not to fall within the operation of the law, is to "evade the law"! The law punishes for obtaining goods by means of false pretences; to obtain goods by true representation is to evade the law! The law forbids acts in which three ingredients exist, *a*, *b* and *c*. To do an act which omits *c*, is to evade the law! The law says, you must not have an interest when you testify. If then you put away that interest, and thus get into the class of the disinterested, you evade the law, if you claim the privilege of the disinterested!

The fact is that this doctrine is a virtual abandonment of the definition of the interest that disqualifies. Where one once had a pecuniary or proprietary interest, with which he has parted, he possibly, probably, has a sentimental interest. He may have an interest in the question. He has a desire that his releasee or assignee may win. But this desire did not constitute at common law a disqualification. "This disqualifying interest," said Greenleaf,[19] "however, must be some legal, certain and immediate interest, however minute, either in the event of the cause itself, or in the record, as an instrument of evidence, in support of his own claims, in a subsequent action. It must be a legal interest, as distinguished from the prejudice or bias resulting from friendship or hatred, or from consanguinity, or any other domestic or social or any official relation, or any other motives by which men are generally influenced; for these go

[18]Darragh v. Stevenson, 183 Pa. 397. Morgan v. Coal Co. 215 Pa. 443.

[19]Vol. 1, 528, 15th Edit.

only to the credibility. Thus a servant is a competent witness for his master, a child for his parent, a poor dependent for his patron, an accomplice for the government and the like. Even a wife has been held admissible against a prisoner. though she believed that his conviction would save her husband's life." "The true test of the interest of the witness" he says again[20] "is, that he will either gain or lose by the direct legal operation and effect of the judgment or that the record will be legal evidence for or against him in some other action." If then the sentimental interest which one who has parted with a right has in the successful assertion of it by his releasee or assignee, was not, at common law a ground of disqualification, why has it been made so by judicial interpretation? We have been told repeatedly, that the object of the legislation concerning witnesses was, not to introduce new causes of incompetency, but to reduce their number.

The attitude taken by the courts is in opposition to the former practice of a century. It was a usual phenomenon, in the trial of causes, for a witness to qualify himself at the table by a release or assignment for the very purpose and for no other, of removing his disability.

Said Greenleaf[21] "The competency of a witness, disqualified by interest, may always be restored by a proper release. If it consists in an interest vested in himself, he may divest himself of it by a release, or other proper conveyances. If it consists in a liability over, whether to the party calling him or to another person, it may be released by the person to whom he is liable. . . . A release, to qualify a witness, must be given before the testimony is closed, or it comes too late. But if the trial is not over, the court will permit the witness to be reexamined, after he is released; and it will generally be sufficient to ask him if his testimony, already given, is true; the circumstances under which it has been given going only to the credibility."

It is to be regretted that an effort should be made to perpetuate the innovation on the common law made by Post v. Avery and its successors, in the application of the act of 1887. The 4th section of that act is as explicit as possible, that no interest and no policy shall exclude a witness, except in cases

[20]Ibid. p. 530.

[21]1 Evidence, 560; 15th Edit.

within clause (*e*) of section 5. The courts have partially nullified this provision, by saying that the policy of law shall prevail, that when interest is divested for the purpose of testifying, the bias arising from the former interest shall not merely discredit but disqualify.

The courts having decided that an assignment made for the purpose of removing a testimonial disqualification, is *ipso facto* not made in good faith, have not irrationally decided that an assignment or release made shortly before the trial, is made for that purpose. In Darragh v. Stevenson[22] Mitchell, J., remarked, "the assignment was not made until the case was at issue, and on the very eve of trial. It is impossible to resist the conclusion that its real purpose was to evade the law and to give the plaintiff's claim that advantage against the dead man's estate which the statute intends to prevent." The assignment being made a few days before a second trial, was, says Fell, J., "evidently not in that good faith which the statute requires, but for the sole purpose of enabling the witness to sustain the action by his testimony."[23] The same has been said, when the assignment was made on the very day on which the witness was offered[24] or on the day before.[25] It required some time for the courts to reach this conclusion however. In Walls v. Walls[26] a release made two years after the action was brought, was able to make Judge Bucher competent. In Parry v. Parry[27] the ejectment was brought in 1884. The trial occurred April 21st, 1886. A deed made by one co-tenant to the other, on March 10th, 1886, was said by Mitchell, J., to make the grantor competent. An assignment made on the very day of the trial failed to qualify the assignor, because it did not embrace all his interest, in Keener v. Zartman.[28]

Whether the release or extinguishment was in "good faith" is to be decided by the court. "Of which good faith" says the 6th section, "the trial judge shall decide as a preliminary question." The trial judge does not need explicitly to decide that

[22]183 Pa. 397.

[23]Gunster v. Jessup, 196 Pa. 548.

[24]Verstine v. Yeaney, 210 Pa. 109.

[25]Matthews v. Matthews, 11 Super. 381.

[26]182 Pa. 226.

[27]130 Pa. 94.

[28]144 Pa. 179.

there was good faith. In permitting the witness to be sworn, he in effect determines the good faith of the assignment.[29] When the court rejects the witness, who has made an assignment or release the supreme court will consider that it does so, because it has found it not to have been made in good faith.[30] The trial court cannot be required, by a request for instructions to the jury, to submit the good faith of the assignment made by the witness whom it has allowed to testify, to the jury.[31] According to Porter, William W. J., the appellate court may overrule the judgment of the trial judge, who has allowed the witness to testify[32] although the Act of 1887 says the trial judge shall decide.

The want of care in drawing up the Act of 1887 is manifest in the duplication of the provision for calling the antagonist party or witness, as on cross-examination. The first part of section 6 is substantially repeated by the 7th section. One incompetent under clause *e* to testify for himself if a party, or for one of the parties, may be called by the opposite party to testify against his interest. If he is so called he becomes fully competent, not merely for the party calling him, but for himself as a party, or if he is not a party, for the party whose interest is consonant with his own. The 7th section is simply somewhat more explicit. These provisions rest on the principle which decisions had recognized, that when a party called an incompetent witness, whether the opposite party or not, he estopped himself from alleging his incompetency, when the witness subsequently testified for himself, or, not being a party, for the party opposite to the one who first called him.[33] It is late in the day to challenge the foundation upon which such decisions rest. C. J. Gibson's suggestions may be accepted as being as good as any that can be made. By calling a witness, the proponent alleges that he is worthy of credit. "Or did he assert no more" asks the justice, "than that he was worthy of credit only when he testified against his own interest? The man who is honest enough to declare the whole truth when it makes

[29]Turner v. Warren, 160 Pa. 336.

[30]Morgan v. Coal Co., 215 Pa. 443.

[31]Sample v. Callery, 184 Pa. 96.

[32]Matthews v. Matthews, 11 Super. 381.

[33]Floyd v. Bovard, 6 W. & S. 75; Stokes v. Demuth, 7 W. 41; Turner v. Waterson, 4 W. & S. 175; Seip v. Storch, 52 Pa. 210.

against him, will be honest enough to declare no more than the truth in his own favor." These remarks are wanting in cogency. When A calls B, who is the opposite party or has an opposite interest, he does not say that he is worthy of credit. He takes the risk, and is known by the court and jury, to take the risk of the falsity of the answers. Perhaps he can do no better, having no safer witnesses, than to take this risk. Suppose the answer is unfavorable to the party calling the witness. Then the jury perceives that the proponent has been disappointed. The proponent *hoped* that he would tell the truth, as he conceives it, and his hope has been defeated. By what logic can it be said that the proponent, in such a case has declared the witness worthy of credit? How unreasonable to say that by calling a hostile witness, in hope that he will tell the truth, his incompetency, founded on the probability that he would, under the stress of interest, lie for himself, is swept away? By saying that the witness will *possibly* tell a truth which is inimical to himself, the party calling him does not say that he will probably tell the truth, when he makes assertions that are friendly to himself.

But the 7th section contains a prodigious extension of the principle in question. If A, plaintiff, calls one of three, four, five, six co-defendants, he not only makes the one called competent to testify for himself and his co-defendants, but he makes all these co-defendants competent! He cannot certify to the believableness of one, without certifying to that of all! It is difficult to conceive a greater absurdity. Veracity, instead of being the attribute of an individual, becomes the attribute of a group, or groups fortuitously combined, in the exigencies of business. If one of the group is honest, all his associates become possessed of that admirable virtue!

MOOT COURT

WM. MAJOR v. TUBERCULOSIS ASSOCIATION.

Bill in Equity to Restrain Erection of Hospital—Nuisance.

Fritz for Plaintiff.
Mendelsohn for Defendant.

OPINION OF THE COURT.

LANDIS, J.—The association, a corporation, is about to erect a hospital in the Borough. It will be within 1000 feet of 20 residences. It is designed to accommodate 100 patients. This is a bill to enjoin the erection and maintenance of the hospital by fifteen of the adjacent property owners. It is admitted that the presence of the hospital will cause apprehension of contagion among the people and will lessen the value of the property in the neighborhood by 33 to 50 percent.

The erection and maintenance of a hospital for the treatment of tuberculosis is not *per se* a nuisance. Such institutions are of great necessity owing to the prevalence of this dreadful malady. Theoretically there need be no apprehension of contagion by adjacent property holders, due to proximity, for in a properly conducted hospital the tubercular bacilli would not be permitted to escape in a virulent form. But it is admitted in this case that the presence of the hospital will cause apprehension of contagion among the people and lessen the value of property in the neighborhood 33 to 50 percent.

"Whatever worketh hurt or inconvenience or damage is a nuisance." (2 Pa. 114). A nuisance is anything which causes hurt, inconvenience or annoyance to lands, tenements or hereditaments of another, or to the reasonable enjoyment of the same (10 Phila. 356; 34 C. C. 537). So we are safe in stating, the act contemplated will constitute a nuisance and as such may be enjoined.

This association is incorporated and proposes to act by virtue of a charter granted by the state legislature. But there is no proof of an actual necessity to locate on the proposed site to the depreciation of adjoining property. It is not shown that the needs of this community demand such hospital. It has been said that there is danger of inoculation merely in walking on the "Strand," so in any populous community, apprehension of contagion is reasonable, where sufferers are introduced into a community otherwise immune.

A low estimate places death rate from consumption at one-seventh of humanity. It is now conceded to be a contagious and infectious disease. There are free dispensaries provided by the state for indigent patients, and hospitals comparatively free, for sufferers in a more advanced stage. Modern methods of treatment require a high altitude in an isolated district. "Question then is whether, as viewed by people generally, this disease is not regarded with dread so as to deter persons from living in vicinity" (87 Md. 352). Act 1903 Pa. Law Sect 33 cited by de-

fendant empowers cities of second class to erect hospitals without their corporate limits, for treatment of certain classes of disease. It would be a novel construction indeed to infer from this authority to erect hospital in a borough.

It is not shown that this is a charitable institution and we infer it is for corporate gain. The balance of injury principle is usually applied on an *ex parte* showing, in preliminary injunctions. One may not injure his neighbor on the ground of advantage to self. That the maintenance of this hospital will impair value of property by destroying physical comfort and menacing health and will therefore be actionable at law, cannot be questioned, but the injury would be of a continuous nature and the remedy at law would not be efficacious.

It is sufficient to constitute anything a common nuisance, that a number of persons are seriously annoyed. It is not necessary that all the neighbors be affected.

We decree, therefore, that a bill be framed with an injunction to restrain the association from erecting hospital contemplated, within the borough or its immediate environs.

OPINION OF SUPERIOR COURT.

In the evolution of the law of nuisance there has grown an element not clearly recognized in the early cases. This element is the comfortable enjoyment of one's property. In the present case the plaintiff insists that the location of a sanitarium for the treatment of a disease, of which there is a positive dread which science has so far failed to combat, so far robs them of that pleasure in, and comfortable enjoyment of their homes as to make it a nuisance and furthermore that the depreciation of the value of their property by the location of the hospital is such a deprivation of property as will warrant a decree in their favor under the maxim *Sic utere tuo ut alienum non laedas.*

The defendant contends that there is no actual danger and that the fear of the plaintiffs is unfounded and unsustained by science and that therefore the courts should take no account of it.

The opinion of the court is that, if the dread and fear of the disease induced by the proximity of the hospital will in fact disturb the comfortable enjoyment of the property of the plaintiffs and is shared by the whole community to such an extent that the value of the neighboring property is materially affected thereby, the right of the plaintiffs to an injunction cannot be denied because this fear and dread may be scientifically unfounded.

The question is, not whether the fear is founded in science but whether it generally prevails to such an extent as to affect the movement and conduct of men. Fear is one of the most common of human emotions and no good reason is discovered why it should not furnish a ground for injunctive relief. The fear of contagion in the present case may according to the theories and dogmas of scientific merit, be unfounded, but such theories and dogmas are not controlling unless shared by the people generally.

In the case of Baltimore v. Fairfield Imp. Co. 87 Md. 352, 40 L. R. A. 494, an injunction against placing a leper in a residential district for

care and restraint was justified upon the ground that the disease caused fear and terror in the minds of ordinary individuals. The court said, "It is not so much a mere academic inquiry as to whether the disease is in fact highly or remotely contagious; but the question is whether, viewed as it is by the people generally, its introduction into the neighborhood is calculated to do a serious injury to the property of the plaintiff." In Stotler v. Rochelle (Kan.) 109 Pac. 188, the maintenance of a hospital for cancer was enjoined. The court said that the question was not whether the establishment of the hospital would place the occupant of adjacent dwellings in actual danger of infection but whether in view of the general dread inspired by the disease the reasonable enjoyment of the adjoining properties would be materially interfered with.

Finally, in Cherry v. Williams, 147 N. C. 452, and Everett v. Paschall, (Wash.) 110 Pac. 879 injunctions were granted enjoining the maintenance of hospital for tuberculosis.

These cases are on all fours with the present case and the decisions and opinions furnish abundant authority and reason for granting an injunction in the present case.

Judgment affirmed.

JOHN TILBERRY v. SOLOMON DEEK.

Tresspass for Damages—Continuous Nuisance—Liability of Grantor—Statute of Limitations.

STATEMENT OF FACTS.

Deek owned land through which a stream flowed, and Tilberry land immediately above it on the same stream. Deek erected a dam upon his land not far from the division line, effect of which has been to flow the water back upon Tilberry's land. The dam was erected twenty years ago and nine years ago Deek sold his land to one McFarlane by whom the dam has since been maintained. Action is for damages suffered six years prior to suit.

Warrington for Plaintiff.

Badger for Defendant.

OPINION OF THE COURT.

WATKINS, J.—The question which the court has to decide is, whether a right of action for damages still exists in Tilberry after having remained silent for twenty years and is the action properly brought against the former owner?

There is no doubt that the flowing of this water back upon the plaintiff's land constituted a nuisance, for it is held in 4 Brewster 333, the flooding of grounds or the flowing of water back upon another's land, constitutes a nuisance.

There is no doubt that this is a continuing nuisance, for as each day passes by, the plaintiff's land is still covered with water to his damage. In 3 Black. Com. 220, it is said that every continuance of a nuisance is held to be a fresh one and that, therefore, a fresh action will lie.

It seems to be the well settled rule that the creator of a nuisance or one who more remotely, either by negligence or design, furnishes the means and facility for the commission of any injury to another, which would not have been done without him, is responsible.

One who erects a nuisance on his land cannot escape liability for damages caused thereby, by a conveyance of the property, and his liability extends to a continuance of the nuisance subsequent to his conveyance. 29 Cyc. 1204.

It is settled that a person who is injured by a continuing nuisance may maintain an action against the original tort feasor, who creates it, or against any grantee who continues it after a request and refusal to abate. 132 Mass. 486, 9 N. H. 88. 3 Allen 264.

It was settled in Roswell v. Prior, 12 Mod. 635, that the grantor himself is liable, notwithstanding his grant, for the continuance.

In that case the plaintiff had recovered against the defendant for erecting a building which stopped the plaintiff's ancient lights. The defendant had granted over the ground with the nuisance to another and contended that he was no longer liable, but that the action should be against the grantee. But the Court said, "Surely this action is well brought against the creator, for before his grant over he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting it over."

In 70 Iowa 145, it was held, where one company built a permanent dam across a river, and caused water to flow back on plaintiff's land, and after the dam was completed, sold it, and the vendee has done no act except to maintain the dam; that where a nuisance is of a permanent nature, all the damages caused thereby are deemed to accrue at once upon its becoming such, and a party injured can recover all damages past and prospective, and that against the grantor.

It appears to be the law of Wisconsin that in order to hold the creator of a nuisance liable after it has passed to his grantee, it must be shown that he is deriving some benefit from its continuance or that he sold with a warranty of the continued use of the property as enjoyed while the nuisance existed.

While it does not appear that this land was conveyed with covenants of warranty, yet the Lower Court is led to believe that the vendee was led into paying a higher price for advantages afforded by this dam, for we see that nineteen years after the sale of this land, he still continued the dam. And is it not fair that the vendor should pay damages when he got rid of his land and obtained a higher price than he would otherwise have received?

Supposing that the grounds had been taken by the defendant that this suit was barred by the statute of limitations, the defense could not have been maintained, for each continuance being a new nuisance, and this action being brought within six years, the plaintiff is entitled to recover. 5 Met. 205.

Plaintiff is entitled to six years' damages.

OPINION OF SUPERIOR COURT.

It is a general rule established by many reported cases that the creator of a nuisance does not by conveying the property to a third person release himself from liability for the continuation of the nuisance.

This is especially true where the grantor conveys his property by warranty deed. Thus in Waggoner v. Germaine, 3 Denio 306 it is held that if one erects a nuisance on his own land, as, for example obstructing a water course, to the injury of the land of another, and then conveys the premises to a purchaser with warranty he nevertheless remains liable for the damages incurred by the continuance of the nuisance subsequent to the conveyance. And in Lohmiller v. Ind. Ford Water Co. 51 Wis. 913, the same doctrine is asserted.

The same rule has been applied in cases where it does not appear that the grantee conveyed the premises with warranty. Thus in Curlice v. Thompson, 19 N. H. 471, it was held that a party who erects a dam that is a nuisance continues liable as long as it exists and is not released from such liability by a sale of the premises. To the same effect are Plumer v. Harper, 3 N. H. 88. Dorman v. Ames, 12 Minn. 451; Hyde Light Co. v. Porter, 167 Ill. 276. Jordan v. Helwig, 1 Wilson, Super. Ct. (Ind.) 447. Eastman v. Amoskeag, 44 N. H. 143.

In Pennsylvania it has been held that an owner of real estate cannot by leasing the same to a tenant avoid liability to a third party for the continuance of a nuisance which existed at the time of the lease. Kraus v. Brua, 107 Pa. 85. It was the duty of the owner to see "that the property before it passed out of his possession was in such a condition that its use would not be injurious to his neighbor."

It has also been held that a party who caused a nuisance by acts done on the lands of another is liable for its continuance and that it is no defence that he cannot enter to abate without exposing himself to an action of tresspass. Smith v. Elliott, 9 Pa. 345.

Upon the precise question involved in this case there seems to have been no Pennsylvania decision, but in view of the rule prevailing in other jurisdictions and the analogies presented by the above cases there would seem to be little doubt that the defendant should be held liable.

The defendant had not acquired a right to maintain the nuisance by prescription. The period of prescription in Pennsylvania is twenty-one years. Strickler v. Todd, 10 S. & R. 63; P. & L. Dig. Dec. vol. 14 c. 24039.

Judgment affirmed.

ISAIAH READING v. COHOCTON TOWNSHIP.

Trespass for Damages—Negligence of Supervisors in Maintaining Highways—Liability of Townships.

STATEMENT OF FACTS.

A road at a certain point was but twelve feet wide. On one side was a declivity six feet deep. A guard rail had been maintained at the top of the declivity, until four weeks before the accident about to be de-

scribed, when it was torn down by somebody. Reading was driving a carriage with two horses when a large newspaper dropped from a carriage in advance of him, was lifted to the wind from the ground, opened, its sheets separated. His horses took fright and attempting to turn, threw the vehicle over the embankment. Reading sustained serious injuries. The vehicle was demolished and one of the horses so hurt that it had to be killed, This is trespass for damages for all these injuries and losses against the township.

McCall for Plaintiff.

Storey for Defendant.

OPINION OF THE COURT.

PEPPETS, J.—This is an action against the township for damages sustained as a result of the negligence of the supervisors and it can rightfully be brought against said defendants. The 6th section of the act of 1836 provides, that the public roads shall be effectually opened and constantly kept in repair, and at all seasons shall be kept clear of all impediments to easy and convenient passing and traveling, at the expense of the township, as the law shall direct. For any wilful or wanton failure to discharge these duties the supervisors are personally liable, and the township is responsible in damages to those who suffer injury from their neglect. (5 W. & S. 545).

According to the act of 1836, a suit may be well brought against the supervisors, because the duty of maintaining and repairing roads is thrown upon them. But although the officers may be held personally, yet the township may be held also. The supervisors, who are elected by the inhabitants and answerable to them, are agents of the corporation. And upon this principle of principal and agent the township is liable for any injury caused by the negligence of the supervisors. It was so held in Dean vs. New Milford Township, 5 W. & S. 545.

That the supervisors were negligent in not repairing the guard rail is evident. It is so conceded by the defendant. Sufficient time elapsed to give them notice of the absence of the guard-rail.

The important question in this case is:—Was negligence of defendant's servants the proximate cause of the injury? "To sustain an action for damages for an injury caused by the alleged negligence of another, the injury must be the natural and probable consequence of the negligence; such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer and likely to flow from his act." (177 Pa. 213 and 29 Cyc. 492-3.)

Now this question presents itself. Was it such a consequence as under the circumstances ought to have been foreseen and provided against? Defendant contends that the injury was caused by an extraordinary outside cause concurring with defect in highway, and, therefore, the township is not liable. We cannot agree with him. On the contrary we think that the fright of the horse was ordinary, and to be expected; that his conduct when in fright would be insane was also to be expected. The supervisor knew or ought to have known, that any horse which took fright at that particular point, might easily, and probably would, throw the vehicle over the bank, for the road was only 12 feet wide.

The fact could have been foreseen in this case that, by reason of the absence of a railing, the vehicle of a traveler on the road was exposed to danger, upon the occurrence of almost infinite combinations of circumstances, of being driven or thrown over the bank.

29 Cyc. 495 says, "Where an act is negligent it is not necessary to render it the proximate cause that the person committing it could or might have foreseen the particular consequence or *precise* form of the injury, or the particular manner in which it occurred, if by the exercise of reasonable care it might have been foreseen or anticipated that *some* injury might result."

In 81 Pa. 44, it was held: "If the road is so dangerous, by reason of its proximity to a precipice, or any other cause that common prudence require extra precaution, in order to insure the safety of the travelling public, the municipal authorities are bound to use such precaution." It was said in the case of Lower Macungie Township vs. Merkhoffer, 21 P. F. Smith 276, "a highway must be kept in such repair that even *skittish* animals may be employed without risk or danger on it."

The case of Burrell Township v. Uncapher, 117 Pa. 353, is very similar to this. A horse and wagon were being driven down a hillside road. At the right side of the road coming down the grade was a steep declivity, unguarded by barriers. Arriving at a point near the foot of the hill, the horse suddenly took fright at a steam thresher standing at the roadside, and sprang to the right, partly over the declivity, becoming altogether unmanageable; he made a second plunge and went over the precipice, upturning the wagon, and injuring the persons therein. The township was held liable. The court said that "The immediately producing cause of the accident, in the present case, was the unguarded condition of the roadside at the place where the accident occurred. If that unguarded condition of the roadside was an act of negligence on the part of the defendant, it follows that defendant is responsible. (See also 79 Ia. 204; 25 Ia. 108.)

In view of the foregoing principles of law, the facts applicable, judgment is hereby given for the plaintiff.

OPINION OF SUPERIOR COURT.

There are many cases in Pennsylvania in which the liability of municipalities and townships for injuries occasioned by frightened horses going over unguarded embankments has been asserted. Township v. Merkhoffer, 71 Pa. 276; Township v. Davis, 77 Pa. 317; Hay v. Philadelphia, 81 Pa. 44; Yoders v. Township, 172 Pa. 447; Bitting v. Township, 172 Pa. 213; Davis v. Township, 196 Pa. 273.

In Boone v. Township, 192 Pa. 206, it is held that "it is the duty of the supervisors to anticipate that accidents arising from the fright of horses may result in the ordinary use of a highway for purposes of travel, and if they neglect this duty by failing to erect guard rails at dangerous places, and an accident happens at such a place from the fright of a horse, unmixed with any element of contributory fault on the part of the owner of the horse, the neglect of the supervisors is the proximate cause of the accident and a verdict may be recovered against

the township." This case is followed and approved in Davis v. Township, 196 Pa. 273.

The leading case on the subject is Yoders v. Township, 172 Pa. 447. In this case the doctrine that the township is liable is unequivocally announced and the reasons for holding the township liable clearly stated.

It is true that there are cases in which it has been held to have been the duty of the court to declare as a matter of law that the negligent ommission to provide a guard rail at a point like that in question, although concurring with the fright of the horse was not the proximate cause of the injury. Many of these cases are collected in Card v. Township, 191 Pa. 254. For the most part they were decided upon the ground that it appeared in the presentation of the plaintiff's own case that the accident was produced by an intervening or independent or unrelated cause, the happening of which the defendant could not reasonably be expected to foresee and provide against, as for example, the breaking of traces, (Wilkes v. Township, 183 Pa. 184; Card v. Township, 191 Pa. 254), the giving away of hold-backs (Habecker v. Township, 9 Super. 553), the choking of a horse by too small a collar (Township v. Phillips, 122 Pa. 601), or his fright from an extraordinary cause at a point distant from the point of accident (Schaeffer v. Township, 150 Pa. 145). They are, therefore, not determinative of the present case.

A piece of paper lying in the road is not an unusual incident; and that "when stirred by the wind" it will "startle and sometimes render a horse uncontrollable" has been judicially asserted to be one of the things which the supervisors are bound to foresee (Yoders v. Township).

The liability of the township is not dependent upon the knowledge of the supervisors of the presence upon the highway of the object which caused the fright of the horse. The township may be held liable although the supervisors did not know of and had no opportunity to discover, the presence on the highway of the object which caused the fright. Davis v. Township, 196 Pa. 273. The fact that the object was placed upon the highway by a third person is also immaterial. Davis v. Township, supra, Trout v. Turnpike Road, 216 Pa. 110.

Judgment affirmed.

JONES ESTATE.

Decedent's Estate—Construction of Wills—Distribution of Trust Funds—Rule Governing Payment of Annuities.

STATEMENT OF FACTS.

John Jones devised real and personal property to "X" in trust to pay $8000 per year from the annual profits to his son William and any balance to his son Charles. He directed also that no profits should be paid to Charles until William should have received $8000 for each year following his death. At the death of William he directed that the trust should be continued till William's youngest child became adult and that then one half of the estate should be conveyed to the children. Seven years after the testator's death, William died leaving a son ten years

ald. William had received nothing. The estate had not produced any profits during the seven years and William had received nothing. Immediately after his death it became exceedingly profitable, the net profits of the first year being $45,000. William's son claims the whole of it through his guardian. William died heavily indebted and his administrators claim the fund; Charles claims that after deducting $8000 for the child the balance should go to him.

Miss Long, for William's son.
Marshall, for Administrator.
Landis, for Charles.

OPINION OF THE COURT.

ROOKE, J.—It is a well settled rule, both in Pennsylvania and in other states, that in all cases involving a distribution under a will, the controlling feature is the intention of the testator. Shubart's Estate, 154 Pa. 230; Graham's Executors v. Graham, 66 Pa. 407; Dalrymple's Estate, 13 Superior 789; Ambert's Appeal, 119 Pa. 48; Rogers v. Rogers, 7 Watts 15.

Therefore, we must first look to see what the intention of the testator was in the case at bar. Clearly, we think, the testator intended, that, after William's death, the trust should be kept alive and the annuity paid to his children until the youngest of them should have become adult. Therefore, before we look further into the case, we will direct the trustee to pay to the guardian of William's son, the sum of $8000. He is clearly entitled to this from the profits, as his father would have been had he been alive.

The only remaining question, therefore, is as to the distribution of the remainder of the fund, i. e., $37,000.

The following question is now raised for our determination: Can the excess income of the fund for any one year be applied to the payment of a deficit in the annuities of a preceding year or years?

The rule seems to be, in Pennsylvania at least, that where arrears of the annuity arise, by reason of a deficit in any of the years, the income of subsequent years cannot be applied to the payment of such arrears, where the will contains no directions to that effect and in fact negatives such intention by a disposition of the excess. Brewster's Appeal, 7 Sadler, 604; Sells Estate, 4 W. N. C. 14; Contra, Rudolph's Appeal, 10 Pa. 34.

The case of Rudolph's Appeal cited above as contrary to the doctrine above stated, is criticized in the case of Sells Estate, 4 W. N. C. 14. The court in that case said: "It will be noticed that the case of Foster v. Smith, so much relied upon by the court in deciding Rudolph's Appeal, was subsequently reversed in a later English case." Foster v. Smith 2 Yound & Colyer, 193 (reversed in 1 Philip's Chancery [Eng.] 234).

The court in the above case then says: "It would seem therefore that the weight of English authority is in favor of the construction contended for by Mr. Mitchell. So far as the case rested on Foster against Smith, it fell with the reversal of that case. It will also be noticed that Rudolph's Appeal is not in point in that there was a provision in the will in Rudolph's Appeal that the annuity should be fully paid whereas there

is no such provision in the case at bar. Furthermore, the instrument interpreted in Rudolph's Appeal was a deed of trust and would be construed in favor of the grantee whereas here the instrument is a will and will be construed according to the intention of the testator."

The quotations from the above case, therefore, seem to indicate that arrearages cannot be collected from the income of subsequent years unless there is an express direction in the will to that effect.

Was there such a direction in the will under our consideration?

We think that there was not. The only clause in the will which could be construed as such is that, "No profits should be paid to Charles until William should have received $8000 for each year following his death."

The intention of the testator was, we think, to provide for both his son William and his son Charles. He expressly directs that the trust shall not be continued for William's benefit after his death, but directs that it shall be continued for the benefit of William's children.

We cannot conceive that any such situation as is here presented occurred to the testator when he made the will. He probably thought that the fund would yield a sufficient yearly income to pay the sum of $8000 and still leave something remaining for Charles. It is clear that he intended that Charles should receive nothing in case the yearly income in any one year was not sufficient to pay William's annuity but further than this, we think, the above mentioned clause cannot be applied.

The gift of the residue to Charles is conclusive on this construction. 4 W. N. C. 14; Stellfox vs. Snyden, 1 Johns Chancery [Eng.] 234.

We, therefore, direct the trustee to pay, first: $8000 to the guardian of William's son, and second: the remainder, $37,000, to Charles.

OPINION OF SUPERIOR COURT.

This case has been argued with considerable earnestness by all the parties concerned, each of whom has called our attention to adjudicated cases in support of their respective contentions. As the question involved is one which is dependent upon the construction to be given to the language of the testator as indicative of his intent, it was to be expected that we should find little that is directly in point in such adjudications, and we indeed have found little that has more than a helpful suggestiveness.

In the following cases it was held that the annuities for each year were charged upon the income of that year and not upon the income generally. Appeal of Brewster. 12 Atl. 470. Estate of Pierce, 56 Wis. 580; Casamajor v. Pearson, 8 C. & F. 69.

In New York the right to recover deferred payments has been recognized but in all the New York cases the wills expressly directed the annuities to be paid out of the income, without restriction and without the word "annual" and the decisions rested upon the absence of any direction that they should be paid out of each year's income. Stewart v. Chambers, 2 Sanf. 382; Matter of Chauncey, 119 N. Y., 119 N. Y. 77.

The present case differs from the New York cases by reason of the fact that the annuity was directed to be paid out of the "annual profits" and from the other cases by reason of the fact that the will contained

the provision that "no profits should be paid to Charles until William should have received $8,000 for each year following" the testator's death.

These words were indicative of an intention on the part of the testator that the income of succeeding years should be applicable to the payment of a previous deficiency. The testator had already stated that Charles was to receive merely the balance remaining after William had received his $8000 from the annual profits and, unless the subsequent direction is interpreted as directing that deficiencies should be paid out of accruing income in succeeding years, it is meaningless and useless.

It is a well settled rule that a will should be so construed as to give effect to every word and part thereof if such construction is possible without doing violence to the obvious intention of the testator. 30 A. & E. 664.

In the present case the interpretation which we have given to the will gives effect to all of its parts and certainly is not inconsistent with any clearly expressed intention of the testator.

The $37,000 should have been awarded to William.

PHILLIPS v. ROHRER.

Sale of Lands—Breach of Condition—Measure of Damages.

O'Hara for Plaintiff.

Rogers for Defendant.

OPINION OF THE COURT.

DORN, J.—Rohrer owned two adjacent houses. He offered to sell one of them to Phillips for $15,000. Phillips agreed to take it at that price if Rohrer would remove, within six months, a privy which stood in the yard of the other house, otherwise he would pay but $12,000 for it. Rohrer agreed to remove the privy and the contract was consummated. A year went by but Rohrer did not perform his promise. This is an action for $3,000 damages.

It is a well established principle of the courts in construing contracts to carry out as far as is possible the intention of the parties by the agreements into which they have entered. With this principle in view the court proceeds to ascertain what was the intention of the parties in this case. The existence of this intent is shown by the fact that different prices were stipulated for the removal of, or the failure to remove the privy in question. Reason would seem to dictate that it was an alternative offer,—either to receive $15,000 if the grantor perform the condition or $12,000 if he did not perform the condition. But he agreed to perform the condition and in reliance upon this agreement the plaintiff paid him $15,000. The removal of the privy was a consideration for the extra $3,000, and there having been a failure of the consideration—and the money being paid,—there is no obstacle in the way of its recovery, for it is a well settled principle requiring no authority to support it, that whenever there is failure of consideration the money parted with may be recovered. If a person receives a sum of money for the performance of an

act, and he performs the act, he is entitled to the money; but if he receives the money for the performance of that act and fails to perform it, then he is not entitled to the money, and must return that which he unrightfully retains in his possession. 17 Wend (N. P.) 447; 22 Wend. (N. Y.) 201; 11 Mass. 76; 48 Pa. 450. 22 Wend (N. Y.) 163; 4 Pick 179; 53 N. Y. 394,

The defendant contends that $3,000 is too much damages for the breach of a contract which would have required a considerably less sum to perform. The court cannot say what is too much or too little damage caused by breach of this contract, for the damages are not susceptible of definite admeasurement. The existence of the privy might reasonably have depreciated the value of the plaintiff's property in a thickly settled community, or it might not have had any effect upon the property at all if the property was located in a rural district. Again, the proximity of the privy to a dwelling house would be considered a nuisance in one case where it would not in another. This tends to show the difficulty in measuring the damages in such a case. Here, however, no admeasurement is necessary, for the removal of the privy was worth $3,000 to the plaintiff, as is shown by the fact that he was willing to pay that much more in case it was removed. Clark says in his book on Contracts: "The contract may be entire or severable, according to the circumstances of each particular case," and "a contract is said to be divisible when it is one in which the promise of one or both parties admits of a more or less complete performance, and the damages sustained by an incomplete performance or partial breach of which may be apportioned according to the the extent of failure." The extent of failure here was clearly $3,000. Upon the question of construction of contracts, Lord Ellenborough has remarked that it depended "not on any formal arrangement of words, but on the reason and sense of the thing, as it is to be collected from the whole contract and the reason and sense of the thing of this case has led this court to the conclusion it has reached.

The defendant having received $3,000 in consideration of the performance of an act which he has failed to perform during a specified time, judgment is hereby entered against him.

OPINION OF SUPREME COURT.

Rohrer offered to sell the house for $15,000. Phillips made an alternative counter-offer; to take the house and pay $15,000 for it, if Rohrer would agree to remove the privy or otherwise to pay $12,000 for it. The first alternative of this counter-offer was accepted by Rohrer. Thus a contract was made. The deed was delivered; and the purchase money, $15,000 paid. The six months in which the privy was to be removed have elapsed and the privy is still where it was. This is not an action to rescind the contract, but to obtain damages for the non performance by Rohrer of his promise.

The contract is enforceable. It is *not* a contract for an interest in land, but a contract for the doing by Rohrer, upon his land, of an act, viz., the demolition of the offending structure.

The only question is that of the measure of damages. The learned court below has assumed that $3,000 is the amount, because Phillips was

willing to pay only $3,000 less than he did pay, if the privy was to remain. But Rohrer did not agree with him that the presence of the structure would detract from the value of the house to the extent of $3000. The one-sided estimate of Phillips cannot be adopted as the proper measure.

The true question is: to what extent would the continuance of the privy lessen the market value of the house. Would it lessen it by $1,000, or $2,000, or $4,000? Phillips may be a peculiarly sensitive and fastidious man, in whose mind the premises are worth $3,000 less than they would be, were the object taken away. But the average man may have no such repugnance as would reduce the selling price by more than $500, or $1,000, or $1,500.

The question, by what amount is the market value of the premises reduced by the permanence of the privy ought to have been submitted to the jury. Immel v. Herb, 43 Superior, 111.

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

HOBBS v. JASPER.

False Imprisonment—Contributory Negligence.

STATEMENT OF FACTS.

Hobbs was calling at the house of Jasper on June 2, 1910, rather late in the evening; Jasper explained that he purposed taking the late train for New York and excused himself to pack his grip, asking Hobbs to wait till he could attend to this. Hobbs got tired and sleepy and lay down and fell asleep. Then the lamp went out. Jasper was slow in packing and when he finished, he found he had but a few minutes to catch his train. Forgetting about Hobbs, he ran downstairs, locked the door and caught his train. Later on reflection he began to worry about Hobbs, particularly after noticing in the paper the fact that Hobbs had disappeared. Upon investigation Hobbs was found in a starving condition in Jasper's home.

Saul for Plaintiff.

Stugart for Defendant.

OPINION OF THE COURT.

STOREY, J.—Action for false imprisonment. According to Cooley, page 174, "False imprisonment is an unlawful restraint upon a man's freedom of locomotion." Pollock, page 188, defines it to be, "The infliction of any kind of detention and restraint not authorized by law." From the definitions hereinbefore stated and the cases hereafter cited, the intention of the party charged with the offense seems to be a principal feature of this tort. In all cases reviewed by the Court, the party charged with the offense knew of its commission, when the false imprisonment was completed. It seems that false imprisonment is an affirmative tort and not one brought about by a non-feasance.

In Spoor v. Spooner, 12 Metcalf, 281, we find a case analogous to case at bar. The plaintiff, a constable of City of Boston, went on board ship, of which defendant was master, with a civil process for purpose of arresting the steward of said ship, and was carried to sea. Ship was on point of sailing when plaintiff went on board and the sails were set. Upon going on board, plaintiff immediately found and arrested the steward, but remained standing with him on board ten (10) or twelve (12) minutes, without attempting to leave the ship, notice having been given for all persons to leave the ship. The Court held: "An action of trespass for false imprisonment cannot be maintained against the master of a vessel, for carrying to sea an officer who went on board to arrest a person, just as the vessel was leaving the wharf, if plaintiff did not use diligence to get on shore, after receiving notice that all persons not belonging on board must leave her." "A person cannot be imprisoned who voluntarily places himself in a situation where another may lawfully do what results in restraining his liberty." In case at bar, the plaintiff voluntarily placed himself in a position by going to sleep, where the defendant could lawfully imprison him. A man who is calling on another at the latter's house, has no right to fall asleep and if he does so he is guilty of contributory negligence. And even if the defendant was also guilty of negligence, of which we think he was not, the plaintiff cannot recover. "It is a settled principle with us that a plaintiff cannot recover damages for an injury that results from a concurrence of his own negligence with that of the defendant." Pittsburg, Ft. Wayne & Chicago R. R. Co. v. Evans, 53 Pa. 250.

Plaintiff contends that as he was lawfully at the house of defendant, that defendant was guilty of the false imprisonment. As to this contention the Court in the case Spoor v. Spooner, where plaintiff contending that plaintiff being lawfully on board, the carrying away of him was a trespass, although he had not used due diligence in getting on shore, held "As he went on board for a special purpose, and it being proved that plaintiff was guilty of negligence in regard to it, when he had sufficient time to leave the ship, after performing his duty, it follows no fault attached to defendant and he cannot be charged as a trespasser, in sailing with plaintiff on board," and we think that such is the law.

"Where there was testimony that defendant obtained the prosecutor's goods under pretense of a contract, and through a lie, even though the defendant was not guilty of obtaining goods under false pretences, or of embezzlement, this is such probable cause for his prosecution, as will defeat a recovery in an action of trespass by him, against the prosecutor, and the justice of the peace who issued the warrants upon which he was arrested." Neal v. Hart, 115 Pa., 347. "He who has probable cause, or in other words reasonable grounds for belief of guilt, stands acquitted of liability." Trovis v. Smith, 1 Barr. 234. "General rule is that malice will be inferred from the want of probable cause so far as to sustain the action." McCarthy v. DeArmit, 99 Pa. 63. These cases seem to infer that reasonable cause is a defense. We believe that the defendant had reasonable cause, at he was in a hurry to catch his train, and, upon coming downstairs found the light out, he naturally would believe that his guest had departed.

In Burdick's Law of Torts, 455, we find, "Towards those expressly or impliedly invited upon one's premises, for mutual advantage, the inviter owes the duty of ordinary care." And in Bixler v. McCready, 54 Conn. 172, "Reasonable care is proportioned to the danger to be guarded against." The Court thinks that the defendant used ordinary and reasonable care in present litigation, as the defendand had no knowledge that plaintiff was in his house and the only danger to be guarded against was that of leaving his house open as a prey for thieves.

We can find no Pennsylvania case which deals with involuntary imprisonment, and from the facts and dicta already stated and cited, we must hold that plaintiff cannot recover.

Judgment for defendent.

OPINION OF SUPERIOR COURT.

A man has not a right to move as he will. He is lame, his legs and arms are broken, he is paralytic. Such a man has not the muscular and nervous and osseous power, if the expression be allowed, to move. But no right has been invaded. In such a case, however, he may have a right not to be moved by others whither he refuses his consent to go. Cf. Ollet v. R. R. Co. 201 Pa. 361.

He has a right not to be prevented, except under special circumstances, from moving as he will, by the purposeful act of another. If A opposes force to B so as to prevent B's locomotion, he generally commits a wrong to B. If A prevents B's locomotion except within a certain area, e. g. a field, a house, a room, he violates B's right. He may violate this right, not merely by opposing his own superior corporeal force to B's but by offering that of external matter. Should he thrust B into a cell, and close the door, so that B could not walk beyond it, except by overcoming the resistance of the walls, or of the door, he would imprison B. Cf. Hildebrand v. McCrum, 101 Ind. 61. So, if, B being within a room, e. g. a bank, on lawful business, about the usual time for closing, the door is locked by the teller, who is aware of his presence, and he is detained for a half hour, he is imprisoned. Woodward v. Washburn, 3 Den. 369. Probably, if, being on a boat at a wharf, the boat is pushed off without giving him an opportunity to step upon the wharf, he will be imprisoned within the boat although he is not prevented except by his fear of drowning, from stepping from it into the surrounding water. Spoor v. Spooner, 12 Metc. 281. Hobbs was clearly imprisoned, and by the act of Jasper. Being in Jasper's home, he had a right not to be prevented with exceptions from leaving it. He was prevented by the locking of the door and of all other exits.

Did the circumstances attending this prevention take from it any tortious character? The necessity for haste, in leaving the house, did not justify the conscious incarceration of Hobbs. But, the incarceration was not known to be occurring at the time. The haste, the preoccupation of the mind of Jasper, or some other cause, had caused him to forget the presence of Hobbs. Must the imprisonment be intended in order to make it "false"? The physical mischief to Hobbs is just as great, from an unintended, as from an intended, imprisonment. The circumstances imposed on Jasper, the duty of not forgetting his presence, un-

less that obliviscence was induced by the conduct of Hobbs himself. A man cannot escape the duty of compensating another for an injurious act, by alleging that he had less than the normal memory, attention, imagination. Insane people, infants, are liable for torts of certain kinds. Their mental defects do not discharge them. Jasper was "bound" to remember, (must act as he would act, if he remembered, must be treated by the courts as he would be treated if he had remembered), that he had a guest in his house, who could not be properly immured therein by him.

But a man may induce action so as to lose the right to complain of it. Did the conduct of Hobbs unduly induce Jasper's oblivion of the fact that he had so recently been in the house, and that he was probably still there? The learned court below thinks that it did. It is possibly unusual for a guest, advised that the host must prepare quickly for a journey, and, left by the host, in order that he may thus prepare, to remain alone in the house. If he gets tired of waiting he probably leaves the house. He probably does not remain, after the lamp goes out. He probably does not lie down and fall asleep. Had he been awake, Hobbs would likely have heard the footsteps of Jasper to the door, the closing and locking of the door. He would have had an opportunity to arrest the departing Jasper. We think that the unusual conduct of Hobbs being a possible co-operating cause of Jasper's want of recollection of his presence, it was competent for the tribunal, the judge himself, or the jury, to determine whether it was in fact such a cause. If it was, if Hobbs' conduct being usual and normal, the forgetfulness or the imprisonment would not have occurred, there was no wrong done to Hobbs. The imprisonment was not a "false" imprisonment.

Normally, the causal influence of Hobbs' conduct upon that of Jasper should be determined by the jury. The parties however, seem to have conceded that it was a matter for the decision of the court. We cannot say therefore, that an error was committed, by the court, when it decided the question instead of referring it to a jury.

Affirmed.

COMMONWEALTH v. WILLIAM HOLPINS.

Seduction—Belief that Seducee is of Age, as Defense.

STATEMENT OF FACTS.

Holpins is indicted for the crime of seducing Mary Adams. He offered to prove that she had the appearance of a woman of 25 years of age, had recently come into the neighborhood, and had, uniformally stated her age to be 24 years. Defence was that he believed her to be 24 years old. The evidence was excluded and he was found guilty. Motion for new trial.

Dickson for Plaintiff.

Edwards for Defendant.

OPINION OF COURT.

WARRINGTON, J.—Neither of the learned counsel seems to be able to support his argument by a decision of the Pennsylvania or any

other court. Although after a diligent search, we have been unable to find any Pennsylvania decision, we have found numerons decisions of different courts of U. S. and England in direct point with the case at bar.

The defendant is being tried for perpetrating an act which is not only *malum prohibitum* but repugnant to the public morals of the state and community in which he lives. In order to prevent the perpetration of such crimes and immoralities, the laws of this commonwealth must be strictly construed, and the violators of said laws punished.

The act of March 31, 1860, P. & L. 394, specifically says that "The seduction of *any* female of good repute, under twenty-one years of age, with illicit connection, under promise of marriage, is hereby declared to be a misdemeanor."

We are unable to so construe this statute as to support the argument offered by the defence, that the seducer must know or have good reason to believe that the girl is under twenty-one years of age. We are of the opinion, that a person, committing such acts, as so directly tend to corrupt the public morals, should do so at his own peril, and if he breaks a law of the state he should be punished. We do not arrive at opinion through prejudice nor without precedent.

In Donley v. State, 71 S. W. 598, it was held that in an indictment for rape, hearsay evidence is admissible to prove age of girl, when based upon information derived from deceased relatives, of the party in question, or from family histories; but unless it is shown to come from one or the other of these sources, it should be rejected." 30 S. W. 479; 55 S. W. 61.

In the case at bar the information was received from prosecutrix, who is alive and capable of testifying, therefore, evidence cannot be admitted on those grounds. In 81 Ark. 16 held that "Evidence that prosecutrix had stated that she was over sixteen years of age was inadmissible."

In 8 Iowa 447, Wright, C. J., said, "In the case at bar, however, if defendant enticed a female away, for the purpose of defilement or prostitution, there existed a criminal or wrongful intent, even though she was over fifteen; therefore the testimony offered was irrelevant, for the only effect of it would have been to show, that he intended one wrong and by mistake committed another. And though the wrong intended was even not indictable, the defendant would still be liable if the wrong done is so." Bishops Cr. Law secs. 247, 249, 252, 254, (Note 4). In this last section the rule is briefly stated thus: "The wrong intended but not done and the wrong done but not intended, coalesce, and together constitute the same offense, not always in the same degree, as if the prisoner had intended the thing unintentionally done."

Where a statute prohibits under certain circumstances or conditions an act in itself immoral, it has been repeatedly held that the doer is guilty, if the circumstances or conditions exist notwithstanding that he committed the act in the belief that they did not exist. Knowledge of age is immaterial. 143 Mass. 32; 31 Am. Rep. 236; 25 Neb. 38; 9 Mich. 150. 83 N. C. 608.

McFarlane, J., 109 Mo. 654: "His intent to violate the laws of

morality and the good order of society, though with consent of the girl and though in a case where he supposes he shall escape punishment satisfies the demands of the law." Therefore testimony that he believed girl to be of certain age was rightly rejected. 165 Mass. 66, held no error for judge to instruct the jury that "unless defendant knew or had reasonable cause to know that said Emma was under 16 years of age, he cannot be convicted, although the jury should find that he did the acts, claimed by said Emma to have been done by him." 30 L. R. A. 734, Knowlton, J.: "It is a familiar rule that if one commits a crime intentionally, he is responsible criminally for the consequences of his act, if the offence proves to be different from that which he intended." Reg v. Prime L: R. 2 C. C. 154, 175.

Defendant may show that the female is over the statutory age, but he cannot give her declaration to another, nor state how old he took her to be. 33 Cyc. 1472, 3 Pennew (Del.) 19, 11 Mo. 271.

Defendant is indicted under statute making it a crime to have carnal knowledge of a girl, unmarried, and under 21 years of age. Therefore after a careful review of the decisions which have been handed down by the different courts of the country, we are of the opinion, that it is no excuse that he (defendant) honestly believed the girl to be over twenty-one years of age, since there existed a criminal or wrongful intent notwithstanding such belief. 69 Col. 315; 31 Pac. 107; 115 Mo. 480, 18 So. 117. In case at bar defendant knew that he was breaking the law. His intended crime was fornication at least.

There was no error by court below in excluding evidence. Motion for new trial refused.

OPINION OF SUPERIOR COURT.

The conclusion reached by the court below at the trial, and upon the motion for a new trial is correct. The defendant knew that his act was criminal. It was *malum in se*. He must be held to have taken the risk that the female was below 21 years of age. The statute intends to punish sexual commerce with one who in fact is a female under 21, procured by means of a promise of marriage. Cf. State v. Johnson, 115 Mo. 480; Lawrence v. Commonwealth, 30 Gratt. 845; State v. Ruhl, 8 Ia. 449. An able discussion of the subject may be found in Brown v. State, 74 Atl. 836 (Del.) where the same result is reached, as by the learned court below.

Judgment affimed.

JONES v. SMITH.

Bill to Set Aside Deed, in Fraud of Husband.

STATEMENT OF FACTS.

John Jones was engaged to Mary Smith. They were to be married January 12, 1909. On January 11, 1909, Mary Smith made a voluntary conveyance of all her realty to her brother, John Smith. On January 13, one day after the wedding and while his wife was still living, Jones

discovered that his wife had conveyed her realty and immediately filed a bill in equity to have the deed cancelled.

Jackson for Plaintiff.

Dipple for Defendant.

OPINION OF THE COURT.

GILBERT, J.—The question raised here is purely a legal one. There is no doubt that it is well settled that when a woman, in anticipation of an intended marriage, without the knowledge of her intended husband, executes a transfer or conveyance of her property in such a way as to deprive him of all benefit in it, and her control over it, such transactions will be declared to be a legal fraud upon him.

Duncan's Appeal, 43 Pa. 67, was an instance of that character. There a married woman, two days before her marriage, executed a deed of trust, without the knowledge of her intended husband, conveying her property to her half-brothers in trust, to pay the income to her during life, and to her heirs after death, and in case of her death without issue, then to her half brothers. After marriage the husband filed a bill to annul the deed. A decree to that effect was made in lower court, which Supreme Court affirmed.

Chief Justice said: "Common candor forbids that so important a change in his intended wife's circumstances, and her power over her estate should be made without his consent, and equity sternly condemns it as a fraud upon his just expectations. This principle of equity has stood the test of experience too long to be open for dispute now."

Thus in the light of previous decisions, and the general rules of law in Pennsylvania we hereby grant the prayer of the bill.

OPINION OF SUPERIOR COURT.

The courts began long ago, to take a very sordid view of marriage, because possibly, that was the view which prevailed among the people at the time. The husband, they thought, sought the wife for the property with which she would endow him. If then, she alienated this property without his knowledge, shortly before the marriage, she was said to commit a fraud upon him, such a fraud as required the conveyance, when not to a *bona fide* purchaser for value, to be set aside. A deed to a trustee, e. g., would thus be set aside; Duncan's Appeal, 43 Pa. 67; Belt v. Ferguson, 3 Gr. 289. Indeed, even when the man did not know that the woman whom he intended to marry, owned any thing, a conveyance by her, in the earlier part of the day on which the marriage occurred, was deemed fraudulent as to him, the grantee not being a purchaser for value; Robinson v. Buck, 71 Pa. 386.

Strange to say, it seems doubtful whether a wife could set aside a conveyance made by her husband, just before the marriage, at least, if the conveyance was of personal property. Potter v. Safe Deposit Co., 199 Pa. 366, although a conveyance was set aside in Baird v. Stearns, 15 Phila. 339.

Should the courts purposely and finally allow a man to disappoint the woman, but not the woman the man, by a pre-nuptial conveyance, there will be justification for the agitation of the suffragettes, and the more

implacable and persistent it becomes, the better. It would be a shame and disgrace to make the distinction which 199 Pa. 366, may be suspected to foreshadow.

Affirmed.

BOOK REVIEWS.

Cases on the Law of Trusts, by THADDEUS DAVIS KENNESON, West Publishing Company, St. Paul, Minn, 1911.

The American Case Book Series, of which the book whose title we have given, is a member, promises to be most useful to students of law and lawyers. The quality of most of the books may be divined from the ability and reputation of many of their compilers, who are leaders among the law-teaching profession. The book before us contains nearly 400 cases, classified under the nature and requisites of trusts; the nature of the cestui que trust's interest; transfer of the respective interests of trustee and cestui que trust; extinguishment of a trust; the duties of a trustee; constructive trusts and equitable liens; tracing property wrongfully appropriated into its substitute; constructive trusts and the statute of limitations. As was to be expected a large number of the cases given are English, but cases from many of the American jurisdictions also appear. The cases selected are well calculated to give the careful reader a very good understanding of the fundamental principles of the law of trusts. The compiler, Prof. Kenneson, is professor of law in the University of New York.

OFFICIAL POSITIONS OF LAW--DICKINSONIANS

The late elections have put a considerable number of Dickinson Law men into office.

Frederick B. Moser, 1898, has been elected judge of the courts of Northumberland County.

The following have been elected District Attorneys:

Charles C. Greer, of Cambria County.
Frank H. Strouss, of Northumberland County.
Jasper Alexander, of Cumberland County.
Clair N. Graybill, of Juniata County.
Thomas B. Wilson, of McKean County.
Samuel A. Lewis, of Frederick County, Md.
Roscoe Wright, of Washington State (to a third term).
Archibald M. Hoagland, of Lycoming County.
Marion Patterson, of Blair County.

The following are now in the office of District Attorney or have completed their terms:

John M. Rhey, Cumberland County.
J. Mede Lininger, Butler County.
Arthur McDuvall, McKean County.
Albert S. Heck, Potter County.
W. S. Clark, Warren County.
J. R. Henninger, Butler County.
James C. Houser, Mifflin County.
Jesse C. Long, Jefferson County.
D. Edward Long, Chambersburg.
Samuel M. Bushman, New Mexico.
Arthur Rupley, Cumberland County.
Thomas Vale, Cumberland County.
W. Alfred Valentine, Luzerne County.

The following are or have been members of one or the other branch of the State Legislature.

Lorrie R. Holcomb, Luzerne County.
Samuel W. Kirk, Fulton County.
Frank P. Barnhart, Cambria County.
Alvin Sherbine, Cambria County.
Claude L. Reno, Lehigh County.
Aloysius C. McIntire, W. Virginia.

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