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QUALIFYING A WITNESS BY CROSS-EXAMINATION

The 6th Section of the Act of May 23d, 1887, P. L. 160, enacts that "Any person who is incompetent, under clause (e) of Section Five by reason of interest, may nevertheless be called to testify against his interest, and in that event, he shall become a fully competent witness for either party." The 7th section of the same Act directs that "In any civil proceeding, whether or not it be brought or defended by a person representing the interests of a deceased or lunatic assignor of any thing or contract in action, a party to the record or a person for whose immediate benefit such proceeding is prosecuted or defended, or any other person whose interest is adverse to the party calling him as a witness, may be compelled by the adverse party to testify as if under cross-examination,[1] subject to the rules of evidence applicable to witnesses under cross-examination, and the adverse party calling such witnesses shall not be concluded by his testimony, but such person so cross-examined shall become thereby a fully competent witness for the other party as to all relevant matters, whether or not these matters were touched upon in his cross-examination; and also where one of several plaintiffs or defendants, or the person for whose immediate benefit such proceeding is prosecuted or defended, or such other person having an adverse interest is cross-examined under this section, his co-plaintiffs or co-defendants

[1]The Act of March 27th, 1865, P. L. 38, authorized any party in a civil proceeding to compel any adverse party or any person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted or defended to testify, as a witness in his behalf. The Act of April 15th, 1869, P. L. 30, contained a similar provision. Neither the Act of 1865 nor that of 1869 enacted that the cross-examined party should become a fully competent witness.

shall thereby become fully competent witnesses on their own behalf as to all relevant matters, whether or not those matters were touched upon in such cross-examination.

THE STATUTORY EFFECT

By calling an incompetent person under clause (e) of Section Five, to testify against his interest, he is made by Section 6, a "fully competent witness for either party," that is, for the party with whose interest his own is coincident. For the party calling him, he must of course already have been competent. He is made competent by the preceding phrase. By Section Seven, any person whose interest is adverse to any other person, may by such person be compelled to testify as if under cross-examination. The party so cross-examined shall become thereby a fully competent witness for the party other than the one who calls him, as to all relevant matters, even such as have not been touched on in the cross-examination.

THE PROCEEDING

The rule that compulsory testifying by a witness by one party qualifies him to testify for the other party, is applicable in any civil proceeding; whether the interest of a decedent or of a lunatic is represented by one of the parties or not. It is applicable, e. g., in assumpsit,[1] in ejectment,[2] under a bill in equity for an account,[3] in an application to open a judgment, the plaintiff being dead.[4] It is frequently invoked in the distribution of the estates of the dead, in the Orphans' Court, by or against a creditor or other claimant,[5] or in controversies over the accounts of executors or administrators.[6] A husband filing exceptions to the account

[1]The Scrantonian v. Brown, 36 Super. 170; Boyd v. Conshohocken Mills, 149 Pa. 363; Danley v. Danley, 179 Pa. 170.

[2]Knauff v. Fryer, 23 Mont. 110.

[3]Watkins v. Hughes, 206 Pa. 526.

[4]Salsberg v. Kopcha, 10 Kulp 410.

[5]Clad's Estate, 214 Pa. 141; Hambleton's Estate, 166 Pa. 500; Davenport's Estate, 4 Kulp 231; Smith's Estate, 22 Lanc. 137; Markey's Estate, 8 York, 95.

[6]Corson's Estate, 136 Pa. 160; Shadle's Estate. No. 1, 30 Super. 151; Yeager's Estate, 31 Super. 202; Mothes' Estate, 29 Super. 464; Bracken's Estate, 15 Dist. 71; DeSilver's Estate, 32 Super. 174; Stockham's Estate, 6 Dist. 196; Bierly's Estate, 81½ 414; White's Estate, 2 Dist. 808; Weyant's Estate, 11 Dist. 177; Belcher's Estate, 51 Pitts. 174; Markey's Estate, 8 York 95.

of the administrator of his wife, exceptions to his right to do so, on the alleged ground that he had deserted his wife, were filed. He could be made competent to testify that he had not deserted his wife, by his being called by the persons who contested his right, and compelled to testify.[1]

THE PRINCIPLE AT COMMON LAW

While at common law, one party to a suit could not compel his antagonist to testify, he might call him, and if he yielded and testified he became fully competent for himself. Indeed, by calling any person, party or not, the party calling him was said to accredit him, and so to warrant his testimony for the other party.[2] If he was interested in favor of the other party, his calling him was a certificate that he could be expected to speak the truth, even though it contravened his interest. "By calling him up and examining him generally as his witness," said Sargeant, "the plaintiff accredited him as competent and credible, and was afterwards estopped from averring the contrary." The plaintiff called one of the defendants. The defendants then prepared to examine him about other matters, and the Court erroneously excluded his testimony; Gibson, C. J., remarking that the witness' interest raised a presumption unfavorable to his credibility, asks "but did not the plaintiff rebut it when he produced him as a witness worthy of credit and had the benefit of his testimony? Or, did he assert no more 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 against him, will be honest enough to declare no more than the truth in his own favor. It would give a party an unjust advantage to let him pick out particular parts of a witness' testimony and reject the rest, but the matter does not rest on principle alone; for it is a familiar rule that a party cannot discredit his own witness or show his incom-

[1]Brown's Estate, 36 C. C. 13.

[2]Stockton v. Demuth, 7 W. 39. The witness was first called by the plaintiff. When later the defendant called him, the objection was made that he was interested, being special bail in the suit. The Act of 1887, so far as it make a witness generally competent, who has been called for cross-examination, is simply declaratory of the common law Stockham's Estate, 6 Dist. 196.

petency."[1] Independently of legislation, then, a witness whether party[2] or not[3] was made competent generally to testify, by being called by the adversary party; that is, the party against whom he *prima facie* might be expected and was prepared to testify. The provision of the Act of May 23d, 1887, that the calling of the adverse party or witness qualifies him to be a witness for himself, when a party, or for the person with whose interest his own is consonant, is, as says Penrose, J., "simply an extension of a well settled doctrine of the common law."[4]

ADVERSE PARTY'S COMPELLING TO TESTIFY

The Act of 1887 says that a person may be "compelled by the adverse party to testify as if under cross-examination, subject to the rules of evidence applicable to witnesses under cross-examination," and the "person so cross-examined shall become thereby a fully competent witness for the other party," etc. One of the rules in Pennsylvania applicable to cross-examination is, that it must not transcend the scope of the examination in chief, except with respect to matters affecting the bias or other qualities of the witness which tend to impair his credibility. This rule is not capable of being observed when, e. g., a plaintiff calls a defendant or other hostile person before such defendant or person has been called by himself or by the party towards whom he is favorable. A plaintiff may call a defendant,[5] a defendant may call a plaintiff who has not testified,[6] either party may call a person who would not be competent, because of interest, to testify, and who therefore has not testified for the opposite party, and so make him competent thus to testify. One of the characteristics of a cross-examination is that the examiner may use leading questions. This privilege attaches to the so-called cross-examination (which has not been preceded by an examination) of the Act of

[1]Floyd v. Bovard, 6 W. & S. 75; Turner v. Watterson, 4 W. & S. 171.

[2]Meredith v. Thomas, 4 Kulp. 505; Seip v. Storch, 52 Pa. 210; Bennett v. Williams, 57 Pa. 404; Forrester v. Kline, 64 Pa. 29.

[3]Turner v. Watterson, 4 W. & S. 171.

[4]Weyant's Estate, 11 Dist. 177.

[5]Watkins v. Hughes, 206 Pa. 526.

[6]Boyd v. Conshohocken Mills, 149 Pa. 363; Brubaker V. Taylor, 76 Pa. 83; Danley v. Danley, 179 Pa. 170.

1887, and of its predecessors, the Act of April 15th, 1869, P. L. 30, and the Act of March 27th, 1865. Of a plaintiff thus called, Sharswood, J., remarked, "It is evident that she was to be considered in all respects as if originally offered and examined as a witness in her own behalf." Defendant had "a right to examine her as if under cross-examination—put to her leading questions—and draw from her any facts or admissions which would corroborate their own case or weaken hers."[1] Calling in the Orphans' Court the claimant against the estate of a dead man for cross-examination concerning matters prior to the death of the debtor makes him competent for himself as to his transactions with the decedent.[2] Those who wished to surcharge the accountant with certain bonds which he alleged the decedent had given him, called him for cross-examination regarding affairs prior to the death of the deceased. He thus became fully competent.[3] Also, in the Common Pleas, if one party represents the interest of a dead man, his calling the opposite party as to matters prior to death will qualify him fully to testify.[4]

CROSS-EXAMINATION IN THE STRICT SENSE MAY QUALIFY

Not only may one party call for cross-examination an adverse party or witness who has not already testified, and so qualify him generally. When such adverse party or witness being competent as to some matters, and incompetent as to other matters, is called by the party to whom he is favorable to testify concerning matters of the former class, he may, in the strict sense, be cross-examined concerning those matters without affecting his competency as respects the matters of the latter class. But the cross-examination may be made to extend to matters relating to the latter class. When this is done, the witness must be regarded as if he had been called as for this cross-examination, and the effect will be that the incompetency of the witness with regard to all matters of this class will be abrogated. An illustration is furnished by

[1]Brubaker v. Taylor, 76 Pa. 83.

[2]Smith's Estate, 22 Lanc. 137; Root's Estate, 11 Lanc. 225; Corson's Estate, 137 Pa. 160.

[3]Stockham's Estate, 6 Dist. 196; White's Estate, 2 Dist. 808; Eichhorn's Estate, 7 C. C. 433; 24 W. N. 364.

[4]Watkins v. Hughes, 206 Pa. 526; Danley v. Danley, 179 Pa. 170.

Hambleton's Estate.[1] A claimed compensation from the estate of her deceased father-in-law for the expenses of the funeral and for board furnished him prior to his death. With respect to the latter, her husband, B, was incompetent, but he was competent with respect to the former. He was called by her attorney to testify, and did testify, concerning the funeral expenses. He could have been legitimately cross-examined upon the same subject, without qualifying him to testify in respect to ante-mortem matters. The counsel for the estate, however, intentionally elicited from him, by his cross-examination, the statement that he had done business for his father after the latter came to live with him, that the father never paid anything for his board, that a certain check endorsed by the father had been given to him by the father, on a disputed account, etc. This extension of the cross-examination beyond the post-mortem topics was held to make A's husband competent to testify fully as to the boarding contract made by his father with his wife, and the board furnished in performance of it. "He was called." said Hemphill, J., "by Mr. Ramsay to testify to matters occurring since the death of his father, but Mr. Harris [counsel for the estate], upon cross-examination, examined relative to matters prior to decedent's death, thus making him a competent witness for all purposes, and the evidence subsequently adduced was in our opinion properly admitted" [by the auditor]. A residuary devisee, and executrix of the deceased payee of a note made by a person now deceased, is competent to testify to matters subsequent to the death of the maker, but not prior. If, however, after he has testified to matters subsequent, the counsel for the estate examines him in regard not simply to subsequent, but to prior, matters, he is made a fully competent witness for the estate of the payee.[2] If in the Common Pleas a witness testifies for himself as to matters subsequent to death, the extension of his cross-examination to matters prior to death bestows complete competency upon him concerning such matters.[3]

[1]166 Pa. 500; cf, also, Fox's Estate, 10 York 109; De Silver's Estate, 32 Super. 174; 15 Dist. 205; Belcher's Estate, 51 Pitts. 174. After cross-examining a witness, who has testified, before he retires from the stand the opposite party may recall him as for cross-examination, and so qualify him generally; Houser v. Griesing, 5 Kulp 388.

[2]Clad's Estate, 214 Pa. 141; cf De Silver's Estate, 32 Super. 174.

[3]Boyd v. Conshohocken Mills, 149 Pa. 363.

In an ejectment by persons claiming under a grantor now dead against persons claiming under the grantee, the defendant testified to matters that happened subsequently to the grantor's death only. Then the plaintiff, seeking to annul the deed, cross-examined him as to matters prior to death. The defendant thus became fully competent.[1]

CALLING FOR CROSS-EXAMINATION IN EARLIER TRIAL

The calling for cross-examination may occur at an early stage of a suit. The person so cross-examined, so made competent, continues competent to testify at any later stage of the same proceeding. If in one trial of a case the plaintiff, an administratrix, requires the defendant to testify to matters prior to the decedent's death, and for some reason a second trial is had, the defendant is a fully competent witness for himself at this trial.[2] The plaintiff's calling for cross examination the defendant before arbitrators, qualifies him to testify for himself before the jury on the appeal.[3] Testimony given under compulsion in an equity proceeding qualifies the witness to testify in a subsequent proceeding at law, e. g., ejectment, when the parties and the issues are the same. When parties or issues are different, however, competency in the later proceeding is not produced. After A and wife have conveyed land to B, and B has in turn conveyed it to C, and after B has died, B's executors file a bill in equity to reform the deed from A and wife with respect to the separate acknowledgment. To this bill C, as grantee, and A and wife, the grantors, were defendants. A was called as a witness for cross-examination by the plaintiff. This did not entitle A to testify in a later ejectment by C against A and wife for the same land, because, says

[1]Knauff v. Fryer, 23 Montg. 110. The defendant was cross-examined as to the care she had taken of the grantor and his clothes, the money paid to her, what was done with it.

[2]Bair v. Frischkorn, 151 Pa. 466.

[3]Forrester v. Torrence, 64 Pa. 20; Shadle's Estate, 30 Super. 151. Suit against three, A, B and C. Before arbitrators plaintiff called A. This made B competent before the arbitrators for the defendants. When A died before the trial on the appeal and his administrator was substituted, the plaintiff was made incompetent, and hence the testimony of A before the arbitrators could not be given in evidence. Allum v. Carroll, 67 Pa. 68.

Mitchell, J., "neither the issue nor the parties were the same. In the equity suit the appellee (C) and Weidner were co-defendants, and Weidner was called by the plaintiffs. Appellee could not have objected, and he was not bound by the plaintiff's waiver of the objection."[1]

PROVING THE FORMER TESTIMONY

As the competency of the witness depends on his having testified as under cross-examination, in an earlier trial, it is necessary when on the later trial he is offered, to precede the offer with evidence of his having earlier testified. If his former testimony was delivered before an arbitrator, or a jury, one of the arbitrators[2] or jurors may testify to the fact that he had testified under compulsion of the opposite party. Possibly the testimony having been delivered after the death of a deceased party the proposed witness would be competent to prove it. Consider here Ballentine v. v. Ballentine.[3] A sci fa sur mortgage against the mortgagor and the terre-tenant was pending. The terre-tenant filed a bill to have the mortgage declared fraudulent as to him, a creditor of the mortgagor. The mortgagee was called as for cross-examination by the terre-tenant and the bill was dismissed without prejudice to the plaintiff's (terre-tenant's) right to defend the suit on the mortgage on the ground of the fraud. Subsequently to the delivery of the mortgagee's testimony, the terre-tenant died, before the trial of the scire facias. At the trial the mortgagee offered himself to prove the testimony he had given under the bill. The court excluded him as incompetent to testify as to matters occurring prior to the death of the terre-tenant.

DEPENDENT INCOMPETENCE REMOVED

The courts have invented the principle, despite the act of 1887, that the incompetency of wife or husband shall be reflected upon her or his spouse. Whatever removes the incompetency of a person removes the derivative incompetence of his or her marital consort. The husband, e. g., being an accountant in the Orphans' Court, to whose account exceptions are filed, if he is called for cross-examination by the the exceptant, and thus made fully com-

[1] Land Company v. Weidner, 169 Pa. 359.
[2] Forrester v. Kline, 64 Pa. 29.
[3] 2 Mona. 333.

petent for himself, his wife likewise becomes fully competent for him.[1] "The wife's interest" says Hemphill, P. J., "is wholly and solely derivative from and dependent upon that of her husband, and whenever that bar is removed, whether by act of assembly, release or the act of the adverse party, and he is made a competent witness, his wife is also." In Kinkle's Estate,[2] Stewart, J., declined to decide whether removal by cross-examination of the incompetency of a husband also involved that of the wife's incompetency; and in Root's Estate,[3] the auditor, W. T. Brown, held that the cross-examination of a wife by the opposite party rendering her fully competent, did not restore the competency of the husband. It would be necessary that he should be cross-examined also.

MAKING HUSBAND OR WIFE COMPETENT

When wife or husband is dead the surviving spouse is not as such incompetent to testify adversely to the right of the deceased. The husband, administrator of his wife, claims certain money as his, although it was deposited in her name. Being called by an exceptant to his account, to testify as to matters prior to the death of the wife, he becomes fully competent to testify that the money is his own.[4] A wife, under similar circumstances, may testify in support of her claim against the husband's estate.[5] But wife or husband cannot testify to confidential communications of the spouse now deceased.[6]

RELEVANT MATTERS

The cross- examination referred to in the act of 1887 is declared by it to make the examinee competent "as to all relevant matters, whether or not these matters were touched upon in his cross-examination." These matters are not simply those which are relevant to the special inquiries of the cross-examination.

[1] White's Estate, Dist. 808.

[2] 13 York 170.

[3] 11 Lane 225.

[4] Eichhorn's Estate, 7 CC. 433.

[5] Taylor's Estate, 4 Dist. 691. Judgment against a husband. The wife applied to have it opened. She not being cross-examined, nor her husband was not competent to testify concerning matters prior to the death of the plaintiff. Salsberg v. Kopcha, 10 Kulp 410.

[6] Taylor's Estate, 4 Dist. 691.

Exceptions to the account of an administrator, specify matters with which he should be surcharged. He is examined with respect to them. This qualifies him to testify to an additional claim which he prefers at the audit for compensation under a contract with the decedent for board, viz., of a grandson of the deceased, the son of a brother of the administrator. "Clearly," says Rice, P. J., "it is not essential that his testimony relate specifically to the subject-matter of his cross-examination, the words of the act settle that question." Nor does it need to refer to the issue raised by the account and the exceptions. The ultimate purpose of the audit in the Orphans' Court is to make distribution of the estate. The testimony of the accountant is relevant to this object, although the account did not allude to the claim, nor did his cross-examination touch upon it.[1] An administratrix of her husband's estate did not charge herself in her account with the price obtained for stock in a corporation which had belonged to him. She alleged that he gave it to her. The exceptant called her as on cross-examination to testify to decedent's membership in the corporation, the name in which the stock was held at the time of his death, to whom it belonged, etc. This qualified her to testify that the decedent had given the stock to her.[2] Exceptions to the account of an executor. He is called for cross-examination with respect to some of the matters excepted to. Another matter with regard to which he is not questioned is a payment of $150 made to an attorney. Inasmuch as the payment had been made, the accountant was said not to be competent to support the propriety of the attorney's claim. However, as the accountant had been examined concerning the other subjects, he was competent to support this claim.[3]

WHAT IS EXAMINATION ON POST-MORTEM FACTS

The administrator files an account. The exceptant calls him and asks for the production of books of account or other writings, showing his business transactions with the decedent, the collection of rents, and monies realized from the sales of real estate, and the disbursements of the same. He produces books

[1]Shadle's Estate, No. 1; 30 Super. 151.
[2]Mothe's Estate, 29 Super. 462.
[3]Bracken's Estate, 15 Dist. 71.

answering the description of the call. He thus virtually affirms the facts stated in the books. He becomes a competent witness for himself as to all relevant matters, whether mentioned in the book or not.[1]

EXAMINATION AS TO BOOKS OF ORIGINAL ENTRIES

At common law, a party, while generally incompetent, was competent to prove that a book produced was his book of original entries; that the entries were made by him and were made at the time of their date. By so doing he did not expose himself without his consent to be cross-examined by the opposite party as to other matters,[2] nor did the cross-examination of him make him competent. But, when a party is required by the opposite party to produce books kept by himself containing an account of transactions with a deceased person, to be used as evidence, the books not being books of original entries, and not offered by the person who kept them, or in behalf of whom they were kept, they are virtually the testimony of the keeper, procured by the opposite party by cross-examination, and the keeper is made fully competent.[3] Distribution of the estate of a dead person. A claim was made against it on a note and a book account. The claimant was called to prove the book of original entries. The cross-examination was not confined to the book, but extended to an alleged settlement, and to the value of the services. Subsequently his own counsel called him for the purpose of contradicting another witness. He should have been allowed to testify, because by carrying the cross-examination beyond the subject of the book of original entries, and going into the settlement of the account and of the matters entering thereinto, the witness was to be regarded as if he had been called for cross examination by the antagonist party.[4]

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[1]Yeager's Estate, 31 Super. 202. Under modern legislation a party may prove his book of original entries, despite the death of the person to be affected adversely. He can be cross-examined with respect to the handwriting of these entries and to the dates when they were made, without qualifying him generally as a witness. Houser v. Griesing, 5 Kulp. 388.

[2]Shaw v. Levy, 17 S. & R. 99.

[3]Yeager's Estate, 31 Super. 202.

[4]Fox's Estate, 10 York 109.

QUALIFYING CO-PLAINTIFFS OR CO-DEFENDANTS

The seventh section of the act of May 23d, 1887, P. L. 160, provides that by calling a witness disqualified by interest to testify for himself the party calling him qualifies him fully to testify for himself. It adds: "and also where one of several plaintiffs or defendants, or the person for whose immediate benefit such proceeding is prosecuted or defended, or such other person having an adverse interest, is cross-examined under this section, his co-plaintiffs or co-defendants shall thereby become fully competent witnesses on their own behalf as to all relevant matters, whether or not these matters were touched upon in such cross-examination." Something can be said in defense of the policy of refusing to allow one who calls a person as a witness, subsequently to object to him as incompetent on the ground of interest, or on other grounds, when he is offered by the opposite party. Having been accredited he shall not be discredited by the same person. But how calling one of a group of plaintiffs or defendants is a declaration that all his co-parties are worthy of credit, is incapable of being perceived. Nevertheless, the wise men who create our laws have created this principle. To affirm the competence, the worthiness of belief, of A, is to affirm the competence, the worthiness of belief of his associates B, C, D, E. Credibility inheres in groups. One of a group cannot have it unless all have. A possible defense of the policy may be that the co-parties would be at the mercy of their associate, who is cajoled, or bribed, or otherwise influenced to testify for their antagonist, unless they were qualified by his testimony for the antagonist, to testify against him. A widow sues for funeral benefits a lodge of the Independent Order of Odd Fellows. The defense was that the husband had been expelled. The widow called one of the members of the lodge to testify for her. This made him and all the other members fully competent to testify for the lodge.[1] The

[1]Dodd v. Armstrong, 2 CC. 352. The answer to the objection to the witnesses was: (a) The plaintiff was not claiming under or through her deceased husband. (b) If she was, the calling by the plaintiff of one member of the lodge qualified all to testify for themselves. When one of several co-defendants is called for cross-examination by the plaintiff, he becomes fully competent to testify for the other defendants. The Scrantonian v. Brown, 36 Super. 170.

fact that there are six co-defendants, one of whom is denying that he is liable, as not being a partner, does not preclude the cross-examination of another of the defendants by the plaintiff.[1]

CALLING TO TESTIFY TO MATTERS SUBSEQUENT TO DEATH

When the witness, who is competent to testify to matters occurring subsequent to death, though not as to matters prior to death, is called concerning the former he is not made competent with respect to matters that occurred before death. He seems to have two kinds of credibility. By calling him for post-mortem matters, his credibility touching such matters generally would be certified to by the calling party, but there would be no certification of his credibility with regard to ante-mortem facts. The executor of a decedent as plaintiff called the defendant to testify to matters subsequent to death. He did not thus qualify the defendant to testify to matters prior to death.[2] So, examining the accountant of a dead man's estate, in the Orphans' Court, with regard to occurrences after death, does not qualify the accountant with regard to occurrences before death.[3] Certain judges for a time apparently doubted whether calling to testify concerning matters subsequent to death would not generally qualify the witness, even as to ante-mortem matters. In 1906, Rice, P. J., remarked: "We are not prepared to decide that the accountant would not have been competent to testify in his own behalf as to matters occurring in the lifetime of the decedent, even if the party calling him for cross-examination had confined his examination strictly to matters occurring after the death of the decedent."[4] Ashman, J., in 1886, refrained from deciding the same question.[5]

[1]The Scrantonian v. Brown, 36 Super. 170. In suit of A against B, C and D, A calls B as a witness. He thus qualifies C and D to testify for themselves. But if B should die before any later trial, so that A is rendered incompetent, the testimony of C and D for themselves is inadmissible, as is also the former testimony of B. Allum v. Carroll, 67 Pa. 68.

[2]Bair v. Frischkorn, 151 Pa. 466; Danley v. Danley, 179 Pa. 170.

[3]De Silver's Estate, 32 Super. 174; Bierly's Estate, 81½ Pa. 419.

[4]Shadle's Estate No. 1, 30 Super. 151. The accountant, after being called for cross-examination by an exceptant, and examined in reference to some ante-mortem facts, was for that reason held fully competent to testify for himself.

[5]Eichhorn's Estate, 7 CC. 433.

WHEN THE WITNESS MADE COMPETENT MAY TESTIFY

The witness who is called for cross-examination by an antagonist party, and thus made fully competent, can be at once questioned by his own counsel upon the matters concerning which he has just testified.[1] He cannot, however, testify as to other matters, until his own turn to put in evidence has arrived. Where the defendant is called by the opposite party for cross-examination, it is not error for the trial judge to refuse to permit the introduction of the defendant's main defense, by examination on matters which have not been opened in his testimony already elicited.[2] An action was brought for compensation for plastering done under oral contracts. The points in dispute were whether plaintiff was to furnish some of the material and what credits the defendant was entitled to. The plaintiff called the defendant and examined him concerning the terms of the contracts and the work done under them, but not concerning payments made on account. Defendant's counsel then immediately endeavored to elicit from him the payments he had made and other matters not "opened up" by his previous examination. The court properly refused to allow the questions. But when the time came for putting in his defense, he testified for himself.[3]

CROSS-EXAMINATION DOES NOT RENDER PREVIOUSLY DELIVERED TESTIMONY COMPETENT

When one who claims against the estate of a dead man is examined for himself, but does not confine his testimony to matters that occurred subsequently to the death, the party who represents the deceased may properly cross-examine upon the antemortem matters testified to, without waiving his right to exclude the evidence from consideration. A claimant called to support her claim that certain jewelry had been given to her by the deceased, was objected to as incompetent. Her counsel then stated that he did not intend to ask her as to any matter that took

[1]The Scrantonian v. Brown, 36 Super. 170.

[2]Corkery v. O'Neill, 9 Super. 335.

[3]Corkery v. O'Neill, 9 Super. 335. The defendant, however, was a fully competent witness for himself, independently of his being called by the plaintiff as for cross-examination.

place before death. He, however, extended his examination to matters preceding death. The auditing judge examined her even more fully as to such matters. This justified a cross-examination upon the same matters, without giving validity to the testimony. Such cross-examination is not a waiver of the objection. The court properly disregarded the testimony concerning ante-mortem occurrences.[1]

CROSS-EXAMINATION UPON THE CROSS-EXAMINATION

When one party calls the opposite for cross-examination the latter may cross-examine himself upon the same subjects. When one party calls one of several defendants to testify for him, the other co-defendants have a right to cross-examination with respect to the matters elicited. They are not bound to call the witness as their own. It is error for the court to exclude a question which the co-defendants wished to address to him, without ascertaining that it did not relate to the subjects touched on in theplaintiff's examination.[2] Under the act of March 27, 1865, assumpsit for work done, defendant called the plaintiff as a witness. He was examined by the defendant, and then cross-examined by the plaintiff. The plaintiff's counsel then called him, and he was examined for himself, and then cross-examined by the defendant. He had become a fully competent witness by the defendant's examining him.[3] If the defendant calls one of several plaintiffs as for cross-examination, the co-plaintiffs have a right to cross-examine him. Hence if the defendant takes the deposition of one of the plaintiffs, and having examined him refuses to produce him for continued examination on the same subjects by his co-plaintiff, or, possibly, with respect to his motives, bias, in giving the testimony, the testimony will be disregarded.[4]

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[1]De Silver's Estate, 32 Super. 174. In Kinkle's Estate, 13 York 170, a son claimed against the estate of his father. Though clearly incompetent he testified in support of his claim. He was then cross-examined with respect to the claim. It was strangely supposed by the court that this cross-examination rendered his testimony competent. Steward, P. J.

[2]The Scrantonian v. Brown, 36 Super. 170.

[3]Seip v. Storch, 52 Pa. 210.

[4]Gunnis v. Abbett, 17 W. N. 424.

DEPOSITION

If a defendant takes the deposition of the plaintiff, or one of several plaintiffs, and files it, but declines to read it, the plaintiff may use the deposition. The simple taking of the deposition is a certificate of the credibility of the defendant.[1] The same principle applies when the plaintiff, having taken the deposition of the defendant, does not produce it. The defendant may testify for himself.[2]

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[1]O'Connor v. Amer. Iron Mountain Co. 56 Pa. 234.

[2]Bennett v. Williams, 57 Pa. 404. In Davenport's Estate, 4 Kulp. 231. M claimed against the estate of X, now dead. In order to show a set-off against M's claim, the widow was offered as a witness. It was mistakenly assumed that she was incompetent, but that she had been made competent by M's calling her to testify.

MOOT COURT

CARPENTER v. JONES

STATEMENT OF FACTS

The facts submitted in the above case are substantially as follows: Carpenter came to Carlisle via the Cumberland Valley Railroad. At the station, Jones was soliciting jobs hauling trunks of the incoming passengers. Carpenter employed Jones to haul his trunks to the hotel. Jones, on the way to the hotel, was attacked by a crowd of union men who were angry because Jones had refused to join their union. Carpenter's trunks and their contents were entirely destroyed by these men. Carpenter was a traveling salesman for a shoe firm and the trunks contained his samples.

Means for Plaintiff.

Voorhis for Defendant.

OPINION OF THE COURT

KOLB, J.—If a carrier is sued for a breach of a legal duty, the first thing to be determined is whether he is a common or a private carrier, for the status must first be determined before the duty can be known to exist. A common carrier is one who, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him, and every one who undertakes to carry for compensation the goods of all persons, indifferently is, as to liability, to be deemed a common carrier. 158 N. Y. 34; 172 Pa. 586. There is, therefore, little doubt that the defendant in this case was a common carrier.

It follows that the burden was on the defendant in seeking to escape liability for the goods destroyed, to show that the loss was to be referred to some one of the exceptions to the common law rule. In the effort to do this, the defendant has utterly failed. The theory advanced by the defendants was that the goods having been destroyed by strikers, that this constituted an act by a public enemy, hence defendant was not liable. True that a common carrier is not liable for damages resulting from acts of God or a public enemy; but can this act be considered that of a public enemey? The authorities seem to be practically one way in this regard. Where there is a total failure to deliver goods, occasioned by the depredations or the violence of mobs, rioters, strikers, thieves, etc., the carrier is liable; for by the word "enemy" in this connection is to be understood the public enemies of the country of the carrier and not of the owner of the goods. 8 W. N. C. 269; 102 N. Y. 563; 2 N. Y. 204.

In the case at bar, Jones, as a common carrier, in taking Carpenter's trunks, agreed to convey them safely to the hotel. In so doing

the trunks and their contents were destroyed. The destruction of the trunks and their contents was accomplished neither by an act of God nor a public enemy. This being the case, we see no reason why the verdict should not be for the plaintiff. We base our conclusion upon the authorities cited and for reasons which are plain without the citation of any authorities.

Judgment for the plaintiff.

OPINION OF SUPERIOR COURT

A common carrier is generally liable for the delivery of goods intrusted to him for carriage in the condition in which he received them. If they are totally destroyed, he must pay the shipper their value. If they are injured, he must compensate the shipper for their deterioration.

There are some exceptions. The injury may be the result of an "act of God," or of the acts of a public enemy. In this case, the injury was due to neither. "Losses by thieves and robbers, strikers, rioters, and the like, do no fall within the exception." Hale, Bailments, p. 364; 6 Cyc. 379. In Coggs v. Bernard, 2 Ld. Raym. 909, Holt, C. J., observed, "though the force be ever so great, as if an irresistible multitute of people should rob him (the carrier), nevertheless he is chargeable."

The justification of the rule is not altogether satisfactory. It would be eminently proper to compel the carrier to exonerate himself by the most convincing proof that the injury or destruction of the goods was caused by the acts of persons which he could not prevent or successfully oppose. It seems not so just to hold the carrier liable for a loss whose provenance he clearly shows to have been an uncontrollable power, whether impersonal or personal.

The only debatable question is, whether the defendant is to be deemed a common carrier. Such carrier is defined "one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place." 6 Cyc. 365. Jones was at the railroad station soliciting jobs of hauling trunks of incoming passengers. We think he may be deemed a common carrier. He announced himself ready to convey the goods of any of the passengers. We do not know whether he had ever done this before, or whether he ever did it afterwards. But, apparently, it is not necessary that he should have previously or subsequently conveyed goods. A farmer who once applied for the hauling of goods from Lewistown to Bellefonte was made liable for the value of the goods when lost while in his custody. Gibson, C. J., observed: "The defendant is a farmer, but has occasionally done jobs as a carrier. That, however, is immaterial. He applied for the transportation of these goods, as a matter of business, and consequently on the usual conditions," viz., that he should be an insurer of the safety of the goods, except when their loss or injury was due to the act of God, or to a few other causes. Gordon v. Hutchinson, 1 W. & S. 285.

Affirmed.

TEMPLE v. GAS COMPANY

STATEMENT OF FACTS

A leak occurred in the pipes conducting gas through Temple's shop, by the negligence of the gas company. A large quantity of the gas escaped, and the tenant of the shop in endeavoring to find the leak unwisely used a lamp. The result was an explosion which shattered the building, causing a loss of $2000. Defense is that tenant is liable.

McCann for Plaintiff.

Fine for Defendant.

OPINION OF THE COURT

VOORHIS, J.—It is admitted that the leak in the gas pipes occurred through the negligence of the gas company. There also seems to be no doubt that the act of the tenant in looking for the leak with a lighted lamp was contributory negligence on his part. 99 Pa. 1 holds that it is contributory negligence for a man to search for a gas leak with a light such as a candle or lamp. The next question, and the one on which this case hinges, is whether the contributory negligence of the tenant can be imputed to the landlord.

The doctrine of imputed negligence is not law at all in some states, while in other states it is in force to a limited extent. 29 Cyc. 542 says that the following doctrine is the law of Conn., Ill., Iowa, Minnesota and N. Y.: "Negligence in the conduct of another will not be imputed to the person injured if he neither authorized such conduct nor participated therein nor had the right or power to control the conduct of such person." This rule certainly could not include the relation of landlord and tenant within its scope where the tenant did not act under the order or authority of the landlord.

Mass., Rhode Island and West Virginia seem to be the only states in which the rule, that the contributory negligence of a tenant can be imputed to his landlord, is in force. There is a case in 122 Mass. 209 which is a case like the one before us. It was there held that the negligence of a tenant could be imputed to his landlord so as to bar the landlord's recovery. There is also a case in 24 R. I. 292 which holds the same as the Mass. case.

Notwithstanding the above authority we do not think the doctrine that the negligence of a tenant is imputable to his landlord, is the law of Pa. There seem to be no cases reported that are exactly in point with the one in question. There is a dictum in 4 Superior Ct. 385 to the effect that the contributory negligence of a tenant cannot be imputed to his landlord so as to bar the recovery of the latter from a third person. 134 Pa. 335 holds that the negligence of a tenant cannot be imputed to the landlord.

Another reason which makes this court think that the above doctrine is not the law of Pa. is the fact that the negligence of a parent is not

imputable to his child in this state. There is a case in 8 Gray (Mass.) 123, Hally v. Boston Gas Light Co., which holds, that negligence of the father is attributable to his infant. This shows that Mass. is very fond of the doctrine of imputed negligence and uses it whenever possible. We think the above Mass. case would have been decided differently in Pa., for as before stated, the rule that the negligence of the father is attributable to his infant is not in force in Pa.

It might be contended that this doctrine of imputed negligence as between landlord and tenant is peculiar to gas cases. We do not think this is so in all states though it may be in some. In Richmond Gas Co. v. Baker, 146 Ind. 600, it was held in a gas explosion case that the negligence of the landlord will not be imputed to a resident of the house where the resident and landlord's family live together in the house damaged. Of course, this case is not exactly like the one in question, but we think it sufficiently indicates that the doctrine of imputed negligence as between tenant and landlord would not be considered by the courts of Ind. even in gas cases.

By reviewing the above authorities it can be readily seen that the authorities are in conflict. It is also plain that the doctrine of imputed negligence is received very cautiously in some states, while in others it is enforced very freely. There is dictum in Pa. to the effect that the contributory negligence of a tenant can not be imputed to a landlord so as to bar the latter's recovery. There is also a case in Pa. which holds that the negligence of tenant is not imputable to landlord.

Considering the conflict of authorities the attitude of Pa. towards the imputed negligence doctrine and the dictum in a comparatively recent case, we think the contributory negligence of the tenant cannot be imputed to the landlord, and that the plaintiff can recover. We therefore give judgment for plaintiff in sum of $2000 and costs.

OPINION OF SUPREME COURT

The conclusion reached by the learned court below is sufficiently justified by its opinion:

The defendant was negligent. But for that negligence the disaster to the shop would not have occurred. The negligent act was sufficiently near to the effect. It made possible (a) the diffusion of the inflammable gas through the building, (b) the explosion from the application of heat.

It is true that the explosion that actually occurred would not have occurred but for the negligent act of the tenant. But for his negligence the plaintiff is in no sense responsible. The act was not foreseen. It could not have been prevented by the plaintiff. A landlord has no right or power to be on the leased premises and to supervise the acts of the tenant. Cf. Higgins v. Los Angeles Gas Co., 115 Pac. 313.

The judgment, therefore, must be affirmed.

HARPER v. HOOVER

Alteration of Check—Bank's Liability

STATEMENT OF FACTS

The holder of a check for $60 raised the sum to $160 and *endorsed it to Hoover* in payment of a suit of clothes costing $80. Hoover not having money at hand to pay the change, asked Harper to cash it. Harper did so and received the check without Hoover's endorsement. When Harper presented the check to the bank, the bank discovering the alteration, refused to pay it. Harper sues Hoover to recover the *amount of the check.*

Burd for Plaintiff.

Saul for Defendant.

OPINION OF THE COURT

WESTOVER, J.—The check is a negotiable instrument under the Negotiable Instruments Act of 1901, Sec. 1, P. L. 194.

By act of 1901, P, L. 199, an instrument is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by the delivery; if payable to order, it is negotiated by the endorsement of the holder, completed by the delivery.

Endorsements may be special or in blank. If special, the check must be endorsed by the party to whom it has been endorsed in order to further make it negotiable. An endorsement in blank specifies no endorsee and the instrument so endorsed is payable to bearer and may be negotiated by delivery.

From the facts, we have assumed that Hoover has taken the check into his possession and is more than a mere bystander, who being asked to cash a check, and unable, refers the holder thereof to another. The facts warrant the assumption that Hoover became the owner of the check for the time being, and finding that he could not immediately make change, secured another to cash it for him. The plaintiff has the same rights as a party across the street would have had if the defendant had gone out of the store to get the check cashed. There may be some doubt as to whether the endorsement in the case is special or in blank. The facts say, "endorsed it to Hoover." This may mean that the endorsement read, "Pay to Hoover," and was signed thereunder by the holder. If the check was signed in this manner, it was no longer negotiable until endorsed by Hoover. But, by act of 1911, P. L. 200, the holder could compel the endorsement if the check was transferred without Hoover's endorsement, and in that case Hoover would be liable for the full amount of the check as an endorser.

If the check was endorsed in blank by the holder to Hoover, it could be negotiated by delivery. By sect. 65 of act of 1901, P. L. 203, every

person negotiating an instrument by delivery or by a qualified endorsement warrants that the instrument is genuine and in all respects what it purports to be.

This check is not what it purported to be. By sect. 125 of act of 1901, the alternation of this check was a material one.

By sect. 124, act of 1901, the holder of a materially altered check, not a party to the alteration may enforce payment thereof according to its original tenor.

The ordinary manner of endorsement is in blank. We hold this check to have been so endorsed according to the facts given. Harper can recover $60 on the check at the bank, and for the balance of $100 Hoover is liable on his implied warranty.

Counsel for plaintiff in facts stated in his brief has not sued for breach of warranty. The counsel for defendant has assumed that Harper has not his action for the whole amount of the check. By the briefs, therefore, we have two sets of facts.

Judgment is given plaintiff for $100, defendant's liability for breach of implied warranty.

OPINION OF SUPERIOR COURT

After a careful examination of this case, we have concluded that the judgment of the learned court below should be affirmed.

The check remained valid for $60, in the hands of Harper, against its drawer, since Harper was a *bona fide* holder in due course. Although Hoover did not endorse the check, he sold it, and like the seller of any personal propery, he warranted his title. He warranted that he had a right, through the check, to receive from the drawer $160. He warranted, as sect. 115 of the act of 1901 expresses the obligation, "that the instrument is genuine, and in all respects what it purports to be." For breach of this warranty, the price paid for the instrument, or so much of it as will equal the loss arising from its defects, may be recovered.

There may be a question, whether Harper had not a right to recover $160 from Hoover, on his tendering back the check. Only he, however, could complain in this court of the limitation of his recovery to $100.

Affirmed.

COMMONWEALTH v. FERRIS

Burglary—Alibi—Preponderance of Evidence

STATEMENT OF FACTS

Ferris is tried for burglary. His parents, four brothers and two sisters all testify that he was home the whole of the night during which the burglary was committed. Two citizens, however, swear that he was 40 feet from the house where the burglary was committed, going toward

the house at 10:30 p. m., and one of the articles, a pistol, stolen from the house was found in his possession two days subsequently. The lower court allowed the jury to convict.

Snyder for Prosecution.

Wallick for Defendant.

OPINION OF THE COURT

TOBIAS, J.—This is a motion for a new trial. The defense rests on what is known in law as an alibi and contends that the court erred in allowing the jury to convict because it was clearly shown that he was at home when the burglary was committed, and it is evident that he could not be at home and at the place where the crime was committed at one and the same time. Judge Agnew in Briceland v. Commonwealth, 74 Pa. 463, states that, "when a defense rests on proof of an alibi, it must cover the time when the offense is shown to have been committed so as to preclude the possibility of the prisoner's presence at the place of the crime; for if it be possible that he could have been at both places, the proof of the alibi is valueless." This same idea is expressed in Commonwealth v. McMahon, 145 Pa. 413, and in Commonwealth v. Gutshall, 22 Superior 269.

The indictment does not state that the burglary was committed at any specified time, but that it may have been committed at any time during the night. Therefore the defense must prove beyond a reasonable doubt that Ferris was at home the whole of that night, and to prove it the defense relies wholly on the statements of his parents, brothers and sisters. However, their evidence was purely negative and may have been given for personal reasons. They declared that he was at home the whole of the night because he was there when they retired and when they arose the following morning. They did not say that they saw him at any time during the night, and there was plenty of time for him to have gone to the house where the burglary was committed and returned during the interval. On the other hand, two citizens swore that they saw him at 10:30 p. m., 40 feet from the house, and going toward it. Their evidence was positive and had to carry with it much weight.

And as he gave no good reason for having the pistol in his possession two days after the burglary was committed, we feel that the alibi as a complete defense failed. And if it raised any doubt in the minds of the jurors, this doubt was cleared away when they examined all the evidence in the case, including that which related to the alibi; and from the whole evidence, returned their verdict of guilty. They were satisfied beyond a reasonable doubt, first, that the burglary was committed; second, that Geo. Ferris, the prisoner, was the man who committed the burglary.

There was no doubt as to the first proposition; and to prove the second one, the pistol was offered as evidence. It was good evidence, because, when it has been proved that a burglary has taken place, and the stolen property, or some of it, has been sufficiently identified, it is

admissible for the state, in order that it may connect the defendant with the burglary, to prove that he was shortly afterwards found in possession of the property stolen at the time of the burglary, and to introduce the property itself in evidence. This idea is set forth in Commonwealth v. McGorty, 114 Mass., 299, which holds, that recent possession of property stolen at the commission of a burglary is presumptive evidence of guilt to be weighed by a jury. In State, v. Brewster, 7 Vermont 112, it was held, that, if stolen goods are found in the possession of the prisoner, it is a question for the jury, how far, under all circumstances, that possession raises a presumption of guilt in the particular case.

In Pennsylvania the rule is, that when there is evidence which alone would justify an inference of the disputed fact in favor of the party on whom the burden of proof rests (the state in this case), it must go to the jury no matter how strong may be the countervailing proof. This fact is set forth in Pratt v. Richards Jewelry Co., 69 Pa. 53, which states as follows: "It is not within the province of the court to say whether a given offer would actually prove the fact it was offered to prove, provided its tendency be to prove that fact. If it, with other facts in the case, tends to establish a result material to be established by the party offering it, it should be admitted, and go to the jury. It is for them to pass on it under instructions from the court."

A case very similar to the one under consideration, is State v. Brady, 91 N. H. 801, decided in 1902. The evidence for the state tended to show that on Sept. 29, 1900, the barn of Stuart, situated several miles east of the city of Des Moines, was unlawfully broken and entered, and certain harness stolen therefrom; that on the said night the defendant was seen upon the public highway in that neighborhood; that about ten days thereafter the stolen property, or some of it, was found in his possession; and that he made some statements or admissions serving to strengthen the suspicion of his guilt. The defendant denied his guilt and offered considerable evidence tending to prove an alibi, and explained his possession of the harness by the statement that he bought it of a person who brought it to his house in Des Moines on the morning after the alleged crime, which statement was also corroborated by several witnesses. Among the instructions given by the court to the jury was the following: "The possession of property that has been recently stolen from a building by means of breaking and entering said building is sufficient to raise a presumption of guilt of the person in whose possession said property is found; that is, it creates the presumption that he is the party that broke and entered said building, and took therefrom the said property, unless the attending circumstances or evidence explains said possession, and shows that the same may have been otherwise honestly acquired."

The fact that the pistol was found on his person, and no satisfactory reason for having it in his possession was given, is prima facie evidence of his guilt.

The motion for a new trial is refused.

OPINION OF SUPERIOR COURT

The evidence submitted to the jury was sufficient to sustain the verdict rendered by it.

With all that is said by the learned court below, concerning the nature of the evidence of an *alibi*, we are unable to agree. The burden of proving guilt is on the Commonwealth. Guilt, in this case, consists in several facts, one of which was presence at the scene of the alleged burglary at the time. Ferris was not guilty unless he entered the house of the prosecutor on the night mentioned in the indictment. The jury must be put by the evidence beyond reasonable doubt, that he was then there. It is enough, then, for the evidence of the *alibi* to put or to keep the jury in reasonable doubt of this, 2 Trickett, Crim. Law 986, *et seq.* The doctrine of the opinion overruling the motion for a new trial if embodied in the charge to the jury, would, in our opinion, have required a reversal of the conviction.

The parents, brothers and sisters testified under a manifest bias in favor of the defendant. Only the jury could appraise the effect of it upon their veraciousness. The learned court below, appositely suggests, that even if correct, they may have been mistaken, for the fact that their son and brother was at home at the beginning of the night, and at the rising hour, was not decisive that he had not been from home in the interval.

The possession two days after the burglary of a pistol that had been stolen at the time that crime was committed and therefore probably by the burglar, was a circumstance, which unexplained to the satisfaction of the jury, would naturally and properly have weight, 2 Crim. Law, 902; 1 Crim. Law, 160.

Seeing no error in the reception of evidence, or in the instructions given to the jury, the judgment must be affirmed.

COMMONWEALTH v. JOHN RONALD

STATEMENT OF CASE

Ronald accused Henry Smith of the murder of X, who died. Smith was tried for murder, and Ronald, with two other whom he had suborned, testified that Smith had inflicted the injuries upon X which killed him. Smith was convicted and executed. Ronald is now indicted for the murder of Smith.

OPINION OF THE COURT

The first question for the court to consider in regard to the case at bar is whether this was murder. Murder at common law is when a person of sound memory and discretion unlawfully kills any reasonable creature in being and under the peace of the commonwealth, with malice afore-thought or implied.

By the statute of Pennsylvania, "all murder which shall be perpetrated by means of lying in wait, by means of poison, or by any other kind of wilful, deliberate and premeditated killing."—Act March 31st, 1860. P. L. 382.

The first thing is the intent to kill. Every voluntary action or omission, which indirectly or directly causes death, is in the eye of the law, the manifestation of an intent to kill.

The doctrine is that every person must be presumed to have foreseen and intended all the natural and probable consequences of his voluntary acts. Thus one who, from any motive whatever, neglects a legal duty whereby he evidently puts at hazard the lives of others; or who performs an act which a series of secondary causes, not depending on extraordinary and unforeseeable conditions, produces death, not only is guilty of the act of killing, but also of the intent to kill. Robinson's Elementary Law, Ph. 528.

Ronald accused Smith of murder and suborned two witnesses to swear that he killed X, therefore Ronald neglected his legal duty, which was to tell the truth, and put Smith's life at hazard. Thus this act, through a series of secondary causes, such as the machinery of the law, producing the death of Smith, makes him responsible for Smith's death, with intent to kill.

Perjury, or subornation of perjury, at one time was punishable by death. At the present time it is a misdemeanor at common law and is punishable by fine and imprisonment. Pa. St. Act, March 31, 1860. P. L. 283, § 14, holds that if any person procure or suborn any other person to make any such oath or affirmation, every person so offending shall be guilty of a misdemeanor.

In some states, such as Georgia, Vermont and others, it is held to be a felony to cause by perjury a conviction of some crimes by statute.

In Vermont the statute provides "that a witness who wilfully and corruptly and with intent to take away the life of a person, bears false testimony against him, and thereby causes such person's life to be taken, shall suffer the punishment of death."—State v. Fournier, 68 Vt. 262.

Ronald is clearly guilty of a misdemeanor in Pennsylvania and by common law, and of murder by the Vermont laws.

He committed a misdemeanor *malum in se*, which caused the death of Smith, therefore by that principle of law he is responsible for the death of Smith.

He had the intent to kill Smith, and being responsible for his death through the machinery of law, he is guilty of murder.

This is not too remote. The testimony convinced the jury, and the judge's sentence and the execution are all directly brought about by their testimony and can be considered one proximate act, the act of the law.

OPINION OF SUPREME COURT

It is with regret that we are constrained to reverse the judgment in this case. The defendant intended that Smith should die. He selected a means. The means was successful. Morally he is as guilty as if he had killed Smith with poison, or a gun, or a stiletto. The difficulty we experience in sustaining the conviction is, that it is seemingly in opposition to the long running and broad current of the decisions.

There are cases which hold that one who injures another by perjury in a civil action, cannot be made liable to the person injured in an action for the wrong. In Davenport v. Sympson, 1 Croke Eliz. 520, A had sued B for breaking a "fountain of silver," A claiming 500 l. as damages. The defendant B, a witness in that case, testified that the fountain was worth only 180 l. The result was that A obtained a verdict of but 200 l., thus suffering a loss of 300 l. The court gave judgment for the defendant, observing that there was no punishment for perjury at common law. Now there is a punishment furnished by the statute of 5 Eliz. C. 9. If this action should be allowed, the defendant might be twice punished, that is, in the prosecution under this statute and in the civil action. If there were a liability in this action, "there would be some precedent for it before this time, but, being there is not any precedent found therefor, it is a good argument that the action is not maintainable." If a witness could be punished for perjury, "every witness would be drawn in question." Similar considerations, in addition to deference to precedent, have induced frequent similar decisions.—Cunningham v. Brown, 18 Vt. 123; Smith v. Lewis, 3 Johns 157; Cf. Horner v. Schinstock, 80 Kans. 136; 18 Am. & Eng. Ann. Cases, p. 21, and note. [In Oakdale Borough v. Gamble, 201 Pa. 289, the question, though involved in the facts, was not considered.]

As for the loss of money, or other property, through a judgment secured by means of perjured evidence, no civil remedy is furnished against the perjurers, so, when a man is by means of false testimony convicted of a crime and made to suffer its penalty, has he no redress.

In Eyres v. Sedgewicke, Cro. Jac. 601, 18 Am. & Eng. Ann. Cases 25, a man who by the false oath of another had been convicted and punished, brought an action against the false swearer for damages. The court disallowed a recovery, adopting, apparently, the argument of counsel as its ground. The testimony of a witness is assumed to be true until it is proved false, and then only in an indictment for perjury. It would be mischievous to permit the truth of an oath to be tried by an action on the case. If the charged perjury should be examined in an action on the case, then, probably one witness would swear against that which the other had sworn, and so there would be oath against oath. The law could not know which of them was true. The law, therefore, will not suffer such an inconvenience. The perjury ought to be punished by conviction upon indictment therefor.

If then, the person who suffers loss of property or liberty, by means of a judgment or conviction procured by perjured testimony, has no redress against the perjurer, it is difficult to see how he is to be punished at the suit of the state, for such loss, and if there is no redress for loss of property or liberty, how should there be for loss of life, through the judgment of the court?

The crime of perjury often has serious consequences, and it would be a sensible policy, in punishing it, to vary the punishment with the gravity of those consequences. The learned court below has shown that in Vermont there is a statute which provides that one who by perjured testimony procures the conviction of another of a capital offense, in consequence of which such other suffers death, shall suffer the punishment of death. State v. Fournier, 68 Vt. 262. This is more sensible than the adoption of an invariable penalty for perjury, without reference to the gravity of the results, or to the existence or not of an intention to injure another. Perjury to save life is surely not as atrocious as perjury to destroy it. All perjury in Pennsylvania is called a misdemeanor and is punishable by a fine not exceeding $500, and an imprisonment not exceeding seven years. For the crime of which the defendant is guilty, this is no adequate punishment. It does not follow that the courts are at liberty to entertain prosecutions of the perjurer for murder, when he has procured a capital conviction, or suits for damages when he has procured the imprisonment, or the loss of property of the person against whom he has testified.

Were Ronald indicted for the perjury, he could not be convicted, except on the testimony of two witnesses, or of one witness with corroboration, to the untruth of his evidence given under oath. It does not appear that the protection of this or any equivalent principle was extended to him. If Ronald could not be fined and imprisoned for seven years on the unsupported testimony of one witness, it would be scandalous to allow him to suffer death in consequence of such testimony.

The judgment must be reversed.