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REFRESHING RECOLLECTION

There are two totally distinct phenomena, which, in dealing with human testimony, it is necessary to discriminate. A man may have had at some time in the past a perception of an event, and while the memory of it still existed, may have reduced his apprehension of it to writing, or have communicated it, by vocal or other non-written signs, to others. He may when evidence of this event is desired in a court of justice be and remain unable to recall it. The tribunal will then be put in the dilemma of being compelled either to dispense altogether with evidence derived from this person or to receive his past declarations concerning it.

A man may have observed a past phenomenon, e. g., a conversation, a series of acts, such as a murder, or arson. When, however, he is called as a witness, he finds himself unable altogether, or in part, to remember. The memory is capable often of being revived. Impressions of a past occurrence have passed out of consciousness, but they may be made to re-enter consciousness by various suggestions. A visual, tactile, auditory or olfactory sensation may revive the latent scene. The name of a person refuses to reappear. Some one asks him, is it Harper? No. Is it Jones? No. Is it John Hamilton? Instantly the memory is evoked from unconsciousness. The response, yes, is instantaneous. In this case the revival has occurred, not through an assertion, but through an interrogation.

If merely interrogative remarks awaken a clear and positive recollection, assertive remarks may no less readily do so. Had the interlocutor instead of saying "was it John Hamilton?" said "it was John Hamilton," the revivication would have also occurred. It is even possible for an assertive declaration to awaken a memory contradictory of or otherwise inconsistent with the dec-

laration. Had the interlocutor said, "The man you saw was not John Hamilton," the person addressed would possibly have instantly replied, "That is the man. It *was* John Hamilton." Things linked with the past sensation or perception by the relation of contiguity in time or space, by resemblance or contrast may suggestively awaken the memory of that sensation or perception. These facts concerning the revivification of the memory present a second problem to the court. When a witness finds himself oblivious of a fact which he has once probably known, may any or all of the instruments known to have the power to reawaken latent memory be employed to awaken his memory? If they may, and if the witness's memory is revived, we have not a past memory of a past event expressed through a memorial or history, which it created in the past, and which is now produced, but a present memory of the past event, which, it is true, was latent a moment ago [as, indeed, all memories are latent for most of the time between the perception of the event and the present], and which is embodying itself in a memorial or history now to be created. One would have supposed that two phenomena so palpably different would not have escaped the discrimination of even ordinarily perspicacious minds. Yet distinction between them has escaped a great number of courts. A clear discrimination between them remains yet to be made in Pennsylvania. "In Pennsylvania," says Wigmore,[1] "it is difficult to say whether there is in this jurisdiction a definite and settled acceptance of past recollection as distinguished from present recollection." Although at one time the use of a past recollection embodied in a memorandum or written narrative is allowed, the process is usually described as a refreshing of the recollection, which, or the like of which, it palpably is not.

DISTINCTION BETWEEN REFRESHING RECOLLECTION AND A PAST RECORD

In a dissenting opinion Gibson, J., indicates the distinction between refreshing the memory and using a past writing as substantive evidence. "Where," says the Justice, "for the purpose of perpetuating the evidence of a fact [it cannot matter what the

[1] 1 Evid., p. 831.

purpose is], a witness has made a written statement of it at the time [it would not need to be at the time, if the witness's memory was still fresh], and can recollect nothing further than that he had accurately reduced the whole transaction to writing, ought not the written statement, thus authenticated by his oath, to be admitted as evidence, and would not the mind of a juror rest more confidently on its truth than on the frail recollection of man."[1] Twenty-two years later, in 1846, the same justice denies that the law prefers memory to writing for the preservation of evidence, or that a memorandum which fails to move the memory [i. e., to revive it] of him who made it, cannot be introduced as independent proof, preceded by his oath of its accuracy when taken.[2]

PROPRIETY OF REFRESHING THE MEMORY

The sweeping observation was once made by Woodward, J.,[3] that "It is always competent for a witness to refresh his memory by memoranda made at the time of the transaction of which he speaks." It may be conceded that it is difficult to define the cases in which such refreshment would not be allowed. B testified that he agreed to pay $50 a year for the use of an alley. It was alleged that the agreement was written, and that the writing was the best evidence. The court nevertheless received the evidence without the writing. Justifying this act, Agnew, J., remarks that the writing would be but a certificate of the fact not on oath. If the writing were the best evidence of the fact to be proved by it [a bond, a deed, a will, a letter?!!], it would open

[1]Smith v. Lane, 12 S. & R. 80. The real question is between a recollection a short time after the event [when the memorandum is written] and a longer time after the event when the testimony in court is to be delivered. The space between these two events may be so short that the memory at the earlier time has no appreciably greater reliability than at the later time. On the other hand, the distance may be so great as to warrant the belief that the memory at the end of it is less reliable than at the beginning.

[2]Hart v. Hummel, 3 Pa. 414. The observation of Thompson, J., in Mut. Ins. Co. v. Schreffler, 44 Pa. 269, that "care should be taken that the recollection alone of the witness thus refreshed should constitute the testimony and not the paper" is inept. It is quite possible that the paper should be known to be an accurate narrative, and, also, that its re-perusal should have awakened the memory of the writer.

[3]Selover v. Rexford's Exec., 52 Pa. 308.

the door to the fraudulent concoction of evidence, enabling men to prove by a written statement what they dare not say upon oath. He concedes that the writing might be called for to "refresh" the witness's memory.[1] The question being whether B was in A's employ between certain dates, it is relevant to show that he was in the employ of C between those dates. C, testifying that B was in his employ, but unable to say exactly when or how long, might look at his book in which he kept an account of payments made to B for labor, and might then say that he believes that B worked for him between the fore part of November, 1855, and February, 1856.[2] In order to ascertain whether A bought goods from B on a certain date, B is permitted to refer to his book, if the charge is in his own handwriting, and, his memory being thus refreshed, to say what goods were sold to A.[3] A witness having made entries into memorandum books of payments of moneys to X in order that X might purchase articles for him, and the next or the same day, having transcribed them into a ledger, may in testifying employ the ledger in order to refresh his memory.[4] In order to refresh his memory a witness may refer to freight books kept by him or verified by him at the time of making, and to check slips made in the ordinary course of business, in transshipping goods from one car to another, in proof of the number of the cars and of the distinctive marks of the goods. Hence a memorandum made by another person, but, at the time of making, examined by the witness and thus found by him to be correct may be used to fix the number of cars at a certain place and time.[5] A car is weighed on its arrival at a certain point. Two months afterwards the weighmaster of the railroad

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[1]Gilmore v. Wilson, 53 Pa. 194. The justice's observations seem wholly irrelevant to the facts.

[2]Dodge v. Bache, 57 Pa. 421.

[3]Shannon v. Castner, 21 Super. 294. The error of refusing to allow a witness to refresh his memory was obliterated by allowing him later to do so. Powell v. Ins. Co., 2 Super. 151.

[4]Ehrhart v. Katzen, 25 Lanc. 358. Hassler, J., quotes from 1 Wharton, Evid., 2d Edit. §516. A witness who makes or is concerned in making written notes of an event, near the time of its occurrence, is permitted to refer in the examination to such notes in order to refresh his memory. Gibson's opinion in 12 S. & R. 80 is also cited.

[5]Huckenstein v. Jolly, 2 Lanc. 164.

company makes an affidavit as to the weight of the car, but he makes it from data in the office and he does not say that he knows the accuracy of these data. Called as a witness he cannot use the affidavit to refresh his memory. He might have used it for that purpose had he known the truth of these data and had the affidavit embodied them.[1] A has a conversation with B, who is now the defendant in a criminal prosecution. Immediately thereafter A makes a memorandum of the conversation. He may as a witness use the memorandum in order to refresh his memory.[2] The question is whether Martin was a partner with McCoy. A book of original entries of a firm, Cook & Cresson, who dealt with McCoy & Co., described those with whom a transaction was, as McCoy and Martin, trading under the firm name of McCoy & Co. Cook, of the firm of Cook & Cresson, was called as a witness to prove that Martin was of the firm of McCoy & Co. "Certainly," says Tilghman, C. J., "he might have refreshed his memory and then sworn with a memory refreshed."[3]

COMPELLING A MAN TO REFRESH HIS MEMORY

In a suit against a railroad company, three rules for the taking of depositions in advance of the trial were entered. One was to compel L. to examine his books so as to refresh his memory and to qualify himself to testify upon his examination. The court refused to make the order: this matter should be regulated by a judge at the trial and not in advance of it before a commissioner [to take depositions]. "Besides," says Arnold, P. J., "it is doubtful whether a witness can be compelled to produce his books and papers anywhere except at a trial before a judge or referee or master who is hearing a case in lieu of a trial in court." L. had already been examined before the commissioner. Examination on his books was deferred until the trial.[4]

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[1]Samuel v. Pa. R. R. Co., 45 Super. 395.

[2]Com. v. Klein, 42 Super. 66.

[3]Juniata Bank of Penna. v. Brown, 5 S. & R. 226.

[4]Ladenburg v. Penna. R. R. Co., 6 Dist. 453. The question being whether A was at place *m* or at place *n* on a certain day. X testified that A brought his horse to X's shop at *n* on that day. While testifying X had his day books before him. In a subsequent trial, a witness could testify to what X said, he being now dead, although the book was not produced. Cox v. Norton, 1 P. & W. 412.

NUMEROUS ITEMS. PAST RECOLLECTION

Sometimes the use of a past knowledge expressed in a memorandum, entries in a book, etc., is justified because of the number of the objects or facts to be ascertained, and the unlikelihood that a witness could recollect them at all, or recollect them without assistance. The question was, whether the sheriff, the defendant, sued for selling on execution against X, the property of A, the plaintiff, had sold certain things. The witness was shown a paper and asked to state whether the things mentioned in it had been sold by the sheriff. The paper was not put in evidence. The witness having inspected it, he swore that the sheriff sold these articles. Says Tilghman, C. J., "If evidence of this kind is rejected, it will be impossible to prove the sale of a number of articles. No man's memory can retain such things, and therefore it has always been judged proper that the witness should be permitted to refresh his recollection in the manner here permitted." It is uncertain whether the witness professed, after inspecting the paper, to have a memory of the sale of the things or simply that the paper correctly embodied what, when he had originally seen it, he knew to be a correct enumeration of the things sold.[1] A statement of things lost in a fire, made out by an insured person and his son, was properly admitted in evidence. They swore that they made it out from their own knowledge of the facts, but that they consulted invoices and other papers to assist them in remembering the articles and prices. This did not give to the statement the character of a copy and of secondary evidence. One may know that he had in his possession articles named in certain invoices, and that these were burnt, and yet be unable to remember the items without the invoice to refresh the memory. "In all cases where accounts are multitudinous, the rule as to personal knowledge of the witness is relaxed. He must be permitted to put the items into an account and to refresh his recollection by means of other accounts and papers as to items. * * * * In an account of sales, consisting of numerous items, the party rarely recollects all the items, but he can be perfectly certain from his mode of business on finding the entries in his books, that the charges were correctly

[1]Babb v. Clemson, 12 S. & R. 328. Several articles had been sold in Striker v. McMichael, 1 Phila. 89.

made.[1] An action for the price of ochre sold and delivered. A has hauled for R, the plaintiff, ochre to a certain factory from the mine. When paid for the hauling he has given receipts to R. As a witness for R, he may look at these receipts and then say that he hauled ochre to a certain quantity and deposited it at the place designated by the defendant, the purchaser of the ochre. "He uses the receipts," says Clark, J., "to refresh his recollection." They are read "simply as a statement prepared by the witness, fixing the several quantities delivered at the dates designated respectively."[2] Work done from day to day over a considerable period. One who has kept an account, may use it while testifying. He may be told to refresh his memory with the papers and books and to work his way along his list, i. e., to read from the accounts.[3] A fire destroyed a large quantity of goods in a store. In order, in a suit upon the policy of insurance, to ascertain the value of the goods destroyed, use was made of an inventory, made a year before. The secretary of the plaintiff company, with others, when the inventory was being made out, verified the figures and was satisfied that they were correct. He positively testified that the goods mentioned in the inventory were in the factory. "Certainly while testifying," says Thompson, J., "he would have been warranted in refreshing his memory by a reference to the inventory made up under his supervision and by his direction, as to the accuracy of which there was not the slightest question, and so demonstrated upon cross-examination."[4]

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[1]Alleghany Ins. Co. v. Hanlon, 31 Leg. Int. 372. But, when a witness infers the accuracy of his memorandum, not from a present memory of the facts mentioned in it, but from his mode of doing business, he is not remembering the specific transactions or facts. His memory has not been refreshed.

[2]Long v. Regen, 119 Pa. 403. There was probably here no refreshing of the memory, but an inference from the receipts that the haulings mentioned in them occurred.

[3]Mead v. White, 6 Sadler 138. Probably no real refreshing of the memory as to most of the daily work.

[4]Wells Mfg. Co. v. Mut. Fire Ins. Co., 209 Pa. 488. The objection was groundless that the men who actually counted and weighed the articles were not called as witnesses because the inventory was made under the direction ot the secretary and was duly verified by him. But the verification was the assertion of the men who did the counting and weighing. The inventory embodied their oral reports to the secretary.

PROOF OF CORRECTNESS OF MEMORIAL

A record of a past event cannot be used to prove the event, unless its own accuracy is established. The witness may remember his execution of the record, and his intention to make it accurate, and his then power to make it accurate. He may be convinced, seeing that his name is to a document, e. g., as a subscribing witness, that he put it there and that he would not have done so had he not seen the execution of the document.[1] "Where a party making the entry is living and competent to testify, it is necessary," says Henderson, J., "to produce him. Where he is dead, or when called as a witness has no recollection of the facts, but testifies that it was his practice to make all his entries truthfully at the time, and that he believes the entry to be accurate, it is considered as original and not hearsay evidence to establish the fact in question."[2] A writing, offered as proof of a fact asserted in it, is only a certificate of the writer, not on oath. He must be called to prove the fact averred in it, or to prove the past correspondence of it with the fact. Says Agnew, J., a party who agrees to pay $50 for the use of an alley may prove that fact, although it is alleged that the agreement is in writing. The writing is not the best evidence of the fact. (!) The person who makes the agreement may testify to it. The writing *may* be called for to refresh his memory, or by the opposite party to contradict him.[3] A settlement between A and B was made in the presence of C. At the trial C had no recollection of what was said by them, but he put down on the paper, by direction of A and B, that one of them, the obligor, in a bond payable to the other, admitted that the bond was unpaid. The paper was properly received in evidence.[4]

PUTTING IN EVIDENCE THE MEMORIAL OF A PAST KNOWLEDGE

When there is a memorandum or record of an event which is sworn to be accurate by one who knows its accuracy, it must, of course, in order to be of use, be put in evidence. A deposit made

[1]Piggott v. Holloway, 1 Binn. 436.
[2]Com. v. Berney, 28 Super. 61.
[3]Gilmore v. Wilson, 53 Pa. 194.
[4]Eby v. Eby's Assignee, 5 Pa. 435.

in bank is entered in a book of the bank. The clerk who makes it swears to its accuracy. He has no present recollection of the transaction, even after examining the book. The book entry is thus made receivable.[1] Assumsit for work done. A witness for the plaintiff, his apprentice, stated that he kept an account of the work done; entries were made in the book on the last day of each week, or if only one day in the week, at the end of that day; that is, he testified to the accuracy of the entries in the book. The book was then receivable in addition to the testimony of the witness, whose recollection, invigorated by the witness, had enabled him to swear to the *facts* stated in them. But, had the witness been unable to testify to the facts, the book would have been receivable. "It is fallacious to suppose," says Gibson, C. J., "that the law prefers memory to writing for the preservation of evidence or that a memorandum which fails to move the memory of him who made it cannot be introduced as independent proof, preceded by his oath, of its accuracy when it was written."[2] A claims for the erection of a stone crusher. One of his employes kept the time of the men. Each day he noted down the number of hours each carpenter worked. After he swore that the book was correctly kept the court admitted it in evidence, not as a book of original entries, but as a memorandum whose accuracy was sufficiently certified.[3] A report made by a conductor of a street railway car shortly after an accident to a passenger, giving the names of witnesses of the occurrence, their addresses and occupations, and other circumstances, could be used by him to refresh his memory, as to the time when the event occurred, the names of the witnesses, etc., more than 2½ years having elapsed since the date of the accident.[4] A minute made by C, at the in-

[1]F. & M. Bank v. Boraef, 1 R. 152. The entry showed a deposit of $80. The entry in the depositor's pass-book showed a deposit of $800.

[2]Hart v. Hummel, 3 Pa. 414. Cf. Smith v. Lane, 12 S. & R. 80, where a book, not of original entries, was thought by Gibson, J., in a dissenting opinion, to be receivable, to prove the deliveries of wheat mentioned in it, on dependable evidence of its accuracy, without the testimony of a witness who professed that his memory had been refreshed by it.

[3]Heavener v. Tilli, 19 Montg. 13.

[4]Clark v. Union Traction Co., 210 Pa. 636. The court speaks of using the report to refresh the memory. It is evident that his memory was not to be refreshed and that the report was to be really used as substantive evidence, supported by testimony as to its correctness. After 2½ years the conductor would not have remembered faces, names or date, even after an inspection of the report.

stance of A and B, of an agreement between them was put in evidence after C had given an account of its writing.[1]

PUTTING MEMORANDUM IN EVIDENCE

When a memorandum is used, because it embodies a past knowledge of the transaction, and not as an instrument for affecting the mind of the witness while he is on the stand, it is a part of the evidence that must be considered by the jury. The witness says it is true. Its contents must then be made known, either by an inspection by the jurors, or by the audible reading of it by some one.[2] When the memorandum is used simply like any other suggestion to awaken the dormant memory of the witness, who will then testify directly to the facts because he recollects them, and not on the authority of the paper, the party who called the witness and caused him to aid his memory, has no right to read the paper, or to submit it to the inspection of the jury.[3] Such is the scientific view.

NOT PUT IN EVIDENCE

A paper used merely to refresh the memory "is not evidence," says Tilghman, C. J., meaning, doubtless, that it is not to be submitted to the jury by the party who elicits the testimony of the witness.[4] A memorandum of a conversation, though used to refresh the memory, was, apparently, not put in evidence.[5] Plaintiff claiming for money advanced to B, defendant, in order that B might make purchases of articles for him, keeps an account of the advances and of deliveries of goods purchased in little memorandum books. Some of these books were lost, but the items in them had been copied by the plaintiff into a ledger on the same or the next day. The plaintiff was allowed to refresh his recollection by referring to the ledger. He did not put the

[1] Eby v. Eby's Assignee, 5 Pa. 435.

[2] 1 Wigmore, Evid. p. 848.

[3] 1 Wigmore, Evid. p. 856.

[4] Babb v. Clemson, 16 S. & R. 328.

[5] Edwards v. Gimbel, 202 Pa. 30. In Juniata Bank v. Brown, 5 S. & R. 226, Tilghman, C. J., says that a witness might use his book of entries to refresh his memory, and then with memory refreshed, might swear to the fact, "but he had no right to introduce into his deposition the matter which he had made use of to refresh his memory."

ledger in evidence. It was, however, put in evidence by the defendant.[1] It is always competent for a witness to refresh his memory by memoranda made at the time of the transaction of which he speaks, and where the memorandum has been received in evidence without objection, and it recites the substance of the very transaction testified to, it is not error for the court to say that it "corroborates the witness."[2] A sues B for the price of electric light fixtures and of inserting them, etc. He puts in evidence a book purporting to be a book of original entries. Having admitted it, the court subsequently told the jury that it could not be considered as such a book. It contained lump charges; it showed the dealings of the plaintiff with the defendant only. The entries in it were not made contemporaneously with the doing of the work. The court said that the witness for the plaintiff could testify to anything that he recalled to have been furnished to the defendant, and that he might use the book as a means of refreshing his memory, if he knew it to be correct. The evidence of the witness showed that he had not depended solely upon the book. No injustice was done to the plaintiff by the court's saying that the book was not one of original entries. If a mistake was made in receiving the book, it was by the fault of the plaintiff who offered it. He cannot complain of the receiving of it.[3]

PUT IN EVIDENCE

In some cases the memorandum book, etc., that has been used by witness to refresh his memory has been put in evidence by the party for whom the witness, after the assisting of his memory, has testified. The reason is not always discernible. A bill of sale was put in the hands of plaintiff's witness. He compared the goods mentioned in it with goods in the plaintiff's possession. It had certain marks, put there by the witness. The judge ad-

[1]Ehrhart v. Katzen, 25 Lanc. 358. The defendant, therefore, could not object to the ledger being in evidence.

[2]Selover v. Rexford's Exec., 52 Pa. 308. The memorandum of an agreement drawn up by a witness and signed by him at the instance of the parties to the agreement, was possibly used by this witness to refresh his memory. It was also put in evidence without objection and the court said to the jury that it corroborates the recollection of the witness in regard to the date and the terms of the arrangement.

[3]McKnight v. Newell, 207 Pa. 562.

mitted the bill of sale in evidence, with a printed catalogue of goods, on which the plaintiff had marked the goods as his. "The marks," says Sharswood, J., "were not evidence, and could not have been supposed to have influenced the jury further than it was sustained by the evidence," thus tacitly conceding that the admission of the bill of sale was not improper.[1] An account of an assignee, used to refresh his memory as to the less worth of articles mentioned in the inventory, than that stated therein, was put in evidence.[2] In a suit by A's executor for barrels in which ale had been sold by A to B, with a promise by B to return the barrels, A's book-keeper produced a book, testifying that he had made the entries in it on the days of the respective sales, etc. The book was then put in evidence. Approving, the supreme court said, puzzlingly: "This case went to the jury upon facts proved by witness, independently of the books of original entries. [How so? The book was in evidence.] The book itself was proved by a witness and the entries in it sustained *aliunde*. [What does this mean? That the sales of ale, or that the entries were proved aliunde.] As the case stood, the book was used rather as a memorandum of charges and a bill of particulars to ascertain the items of the amount."[3] Assumpsit on a stock subscription. A written notice, not in the handwriting of the witness, who was the secretary of the corporation, but which, as he believed, had been written by his order by a clerk, and which he had signed, was put in the hands of the witness, and he was asked whether his memory was refreshed as to the form of notice he had given to the defendant to pay the call. He answered that the resolution recited in this notice was an exact copy of the resolution of the directors making the call, and that he "should say it was a copy of the notices that were sent to all the stockholders." He had no reason to believe that any other form of notice was sent. The written notice was then offered and received in evidence.[4] A's

[1]Striker v. McMichael, 1 Phila. 89.

[2]Conn v. Hazlett, 14 Super. 352. Yet the value of the account as "independent evidence" of values was denied.

[3]Henry v. Martin, 1 W. N. 277.

[4]Car & Coach Co. v. Elsbree, 19 Super. 618. This is called "refreshing recollection." There was no refreshing of recollection. There was simply inference that the notices sent corresponded with the notice in the witness's hands.

note, payable to B, was discounted for B at a bank. A alleging that the note was made for B's accommodation, and that he had paid it, sues B to recover the money paid. The note was lost. Payment was proved by the testimony of A, and of the bank officers, and by reference to the bank's books, which showed several renewals of the note and the payment of the last one by A's check. The pass-books of both parties were also put in evidence. Apparently, the bank's books were put in evidence. Witnesses were called, who made the entries in the bank books, to prove them, and that such a note passed through the books and was renewed from time to time. The books were admissible to refresh the memories of the witnesses, and to supply missing dates, amounts, etc., and make certain what the want of memory would not supply. It was not a case of original and substantive evidence furnished by the books alone.[1]

READING THE PAPER

To read the paper to the jury would be a way of making it evidence. A witness was directed by the court to look at his papers and books beginning at the first charge against the defendant and working his way up to the last; doing so, he announced what he read to the jury, yet he was told to "refresh your memory."[2] In a suit against an insurance company the plaintiff was obliged to prove what things in a store had been destroyed by fire. The witness used the "particular statement" to refresh his memory. "Such items as he could recollect as being in the store *and* [as were?] in the statement, he was permitted to identify

[1]Bollman v. Smith, 34 Leg. Int. 447. In Vulcanite Paving Co. v. Ruch, 147 Pa. 251, plaintiff had paved a street to the width of six feet at the instance of the defendant. A witness testified to measurements made by him as to the space to be paved. He said he made the memorandum at the time he did the measuring. The book was put in evidence. For what purpose does not appear. Even if erroneous, says the supreme court, the admission is not ground for reversal, because, under the circumstances, it could have done no harm to the defendant.

[2]Mead v. White, 6 Sadler 38. Perhaps the books were used as a veridical history of the past transactions, on the witness's assertion of their accuracy. It is not believable that the witness was meant simply silently to scan the items and as often as any of them awakened a memory of the facts, to affirm them on the responsibility of a present memory.

and read from the statement." "This was not wrong," says Thompson, J., "but care should be taken that the recollection alone of the witness thus refreshed should constitute the testimony and not the paper."[1] Jones, called to prove the value of property sold by sheriff, estimated it at $20,000. He was allowed to read to the jury a bill of items of the values of articles sold by the sheriff. Says Agnew, J., "The court only suffered him to state in detail what before he had stated in the aggregate, thus making his valuation more open to attack if unsound and more satisfactory if reliable." But reading to the jury the bill was virtually putting it in evidence. Yet it is treated as simply a means of assisting the memory.[2] The sheriff has taken in execution as B's, goods claimed by A, the plaintiff, who sues him. The goods had belonged to A, who alleged that he had only conditionally sold them to B, and that the condition had not been fulfilled. C, a witness and former clerk of A, proved by deposition the sale and its terms, and what part of the goods sold was taken by the sheriff. He also proved that a certain book produced before him, the "order book," was that in which the plaintiff and his clerks were in the habit of entering such books as were from time to time ordered from him. This book was produced, and plaintiff offered to read the entries therein made by the witness, as clerk, relative to the sale of the goods in question to B. The book was allowed to be read. Says the supreme court; "The book was not receivable as a book original entries. The entries were offered to identify the subject of the sale, not the value. "They were embodied in the testimony of a witness who made them, and verified them, as memoranda to designate the goods selected; and who testified that the ticks and marks placed opposite to the items were used to distinguish the casks or packages delivered to the drayman. The witness did not, as is usual in regard to book entries, authenticate the book, and allow it to speak for itself; he testified to the particulars of the transaction from his own knowledge, and thus corroborated, the entries were clearly admissible."[3]

[1]Mut. Ins. Co. v. Schreffler, 44 Pa. 269. But if the paper is read to the jury, how is it to be known that it is not received by the jury as a part of the evidence?

[2]King v. Faber, 51 Pa. 387.

[3]Fitler v. Eyre, 14 Pa. 392. Apparently the witness had not depended on the book for refreshing his memory. He had testified independently of them. The books corroborated his evidence as his evidence corroborated the books.

[CONCLUDED IN NEXT ISSUE.]

MOOT COURT

COMMONWEALTH v. BEAL

Burglary—What Constitutes a Breaking—Contributory Negligence

STATEMENT OF FACTS

Indictment for burglary.—Williston retired, leaving the window of his bedroom raised about two inches. Beal, the defendant, with intent to steal Williston's watch, raised the window further and entered the room at 12:30 A. M.

Rorer for Plaintiff.

Means for Defendant.

OPINION OF THE COURT

FERRIO, J.—This case presents the interesting question whether the raising of a window which is partially opened is such a breaking as is required under our statute. Breaking may be of two kinds, actual and constructive. A constructive breaking is one obtained by fraud or artifice. It is plainly seen that the defendant's breaking does not come under that head. To constitute actual breaking there must be some actual force used to make an opening. It is true that some force was used in putting up the window, but the window was partially opened and the law does not recognize this as a breaking.

It has been held in this state in Comm. v. Rolland, 85 Pa. 66, by Judge Paxton, "that if a person leaves his doors or windows open it is his own folly and negligence, and if a thief enters therein there is no burglary."

In Comm. v. Strupney, 105 Mass. 588, a case bearing a close resemblance to this one, it was held that before one can be convicted of burglary, there must be evidence that all external openings were closed. This view is also taken in People v. McCord, 76 Mich. 200. It is plainly shown here that the window was partially opened.

Dr. Trickett, in his work on Criminal Law of Pennsylvania, says that an entry into a house at night through an open door or window would involve no breaking, vol. 1, page 147. If a person leaves his doors open or partly opened or his window raised or partly raised or unfastened, it will be such negligence on his part as is calculated to induce or tempt a stranger to enter, and if he does so through the open door or window as by pushing open the partly closed door or window, it will not be burglary, 6 Cyc. 174; 262 Clark's Criminal Law; Comm. v. Strupney, 105 Mass., 588; Timmons v. State, 34 Ohio 426.

The English Courts take the same view as most of our courts which view is stated above. In 7 C and P 441, Rex v. Hyams, it was held to be no breaking if prisoners threw up the sash of a window which had already been raised a couple of inches and so effected an entry.

In Comm. v. Stephenson, 8 Pickering 354, the court held that it should appear that the house was secured in the ordinary way, so that by the carelessness of the owner in leaving the door or window open the party accused of burglary be not tempted to enter. In Comm. v. Strupney, supra, the court held that an entrance into a dwelling through a window or door which has been left partly open is not the forcible entering and breaking necessary to constitute burglary.

Therefore, in view of cases cited it is plainly seen that the defendant did no breaking which is one of the essentials of the crime, and, therefore, cannot be held for the crime.

Verdict for defendant.

OPINION OF SUPERIOR COURT

The question presented by this case was first decided in Massachusetts in 1789. In Comm. v. Steward, 7 Dane Abr. 136, it was held that "if a window be a little pushed up * * * so that one passing may see that the owner has not properly shut his house, it is no burglarious breaking to enter tho a further pushing up of the window be necessary." A similar decision was reached in C. v. Hays, 7 Dane Abr. 136, and these early cases were followed in C. v. Strupney, 105 Mass 588. The same doctrine was enunciated in Rex v. Smith, 1 Moody 178, S. v. Long, 5 Ohio Dec. 617, Rose v. C, 19 Ky. L. Rep. 272.

The doctrine announced by these cases was somewhat modified, tho not entirely repudiated, in P. v. Dupree, 98 Mich. 26. In this case it appeared that the accused on the day preceding the night of the breaking raised the window slightly so that it could not be fastened by the bolt. At night he raised the window so as to effect an entrance. This was held to be a breaking. The court distinguished the case from the others on the ground that the window "was raised so little as not to attract the notice of the occupant."

Recent cases, however, repudiate entirely the doctrine laid down in the Massachusetts cases. In Claiborne v. S., 113 Tenn. 261, 68 L. R. A. 859; P. v. White, 153 Mich. 617, and Murmutt v. S., (Texas) 67 S. W. 508 it is held that to raise sufficiently to gain an entrance a partly open window constitutes a burglarious breaking.

This, it is submitted, is the correct view. Contributory negligence is not a defense to a criminal prosecution. One may be convicted of false pretences, tho the party from whom the property was obtained was negligent in relying upon the pretences; one may be convicted of involuntary manslaughter, tho the deceased was guilty of contributory negligence; one may be convicted of larceny, tho the property was negligently exposed. No good reason is discovered why a different rule should be applied to burglary.

The tendency of the courts of late has been to hold that but the slightest force is necessary to constitute a breaking and it would be a useless refinement to hold that the further raising of a window partly open is not a breaking.

THOMPSON v. YOUNG

Essentials of Tort Liability—Proximate Cause—Death of Horse by Intentional Fright—Aviator

STATEMENT OF FACTS

Young, an aviator, while manoeuvering over the land of Thompson intentionally flew three feet above a horse which was being driven by Thompson. The horse seeing the machine neighed loudly, leaped into the air and fell dead. Reputable veterinarians testified that the death of the horse was due to fright caused by the sight of the flying machine, and there was no evidence to the contrary.

Price for Plaintiff.

Reese for Defendant.

OPINION OF THE COURT

ROWLEY, J.—The question involved here is whether the rule largely followed, that individuals cannot recover damages for nervous shock and mental suffering, should be applied to horses.

In this case the plaintiff seeks to recover on the ground of wilful negligence, which, we think is not the proper ground of recovery, but that of trespass which was committed by Young, the aviator, in sailing so near the plaintiff's horse as to frighten it to death, and that the measure of damages should be the value of the horse.

The defendant contends that the property owner does not own all the space above his land, and that the air is free for navigation.

We must accept the defendant's contentions with some modifications.

It is true that a landowner has not the right to prevent the passage or recover damages for the passage at a *reasonable* altitude, of fowls, smoke or balloons over his land.

But what is a reasonable altitude is difficult to determine, and if a definite line be drawn it must be drawn according to the circumstances of the case.

In the case at bar it is admitted that the defendant intentionally flew within three (3) feet of plaintiff's horse, and the general rule of law is that "a person is answerable in damages for the consequences of his fault so far as they are natural and proximate and, therefore, may have been foreseen by ordinary forecast." Piollet et al v. Simmers, 106 Pa. 95.

We think that a flying machine when brought sufficiently close to a horse is capable of frightening it to death.

Altho a defendant may be negligent in the performance of some duty to the person injured, no liability attaches unless such negligent act was the proximate cause of the injury. Marsh v. Giles, 211 Pa. 17.

But in the case at bar it was proven by reputable veterinarians that the death of the horse was due to fright caused by the act of Young, that act being the proximate cause of the death of the horse.

Piollet v. Simmers, cited above, held that veterinarians would be competent persons to give their opinion based on facts as to whether certain objects were calculated to frighten horses to death.

To constitute proximate cause creating liability for negligence the injury must have been the natural and probable consequence of the negligent act, altho it is not necessary, however, that injury should be the usual necessary or inevitable result of the negligence. Burk v. Creamery Package Mfg. Co., 126 Iowa 730; Brown Stone Co. v. Chattahoochee Lumber Co., 121 Ga. 809.

"That certain phenomena will produce fear in a horse, other brute or man the courts do not deny. That this fright may induce unreasoning, precipitate muscular movements in horse or man is well known, that these movements may issue in injury to the body of horses or man, or injury to vehicles or other property is also well known. If a horse sees an object and takes fright resulting in damage, the person who negligently permitted the exposure of the object is responsible not for the horse's fright possibly, but for the result of that fright." 14 Forum 112.

The injury whether to person or property may be connected with the act of the person who exposes the alarming object thru the nexus of the fear. The contention would not be tolerated, that fear cannot be a cause of sudden violent and uncalculated muscular movements, whether of man or animal, and that the human cause of the fear cannot be made responsible for the consequences of his act or omission, altho mediated by fear. 29 cyc. 503. 14 Forum 170.

Numerous cases hold that mere fright alone, unaccompanied by bodily injury, is not a cause of action, for, if it was, it would prepare the way for many unjust claims and cause great fraud, but we think this rule can not be applied to a horse, as it has not yet acquired the mental equipment whereby it can arrange with its owner to frighten badly on a particular occasion. In support of this statement we cite 14 Forum 168, which held that "one could recover for the psychological deterioration of a horse due to fright."

"An action will lie for physical injury or disease resulting from fright or nervous shock, caused by negligent acts, when defendant should have known that such acts, would, with reasonable certainty, cause such results, or the negligence was so gross, showing utter disregard to the consequences which should have been contemplated by him." Watkins v. Koolin Mfg. Co., 60 L. R. A. 617.

In 111 Iowa 572, it was held that plaintiff could recover where defendant removed a cover from his (defendant's) wagon, thereby frightening plaintiff's horse and injuring her, tho there was no physical impact.

In Conklin v. Thompson, 29 Barb (N. Y.) 218, a case directly in point with the one at bar, held that where Defendant wilfully and without a license exploded firecrackers in a public street intending to frighten plaintiff's horse and it was frightened and died immediately; a verdict, for plaintiff was sustained on appeal.

While aviators have the right to navigate the air at proper heights,

they should do so under the condition that for injuries to property or person on the surface of the earth, they should be liable to make compensation, whether they have acted skillfully or carefully or not. 14 Forum 260.

In the present case Young, the aviator, "intentionally" flew three feet above the plaintiff's horse. We think that this is not a reasonable altitude for safety and judgment is entered in favor of plaintiff.

OPINION OF SUPERIOR COURT

In determining in any case whether a defendant has incurred liability in tort to the plaintiff, the following three questions must be considered: (1) was the harm which the plaintiff suffered one of the *specified kinds of harm* from which the plaintiff has the right by law to be free; (2) was the conduct of defendant the cause, in a legal sense, of this harm; (3) were there any circumstances or conditions in the particular case which excused or justified the infliction of the harm by the defendant upon the plaintiff.

The harm in this case was the killing of the plaintiff's horse by fright unaccompanied by phsyical contact. That this is one of the specified kinds of harm from which the plaintiff has the right to be free was decided by this court in Beck v. Harriman, 14 D. L. R. 168. It was there held that the doctrine prevailing in Pennsylvania as to liability for the results of anthropic fear should not be extended to hippic fear, and that it would be absolutely indefensible to decline compensation for all the consequences of negligence, mediated thro the fear of a horse, in submission to the foolish principle that physic causes and effects cannot become a ground of liability. See also Piollett v. Simmers, 106 Pa. 95.

There is no doubt under the facts of this case that it was the defendant's conduct which actually caused the terror which resulted in the death of the horse, but it is argued that, tho the defendant's conduct may have been the cause as matter of fact, it is too remote to be considered the cause in law. In this contention we cannot concur. That a horse may become and usually does become frightened at the sight of unusual objects is a matter of common knowledge, and that this fright may result in the death of the horse is a physiological fact which is equally well established and which it would be absurd for courts to deny. If it is true as a matter of fact that the defendant's conduct caused the death of the horse, there would seem to be no just reason why the defendant's conduct should not be considered the legal cause of such death.

The defendant can allege no circumstance of justification or excuse, unless it is the law that an aviator has the unqualified right to fly over the land of another, without liability for any damage he may cause, if such damage is not the result of physical contact with the land or the property of persons thereon. This doctrine has never been asserted by any court. It is now generally conceded that aviators have the right to navigate the air at proper heights, but it is the prevailing opinion

that this right has brought with it a concomitant responsibility which renders the aviators liable for injuries caused to persons or property on the surface of the land, whether the aviators acted with negligence or not. Kuhn on the Beginnings of Aerial Law. American Journal of International Law, vol. IV, p. 109; Seligman v. Thorpe, 14 D. L. R. 256. In David on Motor Vehicles, p. 297, it is said: "The height at which an aviator may lawfully pass over property must vary according to the circumstances of the case. The criterion is the degree of peril or inconvenience to which the proprietor is subjected. * * Flying so low as to cause fright to domestic animals doubtless renders the aviator liable for whatever damage may result."

In the present case the defendant was manoeuvering over the plaintiff's land and under the authorities this adds a strengthening element to the plaintiff's case. "The moment an aviator ceases to be a passer-by, he risks becoming a wrong-doer. He may occupy anothers' space temporarily, but he must not do so longer than is reasonably necessary for passage. The law recognizes and concedes the rights of passage, but it does not permit any increase in the risk by reason of a stoppage, hovering or the like. Such acts amount to a nuisance per se." David on Motor Vehicles, p. 296. The same principle has been announced by Pollock in regard to balloonists. Pollock on Torts, p. 348. Judgment affirmed.

DAY v. HAYWARD

Principal and Agent—Ratification

STATEMENT OF FACTS

Day sold goods to one Spencer, but he understood at the time that Spencer had Hayward in mind as the ultimate consumer. Spencer took the goods to Hayward, who accepted them, and agreed to pay Spencer what he was to pay Day, and a commission of 10% for his trouble. Day claims that Hayward ratified Spencer's contract and that he should pay him directly, Spencer having absconded.

Pearlman for Plaintiff.

Rowley for Defendant.

OPINION OF THE COURT

SINGERMAN, J.—The question involved in this case is: Did the relationship of principal and agent exist between Spencer and Hayward? Was Spencer acting as the agent of Hayward? Or, did Spencer buy the goods from Day on his own contract, and subsequently under a new contract, sell them to Hayward? If Spencer was acting as the agent of Hayward, then Hayward is liable as his principal. But if these are two distinct contracts, then Hayward cannot be held in this action.

Evans, on "Principal and Agent," defines an agent as a "person duly authorized to act on behalf of another, or one whose unauthorized act has been duly ratified." "The relation of agent is normally contractual, since it generally arises from a contract, either express or implied, previously entered into between the principal and agent." (31 Cyc. 1190.) There is nothing in the facts to give rise to the presumption that a contractual relation, express or implied, existed between Spencer and Hayward, whereby the former was authorized to fix a liability upon the latter. Spencer took the goods he had purchased from Day to Hayward, and Hayward accepted them, not ratifying Spencer's contract with Day, and agreeing to pay Day, but agreeing to pay Spencer what Spencer had paid Day, and a commission of 10%. An entirely separate and distinct contract was made with Hayward. From the very facts of the case, it was understood that Spencer, and he only, was to be liable to Day on his contract.

Can it be said that when A, a wholesaler, sells goods to B, a retailer, but A knows that B is not the ultimate consumer, but the general public are to purchase the goods and are the ultimate consumers, that A can then sue one of B's vendees in case of default of B? It is very apparent that he could not.

The next question is one of ratification. A ratification is an agreement to adopt an act performed by another for us. * * * Ratification of a contract implies an existing person on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. (Bouvier's Law Dictionary.) At the time Spencer made the contract with Day, Day was not led to believe, nor was he warranted in presuming, that the contract was made in behalf of Hayward. The fact that he thought Spencer had Hayward in mind as the ultimate consumer is immaterial. The vendee is not bound to know what the vendor has in mind. When a vendor sells goods to a vendee, the presumption is that the vendee is acting on his own behalf, and not as the agent of another, until the contrary is shown.

The case of Pittsburg and Steubenville R. R. Co. v. Gazzam, 32 Pa. 340, cited by counsel for defendant, fully covers the question of ratification.

A ratification, by a principal of the unauthorized acts of an agent, in order to be effectual, must be made with a knowledge on the part of the principal of all the material facts. (Merrick Thread Co. v. Phila. Shoe Mfg. Co., 115 Pa. 314.)

The law, as stated, will certainly work a hardship upon Day. It will enable Hayward to secure the goods for nothing, because his vendor has absconded, and Day could only sue Spencer. But the law does not always do justice to both sides.

Therefore, I find that there was no relationship of principal and

agent, between Spencer and Hayward, and there was no ratification by Hayward of Spencer's contract.

Judgment in favor of defendant.

OPINION OF SUPERIOR COURT

The only ground which has been suggested upon which a recovery by the plaintiff could be allowed is that of ratification. The whole doctrine of ratification is anomalous and it should not be extended beyond the limits defined by the existing authorities.

In the present case, tho Day may have understood that Spencer had Hayward in mind as the ultimate purchaser, it does not appear that Spencer professed to act in the name of, or on behalf of, Hayward. It follows that there can be no ratification.

The great weight of authority supports the view that in order that a person may ratify the act of another, the act must have been done *professedly* in the name of, and behalf of, the one so ratifying. In Mitchell v. Minnesota Asso., 48 Minn. 278, it is said: "The law is that where the party acting has no authority to act for the third party, and does not profess at the time to act for him, the subsequent assent of such party, to be bound as principal, has no operation. A ratification is only effectual when the act is done by a person professedly acting as the agent of the party sought to be charged as principal."

The following cases are direct adjudications applying the rule thus stated: In Re Roanoke Co., 166 Fed. 944; Ballock v. Hooper, 6 Mackey 421; Schlessinger v. Co. (N. J.), 76 Atl. 1024; Moore v. Roper, 35 Can. S. C. 533; Hamlin v. Sears, 82 N. Y. 327; Western Pub. House v. Rock, 84 Iowa 106. Statements to the same effect are found in Puget Co. v. Krug, 89 Cal. 237; Ilfeld v. Ziegler, 40 Colo. 401; Herd v. Bank, 66 Mo. App. 643; Mender Co. v. Brustuen (S. D.), 127 N. W. 546.

In a recent case before the House of Lords of England, in which this doctrine was applied, Lord Robertson said: "The whole hypothesis of ratification is that the ultimate ratifier is already in appearance *the contractor*, and that by ratifiying he holds as done for him what already bore, purported or professed to be done for him. There can be no room for ratification until the credit of another than the agent has been pledged to the third party." Keighlly v. Durant (1901), A. C. 240.

In Matheson v. Kilburn, 1 Eng. Rul. Cas. 398, it appeared that a person intending to buy on behalf of another, but without authority from him, and without avowing that he was acting for another person, bought goods in his own name. The majority of the court were of the opinion that the contract was incapable of ratification by the person for whom the buyer intended to buy, as the latter did not assume to buy on behalf of another person.

Judgment affirmed.

MARY DUDLEY v. STONE

Tort—Proximate Cause—Act done under Influence of Pressing Danger—Act April 26, 1855

STATEMENT OF FACTS

One Carter had threatened to kill Stone on sight. The husband of plaintiff was with Stone when Carter approached. Stone upon seeing Carter jumped behind Dudley and held him in front of him. Carter fired and killed Dudley. Stone then fired and killed Carter. Carter left nothing. Stone is rich. Trespass for $10,000 damages.

Sasscer for Plaintiff.

Renard for Defendant.

OPINION OF THE COURT

GOODING, J.—Before considering the main point of contention, it is necessary to determine whether or not Mrs. Dudley has a right of action.

The act of April 26, 1855, provides that the persons entitled to recover for any injury causing death shall be the husband, widow, children, etc. Thus it is found that Mrs. Dudley has the legal capacity to sue, and her right to recover is the same as would have been her husband's had he survived the shot.

The fact that Stone was rich and Carter poor does not enter into this case, since a man is entitled to no legal discrimination, because he is rich or poor, except in the determination of damages which he may be made to pay.

Then the main question is, "Was the act of Stone in seizing and holding Dudley before him the proximate cause of Dudley's death." No satisfactory and absolute rule as to the determination of proximate cause has ever been laid down by the courts, and much must therefore depend upon the circumstances of the particular case. 64 Me. 51, Cooley en Torts, 68-80. Another very sound and reasonable theory is that the injury must be the natural and probable consequence of the act complained of, and such a consequence as might and should be foreseen from the surrounding circumstances. Hoag v. R. R., 85 Pa. 293; Pass. Ry. Co. v. Treteb, 117 Pa. 390; R. R. Co. v. Kellog, 94 U. S. 475.

Applying these principles, Stone could and did foresee that his jumping behind Dudley and holding him would result in Dudley's injury. This is imputably the very reason he acted in such a manner. His first thought was to protect himself, and by placing Dudley in such a position as to intercept Carter's bullet fired at him (Stone), Dudley's injury would result in his own protection.

Without the operation of Stone's act, Dudley would have been untouched. This is an indication, but not an absolute rule in determining what is proximate cause. Ring v. City of Cohoes, 77 N. Y. 83; Taylor v. City of Yonkers, 105 N. Y. 202.

The counsel for the defendant has laid great stress for his defense upon the case of Laidlaw v. Sage, 158 N. Y. 73. But that case differs from the one at bar in two vitally important particulars. First, the action of Sage was not the proximate cause of the injury. Had he moved the plaintiff in the opposite way to which he did the result would have been the same, or had he not moved him at all. The force and destructive power of the dynamite reached every corner of the room, and in this case the dangerous area was the space occupied by a man's body in a line with the barrel of the revolver. Thus the action of Sage, if he did move Laidlaw, contributed in no measure to the injury, while in the case at bar without Stone's overt restraint, no damage would have resulted to Dudley. The second distinction, which we find is that by the plaintiff's own testimony his movement was voluntary and no force was administered by Sage. Can it possibly be found that Dudley stood in the line of fire of his own free will and accord? Decidedly not. In fact the circumstances reveal an absolute negation of such a supposition.

Proximate cause is the cause which necessarily sets the other causes in operation. When the cause nearest to the disaster is the one which makes fatal any or all causes, that is when the causes are dependent one upon the other, the cause nearest the injury is the proximate cause. Insurance Co. v. Boon, 95 U. S. 130.

In application of this principle, Stone's knowledge of Carter's intent to kill him caused him to seize and hold Dudley. As far as this case is concerned we may consider Carter's intention and ability to kill as identical with his killing. Thus the two causes, namely, Carter's shot and Stone's seizure and holding of Dudley are inseparably linked together by Stone's knowledge of Carter's hatred and animosity.

We do not consider it necessary to discuss the principle in Aiken v. P. R. R. Co., 130 Pa. 380, and P. R. R. Co. v. Werner, 89 Pa. 59, that under pressing danger a man's actions are involuntary. Stone's danger was not pressing. The facts tell us that he merely saw Carter approaching. He was armed and was not, as the counsel for defendant says, "unprepared." This is shown by the fact that he, immediately after Dudley's death, shot and killed Carter. His danger was only such as existed between the two armed enemies, and there is no evidence that Carter was a better marksman than Stone.

Stone is rich. He is amply able to pay to Mrs. Dudley the $10,000 which she asks, to support her in the absence of the means of living, of which his act deprived her, and the defense has not questioned the fairness of the amount.

Judgment entered in favor of plaintiff for $10,000.

OPINION OF SUPERIOR COURT

The act of 1851, upon which the plaintiff relies, provides in substance that a widow shall be entitled to recover damages where the death of her husband was occasioned by the unlawful violence of another.

To entitle the plaintiff in the present action to recover, it must therefore appear (1) that the defendant's act constituted unlawful violence and (2) that this unlawful violence occasioned the death of the plaintiff's husband.

The acts of the defendant present all the elements of a battery and of a false imprisonment and therefore constitute unlawful violence, unless it is true, as contended by counsel for the defendant, that when a person is suddenly and unexpectedly confronted by a terrible and impending danger, the law presumes that an act done under the influence of the danger is involuntary and holds any harm which this act causes accidental, for which the actor is therefore not responsible.

The doctrine asserted by the learned counsel is thus stated in Moak's Underhill on Torts, p. 14. "The law presumes that an act done under the influence of pressing danger was done involuntarily." It is said by the same author that this rule is founded upon the maxim that self-preservation is the first law of nature, and where it is a question whether one of two men shall suffer, each is justified in doing the best he can for himself. The Court of Appeals of New York has said that this principle "has been many times affirmed by the courts of this State as well as others." Laidlaw v. Sage, 158 N. Y. 73; 44 L. R. A., 216. Unfortunately the court did not indicate the decisions in which the principle "has been many times affirmed."

It is certainly not true as a universal principle of either the criminal or the civil law that where it is a question whether one of two innocent men shall suffer each is justified in doing the best he can for himself.

The criminal law holds that killing an innocent man cannot be justified or excused on the ground that it was done under threats by third persons in order to save the slayer's life. Rizzole v. C., 126 Pa. 54; 21 Cyc. 833. And it has been held that a man, who in order to escape death from starvation, kills another for the purpose of eating his flesh, is guilty of murder, altho at the time of the act he is in such circumstances that he believes and has reasonable grounds for believing that it affords the only chance of saving his life. Reg. v. Dudley, 15 Cox 624.

By the civil courts it has been held that a man who under threats of death trespasses upon the lands of another is liable therefor, "because one cannot justify a trespass upon another for fear." Gilbert v. Stone, Aleyn 35. And in the famous case of Scott v. Shepherd, Blackstone, J., stated that Ryal, upon whose stand the squib had been thrown and who, acting not as "a free agent," but under a "compulsive necessity for his own safety and self-preservation," instantly picked it up and threw it to another part of the market house so that it struck Scott, was liable to Scott, because "not even menaces from others are sufficient to justify a trespass against a third person; much less fear of danger to either his goods or his person.

The question presented is whether a man is liable for an injury in-

flicted upon an innocent stranger, knowingly or with sufficient notice of the danger, if the injury is an unavoidable incident of self-protection. Answering this question it has been said, and held, that when it is a question of paying damages, a man cannot shift his misfortunes to his neighbor's shoulders. Cooley on Torts, 115; Spade v. R. R., 172 Mass. 448.

In Miller v. Horton, 152 Mass. 547, it is said: "It could not be assumed as a general principle, without discussion, that even necessity would exonerate from civil liability for a loss knowingly inflected upon an innocent person who neither by his person nor property threatens any wrong to the defendant. It has been thought by great lawyers that a man cannot shift his misfortunes upon his neighbor's shoulders."

The principle enunciated by these "great lawyers" may not be applicable to cases where the act of the defendant furthered a common interest of the parties or where it served a public purpose, but we think that it is, and should be, applicable to the present case.

Assuming that the act of the defendant in holding the plaintiff's husband was unlawful violence, the question whether this violence "occasioned" the death of the plaintiff's husband remains to be answered.

The learned counsel for the defendant claims that Stone's act was not the proximate cause of Dudley's death, because between Stone's act and the injurious consequence there intervened an act produced by the volition of a third person.

It is not, however, true that the mere circumstance that there intervened between the wrongful act and the injurious consequences acts produced by the volition of third person renders the result so remote that no action can be maintained.

Where the intervention of the independent agency might have been reasonably anticipated the causal connection is not broken and the original wrong doer is liable for the injury sustained. 29 Cyc. 501.

Judgment affirmed.

ESTATE OF JOHN MARSHALL

Specific Legacy—Ademption of Specific Legacy

STATEMENT OF FACTS

Marshall wrote a will in which he bequeathed to his son Henry his 40 shares of the stock of the X. R. R. Co. Subsequently that company merged with the Y. R. R. Co., the combined company being the Z. Co., and shares in company formed by the merger, viz., the Z. Co., were issued on surrender of shares in X. and Y. Cos. Marshall died and Henry claims the 40 shares of the Z. Co.

Young for Plaintiff.

Durkin for Defendant.

OPINION OF THE COURT

McCALL, J.—The facts set forth above show that the legacy in question is specific. A specific legacy is defined to be a gift by will of a specific article or part of testator's estate which is identified and distinguished from all other things of same kind and which may be satisfied only by delivery of particular thing. 18 Am. & Eng., Encyc., 714; Stover's Est., 45 Sup. 451; Snyder's Est., 217 Pa. 71.

The question to be decided then is whether the facts set forth constitute an ademption of this legacy. Counsel agree that testator in his lifetime exchanged the stock.

The old idea that the testator's intention was to be considered has been exploded. Gibson, in Blackstone v. Blackstone, 3 Watts 335, says: "The annihilation of a specific legacy, or such changes in its estate, as makes it another thing, annuls bequest for reasons paramount to considerations of intention."

In Walton v. Walton, 7 Johnson Ch. (N. Y.) 258, it is said, "An ademption is affected on principle that the thing is annihilated or its condition so altered that nothing remains to which the terms of bequest can apply." In Hoke v. Herman, 21 Pa., 301, it is said: "Unless the very thing bequeathed is in existence at death of testator, and then forms a part of his estate, the legacy is wholly inoperative; the legatee has no right or claim; the executors are under no obligations to replace the thing by purchasing another one of same kind as described in the will by means of other assets in their hands belonging to estate." See Ludlow's Est., 13 Pa. 188.

Gibson, J., in Blackstone v. Blackstone, Supra., says: "A legacy properly specific, and not merely specific in its nature by being charged on a specific fund, is adeemed by any change of its state or form, effected, not by fraud or operation of law, but by act of testator, whatever be its purpose, which makes the corpus of legacy at his death a different thing than what is indicated by terms of description." In Thayer v. Paulding (Mass.), 85 N. E. 868, it is said: "A specific legacy of a designated number of shares of corporate stock owned by testator at the time of execution of his will, is adeemed on testator disposing of same in his lifetime or on property ceasing to exist."

Pope v. Hinckley (Mass.), 95 N. E. 798, is relied on by plaintiff. In that case the exchange of stock was not made by testator in his lifetime. The corporation whose shares he devised in his will, was a New Jersey Corporation operating in Connecticut, and had passed into hands of receivers, and testator had merely deposited his shares in a trust company which issued negotiable voting trust certificates. This was the state of affairs when testator died. After his death, trust certificates were exchanged for stock in the new corporation which was organized in Connecticut. Depositing the stock in the trust company was but one step toward the transmutation of stock in the old company into that of the new. If the scheme failed, the old stock was to be returned to the

stockholders. The court then decides the legacies were not specific, and of course the legatees took the stock in the new company. (Thayer v. Paulding was relied upon in this case.)

Gardner v. Gardner (N. H.), 56 Atl. 316, is also relied upon by the plaintiff. Testatrix after bequeathing 75 shares of stock, traded these in for 75 shares of stock in a corporation formed by a merger of the old corporation and another. She subsequently sold 25 shares. The court decided that the remaining 50 shares were subject to the specific devise. But counsel in this case agreed that it was the intention that the shares of the second corporation be substituted for those of the first. Hence this case decides that a specific legacy is liable to abate by testator disposing of part of devised property. Snyder's Est., 217 Pa. 71, is similar to this case in that the intention of the testator was shown dehors the will.

In re Pierce, 25 R. I. 34, 54 Atl. 588, is very similar to the case at bar. Testatrix bequeathed certain stock in a bank. Subsequently, but during her lifetime, this bank consolidated with other banks. The new concern taking over the liabilities and assets of several banks without a formal liquidation, and their stockholders being entitled to exchange their shares for stock in the consolidated bank. Testatrix did so, making a small additional payment in cash.

HELD.—That as transfer was not a sale, but an exchange, there was no ademption of the legacy. This was a per curiam opinion and only one case was cited in it and access cannot be had to examine it. But the court seems to imply that had this been a sale, the legacy would have been adeemed.

"A sale or exchange is a transmutation of property from one man to another in consideration of some price or recompense in value." "But with regard to the LAW of sales and exchange, there is no difference." 2 Black, 446, 447; Tiffany on sales, 12, and cases therein cited. The only comment I make on this case is that it is based on a very refined distinction, and that the weight of authority is the other way, both in Pennsylvania and in the other states. Powers Est., 222 Pa. 179; Black's Est., 223 Pa. 382; Snyder's Est., 217 Pa. 71.

Many more cases may be found on this subject in a note to Snyder's Est. (Supra.), in 11 L. R. A. N. S., 63.

Although the courts do not favor specific legacies, and the working of the law of ademption works hardships as in the case at bar, yet the precedents must be followed regardless of one's personal opinion of what the law ought to be.

It is decided.—

(1) The legacy was specific.

(2) The legacy was adeemed by the testator's exchange of the stock before his death.

Judgment for defendant.

OPINION OF SUPERIOR COURT

It is well established that a legacy of a stated number of shares of stock of a designated corporation without further explanation and without more particularly referring to and identifying the shares intended to be bequeathed is general and not specific. 18 A. & E., Encyc., 718; 10 Annotated Cas., 492. In Sponsler's Appeal, 107 Pa. 95, a legacy of "fifteen shares of second preferred C. V. R. R. stock" was held to be a general legacy. See also Lathrop's Estate, 3 D. R. 100; Snyder's Est., 217 Pa. 71, 11 L. R. A. N. S. 53.

According to the great weight of authority, the ownership by the testator of the exact number of shares bequeathed does not make the legacy specific, Sponsler's Appeal, 107 Pa. 95; 18 A. & E., Encyc. 718. "A legacy of stock even tho the number of shares is an odd one, corresponding exactly to the number owned by the testator, and tho the stock itself is not generally found on the market, is not specific." Yerkes Est., 8 D. R. 84. "A legacy of stock, of whatever denomination, is not prima facie specific, altho the testator may have had stock of the description mentioned, sufficient to answer the bequest." Snyder's Est., 217 Pa. 71.

Where, however, the testator describes the stock bequeathed as his, the legacy is specific. 18 A. & E., 719; 10 Annotated Cas., 494; Alspoop's Ap., 9 Pa. 375; Ludlow's Est., 13 Pa. 188; Blackstone v. Blackstone, 3 Watts 335; Klenke's Est., 210 Pa. 575. "It is certainly true that the presumption of intention is favorable to general legacies, and that it requires clear proofs of a restrictive intention to repel it; but the word "my" prefixed to the word stock, has always been held sufficient of itself to do so." Snyder's Appeal, 217 Pa. 71. The legacy under examination in the present case was therefore specific.

The learned court below has correctly decided that the legacy was adeemed. There was an absolute annihilation or extinction of the interests of the X. R. R. Co., and compensation was awarded in the shape of an allotment of different stock, in a different concern, on an entirely different footing. In a recent well considered case, decided by the Court of Appeal of England, it is held that a specific legacy of stock in a corporation is adeemed where, after the execution of the will, the testator exchanges the stock for stock in a corporation which has succeeded to the rights and property of the first corporation. Slater v. Slater (1907), 1 Ch. 665. The court said, "It seems to me, upon a consideration of the authorities that, having regard to the facts of this case, there is an extinction or annihilation of the original property, which has put an end to it, and that this other stock which is taken for it, cannot be treated as substituted for it in such a sense as is to be found in some of the cases which have been referred to, where a change in stock not in substance, but in form, has been held not to change its identity."

Judgment affirmed.