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REFRESHING RECOLLECTION

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NOT READING

Occasionally the courts realize that reading from a book is equivalent to putting it in evidence. In a suit against a bank for neglecting to collect a note sent it for collection, the defense was that the note had not in fact been sent to the defendant. The cashier and the officers deposed for the plaintiff, and in the deposition inserted copies of entries in the bank books. This was considered an oblique way of introducing the entries themselves. "If the books, supported by the oath of those who made them, were conceived to be evidence, they should have been offered, and upon proper identification, produced at the trial."[1] A memorandum of a conversation might be used by the person who made it, to refresh his memory, by a silent perusal of it, but it could not be read to the jury.[2] In order to ascertain that a sale of goods was made to a certain person, at a certain date, and what they were, the merchant was permitted to look at his book of original entries, kept by himself, and, having thus refreshed his recollection, "to state what goods he sold to Matthew Castner, but he is not to read [i. e., aloud to the jury] off his books."[3]

[1]Nat. Bank of Dubois v. Nat. Bank of Williamsport, 114 Pa. 1. In Juniata Bank v. Brown, 5 S. & R. 226, it is said that a witness, examined at the bar, may look at his notes for the purpose of refreshing his memory and then if he can, with a safe conscience, he may swear from his own recollection, but he would not be permitted to read his notes to the jury. A witness could not properly insert in his deposition an extract from a book, the averment in which is intended to be evidential of the thing averred.

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

[3]Shannon v. Castner, 21 Super. 294.

A witness had no personal knowledge of the sale and delivery of goods by A, his employer, to B. He had made out bills from memoranda furnished by others. A book called the bill book contained letter press copies of bills which he had made out. He was asked and allowed to refresh his memory by the bill book. The practical effect was to get the bills themselves in evidence through the thin disguise of filtering their contents through the witness. That is, the reading of the book and announcing what he read, was virtually putting the book in evidence.[1]

WITNESS INTERPRETING HIS BOOKS

The question was whether G was employed by Dodge between certain dates. It was attempted to negative this employment by showing that G was employed at this time by another, by Dickinson. Dickinson testified that G had worked for him. He could not say when nor how long. It was then proposed to show by Dickinson, after he had examined his books, that he believed that G worked for him between certain days. The witness might say that he believed the entries in his books, indicating payments of certain dates to G for work to be correct. "It could only be on his knowledge that the entries were a truthful record of his transactions made at the time."[2]

USE OF MEMORANDUM IN CROSS-EXAMINATION

When a paper is used not as substantive evidence of the facts averred in it, but simply to refresh the memory, it cannot be put in evidence by the party who causes the witness to use it for refreshing his memory. The opposite party, however, has a right to see, and to have the jury see it; to put it, therefore, in evidence[3] for the purpose of contradicting the witness who professes that his memory has been refreshed by it.[4]

IDENTIFICATION OF THE MEMORANDUM

When a memorial of a transaction is to be used as evidence of it, the memorial must be identified by a witness as being such

[1]Owen v. Rothermel, 21 Super. 561.

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

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

[4]Gilmore v. Wilson, 53 Pa. 194. Obscure dictum of Agnew, J.

and as being a correct history of the transaction. A claim was made by a physician against the estate of C. Magee. The physician's clerk testified that he kept no regular books, that in this case he made entries of the time devoted to Mr. Magee, on cards, each day, that she, the clerk, made a note of the time also, on a little memorandum and compared it with the physician's entries on the cards, which she thus found to be correct; that bills were sent to Mr. Magee, founded on these cards. The bills were not in evidence. Ten of the cards were offered. They were rejected. (a) They were not a book of original entries; (b) the cards produced could not be known by the clerk to be the cards, whose accuracy she had discovered by comparing the entries on them with her own memoranda. They had no characteristic earmarks. They were not in her exclusive possession. The cards produced might have been substituted by the physician for the original cards.[1] A book was produced by the plaintiff. He swore that the entries in it were made at the dictation of the defendant; that defendant told him the figures and he put them down accurately. The book was received in conjunction with the testimony.[2]

ORIGINAL COGNITION NECESSARY

There can be no refreshing of a memory which has not once existed. The witness must at one time have had a knowledge of the fact to which he is to testify, in order that he may speak from a revived memory of it. Hence, when A has no personal knowledge of sales and deliveries of goods, when he makes out bills founded on memoranda of such sales which are furnished to him by those who made the sales, and when he has made letter press copies of these bills, one of the objections to his testifying to sales to X, after an inspection of the letter press copies of the bills, is that A never had knowledge of the sales, he knew only that reports had been made to him of sales.[3] Contemporaneous entries in books in the ordinary course of business are original evidence when the subject of the entry is within the peculiar [why pecu-

[1]Magee's Estate, 50 Pitts. L. J. 59. Over, J., quotes from Withers v. Atkins, 1 W. 236, as to the conditions under which a memorandum by which a witness has refreshed his memory, can be put in evidence.

[2]Mead v. White, 6 Sadler 38.

[3]Owen v. Rothermel, 21 Super. 561.

liar?] knowledge of the person making it, and where no motive to prevent the truth is apparent. It is essential to the competency of such evidence, however, that the person making the entry have personal knowledge of the subject; otherwise the evidence is hearsay and inadmissible.[1]

PAPER A COPY

Apparently, a copy of an original may be used by a witness who made both, to refresh his memory, or, supported by his testimony, as substantive evidence. The plaintiff testified that he had carried memorandum books till they were worn out. He had transcribed from them to the paper which he had in court. On his swearing that each of the items on the paper was truthful, the court allowed him to "use the paper."[2] A book account copied from memoranda made after the delivery of the goods for whose price suit was brought, was received, after proof by the plaintiff that he had made both the memoranda and the book.[3] In a suit against a fire insurance company, a particular statement of loss was put in evidence. The plaintiff and his son could prove the items, and state that the statement was made by them. The fact that they referred to invoices and other papers to assist them in remembering the articles and prices does not necessarily give the statement the character of a copy, of secondary evidence. The point of the matter is that they swear to the statement as their own work made out from their knowledge of the facts. One may know that he received and had the articles set forth in certain invoices and that these articles, or a certain number of them, were destroyed by fire, and yet be unable to remember the items without the assistance of the invoices to refresh his memory.[4] Apparently an "extract" from a book of original entries, might be used to refresh the memory.[5]

FICTITIOUS REFRESHMENT OF MEMORY

Use of the oral or written statement of another as to a fact; e. g., as to the date of a conversation, may be attempted, not to

[1] Com. v. Berney, 28 Super. 61.
[2] Mead v. White, 6 Sadler 38.
[3] Wagonseller v. Brown, 7 C. C. 663. Ehrhart v. Katzen, 25 Lanc. 358.
[4] Allegheny Ins. Co. v. Hanlon, 31 Leg. Int. 372.
[5] Juniata Bank v. Brown, 5 S. & R. 226.

refresh, but to supersede, the memory of a witness. A witness, plaintiff's attorney, had testified to a conversation with the defendant, had in November or December, 1884. On cross-examination the defendant offered to hand to the witness a letter from the plaintiff's husband and agent to the defendant, dated January 9th, 1885, for the purpose of refreshing his recollection from the contents so as to determine whether the conversation occurred in November, December or January. The offer was rejected.[1]

BOOKS OF ORIGINAL ENTRIES

A book of original entries may be used, as such, without the precondition that any one should testify to the accuracy of the items contained in it, which are to be employed as evidence, and without their reviving a remembrance in any one of the facts mentioned in them. But, it is also clear that the keeper of the book may be able to say that the entries therein were made immediately after the respective transactions, and to agree with these transactions. Since the evidence act of 1869, said the supreme court, the book entries are not the foundation of the action. The party is the witness, and he uses the books as a memorandum "to refresh and assist his memory."[2]

TIME OF MAKING A MEMORANDUM

When a memorandum is used as itself evidence when supported by the witness as a past but true record, the truth of the memorandum depends on the knowledge of the things narrated in it by the maker at the time of making it. For evidence of this knowledge it would be necessary to depend on the testimony of the person who made it, or who read it, that he knew its averment to be true. If a short interval only had elapsed between the event and the writing of the history of it, that would be one guarantee of its possible accuracy. If a considerable interval had intervened, the accuracy could be rendered suspicious. When a paper is used to refresh memory, in the correct sense of that ex-

[1]Steele v. Wisner, 141 Pa. 63. The objections made to the evidence were, it did not appear that the witness was present when the letter was written, or authorized the writing of it, or was connected with it in any way.

[2]Barnett v. Steinbach, 4 Lug. Leg. Reg. 138.

pression, since an inaccurate paper may refresh, it is illogical to insist that the paper should have been made at any particular time. The courts, however, not seldom insist that the memorandum should have been made or perused by the witness at or shortly after the occurrence which it embodies.

WHO MAKES THE MEMORANDUM

Whether a memorandum is made by the person who as a witness uses it or not ought to be immaterial, whether it is used as a means of reviving a memory, or as a record of a past knowledge. A man's memory can be revived, not merely by his own memoranda or by suggestions originating with himself; but by the remarks, written or oral, made by others. A false memorandum may revive a true recollection. If the memorandum is used as embodying a past knowledge of the witness, it is evident that its having been made by the witness is not a prerequisite to this embodiment. A may read a narrative by B of an event which both he and B had seen, shortly after the event, and may as well know whether the narrative is true or not, as if he had written it himself. In Babb v. Clemson[1] the same paper was used by two witnesses, who were examined as to what things had been sold by the sheriff. Perhaps neither of them made, certainly both of them did not make, it. The court justified the use of it, because, not being itself evidence, "the only use made of it by the witness was to refresh his memory." A person who inspects a memorandum at the time of its making by another, which is simultaneous with the facts narrated in it, may use it to refresh his recollection.[2] The matter to be proved was what X testified in a former trial. Huston, J., was unwilling to say more than that "perhaps"[3] a witness could refresh his memory by notes or memoranda made by another person, when he looked over the writer, and saw that what was being written, was written correctly; or where he immediately after it was written read it over and found it correct,

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[1]12 S. & R. 328. In Huckenstein v. Jolly, 42 Leg. Int. 321, 2 Lanc. 164, Trunky, J., points out that in Babb v. Clemson, the same paper was used by two witnesses, and that, so far as appears, neither made it.

[2]Huckenstein v. Jolly, 42 Leg. Int. 321.

[3]The hesitancy of the judge on such a point is clearly the result of a limited observation of the operations of the human memory.

and when he can positively swear that the paper he is using to refresh his memory is the very one he thus verified. But a witness who heard X's testimony cannot refresh his memory of it by reading notes of it made by another person, which notes he had not seen until years after they were taken.[1] A paper, not apparently made by witness, viz., a bill of sale of the plaintiff's goods, had been compared by the witness with the goods in the plaintiff's possesssion. This bill of sale was properly put, says Sharswood, J., in the hands of the witness to refresh his memory.[2]

MEMORANDUM OF THE WITNESS

A memorandum by X of a conversation is transcribed by a type-writer. The accuracy of the transcription is verified by X at the time. This transcript may by used by X, a witness, to refresh his memory.[3] A conductor's report of the names, addresses, and occupations of persons who saw an accident, may be used by him.[4] A bank assigns for the benefit of creditors, having five days before received deposits. In a prosecution for receiving such deposit, knowing the bank to be insolvent, the account of the assignees which stated that certain items in the inventory had no value, and certain others less value than that assigned to them by the inventory was put into the hands of one of the assignees, who was a witness. It was not error to allow him to use it in order to refresh his recollection.[5] For the same purpose an inventory of articles in a factory, made under the supervision and direction of X and verified by him, might be used by X.[6] An account of labor done by A for the defendant may be used by A, who kept it, as a witness. He was told to refresh his memory with his

[1]Withers v. Atkinson, 1 W. 236. The court judicially knows that no human memory can latently remember for years, the testimony in court of another, which memory may finally be evoked from sub-consciousness by notes not made by the witness. But suppose they had been made by the witness. Would they have stimulated the suppressed memory, or would they rather be used as the embodiment of a past knowledge?

[2]Striker v. McMichael, 1 Phila. 89 (District Court).

[3]Edwards v. Gimbel, 202 Pa. 30.

[4]Clark v. Traction Co., 210 Pa. 636.

[5]Com. v. Hazlett, 14 Super. 352.

[6]Wells Whip Co. v. Ins. Co., 209 Pa. 488.

papers and books, "beginning at the first charge you have ,and working your way up."[1]

SINGLE FACTS

The use of a written record, narrative, etc., in order to "refresh" the memory is not limited to numerous items, numerous sales and deliveries, numerous things lost in a fire, numerous days' work, etc. A witness in fixing the date of a transaction may refer to a book or diary to refresh his recollection. He may state that the entries of events therein were made at the time of their occurrence and that he is able thereby to fix with accuracy the date in question.[2] An accident happened to a passenger in alighting from a street railway car. The conductor, according to his instructions, takes the names, addresses and occupations of passengers who see the occurrence and reports to his superiors. In testifying for the traction company he could refer to this report in order to refresh his memory as to the names, addresses and occupations of the witnesses of the affair and the time of its happening. Says Elkin, J., "more than two years and a half having elapsed from the date of the accident to the time of the trial, it was important that the conductor should refer to his report in order to definitely fix the time when the accident occurred, the names of the witnesses who saw it and other circumstances connected with the accident."[3] A land surveyor may look at his field notes when he testifies about a line he has run, but if he inserts the declarations of a bystander, those declarations are not evidence.[4] An engineer made a survey of dams and embodied the results in a report which embraced not only what he ran and could testify to, but matters communicated to him by others.

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[1]Mead v. White, 6 Sadler 38. The memoranda could not be used as original entries. The Supreme Court says the memoranda could be used to refresh the memory by the witness "when he knows the entry to have been correct when he made it." But if he knows that, why are the memoranda not evidence, even if the memory is not revived?

[2]Nat. Bank of Dubois v. Nat. Bank of Williamsport, 114 Pa. 1.

[3]Clark v. Traction Co., 210 Pa. 635. There was probably no refreshing of the memory as to names or time. The witness inferred from the fact that he in his report made certain averments, that they were correct. His report embodied a past recollection.

[4]Dictum of Black, J.

Called as a witness, he used his report to refresh his memory. He stated from it all the facts ascertained by himself. The opposite party then proposed, but was not allowed, to cross-examine him upon the remainder of his report. This was proper.[1]

CONVERSATION

A conversation may be reduced to writing by one of the parties to it, shortly after it occurs, and the minute thus made may be used to refresh the memory of the person who made it. Immediately after G had had a conversation with H, G made a memorandum of it. The next day he had the memorandum copied by a typewriter. He signed the copy and sent it to his superior officer. He thus attested the accuracy of the copy. It was not error to permit him as a witness "to refresh his recollection of the conversation by referring to the typewritten copy of his memorandum."[2] A memorandum of a conversation with the defendant on trial for the crime of bribery, made by the witness immediately thereafter, was allowed to be referred to by the witness "for the purpose of refreshing his memory," but he was not permitted to read it.[3]

FORMER TESTIMONY. USE OF PAST MEMORY

It is sometimes proper to prove the former testimony of a witness. It is not within the scope of this article to discuss the circumstances which justify the use of this former testimony. One who has heard it and who remembers it, either without or after a refreshment of his memory, may testify to it. Notes may have been taken of it, either by the judge[4] who presided at

[1]Robeson v. Schuylkill Navigation Co., 3 Gr. 186.

[2]Edwards v. Gimbel, 202 Pa. 30. How long time intervened between the conversation and the testimony in court does not appear. It is probable that there was no refreshing of memory, only the use of a past recollection embodied in the memorandum. Otherwise the accuracy of the memorandum would be unimportant. An inaccurate narrative can *revive* a memory as readily as, and more clearly than, a true narrative.

[3]Com. v. Kline, 42 Super. 66. How long the interval between the conversation and the testimony? Did the witness really remember the conversation after looking at the memorandum, or did he remember merely the statement in the memorandum?

[4]Miles v. O'Hara, 4 Binn. 108; Ricthrock v. Gallaher, 91 Pa. 108.

the trial, or by a counsel[1] in the case, or by a stenographer,[2] and these notes may be used as the embodiment of that testimony. They are a written history of it. That they are the notes of the judge or counsel or stenographer must be proved, but that is not enough. They must be proved to have been so taken as to correspond with the testimony. A certificate of the judge who took them, that the notes are correct, *a fortiori* his certificate that a copy of the notes is a correct copy, is insufficient.[3] He must, the attorney or other person must, by deposition or by testimony before the jury swear to their accuracy. When he so swears, the notes may be received as evidence of the fact that witness testified as they report him to have testified. It is not necessary that the witness (judge, counsel, etc.) should say that he recollects the testimony. He may say, "I don't recollect the testimony, independent of the notes."[4] In a case in which the counsel who took the notes had not only authenticated them, but undertaken to say what the former witness had testified, Gibson, J., observes, after saying that the counsel was competent to testify, "It seems, however, singular that instead of trusting to Mr. Fisher's recollection the plaintiff did not offer his *notes* in evidence, against which, when properly authenticated, there could be no sort of objection.[5] The judge who took the notes saying that they were correct, but not testifying to a present memory of the evidence, the witness himself, now 87 years old, feeble and ill and his memory having failed, was unable to say what he testified to. He contented himself with saying that if he did testify so and so, his testimony was correct and true. The notes were receivable in evidence, although unaccompanied by the testimony

[1]Cornell v. Green, 10 S. & R. 14; Rhene v. Robinson, 27 Pa. 30; Chess v. Chess, 17 S. & R. 407.

[2]Com. v. Levi, 44 Super. 253.

[3]Miles v. O'Hara, 4 Binn. 108. The judge was not called to prove his notes. The witness, notes of whose testimony was taken, is called, 11 years after his first testimony, but he now has no recollection of a certain fact, e. g., the serving of a notice. His testimony that if the notes of the judge are correct, he testified he had served the notice, and, if he testified that he served, he in fact served the notice, is not evidence. Reed v. Orton, 105 Pa. 294.

[4]Chess v. Chess, 17 S. & R. 407.

[5]Cornell v. Green, 10 S. & R. 14.

of anyone that he remembered that the witness had sworn so.[1] A stenographer who took the testimony and who testifies that the notes are correct and full, says that he has now no recollection of the testimony. The notes are receivable.[2]

FORMER TESTIMONY. REFRESHING MEMORY

As notes of former testimony may be used as the embodiment of a past memory of the testimony, without profession by a witness that, independently, or by means of them, he recalls the testimony, so they may be used as a means of refreshing the memory, and the witness whose memory is thus refreshed may testify to a present recollection of the testimony. Whether the former witness who is called, in a later trial, to testify to the same subject, may refresh his memory by the former testimony (disclosed to him by notes or otherwise) is said to depend in part on the nearness of the former testimony to the occurrence of the facts which constitute its subject matter. The earlier testimony must have been delivered so shortly after the occurrence "that the facts were still fresh in his mind."[3]

CASES OF DOUBTFUL REFRESHING

Cases are numerous in which the process of using a paper is described as a refreshing of the memory of the witness, when it is really authentication of the paper as a past record, and a use of this record as evidence of the facts averred in it. A witness, e. g., is said to refresh his recollection of a conversation, when he refers to a minute made of it immediately after its occurrence, though

[1]Rithrock v. Gallaher, 91 Pa. 108.

[2]Com. v. Levi, 44 Super. 253. The notes were taken in an investigation in the Orphans' Court. They were used in a prosecution of the witness for embezzlement. In Velott v. Lewis, 102 Pa. 326, Smith, 68 years old, was asked as to the condition of a building at a former date. He said he did not remember when a certain addition was built. He remembered having testified before arbitrators. The notes of this testimony were excluded because there was no evidence that Smith had lost his memory since the arbitration, by old age or otherwise. He simply failed to recollect what he had previously sworn.

[3]Smith v. Summerhill, 21 York 132. In Putnam v. United States, 162 U. S. 687, White, J., held that if 4 months intervened between the occurrence and the first testimony, this testimony could not be used to revive the memory of the witness at a later time.

he was probably simply remembering that the minute said the conversation was this and this.[1] A paper is shown a witness, who says it contains an exact copy of resolutions of the board of directors of a corporation, calling on the stockholders to pay their subscriptions. He says, "I should say it was a copy" of the notice sent to the stockholders. I have no reason to believe any other kind of notice was sent [i. e., he argues with himself that this is a copy; he does not recollect]. The paper was then put in evidence. This process is said to be "permitting the witness to refresh his recollection from a written notice."[2] The simple reading from, or stating after perusal, the contents of a letter-press copy of a bill is spoken of as a refreshing of the memory, although the witness did not pretend to have had any knowledge of the transaction mentioned in the letter, and could not remember the particular bills he had sent out.[3] Sales of articles made from time to time are recorded in an account book. The vendor, as a witness, uses this book, as the court says, to refresh his memory. He probably had no memory of the sales in question.[4] In Barnett v. Steinbach[5] the supreme court per curiam, says, since the act of 1869, the plaintiff is the witness; his books are not the foundation of his claim. He uses the book simply to refresh and assist his memory. But it is evident that the memory is not refreshed. The averments of the book are the evidence upon proof of the accuracy of them when made. A witness has made an affidavit of a circumstance, two months after its occurrence, i. e., concerning the weight of a car. Having no present recollection of the weight, his reference to the affidavit is said to be a refreshing of the memory. It clearly was not. He had no memory.[6] Whether the seals of certain cars, whence pig tin had been stolen, which cars came from Jersey City to Altoona, had been broken before the arrival at Altoona was a question. Car in-

[1]Edwards v. Gimbel, 202 Pa. 30.

[2]Car and Coach Co. v. Elsbree, 19 Super. 618.

[3]Owen v. Rothermel, 21 Super. 561.

[4]Wagonseller v. Brown, 7 C. C. 663. The court says, however, that the witness testified to most of the sales, and then produced the book to identify the particular goods. The book was admissible for that purpose.

[5]4 Luz. Leg. Reg. 138.

[6]Samuel v. Pa. R. R., 45 Super. 395.

spectors examine cars, and, if the seals of any have been broken, they make memorandums. These memorandums are sent to an officer of the railroad, who keeps a record of reports of broken seals. This record disclosed no report of the breaking of the seals of the cars in question. In the trial of B for having stolen the pig tin in Blair county, it was held that this was not legitimate evidence that the seals had not been broken before the cars' arrival at Altoona. It was not shown that the original slips or memoranda, made by the car inspectors, were still in existence. There was no evidence that the record kept by the clerk of the reports was accurate. Conceding that it could hardly be expected that the inspectors should remember the inspection of these particular cars, Henderson, J., says that their memoranda might be used by them to prove the fact of inspection; from such fact and refreshing their recollection by the reports prepared by them, they might be able to testify that the seals of the cars were in good condition when they inspected them, because of their practice of noting in the report any defect in that respect. But it is clear that there would have been no refreshing of the recollection. They would merely infer from the absence of reference in these reports, to the cars in question, that they had found nothing wrong, because had they found anything wrong they would (such was their practice) have made the report, and, if they had made the report, it would have been preserved or a record of it made. Their testimony that the cars were in good condition would be simply an inference.[1] An assignee for the benefit of creditors testifying to the difference of value of certain articles as estimated in the inventory, and as realized by a sale, his account was offered and received in evidence. It had not been confirmed nor its accuracy acquiesced in by the assignor. The object of the evidence was to show that the assignor, a bank, in receiving a deposit had done so with knowledge of his insolvency. Such account, says the court, is not independent evidence that the items therein indicated were of no value. If, however, it was offered and used simply as a memorandum to refresh the recollection of the witness, there was no reversible error in receiving it.[2]

[1] Com. v. Berney, 28 Super. 61.
[2] Com. v. Hazlett, 14 Super. 352.

MOOT COURT

GEORGE ACKERS v. WM. SHOMO

Trespass—Damages Caused by Exposure—Proximate Cause—Necessity

STATEMENT OF FACTS

Ackers was walking along a street on which Shomo dwelt, when a terrible blizzard overtook him. Ackers was unable to advance or retreat on account of the snow, and the cold was intense. In order to escape the storm he opened the front door of Shomo's house and sheltered himself in the vestibule. Shomo, discovering him there, asked him what he was doing there? After Ackers' explanation he opened the door and forcibly ejected him. Ackers was frost bitten by the cold, and was attacked with pneumonia in consequence of the exposure.

Rowley for Plaintiff.

Singerman for Defendant.

OPINION OF THE COURT

SNYDER, J.—The Plaintiff relies on two points. The first is that he was forcibly ejected without being asked to leave. Now in regard to this, it is clearly shown that in entering he was a trespasser, and was breaking the close of the defendant, yet if the defendant ejected him forcibly without first asking him to leave and used more physical force than was absolutely necessary, then he, the defendant, is liable. There is no question about the right of the plaintiff to enter the vestibule of the defendant's house; he clearly had no such right.

The second is that he had only the choice between two alternatives, either to enter the vestibule, which he did, or expose himself in the weather, to disease or some other and maybe worse result. His act was involuntary, and under the facts of the case at hand justifiable, at least from a moral standpoint, and for this reason he claims it was not a trespass. P. & L. Digest of Decisions, Vol. 21, Col. 37483, "an act which was involuntary or is the result of unavoidable accident, is not a trespass, and the fact that an act causing injury is of such a character, is a complete defense to an action of trespass based thereon."

Vol. 8, Forum 225, says, "that a tramp has a right, though he visits uninvited a house for the purpose of getting a meal, not to be beset and bitten by a dog whose vicious propensity is known by the dog's owner.

Now clearly this man had more right than an ordinary tramp, and was entitled to some consideration at the hands of the defendant.

29 L. R. A., Note 154. When it is said a person may use as much force as is necessary for the protection of his person or property, the rule is subject to the most important modification, that he shall not, except in extreme cases, endanger human life or cause great bodily harm.

59 L. R. A. 771. A trespasser cannot recover for injuries not wantonly or willfully inflicted, but in this case it would seem that there was no other course open for the plaintiff to take, he had either to enter the house or else stay outside and expose himself to the elements, the result of which might be his death. This seems as though his entering the vestibule, even if had no legal right, was such an act as to take from it any manner or form of illegality, that would ordinarily attach to such an act.

The defendant knew that when he put him out he was liable to suffer from exposure, and it does not appear from the facts that he was such a man as did not know the probable outcome of his act. He could clearly foresee that it would result in great personal injury and perhaps death and that his act of ejecting the plaintiff forcibly would be the proximate cause of any injury resulting from exposure. Proximate cause as defined in 32 Cyc. 745 is, "An act which directly produced or concurred in producing the injury, an immediate, direct or efficient cause of injury; that cause which naturally leads to and might be expected to produce the result." The defendant relies chiefly on the fact that the plaintiff was a trespasser, yet in view of the facts of the case and the authorities offered, it is doubtful whether he was a trespasser from a moral viewpoint.

Defendant claims that he did not use excessive force, but this may be rebutted and from the fact that he did not request the plaintiff to leave before ejecting him, he was in the wrong.

Judgment for the Plaintiff.

OPINION OF SUPERIOR COURT

It would be a barbarous and barbaric system of law which would require a court to hold that the plaintiff in the present case has no cause of action against the defendant. Fortunately the principles of the common law as established in former adjudications do not require us to so hold.

The common law does not permit the so-called owner of property to make all conceivable uses of it nor does it permit him to exclude others from making all conceivable uses of it. Acts, which under ordinary circumstances would be trespasses, are sometimes excused by what has been pertinently called the law of necessity.

An examination of the cases in which this rule of necessity has been applied will disclose that they are so numerous and their facts so varied as to raise the rule to the dignity of a general principle sufficiently broad to justify a recovery by the plaintiff in the present case.

The law of necessity has been stated in the following language: "Necessity for the performance of an act will, as a rule, excuse," 28 A. &. E. Encylc. 560. "Necessity is a supreme law over man, he is powerless to contend against it. Therefore, the law of the land never sets itself against this force and in whatever terms a law is expressed it is construed as subject to this exception," Bishop Non-contract Law, sec. 185. See also Pollock on Torts, 317.

The law of necessity has been frequently invoked to justify an entry upon the land of another. "It it clear," says the Vermont court, "that an entry upon land may be justified by necessity," Ploof v. Putnan (Vt.), 71 Atl. 188.

This rule is of ancient origin. In the Year Books it is stated, "If a man by negligence suffer his house to burn, I, who am his neighbor may break down the house to avoid danger to me," 1 Y. B., 9 Ed., IV 35, and in the following early authorities entries upon land made under various conditions were justified by the law of necessity, Miller v. Tandrye, Poph. 161; 21 Edw., IV 64; Vin. Ab. Trespass, K. A. pl. 1.

Applying the rule it has been held that one who enters upon the land of another in order to save his own, or the land owner's, or a third person's property from destruction, is not guilty of a trespass. "It is a very ancient rule of the common law," says the Massachusetts court, "that an entry upon land to save goods from being lost or destroyed by water; fire or other like danger is not a trespass," Proctor v. Adams, 113 Mass. 376. To the same effect are Chambers v. Bell, 2 W. &. S. 226; Forster v. Bridge Co., 16 Pa. 395; Buck v. Weeks, 194 Pa. 522; Hugh v. Williams, (Eng.) Ames. Cas. 170.

It is also well settled that a traveler upon a highway who finds it obstructed by a sudden and temporary cause may pass upon the adjoining land without becoming a trespasser, Campbell v. Race, 7 Cush. 408; Morey v. Fitzgerald, 56 Vt. 487; that one whose cattle trespass while being driven along the highway is not liable unless negligent, Tillett v. Ward, 112 B. D. 17; and that one whose land is entered upon in defense of the country can maintain no action against the defenders. Prerogative Case, 12 Co. 12, Respublica v. Sparhawk, 1 Dall. 353.

It will be observed that in none of these cases was the excusing necessity of an absolute physical sort. The acts done were *practically* necessary for the ordinary conduct of the affairs of life. If an entry upon land to retake one's property, to save his own or another's property, to avoid the temporary inconvenience of being unable to complete one's journey is justified, surely such entry should be justified when necessary to save human life.

This is the doctrine of the cases: "The doctrine of necessity applies with special force to the preservation of human life." Ploof v. Putnan (Vt.), 71 Atl. 188. Thus, one who is assaulted and in peril of his life may run thru the close of another to escape his assailant, 37 Hen. VII, pl. 26, Ames. Cas. 168n; one may sacrifice the property of another to save his life or the lives of his fellows, Mouse's Case, 12 Co. 63, Ames Cas. 173; Burlon v. Mc Clelland, 3 Ill. 424; King v. Kline, 6 Pa. 320; and one who throws things upon the land of another to prevent injury to third persons is not a trespasser, Dewey v. White (Eng.), Ames. Cas. 165.

The correction of the conclusion of the learned court below is convincingly demonstrated by the authorities already cited, but still more convincing are the following two very recent American cases:

In Depue v. Hateau (Minn), 111 N. W. 1, the plaintiff, who was a

cattle dealer, at the invitation of the defendant stayed and took supper with him. Later the plaintiff became ill and requested permission to stay over night or until he should get better. The defendant refused to allow this, conducted the plaintiff from the house, assisted him to his sleigh and started the team toward the plaintiff's home. On the way home the plaintiff fell out of the sleigh and was severely frost bitten. The court held that his action had been improperly dismissed, saying, "The facts of this case bring it within the comprehensive principle that whenever a person is placed in such a position with regard to another that it is obvious that if he does not use care he will cause injury to that person, the duty at once arises to exercise commensurate care * * * and a negligent failure to perform this duty renders him liable for the consequences."

In Ploof v. Putnan (Vt.), 71 Atl. 188, while the plaintiff and wife and children were sailing, a violent tempest arose imperiling the boat and its occupants. To save them the plaintiff was compelled to moor the boat to the defendant's dock. The defendant unmoored the boat, whereupon it was driven ashore by the tempest and destroyed and the plaintiff and wife and children injured. A demurrer to the declaration was overruled by the court, which said, "It is clear that an entry upon land may be justified by necessity and that the declaration before us discloses a necessity for mooring the sloop."

Judgment affirmed.

ADAM STRUPPLE v. JOHN CALEY

Composition of Creditors—Fraud—Burden of Proof

STATEMENT OF FACTS

Strupple being indebted, his creditors caused a sale on execution of his land. Of these creditors, there were eight. Caley and Sampson were two of them. Caley and Sampson agreed with two other creditors that Caley should be allowed by the rest alone to bid for the land, he agreeing that if it was knocked down to him, he would transfer interests therein to Sampson and the other two proportionate to their respective judgments. The other two creditors were not parties to the agreement. The sale was made to Caley, and he received the sheriff's deed. Strupple, alleging the agreement fraudulent as to him and to the other two creditors, inasmuch as it reduced competition, brings this ejectment.

Voorhis for Plaintiff.

Renard for Defendant.

OPINION OF THE COURT

SOHN, J.—It can not be laid down as a general principle of law that all cases in which there is a composition of creditors are necessarily tainted with fraud. Each case must be examined minutely and

determined upon its own particular facts. There are in Pennsylvania a large number of cases in which judgment sales have been set aside because the very purpose for which the creditors combined was fraudulent and against public policy. In Hay's Estate, 159 Pa. 381, a judicial sale was set aside because the agreement between two of the lien creditors was made without the knowledge or consent of the debtor, and in Phelphs v. Benson, 161 Pa. 418, where the sale was made without the knowledge of the plaintiff of an agreement between the creditors, and the land secured for a price much below its actual value, the sale was annulled. In Slingluff v. Eckel, 24 Pa. 472, the facts disclosed were that by combining the creditors bought the land at a price much less than they otherwise would have secured it for, and the sale was deemed to be void. But in all these cases the reason for setting aside the sale was because it was actually fraudulent. Either the combination was effected by the creditors without the knowledge and consent of the debtor or other creditors, the land was bought at a greatly reduced price, or the very purpose was to directly reduce competition in bidding.

The present case narrows itself down to this question, "Was there such actual fraud as reduced competition among the bidders at the sale?" Upon examination of the facts we do not think that this was so. In Kennedy v. Taylor, 15 Howard 520, the court was of the opinion as follows: "It is true," he said, "that in every association formed to bid at a sale and who appoint one of their number to bid in behalf of the rest, there is an agreement, express or implied, that no other member will participate in the bidding, and hence, in one sense, it may be said to have effect to prevent competition. But it by no means follows that if the association had not been formed, and each member left to bid on his own account, that the competition at the sale would be as strong and efficient as it would by reason of the joint bid for the benefit and upon the responsibility of all. The property at stake might be beyond the means of the individual."

And in Braden v. O'Neil, 183 Pa. 462, we have a case in which, as in the present case, only a portion of the creditors was embraced in the combination. There the language of Williams, Judge, was as follows: "This combination only embraced a portion of the creditors. It did not look to preventing competition at the sale, or to depressing the price. There must be actual fraud, such as a combination to purchase at an undervaluation, or to discourage bidding by others, to justify setting aside the sale or treating it as a nullity."

To the same effect as the above cases was the case of Woodruff v. Trainer, 175 Pa. 302, where the judge in his opinion said, that "even a combination between creditors does not necessarily indicate fraud. Creditors whose money is in peril have rights as well as debtors.

Snull v. Jones, 6 W. & S. 127, is another case in which there was a composition of creditors. "It is far from being true," said the judge in that case, "that every agreement of this kind has a necessary tendency to lessen the price that otherwise might be obtained for the property at

the sale; on the contrary, it may tend to increase it. For instance, where there are a number of creditors who singly have not ability to buy, but, by uniting their means they are enabled to do so. they thus not only create competition, but may be induced to give more than any other persons are willing to give."

With these decisions in mind, what are the facts of the present case? Caley and Sampson agreed with two other creditors that Caley should be allowed by the rest alone to bid for the land, he agreeing that if it was knocked down to him he would transfer interests therein to Sampson and the other two creditors proportionate to their respective judgments. The facts are not disclosed that Strupple or the other creditors were ignorant of this agreement, nor does Strupple allege that the agreement was fraudulent for that reason. He alleged simply that it was fraudulent inasmuch as it reduced competition. What have we to show that it did reduce competition? There is nothing to show that Strupple would have received more for the land had each of the four creditors who combined bid for the land separately, nor is there any proof that their intention was to get the land at an undervaluation. We do not know the exact reason why the combination between the four creditors was effected, but we can not assume that their intention was necessarily fraudulent. Individually they may have been unable to make a successful bid for the land, but by combining their assets they may have been able to let one of their number buy, and then satisfy their interests proportionate to their respective judgments. Surely they, as creditors, have a right to protect their interests the same as the debtor or the other creditors. The plaintiff has not shown that any deceit, trick or imposture has been practiced by the defendant in securing the land. The burden of proof in showing fraud, according to Black, Judge, in Abbey v. Dewey, 25 Pa. 413, is upon the plaintiff. "It is very seldom," he says, "that perfectly clear proof can be produced of a fraud, but the plaintiff must introduce such evidence of fraud as one can reasonably and safely rest his conscience upon." Here we can not see that there is anything to show any fraud whatsoever on the part of the defendant or that competition at the sale was reduced. We can not find against the defendant upon a mere presumption.

Judgment for defendant.

OPINION OF SUPERIOR COURT

That the power to combine in purchasing might be abused so as to cause a sacrifice of the property of the debtor is quite clear. There were eight judgment debtors who would be interested in not allowing the debtor's land to be sold for less than its value. Four of them combine, and cease to be competitors with each other. The number of potential bidders, outside of non-lien creditors, was thus reduced to five. But, if 4 could unite, 8 could, in which case there would be no competition, unless non-creditors should be present and bid at the sale. Nowithstanding this possibility, several cases cited by the learned court below, re-

fuse to find in such agreement for joint purchase, any wrong to the debtor, of which he could complain. The judgment reached by the learned court below must be affirmed.

HINKLE v. CARROL

Check—Delay in Presentment—Liability of Drawer—Burden of Proof—Statute of Limitations

STATEMENT OF FACTS

Carroll gave Hinkle a check on a bank for $175 on August 16, 1902. Hinkle mislaid the check and forgot it until he found it in 1908. On June 5th, 1908, he presented it to the bank, which told him that Carroll had ceased to have a deposit in the bank for 2 years. Hinkle sues Carrol on August 16, 1908, upon the check and also upon the debt.

Sasscer for Plaintiff.

Shearer for Defendant.

OPINION OF THE COURT

STRITE, J.—The question in the case is whether by reason of Hinkle's delay in presenting the check for payment the presentation to him of the check did not operate as satisfaction of the debt. If he had presented the check for payment between August 16, 1902, and some time during 1906, he would have been paid. The failure to pay the check was, therefore, in large measure due to his negligence in not presenting it within a reasonable time. Does his "mislaying and forgetting" about the check for more than four years excuse him? We believe not. Such a rule would make it necessary in many cases for men to keep large sums of money on deposit for several years subject to the whims of negligent men and lapses of defective memories.

It has long been held that as between the holder of a check and the drawer a demand at any time before suit is brought will be sufficient, unless it appears that the drawee has failed or the drawer has in some other manner been affected by the delay. 3 Kent 88. But it has also been held that the payee of a check who does not promptly present it for payment to a bank has the burden of proving that the maker was not injured thereby. Hamlin v. Simpson, 105 Iowa 125; 44 L. R. A. 397. The law presumes that the drawer is injured by the delay and it is incumbent upon him to prove the absence of injury. 5 Cyc. 532 and authorities therein cited. There seems to be nothing in the state of facts to establish the absence of injury and therefore we must presume that the drawer was injured.

As to what is a reasonable time in which to present a check for payment, Kilpatrick v. B. &. L. Association, 119 Pa. 30, is in point. In this case a mortgage debtor was held not liable where a check became worthless by reason of the solicitor of a corporation failing to present the check within six months. If a corporation is liable for the negli-

gence of its agent in such a case, surely a man is liable for his own negligence.

In this case, therefore, after the lapse of a reasonable time for presentation of the check by Hinkle, the giving of the check to him operated as a satisfaction of the debt, unless it appear that Carroll sustained no loss. Nothing appears to rebut this presumption of loss.

It is unnecessary to decide whether the statute of limitations applies.

Judgment for defendant.

OPINION OF SUPERIOR COURT

Carrol's check was simply the instrument through which Hinkle was to obtain from Carrol's bank $175 of Carrol's money on deposit. Hinkle has not used the check. When he presented it June 5th, 1908, the bank refused to pay it. Why then should Carrol not pay it? Is he to continue to keep the money he owed Hinkle simply because Hinkle has allowed him to keep it for nearly six years? A strange reason that would be.

If Carrol, having given the check, had left a deposit in the bank to meet it for four years, and the bank had become insolvent, so that the deposit was wholly lost to him, there would be sufficient reason for putting the loss on Hinkle. Having occasioned the continuance of the deposit with the banker until his insolvency, he should suffer the loss.

In this case there is no suggestion of insolvency. The evidence is that the deposit had been withdrawn by Carrol four years after delivering the check. There was then no loss, save possibly of the interest upon the deposit.

The evidence is not clear whether the deposit which continued in the bank for four years was large enough to cover $175. The burden may properly be put on the plaintiff to show that it was not. In the absence of evidence on the point, the defendant should not be liable for any interest for the period between the issue of the check and the total withdrawal of the deposit. The defendant would properly be liable for $175 and for interest from the withdrawal of the deposit to the rendition of the verdict.

The check was given on August 16th, 1902. If this be taken to be the day on which the duty of paying the check arose, the statute of limitations would not bar the action until August 17th, 1908. The suit begun on August 16th, 1908, was begun within six years. Menges v. Frick, 73 Pa. 137; Edmundson v. Wragg, 104 Pa. 500; Lutz's Appeal, 124 Pa. 273.

We have not contested the principle insisted on by the learned court below that "the burden of proof is on the holder should he seek to recover from the drawer, to show that he has not been injured by the holder's failure to make presentation within the prescribed time." 5 Cyc. 532. It sufficiently appears that no loss save of interest has oc-

curred by reason of Carrol's delay, and it matters not which of the parties furnished the evidence. The aforesaid principle, however, has been repudiated in Rosenbaum v. Hazard, 233 Pa. 206.

Pertinent cases on the question are Flemming v. Denny, 2 Philada. 111; Rice v. Daniel, 16 W. N. C. 35; Bradley v. Andrus, 107 Fed. 196; 53 L. R. A. 432.

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

HARRIS v. LIFE INS. CO.

Life Insurance—Death of Insured by State Execution

STATEMENT OF FACTS

Harris and another were partners. Harris' wife, who was insured in defendant's company, killed her husband's partner. She was convicted and executed. Harris now brings suit to recover the amount of the policy.

Fine for Plaintiff.

Long for Defendant.

OPINION OF THE COURT

POWELL, J.—It is the policy of every state to uphold the dignity and integrity of its courts of Justice and to prevent the execution of contracts that appear to be contrary to public interests.

The counsel for the plaintiff argues that the prospects of obtaining the amount of the policy would be no inducement to the insured to commit murder, for he would not live to enjoy it. Why, to allow the beneficiaries of a policy to recover in which the insured was executed for murder, would be simply offering a reward for the perpetration of crime.

As early as 1830 the English courts held in the case of Amicable Society v. Bollard (5 H. L. C. 70), that an assignee of a policy of life insurance could not recover when the insured was executed for a capital felony, although the policy contained no express stipulation against such an event. If such a contract were valid, would it not remove the restraint from the commission of crime?

In Burt v. Union Central Life Ins. Co., 187 U. S. 362, the question was, "Do insurance policies insure against crime?" and it was held that "Public Policy forbids insertion in a contract of a condition which tends to introduce crime, and as it forbids the introduction of such a stipulation, it also forbids the enforcement of a contract under such circumstances that cannot be lawfully stipulated for."

We consider therefore on the grounds of public policy that the law of Pennsylvania forbids a recovery upon a policy where the insured has been executed for crime, and this whether the policy contained a clause upon the subject or not, and even if it stipulated that the com-

pany shall be liable in such a contingency, Collins v. Metropolition Life Ins. Co., 13 Dist. 384.

In Burt v. Union Central Life Ins. Co., 187 U. S. 362, referred to above, Judge Brewer held that even if the insured was executed for a crime of which he was innocent, there can be no recovery. Can there be a legal life insurance against the miscarriage of justice? Can contracts be based on the probability of judicial murder? If one policy so written is valid, the business of insuring against the fatal mistake of juries and courts would be legitimate. The same principle may be applied to the case at bar only with much greater force, for in this case the insured was justly executed for murder.

Wells v. Ins. Co., 191 Pa. 207; Seidenbender et. al. v. Charles' administrators, 4 S. & R. 151; Thorne v. Ins. Co., 80. Pa. 15, all hold that contracts against public morals and principles cannot be enforced and are void.

We think that the facts of this case clearly come within the rule adopted by courts of England, Pennsylvania and many other states of the Union, and to enforce such a contract would be in direct opposition to public principles and morals.

Judgment for defendant.

OPINION OF SUPERIOR COURT

The United States Supreme Court, in a very recent case, decided that death by legal execution for crime is not covered by a policy of life insurance, tho the policy contains no provision, excepting such manner of death from the risks covered by it. North Western Life Ins. Co. v. McCue, 223 U. S. 234. In so deciding the court simply followed a previous decision in Burt v. Union Central Ins. Co., 187 U. S. 362. The same doctrine has been announced by the courts of England and by the Superior Court of Pennsylvania, Collins v. Ins. Co., 27 Super. 353. In support of its conclusion the Pennsylvania court said, "The reason for the refusal of the court to aid one who founds his action upon his own criminal act is because of the public interests involved, which require that laws against crime be enforced and that the courts aid no man to take a profit from their violation. The rule is enforced upon the ground of public policy alone and not out of consideration for the defendant to whom the advantage is incidental."

In deference to these authorities we affirm the judgment of the learned court below, but we do so with great reluctance. We regard as utterly silly the contention that a contrary holding "would tend to induce crime."

WILLIAM HILTON v. ADAM KOLLOM

Recording Act—Unacknowledged Deed—Notice to Subsequent Vendee

STATEMENT OF FACTS

A former owner of land conveyed it by an unacknowledged deed to William Hilton, who did not take possession of the land. Seven

months subsequently, the former owner, conveyed the same land to Adam Kollom, who at once took possession. William Hilton's deed was on record and Adam Kollom read the record of it before he made his purchase.

Wallick for Plaintiff.

Locke for Defendant.

OPINION OF THE COURT

SURRAN, J.—In the common law the doctrine of registry is unknown. The livery of seisin for estates of freehold and entry for estates for years were the only notorieties which it demanded in such transactions. The first step toward registering conveyances is found in the statute of enrollments, being an appendage to the statute of uses (27 Henry VIII C. 10). In the United States the advantages which are to be derived from the general registration of all conveyances has been fully realized and perfected. These laws vary in the different States, but the object of the registry laws is manifest. "The purpose of this record [registry laws] is not to furnish proof of the state of the title or even of the transaction set forth in a recorded instrument, but to give to every person proposing to acquire by purchase an interest in land which has already been conveyed, bargained away, encumbered or leased by the person from whom such interest is to be acquired or his privy, notice of such prior conveyance, contract, encumbrance or lease." Minor and Wurts Real Prop. P. 828, Para. 1072.

Therefore the question here is this: Under the circumstances stated was Adam Kollom an innocent purchaser? By reading the record, though unacknowledged, the court is of the opinion that such notice was sufficient, at least, to cause any person contemplating the purchase of the property, to exercise a reasonable amount of caution before proceeding further. "Particular persons in contracts," says Lord Hardwicke in Chesterfield v. Jansun,"shall not only transact bona fide between themselves, but shall also transact bona fide in respect of other persons, who stand in such relation to either as to be affected by the contract or the consequences of it."

It was held in Kerns v. Swope, 2 Watts 75, by Judge Gibson,"that the vague reports of strangers or information given by a person not interested respecting a defect of title to land, will not have the effect of notice to the purchaser." However, this is quite different from reading a record of the conveyance itself, but even so, the opinion was dissented from.

Tilghman, C. J., in lessee of Correy v. Paxton and Rees, 4 Binney 139, made this significant statement: "The taking of a legal estate after notice of a prior right makes a person a mala fide purchaser. It is a species of fraud and dolus malus itself in the civil law. 2 Atk. 654."

The situation of this case as presented to the court is well expressed, we think, in a similar case in New Jersey. Said that court: "If a purchaser has before him facts which should put him on inquiry,

it is equivalent to notice of the fact in question and where such fact constitutes a fraud on a third party, it will not protect the purchaser that he purchased for value." Tantum v. Green, 21 N. J. Equity 364.

It follows then, that since the reading of the record of Adam Kollom was a sufficient warning to cause him to inquire further in the title to the property, he acquired no right therein, as against William Hilton.

Judgment for the plaintiff.

OPINION OF SUPREME COURT

The deed to Hilton was not legally recorded. The recorder has authority to record only those deeds which have been acknowledged or proved, and the Hilton deed had been neither acknowledged nor proved.

What, however, purported to be a copy of this deed was in fact a copy. There was a deed to Hilton and its tenor was reproduced in the recorder's deed-book. Not having been legally recorded, there was no duty on the part of Kollom to examine the record. Had he not examined it, he would have been in no default and he could not be regarded as having the information which he would have had, had he examined it.

He in fact examined the record. It told him that an earlier deed for the same land had been delivered to Hilton. Was this enough to awaken a suspicion that such a deed had in fact been delivered? Should he not have suspected that the recorder would not have made the record unless he had had a deed before him as original, purporting to be the grantor's, and which the recorder believed genuine? Should he not have suspected that this deed had been presented for record by Hilton, the grantee named in it, and that Hilton was therefore claiming the land under it? We think he should.

Suspecting then that Hilton had a deed, under which he claimed the land, had Kollom a right to go on and purchase the same land from the grantor without taking the trouble to inquire of Hilton whether he in fact had a genuine deed? We think not. The purchase of the land from Hilton's grantor, with such information as Kollom had, with the intention to claim the land from Hilton was, we think, fraudulent. We concur with the learned court below in concluding that Kollom had sufficient notice of the earlier deed to disable him from claiming the land as against Hilton.

A different view was taken by Gibson, C. J., in Kerns v. Swope, 2 W. 75, and the Supreme Court of Kansas, largely relying on that authority, has also decided that the reading of the record of an improperly recorded deed was not notice of the contents of the deed. Nordman v. Rau, 86 Kan. 19. 38 L. R. A. N. S. 400. The able dissenting opinion in that case is, however, the more convincing. The learned annotator in the L. R. A. N. S. pronounces the decision "against the weight of authority, and, it would seem, the rule of reason." Smith and Tudor, the learned commentators of Leading Cases in Equity, commenting on Kerns v. Swope, observe that whether the second purchaser read the

record of the earlier improperly recorded deed, was a question for the jury, which had not been submitted to it and that Gibson, C. J.'s, position that even if he had been found to have read the record of the deed, he could not be affected by it, was questionable. "But," they say, "the court would seem to have gone too far in saying that if such evidence had been adduced [i. e., of the second purchaser's having read the record] it would not have sustained an inference of notice," citing Hastings v. Cutler, 4 Foster (24 N. H.) 481.

That purchasers must inquire when cognizant of facts that awaken suspicion, is not an unfamiliar doctrine. If B about to buy land from X, finds A in possession, he must suspect that A has some claim to the land, and he must inquire of X what the basis of the claim is. It is as reasonable to require B, when he learns that there is a record of a deed for the land which he is about to purchase, in which A is grantee, to inquire of A before he makes his purchase.

Convinced of the propriety of the decision of the learned court below, we must affirm its judgment.

Affirmed.

FARMERS' BANK v SIMCOX

Deceit—Honest Belief

STATEMENT OF FACTS

Adam Ferguson owned shares of stock in a bank for which he held certificates. These were stolen by X, who, purposing to sell the stock, requested Simcox to identify him at the bank as Ferguson. Simcox went to the bank with X and assured the officials that he (X) was Ferguson. Simcox acted in good faith, being himself mistaken. The bank therefore cancelled the old certificates and issued new ones to Y, an innocent purchaser, for value. Ferguson repudiated the transaction and the bank was obliged to issue stock certificates to him, and then brought this action against Simcox.

Dorn for Plaintiff.

Burd for Defendant.

OPINION OF THE TRIAL COURT

KOUNTZ, J.—It seems, that as a general rule of law, a person who makes a mis-statement of a material fact in good faith, believing on reasonable grounds that it is true, is not liable in deceit. But he must have reasonable grounds for his belief.

But the rule in Pennsylvania is, undoubtedly, that a person cannot be held liable in deceit if he entertained an honest belief in the truth of his representations, no matter how unreasonable were the grounds on which the belief was founded. "In an action of deceit," says Chief Justice Gibson, in one of the early cases on this subject, "the jury

have to deal with a question of good faith, and if they are satisfied that the defendant believed his own story, they must find for the defendant." This rule, laid down in Bokee v. Walker, 2 Harris 139, was followed in Delworth v. Bradner, 85 Pa. 238; Duff v. Williams, 85 Pa. 490; Erie City Iron Works v. Barber, 102 Pa. 156; Griswold v. Gebbie, 126 Pa. 353, etc. "The scienter must be both alleged and proved." Griswold v. Gebbie, supra.

Lamberton v. Dunham, 165 Pa. 129, cited by the learned counsel for the defense, was an action for trespass in deceit in certifying to the correctness of a signature to a check, which was in fact forged. The defendant testified that he was familiar with the supposed indorser's signature, and that this was the signature of the indorser. The court held that the only ground for recovery for false representation is bad faith in making the representation, and that the reasonableness of the defendant's ground for his belief in his representation cannot be called into question.

In the case at bar, an action of trespass for deceit, a scienter is neither alleged nor proved; in fact, the defendant's good faith is admitted.

Judgment is entered for defendant.

OPINION OF SUPERIOR COURT

It would have been possible for Simcox, for a consideration, to have guaranteed the accuracy of his identification of X. He might then have been made liable on this guaranty, by an appropriate action. He gave no guaranty, nor is the action founded on any guaranty.

The action is for deceit. X, identified by Simcox as Ferguson, was not Ferguson. The bank has been misled to its injury. But for a misrepresentation, having no element of fraud or deceit in it, Simcox is not responsible. He "acted in good faith, being himself mistaken." The learned court below has properly decided that there being no deceit, and no guaranty, there is no liability. Lamberton v. Dunham, 165 Pa. 129, is similar to the case before us.

In Griswold v. Gebbie, 126 Pa. 353, Mitchell, J., observes: "A man who is shown to have made a false statement, from the consequence of which he will be relieved, if he himself believed it to be true, even on insufficient grounds, should at least be charged with the burden of showing that he did have such belief." The burden in this case has been lifted by Simcox. The evidence shows that he "acted in good faith, being himself mistaken."

Further decision is made unnecessary by the careful opinion of the learned court below.

Affirmed.

COMMONWEALTH v. JOHN FISKE

Selling Liquor without License by an Incorporated Social Club

STATEMENT OF FACTS

Merchants' Club was incorporated under the act of 1887 for "social enjoyment." The club bought liquors and sold them to such of its members as chose to pay for them. A steward was employed to attend to such sales, receiving a salary. The prices charged were calculated so as to barely cover the cost of the liquors and the steward's salary, so that no profit was made from the sales. Fiske is the steward and he has made sales to members. The club has no license to sell liquors. The defendant is indicted for selling liquors without license.

Davis for Plaintiff.

Ferio for Defendant.

OPINION OF THE COURT

FRY, J.—The defendant is indicted for selling liquor without a license in violation of "liquor law" of 1887. The question is, was the steward of an incorporated club in selling the liquor to members of the club guilty of selling without a license in violation of the statute.

The license laws cannot be evaded by the device of a pretended club, whose chief object is the sale of liquors to members, as the law looks through all disguises in such cases and pronounces the sale unlawful. Comm. v. Tierney, 148 Pa. 552; Comm. v. Brem, 5 Super Ct. 104; Comm. v. Steffner, 2 D. R. 152; and even a regularly organized club cannot sell liquor to others than its own members without incurring the penalty provided in the act. Commonwealth v. Loesch, 153 Pa. 502; Commonwealth v. Heffner, 8 Legal Gazette 166.

In the above cited cases it is clearly seen that no purpose other than the sale of liquor was intended, or if any other purpose was expressed, it was a mere sham to evade the liquor license act. In the case now before us a different purpose existed.

The club was organized for "social enjoyment." A bona fide club formed for proper purposes may furnish liquor to its members without profit out of a common stock and such furnishing does not constitute an illegal sale within the meaning of the act of 1887. Klein v. Livingston Club, 177 Pa. 224; Comm. v. Smith, 2 Super Ct. 474. The question is, what are proper purposes? They include "good faith of the organization, the method of selection of members, the common ownership of its property, the manner of distribution among the members, and the fact that sales are made to none except members." Comm. v. Pefferman, 12 Super Ct. 209. There could be no true "social enjoyment" without these proper purposes, and these purposes have been carried out by the club in this case.

There seems to be some doubt as to whether the transactions be-

tween the steward and members of the club was a sale. Mr. Justice Backburn says: "A contract concerning the sale of goods may be defined to be a mutual agreement between the owner of the goods and another, that the property in the goods shall for some price or consideration be transferred to the other, at such time and in such a manner as is there agreed." In this case there is no one who can be called the owner, as the liquor was the common property of the club. The steward, although he did give the members liquor for money, was not a seller, but was hired to distribute this common property of the club to those members desiring it. The transaction lacks the usual incidents of sale, namely, "the aim by the vendor at profit" and "the element of bargain."

The next question which arises is that of profit. If the intention of the club was the sale of liquor for profit, there is no doubt it would be a violation of the statute, but here the prices charged barely covered the cost of the liquors and the steward's salary. Thus there was no profit derived by the sale of the liquor. The steward's salary is only an incident to distribution of the liquor and cannot be held as profit, as it did not result in any benefit or profit to the club.

In Klein v. Livingston Club, 177 Pa. 224, Mr. Justice Dean said: "the intent must govern; if the object of the club is merely to provide members with a convenient method of obtaining drink, then it falls within the terms of the law. But on the other hand, if the club is organized and conducted in good faith, with a limited and selected membership and formed for social, literary, or other purposes, to which furnishing of liquor to its members is a mere incident, then it cannot be considered within the purpose or letter of the law."

In view of the leading cases which have been adjudicated on this subject, we think the defendant is not guilty.

Verdict for defendant.

OPINION OF SUPERIOR COURT

The opinion of the learned court below is amply sustained by the authorities cited. All of the authorities upon the question involved are collected in 12 L. R. A. N. S. 519, 20 L. R. A. N. S. 1095, 23 L. R. A. N. S. 192, 38 L. R. A. N. S. 101, 23 Cyc. 205, 18 A. & C. 361. From these authorities it appears that there is a conflict of opinion, the weight of authorities according with the decision of the learned court below.

Judgment affirmed.

BOOK REVIEW

Conduct of Law Suits, Out Of and In Court—by JOHN C. REED. 2nd Edition. LITTLE, BROWN & Co., Boston, 1912.

This work, which originally appeared in 1885, has just re-appeared in a second edition from the press of the distinguished publishers, Little, Brown & Co. A noteworthy feature of this edition is an appreciative introduction by Prof. John H. Wigmore. "I have long admired this book," says the Professor, "and am glad to see it going into another edition. It is for several reasons most admirable in its kind." He enumerates the points that its standards of conduct are high, and yet practical; that its treatment of problems is based on a thoughtfulness, a large philosophy, and a shrewd perception of human nature, and that it covers unwritten experience systematically from beginning to end. Following an introduction comes the first book on Conduct Out of Court, which is divided into six chapters; on the case offered, principles of preparation, preparation of the law, other particulars of preparation, plan of conduct, briefs. Book two has an introductory chapter, followed by chapters on opening the pleadings and the case, beginning of presentation of evidence, cross-examination, re-examination, note-taking, argument, new trial and appeal, victory and defeat. The final chapter is on the character of the successful lawyer. After this abstract of the contents, which will give a conception of the scope of the book, it will be enough for us to add that the work ranks high in the class to which it belongs, and its study must prove exceedingly useful to the beginning practitioner. The text covers 426 pages.