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THE DELEGATION OF LEGISLATIVE POWER

Among the maxims which one meets frequently in juristic writings, is *delegata potestas non potest delegari.* When A selects B to do a thing, he ordinarily does not intend to give, nor give authority to B to select C or D to do it. In Parker v. Commonwealth,[1] the principle is applied to the legislature of a State. The electoral people of the State are the principal. The legislature is the delegate. "Among the primal axioms of jurisprudence," says Bell, J., "political and municipal, is to be found the principle that an agent, unless expressly empowered, cannot transfer his delegated authority to another, more especially when it rests in a confidence partaking the nature of a trust, and requiring for its due discharge, understanding, knowledge and rectitude. The maxim is *delegata potestas non potest delegari.* And what shall be said to be a higher trust, based upon a broader confidence than the possession of the legislative function? What task can be imposed on a man as a member of society, requiring a deeper knowledge and a purer honesty?"

It might be conceded that the people of the State being the principal, the delegation to a fraction of the people of the legislative powers, would be a violation of the maxim. One is astonished however to find the justice declaring that

[1] 6 Pa. 507. In case of the Borough of West Philadelphia, 5 W. & S., 281, Gibson, C. J., remarks, "Under a well-balanced constitution, the legislature can no more delegate its proper function than can the judiciary."

the remission by the delegate, the legislature, of the power back to the principal, the entire people, is a violation of it. "It," the duty of legislation, he says, "is a duty which cannot therefore be transferred by the representatives; no, not even to the people themselves, for they have forbidden it by the solemn expression of their will, that the legislative power *shall* be vested in the General Assembly; much less can it be relinquished to a portion of the people who cannot even claim to be the exclusive depositories of that part of the sovereignty retained by the whole community." It is needless to remark on the absurdity of the suggestion that the remission of his power by an agent to his principal, with the principal's consent, is a reprehensible and inadmissible act.

That the legislature cannot delegate legislative power to a man, or group of men, (less than the entire electoral people) to a judge, or other officer; to the voters of a township, ward, borough, city, county, seems to be assumed, although we shall see that there are plain exceptions to the principle. Parker v. Commonwealth, affirms it. Although Locke's Appeal,[2] dissents from the result reached in Parker v. Commonwealth, it does so, not because it holds the delegability of the legislative power, (for it assumes the indelegability thereof) but because it denies that the suspension of the authority to license the sale of liquor in a geographical division of the State, upon the consent of the people of a ward,[3] of a city or borough is a delegation of legislative power to these people.

PARKER v. COMMONWEALTH

The act of April 7th, 1846, made it "lawful" for the citizens of the several boroughs and townships of 18 designated counties, among which was Allegheny, and of the borough and township of Mt. Pleasant, in Wayne county, and of the borough of Lewisburg, in Union county, to "decide by their votes (at the annual elections) whether or

[2]72 Pa., 491.

[3]Parker v. Commonwealth, 6 Pa., 507; Locke's Appeal, 72 Pa., 491.

not the sale of wines and spirituous liquors shall be permitted among them for the ensuing year." The act provided that when the majority of voters voted "against a sale of liquors," "it shall not be lawful for any person or persons to sell vinous or spirituous liquors within said boroughs, wards or townships;" nor for the court of quarter sessions or the treasurer of the county to grant licenses for the sale of liquors. It declared the sale of vinous and spirituous liquors within such borough, ward or township, during the ensuing year, to be a public nuisance. The sale of liquor in violation of the act was made indictable, and punishable with a fine not less than $20 nor greater than $100. If the voters in any borough, ward or township voted "for a sale of liquors," the already existing laws were to continue to operate.

After giving a synopsis of the provisions of the act of 1846, Bell, J., observes, "From this summary of its features, it will be perceived this act of the General Assembly, whether considered as an enactment of new and substantive provisions, or as a statute of repeal, abrogating existing laws, depends for its validity and binding efficiency within the several counties named in it, upon the popular vote of designated districts. Without this affirmatively expressed, it is inert. Possessng no innate force, it remains a dead letter until breathed upon by the people and called into activity by an exertion of their voice in their primary assemblies. Until then, it prohibits no act, creates no offense, points out no mode of trial, fixes no penalty, and when so bidden into life, its existence as a rule of action is limited to the brief period of a single year, unless new energy be again infused through the medium of the ballot-box. If a majority within the particular district should vote negatively upon the question, yearly to be submitted to the people, the act as a statute has no existence * * * It (the act) operates not *proprio vigore*, but, if at all, only by virtue of a mandate expressed subsequently to its enactment, in pursuance of an invitation given by the legislative bodies. As it left the halls of legisla-

tion, it was imperfect and unfinished, for it lacked the qualities of command and prohibition absolutely essential to every law. * * * * If it (the statute) has that character at all (i. e. the character of law) it must have been conferred by the *fiat* of a portion of the people expressed through their votes. * * * * If so, what is this other than a delegation of the legislative franchise by an act of the General Assembly?"

ALLEGED CONTRARY DECISIONS

In opposition to the view that the suspension of the law, granting to or withholding from the judges the power to grant licenses for the sale of liquor, upon the votes of the people, was an unconstitutional delegation of power, the principle that the legislature made a delegation of power, when it conferred on municipal corporations authority to enact ordinances (e. g. an ordinance to prevent the erection of wooden buildings within certain parts of the city of Philadelphia), was called to the attention of the court. Bell, J., thinks he parries the difficulty by remarking that it is founded on an "entire misapprehension of the nature of the right to make ordinances." He suggests that such ordinances are "no more than a species of contract between the individual members" or between the city or borough and a stranger who comes voluntarily within the jurisdiction, upon the principle that his coming is equivalent to an assent to be bound by the local law of the place. How, the justice asks, with an air of triumph, "how, when or where have the minority of the people of Allegheny county, agreed to be governed by the will of a majority of their fellows, except in the mode pointed out by the constitution of the state of which they are members? They have agreed they will be subject to the resolutions of "selected bodies of men to whom the community has delegated the legislative authority," when their decrees assume the character of laws, because endowed with the principle of action which only those selected bodies can confer. But there is no assent beyond this." The analogy

between the legislation in question and that of municipalities, therefore "altogether fails."

The justice is mistaken. It does not "fail." Whether there shall be a city, or a borough or a township, or a county, the legislature determines. Whether, existing, such city, etc., shall have this or that power to legislate, or not, it likewise determines. The power in a city to legislate no more springs from the consent of residents within the city, than does the power of the legislature of a state to legislate, depend on the consent of each inhabitant thereof. The legislature could forbid wooden buildings in a city. It can authorize councils to decide whether there shall be such buildings or not. In thus authorizing, it plainly delegates to councils a portion of its legislative power. What then hinders its making a ward of a city into a quasi-corporation, and giving to it the authority to permit or prohibit, as it will, this or that act, e. g., the building of wooden structures, the selling of intoxicants? Justice Bell's remarks are in part unintelligible, and in part inept.

It was urged by those who contended that the act of 1846 was unconstitutional, that the Common Schools statute of June 13th, 1836, P. L. 525, contained a provision that it should operate only on the consent of the people of the several school districts, and that its constitutonality had not for that reason been contested. Justice Bell thinks he escapes the difficulty by showing that the law simply suspends the contribution of the state to each district, upon the district's raising a certain tax, to which tax the voters of the district were to give their consent. The right to impose this tax emanated from the legislature, but it was conditioned; and the condition was, the consent of the voting people of the district. The analogy is flagrant between the act of 1836 and the act of 1846 in this respect and the denial of it makes difficult the attribution to the justice of both candor and perspicacity.

It was argued before the court that it was competent for the legislature to make a law ordaining or forbidding acts if, and only if, certain facts should come into exis-

tence. An act of congress of 1810, modifying that of 1809 prohibiting the introduction of British and French goods into the United States, unless those countries should repeal their edicts against the commerce of the United States, and the President should proclaim the fact of such repeal, was urged on the notice of the court. Bell, J,. remarks "It is plain the revival or continued suspension of the act of 1809 was not made to depend on the proclamation but upon independent facts, of which the proclamation was evidence; after which the statute operated *proprio vigore.*" He thinks the distinction important between a statute whose operation is "suspended upon the occurrence of a particular event" and one which is inoperative "unless otherwise willed by the people." "In the first case" he observes, "the law remains quiescent until the happening of the appropriate event stirs it into motion; in the last, the so-called law was altogether without the power of motion, of itself, when it left the hands of the law makers." Apparently, what the justice means is that when the legislature wills a certain sequence of fact bon fact *a*, when fact *a* is not the volition of the seuqence by another person its will is valid legislation, but, when it wiils the sequence of *b* upon *a*, only if a man, or a group of men, likewise wills it, it is unconstitutionally delegating the legislative power to this group of men. "What is this more or better" asks the justice, "than simply preparing the *project* of a law to be submitted for the sanction of a distinct and independent tribunal, whose will is to determine its future existence or continued nonentity?"

It was suggested by the counsel who upheld the statute of 1846, that congress delegates the legislative function to territorial legislatures. The answer which satisfied Justice Bell was that the right to do this is conferred by the provision that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States." In descrying in this provision a

warrant to delegate otherwise undelegable legislative power, the justice displays an admirable ingenuity.

An effort was made by counsel to discover a similarity between the alleged delegation of the legislative power, of the act of 1846 ,and the act of April 14th, 1835 which submitted to the people of the state, the decision whether a convention should be held to frame a new state constitution. The justice observes that that act did not pertain to the ordinary business of legislation. The act was not essential to the elaboration of a new constitution. "Though enacted with all the forms of a law, it was not in truth a law, for it contained nothing binding or obligatory on the people, who were at liberty to obey or disobey it, as they thought proper."

The justice refers to legislation providing for the erection of poor-houses in several counties, upon an assenting vote of the people thereof. "Whether," he observes, "this provision can, in principle, be distinguished from that we have been reviewing it is not necessary to decide, and perhaps may never be. If it be unconstitutional, these acts may be cited as showing how silently and insidiously a dangerous practice may creep, unnoticed, into the legislation of the state; but surely they cannot be called in to justify a continuance of the practice."

ABOLITION OF A TOWNSHIP

The 13th section of the act of March 8th, 1847, P. L., 256 provided that the continuance of Washington township in Lebanon county, which had been formed from Bethel township should depend on a vote of the people. If a majority should favor the new township, it was to remain; if a majority should be against it, the old township of Bethel was to "remain as if the said new township of Washington had never been erected out of the same." A majority of the voters voted against the new township, and the court of quarter sessions accordingly refused to appoint a constable for the new township. The Supreme

court refused to compel the appointment by mandamus.[4] holding that the act of 1847 was constitutional. Admitting that Parker v. Commonwealth settled that the General Assembly could not delegate to the people the power to enact laws by vote, affecting the property and the political and social rights of citizens, Bell, J., held that the erection or suppression of a township, like the laying out of a highway, or the erection of a bridge, may be made dependent on the consent of people, of courts, e. g., or of voters. "If the legislature can authorize the courts to decide questions of this character, they can also authorize the people primarily to do so." "The power of the legislature directly to repeal that action (of the court in erecting a township) cannot be questioned, and that which they could do immediately may also be effected by the secondary means of a popular vote." This decision was rendered a year after that of Parker v. Commonwealth, and by the same judge. The attempt made by Bell, J., to distinguish it is futile. The legislature *willed* that Washington township should disappear, *if* the voters of Bethel and Washington township willed its disappearance.

REMOVAL OF COUNTY SEAT

The act of March 3d, 1847, P. L., 209, provided for the removal of the seat of justice of Delaware county from Chester to another place, if, on the submission of the question to the voters, a majority of them voted in favor of the removal. Upon such a vote issuing in such a majority, it was made the duty of the county commissioners to dispose of the public property in Chester and to cause the erection of a court house, jail and offices at the newly selected site. The election was held and resulted in a majority in favor of the change of site. Doubting the constitutionality of the act of 1847, however, the commission-

[4]Commonwealth v. Judges of Quarter Sessions, 8 Pa., 391. The distinction attempted to be drawn between this case and that of Parker v. Commonwealth is said in Locke's Appeal, 72 Pa., 491, to "rest on no difference."

ers of the county declined to proceed with the erection of buildings at the new site. The Supreme Court compelled them by mandamus.[5] Coulter, J., makes no effort to distinguish the case from Parker v. Commonwealth. He cites the retrocession by Congress to Virginia of the Virginia portion of the District of Columbia. The retrocession was submitted to a vote of the people. If a majority should be opposed, the act was to be void; if a majority favored, the act was to be in full force. The writer of the opinion curtly remarks, "This court is of opinion the case of Parker v. The Commonwealth does not reach or cover the case in hand."

ENLARGEMENT OF AREAS OF CITIES, ETC.

The act of April 6th, 1867, P. L. 846, provides for the annexation to Pittsburgh of certain districts. The people dwelling in each of these were to vote. If a majority of the voters in any district were opposed to consolidation, the district was not to be included in the city. A bill in equity was filed in the Supreme Court, to have the act declared unconstitutional, and to enjoin against the holding of an election in pursuance of it. Refusing the injunction, Thompson, J., says[6] "It is not unconstitutional to submit such a question to the people. We do not regard it within the principle which forbids the delegation of legislative power. This is applicable to the creation of laws which the law-making power provided by the constitution must not delegate. So far as questions like the present are concerned, the constitution itself furnishes a precedent in the division of counties, so do the acts of assembly in regard to the division or establishment of new townships created out of the old. * * * The legislature had the undoubted power to pass an act for consolidation; it may unquestionably enlarge, divide and change the boundaries of municipal corporations, and may do this without referring the question of choice to a vote of the people. * * * But it did

[5]Commonwealth v. Painter, 10 Pa., 214.
[6]Smith v. McCarthy, 56 Pa., 359.

not do so. And we think no breach of the constitution was involved in the method adopted."

THE FENCE LAW

The act of 1700 required the owners of "cornfields and ground kept for enclosures" to keep them well fenced, depriving them for neglect to do this of damage for trespasses of cattle, etc., of others. The act of June 23d, 1885, P. L. 142, in its first section, repealed this act, but the second section provided that for the purpose of ascertaining the judgment of the electors as to the repeal, the voters of each county should vote for or against repeal, and if a majority should favor repeal "this act shall forthwith take effect therein, but the same shall not take effect in any county of this commonwealth, until it has been ascertained that the provisions thereof are deemed expedient and desired therein, by an election as hereinbefore provided." After a vote against repeal, another vote could not be taken for three years thereafter. This was a clear case of the suspension of the legislative will, with respect to the duty of fencing in any county upon the vote of a majority of the voters of that county. The act was declared unconstitutional[7] because it was local and special legislature concerning the affairs of counties but Paxson, J., the writer of the opinion observed in it, "I have not considered it necessary to discuss the question of the delegation of power." He does however say that, as the legislature cannot directly pass a valid local law regulating the affairs of counties "it cannot accomplish by indirection, as by classification resting on no necessity nor reason of public policy, or by calling in the aid of the *people at the polls to breathe life into an otherwise dead statute.*" But, a dead statute is not a law. The remark implies that the law element in the statute was conferred by the will of the voters.

[7]Frost v. Cherry, 122 Pa., 417.

THE SO-CALLED LOCAL OPTION LAWS

Ordinarily, by a "local option law" is meant one which allows the people of a ward, borough, city, township or county to decide whether the sale of liquors therein shall be permitted. Of this class of acts, that which was dealt with in Parker v. Commonwealth is a sample. The act was there held void, as delegating legislative power to the people of a ward. The act of May 3d, 1871, P. L. 522, provided for a vote by the electors of the 22d ward of the city of Philadelphia, upon the question whether licenses for the sale of liquors therein should be issued. "Whenever" said the act, "by the returns of election in the 22d ward of the city of Philadelphia, it shall appear that there is a majority against license, it shall not be lawful for any license to issue for the sale of spirituous, vinuous, malt or other intoxicating liquors in said ward, at any time thereafter, until, at an election as above provided, a majority of the voters of said ward shall vote in favor of a license." The sale of liquor without a license in the ward was made for the first offense punishable with a fine of $50 and imprisonment for six months and for subsequent offences, with a fine of $100 and imprisonment for one year. An election in the ward resulted in a majority against the granting of licenses. A bill in equity, in the name of the Commonwealth, was filed in the court of common pleas against Locke and two others, city commissioners, to restrain them from granting licenses to sell liquors in the 22d ward. The court granted the injunction, and its act in so doing was on appeal affirmed by the Supreme Court.

The doctrine laid down by the Supreme Court is that while the legislature cannot delegate the law making power to another person or group of persons, there is no such delegation when a statute provides for the doing or not doing of acts, upon the contingency that such or such things occur; and that the things on the occurrence of which the doing or not doing of acts may be made contingent, may be the opinion, wish, or will of some person or group. The act of 1871 directed the refusal of all licenses by the city

commissioners, to sell liquor in the 22d ward if a majority of the electors willed, and expressed their will in a certain way, that licenses should not be granted. The General Assembly willed that, if the people of the ward willed so, there should be granted no licenses to sell liquor therein. "The law," says Agnew, J., "is simply contingent upon the determination of the fact whether licenses are needed, or are desired, in this ward." The power to grant licenses may be bestowed on judges upon their decision of their expediency or necessity in any case. If so, why cannot the decision be left with the people of a locality?

THE REPEAL OF A LOCAL OPTION LAW

The act of April 11th, 1866, P. L. 658, prohibited the sale of vinous, spirituous, malt or brewed liquors in Potter county. The act of April 28th, 1899, P. L. 68, in its first section repealed the act of 1866, provided, said repeal shall not go into effect unless a majority of duly qualified voters of said county shall vote in favor of said repeal, at an election to be held as provided for in section three of this act." An election was held in 1902, the result of which was that the repeal went into effect, if the act of 1899 was valid. The court of quarter sessions thereupon granted a license. The Superior Court reversed the grant of the license, holding the act of 1899 unconstitutional because of delegated legislative power. The Supreme Court reversed the judgment of the Superior Court, and affirmed the order of the Quarter Sessions.[8] Brown, J., makes a distinction between the "passage of the act ,and the contingency under which it was to go into effect. Its passage, he says, "with its condition was the act of the legislature alone. * * * What the legislature did in the second section of the act was simply to adopt a popular vote as a means of reaching a result, without which it declared its act should not go into effect." The legislature willed that if the people of Potter county so willed, the prohibition of licensing, established by the act

[8]McGonnell's License, 209 Pa., 327. .

of 1886 should cease. A legislative repeal contingent on the wishes of the electors, is not a repeal by the electors.

THE SUBSTANCE OF A LAW FURNISHED ABEXTRA

Some of the cases considered illustrate the principle that the suspension of the operation of an act, in the mode defined therein, upon a fact which is yet to come into existence, or the existence of which is yet to be ascertained, is not a delegation of legislative power, even when the fact is the volition of a person or a body of electors. Precisely what is to be done or omitted, on the happening of this fact, may be ascertained by a perusal of the act. When, however, the act requires a thing to be done which is not described in it, but which is to be described by a person or persons, official or not, so that, until such person or persons furnish the description it is inoperative, and it is made operative by his or their furnishing the description, a delegation of legislative power is held to occur. An illustration is found in the act of April 16th, 1891, P. L. 22. This act declares that the insurance commissioner shall prepare and file in his office a printed form of a policy of fire insurance, together with such provisions, agreements or conditions as may be endorsed thereon or added thereto. This form is to be known as the standard fire insurance policy of the state. The act requires under penalty the incorporation of the provisions of the standard policy into all contracts of fire insurance. Not denying the power of the legislature to prescribe a standard policy of fire insurance, to prohibit "technical and unjust conditions intended to open the way to vexatious litigation, and to defeat the just expectations of the insured," Williams, J., holds[9] that the act of 1891 is a void delegation of legislative power, because, not itself fixing the terms and conditions of the policy, it deputes the power to fix them to the insurance commissioner. Possibly had the legislature itself created, in the act of 1891, the form of a policy, and enacted that that form should become obligatory, when it

[9]O'Neil v. Insurance Co., 166 Pa., 72.

was approved by the insurance commissioner the act would have been deemed valid. If the legislature may constitutionally will certain effects, provided that they are willed by the majority of voters, it may do so, provided that they are willed by a judge, or an insurance commissioner. The court of common pleas having enforced the statute, by awarding a non-suit for want of compliance by the plaintiff with the requirements of the policy, the Supreme court holding the statute void, set aside the non-suit and awarded a procedendo.

PERMISSIBLE DELEGATIONS OF LEGISLATIVE POWER

From the foundation of the state, municipalities have been created, having a more or less complete organization with greater or less powers, such as counties, townships, boroughs, cities, school districts. Those of the more complex organization are brought into existence in order not only that they may do things by their officers but that they may require or prohibit the doing of things by their inhabitants. Their existence and all their powers come from the state legislature.[10] Their powers are largely legislative as well as administrative and judicial. The very things upon which they legislate might be legislated upon by the General Assembly. Their power to legislate derives from that body. There is then a true delegation of legislative power to these corporations. Referring to taxation, Mercur, J., observes "Whatever power of taxation the legislature possesses, it may delegate to a municipal government, to be legitimately exercised within its corporate limits.[11] An act of April 18th, 1795 authorizing the city of Philadelphia to regulate buildings in the city, an ordinance was passed, in pursuance thereof, forbidding the erection of any wooden mansion-house, shop, etc., within a described portion of the city. Duquet was indicted in the Mayor's court for a violation of this ordinance. The indictment was removed to the Supreme court by certiorari.

[10]Commonwealth v. Moir, 199 Pa., 534; Philadelphia v. Fox, 64 Pa., 169.

[11]Butler's Appeal, 73 Pa., 448.

One of the objections to a conviction was that the legislative power to define and punish offenses could not be delegated. The Supreme court however, gave judgment for the Commonwealth.[12]

GIVING THE PEOPLE OF A MUNICIPALITY A VOICE

The constitution of the state has not only authorized but required the submission of proposed municipal legislation upon some subjects to the people of the municipality. But, independently of contitutional requirement, the legislature, in conferring power of legislation upon cities, boroughs, etc., may require the co-operation of the electorate with the councils or other governing bodies. An example may be found in Moers v. City of Reading[13]. The legislature by act of April 5th, 1853, authorized the city of Reading to subscribe for shares of stock in the Lebanon Valley Railroad Company, but required the councils, before subscribing, to obtain the consent of the voters, to be expressed at an election. In ordinary affairs, the power of decision is conferred on the councils, in this it was divided between councils and the people. Neither, without the other could decide. It was objected by plaintiffs in a bill asking for an injunction to prohibit the city from proceeding under the statute, that it was not an exertion of legislative power by the Assembly, but a mere delegation of it to the people of Reading. Says Black, C. J., "We cannot see it in that light. Half the statutes on our books are in the alternative ,depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But, it cannot be said that the exercise of such a discretion is the making of a law. * * * When individuals or corporations are merely authorized to do a thing, the doing of it necessarily depends on their own will; and we can see no reason why the acceptance of a new power, tendered to a public corporation, may not be made to depend

[12]Respublica v. Duquet, 2 Y., 495.
[13]21 Pa., 188.

on the will of the people when it is expressed by themselves, as well as when it is spoken by the mouths of their officers and agents." If indeed the legislature may create councils in boroughs and cities, and communicate to them a portion of its own legislative power, there can be no valid objection to the communication of that power to the whole mass of inhabitants, or of electors, or to both councils and electors acting conjointly.

DELEGATION OF LEGISLATIVE POWER TO THE COURTS

The courts, by virtue of their being courts, and without express authority of the General Assembly, have power to make rules which are in fact laws, for the regulation of practice before them, e. g. may require the certificate of counsel in addition to the affidavit of a party who asks for a special jury,[14] or may adopt the rule that "engagements of counsel in the lower courts will not be recognized as a reason for the continuance or postponement of a cause, except when they are actually engaged in a trial which has been commenced in a previous week and is unfinished, and thus make it the duty of an inferior court, to continue a trial when the counsel of a party is in the Supreme Court, at the argument of a cause, in which he is counsel.[15] But the Supreme Courthas no inherent power to adopt rules to be observed by the inferior courts. The 13th section of the act of June 16th, 1836, P. L. 789, enacted that the rules of the Supreme Court of the United States, concerning equity practice shold be observed by the courts of this state "unless it be otherwise provided by act of assembly, or the same shall be altered by the Supreme court of this commonwealth, by general rules and regulations made and published as is hereinbefore provided." The Supreme Court has adopted equity rules and this adoption has been, says Brown, J., "by the authority of an act of the legislature." Hence he further says, they "have all the force and effect of a positive enactment" and all proceedings not in

[14]Dubois v. Turner, 4 Y., 361.

[15]Peterson v. Atlantic City R. R. Co., 177 Pa., 335; Smith v. Times Publishing Co., 178 Pa., 481.

conformity with them are irregular and void.[16] What the legislature might have done directly, it has authorized the Supreme Court to do. There is thus a delegation of legislative power. Howeveraverse to such delegations, the court may be, in general, it has no objection to this particular delegation to itself. It is the part of a good judge to expand his jurisdiction, and such a judge is loath to reject a gift of jurisdiction even though it be in nature legislative.

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[16]Yetter v. Delaware Valley R. R. Co., 206 Pa., 485; Traction Co. v. Phila., etc., R. R. Co., 180 Pa., 432; Palethorp v. Palethorp, 184 Pa., 585.

MOOT COURT

ILLINGS v. WORTH

Contracts—Offer and Acceptance—Mistake of Telegraph Company in Communicating Offer

STATEMENT OF FACTS

Worth sent a telegram to Illings offering him potatoes at fifty-five cents, but the telegraph operator mistakingly made the message read thirty-five cents. Illings at once accepted the offer, as he had received it. Worth not yet knowing of the mistake shipped the potatoes but arrested them on the way, on learning that Illings had believed them offered at thirty-five cents. This is an action for damages for breach of contract by Worth.

Smith for plaintiff.

Bashore for defendant.

OPINION OF THE COURT

GUNTER, J. Plaintiff in this action seeks to recover for breach of contract. He must, of course, show that one existed between himself and the defendant. One of the prerequisites to a valid and binding contract is that there must be mutuality of assent, which naturally resolves itself into offer and acceptance. Hence there could be no doubt but that there would be no contract if defendant had met the plaintiff in person and had said "My price is fifty-five cents" and the latter had answered, "I will buy for thirty-five cents." This would be a disagreement instead of an agreement.

Is this mutuality of assent supplied by the fact that the defendant employed the telegraph company to transmit the message for him? Some courts hold that such employment of the telegraph company makes the company the agent of the sender and he is therefore bound by its acts. But it is rather difficult to see upon what theory or principle such an agency arises. The telegraph company can not be said to be a private agent. It is similar to railroad companies, in that it is given certain privileges by the Commonwealth, such as the power of eminent domain, and in return for these privileges certain duties and obligations are placed upon it, such as the duty to accept and transmit all messages offered to it. Neither the plaintiff nor the defendant has any power to supervise the manner or means which the company uses in the discharge of its duties to the public in the transmission of messages for particular individuals. The paper on which the sender writes his message is never delivered to the sendee, but the company sends the message which is written

thereon over the wire and it is reduced to writing at the other end. Knowing the scope of the employment and the methods of transmission, the sendee should be held to know that the sender is bound by the contents only so far as it is a faithful reproduction of what it sent. The company retaining exclusive control of the manner of performance and of its own employees and instrumentalities the sender of the message being absolutely without voice in the matter, it seems that the position of the company is that of an independent contractor, as defined and understood in those cases where the employer is held to be not responsible for negligence of contractor in the performance of his work. Pepper v. Telegraph Co., 87 Tennessee 554; 4 L. R. A., 661.

The case of N. Y. & Washington Printing Telegraph Co. v. Dryburg, 35 Penna., 298, is held out by some as authority for the proposition that the telegraph company is the agent of the sender, 35 Cyc., 63 and 9 Cyc. 294. But as was said in Pepper v. Telegraph Company, supra, what is said in that case as to agency of company so as to bind sender is pure DICTUM. A glance at the parties will indicate that it is the telegraph company and not the sender that is being sued. The Dryburg case is first reported in 3 Phila., 408, where Judge Sharswood says "The telegraph company can not be considered the sender's agent in a proper sense. To constitute it such, the sender ought to have some control over the transmission of his message. He should at least have had a right to be present to oversee that his business was properly done, so as not to subject him to responsibility to strangers, if not the right to take it in hand and do it himself. A man employed to make a coat for another can not subject his employer to an action by a third person for the consequence of his negligence. One who contracts to build a house is in no sense his servant. This is the position of the telegraph company. It contracts with the sender to deliver his message to the sendee. The company and the sender are both principals as to the sendee. If he is injured by the negligence of either of them his recourse is to the party guilty of the negligence and to him ONLY. These responsibilities are independent of contract and rest on no privity between the parties and are therefore incurred to strangers."

This case was appealed in 39 Penna., 303, where the Court said that the telegraph company was not only the agent of the sender but also the agent of the sendee, because telegraph companies are public institutions and are open to all and that it shall FOR ALL PURPOSES OF LIABILITY BE CONSIDERED AS MUCH THE AGENT OF HIM WHO RECEIVES AS OF HIM WHO SENDS THE MESSAGE. This seems to indicate that the theory of agency is used only for the purpose of FASTENING LIABILITY on the TELEGRAPH COMPANY.

In the case at bar the sendee could successfully maintain a

suit against the telegraph company without being met with the doctrine of respondeat superior, because the wrong done by the company was one of MISFEASANCE and not NONFEASANCE.

As to the question of agency, it was said in Wolf Co. v. Western Union Telegraph Company, 24 Pa. Sup., 135, "Whilst it may be true, THAT IN A SENSE the company was the agent of the sender it was such for the purpose of submitting a telegram estimating the cost of certain articles at $1735. The sender was not bound by a telegram offering the same articles for $735 as delivered to the sendee, and in refusing to be bound by telegram as delivered to the plaintiff, the sender did not render himself liable for the difference between the estimate delivered to the defendant and that which was transmitted and delivered to plaintiff by it.

In Bailey and Co. v. Western Union Telegraph Co., 227 Pa., 522, it was said that for its negligence in transmitting the very message prescribed, it is responsible in an action sounding in tort to the part to whom the erroneous message is addressed, and even if the company be considered the agent of the sender of the message it is liable to third persons as a wrongdoer for any misfeasance in the execution of the duties confided to it.

From the above Pennsylvania cases it will be seen that the theory of agency is used in a very limited manner for the purpose of establishing the liability of the company.

The leading case supporting the plaintiff's contention is Ayer v. Western Union Tel. Co., 79 Maine, 493; 10 Atl. 495. It will be noticed that this was an action by the SENDER against the company and not by the SENDEE AGAINST the SENDER and also that the contract in that case had been performed. The case also admits that the sender should have his remedy over against the company. It seems much more feasible to do what was suggested in the Dryburg case, that is allow the injured party to sue the one who caused the injury, and thus prevent a number of costly suits. If two suits are to be allowed the evidence in the first suit might satisfy one jury that a breach had occurred, and hence the sendee would recover, but this evidence placed before another jury might cause them to reach an entirely different result, and hence the sender would be unable to recover against the company. Public policy therefore demands that the wrong be redressed in one action and that it be brought against the one who committed the wrong. It is also said in the Ayer case, supra, that the rule laid down presupposes the innocence of the sendee, and that there is nothing to cause him to suspect an error. If there be anything in the message or the attendant circumstances, or in th prior dealings of the parties, or in any thing else, indicating a probable error in the transmission, good faith on the part of the sendee may require him to investigate before acting. From the contents of the telegram in the case at bar, one would suppose that the sendee must have been a wholesaler and

as such it is fair to assume that he was familiar with the market price of potatoes, and that the discrepancy of twelve cents a bushel would be enough to put him on inquiry as to the correctness of the message. Potatoes generally sell for fifty-five or sixty cents and in view of the fact that the original offer was for fifty-five cents, it is possible to take the case out of the Maine rule even if we should consent to adopt the same.

However, we prefer to follow the other rule that the company, if an agent at all, is only one in a limited sense, just as the United States post office is regarded as the agent of the sender of the letter. The idea that the government postal service is an agent is now regarded as a mistaken notion. Ashley on Contracts, Page 35.

Ayer v. The Telegraph Company is criticised in Ashley on Contracts where it is said, "The court allowed this claim apparently on the theory that there was a contract to furnish the goods at the lower price. This is clearly wrong, and cannot be sustained on any theory. Even if it were true that the telegraph company is in any sense an agent it certainly has NO AUTHORITY to do anything but deliver the MESSAGE SENT. The offer contemplated was never made and the company had no authority express or implied to make any other. Hence as there was no offer, there could be no acceptance, and no contract." The author then lays down the rule that when a person sends a telegram he contracts with the telegraph company to forward his message. The company is not in any true sense his agent. Should the company negligently deliver a wrong message, thereby causing injury to the recipient, such recipient has no ground of action on contract, either against the company or the person sending the message. He should be allowed an action in tort against the company.

It follows that the plaintiff has sued the wrong party and has brought the wrong form of action and judgment is accordingly given for the defendant.

OPINION OF SUPERIOR COURT

By mistake of the intemediary, the potatoes were offered to Illings for 35 cents. Worth intended to offer them, and instructed the intermediary to offer them for 55 cents. It is evident that the parties did not agree to the same thing, and this want of agreement, prevents, we think, the formation of a contract.

Should Worth be precluded from showing that his offer was of potatoes at 55 cents? We think not. He employed as the learned court below has well shown, the telegraph company, an independent contractor, and he is not to be made responsible for its error in the transmission of the telegram. He is not shown to have been guilty of any negligence. Nor is it shown that, by denial to Illings of the right to compel the sale at 35 cents, any legal injury is done him.

He has no moral right to make profit out of the mistake of the telegraph company at the expense of Worth. Why should he have a legal right?

We cannot do better than adopt the conclusion reached in a somewhat similar case by the court of Indiana. In Mummenhoff v. Randall, 49 N. E., 40, A directed the stenographer to write a letter offering to B, potatoes at 55 cents. She mistakenly wrote 35 cents, and the letter, with this mistake, was sent to B. B in ignorance of the mistake, accepted the offer. A learned of the mistake, informed B, who insisted on keeping the potatoes. The court held that no contract was formed, until B, learning of the mistake, and that A was intending to sell the potatoes at 55 cents, nevertheless retained them. He thus made a contract to pay 55 cents. The type-writer was the agent of A, but that gave no right to B to maintain that a contract was made by his aceptance on A's part to sell and on his part to buy the potatoes at 35 cents. The judgment is affirmed.

DUNCAN v. BROWN

Liability of Indorser on a Promissory Note After Dishonor Discharged by Failure of Payee to Give Immediate Notice and Demand Payment—Right of Indorser to Recover Back Money Paid on Note When Under No Legal Obligation to Pay

STATEMENT OF FACTS

Brown held a note for $300.00 payable on May 11, 1914, on which Duncan was indorser. On June 11, Brown informed Duncan of the note, stating that it was due on that day. Duncan forgetting the true date, paid the note. On obtaining it he perceived that he had been discharged as indorser because of failure to demand payment on May 11th, and to give him immediate notice.

This is a suit to recover the money.

Morosini, for plaintiff.

Potter for defendant.

OPINION OF THE COURT

.. MARTIN, J. The liability of an indorser of a promisory note is only secondary. It depends on due presentation to the maker, demand of payment at the proper time and place, and notice of dishonor. These are necessary conditions or ingredients of an indorser's absolute liability, unless waived by him: Chestnut Street National Bank v. Ellis, 161 Pa., 241, 1894; Peale v. Addicks, 174 Pa., 543, 1896; and Wolf v. Jacobs, 187 Pa., 360, 1898. The Act of May 16, 1901, P. L. 194, Sec. 89; also Purdon's Dig. (13th Ed.), 3290, provides that "except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-pay-

ment, notice of dishonor must be given to the drawer and to each indorser and any drawer or indorser to whom such notice is not given is discharged." The came act further provides, in Sec. 102, that "Notice may be given as soon as the instrument is dishonored, and unless delay is excused, as hereinafter provided, must be given within the times fixed by this Act." There is no provision in this act which can be interpreted to indicate an intention to permit the holder of a note to wait one month after its maturity to notify an indorser in contemplation of a recovery against him upon his liability as a surety. It was held in the case of Solomon v Cohen, 94 N. Y. Suppl., 502, 1905, that notice to an indorser that a note has not been paid, given two or three days after it was due, is too late. In the case of Slack v. Longshaw, 8 Ken. L. Rep. 166, 1886, it was decided, that since immediate presentment and notice are necessary to fix the liability of an indorser of a bill payable on demand, where there has been delay, he need not show as a matter of fact that he was injured thereby. Furthermore, the statute of limitations is applied with the same effect in a court of equity as in a court of law, and a party who has been guilty of lashes has no standing in either. Hamilton v. Hamilton, 18 Pa., 20; Neely's Appeal, 85 Pa., 387, 1877.

Therefore it is clear that the law would not have compelled payment in an action by Brown against Duncan brought one month after maturity, the defendant not having been notified upon the the dishonor of the note at maturity.

The point remains whether or not the plaintiff can recover back money paid by mistake which the law would not have compelled him to pay?

The principle that "Every man must be taken to be cognizant of the law," was first established by Lord Ellenborough in the case of Bilbie v. Lumley, 1802, 2 East 469, 470, 472; Woodward on "The Law of Quasi Contracts", page 54, Sec. 35. This case established the rule that money paid by mistake of law, even under circumstances which make it inequitable for the defendant to retain it, is not recoverable. The courts of law, while frequently evincing the most profound dissatisfaction with the rule, have followed it with unusual consistency, and even the courts of equity though granting relief from mistakes of law in other cases, have refused to permit the recovery of money paid: Hemphill v. Moody, 64 Ala., 468, 1879; Tiffany Co. v. Johnson & Robinson, 5 Cush. (27 Miss.), 227, 232, 1854; Knickerbocker Trust Co. v. Oneonta, etc. R. Co., 123 N. Y. Supp., 822, 1910.

The general rule is well settled that one who voluntarily pays money with full knowledge or means of knowledge of all the facts, without any fraud having been practiced upon him, cannot recover it back by reason of the payment having been made in ignorance of law: Bobst v. Gring, 32 Pa., Super., 541, 1906; Natcher v. Natcher, 47 Pa., 496; Real Estate Saving Institution v. Linder, 73 Pa., 371;

Finnel v. Brew, 81 Pa., 362; Gould v. McFall, 118 Pa., 455; Schoenfeld v. Bradford, 16 Pa. Super., 165.

Where money is voluntarily paid to one entitled to receive, it cannot be recovered back on the ground that payment was made under a mistake of law: Peters v. Florence, 38 Pa., 194; Irvine v. Hanlin, 10 S. & R., 219; Real Estate Savings Inst. Co. v. Tinder, 74 Pa., 371; Walter v. Robb, 1 Ash., 43; Westfield v. Dill, 12 Pa., C. C. 30.

Where one's misreliance upon a supposed duty is the result of two mistakes; one of fact and one of law, he is not entitled to relief in jurisdictions where money paid under mistake of law cannot be recovered; Needles v. Burk, 81 Mo., 569, 1884; 51 Am. Rep. 251; Woodward on "The Law of Quasi Contracts," page 71, Sec. 44.

It cannot be said that a fraud was perpetrated upon the plaintiff. He had every means of ascertaining the truth of the defendant's statement that the note was due on that day. In paying the note he only did that which in equity and conscience he should have done, but which the law would not have compelled him to do. He has in effect waived his right to notice under the law and has assumed his original liability. The plaintiff is no worse off that he would have been if he had received notice as indorser on the day of dishonor, for he still has his remedy against the maker of the note.

The plaintiff claims to recover on the ground of a misreliance upon a mistake of both fact and law. In view of the authorities cited as applied to the circumstances of this case the court is of the opinion that the plaintiff cannot recover. Judgment for defendant.

OPINION OF SUPERIOR COURT

When the plaintiff paid the defendant the amount of the note, he was ignorant of the facts (to wit, failure to present and demand) which operated under the law to discharge him from liability. He is therefore entitled to recover the amount which he paid. "Where the indorser of a note pays the same without negligence and without knowledge of the fact that he has been discharged such payment may be recovered by him." 7 Cyc., 1044.

The fact that the plaintiff could probably have discovered the facts if he had examined the note does not disentitle him to recover. "Money paid in ignorance of the facts is recoverable notwithstanding laches; laches, in the sense of a mere omission to take advantage of the means of knowledge within the reach of the party paying the money, is not sufficient to disentitle him to recover it back." Girard Trust Co. v. Harrington, 23 Super., 615. Furthermore, the plaintiff relied upon the statement of the defendant. This makes his right to recover more clear. Dotterer v. Scott, 29 Super., 553. Judgment reversed.

KILPATRICK v. REPPERT

Trespass—Action to Recover Damages for Death of Dog by Automobile—City Ordinance Limiting Rate of Speed

OPINION OF THE COURT

Brown for plaintiff.

Bender for defendant.

BURNS, J. This is an action of trespass to recover damages for the death of plaintiff's dog, alleged to have been sustained by the negligent operation of an automobile owned and operated by defendant, Reppert. The facts show that at the time of the accident, defendant was riding in the automobile alone, in the limits of the borough, and was going at the rate of forty miles an hour when he struck plaintiff's dog, valued at $50. The maximum speed permitted by the borough ordinance was ten miles per hour and the dog, when struck, was endeavoring to escape from the middle of the street to the sidewalk.

The only evidence in this case to show negligence would be the neglect to stop the automobile when the dog was endeavoring to cross. If Reppert had seen the dog and could have stopped, there would have been negligence. If he knew the dog was there in danger of being struck, it was his duty to stop. If the manner in which the machine was run on the occasion of this accident was such that it was grossly negligent; that is, careless to such a degree that a reasonable man would say it was reckless, then there is an obligation to pay damages independent of the matter of due care. In any event the question of negligence is for the jury.

In Furness v. The Railroad Co., 4 D. R., 784, an action for damages was brought against defendants for the killing of a dog valued at $500.

It appeared from the evidence in this case that the railroad operated a trolley line over the public road near plaintiff's residence. The plaintiff's dog ran upon the track in front of the car, which was going at a high rate of speed, and was seen by the motorman about fifty yards away but not on the track, and it was held that there was no evidence of guilty negligence in the killing of the dog. The court went on to say that dogs, like other domestic animals, are to a certain extent under the protection of the law, but a dog's place is at his home, and if he strays on the highway he then has not the same right as if in the enclosure of his master, whose control he is under, especially in the case of a valuable dog, such as this was.

The court was also of the opinion that the same kind of care is not required to save the life of a dog that would be to save the life of a human being.

It is well settled at common law that dogs are property so far as

to enable an owner to maintain an action for damages against one who wrongfully kills or injures his dog. Wheatley v. Harris, 70 Amer., Dec. 258; Heisrodt v. Hackett, 34 Mich., 283.

But the American courts hold dogs to be entitled to less legal regard and protection then more harmless, useful domestic animals. Blair v. Forehand, 100 Mass., 141; Jenkins v. Ballantpne, 16 L. R. A., 689

The opinion in Jones v. Bond, 40 Fed. Rep., 281, states that employees in charge of a train are not bound to exercise the same care to avoid injury to an intelligent dog, upon the track, as in the case of other animals, the presumption being that a dog has the instinct and ability to get out of the way of danger, and will do so unless its freedom of action is interfered with by other circumstances.

A conductor is not guilty of negligence rendering the company liable for killing a dog, in signalling the engineer to start without paying any attention to a dog which he saw go under the train after it had stopped to unload freight. Texas & P. R. Co. v. Scott, 17 S. W. 1116. And Jameson v. Southwestern R. Co., denies recovery for an unintentional though negligent killing, holding that dogs are property only in a qualified sense.

In Liedermann et ux v. R. R., 165 Pa., 118 it was held that evidence that a city ordinance forbade trains to be run at a higher rate of speed than five miles an hour may be considered in ascertaining whether or not the train was being negligently run, but such an ordinance is not in itself evidence of negligence. From the foregoing conclusions of law, verdict must be for defendant.

OPINION OF SUPERIOR COURT

The judgment of the learned court below is affirmed because the facts stated in the present case are not sufficient upon which to base a finding that negligence on the part of the defendant was the proximate cause of the injury to the dog.

The facts state (1) that the plaintiff ran over and killed the dog; (2) while driving at a high rate of speed; (3) when the dog was endeavoring to escape from the middle of the street to the sidewalk. We are not informed as to the other details of the accident which in view of the known habits and characteristics of dogs might have been very significant. "It would be easy to surmise a variety of things entering as acts of causation into the injury of the dog which might have occurred in addition to the factors stated and consistent with them." The improper speed of the automobile might have concurred in point of time with the injury to the dog without being, in a legal sense, the cause of it. The learned court below was right in not permitting the jury to conjecture "what the real proximate cause of the killing of the dog was." See Wallace v. Waterhouse, 86 Conn., 546. Judgment affirmed.

ALEXANDER v. SIMMONS

Rights of a Bona Fide Holder Without Notice of a Note Given For Money Lost in Betting—Construction of Section 55, 57, and 197 of Negotiable Instruments Act—Their Effect on Section 8 of Act of April 22, 1794

STATEMENT OF FACTS

Simmons, having lost in betting, gave to the winner a note, negotiable in form, for the amount lost. The winner endorsed the note before its maturity to Alexander, an innocent purchaser for value. The court was requested to instruct the jury that under the Negotiable Instrument Act, the illegality of the note did not prevent a recovery. The court told the jury that there could be no recovery. Alexander appeals.

Garrahan for plaintiff.

Rockmaker for defendant.

OPINION OF THE COURT

PRINCE, J. The question to be determined in this case is whether under the Negotiable Instruemnt Act of 1901, May 16th, a bona fide holder without notice, of a note given for a gaming consideration can recover on the note against the maker of the note. It is admitted by the learned counsel for the plaintiff that there could have been no recovery prior to the Negotiable Instrument Act of May 16th, 1901, under the Act of April 22nd, 1794, section 8, Smith's Laws 117, but he contends that the Act of 1901 has repealed the Act of 1794 in so far as section 8 is involved.

Section 8 of the Act of April 22, 1794, 3 Smith's Laws 177, provides that persons losing money at any game of address or hazard, play or game whatsoever, "shall not be compelled to pay or make good the same; and every contract, note, bill, bond, judgment or mortgage, or other security or conveyance whatsoever, given, granted, drawn or entered into, for the security or satisfaction of the same, or any part thereof, shall be utterly void and of none effect." This Act is analagous to the Statute of Anne, Ch., 14, section 1, which makes notes given for money lost at play utterly void, frustrate and of none effect, to all intents and purposes whatsoever. The purpose of these Acts was to indirectly prevent gambling or gaming. While it is true that gaming is a criminal offense, nevertheless, the legislative bodies found it advisable to pass the act, in order to make it absolutely impossible for one gaming or his subsequent transferee or transferees to recover where there was a gaming consideration. They realized that it was very easy for the gaming parties to give a note, bond, judgment, etc., for the money lost, and that the winner would transfer the note or security thus given to an innocent purchaser for value without notice and thereby eliminate the doctrine of "Personal Defences." There-

fore to avoid this result, they passed the Act of April 22, 1794, 3 Smith's Laws, 117, which made the gaming transaction a "Real Defence," enforceable even as against a bona fide purchaser for value before maturity and without notice.

Counsel for the plaintiff contends that section 55 and 57 are in direct conflict with section 8 of the Act of 1794 and, therefore, section 197, which provides that "All acts and parts of acts inconsistent with this act are hereby repealed," repeals sectoin 8 of the Act of 1794. Section 55 of the Negotiable Instruments Act of 1901 provides that, "The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." Section 57 provides that "A holder in due course holds the instrument free from any defect of title of prior parties, and free from any defenses available to prior parties among themselves, and may enforce payment of the instruments for the full amount thereof against all parties liable thereon."

Prior to the passage of the Act of 1901, Pennsylvania by a line of decisions has held that under the Act of 1794, a negotiable note given for a gaming consideration is void in the hands of even an innocent purchaser or holder for value. Unger v. Boas, 13 Pa., 601, 1850; Harper v. Young, 112 Pa., 419, 1886;Fareira v. Gabell, 89 Pa., 89; Cauler v. Hartley, 178 Pa., 23; Griffith v. Sears, 112 Pa., 523; Northern National Bank v. Arnold, 187 Pa., 356, 1898; Merchants' Bank v. Harrison, Vol. 18, Dickinson Law Review, page 135.

In the case of Merchants' National Bank v. Harrison (Supra.), the learned Superior Court expressed a dictum on page 137, "The action is not by Dr. Stoop, but by the Merchants' Bank. Had the note, which is negotiable, been discounted by the bank in ignorance of the consideration of it, the bank could have compelled payment." However, it is merely dictum and no cases are cited to support the view. We are therefore free to decide the case contra to the view expressed in that learned opinion of the Superior Court in Merchants' Bank v. Harrison (supra.). Wirt v. Stubblefield, 17 App. D. C., 283, held that since the passage of the Negotiable Instruments Act, there could be a recovery, the Court saying, "We know, moreover, that the great and leading object of the Act, not only with Congress, but with the larger number of the principal states of the Union that have adopted it, has been to establish a uniform system of law to govern negotiable Instruments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form, as fully as possible, all the law upon the subject, to avoid conflict of decisions, and the effect of mere local laws upon the subject and usages that have hitherto prevailed. The great

object sought to be accomplished by the enactment of the statute is to free the Negotiable Instruments Act as far as possible from all local infirmities that would otherwise inhere in it to the prejudice and disappointment of innocent holders as against all the parties to the instrument professedly bound thereby. This clearly would not be effected so long as the instrument was rendered absolutely null and void by local statute." See also Schlesinger v. Kelly, 117 App. Div., 543, 1906. 97 S. W. 353, however, is decided directly contra to Schlesinger v. Kelly (supra), and therefore, there is a decided conflict between courts upon the question in issue.

In Pennsylvania, the only case on the question is Martin v. Hess, 23 District Reports 195, Jan., 1914, and in that case on the very facts of the case at bar, it was held by Judge Wheeler, Municipal Court of Philadelphia, that section 57 of the Negotiable Instruments Act of 1901, P. L. 194, providing that a holder in due course holds the instrument free from any defect of title of prior parties and free from any defenses available to prior parties among themselves, does not repeal section 8, Act of April 22, 1794, 3 Smith's Laws 171, making a note given for a gaming consideration void. This decision is directly opposed to the result reached in Wirt v. Stubblefield (supra), but we think that the reasons in support of the doctrine of Martin v. Hess (supra) are far more logical and conclusive than those enunciated to support Wirt v. Stubblefield (supra). Can we presume that it was the intention of the framers of the Negotiable Instruments Act and of the Legislatures that passed the Act, to allow gambling, even, though the allowance is indirect? Which reason carries more weight, the one in support of Wirt v. Stubblefield (supra), that a recovery should be allowed in order that there a more perfect system of negotiability in all cases, or the one laid down in Martin v. Hess (supra) that the act is not to apply in cases of "Real Defense," as where the consideration is illegal and made so by statute? Section 55 of the Negotiable Instruments Act provides that "The title of a person who negotiates an instrument is defective." The very use of the word "defective" raises a presumption that the framers intend that the section should only apply to "Personal Defenses." The presumption is based on antiquas decisis, "that a note given for gaming consideration is void and of no effect, and therefore, the party has no title whatsoever, and cannot be considered to have a defective title within the meaning of Negotiable Instrument Act of 1901. Our opinion is that the section applies to cases where there is a negotiable note and there is some defect, and not to cases where there is an alleged negotiable note. The Act of 1794 says that the note shall be void, therefore, it is not a negotiable note. The mere fact that it is drawn up in negotiable form does not make it negotiable. The Act of 1901 was made applicable only to negotiable notes. To hold that the Act of 1901 is applicable to a note that is alleged to be negotiable would be to say

that altho in section 1, of the Act of 1901, it provides that, "An instrument to be negotiable must conform to the following requirements:--" if those requirements are not complied with, nevertheless sections 55 and 57 do apply and the decision should be based upon sections 55 and 57. The effect of the Act of 1794 is that the alleged note is merely a paper and not a note, therefore, the party has no title whatsoever; the Act of 1901 says that the title is defective if given for an illegal consideration. We feel that that cannot be construed to include cases in which an Act says that the note thus given upon that illegal consideration is void. Furthermore, in analyzing setcion 57 of the Act, which provides, "and may enforce payment of the instrument for the full amount thereof against all parties LIABLE thereon," the use of the word "liable" clearly indicates that the framers recognize that there are cases in which the parties may not be liable, for example as in the case at bar. If they intend the broad doctrine that there could be a recovery in all cases, the words "liable thereon" are mere surplusage.

As to section 197, which provides that "All acts and parts of acts inconsistent with this act are hereby repealed," we do not favor repeal by implication. In Jackson v. P. R. R. Co. 228 Pa., 566, it was decided that, "Repeals by implication are not favored, and will not be indulged unless it is manifest that the legislature so intended. It is well settled that the learning of all the Courts is strongly against repealing the positive provision of a former statute by construction. There must be such a manifest and total repugnance that the two enactments cannot stand. It is not enough that there is a discrepancy between different parts of a system of legislation on the same general subject; there must be a conflict between the different acts on the same specific subject. An early statute is repealed only in those particulars wherein it is clearly inconsistent and irreconcilable with the later enactment."

Upon the above reasoning and in reliance on the case of Martin v. Hess (supra), the charge of the lower court was correct and, therefore, plaintiff's appeal is dismissed. Judgment affirmed.

OPINION OF SUPERIOR COURT

The learned court below has followed Wheeler, J., of the Municipal Court of Philadelphia, in Martin v. Hess, in holding that the Act of 1794 is not repeated by the Act of 1901. A learned note in the 27th Harvard Law Review, p. 679, gives reasons for approving this decision. We cannot do better than to adopt it. The judgment is therefore affirmed.