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CAMPUS NOTES.

J. C. Johnson, of Emporium, Pa., a lawyer of prominence and solicitor for the Penna. R. R. Co., representing the 48th district, was in town Saturday, November 14th, visiting his son, who is a member of the class of '06.

Quite a number of Law School men went to Harrisburg Saturday night, November 14th, to meet the Dickinson foot ball team returning from their victory over State College at Williamsport, Pa.

Setzer, '05, and Reeser, '05, participated in a foot ball game in Harrisburg on Saturday, November 14th.

CLASS NOTES.

Laub, McAlee and Rexach, all of the class of '06, took the examination for registration as law students in Cumberland county on November 24th.

The officers elected by the Junior class for the ensuing year are as follows: Laub, president; Barner, secretary; Ferguson, treasurer.

The officers elected by the Senior class for the ensuing year are as follows: Flynn, president; Yocum, vice president; Lourimer, secretary; Lanard, historian; Cook, treasurer.

F. Pierce Kugler, of Linfield, has entered the class of '06.

ALUMNI NOTES

Walter S. Bishop, '03, is in Johnstown, preparing for the examination for admission to the Philadelphia Bar.

Clarence F. Albertson, '03, of Atlantic City, recently passed the final examination for admission to the Supreme Court of New Jersey. THE FORUM regrets to learn of the recent death of Mr. Albertson's sister.

D. Lloyd Claycomb, '03, member of the Bedford County Bar, at present associated with Hon. John M. Reynolds, was in Carlisle to witness the Lehigh-Dickinson game,

Thos. B. Wilson, '03, is the junior member of the law firm of Stone, Simons and Wilson, at Bradford, Pa.

A. Irving Yeagley, '03, who successfully passed the Supreme Court examination last June, is engaged in teaching at Kleinfeltersville in conjunction with his legal work. He was admitted to practice in Lebanon county Oct. 5, 1903.

H. Spencer Vastine, '03, conducted a case before an auditor in Sunbury on Saturday, Nov. 14, 1903.

Samuel B. Kaufman, '03, who is registered in the office of Wm. T. Rourke, Esq., of Reading, was a visitor at the Law School on Monday, November 9th.

A. C. McIntire, '01, is a member of a Martinsburg, W. Va., law firm. His firm has offices in both Martinsburg and Berkeley Springs, W. Va.

J. F. and Frank Rhodes, both of '01, have located at Clarksburg, W.Va., where they have established a large practice.

Muir, of '02, has returned from Iowa and intends practicing in Pennsylvania.

Chas. F. Hickernell, '03, was admitted to the Lebanon County Bar Oct. 26, 1903.

Daniel Kline, '01, of the Luzerne County Bar, was in Harrisburg November 18th, attending a meeting of the Board of Pardons. During his short sojourn in this part of the State he made a brief visit to his Alma Mater.

E. L. Dively, '03, of Altoona, Pa., is making an extended visit among his friends in Carlisle.

R. M. Wright, whose wife was formerly Miss Katherine Spotts, of Carlisle, is practicing law at Seattle, Wash.

Chas. E. Daniels, '98, is prospering in the practice of law at Scranton, Pa.

Albert S. Longbottom, '03, will practice in Philadelphia.

Newton R. Turner, '01, is practicing in Easton, Pa.

Harry P. Katz, '01, has located in the Stafford Building, 1112 Chestnut St., Phila.

Wencel Hartman, '01, is a bond clerk in the office of the District Attorney of Philadelphia.

John Bertram Lavens, '02, is with the Pennsylvania Electric Vehicle Co., 250 Broad St., Phila.

Robert H. Moon, '02, has opened an office in Parkersburg, W. Va., and is also engaged in mine brokerage.

Chas. A. Piper, '01, formerly of Tyrone, Pa., died recently in Oklahoma, under painful circumstances. He had but recently settled in Oklahoma City and been admitted to the bar. Attacked with appendicitis, he submitted to an operation, from the exhaustion of which he never rallied. None of his relatives were with him, his death having come so suddenly.

A RESOLUTION.

WHEREAS, Charles A. Piper, a former member of the Dickinson Chapter of Delta Chi Fraternity has, through the infinite wisdom of God, been summoned from this earth, be it

Resolved, That by his death, we, the members of Delta Chi Fraternity, suffer the loss of one who was a loyal, earnest and enthusiastic brother in the Fraternity, a kind friend and congenial companion to all who were associated with him in the Fraternal life. His memory will ever be cherished in the Fraternity and his influence will long be felt among us. Be it further

Resolved, That we especially mourn the loss of one whose early manhood gave promise of so much usefulness. Be it further

Resolved, That we extend to the family of our late brother in this, their hour of sorrow and grief, our deepest and most sincere sympathy. Also be it

Resolved, That a copy of these resolutions be sent to the bereaved family and that said resolutions be inserted in THE FORUM.

E. F. HELLER
PAUL WILLIS
H. F. LAUB

Carlsle, Pa., Dec., 1903

FRATERNITY NOTES.

DELTA CHI.

Since the last issue of THE FORUM Delta Chi has initiated the following men: Bowman, McAlee, Laub and Braddock, all of '06; and pledged Oyer, a special student.

THETA LAMBDA PHI.

Theta Lambda Phi has recently initiated the following men: Hassert, '05, and Davis and Walt, '06.

During the past week the Supreme Senate of the Theta Lambda Phi approved an application from students of the Law Department of Cornell University, for a chapter of the above fraternity.

At present, applications for chapters in several other law schools are under consideration.

MOOT COURT.

POSTEN TRANSFER CO. vs. LOUIS FISHER.

Sale—Principal and agent—Liability of purchaser who receives goods from one who wrongfully obtains possession.

STATEMENT OF THE CASE.

The plaintiff company are livery keepers in Wilkesbarre, Pa., and in connection with their business they are wont to accumulate a quantity of what is commonly called junk.

Defendant deals extensively in the junk trade, buying and selling the same. He also has five or six wagons to collect the junk and bring the same to his yard where it is sold.

On June 30th last, a man unknown to the plaintiff company came to one of the plaintiff firm and presenting defendant's business card said he desired to buy some junk, that he was the defendant's authorized agent, although his name did not appear on the card. The card simply bore defendant's name as "dealer in junk," etc.

Plaintiff entered into negotiations with this man and completed the sale of the junk to the defendant. Plaintiff and defendant never had dealings before and their respective places of business were over a half mile apart.

Meyers (that being the name of the man who bore the card) told plaintiff that defendant's wagon would call for the junk shortly.

On the afternoon of June 30th defendant's wagon, along with the card bearer of the morning and with one of defendant's teamsters, drove to plaintiff's place of business and carted away the purchase of the morning. Defendant's name, as on the card, appeared on the wagon.

Plaintiff was assured by Meyers that he would hand a bill, which plaintiff gave him, to the defendant. This bill was taken by Meyers as the wagon left plaintiff's place of business.

The goods were charged to defendant on the back of the card of the defendant which Meyers had presented to plaintiff. This card has since been lost. Said card can be accounted for and its loss duly proven.

A diligent search has been made for the card up to the time of the trial.

Plaintiff knew of the defendant, but only in a business way.

Meyers sold the goods to defendant, who paid Meyers by check, which check was paid through the clearing house.

Plaintiff mailed defendant a bill on July 1st, as per his custom to so mail bills. Plaintiff is accustomed to keeping his accounts in the livery business by memoranda. No account against the defendant was opened on the ledger.

A true copy of the bill mailed the defendant was offered in evidence to charge defendant for goods sold and delivered.

Plaintiff received word by telephone from defendant six days after receiving the bill that he had paid Meyers and did not owe plaintiff any sum whatever. He did not deny receiving the goods.

Defendant admitted on cross-examination that he and Meyers were total strangers and that he did not know if Meyers had a place of business or not and that he had never seen Meyers before.

BENJAMIN and CARLIN for plaintiff.

The sale of goods tortiously obtained vests no title in second vendee. Barker v. Dinsmore, 72 Pa. 427.

The owner may waive the tort and sue in assumpsit. McCullough v. McCullough, 14 Pa. 295; Trubat and Haley, ¿1494

WILLIS for defendant.

Assumpsit does not lie unless there is an express or implied contract. Bethlehem B. & F. Co., 81 Pa. 446.

OPINION OF THE COURT.

There are but two theories upon which the plaintiff could maintain assumpsit against the defendant in this action. The first is that of the agency of Meyers; the second is that the defendant was guilty of a conversion and thus would be liable in *indebitatus* assumpsit.

We are of the opinion that the defendant, Fisher, in no wise appeared to the Posten Co. as principal, so that he might not later deny the agency of Meyers. The mere possession of a business card and the use of Fisher's wagon were not circumstances which would estop him. The possession of the one, and the use of the other, might suggest the relation of the principal and agent; but are not such circumstances as would cause us to conclude that Fisher was by them estopped. Hence, there could be no priority of contract between the Posten Co. and Fisher, and assumpsit could not be predicated upon the theory of agency.

It is urged by the plaintiff that Fisher obtained no title to the junk by the purchase from Meyers, and Barker v. Dinsmore, 72 Pa. 427, and Decan v. Shipper, 35 Pa. 239 are cited in support of the proposition.

We agree that Fisher took no title from Meyers, for Meyers had no title to convey; but the plaintiff can not recover in this action from Fisher unless Meyer's conversion may be imputed to him. In Barker v. Dinsmore, and Decan v. Shipper, replevin was maintained because no title passed; but assumpsit was not considered.

The only question remaining is, was Fisher guilty of a conversion? If he was the tort may be waived and the Posten Co. may declare in *indebitatus* assumpsit: McCullough v. McCullough, 14 Pa. 295. To hold the defendant upon this theory, it is necessary to prove either, that he personally committed the conversion, or that the act was done by his agent. From the statement of facts, Fisher was in no manner connected with the transaction between Meyers and the Posten Co.; and his relation as a principal to Meyers, in any phase of the case, has not been established. Hence, there could be no recovery upon the theory of conversion.

We fail to see wherein the Act of May 5, 1899, could influence this case.

Judgment of non-suit is accordingly entered for the defendant.

AMERMAN, J.

OPINION OF THE SUPREME COURT.

The sale was made by the plaintiff on intention to the defendant, but the defendant did not, in fact, buy, nor did he do any acts which could estop him from denying that he bought the junk.

No title to the junk passed from the plaintiff and he might have recovered the goods in replevin. It does not appear that a demand for them of Fisher had been unsuccessfully made or that any thing else had happened showing Fisher's intention to convert them. Hence, he cannot be made liable for their value in assumpsit.

Judgment affirmed.

JOHN SIMPSON vs. ADAM KELTIE.

Contributory negligence a bar to recovery by a son of deceased—Duty of employer to employee — Question of negligence for jury.

STATEMENT OF THE CASE.

Keltie was an employer of Simpson's father, who was killed by an accident caused by the negligence of a co-employee.

The evidence tended to show that this employee was an habitually careless man and that he had been reprimanded three or four times for his negligence, by the defendant.

The court instructed the jury that,—(a) Plaintiff can recover for the death of his father only on the same conditions on which the father, if he had survived, could recover for his injuries. (b) That as defendant is not liable to employee for the result of the negligence of the co-employee, neither is he liable to the son of such employee, if killed. (c) That the deceased's contributory negligence would as much prevent his son's recovery as it would have prevented his own recovery. (d) That under all the evidence their verdict should be for the defendant.

BENJAMIN and BARNHART for plaintiff.

The son may bring this action. Act April 26, 1855, P. L. 309.

The employer must exercise ordinary care in the selection of his employees, and if he fails or neglects to do so, or if he retains them after he becomes acquainted with their unfitness or incompetency he is answerable to the fellow servant for his negligence in this respect. Huntington R. R. v. Decker, 84 Pa. 423; Frazier v. P. R. R. Co., 38 Pa. 104; Caldwell v. Brown, 53 Pa. 453; O'Donnell v. Allegheny Valley R. R. Co., 59 Pa. 239.

HILLYER and HELLER for defendant.

General rule is that all workmen in the

same employment, are fellow servants, so that the negligence of one, causing injury to another, does not render the employer liable. L. V. Coal Co. v. Jones; 86 Pa. 432; N. Y. L. E. & U. v. Bell, 112 Pa. 400.

If contributory negligence existed there can be no recovery although defendant was guilty of negligence. Sykes v. Packer, 99 Pa. 465; Dooner v. Delaware, 171 Pa. 581.

Defendant is not liable because, while he knew of employee's carelessness, he did what an ordinary person would do, reprimanded him, and had reason to expect it would cease. Brown v. Lyman, 31 Pa. 510; Ebright v. Mineral R. R. Co., 15 Atl. 709.

OPINION OF THE COURT.

Under the evidence produced, the court is of opinion that the learned judge of the court below erred in his charge to the jury in reference to specification B, which reads as follows: "That as defendant is not liable to employee for the result of the negligence of a co-employee, neither is he liable to the son of such employee if killed." The evidence produced in this case tended to show that the employer was negligent in retaining an employee when he had knowledge that he was an habitually careless man, and liable to do an act dangerous to his co-employee. The fact that the employer had reprimanded the employee three or four times for his negligence shows conclusively the employer did not use ordinary care in selecting the culpable employee. In the case of Caldwell *et ux* v. Brown *et al*, the court held that an employer is not bound to indemnify an employee for losses in consequence of the ordinary risks of the business, nor of the negligence of another person employed by the same employer in the same business, unless he has neglected to use ordinary care in the selection of the culpable employee.

The employer, indeed, is bound to use ordinary care in providing suitable structures and apparatus, and in selecting proper servants, and is liable to other servants in the same employment if they are injured by his own neglect of duty. Gilmore v. Eastern Railroad Corporation, 10 Allen 233. In the case of Ardesco Oil Co. v. Gilson, 13 Smith 146, the court held that employers owe their servants and workmen the exercise of reasonable care and proper diligence in providing them with safe machinery and suitable tools, and employing with them fit and competent fellow-workmen.

In the case of Patterson v. the Pittsburg and Connellsville R. R. Co., it was held that if a master subjects his servants to dangers such as he ought to provide against, he is liable for any accident resulting from them.

In the case of Huntingdon and Broad Top Mountain R. R. and Coal Co. v. Decker, 1 Norris 119, it was held that where a railroad company knowingly employs a conductor who is unfit for his position, it is responsible for his negligence to a fellow-servant.

The court is of opinion that the evidence in this case was sufficient to require submission to the jury in reference to the question whether the negligence of defendant had caused or resulted in the loss and damage sustained by the plaintiff. The court erred in instructing the jury that defendant is not liable to the plaintiff for the result of the negligence of a co-employee when the evidence shows that the employer did not use ordinary care in the selection of an employee. We, therefore, conclude that a new trial should be granted.

CARLIN, J.

OPINION OF THE SUPREME COURT.

The negligence of the father of Simpson, contributing to his injury, would have barred his own recovery of damages. It would equally bar a recovery by his son of damages resulting from his death. There is no error in the charge of the court, in so far as it assumes this principle.

But the evidence tended to show that the employee was a habitually careless man. This habitual carelessness would justify an inference of knowledge of it by the employer. He would be negligent in retaining such a person and for the negligent act of such a person, resulting in damage to a fellow workman, he would be liable to the latter.

The evidence went so far as to tend to show that three acts of carelessness of the employee had been known to the employer. Whether the court could say that this was conclusive of negligence of the employer, in retaining the employee or not, it surely should have permitted the jury to say whether the employer was negligent or not, in retaining the employee.

Judgment affirmed.

JOHN PRENTICE vs. HENRY LEWIS.

Priority of deeds recorded the same day —Time of recording under act of 1893— Right of grantee to maintain trespass quare clausum fregit.

STATEMENT OF THE CASE.

Wm. Johnston by deed conveyed his farm to Prentice on August 3, 1900, and eight weeks later by another deed gave to Lewis a right to enter on and haul away slate from a quarry for the period of five years. The Prentice deed was left for record December 22, 1900, at 8 a. m., and the Lewis deed left for record on the same day at 2 p. m. Prentice did not take possession until October 5, 1900, at which time also Lewis made his first entry for the purpose of beginning operations. This he did with the knowledge of Prentice. This is trespass *q. c. f.*

PRICKETT and COOK for plaintiff.

Act of 1775 provides every deed shall be recorded within six months or it shall be judged fraudulent and void as against subsequent purchasers or mortgagees for valuable consideration.

But penalty of postponement is not incurred if mortgage or deed is recorded at any time within six months from its execution or (2) if it is actually recorded before the second deed is recorded. Fries v. Null, 154 Pa. 573.

The Act of 1893 changes the time of recording from six months to ninety days, but otherwise the law remains the same as it stood under the Act of 1775. P. & L. Digest, Col. 1572; Davey v. Ruffiel, 162 Pa. 443.

The plain reading of the acts is, that in order to be first in right against a prior purchaser's deed, the subsequent purchaser must be first in time on record. Salt Co. v. Neal, 54 Pa. 9.

FLEITZ and WILCOX for defendant.

The recording of a conveyance within six months from its date is essential to the validity of the title granted by it, as against a subsequent *bona fide* purchaser for value. Poth v. Anstatt, 4 W. & S. 210; Ebner v. Gornsdie, 5 W. & S. 49.

A deed not recorded within six months from the date of its execution is fraudulent and void as against a subsequent purchaser for value. Act of 1775, P. & L., Vol. I, 1572.

Act of May 19, 1893, reduces time of act of 1775 to ninety days and changes the law only in this respect. Davey v. Ruffiel, 162 Pa. 443.

OPINION OF THE COURT.

The questions involved in the case at bar are, first, as to the priority of a deed recorded after ninety days from its execution, as against a later deed for the same land recorded within that time; and, second, as to the right of the first grantee to maintain trespass *quare clausum fregit* against the second grantee for an entry upon the land in pursuance of the second deed.

In regard to the first question, it is provided by the act of 1775, "that all deeds and conveyances which from and after the passage of this act, shall be executed within this Commonwealth concerning any lands, tenements, etc., * * * shall be recorded in the office of the Recorder of Deeds within six months after the execution of such deed. And every deed not so recorded within six months shall be adjudged fraudulent and void as to any subsequent purchaser." By a supplementary Act passed May 19, 1893, P. L. 108, the time limit is changed so that a deed now must be recorded within ninety days. But the rule as it stood under the old law is the rule under the Act of 1893 except as to the length of time allowed for recording. Davey v. Ruffiel, 162 Pa. 443.

This being so it, perhaps, might not be amiss to look at the adjudicated cases reported prior to the passage of the act of 1893. One of the most frequently cited of these cases, and one that contains a resumè of the decisions under the recording law of our state, is the case of Fries *et al.* v. Null, 154 Pa. 573. The essential facts of that case were that a mortgage was executed on April 2, 1875, and recorded October 4, 1875, which was more than six months after the date of the execution. A deed for the same land was executed April 6, 1875, and recorded October 5, 1875, which was one day less than six months after its execution. A divided court held that the mortgage had priority of lien to the deed. Mr. Justice Green, who wrote the opinion of the majority of the court, said: "The penalty of postponement is not incurred if (1) either the mortgage is recorded at any time within six months from its execution; or (2) if it is actually recorded before the deed is recorded."

"There is no matter of sentiment or good morals about the transaction. It is simply a question of written law founded, doubtless, upon just consideration of public policy. It does not say that its words are to apply only when both parties have been derelict for the whole period of six months, and if we undertake to do so we must put words in the statute which are not there now, and this we cannot do."

This case settled the law under the act of 1775, and, as we have seen, the law remains the same under the act of 1893, except as to the time of recording.

Fries v. Null was reargued, and the Supreme Court again reached the same conclusion. See Fries v. Null, 158 Pa. 15. In Collins v. Aaron, 162 Pa. 539, the doctrine was laid down that "where two deeds are made of different dates from the same grantor to different persons, neither of which is recorded within six months, that which is first recorded will take priority."

The last case we have been able to discover, and one that is almost analogous to the case at bar, is that of Gillespie v. Railway Co., 17 Superior 574. The action was ejectment by Gillespie v. the Railway Co. The plaintiff claimed title by deed dated Aug. 5, 1880, and recorded February, 1883. Defendants claimed title by deed from the same grantor, dated Dec. 22, 1882, and recorded April 13, 1883. The court held: "A deed recorded after six months from its execution has priority over a subsequent deed recorded within six months from its execution, if the recording of the first deed is prior in date to the recording of the second deed."

The circumstances in that case were even stronger than in the present case, for the grantor remained in possession after the first conveyance, and the grantee stood by while the defendant company made extensive improvements and expended a large sum of money. Notwithstanding this, the court held the grantee in the first deed could recover the land in ejectment.

With these decisions before us, our individual opinion can have but little weight; there is but one thing to do, and that is, to lay down the law as we find it. Hence, taking these decisions as our guide, we hold that the deed of Prentice has priority over the deed of Lewis, even though he, Prentice, failed to get his deed on record within the time prescribed by the Act of Assembly.

The statement of facts shows Prentice took possession on October 5, 1900, and that it was on this date that Lewis made his first entrance. Under these conditions, we think it fair to presume that Prentice was either in possession when Lewis arrived, or else he arrived and took possession shortly after Lewis began operations. If so, we think trespass *q. c. f.* may be maintained. Prentice had not only title, but possession, and the grant to Lewis was a grant of something which his grantor did not possess, nor have any right to convey. Under the circumstances, if Johnston still had been in possession on October 5th, we deem it doubtful if the plaintiff could recover in an action of trespass *q. c. f.* Gillespie v. Railway, *supra.*

Judgment is rendered for plaintiff.

FLYNN, J.

OPINION OF THE SUPREME COURT.

The Prentice deed was not recorded within ninety days of its execution nor was the Lewis deed. The former was recorded at 8 a. m., on Dec. 22d, 1900, the latter, on the same day, at 2 p. m. Had the Lewis deed been recorded within the ninety days, it would have been postponed. Gillespie v. Buffalo, etc., Railway Co., 204 Pa. 107; Fries v. Null, 154 Pa. 573. *A fortiori*—must it be postponed, since it was not recorded within the statutory term.

The minute of the day at which a deed is left for record is regarded. The recording at 8 a. m. is not to be deemed simultaneous with that at 2 p. m., on any theory that the law will not cognize fractions of a day.

Judgment affirmed.

GIBSON vs. GIBSON.

Ejectment by tenant in common—Right of one tenant to eject the licensee of another ex-tenant—Plaintiff must show title in himself.

STATEMENT OF THE CASE.

A widow leases a property composed of a house and lot. She has four children. She marries, gives birth to one child and shortly after dies. A guardian has been appointed for the four children. The

father ("B") gives to the guardian a release of his right, title and interest, but he still holds possession. One of the four children ("A"), a daughter, marries. She and her husband occupy the upstairs, together with the three children, and the father of the fifth child occupies the downstairs together with the said fifth child, and refuses to vacate. The property is a leasehold interest with five years notice to quit. Ejectment by daughter against the father.

EHLER for plaintiff.

The leasehold is personalty and descends to husband and children in equal shares, that is share and share alike. Act of 1848, April 11.

In actions that savor of the realty tenants in common must sue separately. Mobley v. Bruner, 59 Pa. 481.

A tenant in common may recover his individual interest in property by ejectment. Dawson v. Mills, 32 Pa. 302.

HEDGES for defendant.

The interests here being several and distinct, the plaintiff herein cannot sue in her own name for the entire possession of the leasehold. She can only recover her own individual share or interest therein. Bennett v. Hethington, 16 S. & R. 193.

Each tenant is considered to be solely or separately seized of his share. 4 Kents Commentaries, pages 368, 369.

Under the statute as to the descent of personal property there is no distinction between brothers and sisters of the whole and the half blood.

OPINION OF THE COURT.

In an action of ejectment the plaintiff will not be allowed to recover by showing defects in the defendant's title, but he must recover upon the strength and validity of his own title.

The property in dispute is a leasehold interest—an estate for years—and being personal property the unexpired term vested in the distributees. Keating v. Condon, 68 Pa. 75. This interest was divided in accordance with the act of April 11, 1848, Sec. 9, between the husband and all the children share and share alike. In this division the child of the second marriage participated and took the same share as the children under the first marriage. 2 Woodward 174. Subsequently, the husband gave a release of all his right, title and interest in the said estate to the guardian of the four children, who thereby acquire his portion. But he does not release his child's interest, nor does he remise his purport to his child, and he, together with the child, occupies the lower part of the house. One of the four children, a married daughter, brings this action to eject him. Can she maintain it?

The authorities are generally agreed that ejectment will lie upon a right to an estate for years. Heffner v. Betts, 32 Pa. 376. In White v. White (16 N. J. L. 202), a room in a house was recovered in ejectment.

By virtue of the act of 1705, Sec. 2 (P. & L. Digest Col. 4046), this widow's interest was held by the distributees as tenants in common and not as joint-tenants. Joint tenancies are not confined to real property, but in Martin v. Smith (5 Binn. 22) it was distinctly held that personalty might be held jointly. See also Goell v. Morse, 126 Mass. 480. A tenancy in common arises where two or more persons hold lands or tenements in fee simple, for life or for years, by several and distinct titles, and occupy the lands and tenements in common. Unity of possession is all that is required between tenants in common. Having several and distinct titles, estates in common are subject to the same disposition, incidents and charges as an estate owned in severalty. 2 Boone on Real Property 956; Tiedeman on Real Property 199; 4 Kent 368; 2 Blackstone 191. Since all the tenants have separate titles, *i. e.* hold their titles in severalty—it has been held by many of the courts (though there is some dissension) that in trespass, nuisance and for injuries to the possession, the tenants must join in their actions; Tiedeman on Real Property 200, and the cases there cited; 2 Black 192; but that in real actions, as ejectment, they must not join. 2 Boone on Real Property 956; Johnson v. Sepulbeda, 5 Cal. 149. This is the rule in Pennsylvania. Our courts have held that while a tenant in common cannot maintain ejectment for the benefit of his co-tenants, he, may, nevertheless, recover his aliquot share. Mobley v. Bruner, 59 Pa. 481; Dawson v. Mills, 32 Pa. 302; Jones v. Methodist Church, 6 Forum 244. See also Hayden v. Partison, 51 Pa. 261, and Cook v. Brightly, 46 Pa. 439, which seem to support this principle.

Having reached this conclusion are we

now justified in entering judgment for the plaintiff? Under the authorities she has clearly established her right to sue alone; but has she, under the facts of the case, a right to demand that the defendant be ousted? We think not. Grant her a recovery of her aliquot portion of the house; what would it avail her? Can she still show the defendant a trespasser? Manifestly not. The plaintiff must in all cases show a better title than the defendant and can only recover upon the strength of her title. Her right extends over a certain portion of the house and in order to eject the defendant she must show her right to the portion he occupies.

This she cannot do. In order to eject the defendant, partition must first be had, and the lower part allotted to her. Partition may be voluntary. It may be *in pais*. It may be of personalty. It may be by parol. 21 Am. & Eng. Encyc. of Law, 1139, *et seq.*; McKnight v. Bell, 135 Pa. 358. But here there is no indication of such a parol partition, other than the fact that the respective parties occupied certain portions of the house. It does not appear that this was in pursuance of an agreement, and we do not feel that we are justified in holding that a partition had been had where one child occupies the lower part of a house and four children the upper part. The very inequality of the division forbids us from presuming a partition.

Besides this, it must be remembered that the child has certain rights in this property. He is a tenant in common with the other four children, and is entitled to the same rights and privileges as they are. In McGarrod v. Murphy [1 Hilt. (N. Y. Com. Pleas) 132, cited in 17 Am. & Eng. Encyc. of Law, 671], it was held a trespass for one tenant in common to eject a person who is on the premises by permission of another co-tenant. This would imply that it is not in the power of a tenant in common to oust a licensee of a co-tenant. See Am. & Eng. Encyc. of Law, *supra*. And what is the father in this case if not a licensee—possessed of his child's permission? The father has certain rights in regard to the child. He is its natural guardian; is entitled to its custody, its earnings, and its services. As its guardian he holds his estate as trustee. In view of all this, plus a natural desire of a child, evidently very young, to be with its father, are we not justified in saying that he was upon the premises with the permission of the child, express or implied? If this were denied, then the defendant's child might eject the plaintiff's husband.

For these reasons, (*a*) that the plaintiff has shown no title in herself to the part occupied by the defendant, and (*b*) because the defendant was upon the premises with the permission of one of the co-tenants, we enter judgment for the defendant.

CLAUDE T. RENO, J.

OPINION OF THE SUPREME COURT.

The leasehold on the death of the lessee passed as assets to the administrator. The next of kin and husband would have no right to it, unless, creditors not needing it for the satisfaction of their debts, the administrator consented that they should take it. The evidence does not disclose an absence of debts, nor the consent of the administrator. The plaintiff and defendant both occupy the house because of the sufferance of the administrator. The latter alone, on the facts exhibited, is entitled to oust either of them by ejectment.

If there were no debts and the administrator consented to the taking of the leasehold by the distributees, they would, as the learned court below says, be entitled to it as tenants in common. The husband has released to four of the five children, his sixth. The plaintiff is entitled to $\frac{1}{6} + \frac{1}{4}$ of $\frac{1}{6} = \frac{1}{6} + \frac{1}{24} = \frac{4}{24} + \frac{1}{24} = \frac{5}{24}$ths. She has a right to five twenty-fourths of the downstairs as well as of the upstairs. The youngest child has no right to the exclusive possession of any single room of the house; still less of any floor. We should feel compelled to reverse the judgment of the court below, and hold that the plaintiff was entitled to recover five twenty-fourths of the downstairs, but for the want of apparent title of any of the children specifically to the leasehold. This view was probably not presented to the learned court below, whose able opinion is directed to other aspects of the case.

Judgment affirmed.

JOHN BURTON vs. WILLIAM COVERT

Mortgage—Effect of mortgage executed by the reversioner and the lessee for years—Right of subrogation—Who may bring the action.

STATEMENT OF THE CASE.

C. Harrison held land in fee, subject to a lease to Covert for twenty years. They both united in a mortgage of the land to Chas. Nailor for $4,000. Subsequently a judgment was recovered against Harrison on another debt, and at the sheriff's sale, Burton became the purchaser. Nailor threatening to enforce the mortgage, Burton paid it, taking an assignment of it. This is *sci. fa.* against Covert and Nailor.

GILLESPIE and HUBLER for plaintiff.

A mortgage does not necessarily merge or become extinct by being united in the same person with the fee. It may be kept alive where such is the intention or agreement of the parties, or where it would be for the holders interest or advantage. P. & L. Digest of Dec., Vol. 12, 20878; Bispham's Equity, Sec. 160; Duncan v. Dowry, 9 Pa. 32; Moore v. Harrisburg Bank, 8 W. 138; Cook v. Brightly, 46 Pa. 489.

The law presumes an intention in accordance with the real interest of the party. Denzler v. O'Keefe, 34 N. J. 361.

HILLYER and JACOBS for defendant.

When the owner of a fee takes an assignment of a first mortgage the legal title and the mortgage merge and the assignee of the mortgage can not sue on the bond accompanying the mortgage. Cowley's Appeal, 1 Grant 401; Protective B. & L. Ass. Appeal, 12 Montg. Co 63.

When Burton paid the mortgage he did that which, by the terms of the sale, he was bound to do. It constituted part of his bid and he had no legal right to use it to divest an estate subject to which he purchased the property. Hansel v. Lutz, 8 Harris 284; Bank v. Burns, 87 Pa. 491.

OPINION OF THE COURT.

Wm. Covert, owning a term of twenty years, and C. Harrison, owner of the reversion in certain realty, desiring to raise $4,000, both joined in a mortgage, covering their combined interests, to Chas. Nailor. On a judgment, recovered subsequently against Harrison, and execution following, his equity of redemption was sold by the sheriff to John Burton, who afterward paid Nailor's mortgage and took an assignment of the same when foreclosure was threatened. Burton has sued out a *scire facias*, making Covert and Nailor defendants.

There is no doubt concerning Harrison's ability to mortgage the fee, and, as between the parties, Wm. Covert's joinder bound his term. Coble v. Nonemaker, 78 Pa. 501; Bismark Building and Loan Association v. Bolster, 92 Pa. 129.

At any time "after the expiration of twelve months next ensuing the last day whereon the said mortgage money ought to" have been paid, Nailor could have sued out a writ of *scire facias* on his mortgage (Act of 1705, P. & L., Vol. 1, 1598), and could have pursued his remedy in the same manner as if Covert's interest had of freehold instead of a leasehold. Act of April 3, 1868; Hilton's Appeal, 116 Pa. 351. And Burton, as assignee of the mortgage, could have sued out a *scire facias* in his own name, or in the name of the mortgagee to his use (Act of April 22, 1863, P. & L., Vol. 1, 1604), unless prevented by a merger of the mortgage into the equity of redemption in the fee already owned by him.

But, though Burton, by taking an assignment of the mortgage, became both mortgagor and mortgagee, yet no merger would occur if such merger would be detrimental to the interests of Burton (Moore v. Harrisburg Bank, 8 Watts 138; Bryar's Appeal, 111 Pa. 81; Carrow v. Headly, 155 Pa. 96); and Burton will not be presumed to have intended a merger contrary to his interests. Indeed, his taking an assignment instead of having satisfaction on the record, shows an intention to keep the mortgage in existence for some purpose. Had the assignee of the mortgage pursued the foreclosure proceedings by *scire facias* in the name of Nailor, making himself and Covert defendants, as the "real owners of the land charged," all the interests covered by the mortgage could have been sold. Moore v. Harrisburg Bank, 8 Watts 138; Act of April 22, 1863, P. & L., Vol. 1, 1604; Act of 1901, P. & L., 614, 1 Cl. 10. But in that case an apportionment would have been necessary; and the same equitable results may be attained by treating the mortgage as extinguished so far as Burton's interest in reversion is concerned, but as still in full force as to Covert's leasehold. This principle was applied by the

Supreme Court of Massachusetts in Blodgett *et al.* v. Hildreth, 90 Mass. 186. The Supreme Court of Rhode Island, in Tillinghast v. Fry, 1 R. I. 53, says: "But because he has an interest in preserving the mortgage distinct from the equity, to the extent of the money advanced, for the redemption of the other portion of the estate, and to that extent alone, equity considers the mortgage as subsisting on the other portion of the estate, for the purpose of compelling contribution."

In our own case of Fisher v. Clyde, 1 Watts & Sergeant 544, the owner of the equity of redemption in a portion of the land charged with the payment of a mortgage debt paid the whole mortgage, took an assignment, and was allowed to sue out a *scire facias* against the owners of the remainder of the lands charged. It is true that in these cases the mortgages covered parcels of real estate in the hands of separate owners in fee, but the equitable principle governing the decisions is that where one person pays the whole of a mortgage debt, where another is also bound, that other one should contribute his just portion. We can see no reason for not applying the same principle to the present case where different estates in the same parcel of land are bound by a mortgage entered into jointly by the owners of such different estates.

The original mortgagee, Nailor, could have maintained ejectment against Burton and Covert, prior to the assignment of the mortgage to Burton, (Bower v. Fenn, 90 Pa. 359), and as assignee of the mortgage Burton "stands in the shoes" of Nailor. Earnest v. Hoskins, 100 Pa. 551. The enforcement of the same contribution by Burton by *scire facias sur mortgage* cannot be complained of as an injury by Covert. It may be well to notice, though not raised on argument, that the Act of 1901, P. L. 614, Cl. 10, requires that the real owners of the land charged shall be made defendants to a *scire facias sur mortgage;* but in the case at bar we regard the mortgage as extinguished to the extent of Burton's interest, so that he is no longer the owner of an interest charged.

Nailor, after his assignment to Burton, lost all interest in the mortgage unless he guaranteed the payment of the mortgage debt, which does not appear. In any case Nailor can suffer no injury from being made a defendant to the *scire facias.*

The conclusion of the court is that Burton could elect whether to consider the mortgage as existing against the whole estate, or as merged as to his estate in reversion, as best suited his own interests, since, in either case, the position of Covert and his liabilities are the same. Hence, the *scire facias* was properly sued out.

W. L. HOUCK, J.

OPINION OF THE SUPREME COURT.

Covert and Harrison made a mortgage which embraced the twenty years leasehold of the former, and the reversion or remainder in fee of the latter. Harrison's reversion was bought by Burton, subject to the mortgage. Had the mortgage been Harrison's only, it would have been Burton's duty to Harrison to pay it in full, for he would have paid for the land at sheriff's sale, as much less than if there had been no mortgage, as the mortgage amounted to. It would follow that as to Harrison the mortgage, when subsequently paid by Burton, would be extinguished.

But the mortgage was made by Covert as well as by Harrison. But how? Was Covert surety for Harrison, or Harrison for Covert? Or, were they co-principal debtors? And if so, were they equal, or unequal debtors? To these questions, the evidence yields no answer. It is impossible to adopt any other practicable assumption, for the solution of the problem before us, than that Burton paid for the land what, had there been no mortgage, he would have paid minus the whole mortgage. The land, let us suppose, was worth at the sheriff's sale, in Burton's estimation, $5,000. As the mortgage for $4,000 would remain undivested, he would be willing to pay in cash $1,000, and such was in fact his bid. As he got $5,000 worth of land for $1,000 plus the mortgage, it became his duty towards Harrison to pay the mortgage. When he did pay it, if there was any right of subrogation, that right was not in him, but in Harrison. Harrison could wield the mortgage for the purpose of compelling an equitable contribution from Covert. But, we have no facts from which it might appear that the debt was not wholly Harrison's, or, if

it was, in part, Covert's, to what extent it was Covert's.

Burton is not the mortgagee if he is not the proper use-plaintiff, and, it does not appear that Harrison could have maintained the action as use-plaintiff. We think the learned court below was in error in sustaining the action. *Cf.* Steele v. Walker, 204 Pa. 257.

Judgment reversed.

JOHN HAMMER vs. LOUIS DAWSON

Trespass—Breach of borough ordinance —Negligence—Remote and proximate cause.

STATEMENT OF THE CASE.

Hammer, working on the roof of a two-story house, slipped and fell to the ground.

Immediately, as he began to fall Dawson, an occupant of the second floor, threw a piece of furniture through the window into the street, which struck Hammer in the face and knocked out an eye. The fall to the ground injured him but not seriously. The throwing of the article out of the window was negligent because of the likelihood that passengers on the pavement would be injured. There was also an ordinance of the city against throwing anything out of the front windows.

KAUFMAN, DAVID E., and SCHWARTZKOPF for plaintiff.

Ordinarily, what amounts to proximate cause is a question for the jury, but where the facts are undisputed, it becomes the duty of the court to so instruct the jury. Mack v. Lombard, 8 C. C. 305; Hoag v. R. R. Co., 4 Norris 293; Township v. Watson, 112 Pa. 574.

The result might have been foreseen, and the cause of the injury is therefore proximate. Milwaukee R. R. Co. v. Kellogg, 94 U. S. 469; Pollock on Torts, p. 36.

Where an act is *malum in se* or willful, the person guilty of it is liable for all the consequences, however remote, because the act is *quasi* criminal in its character, and the law conclusively presumes that all the consequences were foreseen and intended. Brown v. State, 105 U. S. 249; Drake v. Kiely, 93 Pa. 495.

RENO and SETZER for defendant.

The burden of proving negligence is on the plaintiff, and will not be presumed. Brown v. Gilmore, 92 Pa. 40; Reese v. Clark, 146 Pa. 465.

The negligent act of defendant must further be shown to be the proximate cause of the injury. Brownfield v. Hughes, 128 Pa. 195.

If no proof of negligence be adduced, the presumption is that the defendant is innocent of negligence. P. & R. R. R. Co. v. Hummel, 44 Pa. 378.

OPINION OF THE COURT.

It is submitted by the counsel for the defendant that there is no cause of action shown, that the result was such as the defendant could not have foreseen and that the injury sustained was not the proximate result, such as, according to common experience of men, are likely to happen or should be expected to happen. They therefore urge that the maxim, "*Causa proxima, non remota spectatur*," applies.

Ordinarily, the question of what amounts to proximate cause is for the jury, but where there is an admitted and indisputable state of facts, it becomes the duty of the court to determine whether the injury was proximate or not. Mack v. Lombard, 8 Pa. C. C. R. 305; Hoag v. R. R., 85 Pa 293; Township v. Watson, 112 Pa. 574, and cases cited.

Proximate cause has been defined as follows, in Hoag v. Lake Shore, etc., R. R. Co., 85 Pa. 293, by Paxson, J.: "The true rule is, that the injury must be the natural and probable consequence of the defendant's negligence, such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrong-doer as likely to flow from his act." Substantially the same definition will be found in Milwaukee, etc. R. R. Co. v. Kellogg, 94 U. S. 469; Wood, v. R. R. Co., 36 W. N. C. 410; Pollock on Torts, 36.

In the present case we do not think the act of the defendant was such as he could, or ought to have foreseen as likely to flow from his conduct.

It is not such a probable or usual occurrence for a man to fall from a roof that the defendant owed a duty to Hammer to look upwards before putting the furniture out of the window.

In explaining the rules of proximate cause, Judge Orlady, in Swanson v. Crandall, 2 Sup. 85, remarks: "That natural consequences of an act is the consequence which ordinarily flows from it—the result which may reasonably be anticipated from it." Also Boutwright v. R. R. Co., 4 Sup. 274; Hockle v. Heating, 5 Sup. 21.

The counsel for plaintiff contends that the act is *malum in se* and the defendant

is liable for all the consequences, however remote, and citing Scott v. Shepherd, 2 Blk. 212. We cannot agree with this contention. In Scott v. Shepherd the throwing of the lighted squib into the crowded market was such a malicious, willful and mischievous act that the law will conclusively presume that all the consequences were foreseen and intended. While in the present case there is no such evidence. The act was only forbidden by an ordinance, and if no proof of negligence be produced the presumption is that the defendant is innocent. P. & R. R. R. Co. v. Hummel, 44 Pa. 378. The presumption is always that the defendant will perform his duty. 2 Bouvier's Law Dictionary 479.

The breach of the ordinance might expose to the imposed penalty, but give no right of action to Hammer. Even though a valid municipal ordinance requires Dawson to refrain from putting his furniture out of the window, it would not result that a duty would be thereby created toward Hammer. Hartford v. Talcott, 48 Conn. 525, also 18 W. N. C. 7. Brown v. R. R. Co., 22 N. Y. 191, and 123 N. Y. 405.

Another essential of a negligent act is that the person committing it must owe some legal duty to the person on whom the injury is inflicted, as stated in opinion of Ewing v. Pittsburg, C. & St. L. R. R., 147 Pa, 43. The duty which is violated must be something more than a general duty to the public. It must be a duty due direct from the wrongdoer to the injured party. 7 Met. (Mass.), 276 and 107 Pa. 530.

As long as Hammer was on the roof Dawson did not owe a special duty, and the falling of Hammer being unusual and not what Dawson, or an ordinary man in like circumstances, according to common experience, and usual course of events, should expect to happen. And he cannot be held answerable to Hammer in damages for the injuries sustained. We, therefore, instruct the jury to render a verdict for the defendant.

ARTHUR L. REESER, J.

OPINION OF THE SUPREME COURT.

The charge of the learned court below sufficiently justifies itself. It may have been a negligent act to throw a piece of furniture through the window into the street. There was danger in it to passengers on the street, and had one of these been hurt, he would probably have had a cause of action. It is, however, quite unusual for men to fall from roofs, and it would hardly be permissible for a jury to say that Dawson should have realized the possibility that some one was falling, and for that reason should have refrained from casting an article through the window, that might strike him. *Cf.* Elliott v. Allegheny County Light Co., 204 Pa. 568.

Judgment affirmed.

BROOKE vs. SEJONE.

Assumpsit on promissory notes—Liability of accommodation endorser—Ignorance of the endorser of the presence of an existing debt owed by the maker no excuse.

STATEMENT OF THE CASE.

Wm. Barry had borrowed $4,000 from Brooke, giving as collateral security what purported to be a mortgage by J. Hooper of the land of the latter. Brooke discovering the forgery threatened to prosecute Barry for forgery unless he produced other security. Barry and Brooke then called on Sejone, a friend of Brooke, and asked him to become security for him by endorsing two notes for $2,000 each for his accommodation. Nothing was said about the existing debt or the forgery. Two notes were drawn payable to Sejone and by him endorsed to Brooke. They were renewed at intervals of three months for eighteen months, when Sejone refused to renew or pay, alleging that the pre-existing debt and the forgery had been concealed from him. It was not until the first renewal had been made that Sejone learned of these facts. Assumpsit on endorsement.

HENNEKE and FOX for plaintiff.

When a note is not endorsed in the ordinary course of business, nor for value, but at the maker's request and for his benefit, the endorsement is an accommodation endorsement for the maker. Peeble v. Addicks, 174 Pa. 543; Newbold v. Boraef, 155 Pa. 227.

The holder of an accommodation note can pledge it for an old debt, have it discounted, and is not restricted in any manner as to its use. Lentheim v. Wilmirding, 55 Pa. 75; Lord v. Bank, 20 Pa. 384; Moore v. Baird, 30 Pa. 138.

Having learned of the forgery and still

continuing to renew the note he is estopped from setting up the forgery. Iron City Bank v. Fort Pitt Bank, 159 Pa. 46.

HEDGES and JACOBS for defendant.

The endorsement by Sejone was procured fraudulently and Brooke was a party to the fraud. The debt was not contracted contemporaneously, but pre-existed; therefore no consideration passed between Brooke and Sejone. Rogers v. Keystone Bank, 83 Pa. 248; Maynard v. Bank, 98 Pa. 250; Cozen v. Middleton, 118 Pa. 622; Cummings v. Boyd, 83 Pa. 372; Paxton v. Nields, 137 Pa. 385.

Renewing without a new consideration does not change it a particle from the original; it does not make Brooke a *bona fide* holder for value. Maynard v. Bank, 98 Pa. 250; Tasker's Estate, 182 Pa. 122; Carpenter v. Bank, 106 Pa. 170; Kirkpatrick v. Muerhead, 4 Harris 117.

OPINION OF THE COURT.

In the case at hand there are two questions involved, first: "Was Sejone an accommodation endorser?" and, second "If Sejone was an accommodation endorser is his contract void on the ground of fraud?" We will deal with these questions in the order stated. The learned counsels for the defendant have cited various cases to prove that Sejone was not an accommodation endorser. In the opinion of the court the cases so quoted do not contain the rule as recognized in Pennsylvania courts to-day. Although they may hold that an accommodation note is a loan of the maker's credit without restriction as to the manner of its use, etc., nevertheless, the court, depending upon its own investigation, believes that the rule as recognized in the Commonwealth of Pennsylvania at the present day is contained in the case of Carpenter v. Republic Nat. Bank, 106 Pa. 170, which defines accommodation paper as that which is made by one party for the benefit of another without consideration; it represents the loan of credit. This is the general rule throughout the country and no exception is made where the note is given for a specific or defined purpose. The state of affairs does not, in the opinion of the court, alter the character of the instrument. The correct rule may be found in Norton on Bills and Notes, p. 176. On these grounds the court has decided that Sejone was an accommodation endorser and consequently he is liable to the plaintiff unless the contract be void on the ground of fraud. This question will be dwelt with immediately. There is nothing in the statement of facts to make one absolutely certain that fraud did exist. To constitute fraud there must be in the mind of one person an intention to take advantage of another person of inferior knowledge on a certain subject and this intention must be carried into effect. In this case nothing appears to show that it was the intention of Brooke and Barry to defraud Sejone; probably they thought it immaterial that Sejone should know of the former transaction and this without any intention to defraud. But giving the greatest strength possible to the defendant's position and admitting that Barry and Brooke were guilty of fraud, nevertheless, in the opinion of the court, this cannot be used as a defence at the present time. Sejone relinquished this right by his action in renewing the notes. If Sejone had declared that he would not be held liable on the notes as soon as he became aware of the existence of fraud he would have had a good defence, but by his action of renewing the notes five times after he became aware of the fraud, he is estopped from setting up fraud as against these notes, accordingly judgment is entered for the plaintiff for the full amount of the notes.

HASSERT, J.

OPINION OF THE SUPREME COURT.

Brooke was under a duty not to accept the notes of Sejone, as security for the debt of Barry, without disclosing to Sejone the facts of Barry's forgery. Knowledge of that fact would have been to Sejone important, and he was about assuming the relation of surety. He had a right therefore to the divulgation to him, by Brooke, of this fact.

So much the learned court below seems to concede, but it holds that Sejone has lost the right to insist on the non-disclosure of the facts to him as a defense, because, with full knowledge of them, he has renewed the notes five times. It does not appear that Brooke's position would be any worse, were Sejone exonerated after the fifth renewal, than if the latter had been exonerated after the first renewal. It is not manifest that had Sejone declined to renew the notes, after learning of the forgery, Brooke could have recovered any more of his debt than

he could now recover, were Sejone discharged. The principle would be entirely sensible, that Sejone could not now escape, unless it was clear that his escape would not cause a loss to Brooke, which he would not have suffered, had Sejone been prompter in repudiating any obligation. It is not so satisfactory, to affirm that although Brooke is known to have lost nothing by reason of Sejone's delay, that delay shall bind on Sejone a duty from which, but for it, he would be free.

There are cases however, *e. g.*, Dunn v. Columbia National Bank, 204 Pa. 53, which seem to hold that Sejone's recognitions of a duty after he obtained knowledge of the facts, would deprive him of the right to avoid payment on account of them, irrespective of any injury to Brooke that would arise on account of the tardiness of his repudiation. In recognition of these cases,

Judgment affirmed.

WILLIAM CHURCH vs. ADAM SALONY.

Estates upon condition—Conditions subsequent—Conditions precedent.

STATEMENT OF THE CASE.

Church conveyed a lot in the borough to John Sharkey "to have and to hold to him and his heirs for the purpose of erecting on it a school and of maintaining instruction therein." Sharkey never built the school. Three years after the deed to him he conveyed the lot to Salony, who has since erected, three years ago, a dwelling house he continues to occupy. Church now brings ejectment against Salony for the recovery of the property.

TYLER and MENGES for plaintiff.

The policy of the law is to render alienation of lands as free as possible, and conditions are not favored in the courts especially conditions subsequent. Clark v. Martin, 49 Pa. 289; First M. E. Church of Columbia v. Old Columbia Public Ground Co., 103 Pa. 608, 4 Kent Com. 131; Bishop on Contracts 132; Parmelee v. Oswego El. R. R. Co., 6 N. Y. 80; Davis v. Lyman, 6 Com. 252; Myers v. Burns, 33 Barb. 401; Pathbon v. Tioga Nav. Co., 2 W. & S. 74; 1 Washburn on Real Prop. 447.

The provisions essential to constructing this as a condition are not present and it cannot be so construed. Groves *et al.* v. Deterling *et al.*, 120 N. Y. 457; Cook v. Trimble, 9 Watts 16; Tiedeman on Real Property, 191; Mary A. Kirchline App. v. Harring, 189 Pa. 560.

PARK and LONG for defendant.

Ejectment may be brought any time on breach of a condition subsequent. Hayden v. Staughten, 5 Pick 529.

The words used in this deed must be construed as a condition subsequent. Tiedeman on Real Property, 225; Kirk v. King, 3 Pa. 436; Upington v. Corrington, 151 N. Y. 143.

OPINION OF THE COURT.

This is an action of ejectment by Church to recover from defendant the possession of a piece of land which plaintiff had conveyed to one John Sharkey, "to have and to hold, to him and his heirs for the purpose of erecting on it a school and maintaining instruction therein." Sharkey did not build the school house, and three years after the land had been conveyed, he sold it to Salony, the defendant in this action, who has erected thereon a dwelling house which he now occupies.

The decision of the case depends upon the construction to be given to the clause "to have and to hold to him and his heirs for the purpose of erecting on it a school and maintaining instruction therein."

The plaintiff contends that the clause creates a condition subsequent, for a breach of which he has a right of re-entry; the defendant argues that the clause is a covenant, and that there is no right of re-entry.

An estate upon condition is defined to be "one which may be created, enlarged or defeated by the happening or not happening of some contingent event." 2 Blackstone's Commentaries, 152.

A condition subsequent is one which does not necessarily precede the vesting of the estate, but may accompany or follow it. But conditions subsequent are not favored in law, and are construed strictly for the reason that they tend to destroy estates. Sharon Iron Co. v. Erie, 41 Pa. St. 341.

In McKnight v. Krentz, 54 Pa. St. 232, the court says: "Conditions that work forfeitures are not favorites of the law, and nothing less than a clear expression of intention that a provision shall be such will make it a condition upon which the continuation of an estate granted depends." In Cook v. Trimble, 9 Watts 16, the lan-

guage is, that "The intent to create a condition must be not only clear, but, in a deed, expressed in apt words."

The words used in the deed in question are "to have and to hold . . . for the purpose of erecting a school," etc. Are these words to be so construed, that, upon a non-compliance therewith by the grantee, his estate will be defeated? We think not. The words do not show a clear intention to create a condition subsequent, and a condition will not be raised by implication from a mere declaration in a deed that the grant is made for a special purpose, without being coupled with words appropriate to make such a condition. Packard v. Ames, 16 Gray (Mass.), 327; Barker v. Bowers, 138 Mass. 580.

That there was no clear intention to create a condition subsequent is evidenced by the fact that no provision is made for a forfeiture or a termination of the estate, in case the provisions of the clause were not complied with. No right of re-entry was reserved by the grantor on any contingency.

The authorities show that the recital of the consideration, and a statement of the purpose for which the land is to be used, are wholly insufficient to create a conditional estate. The obligation of the vendee was, at most, a covenant. See the Methodist Episcopal Church v. the Ground Company, 103 Pa. St. 608. Judgment will, therefore, be for the defendant.

SMITH, J.

OPINION OF THE SUPREME COURT.

The conveyance to Sharkey was to him and his heirs "for the purpose of erecting on it (the premises) a school and maintaining instruction therein." Sharkey has not built the school house, and, three years having elapsed, since the conveyance to him, he has conveyed the land in fee to Salony, who has erected on it a dwelling house.

There is no collateral limitation that the land shall be used for school purposes, and no cessation of such use. *Cf.* Henderson v. Hunter, 59 Pa. 335.

Not enough of the conveyance to Sharkey and of the circumstances of its making appears to justify us in saying that he received it in trust to erect and maintain a school upon the land. But, even if it did, such a trust is not the equivalent of a condition. The *cestui que trust* might vindicate the trust, but the grantor could not resume possession. *Cf.* Soller's Church Petition, 139 Pa. 61.

The declaration in the deed, of the purpose to which the grantor or grantee intends the land to be devoted, does not make the devotion of it to this purpose a condition subsequent. M. E. Church of Columbia v. Old Columbia Public Ground Co., 103 Pa. 608; Wilkesbarre v. Wyoming Society, 134 Pa. 616; Rankin Regular Baptist Church v. Edwards, 204 Pa. 216; though the prohibition in the deed of any other use than that named, would. Kirk v. Kink, 3 Pa. 436; Schultz v. Fitzwater, 5 Pa. 126.

The purpose that the land shall be used for the erection of a school house is clearly expressed. The implication that any other use is forbidden is not sufficiently cogent to become a condition. Clogs on alienation are not looked on with favor, and they must be explicitly created.

Judgment affirmed.

FULMER vs. ADAMS COAL CO.

Right of co-tenant in leasehold after refusal to co-operate with the co-tenants—Bill in equity for accounting, under Act 25th, April, 1850—Duty of the court.

STATEMENT OF THE CASE.

Fulmer and six others, intending to form a corporation for the trading of coal, obtained a lease of coal land for fifty years, in which it was stipulated that they were to pay 50 cents per ton royalty for all coal taken out, and that they were to take out and pay for annually at least 5,000 tons. For some reason, Fulmer became dissatisfied with the proposed operations of his associates, and refused to unite with them in obtaining the incorporation.

They, however, obtained the charter, and, entering in the premises, dug and took away coal. They have at all times been willing to allow Fulmer the number of shares agreed upon, and to give him his share of the profits, on his paying for them. He files this bill to enjoin against the further prosecution of the business, and also for an accounting.

The master recommends a perpetual injunction, and allows a compensation for

Fulmer's shares of coal taken out, its value at the mine's mouth less the cost of taking it from its original place and putting it there. Exceptions.

EHLER and CAREY for plaintiff.

A tenant in common may demand an accounting for all coal taken out according to the respective proportions and interests to which they are entitled in the land. Coleman's Appeal, 62 Pa. 252.

The fact that Fulmer refused to join in the incorporation is no bar to equitable relief. Muncy Traction Engine Co. v. De La Green, 143 Pa. 269; Garret v. Dillsburg & Mechanicsburg R. R. Co., 78 Pa. 465.

MCNEIL and BARNHART for defendants.

One co-tenant cannot make his own omission to occupy the joint estate, a ground of action against his co-tenant. Boyer v. Holmes, 6 Gray 118.

The plaintiff cannot sustain his injunction unless he can show fraud or acts *ultra vires*, and the burden of proof is on plaintiff to show this. Malone v. Lancaster Gas Co., 182 Pa. 309.

He who seeks equity must do equity.

OPINION OF THE COURT.

Fulmer and six others, intending to form a corporation for the mining of coal, obtained a lease of coal land for fifty years, in which it was stipulated that they were to pay fifty cents per ton royalty, for all coal taken out, and pay for annually at least 5,000 tons. For some reason Fulmer became dissatisfied with the proposed operations of his associates, and refused to unite with them in obtaining the incorporation. They, however, obtained the charter, and entering upon the premises dug and took away coal. They have at all times been willing to allow Fulmer the number of shares agreed upon and to give him his share of the profits on his paying for them. He files this bill to enjoin against the further prosecution of the business and asks for an accounting; the master recommends a perpetual injunction and allows a compensation for Fulmer's share of coal taken out, its value at the mine's mouth, less the cost of taking it from its original place and putting it there. Exceptions.

That Fulmer and the six others who leased the coal land and are parties in this proceeding are co-tenants of the coal lands, ought to be considered as a point settled beyond dispute. The fact that six of the same original co-tenants have formed a corporation does not materially alter the facts of the case. The corporation and Fulmer became the co-tenants.

Ever since estates in common have been known in the law it has been the unquestionable legal right of a tenant in common, one of his essential proprietary rights, to occupy, use and enjoy the common property without liability to account to his co-tenants so long as he does not prevent them from exercising the same right. This land was leased for the sole purpose of mining coal and the rent was to be paid on the amount of coal mined and a certain amount was to be mined each year. In order that the rent be paid and not paid directly from the pockets of the seven co-tenants, it was necessary that the proposed corporation be formed and the land operated. Six of the seven proceeded under the original plan upon which the land was leased. Fulmer, the seventh, refuses to enter into the operation of the land and in as much as the other co-tenants stand willing that he should come in and have equal enjoyment of the land with them in the manner in which the land was to be used, we think acts as a bar against him. Sec. 12 Col. 414 and 73 Am. Dec. 550, it has been held that the neglect of a co-tenant to enter into equal enjoyment at any moment may be regarded as an assent to the sole occupation of the others. The six men who have formed the corporation have in no way attempted to oust Fulmer from the land, but ask that he pay for his share of the stock. This is certainly equitable and as they stand at all times ready to allow him to come in and enjoy with them the benefits of the land upon his paying his share we cannot see that he has any grounds upon which to base his claim.

In 30 Md. 120 and 96 Am. Dec. 571, it was stated that co-tenants being jointly seized of the entire estate, each has an equal right of entry and possession and the entry and possession of one will be presumed to be in accordance with his title, such presumption holding until some notorious and unequivocal act of exclusion occurs. Upon these grounds we contend that Fulmer has not done his part in the agreement and the court sees no reason why his prayer for an injunction should be granted.

Furthermore, we see no reason for an

accounting being made to him in that he has invested no money in the land or the operations which have been begun upon the land. Had he money invested or been refused the privilege of investing money, an entirely different view of the matter would present itself. We cannot see where he has any claim at all upon the corporation which is his co-tenant under the lease, and it has been held in 29 Mo. 356 that where one co-tenant, occupying the whole estate without claim on the part of his co-tenant, is under no obligation to account.

In view of the facts existing the court dismisses the bill.

E. F. HELLER, J.

OPINION OF THE SUPREME COURT.

Fulmer and six others acquired a lease of the coal land for fifty years. The price they were to pay was a royalty of 50 cents per ton on the coal taken out, and not less than 5,000 tons were to be taken out in any one year. Fulmer, therefore, became owner of an undivided seventh of the land for the term. That no cash was paid for the lease could not affect his estate. He practically agreed to pay his seventh, at future annual periods, in sums to be ascertained by future events; but a man becomes none the less an owner of land because the payment of the price is postponed, or its amount is variable and contingent.

The coal lease was of no value except for the purpose of selling it, or of extracting and selling the coal. The six associates proposed to extract and sell the coal, but Fulmer declined to unite with them in the enterprise. They became, for this purpose, a corporation; but he refused to take any shares in it. What, then, was to be done? Must the six allow their leasehold to lie unused, because their co-tenant was unwilling to co-operate with them?

But, when these six, as they had a right to do, undertook to operate the coal mine, at their own expense, they necessarily took out not six-sevenths, but seven-sevenths, of the coal that was removed. One of these sevenths belonged to Fulmer. The act of April 25, 1850, 1 P. & L. 717, gives to him a right to file a bill in equity for an account, and directs the court to make such decree "as may appertain to justice and equity;" and to ascertain how much coal, etc., has been taken out, "and the sum that may be justly and equitably due" from the defendant to the plaintiff, according to their "respective proportions and interests." Under this act, Fulmer had a right to file the bill, and to obtain an accounting.

Nothing appears indicating that he had a right to prevent the prosecution of the work by the defendants. He made no effort himself to operate the mine. He had no right to require the defendants to let it lie idle. The utmost that he could ask was an equitable share of what was produced.

It was error in the learned court below to dismiss the plaintiff's bill. The defendants have appropriated to themselves a seventh of all the coal taken by them, belonging to the plaintiff, he is entitled to the value of it. But, the value where? In its native place? or, after labor has been expended on it, in bringing it to the mine's mouth? or to some market more or less distant? It is plain that Fulmer should have the value of the coal in its native place. All other additional value is the product, not of his contract with his lessor, but of the skill, expenditure, and effort of the defendants. In this product he has no right to share.

How is the value of the coal in place to be ascertained? Not by subtracting from the price obtainable for the coal at the top of the mine, or in the nearest coal market, the cost of placing it there, for that would be to give Fulmer a share of the profits. Between the value of the coal in place, and its price in the market, lies, not only the cost, but also the profits of the enterprise.

The value of the coal in the place is the price that could be got for it, *i. e.*, the value of the coal lease. Like the value of anything else, this must be ascertained by the opinion of competent judges, or by evidence of what similar coal leases sell for. It will be the duty of the court below to hear evidence as to this value of the coal place, and to award to Fulmer one seventh of it, with interest from the time of the defendant's appropriation of it. *Cf.* Fulmer's Appeal, 128 Pa. 24; Coal Co. v. R. R. Co., 187 Pa. 145.

Decree reversed and bill reinstated with *procedendo*.

DUNBAR vs. DUNBAR.

Assumpsit for back annuity—Husband and wife—Contract in consideration of separation—"Maintenance" defined.

STATEMENT OF THE CASE.

Plaintiff and defendant being married, had agreed to separate, the defendant agreeing to pay plaintiff an annuity of $500 "during her life, or until she re-marries, having obtained a divorce." The defendant became a bankrupt, and is discharged under Federal Act. This is an action to recover a back annuity, the plaintiff neither having obtained a divorce nor re-married. Defendant sets up his discharge in bankruptcy.

PRICKETT for plaintiff.

A discharge in bankruptcy is not a release of liability for maintenance or support of wife or child. Par. 2, sec. 17, Fed. Act, 1898, and amendment Feb. 5, 1903.

Contract of husband is a maintenance; he is bound by law to support his wife.

The discharge of a contingent debt is not within the meaning of the statute of 1898, the act applying only to all provable debts and no method being laid down by which a contingent debt could be ascertained.

SMITH for defendant.

OPINION OF THE COURT.

Plaintiff and defendant, being married, had agreed to separate, the defendant agreeing to pay plaintiff an annuity of $500 during her life or until she re-married or having obtained a *divorce.* The defendant became a bankrupt and is discharged under the Federal Act. This is an action to recover *a back annuity,* the plaintiff having neither obtained a divorce nor re-married. Defendant sets up his discharge in bankruptcy.

In England deeds in the form of articles of separation were once held to be *contra bonos mores,* and courts of equity refused to carry them into effect. But judicial opinion has undergone a change and it is now well settled in England that such deeds are not against public policy.

In Pennsylvania, as early as 1846, the doctrine was deemed well settled that separation deeds are valid and effectual, both at law and in equity, provided their objects be actual and immediate and not contingent on future separation.

In Scott's Estate, 147 Pa. 102, the court said: "It is settled law in this State that an agreement between husband and wife to live separate and apart, if based upon a good consideration and reasonable terms, will be valid and binding." So the only question left for the court is, whether this annuity was discharged in bankruptcy.

Section 17 of chapter II, amended by act of 1903, provides: "Debts not affected by a discharge," and among other debts are maintenance; "(2) *for alimony, due or to become due, or for maintenance or support of wife or child* * * *."

The question now presents itself, does this annuity of $500 come within the meaning of either of the terms "*alimony,*" "*maintenance,*" or "*support?*"

First as to alimony: Alimony as defined by Bouvier is "the allowance which a husband by order of court, pays to his wife living separate from her for her maintenance." Standard Dictionary: "The allowance made a woman by order of court * * * after divorce or legal separation." In 16 Gray 110, the husband entered into an agreement with his wife for a separation, and gave a bond to a third party to secure performance by him, and to pay a certain sum by way of alimony for her support and maintenance during the existence of the coverture between them. *Held,* That the word alimony is not used in its technical signification, for what she received is to be enjoyed by her or disposed of for the maintenance of herself and daughter. It is therefore to be received by her rather as an annuity than as an alimony.

Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Barber v. Barber, 21 How. 582.

Counsel for the plaintiff seems to lay great stress upon the words "maintenance or support." Maintenance, as defined by Black, is "sustenance, support, assistance." "The furnishing by one person to another, for his support, of the means of living, or for clothing, shelter, etc., particularly when the legal relation of the parties is such that one is bound to sup-

port the other as between father and child, or husband and wife." Surely the legislature never contemplated giving this term "maintenance" such a broad meaning. If this were true, one could hardly conceive how it would be possible for a man to obtain a discharge in bankruptcy, covering sufficient ground to enable him to again embark in a business enterprise free from any liabilities of his former debts. We are of opinion that such was not the intention of the framers of the act, but rather intended this term to be used in its more restricted sense. Bouvier says: "Maintenance is aid, support, assistance. The support which one *person who is bound by law to do so*, gives to another."

It is a well defined principle of law when a wife is living apart from her husband, when a husband neglects to provide for, or support his wife, the wife has a right to pledge his credit for necessaries; although the husband will not be liable for necessaries purchased by his wife if he shows that credit was given to the wife herself or that she has a sufficient separate income. It is likewise well settled that there is an obligation of a parent to support his child, until the child is in a condition to provide for its own maintenance, and no further. Debts of this character would seem to be more in line with the legislature's meaning of the clause excepting debts for "maintenance or support." In Vale (96 Fed. Rep. 964) "The court held that judgment against a father for support of a bastard child can not be proved as a debt in bankruptcy," Nowhere in the act do we find this debt expressly exempted, so the clause "maintenance or support of a child" must be construed to mean such. In State v. Belty, 61 Iowa 307, the defendant was charged with bastardy. Complaint was filed before child was born. The child was delivered dead. The State asks at the trial for judgment for expenses of medical attendance and other lying in expenses, contending the law charged the defendant with the *maintenance* of child. Court said "maintenance was aid, support, assistance, which one person bound by law to do so, gives to another for his living. *Held:* as child was not born alive there was never any person for whose maintenance the defendant could be charged." This only adds to the long line of authorities which seem to hold that the real meaning of "maintenance" is "that which under the law a person is bound to give for support." The agreement to pay the $500 annuity was a contract, pure and simple, founded upon sufficient consideration, a specific ascertained sum designated, an agreement in consideration of living apart he was to pay the annuity. Now suppose, as counsel for the plaintiff would have us believe, that this was for maintenance, then maintenance and annuity would be synonymous; yet for a failure to pay the annuity an action for breach of the contract would hold, while if the action was to be called maintenance only, an action or implied contract for necessaries could be sustained—one a recovery for $500, the other for actual necessaries furnished and needed by a woman in her station. It seems inconsistent to hold that the two are synonymous. Then again, while we do not lay much stress on this, yet it has been held in 159 Mass. 474, that "money was not to be regarded as necessaries"—"at law it is entirely clear that a married woman has no right to borrow money on her husband's credit even for the purchase of necessaries." So if money is not classed among necessaries, in an action for maintenance, which is based on necessaries, the sum could not be recovered.

In view of the above argument, we are of opinion that this debt does not come within the meaning of the act and a discharge in bankruptcy is a good defence to the action.

While the court is cognizant of the dearth of authority on this subject, yet it is to be regretted that the brief of the counsel for the defendant has been of little or no assistance to the court in determining this question. Judgment for defendant.

LANARD, J.

OPINION OF THE SUPREME COURT.

The action is assumpsit on case stated, reserving the right to appeal and to writ of error. The facts show an express contract. The action is to recover "a back annuity," whether accruing before or after the filing of the petition in bankruptcy, is not said. This may vitally affect the plaintiff's right of recovery in this case. We shall consider this later. As to the

validity of this agreement of separation, whatever may be the result of the vacillation of the English courts in their treatment of similar contracts, we agree with the learned court below that the agreement in question is not contrary to the law of their State. Hutton v. Hutton, 3 Pa. 100. The principal question to be treated is as to the effect of the plea of a discharge in bankruptcy. According to our interpretation of the agreement and the law applicable thereto, this depends wholly upon the time the annuity sued for became due and payable. At the end of each year, a certain sum of money would fall due the plaintiff under the terms of the agreement. Now did the sum sued for in this case fall due before or after the filing of the petition in bankruptcy? Let us suppose the sum fell due before the filing of the petition. The question then is, could the claim be proved in bankruptcy and if so would it also be discharged? The Federal Act of 1898 defines "debt" as any debt, demand or claim provable in bankruptcy, (sec. 1, *supra*. 11) and a "discharge" in bankruptcy as meaning the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by the act, (sec. 1, *supra*, 12). A claim may therefore be proved in bankruptcy and share in the dividends but not be affected by a discharge as to the balance. A provable claim is not always dischargeable, but a dischargeable claim is always provable. Sec. 63 of the act gives the list of the debts which may be proved against a bankrupt estate and among that list we find (*supra*. 4) debts founded upon an open account, or upon a contract, express or implied. The debt here is upon an express agreement of separation and would undoubtedly fall within the meaning of this section and would therefore be a claim provable in bankruptcy. Now as to the effect of a discharge granted. By the terms of the certificate of discharge (Forum No. 59) the bankrupt is discharged from all debts and claims provable and which existed on the day the petition for adjudication was filed, except such debts as are by law excepted from the operation of a discharge in bankruptcy. Sec. 17 gives a list of the debts not affected by a discharge and among others (*supra* 2) are liabilities for alimony, due or to become due, or for maintenance, or support of wife or child. The question may now be raised whether the claim under consideration comes within the meaning of alimony, or of maintenance, or of support. "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract express or implied, but on the natural and legal duty of the husband to support the wife." Gray, J. Audubon v. Shufield, 181 U. S. 575. It was held in this case that alimony was not provable in bankruptcy or barred by a discharge. Certainly our claim would not come within the definition of alimony. We agree with the learned court below in holding that the words alimony, maintenance and support all have reference to such obligations as were enforced at common law under the common courts and not to an obligation assumed by express contract. In fact upon close reading of this particular subsection it will be noted that every liability mentioned is of this character. It is evident, therefore, from the above argument that the claim as presumed was not only provable but dischargeable in bankruptcy. The plea would then be good. Suppose the annuity fell due after the filing of the petition? Then by the very terms of the discharge it would not be affected. (Form No. 59). What is not provable is not dischargeable. Why is not the entire agreement or contract for annuities due and to become due provable and dischargeable in bankruptcy? Upon inspection of sec. 63, it will be found that no express provision is made for the proving of contingent claims, and our contract, except for the sums actually due, is entirely contingent. How can we tell the length of life of plaintiff, or whether she may not break the provision of the agreement by either marriage after defendant's death or divorce during his lifetime?

Herein the act of 1898 is radically different from the previous bankruptcy laws of 1844 and 1867. Both the latter acts provided expressly for the proving of contingent claims and a calculation of their present value. Sec. 19, act 1867. Willistown cases, Bankruptcy p. 49. Act of 1841, 5 stat. at L. 445, chap. 9. Owing

to what has been said to be inadvertence upon the part of the framers to provide expressly in the present act for such claims, divergent views upon the subject have been expressed by various courts of bankruptcy. In Mock v. Market St. Nat. Bank, 107 Fed. Rep. 897, the bankrupt was indoser of commercial paper not due at the time of the filing of the petition, it was held that under sec. 60 *a*, sub-sec. 4, the creditor might prove against the estate of the bankrupt after the liability had become fixed. A similar view was expressed in Cobb v. Overman, 54 L. R. A. 809, respecting an annuity bond given by the bankrupt. Cases *contra* to the above will be found in *In re.* Schaefer, 104 Fed. Rep. 973, and Goding v. Rosenthal, 61 N. E. R. 222. A recent case, Dunbar v. Dunbar, 23 Sup. Ct. R. 757, throws some light upon the question. The bankrupt had made an agreement with his divorced wife to pay a certain annuity "during her life or until she re-marries." Held, a discharge in bankruptcy did not affect the obligation. "Conceding that the bankruptcy act provides for discharging some classes of contingent demands or claims, this is not, in our opinion, such a demand. Even though it may be that an annuity dependent upon life is a contingent demand within the meaning of the bankruptcy act of 1898, yet this contract, so far as regards the support of the wife, is not dependent on life alone but is to cease in case the wife re-marries. Such a contingency is not one which, in our opinion, is within the provision of the act because of the innate difficulty, if not impossibility, of valuing the particular contingency of widowhood," per Peckham, J. Dunbar v. Dunbar, *supra.* Although this case presents a somewhat different question from the one under discussion, we are of opinion that the reasoning is fully applicable to the matter in hand. We hold, therefore, that the contract of annuity, condition upon life, marriage or divorce, was not a claim provable in bankruptcy. The discharge, accordingly, would not affect the obligation and the plaintiff could recover for any annuity, except such as matured prior to the filing of the petition. We have been led to a full expression of our views upon this case by reason of the lack of adequate treatment of the bankruptcy features in the opinion of the court below. As intimated at the start, it is impossible to ascertain just what the expression "back annuity" means, which is of prime importance in dealing with the plea pleaded. We will therefore reverse the judgment of the court below and award a *procedendo,* to give parties opportunity to amend statement.

Judgment reversed and *procedendo* awarded.

JOHNS vs. INS. CO.

Insurance—Avoidance of policy by act of assured—Effect of execution of assured.

STATEMENT OF THE CASE.

Plaintiff's testator held a policy of insurance on his life, payable to his estate. The insured was executed for the crime of murder. It was afterwards discovered beyond a doubt that he was innocent of the crime for which he was executed. There was no stipulation in the policy as to death at the hands of the law. There is no other defense to the policy than the above facts shown.

CARLIN for plaintiff.

The language of an insurance policy is to be construed most strictly against the company.

Metropolitan Ins. Co. v. Drach 101 Pa. 278; Burkhardt v. Travelers Ins. Co. 102 Pa. 262.

Defendant was liable if the deceased's death was not the natural cause and reasonable result of his own misconduct. Bradley v. Mut. Benefit Ins. Co., 45 N. Y. 422; Watts v. Com. Mut. Life Ins. Co., 48 N. Y. 34.

YOCUM for defendant.

The law refuses to allow a recovery on a policy of life insurance, on the grounds of public policy, whenever death results at the hands of justice. Hatch v. Ins. Co., 120 Mass. 550. Cloff v. Mut. Benefit Life Ins. Co., 13 Allen 308; Wells v. Life Ins. Co., 191 Pa. 207; Amicable Society v. Bolland, 5 H. L. Cas. 70.

Insurer has a right to insist that all the conditions of the contract, express and implied, be fulfilled by the assured. Raum v. Home Ins. Co., 59 N. Y. 387; Stone v. Hooper, 9 Con. 154; Allwe v. Orland, 2 Johns Cas. 52. Conerty v. Benton, 17 Johns 142; Mount v. Waits, 7 Johns 434.

OPINION OF THE COURT.

Plaintiff's testator held a policy of insurance on his life, payable to his estate. The insured was executed for the crime of murder. It was afterwards discovered be-

yond a doubt that he was innocent of the crime for which he was executed. There was no stipulation in the policy as to death at the hands of the law.

There is no other defence to the policy than the above facts show.

The only point upon which we think it necessary to decide this question is as to the manner of death.

We have examined several policies issued by as many companies, and in all there is only one stipulation as to death, and that refers to suicide, the policy being rendered void if the act is committed within a year in some cases, and within two years in others. There is also a stipulation as to the incontestability of a policy after a certain time; namely, one and two years. We have not, however, enough facts in our possession to warrant a decision on this ground, as we have not been informed as to the length of time which this policy has been in effect.

We have also examined the statutes of a number of States, and there is no provision made as to death at the hands of the law, but to the contrary, they give an insurance company full power to take any risk they desire. The Pennsylvania Statutes provide that corporations incorporated under provisions of the Act of Assembly for the insurance of human beings against sickness, death or personal injury, shall have the power and right to make insurance of every nature and kind, and insurances of every kind against the death, sickness or health of human beings by disease of every kind, whether within this Commonwealth or beyond it; and such corporation shall have the power and right to make, execute and perfect such, and so many, contracts, agreements and policies and other instruments as may be required therefor. Act of April 24, 1874.

This contract is between the Insurance Co. and the deceased. The contract is valid, having all the requirements of a contract. It is an absolute and unqualified contract. Therefore, this being so, can one of the parties after the performance by the other refuse to carry out his part of the contract? There has been no stipulation against death and the conditions of the contract have presumably been complied with.

If the company refused to pay this money on the ground that the deceased had made a default in his payment, the case would be otherwise, but all we may consider are the facts as presented to the court.

We cannot see that it would be against public policy to allow a recovery on this policy. There is no fostering, aiding or abetting of crime, and as the deceased had paid the penalty for his crime, by death, if guilty or innocent, why should his property be allowed to remain in the company with whom he had contracted, he has done nothing to cause him to lose his property. They stipulated to pay this money at his death. They have taken his money for the premiums, as they have become due, should they be allowed to all the benefits of his contract, and keep the money paid as premiums, and also the money contracted for? We think not.

The language of an insurance policy is to be construed most strongly against the company. Metropolitan Ins. Co. v. Drach, 101 Pa. 278. Burkhardt v. Travelers Ins. Co., 102 Pa. 262.

The insurance company will be estopped from making a defence after having stipulated to pay, simply because it would be against public policy.

If the insurance company wrongfully revokes the policy the assured may recover the full amount of the premiums paid thereon, with interest, even though he has been having the benefit of the insurance under it from its inception to the day of its wrongful revocation, and though such revocation would not operate in law to avoid the contract, the insured may elect whether he will enforce the policy or treat it as rescinded. Van Werden v. Ins. Co., 99 Iowa 621. We think that as all the requirements of the contract were complied with, and as this contest did not come until after the policy had been issued and after the death of the assured, the representatives should be allowed to recover on this policy.

Judgment is therefore rendered for the plaintiff. MOOREHOUSE, J.

OPINION OF THE SUPREME COURT.

We find ourselves utterly unable to agree with the reasoning in the opinion of the learned court below. It is to be deplored that the learned court did not employ more of its valuable time in a reference to the authorities cited in the

briefs submitted by counsel, instead of indulging in a vain and weak effort at *a priori* reasoning. The facts in the case can give rise to the question whether in an action brought by the executor upon a policy of life insurance, payable to the estate of the insured, and containing no express stipulation against death at the hands of the law, it is a valid defense that the insured was hanged for murder, although admitted in this action to have been innocent of the crime for which he suffered the extreme penalty. Policies of life insurance like all other contracts must conform to regulations of the law. "Contracts are enforced by the courts not for the benefit of the parties, but because the law regards the enforcement of contracts in general as essential to the welfare of the community; whenever, therefore, it appears that it would be prejudicial to the public interest to enfore a particular kind of contract the courts refuse to enforce contracts of that character." Harrimon on Contracts, p. 101. It is an elementary principle of the law of life insurance that the risk assumed by the insurer does not include death at the hands of justice. "Even though a policy contains no provision for forfeiture in the event of the execution of the insured for a crime there can be no recovery when the insured is executed." Elliott on Ins., p. 419. As early as 1830, the English courts had 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. "Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crime, namely, the interest we have in the welfare and prosperity of our connection." Per Ld. Lyndhurst, Society v. Bollard, *supra*. This is the classical case upon the subject and has been judicially followed in this country. "Even if this risk were not excepted, or were specially covered, it would be against public policy to permit a recovery in such a case." Kerr on Ins., p. 393. Ritter v. Mutual Life Ins. Co., 169 U. S. 139. It was intimated by the learned court below that the incontestability clause in the policy might affect the question, but such clauses manifestly are inoperative to waive defenses which are raised by law on grounds of public morality, as the defense in question or the kindred one of lack of insurable interest. Elliott on Ins., p. 410. Does the admitted innocence of the insured differentiate our case from the above line of authority? A case almost on all fours with the present one is found in Burt v. Union, etc., Ins. Co., 23 Sup. Ct. Rp. 138. The insured was convicted of murder and hanged. The policy contained no express provision as to death resulting from crime. The assignees brought suit on the policy alleging the innocence of the insured. Held, that even if the allegations were true, there could 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 be valid, the business of insuring against the fatal mistakes of juries and courts would be legitimate. The same principle could be applied in a kind of accident insurance to the miscarriage of justice in cases that led to conviction and punishment not capital, and in each suit to enforce such a policy the issue as to the fatal judicial mistakes would be tried by another jury and court not infallible," per Brewer, J. We adopt the reasoning of the above learned judge as conclusive of the question under consideration. It is to be noted that in the case at bar the plaintiff is the representative of the insured and not an assignee or beneficiary, thus making the facts stronger than in Burt v. Ins. Co., *supra*, where the assignees were seeking to recover. We thus escape a distinction between the rights of assignees and beneficiaries on the one hand and those of the insured and his estate on the other, that has found judicial sanction in the courts of Penna. Morris v. State, etc., Assur. Co., 183 Pa. 563, and those of sister States. Darrow v. Family Fund Society, 116 N. Y. 537; Seiler v. Life Assoc. 105 Ia. 87. Hard cases, but prove a rule, and although the doctrine as laid down appears harsh when applied to the facts of the case under consideration, we are persuaded of its complete soundness, and hold therefore that the plaintiff in this case cannot recover.

Judgment of lower court reversed and judgment for defendant.