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EVIDENCE OF IDENTITY

Identity and similarity are different conceptions. Two peas, two horses, two men are possibly similar, but they are two, not one. On the other hand, the same man may at different times and places exhibit some different qualities. His identity is compatible with the difference between these qualities. But, what do we mean by sameness or identity? A thing is itself. Contemplated at one instant of time, there is no occasion to think it as identical with itself, as being itself. But, when we conceive this thing as continuing without loss of important properties, uninterruptedly through a period of time, we then affirm the sameness of this thing at the end or the middle of this time, with the thing at the beginning. By sameness we mean uninterruptedness and essential invariableness. We may accept Hume's statement as correct[1]. "Thus the principle of individuation is nothing but the invariableness and uninterruptedness of any object, through a supposed variation of time, by which the mind can trace it in the different periods of its existence, without any break of the view, and without being obliged to form the idea of multiplicity or number." I saw a man, X, a year ago. I see a man to-day. Are the two the same? That is, are the seeming two in fact one? Would an omniscient being have seen that X, of a year ago, continued unchanged into the next day, the next week, the next month, the twelfth month and at these various times, was at point a, b, c, d, in space, and that, advancing through time and space, *he* is now here? If it would, the man I see to-day, is the *same* man I saw a year ago, *is* X.

[1]Philosophical Works, Vol. 1, p. 254.

IMPORTANCE OF IDENTIFICATION

To identify a man, a horse, a bond, a deed, with a man, horse, etc., seen at another time; or which did or suffered something at another time is not to make him that other, but either to discover for one's self, or to assist another, e. g., a judge, a jury, to discover, that he is that other. The supreme importance of this is evident. The law endeavors to punish for a crime not anybody, but the man that committed it. The court must therefore convince itself that the prisoner on trial *is* the man; is the *same* man. To say that he is the man and that he is the same man, is to say the same thing. If a will purporting to be X's is offered for probate, the question will be was it written by the same person, X, who has recently died and whose property it is proposed to administer. In assumpsit on a promissory note, the defendant must be found by the court to be the person, the *same* person, that executed the note. If a personal injury is alleged to have been inflicted by the defendant in an action of trespass, the court must be satisfied, before there can be a judgment for the plaintiff, that the defendant is the man, the *same* man, that did the injurious act. There cannot be a suit of any sort, in which identity of the plaintiff with one who did or suffered something, identity of the defendant with one who did or omitted something, identity of bond, deed, horse, carriage, gun, poison, with some bond, deed, horse, etc., must not be found. Often some of these identities are uncontested. But very often they are strenuously disputed.

THE NAME AS A MEANS OF IDENTIFICATION

Men's continuity of existence, and distinctness from their fellowmen, are perceived by their neighbors and friends. Becoming subjects of conversation, parties to contracts, agents in the performance of acts which have legal results, it becomes convenient for them to be designated by certain names. If there is evidence that a Thomas Kirkham has stabbed a man, a man known under that name, may be apprehended, and put on trial. The names and the combinations of names are many, and usually, in a given locality, those who have the same are few. If it is known that a Thomas Kirkham has stabbed, it is more or less probable that the apprehended man who has that name is the

man that did it. There are cases which say that identity of name is sufficient, in the first instance, to raise a presumption of identity of person[2]. If land has been conveyed to A. B., and a deed from A. B. to C. D. is offered in evidence, in an ejectment, it will be received without proof of the identity of the A. B. grantee with the A. B. grantor[3]. If a writing signed Jacob Hamsher is witnessed, and the witness testifies to his signature, but is unable to say whether Jacob Hamsher, the plaintiff is the person in whose presence he signed as witness, the writing may be properly received in evidence[4]. A note was payable to J. J. & J. P. Kirk. It was endorsed J. J. Kirk. The endorsement being proved to be J. J. Kirk's, will be taken *prima facie* to be that of the firm. "Identity of name" says Sharswood, J. "is *prima facie* evidence of identity of person. The transactions of the world would not go on if this were not so."[5] In a suit on a policy of insurance of the life of George Arnold, one of the defenses was that Arnold had falsely stated that he had not needed medical attention within a certain period. To prove that he had needed this attention, the testimony of a man, who did not know Arnold, that he had heard a man, whom the mother-in-law of Arnold's son had called George Arnold, say, that he had been "doctoring for over a year," was received. This was sufficient evidence that the person who uttered these words was George Arnold.[6] In a suit by Wesley Brown, endorsee of a negotiable promissory note, against the maker, the defense was fraud practiced on the maker by the payee, of which fraud Brown had had knowledge, because he was present when the note was taken. He not being in court, one of the circumstances indicating that he had been thus present, was that the payee of the note had spoken to the man that accompanied him as Mr. Brown.[7]

[2]Yardley's Estate, 21 Dist., 518.

[3]Atchison v. McCulloch, 5 W., 13.

[4]Hamsher v. Kline, 57 Pa., 397.

[5]McConeghy v. Kirk, 68 Pa., 200. When a judge certifies that Alexander Power appeared before him and made probate of a deed, to which there are two subscribing witnesses, one of whom is Alexander Power, the identity of the prover with the subscriber will be presumed when the deed is offered in evidence. Luffborough v. Parker, 12 S. & R., 48.

[6]Arnold v. Life Ins. Co., 20 Super., 61.

[7]Brown v. Shock, 77 Pa., 471.

In a suit on a note against Theodore Valney, the defense being the statute of limitations, it was shown that, in response to a letter from the attorney of the plaintiff, a man appeared in the attorney's office, who said that he was Theodore Valney, and who promised to pay the note. Valney not appearing at the trial, Sharswood, P. J., held the identity of the name of the man who appeared at the office with that of the defendant, sufficient evidence, in the absence of contradictory evidence, of the identity of that man and the defendant.[8] On a Maryland judgment against one Hyatt, a suit was brought against one of that name. A special plea was filed, denying the identity of the defendant with the defendant in the judgment. There was no evidence in support of the plea. A verdict for the plaintiff was sustained by the trial court.[9]

NAME OF A CORPORATION

The probability that there will be two or more corporations of the same name, is not any greater than that there will be two or more natural persons of the same name. A judgment by a justice against the Metropolitan Life Ins. Co., a foreign corporation, was reversed on certiorari, because the summons was served on some other agent than the one designated by the corporation to represent it in this state. A certificate of the insurance commissioner stated that the Metropolitan Life Ins. Co. had appointed J. A. M. Pasmore, residing at Pottsville, as its attorney on whom process should be served. To the suggestion that there was no proof that the company mentioned in the certificate was the defendant, Rice, P. J., replied, "identity of name is *prima facie* evidence of identity of person."[10]

WHEN IDENTITY OF NAME IS NOT SUFFICIENT EVIDENCE

If a name were a very common one, the inference that a party to a transaction bearing that name, was the party in court, because he had the same name, would be infirm. Hence, occasionally, when identity of name is held to justify the conclusion of identity of person, it is pointed out that the name, e. g. Theo-

[8]Kelly v. Valney, 5 Cl., 300.
[9]Burns v. Hyatt, 1 Cl., 323.
[10]Ins. Co. v. Keating, 5 Kulp., 357.

dore Valney, is an "uncommon one."[11] If there is a large interval between the transaction in which one of a certain name appears, and another, in which a person of the same name is an agent, the cogency of the inference of identity is weak; possibly too weak to warrant dependence on it.[12] In an ejectment, A claims through Jacob Sailor's deed of 1817. Defendant shows that, prior to this conveyance of Sailor's, a Jacob Sailor in 1808 had petitioned for the benefit of the insolvent laws. Gibson, C. J., thought that in addition to the identity of name, "after more than a quarter of a century there ought certainly to be some preliminary evidence, however small," of the identity of the Jacob Sailor who conveyed to Henry Sailor the plaintiff, and the Jacob Sailor who had become insolvent. But there were only nine years between the two acts of some Jacob Sailor. In Sitler v. Gehr,[13] an ejectment in which the relationship of Baltzer Gehr the plaintiff, to Kitty Gehr was in question, the defendants offered to show that *a* Conrad Gehr had lived in Germantown in 1743, in order that an inference might be drawn that *the* Conrad Gehr who was the ancestor of the plaintiff was a different person from the Conrad Gehr who was the ancestor of the deceased. The court rejected the offer, because there was no evidence that the Conrad Gehr who had been mentioned by the witnesses ever lived in Germantown, none that identified the Germantown Gehr with the Conrad Gehr, in question. Approving, Paxson, J., remarks, "It would work great injustice if rights of property, after a great length of time, were allowed to depend upon mere identity of name. A *prima facie* case thus submitted to a jury might be extremely difficult, if not impossible to disprove. I know of no case in which mere identity of name has been held sufficient after the great lapse of time which exists here." In Trust Co. v. Ins. Co.[14] suit on a life insurance policy, the defendant offered to show that *a* Wm. J. White had applied to another company for insurance and had been rejected, and that this fact had not been

[11]Kelly v. Valney, 5 Cl., 300; Jacob Sailor was said not to be a very common one, in Sailor v. Hertzogg, 2 Pa., 182.

[12]Kelly v. Valney, 5 Cl., 300.

[13]105 Pa., 577.

[14]But, the Conrad Gehrs mentioned were contemporaries if different persons.

revealed to the defendant. Stewart, J., approved of the rejection because it was not proposed to show the identity of the rejected applicant with the insured. Yet the name was not remarkably common, and the transaction was recent.

IDENTITY OF NAME NOT CONCLUSIVE

It has been several times said that identity of name may be *prima facie* evidence that the bearer of them was one, not two.[15] By this, probably, is meant, not that the jury must assume identity of person unless the evidence is overcome, but that it may assume such identity.[16] The phrase having either meaning, the identity may be disproved. A certificate of naturalization of Henry Conaghan was issued by a court. One of that name who has voted upon it, may, in an election contest, testify that he never appeared before a court for naturalization. This testimony, if believed, would rebut the presumption that he was the Henry Conaghan who had been naturalized, and, he being a foreigner by birth, would show that his voting was illegal.[17] The names of two petitioners for a road were the same as those of two viewers appointed, upon the petition to make the view. No exception was filed, before the absolute confirmation of the report, so as to give the petitioners an opportunity to disprove the identity of the two viewers with two of the petitioners. A petition after the final order of confirmation to open it, was denied. The Superior Court says, a legal presumption had arisen that all of the viewers were qualified to act, which is not repelled by the fact that the names of two of them are the same as the names of two of the petitioners."[18]

PHOTOGRAPHS

Photographs may be a means of discovering likeness and identity. A Charles Bryant having died in Philadelphia, without issue, various claimants of his estate appeared. Forty years be-

[15]213 Pa., 415.

[16]Sailor v. Hertzogg, 2 Pa., 182; Sitler v. Gehr, 105 Pa., 577.

[16]Burns v. Hyatt, 1 Cl., 323, treats the identity of name (Hyatt) as sufficient evidence to sustain a verdict which assumes identity.

[17]*In re* contested election of O'Day, 5 Kulp., 491.

[18]Lampeter Township Road, 35 Super., 379.

fore his death, he had, it was said, left North Bridgewater, Mass. Evidence that he was the one who so left Massachusetts, was found in the likeness between two photographs of himself found among his effects, and a daguerreotype which the N. Bridgewater man had given a kinsman. There was no evidence when or by whom the pictures were taken. There must have been a 40 years' interval between the takings. The resemblance between the pictures, coupled with other circumstances, viz. the identity of name of the Bridgewater and of the Philadelphia man, (viz. Charles Bryant); the Philadelphia man as well as the other having been born in Bridgewater; their both being sea-faring men, was held to put their identity beyond doubt.[19] A man in Baltimore was there known as Goss. A man in Chester county was there known as Wilson. Wilson was murdered. It was important to the prosecution of one for the murder, to show that Wilson was Goss. A photograph of Goss may be shown to one who has known Wilson, in Chester county, and he may say that it is a picture of Wilson.[20] B being arrested, A became his bail. B subsequently absconded, and A, in order to escape liability upon his recognizance, procured X to personate B, to appear in court, undergo trial, conviction and punishment. A was then indicted for conspiracy with X. For some reason it was desired by the Commonwealth to prove that X resembled B. For this purpose, it was proper to put in evidence a photograph of B, after B's wife had testified to its being a correct picture. The testimony of the photographer was unnecessary.[21] A, with B and C, robbed a bank in Easton. B was tried and convicted of a similar offense at Lewisburg. At the trial of A in Easton, one of the bank clerks, who had seen B in the Easton bank, with A and C, and had gone to Lewisburg, and seen B undergoing trial, identified him as the person he had seen in the Easton bank. A photograph of B proved, but not by the photographer probably, to be a correct picture of B, was received in evidence, for the prosecution.[22] Seventeen days after death and burial, the body of a man was

[19]Bryant's Estate, 176 Pa., 309.

[20]Udderzook v. Comm. 76 Pa., 340. No proof of the accuracy of the picture was given. The court took judicial notice of the accuracy of photographs.

[21]Comm. v. Swartz 40 Super., 370.

exhumed. It was distended and putrid. Nevertheless one who had not known Goss in his lifetime, was shown a photograph of the exhumed man, and was allowed to say that the body was of the person of whom was the photograph.[23]

RELIABILITY OF RESEMBLANCE

Occasionally, the courts take occasion to tell us that resemblances of feature are not reliable as proof of identity. "Likeness," says Mitchell, J.,[24] [he was speaking of likeness of two photographs, one taken 40 years before the other] "may be accidental, and the wonder rather is, considering the small area of the human countenance, that among the countless thousands of faces, such constant variation, rather than likeness should be found."[25] He means, that two or more different persons may be similar in appearance, so that persons may, seeing one, think they are seeing the other. When witnesses are testifying to the identity of a man observed at one time and place, with a man observed at another time and place, there are several infirmative suggestions to be made. Observers may be careless, they may lack the power of graphic description. Peculiarities of form or color or expression strike different observers with different force, so that, says Mitchell, J., identification is one of the least reliable facts testified to by witnesses who have seen the parties in question,[26] a remark which needs important qualifications. In every case, identification of persons and things is involved. In comparatively few of them is there any serious difficulty other than that which pertains to the truthfulness of the witness.

On account of distance, insufficiency of light, confusion and excitement, etc., it sometimes happens that the opportunity to

[22]Comm. v. Connors, 156 Pa., 147. Why it was used does not appear. It does not seem to have been used as a means of identification of any body. In Comm. v. Keller, 191 Pa., 122, a photograph of a man and woman, standing side by side, was used to show to the jury the size of the man in comparison with that of the woman, the man having been murdered, and she being before the jurors as a witness.

[23]Udderzook v. Comm., 76 Pa., 340.

[24]Bryant's Estate, 176 Pa., 309.

[25]But, the resemblance fortified by other coincidences left him thoroughly convinced.

[26]Bryant's Estate. 176 Pa., 309; Comm. v. House, 223 Pa., 487.

observe the person to be identified was not good, but there are hundreds of cases in which no such difficulty to correct identification exists. Sheehan's Estate[27] presents a different question. A woman, alleging that she was the daughter of a deceased, claimed his estate, in competition with his collateral relatives. She had been separated from him when but nine days old, and thirty years had since elapsed. One of the evidences of her kinship, was the alleged resemblance between her and the deceased. Says Paxson, C. J., the alleged resemblance is a "very weak" circumstance. "Granting the likeness, it may be the result of the merest chance. We all know that striking likenesses often occur between persons who are not of the same blood; so strong that in many instances the one is mistaken for the other."

IDENTIFICATION BY A MOTHER

There are circumstances under which the court or jury may be unconvinced of the identification by a mother of one as a son or daughter. "The books" says Paxson, C. J., "are full of cases where mothers have been thus misled." A daughter being taken from a mother, when the former was but nine days old, and never seen afterwards, unless X, who, at the end of 30 years, appeared, was she, the mother testified that X was her daughter, but the court did not believe her, thinking she had been "influenced by weak and inconclusive evidence."[28] A mother, Beaver, J., assures us, for knowledge of her own offspring, that is that A, or B, was born of her, depends largely on what the nurse has told her.[29]

RESEMBLANCE OTHER THAN FACIAL

The visible features are not the only means of identification.

[27]139 Pa., 168. The court allowed a man to be convicted of murder by evidence *inter alia*, of a man who had known the deceased Goss and who identified the distended and putrid body, exhumed 17 days after death, as the body of Goss.

[28]Sheehan's Estate, 139 Pa., 168. The surprising statement in Comm. v. House, 223 Pa., 487, that "no class of testimony is more uncertain and less to be relied upon than that as to identity," is manifestly inaccurate. There are hundreds of cases where identification is as trustworthy as any other act of witnesses. Identification involves comparison between impressions, and inference of a common cause of them. But how much testimony involves comparisons quite as liable to mistake.

[29]Arnold v. Life Ins. Co., 20 Super., 61.

The voice is a means. One speaking through the water closet pipes of a jail, may be heard by another, who knows his voice, and the latter may testify to what he said through the pipes.[30] The perpetrator of a murder having spoken mumblingly, one on trial for the murder may apparently be asked by the prosecutor to utter certain phrases, in order that those who heard the criminal at the time of the commission of the crime, may determine whether the prisoner is the guilty person.[31] Whether G. A., whose life was insured, was the man who had made a certain remark, was at the trial of the assumpsit on the policy, a question. It might be shown that the person who spoke was hard of hearing, and that G. A. was.[32] The resemblance of a man Goss and a man Wilson, in point of habitual drinking to intoxication, may, with other facts, be considered as indicating their identity.[33] The identity of the producer of a writing with the producer of other writings, is often inferred from the resemblance of the writings. Letters written by a man calling himself Goss, and letters written by a man calling himself Wilson, may by the similarity of the writing, be used, in conjunction with other evidence to establish the identity of Goss and Wilson.[34] A resemblance in knowledge may be a means of identification. A, is aware, in Philadelphia at 8.30 a. m. that a murder was committed in Chester county, the night before. The murder was not generally known in Philadelphia until 10.30 a. m. A is thus shown to have one property at least, which the murderer would have.[35] The burglars and murderers having worn masks, when committing the crime, two men are brought to the presence of their victim, in order that he may see them and make a dying declaration as to their being the guilty persons, and they are asked to put on masks, such as the murderers wore. They were then identified

[30]Brown v. Comm., 76 Pa., 319.

[31]Johnson v. Comm., 115 Pa., 369.

[32]Arnold v. Life Ins. Co., 20 Super., 61.

[33]Udderzook v. Comm., 76 Pa., 340.

[34]76 Pa., 340. A peculiar ring worn by Wilson, and shown to have belonged to Goss, Wilson's recognition of a person as his brother, who was the brother of Goss, were also shown.

[35]Johnson v. Comm., 115 Pa., 369.

and the dying declaration was properly put in evidence.[36] The instrument of identification may be a jawbone. A ludicrous identification of a lower jaw bone, was permitted, against a prisoner, in a murder case.[37] A woman, Mrs. McCready had been murdered, and thrown into a stream. Fourteen months subsequently, a skull, and a lower jaw bone were found. R., who for two years had eaten at the same table with her, was allowed to say as a witness, that there were certain marks about her lower jaw bone, and the teeth therein, and that he identified the jaw bone as hers by means of these marks. A daughter also testified "that lower jaw looks very familiar to me. * * From my knowledge of my mother's jaw, and from the appearance of that jaw, I believe it to be my mother's."

ALIBI IN DISPROOF

The identification of a witness, may be opposed to the negation of identity of another witness, or to identification by another witness, of a person seen at another place, at the time of the commission of an act, with the person on trial. The *alibi* may be depended on to refute the identification of the prisoner with the person who did the act.[38]

INSTANCES OF RELEVANT IDENTIFICATION

Identification is involved in a vast variety of cases. In criminal cases, it may be of the prisoner with the person who committed the act, such as assault[39] or murder.[40] It may be of the person who has been killed, e. g., that the man killed in Chester county and known there as Wilson, was the same man that was known in Baltimore, as Goss.[41] In a civil action, identification of a dead man with another, is often necessary, e. g. in order to show the right of the relatives of the other, to share in the dead man's estate as next of kin;[42] in order to show that the

[36]Comm. v. Roddy, 184 Pa., 274. A birth mark may be a means but sometimes an insufficient means of identification. Sheehan's Estate, 139 Pa., 168.

[37]Gray v. Comm., 101 Pa., 380.

[38]Comm. v. Roddy, 184 Pa., 274; Brown v. Shock, 77 Pa., 471.

[39]Comm. v. House, 223 Pa., 487.

[40]Comm. v. Roddy, 184 Pa., 274; Johnson v. Comm., 115 Pa., 395.

[41]Udderzook v. Comm., 76 Pa., 340.

[42]Bryant's Estate, 176 Pa., 309.

assured in a life policy, is the same person that admitted that he had diseases which the assured had concealed from the company,[43] or is the person whose application to another company, had been rejected, which rejection he had concealed from the company which issued the policy.[44] A being on trial for conspiring with B to impose on the court which was, as it supposed, trying C for a crime, by B's personation of C, the identity of the person actually tried with B, and not with C, was necessary to be proved.[45] In a civil action, the identity of the defendant with the defendant in a foreign judgment on which the suit was brought was at issue.[46] The identity of a man who admitted to the plaintiff's attorney that the debt was due, with the defendant, needed to be proved, in order to toll the statute of limitations.[47] It was necessary to prove that the plaintiff, endorsee of a note who was not at the trial, was the person who was proved by witnesses to have had cognizance of the fraud practiced by the payee upon the maker, the defendant.[48] Whether two petitioners for a road, were the persons who, having the same name, were viewers,[49] whether the Henry Conaghan who had voted, was the same person who, under that name had been naturalized[50] have been questions of identity considered, as was whether a woman over 30 years old, who had been separated from her parents when but nine days old, and never since for 30 years seen by them, was their daughter.[51]

IDENTIFYING DEVISEE

The identification may consist in the conviction of the jury or a court, that a person or corporation X, is the person whom a testator had in mind, when under a certain name, he made a devise or bequest. The difficulty may be caused by the existence

[43]Arnold v. Life Ins. Co., 20 Super., 61.
[44]Trust Co. v. Ins. Co., 213 Pa., 415.
[45]Comm. v. Swartz, 40 Super., 370
[46]Burns v. Hyatt, 1 Cl., 323.
[47]Kelly v. Valney, 5 Cl., 300.
[48]Brown v. Shock, 77 Pa., 471.
[49]Lampeter Township Road, 35 Super., 379.
[50]*In re* contested Election of O'Day, 5 Kulp., 491.
[51]Sheehan's Estate, 139 Pa., 168.

of two persons having the same name as that used by the testator, when additional indications of the person probably intended must be sought.[52] The name, especially of a corporation, may be more or less incorrect, without rendering the discovery of the legatee who is intended, impossible. Facts, external to the will, may be relied upon.[53]

IDENTIFICATION BY TRADITION

In Arnold v. Life Ins. Co.,[54] the somewhat startling remark is made by Beaver, J. "Personal identity [by which he must mean, identification] must depend almost entirely upon tradition * * * we must all ultimately rely upon tradition for *all* (!) that we know as to our personal identity. * * * In the very mature of the case, personal identity must depend upon tradition. A mother knows her own offspring largely by what the nurse tells her and even a nurse, except where there are unusual physical peculiarities, would be unable to tell a year from the birth of a child, whether that was the identical child at whose birth she was present." Whether I, who speak to-day, spoke also yesterday, I surely do not depend on tradition to know. Memory connects my present self with my past. There are *some* things about myself, which I cannot know, except through the assertions of others. I cannot know e. g. whether I was born on January 1st or June 1st; whether I was born in Harrisburg or in Philadelphia; whether I was born of this pair of persons or of that. I know only because I have been informed by others, by their explicit statements, or by their clear implications. But there are many important things concerning myself, for the knowledge of which I do not depend on the testimony of others; things of which I was aware, when they happened, and the memory of which still abides.[55]

[52]Williams' Estate, 19 Dist., 241.

[53]Smith Estate, 19 Dist., 988.

[54]20 Super., 61.

[55]The philosophizing of Beaver, J., was scarcely required by the task before him. The only question was whether X, having made a remark in the hearing of a witness, this X was George Arnold, and whether that he was could be shown by a statement by the mother-in-law of Arnold's son to the witness that he X, was Arnold.

IDENTIFICATION OF OBJECTS

It is needless to observe that the identification of objects other than human beings, is a very frequent task of witnesses and tribunals. An automobile, which frightened a horse, may be identified, not only by its number, but by certain peculiarities, such as its having had decorations of bunting, while no other automobile at the place, had.[56] When an injury to a workman has been caused by the breaking of a rope employed in the lifting of heavy timbers by means of a crane, the identity of a rope as to whose condition, just after the accident, witnesses testify, with the rope the breaking of which was the cause of the injury, must be established.[57] The fact that there was only one broken rope and that the rope whose condition is testified to was broken; and certain correspondences between the facts pertaining to the rope in question and facts pertaining to the rope observed by the witnesses may justify an inference of identity. A sues B on an agreement to be responsible for a check which A cashed for B. X, a witness saw A cash a check of W. M. for $150, for B, and heard B say that he would be responsible for it, but did not see the check, being too far away. X afterwards presented *a* check, drawn by W. M. for $150 at bank, payment of which was refused. It was not shown that A had ever cashed for B more than one check. There was sufficient proof of the identity of the check for guarantying which B was sued, with the check concerning, which X testified.[58]

COMPARISON OF IMPRESSIONS

Witnesses who affirm that the man before the court, as prisoner, party, or witness, at some former time, was somewhere, or did something, must have seen the person on the former occasion and must see him now. They compare their two impressions of him, and, detecting a certain degree of resemblance in

[56]Bowling v. Roberts, 235 Pa., 89.

[57]Wells v. Erie R. R. Co., 232 Pa., 331.

[58]Caldwell v. Remington, 2 Wharton, 132. In Darrach v. Stevenson, 183 Pa., 397, a letter written, five years after the making of a certain note, and referring to cancelling "the note," was held not sufficiently to identify this note as the one intended by the writer.

certain respects, come to the conviction, that the man who furnished the former impression is the man who is furnishing the present impression. X, e. g. has been tried for the murder of A. He is now being tried for the murder of B. A witness who saw him at the former trial, may at the second, identify him as the person formerly tried.[59] The conviction of the identity of the cause of the two impressions, may be expressed by the words "I am satisfied," that the men before me, are the men that, some weeks ago were here, committing a burglary and an assualt.[60] The conviction of identity may be so unstable, as to warrant doubt by the jury of its being well-founded. An assault is committed on A, on the street. B or C, according to the evidence, might have committed it. B voluntarily goes before A, just after the assault, and A declares that he is not the man who made the assault. The next day B is brought before her, and she refuses to say that he was the assailant. R, who was in the neighborhood of the assault, and to whom A ran for protection, within an hour after the assault, after a careful examination, declared that B was not the man who committed it. These persons did not see B under circumstances favorable to subsequent identification. At the trial, however, these persons testified that B was the guilty person. Since this variation of opinion weakened very materially, their testimony, it should have been referred to by the trial judge, in his charge to the jury.[61]

IDENTIFICATION BY JURY

Frequently witnesses identify the party before the court with the person who did some act the legal consequences of which are to be made to follow by means of the verdict or decision of the tribunal. The witnesses may establish facts, one, one, and another, another, and a third, a third, and the identity of the defendant or plaintiff with a problematical person may be inferred, not by them, or any of them, but by the jury or judge. One witness may prove that a murdered person had had a great quantity of coins. Another may prove the disappearance of these

[59]Brown v. Comm., 76 Pa., 319.
[60]Comm. v. Roddy, 184 Pa., 274.
[61]Comm. v. House, 223 Pa., 487.

coins after death. A third may prove that the prisoner had shortly after the murder, a large number of similar coins. This, with other circumstances, may induce the jury to believe that the prisoner is the murderer.[62] Identification, that is, the belief of the jury of the identity of a defendant with a murderer, may be superinduced by convincing them of a variety of facts, the provers of which have no opinion as to this identity.

[62]Brown v. Comm., 76 Pa., 319.

MOOT COURT

HARRIS v. HARPOLE

Liability of Land-owner for Use of His Property in a Manner Detrimental to Neighbor—The Effects of an Act Otherwise Lawful When Committed with a Bad Motive.

STATEMENT OF FACTS

Harris is suing to recover damages which he alleges were caused by act of Harpole in placing upon his property a sign that he would sell his property to Chinese only, the purpose of Harpole's sign being to impede sale of Harris' property, which was also upon the market.

Tobias for plaintiff.

Surran for defendant.

OPINION OF COURT

WATKINS, J: Plaintiff is suing to recover damages, which he alleges were caused by act of defendant in placing upon his property a sign that he would sell his property to Chinese, the purpose of defendant's sign being to impede sale of plaintiff's property which was also upon the market.

In the present day cosmopolitan growth of America, with its varied races, creeds and nationalities, necessarily conditions original and peculiar in their effect must arise. Rights, heretofore universally conceded as belonging to the individual must be restricted as rights belonging to the community in general.

In the case at bar we have one neighbor using his property in a manner apparently within his rights, but using it with the avowed purpose of detriment to his neighbor, knowing it can be of no personal advantage to himself, but rather the contrary.

If there is any damage, as a result of defendant's action, it is consequential. In general any misfeasance or act of one man, whereby another is injuriously treated or damnified is in its largest sense a trespass.

The action being for cause of neutral damages prior to act of 1887, would be brought as an action of case. Sec. 2, act May 25, 1887, provides that "So far as relates to procedure the distinction heretofore existing between actions ex-delicto be abolished and that all damages heretofore recoverable in trespass, trover or case, shall hereafter be sued for and recovered in one form of action, action of trespass."

Defendant contends that the act he has done is lawful altho it proceeded from a malicious intent and in support cites, Jenkins v. Fowler, 24 Pa., 310, where court held, "Malicious motives make a bad act worse but they cannot make wrong that which in its essence is lawful."

This case depends upon the fact that the act is in its essence lawful.

We think that upon the facts this case is clearly distinguishable from present action.

Defendant relies much upon case of Mahan v. Brown, 12 (Wemd.) N. Y., 261, 1839. Here defendant erected fence 40 ft. high with no advantage to himself and for sole purpose of annoying plaintiff and by means of which house was darkened and boarders left, etc.—Plaintiff was nonsuited. Court said that plaintiff had only been refused the use of that which did not belong to her, hence she had no legal cause of complaint.

This proceeds upon the ground that the rights of defendant were absolute and not correlative, that the act done was in the exercise of his rights, without interference with legal rights of plaintiff, whereas act of defendant in present case was an exercise of rights with the interference of legal right of plaintiff.

Has plaintiff been deprived of a legal right by act of defendant? It is idle to state that he has not. The facts state specifically that he received no offer of purchase, save from Chinese. To hold that plaintiff has not been deprived of a legal right, would make the law a convenient agency, in cases like present to injure and destroy the peace and comfort of individuals, and to damage the property of one's neighbor for no other than a wicked purpose which in itself is unlawful. 8 L. R. A., 186.

To contend that no legal right of plaintiff has been effected, would in the present age of diversified industry and community life amount to a confiscation of property. A man with malicious motive irrespective of harm to itself could under these conditions do acts lawful, because within the technique of the law, which would and could destroy his neighbor.

The wo"d "impede" is capable of no other definition than "to entangle the feet," "to obstruct." This per force shows purpose of defendant's advertisement.

There is a well defined class of cases which hold that the action can be maintained upon the particular distinction that the rights which the individual has over his own land, with the rights of his neighbors are correlative and not absolute. This we contend is a policy more consistent with modern growth and more conducive to general welfare.

In the Barclay case, 96 N. W. (Ia.), 1080, court said "The right being conceded possibly the intent with which the right was exercised would be immaterial, but called attention to the strict rules of the common law with respect to percolating waters and held that the rights of the landowners are correlative and not absolute and based its decision restraining the landowner from maliciously wasting his water to the detriment of his neighbor.

In Moores v. Bricklayers' Union, No. 1, 33 Ohio L. J., 48, the court, in holding act of defendants in maintaining a boycott v. plaintiff. actionable, said, "That in the exercise of common rights, acts which would otherwise be lawful, become actionable when they are actuated by single motive of malice.

So in present case each had the legal right to sell his property, but defendant stepped outside the limit of his right when he used his right

maliciously to disadvantage of his neighbor and with no advantage to himself.

In Hoy v. Sterret, 2 Watts, 327, an action of a lower riparian landowner v. an upper proprietor, for improper detention of water, the court said, "That as their rights were correlative, if defendant's action in detaining the water was malicious his conduct was actionable.

In 81 Mich., 52, court held that a fence erected maliciously and with no other purpose than to shut out light from a neighbor's window was a nuisance and actionable.

In Greenleaf v. Francis, 10 Pick., 117, the Massachusetts court held, "That the owner may dig a well on any part of his property, *unless* in doing so he is actuated by mere malicious intent to deprive his neighbor of water without benefit to himself.

So in case of Solloway v. Tremont, 15 D. L. R., 188, Superior court said, "That if it clearly appeared that defendant had built the fence for pure malicious motive, for sole purpose of injuring his neighbor, we would maintain action. But one conclusion can be sustained from this, viz., where a person uses his property maliciously to disadvantage or harm of another without advantage to himself he is liable to action. A stronger case arises, when he uses his property to no advantage to himself resultant, but apparently to disadvantage.

Judgment for plaintiff.

OPINION OF SUPERIOR COURT

It is perhaps true that there are acts which are legally right and defensible without regard to the motives which induce or characterize them; but there is abundant authority for saying that this is by no means a universal rule and that an act which is legally right when done with certain motive may become legally wrong when done with another motive.

Indeed, the tendency of the recent cases is to consider the motive with which an act is done as an important element in determining the legality of the act, and to hold that an act which injures another and is committed for the sole purpose of injuring another is illegal.

This court already stands committed to this doctrine. In Solloway v. Tremont, 15 D. L. R., 188, it is said, "There is no reason for allowing a man to cause injury to another simply for the sake of causing such injury. It is good policy to prevent acts that work bad effects, and instead of saying that malice will not make a lawful act unlawful, it is more consistent with elementary principles of right and wrong to say that damage done to another is wrong unless there is some just cause or excuse for it."

In accordance with the trend of thought in the modern cases, the principle that a man may use his own property according to his own needs and desires has been subjected to many limitations. Men cannot, always, in civilized society, be allowed to use their own property as their interests or desires may dictate without reference to the fact that they have neighbors

whose rights are as sacred as their own. The existence and well being of society require that each and every person shall conduct himself consistently with the fact that he is a social and reasonable being.

It is, therefore, very properly held that the purpose for which a man is using his property may sometimes determine his rights, Tuttle v. Buck, 107 Minn., 145; 119 N. W., 946, and that "the right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership;" Rideout v. Knox, 148 Mass., 368, and that "an act cannot be judged separately from the motive which actuated the doer."

In Hobrook v. Morrison (Mass.), 100 N. E., 1111, a property owner had advertised his property for sale to members of the colored race. In a suit by a neighbor the court said, "If she had put up the sign x x x x solely for the purpose of injuring property of complaintant, there can be no doubt that such conduct would have been actionable. Judgment affirmed.

CLARK v. McCUNE

Sales—Intention of Parties in Determining Whether Title Passed

STATEMENT OF THE FACTS

Clark sold one Sharp a horse for $250, terms cash. Sharp gave his check for this amount and took the horse, reselling it the same day to McCune for $200. Check was dishonored and Sharp has absconded. Replevin for horse.

Brown for plaintiff.

Evans for defendant.

OPINION OF COURT

BENDER, J.: The case at hand may be resolved into two primary questions—(1). Was there a sale from Clark to Sharp; (2). Did McCune purchase from Sharp for value and without notice? Clark has been induced to part with his horse by the tendering of a fraudulent check by Sharp.

In the early cases it was held, when a sale was procured by fraud the property in the goods did not pass. Earl of Bristol v. Wilsmore, 1 Barn. & C., 514; Benj. on Sales § 434.

But at present date and for a good many years by a long line of decisions the law has undergone a change. It is now held that where a sale is procured by fraud, the property in the goods is transferred by the contract, subect to the seller's right of rescission, that is he, the vendee has not a void title but a voidable title and if the goods pass into the hands of an innocent purchaser for value, without notice before seller rescinds the sale, the innocent purchaser acquires a good title. In Moun v. Salsberg, 17 Sup. Ct., 280, it was held "in cases of this character the

contract is voidable at the election of vendor upon discovery of the fraud, and he must rescind promptly upon the discovery, otherwise a conclusive presumption of ratification will arise. But the right of rescission will not avail when the goods have passed into the hands of an innocent purchaser for value, without notice. 40 Pa., 417; 17 S. & R., 99; 2 Chester Co., 134; 8 Watts., 489; 3 W. & S., 479; 6 Phila., 202.

It was held in 143 Pa., 607, "where goods are obtained from their owner by fraud it is necessary to inquire whether the facts show a *sale* to the party guilty of fraud, or a mere delivery of the goods into possession, induced by fraudulent devices on his part. If the owner intended to transfer the property in the goods as well as their possession the transaction is a sale however fraudulent the device may have been, but if he intended to part with nothing more than the bare possession there is no sale and no property passes.

In applying this doctrine to case at bar it is easily seen that our case is in the first class for the vendor parted with both property and possession for he never expected the vendee to return the horse to him. The latter part of the doctrine of 143 Pa., 607, refers to a case in which there was a pledge or a thing was hired, namely a bailment, and in present case there certainly was not a bailment.

In Edelman v. Latshaw, 159 Pa., 644, vendor had sold certain stocks to vendee and afterwards vendor filed a bill in equity against vendee to compel a reassignment of the stock on the ground that vendee had induced him to sell stock by false and fraudulent representations. It appears that vendee had sold stock to a third person before bill was filed and that third person was a purchaser for value without notice and a decree in favor of vendee was affirmed. 10 Montgomery Co., 59. The same rule prevails by weight of authority in England and most of the States in this country.

The leading case in England is in 10 C. B., 919, White v. Gorden; Plaintiff made a contract with Parker for the purchase of 50 tons of iron giving him in payment a bill purporting to be accepted by a supposed seedsman and it turned out to be a fictitious bill as no such person as that was found.

Rule laid down in that case that if one of two innocent parties had to suffer, the one who had parted with his goods on the faith of a worthless piece of paper which a little inquiry would have proved should bear the loss instead of the defendant who had trusted to the possession of the goods themselves. The rule in New York as held in Saltus v. Everett is that the title of property in things movable can pass from the owner only by his own consent and voluntary act; but that the innocent purchaser for value without notice will be protected in his title against the original owner in those cases and in those only where such owner has by his own direct act conferred upon the person from whom the bonafide purchaser bought.

If he has in any way parted with the actual goods with his own con-

sent though under such circumstances of fraud as would make that consent revocable, he may rescind the sale and recover the goods as against the original vendee. But if the goods or property in the goods pass to an innocent purchaser, first owner must bear the loss. Mowery v. Walsh, 8 Cow., 243; Root v. French, 13 Wendell, 572; 12 Johns., 348.

In case of Barnard v. Campbell, 55 N. Y., 456, following rule was laid down: "Two things must concur to create an estoppel by which an owner may be deprived of his title to property by act of a third person; 1st the owner must have clothed the person assuming to dispose of it with apparent authority to dispose of it; 2nd the person alleging the estoppel must have acted and parted with value upon faith of such apparent ownership so that he will be the loser if the appearances to which he trusted are not real. Weaver v. Borden, 49 N. Y., 286; McGoldricks v. Willets, 52 N. Y., 612; Bank v. R. W. & O. R. Co., 44 N. Y., 136; 25 N. Y., 278; 13 N. Y., 121.

In Rowley v. Bigelow, 12 Pick (Mass.), 306; the law of Mass., was said to be "a fraudulent purchase of goods accompanied with delivery is not void but voidable only at the election of vendor and until it is avoided the vendee has power to make a valid sale of goods to a bonafide purchaser; and same rule is laid down in many States. 8 Allen, 7; 6 Metc., 68; 134 Mass., 156; 23 Col., 359; 39 Conn., 406; 10 N. H., 477; 13 N. H., 109; 51 N. H., 577; 94 Ill., 154; 38 Me., 561; 21 Md., 406; 5 Mo., 296; 132 Ala., 618; 57 Ga., 172; 5 Grot., (Va.), 268; 15 B. Mon., (Ky.), 270; 8 Boxt., (Tenn.), 506; 21 Ind., 411.

It is argued by plaintiff below that on account of Sharp selling the horse to McCune for fifty dollars less than he bargained to pay original vendor for him that it should have put him on his guard and caused the second vendee to be a purchaser with notice and caveat emptor should apply. We have found one case in Pennsylvania on that point and it seems that if the fraudulent buyer had offered the horse for a ridiculously low sum the doctrine of caveat emptor might have applied in this case.

In Humphrey v. Green, 50 Pa., 212, Humphrey sold a mare to one Wallace for $115 paying $15 in good money and $100 in counterfeit. Wallace afterwards sold it to Green for $45 and it was held that in that case if the jury thought that Green was an innocent purchaser without notice they should hold for defendant. But jury thought otherwise and held for plaintiff.

But we think that in the case at hand McCune was an innocent purchaser for value without notice and entitled to the horse in question. The plaintiff has a remedy against Sharp and if he can not be found it is no fault of the defendant.

Verdict for defendant.

OPINION OF SUPERIOR COURT

The sale was for "cash," that is, Clark intended and conveyed to Sharp the intention and Sharp knew that he intended that the ownership

so frequently and grossly misnamed the "title," should not pass, unless and until the price was paid. That this intention will decide whether the ownership passes or not, ought not to be open to question. The horse was Clark's. The payment of the price is the event on which he determines that it shall become Sharp's. Sharp is aware of this and assents to Clark's purpose. How could there be any question then, that until payment the horse continued to belong to Clark?

Occasionally however, it is assumed that if the vendor puts the article into the possession of the vendee, even though both parties intend that the ownership shall not pass, it will pass in spite of them. Some such assumption seems to have been in the mind of Gibson, J., in Harris v. Smith, 3 S. & R., 20, who, in order to deny the transition of the ownership after the thing sold—liquorice paste,—had reached the hands of the vendee, deemed it necessary to find that the vendee had gained the possession by a trick. How could it matter whether he gained it by a trick or with the consent of the vendor, if the understanding between them was that the estate in the liquorice should not pass, despite the delivery of possession, until payment?

Even, however, if it was conceded that a purposed delivery of the thing, by the vendor, would necessarily pass the ownership also, if that delivery were wrought by means of a trick, it would not produce this result. And what is the sort of "trick," which will deprive delivery of its power to pass ownership despite the parties' intention? In Harris v. Smith, *supra*, the delivery of the liquorice was not to be made until a note with an approved endorsement was given. The vendee offered to procure one with Yohe's endorsement, and on the vendee's promise to send immediately a note with Yohe's name upon it, the liquorice was delivered. Having thus obtained the liquorice, the vendee never sent the note. It was held that the vendor had not lost the ownership and that the auctioneer who had made the sale or his clerk could recover the liquorice by the action of replevin. "Where performance and delivery are understood by the parties to be simultaneous, possession obtained by artifice and deceit will not avail," says Gibson, J. Yet the delivery was made on the vendee's promise to send the note immediately.

The learned court below has found that a fraud was practiced on the vendor, to superinduce the sale, and that for this reason, he could recover the horse from the vendee. The distinction between the possible views is that, if the parties intended that the ownership should not pass, a delivery would not cause it to pass, if this delivery were procured by a "trick." In the other view the ownership would have passed, but the vendor by rescission could cause it to pass back. For a while, it would have been in the vendee.

It is sometimes said that, although a sale is for cash, payment may be waived, as a precondition to the transit of the ownership, and strangely enough, it is thought that when the vendor allows the possession to pass before payment, he is likewise allowing ownership to pass, a singular

hallucination. Could any thing be more different than the lapse over of an estate from vendor to vendee, a purely ideal process, and the delivery of possession? Is the phenomenon not familiar, of one man's owning a thing, and of another man's having the possession of the thing? Why then shall we say that when the vendor allows the thing to pass into the vendee's hands, he allows his ownership to glide also? In Brown v. Reber, 30 Super., 114, a horse continued as between vendor and vendee to be the vendor's because the sale being for cash, the cash had not been paid, *and the horse remained with the vendor.* The horse's dying was the vendor's loss. Welsh v. Bell, 32 Pa., 12; also asserts that if actual possession was given to a vendee, the vendor's "property in the goods was gone with his possession," but the question there arose between the vendor and an execution creditor of the vendee, or the sheriff who levied on the goods as the property of the vendee.

But, in the case before us, there is no waiver. The check was payable on demand. The bank on which it was drawn, was made the instrument for paying the price, the check being the depositor's authority to pay it. If counterfeit notes or coin had been given, and possession transferred, we do not suspect that the ownership would have passed, simply because the possession had been transferred. The manifest intent of the vendor known to the vendee, would have been to make the delivery of possession conditional upon the genuineness of the money, if any thought of its being a forgery had been in mind. In receiving a check, its sufficiency to secure payment as soon as presented was tacitly assumed. There was no intention to give credit.

Were the controversy between Clark and Sharp, there could, we think be no doubt of the right of Clark to recover the horse from Sharp. Sharp, however, has sold it to McCune for $200. If a so-called "title" had passed to Sharpe, voidable by Clark, it would, as the learned court below has decided, have become unavoidable, on the sale to McCune, a *bona fide* purchaser for value.

But, if no "title" passed to Sharp from Clark, was it drawn out of Clark into McCune, by Sharp's sale to him? There is no imaginable reason for bestowing Clark's horse on McCune, other than the fact that the horse was in Sharp's possession under the circumstances proved when he sold it to McCune. If the horse had been put into Sharp's hands to try him, before deciding whether to buy it or not, Sharp could not have divested Clark's estate in it by selling it to McCune. If the horse had been bailed to Sharp, on one of the several kinds of bailments, he could not have effectively sold it.

We fail to see why, no ownership having passed to Sharp, he is able to bestow ownership on McCune, simply because, having obtained possession on an undertaking to make simultaneous payment—and such, virtually was his undertaking—he had it in his possession, and was able to exhibit it to McCune. McCune must know that possession of a chattel does not always mean ownership. He was just as rash in trusting Sharp

as owner, as was Clark, in believing that his check would bring him the purchase money.

The learned court below assuming that the "title" passed to Sharp, has properly held that Sharp's sale gave to McCune an indefeasible title. The conclusion we have come to is, that no "title" passed from Clark to Sharp, and therefore, that none passed from Sharp to McCune. Hence it is necessary to reverse the judgment. Reversed.

DREER v. MITCHELL

Fungible Goods—When Title Passes—Liability of Warehouseman for Destruction of Goods by Fire

STATEMENT OF FACTS

Mitchell sold Dreer 1000 bushels of wheat of the lot in elevator number ten. Dreer paid the price in full and received a receipt for the wheat in which the wheat was made deliverable to the order of Dreer. Later fire destroyed half the wheat in this elevator and upon presentation of the receipt Mitchell refused to deliver more than 500 bushels. Trespass for conversion of 500 bushels of wheat.

Gunter for plaintiff.

Haberstroh for defendant.

OPINION OF COURT

HEMPHILL, J. The main question in this case is whether the trasaction entered into between the plaintiff and defendant, whereby the plaintiff paid the defendant the price in full for a 1000 bushels of grain in elevator number ten, the defendant giving the plaintiff a warehouse receipt for the same making the wheat deliverable to his order, constituted a sale. If it did the risks as well as the rights of ownership passed to the buyer, and this is so whether delivery has been made or not. Tiffany on Sales, P. 141, A. & E., p. 1056. We think there was a clear transfer of title in this case and consequently a sale.

In considering whether title passes it is necessary to take into consideration the character of the property, the use that is to be made of it, the nature and object of the transaction, the position of the parties, and the usages of trade and business. 205 Pa., 229; 200 Pa., 168. The grain in question falls in that class of goods known as fungible goods, the sale of which has given rise to a wide difference of opinion. The weight of American authority supports the proposition that when the property is sold to be taken out of a specific mass of uniform quality, title will pass at once upon the making of the contract, if such appears to be the intent. Brownfield v. Johnson, 128 Pa., 254; Lockart v. Bousoll, 77 Pa., 53; Bretz v. Diehl, 117 Pa., 589; Timberly v. Patchin, 17 N. J., 130. However there are a number of Penna. cases which hold that separation or appropria-

tion is necessary to pass title, but 39 Pa., 521, and 51 Pa., 66, both hold that although as to third parties no title passes without separation, title will pass between the parties, if such is their clear intent. It seems obvious that in the case at bar it was the intention of Mitchell to pass title to the wheat to Dreer. The warehouse receipt is itself prima facie evidence of the title in the holder, and a receipt for goods in Mass., transfers title without separation. 30 A. & C., 44, 74. Massachusetts has by statute provided "that the warehouse receipt for any portion of grain or other property stored in a public warehouse in such a manner that different lots or parcels are mixed together so that the identity of the same cannot be preserved shall be deemed a valid title to so much thereof as designated in said receipt, without regard to any separation or identification." Penna. has passed no such statute, but it has passed the Warehouse Receipts Act which makes warehouse receipts negotiable, and the receipt here given for the grain was in such form that had it been sold it would have passed good title. A sale without delivery of possession divests ownership of the vendor as between him and his vendee, 150 Pa., 339; 14 Pa., 263; 22 Pa., 168. And so goods stored in a warehouse may be delivered by a delivery of the warehouseman's receipt. Bond v. Bunting, 78 Pa., 210; Stephens v. Tifford, 137 Pa., 219.

The intention of the parties is often arrived at by usage and custom. The practice with regard to grain elevators shows the intention of depositors to retain a property right and of buyers and sellers of receipts for grain to transfer property in the grain by dealing with the receipts, even though the grain referred to therein is mingled in a mass of undetermined and varying quantity. Some evidence of intention is essential to transfer title, whether furnished by usage or not. From consideration of the fact that the full price was paid for the grain, and that a receipt was given for same deliverable to plaintiff's order, and that it is the general usage of warehousemen to give receipts in order to pass title in grain, we believe there was a sale when the defendant executed the receipt for the 1000 bushels of wheat of the lot in elevator number ten, altho there was no separation or delivery.

The plaintiff then became a tenant in common with the other owners of grain in elevator number ten. Bretz v. Diehl, 117 Pa., 589. It necessarily follows says Williston in his book on sales, from the fact that the property is transferred to the buyer that the risk of his share is upon him; if, therefore, all the goods are destroyed he must pay the price, and if he has already paid it, he cannot recover it. If the loss is partial only, the loss must fall upon the several owners in proportion to the shares owned by each. 103 Iowa, 389. Mitchell became a bailee for hire, and was bound to exercise ordinary diligence and care. His liability could only be the result of a failure to exercise such care and diligence. Tower v. Supply and Storage Co., 159 Pa., 106; 30 Pa., 247. A warehouseman is not liable for the destruction of goods by fire, not due to his negligence, or that of his agents, when due diligence has been exercised for

their safety, and the burden of showing neglect of the warehouseman or his agent is upon the plaintiff, but it is necessary for the warehouseman to show that the property of the claimant was destroyed. However he is not liable as an insurer of the goods unless he makes himself so by terms of his contract nor for loss of or injury to the goods due to an act of God or of the public enemy, nor for losses due to inherent defects in the goods, or other causes not due to negligence on his part. He is only required to exercise that degree of care which ordinarily prudent warehousemen are accustomed to exercise in regard to similar goods under like circumstances. As a general rule he is not liable for the destruction of goods by fire not due to his or his agent's negligence. Applying these principles to the case at bar, we find that there is no proof showing a want of this care or diligence. The cause of the fire is not shown and negligence is not imputed. Where there is no evidence as to the origin of the fire, the question of negligence should not be submitted to the jury. Tower v. Grocery Supply Co., 159 Pa., 106. Mitchell, therefore, as a bailee for hire is not responsible for their accidental loss by a fire which was not caused by his negligence. Judgment should be entered for the defendant.

OPINION OF SUPERIOR COURT

It has been held in several Pennsylvania cases that ownership by several persons may exist in a specific mass of fungible goods, tho the aliquot share of each owner can only be stated by the measurement of the whole mass. Such ownership is in the nature of a tenancy in common. Bretz v. Diehl, 117 Pa., 589; Hutchinson v. C., 82 Pa., 472; Brownfield v. Johnson, 128 Pa., 254.

It follows that this right of the several owners is the subject of sale, since it has been held from a very remote period, that where personal property is owned in common a tenant in common may sell his share. Williston on Sales, sec. 147. Bretz v. Diehl, 117 Pa., 589; Hutchinson v. C., 82 Pa., 472.

The law thus allowing ownership in the nature of a tenancy in common in a mass of fungible goods of an undetermined amount "no valid reason in logic and no rule of law can be suggested which would prevent parties from giving rise to a similar situation when the mass of goods belongs wholly to one party at the outset." If A may pour, with B's consent, ten bushels of grain into B's bin, which contained an undetermined amount, without losing a property right, B must surely be able to give A just such a property right if A had no grain originally and all belonged to B. If A's title to ten bushels, when he owned that amount originally, can be, and is translated, when he mingles it with B's grain, into an equivalent of ten bushels, a fraction of the mass, ten being the numerator and the undetermined quantity of the whole mass, which we may be called X, being the denominator, there is no reason why a similar transaction may not be made when B agrees to sell A ten bushels from a

mass belonging to B and the parties intend that the property shall pass at once." Williston on Sales, 155.

Applying these principles the weight of American authority supports the view taken by the learned court below, to wit: In the case of fungible goods, there may be a sale of an undivided share of a specific mass, tho the seller purports to sell and the buyer to buy a definite number, weight or measure of goods in the mass, and tho the number, weight or measure in the mass is undetermined, and by such a sale the buyer becomes an owner in common of such share in the mass as the number, weight or measure bought bears to the number, weight or measure of the mass.

If the buyer thus becomes a tenant in common with the seller it follows that the whole mass is at the risk of buyer and seller in proportion to their holdings, and each must bear his proportionate share of a loss from any cause for which the seller, as warehouseman, is not legally responsible.

A warehouseman is responsible for only those losses which are due to his negligence, and where he accounts for a loss in a way which shows that the loss was consistent with the exercise of due care on his part, this is a sufficient defense, without further proof of due care on his part, and the plaintiff cannot then recover without proof that the loss was due to the warehouseman's negligence. 2 P. & L., Dig., Dec. C., 1986.

A loss by fire is consistent with the exercise of due care by the warehouseman. Tarham v. R. R., 55 Pa., 53; Nat. Steamship Co. v. Smart, 107 Pa., 492; Tower v. Grocer Co., 159 Pa., 106. The burden of proving negligence was therefore on the plaintiff. No evidence of negligence was offered by the plaintiff and the judgment of the learned court below must therefore be affirmed.

ACKER v. BROWN

Sale of a Building as Personalty—Parol Agreement to Sell a Building

STATEMENT OF THE FACTS

Brown intending to erect a new building, verbally sold the old building to Acker to be removed within sixty days; but before the sixty days had elapsed Brown, himself, removed the building and sold the materials to third parties. The question is was this a conversion of the property of Acker.

Ingram for plaintiff.

Kearney for defendant.

OPINION OF COURT

HOLTZMAN, J. Irreconcilable conflicts exist in the decisions of the numerous courts, but the greater weight of authority holds that if the

owner of unincumbered real estate sells an article, which as a fixture is part of the realty, the sale operates as a severance of the fixture and the vendee has a right to remove it as a personal chattel. 19 Me., 252; 24 Wend., 191; 127 Mass., 125.

In determining whether an article is a fixture the old notion of physical attachment is exploded. It is the intention which is the criterion of annexation or disannexation and its removability largely depends upon the relation of the parties to the property and to each other. The intention must be expressly declared by the parties, or flow patent to all from the nature and character of the act, the clear purpose to be served, the manifest relation which the parties bear to the realty and the visible consequences upon the proper and obvious use of it. 106 Pa., 303; 81 N. Y., 38; 12 Mich., 314; 46 Texas, 551; 40 Mich., 693; and Elwes v. Mawe, Mich., 43 G 3 K. B., which is the leading English case on fixtures.

Severance either actual or constructive does not change the nature of the property. A fixture actually severed does not necessarily become personalty. Mere thinking that a fixture is personalty, or intended to be separated from the realty and restored to the status of personalty is not enough. Severing a chattel is not a secret purpose, for the intention to disannex will not prevail over the intention which the law deduces from acts; such an attention must be disclosed by acts, words and circumstances. The intention to disannex must relate to the time of disannexation. Realty may become personalty by force of the agreement of the parties in interest. Whether a sale transfers a fixture or only a right to sever it depends upon the interest of the seller in the fixture and the intention of the parties; such a transfer is held not to be within the statute of frauds, it being in form a bargain and sale. 19 Cyc., 1069; 4 Coke, 62a; 16 W. Va., 333; 43 Ill., 522; 128 Mass., 304.

The statute of frauds prevents an oral sale of a fixture where the title to the fixture is claimed thru title in the land and where the sale would defraud third parties such as subsequent purchasers, mortgagees, and heirs. In the present case no other parties are concerned but the absolute owner of the land and the building and a mere vendee. Even buildings may be regarded as personal property and so pass without the formalities of the statute. 10 Me., 429; 23 Ind., 562; 74 Pa., 286; 13 Allen, 139. The personal character may be given to a building by contract and will be regarded as personalty. 19 Conn., 154; 43 Iowa, 466.

In 88 Pa., 96, the school board verbally sold the old school house which it had erected on the defendant's land. It was held that such an agreement was not within the statute of frauds, and that the agreed consideration could be recovered. Where there has been such an agreement for removal, as renders the building personalty, an agreement for its sale may be made by parol. 74 Pa., 286; No. 8, 35 N. H., 477.

The old English cases held that fixtures were assumed to be articles for which trover would lie. 5 M. & W., 175; 3 I. B., 961; 1 C. M. & R., 276. Fixtures are removable at the will of the owner and as such are considered as chattels when bargained for and sold as such. They are not considered goods properly speaking. 11 M. & W., 243; 4 M. & W.,

687; 12 B. D., 700; 10 Ch. D., 13. Nor did any sale of them transfer any interest in land within the meaning of the fourth section of the statute of frauds. The same things may be fixtures as between some persons, and not fixtures as between others. Trover will lie for a building if it had been agreed that it should be treated as personal property. 1 Hill, 176; 6 W. & M., 679; 101 Pa., 265; 13 W. N. C., 332. Trover does not lie for chattels when title to them is claimed through the title to the realty for in such a case the title to land would be tried in a local action. 3 S. & R., 509; 99 Pa., 555; 11 W. N. C., 312; 29 Pittsb., 463; 13 Lanc., 188; 101 Pa., 265.

The facts indicate in this case that the owner clearly and expressly intended the building to be personalty. His subsequent sale of it estops him from denying that allegation. His relation to the property was such that he could class it as personalty and his relation to the vendee by contract such that he was bound to respect it. The agreement of sale was an unconditional contract. In such a contract the property passes to the buyer at the time when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed. (Sales act). The contract was complete and binding, and the subsequent sale was a sale of the plaintiff's property and worked a conversion.

Judgment in favor of the plaintiff.

OPINION OF SUPERIOR COURT

There was a verbal sale of a building by the owner of it and of the soil upon which it stood. The building was to be removed within 60 days. There was, so far as the intention of the parties can cause it, a passage of the ownership of the house to the plaintiff. This intention has effectuated itself unless the statute of frauds interferes.

A house is a part of the land on which it stands. The statute of frauds requires interest in land to be conveyed by writing. Is then an oral sale effectual?

Timber, growing on land, is as much a part of it, as is a house standing thereupon. While a sale of the timber generally requires a writing, Patterson's Appeal, 61 Pa., 294, if the timber is to be removed in a short time, the sale is regarded as converting the timber into personalty at the same time that it passes the ownership. McClintock's Appeal, 71 Pa., 365; Robbins v. Farwell, 193 Pa., 37. In the former case, the vendee was to remove the timber within 30 days after notice from the vendor to remove it. In the latter case, no time was expressed for removal, but the court discovers that "in this contract, it was intended by both parties that the timber should be immediately cut and removed. It was so cut and removed, etc."

It would be impossible to distinguish between an oral sale of timber, and an oral sale of a house. The house which is the subject of controversy was to be removed by the vendee within 60 days. The sale of it therefore, must be deemed a sale of personalty.

Since then, the ownership of the house passed to the plaintiff, the subsequent appropriation of it by the vendor was a conversion, for which he must make compensation. Affirmed.