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# THE FORUM.

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## THE COMMENCEMENT ORATOR

The gentleman selected to deliver the Baccalaureate Address at the coming Commencement of the Law School, is Hon. Gustav A. Endlich, LL. D., of Reading, Pa.

Judge Endlich, a graduate of Princeton, of the class of 1875, was admitted to the Berks County Bar in 1877. Five years thereafter, at the age of 26, he published "The Law of Building Associations," a work whose fulness and accuracy have secured it a very high place. Two years later came from the same pen "The Law of Affidavits of Defence." The next year were published two volumes of "Woodward's Decisions," and three years after that, "Commentaries on the Interpretation of Statutes."

For five years ending in 1894, Judge Endlich was the editor of the Criminal Law Magazine, although, having been elected Additional Law Judge in 1889, he had to take his share of the large business before the courts of Berks. He has delivered lectures before Law Schools, the State Bar Association and other learned bodies. In 1898 he received from Muhlenberg College, the degree of LL. D., an honor which his high character, exceptional learning, literary skill, and public services had abundantly merited. In 1899 his first term as judge being about to expire, he was renominated by both the Democratic and Republican parties of Berks county and elected without opposition for a second term of ten years.

There are no more learned lawyers in the State of Pennsylvania, than is Judge Endlich, and but few, if any, in the United States.

It is pleasant to add that he is an incorporator of our School, and from the first has been its steadfast and loyal friend. We are heartily glad that we shall have the honor and pleasure of seeing and hearing him in June.

## THE COLLEGE BANQUET

The annual college banquet held in Assembly Hall on the evening of the 20th, brought together about 200 of the undergraduates, every member of the college faculty and many of the alumni, living in the vicinity of Carlisle. It was a spirited,

and impressive gathering. Class, fraternity and faculty lines were cast aside and every person met on a common basis. College songs, college yells, class songs and class yells, followed at intervals, and each was given with enthusiasm. These along with the decorations, and the large crowd added to the impressiveness of the occasion.

Dr. Reed gracefully performed the function of toastmaster, and the following responded to toasts: Rev. J. A. Lippincott, D. D., Philadelphia; Dr. B. O. McIntire, of the College Faculty; Hon. J.M. Weakley, of the Law School Faculty; Miss Wright, Messrs. Leib, Baker, Smith and Cunningham of the college; Sherbine, Flynn and Barnhart of the Law School; and Mr. Amthor of the Preparatory School. Sherbine spoke for the Senior class of the Law School, Flynn for the Middle class and Barnhart for the Junior class.

The following students of the Law School were present: Hillyer, Patterson, Wilcox, Keller, Hamblin, Cook, Wolfe, Lanard, Houck, Vera, Hubler, Mowry, Peightel. Fox, Barnhart, Sherbine, Flynn, Bishop, Claycomb, J. R. Jones, Henraieke.

## SCHOOL NOTES

The Senior class has begun to make arrangements for the coming Commencement Exercises. At a recent meeting, committees were appointed, and other preliminary arrangements were made. Before the adjournment of the meeting, President Bishop appointed the following committees:

Programmes and Invitations — Fox, Boughton, Core and Gerber.

Music—Jones, Miller, Drumheller and Delaney.

Caps and Gowns—Ebbert, Phillips, Claycomb and Hickernell.

Hall and Ushers—Gross, Walsh, Dever and Williamson.

Phillips of the Senior class was in Chicago on legal business during part of the month.

The Middle class will receive three months' instruction on Blackstone, covering in that time the first and second books of the eminent jurists' works. Professor McKeehan, who will have charge of the subject, has announced that the course will be begun in a few weeks, when the class has finished the subject of agency.

The last of the series of mid-winter dances conducted by the Comus Club, was held in the Armory, Tuesday evening, Feby 24. An unusually large crowd was present.

The lecture of Wm. Jennings Bryan in the Carlisle Opera House on the evening of Feb. 23d, brought together a crowd that filled the house to its doors. The lecture was conducted under the auspices of the college Y. M. C. A., and was the first of a series to be given during the coming Spring.

Mr. Bryan was met at the station by the entire student body who extended him an enthusiastic reception. They followed him to the residence of Dr. Reed, whose guest he was while he was in town, and refused to leave until Mr. Bryan made a short address.

The subject of the lecture was, "A Conquering Nation." It was a discussion of the great questions being considered by the American people, taxation, trusts, the conquest of the Philippines and the money problem. Within the two hours of the lecture he discussed these questions with an eloquence that won frequent applause.

Senator Calpin of Lackawanna county, was a guest of Fleitz and Benjamin of the Middle class during the fore part of the present month.

Clifford D. Jones entertained his sister and Miss Densmore of Ebensburg for several days during the present month.

The following Law students attended a reception at Irving college, Mechanicsburg, on the evening of the 21st: Wilcox, Kress, Sherbine, C. D. Jones and Lloyd.

The Allison Society has elected the following officers to serve for the next three months:

President—Wilcox.

Vice President—Hillyer.

Secretary—Yocum.

Executive Committee — Burkhouse, Schwarthopf and McDonald.

## AMONG THE ALUMNI

In the recent municipal compaign in Scranton two of the alumni of the Dickinson Law School, T. A. Donahoe, '02, and W. W. Johnson, '01, participated prominently. The former was secretary and the latter assistant secretary of the Democratic city committee. These are positions of prominence and responsibility, it being necessary for the persons holding them to carry out the details of the campaign. This year that part of the campaign required men of more than ordinary energy and executive ability, for it was the first election in the city, under the Ripper Bill, for a Recorder, and the Democratic party having carried the city in the two last county elections, its leaders, in the city, planned a vigorous city campaign. To conduct it, they selected only men upon whom they could rely and in whose ability they had confidence. The appointment of Johnson and Donahoe gave general satisfaction.

Valentine and Hess, both members of the class of '01, who are in partnership in Wilkes-Barre, were recently appointed attorneys for a newly organized corporation the purpose of which is to give instruction in various branches by mail. Hess was one of its incorporators. He is also one of its directors. The business of the corporation will be conducted in Wilkes-Barre.

Thorne and Kern, the former a member of the class of '01, and the latter of '02, were in town during the past month for several days.

Jay D. Creary of last year's Middle class, was recently admitted to the Bar in Seattle, Wash.

Hon. L. P. Holcomb '01, a member of the present Legislature was in town during the present month.

Ed. Rogers who was a member of the present Senior class in its first year and who left here to enter the University of Minnesota, was recently elected captain of the foot ball team of that institution for next year. During the year that he was in the Law School here, he was captain of the Indians' foot ball team. He also played second base on their base ball team.

Frederick A. Marks '01 was recently elected president of the Central Luther League of Reading and vicinity. He is a resident of Kutztown, Pa., and has established there a lucrative law practice. For several years he participated prominently in the League work. His election to the presidency of that body was a recognition of his service in its interest.

## EUGENE D. SEIGRIST OF THE LAW FIRM OF SEIGRIST AND MOYER, HONORED

We take pleasure in announcing the election of Eugene D. Seigrist, Esq., to the Common Council of the city of Lebanon, from the first ward.

Recently Mr. Seigrist and Gabriel H. Moyer, of Palmyra, entered into a partnership as a law firm and opened offices at No. 773 Cumberland St., Lebanon, Pa., with a branch office at Palmyra, Pa.

Both gentlemen are graduates of the Dickinson School of Law, and are known as bright energetic and able young attorneys. Since their graduation they have become popular throughout the county of Lebanon and have taken an active part in Republican politics.

The election of Mr. Seigrist is indication of the fact that his sterling qualities are appreciated by his constituents.

# MOOT COURT.

## THOMAS' ESTATE.

*Post-nuptial contract—The confidential relation of marriage imposes the utmost good faith—There must be a full disclosure of property.*

STATEMENT OF THE CASE.

John Thomas and Sarah Giles, the former 60 years, the latter 28 years, married. Thomas owned $10,000 of personal property and land worth $25,000, and Giles $20,000 of personalty and land worth $20,000.

Both were childless, though previously married.

Six months after marriage, they agreed, in writing, each to renounce all right, at the death of the other, in the estate of the deceased.

Two years after, there being no material change in the estate of either, John died.

His widow, Sarah, commences partition to have dower assigned.

His heirs obtain a rule to show cause why the petition should not be dismissed.

The evidence shows that Sarah Giles was not aware of the size of Thomas's estate and did not know that he owned any land.

Thomas made no disclosures to her as to his estate.

On the other hand, he was ignorant that she owned anything, and supposed that she was without property.

JAMES and LOURIMER for the rule.

The promise of the husband was a good and valuable consideration for the promise of the wife. Duffy v. The Insurance Co., 8 W. & S. 434.

All that the law requires is that the provision for the wife be reasonable and proportional to the means of the husband. Kline's Estate 64 Pa. 123; Ludwig's Appeal, 101 Pa. 535; Turman v. Bunn., 92 Pa. 250.

HOUCK contra.

The statutory capacity of a *feme covert* to make contracts does not extend to contracts generally between husband and wife. Married woman's act of 1893; Odenwelder's Appeal, 1 Supreme Court 345; Bramberry's Appeal, 156 Pa. 628.

To make such an agreement valid there must be the utmost good faith between the parties and a disclosure of every essential fact necessary to intelligent action. Weeks v. Haas, 3 W. & S. 520; Bispham's Equity, p. 230 to 233; Darlington's Appeal, 86 Pa. 512.

OPINION OF THE COURT.

The only question at issue in this controversy is the validity of a post-nuptial contract, made between John Thomas and his wife Sarah, who now claims to take the interest in his estate, which in the absence of such agreement, is secured to her by law.

Parties to contracts of this nature are not like the ordinary contractors dealing at arms length; they stand in a confidential relation demanding the utmost faith. And where the parties have such a confidential relation as exists between husband and wife, the court will look upon their contracts with jealousy and solicitude, and if it appears that the slightest advantage was taken or deception practiced, relief will be given to the injured party. In a long line of well adjudicated cases, the principle is laid down that the provision made for the wife, in order to bar dower, must not be unreasonably disproportionate to the means of the husband. What provision was made for Mrs. Thomas? He knew nothing of her separate estate. On the other hand, he supposed that she was without property. He knew that he was worth considerable property. Notwithstanding, he sought to cut her out of a share in his estate, and by means of this agreement, leave her at his death, for all he knew or cared, dependent upon the charities of the world. We fail to discover any consideration except, in case he survived her, which was highly improbable, that he would renounce all right to her estate. This was not such a provision as would bar her right of dower.

Nor does the fact that the wife possessed an estate of her own make any difference in the determination of the question involved. Suppose at the time of the making of the contract she had made him acquainted with the size of her estate. Would it have had any effect? We think not. She was ignorant of the quantity of his estate. She knew nothing of what she was relinquishing. He did not say one word about his estate; he did not honestly, openly and fairly lay before her the true state of his property, which the law requires. Kline's Estate, 64 Pa. 122; Bierer's Estate, 92 Pa. 265; Shea's App., 121 Pa. 302. And when his representatives call upon a court to sustain a contract of this kind the burden is upon them to follow the proof of the contract by sufficient affirmative evidence that it was her voluntary act, and not induced by undue influence exerted upon her. Darlington's App., 86 Pa. 521; Kreiser's App., 69 Pa. 198; that no advantage was taken of the confidential relation; that there was no concealment of a material fact; that the contract was executed by the wife with a full knowledge of its provisions and their effect. Shea's App., 121 Pa. 302. And if they fail to show that the husband performed his whole duty, equity will treat the transaction as one of constructive fraud and set it aside. Kline's Estate, 64 Pa. 124.

In Campbell's Appeal, 80 Pa. 298, Thompson, C. J., said "The authorities, as also the reason of the thing, seem to teach that without an actual execution of

a post-nuptial settlement by an irrevocable effectual transfer of the property settled, the wife will not be bound if she does not choose, and is never bound by a mere promissory consideration. I have not been able to find a single case in which a wife has been decreed to perform a post-nuptial executory contract at the instance of the representatives of her husband." The contract in the case at bar is very like the one in the case cited above, and is therefore not binding upon the wife unless she choose to be bound.

For the reasons assigned we, therefore, discharge the rule and further decree that dower be set out.

WILLIS, J.

OPINION OF THE SUPREME COURT.

The theory that husband and wife were one person, never expressed the legal facts. The elaborate principles regulating their relation implied a recognition of their duality. If the husband murdered her, he was not supposed to kill himself; and an assault by him on her, was not considered a self-flagellation. The time never was, in the history of the common law, when the wife was not regarded as a woman, and the husband as a man, and when third persons dealing with one of them, were treated as *ipso facto* dealing with the other. Inaccurate thinkers delighted to chatter about the unity of husband and wife in one person, pretty much as in another sphere of thought, men scribbled and talked about the unity of two beings of different species in one person.

The legal fact now is, at all events, that a man is one person and his wife is another, and that she, as well as he, can make valid contracts, and, further, that she *can* make valid contracts with him.

We are to inquire whether the particular contract of Mrs. Thomas with John, her husband, is to be enforced.

It is first suggested, as reason for treating it as void, that there is no sufficient consideration. Is it really so? John's estate, at the time of making it, consisted of $35,000, of which $10,000 was personalty. Mrs. Thomas' estate, at the same time, was worth $40,000, of which $20,000 was personalty. If the estates continued as they were, Thomas by the contract renounced $20,000 of personalty absolutely, and a life estate in $20,000 worth of land. Mrs. Thomas renounced $5,000 of personalty and a life estate in $12,500 of land. These figures do not suggest a want of consideration.

We are reminded that John Thomas did not know that his wife had any property, and that he supposed that she owned nothing. What follows? He did not think that he was sacrificing anything, but *she* knew that he was sacrificing a good deal. Whether she received an adequate consideration or not, if it depends on opinion, depends on *her* opinion. She renounced a share in his estate because *she* knew that he was renouncing a share in her considerable estate. Surely the sacrifice she *knew* that he was making, was substantial consideration for her making a reciprocating sacrifice. How can she be hurt by the erroneous opinion of her husband that he was sacrificing nothing, when she knew that he was sacrificing much?

We are prepared to concede that if in fact what she was giving up was grossly disproportionate to what he was giving up, if *e. g.* he was worth $2,000,000 and she only $40,000, the disparity would strongly move a chancellor to annul the transaction. This disparity does not exist.

It is suggested that John Thomas did not act ingenuously towards her. The court will not annul a contract because of a want of frankness and explicitness on his part, but only when it is convinced that she has been or may have been misled by them into a contract which, in fact, is disadvantageous to her. We must advert here to the circumstance that it is he who suffers, and not she, by the want of openness. She *did* know that she had *some* estate, but did not know that he had any real estate. *He* supposed that she had nothing at all. Why did she not tell him? Did she owe no wifely duty of absolute disclosure of her circumstances to him? Or, by some singular freak of the law, was it simply for him to tell her all about his circumstances? We cannot see, in the conduct of this woman, that she was one of those confiding, self-forgetting, all-abnegating creatures, whom the courts have chivalrously taken under their especial patronage. If John was shrewd,

Sarah was shrewder. If John loved his next of kin more than Sarah, Sarah was not behindhand, in loving hers more than John. The fact is that Sarah seems to have been abundantly able to take care of herself, to meet craft with craft and concealment with concealment.

It is urged, again, that no consideration has actually passed, except the exchange of promises. Is that a quite fair statement of the fact?

The parties, having made the contract lived for two years. During these years, Sarah had for her estate its protection. She had bound John not to claim any part of it. It is only when he is dead, that she discovers that she has had no consideration but a promise. Similar complaints are sometimes made by people who have insured their houses or barns in mutual companies, and who, after the expiration of their policy, are asked to make payments on their premium notes. They think they are suffering a shocking hardship in having to pay for *nothing!* But they are not paying for *nothing.* They have had the protection of the policy for one, two, five years, and they ought to pay for it. So, Sarah's estate has been for two years shielded from the risk of her dying first, and of John's claiming a large slice of it, to the detriment of her next of kin, whom, apparently, she cared for more than for him. And now that the two years are over, and the risk is no more, she has the temerity to suggest that she received no consideration but a promise. Had she died first, I ween that her kin would have been eager enough to maintain the integrity of the contract. But now that it can be of no further use to her, she thinks she can kick it aside, and take from her husband's estate what she solemnly promised not to take. The suggestion is made that the contract was not separately acknowledged. We know not whether it was or not. But even if it was not, and would therefore be invalid as to the land of her husband, it would not be invalid as to his personalty. A wife can surely make contracts concerning personalty, without a separate acknowledgment. However, it would be better to concede that the reciprocal renunciations were intended to affect both land and personalty, and not either without the other, and to hold that if the contract is not valid as to the land, it will not be valid as to the personalty, because it would no longer express the intention of the parties. The contract is virtually a release of dower to the husband. Such release must doubtless have been acknowledged at the time at which this was made. For this reason alone, we agree with the learned court below that the agreement is void. Campbell's Appeal, 80 Pa. 298. We have examined the cases cited by the learned counsel, but have not deemed it necessary to cite them.

Appeal dismissed.

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## HENRY GRUBB vs. MANUFACTURING COMPANY.

*Master and servant—Discharge of servant before the end of the period for which he was hired—Right of president to discharge when board of directors were satisfied with the service of the servant.*

The company, by its president, employed Grubb, Jan. 1, 1900, for one year, at a salary of $25 per week, as a salesman, Grubb agreeing to do his work in a faithful manner and to the company's satisfaction. In three months he was discharged by the president of the company, in the face of the opposition of the directors, who were entirely satisfied with him. The president declared, as his reason for the dismissal, that he was not attentive to customers, nor alert or agreeable. Evidence tended to prove that a private business difficulty between them was the cause of the discharge. The court entered a non-suit, on the ground that the plaintiff was not satisfactory to the president.

WILLIS and YEAGLEY for plaintiff.

When the facts are disputed the question of whether there was sufficient ground for dismissal is for the jury. Wilke v. Hannon, 166 Pa. 202. In all cases the dissatisfaction must be real and not intended, and must be honestly entertained in good faith. Daggett v. Johnson, 39 Vt. 345; Singerly v. Thayer, 108 Pa. 291.

CHAPMAN and EBBERT for defendant.

When the facts are undisputed, the question of whether there was sufficient cause for dismissal is for the court. Elliott v. Wanamaker, 155 Pa. 67; Remuxter v. Huber Co., 196 Pa. 580.

OPINION OF THE COURT.

Suit was entered in this case because the plaintiff's work was alleged not to have been satisfactory to the president of the defendant company. The president, as agent of the company, employed the plaintiff, as salesman, upon the condition that he do his work in a faithful manner, and to the satisfaction of the company.

The president declared that he discharged the plaintiff because he was not attentive to customers, nor alert or agreeable. On the other hand, there was evidence that tended to prove that a private business difficulty between them was the cause of dismissal. There is no doubt that the president, by virtue of his office, had the power to discharge, if done for sufficient reason and in the interest of the company. But, whether the plaintiff performed his duties as salesman, is disputed and undetermined and should have been left for the jury. The doctrine of Elliott v. Wanamaker, 155 Pa. 67, that what is sufficient ground for dismissal, is a question of law for the court, the facts being undisputed, does not apply in this case; for the facts are, in this case, disputed, and ought to have been left for the jury.

The declaration of the president that the plaintiff did not perform his duties in a proper manner; and the other evidence that the directors were satisfied with the plaintiff and that it was a business difficulty between him and the president that caused his dismissal, are contradictory in terms. In Dixon v. Daub, 17 Sup. 168, the court said: "There is in every case triable by jury a preliminary question of law for the court. Whether or not there is any evidence from which the fact sought to be proved may be fairly inferred; if there is, it is sufficient to send the case to the jury, no matter how strong the proofs to the contrary." The plaintiff in this case, claimed commissions as agent of defendant. Defendant denied their agency, alleging that they acted as mere volunteers and without authority.

Whether or not plaintiffs were agents of defendant, was held to be a question for the jury. This is also supported by 122 Pa. 494. Non-suit is set aside.

J. M. PHILLIPS, J.

OPINION OF THE SUPREME COURT.

We regret that in the consideration of this case we receive so little aid from the learned court below. Its opinion was manifestly written under an extreme sense of the value, for other purposes, of its time, and of the irksomeness of investigation, reasonably thorough enough to guide it or us to a sound conclusion. Its result, after so meager and superficial an examination, could, if correct, be so, only by an accident.

There are three distinct questions in this case. Was Grubb dischargeable by the company, on his failing to perform his work to the company's satisfaction? Did he fail to perform it to its satisfaction? Was he discharged by it?

Grubb agreed "to do his work in a faithful manner and to the company's satisfaction," and he was thereupon employed by it for one year at a salary of $25 per week. This agreement makes a condition subsequent, so that if at any time within the year, Grubb should fail to perform his work in a faithful manner, or to the company's satisfaction, the obligation of the company to retain him, and pay him would cease at its option.

"Faithful manner" appeals to an objective test. The defendant could not be the sole judge of it. A want of faithfulness must be expressed in the conduct of Grubb; his want of punctuality, his absences, his indifference to being agreeable or accommodating towards customers. We think it was to be presumed that Grubb had performed in a "faithful manner," until evidence to the contrary was produced. It would have been error to nonsuit him, before such evidence was tendered by the defendant, Grubb having shown no unfaithfulness in the manner of his performance, if the right to dismiss Grubb depended on this unfaithfulness.

Grubb agreed, however, "to do his work * * * to the company's satisfaction," and it appeared at the trial, that the president of the company had discharged him on the ground that he, the president, was dissatisfied with him. The president, it was shown, had declared, as his reason for dismissal, that Grubb was "not attentive to customers, nor alert or agreeable." The plaintiff submitted evidence tending to prove that a private business difficulty be-

tween him and the president, was the cause of his discharge. Should this evidence have been submitted to the jury? We think it should.

The discharge *might* have been because of this business difficulty. That would have produced dissatisfaction in the president's mind. But, (a) it would not have been dissatisfaction with Grubb's "work." Grubb was to "do his work" to the company's satisfaction. He might have done it thus, and might have been discharged for a personal reason. The court could not properly hold that the mere act of discharge was the proof of the president's want of satisfaction with his work. (b) The president's dissatisfaction springing from extra-corporate relations between himself and Grubb, could not be deemed the company's dissatisfaction. The president's state of mind, as officer, and arising from his interest in the corporation, might be considered as the company's state of mind, but his state of mind having no relation to his function as officer could not be imputed to his company. If he was dissatisfied with Grubb because of a private quarrel, that dissatisfaction could not be deemed the dissatisfaction of the company, the common employer of both. One question to be decided then, was whether such want of satisfaction, on the president's part, as led him to dismiss Grubb, was dissatisfaction with Grubb's "work." The court could not assume, as it did, in entering a non-suit, that it was.

But, suppose the jury should find that the president was not satisfied with the "work," and that his want of satisfaction was the company's. Would that alone have justified the discharge? We think it would. It is to be noted that we distinguish between being dissatisfied with the work, and being dissatisfied with something else than the work. If the company was dissatisfied with him, because his family did not buy its goods from it, because he did not attend the same church as the directors, because he voted the Democratic ticket, etc., etc., and not because of his mode of performing the work for which he had been employed, it would have had no right to end his employment before the expiration of the year. When however the dissatisfaction with the work is real, (*bona fide*, to use an expression of some of the cases), then the company may discharge him. It is not necessary that in addition there should appear to other minds, *e. g.* to a judge, or to jurors, facts without which in their opinion there ought to have been satisfaction. The employer may be dissatisfied, when others think that he should not be, but he is what he is, and when he stipulates that the employment shall not continue when his satisfaction ceases, courts are not to say that such a stipulation is void. A man has a right to contract for his own satisfaction. Singerly v. Thayer, 108 Pa. 291. In Seely v. Welles, 120 Pa. 69, a reaper was alleged to have been sold. The buyer furnished evidence that the agreement was that "if it worked to suit me, and my team could handle it satisfactorily on my land, I would buy it; otherwise I would not, and I told him I was to be the judge." It was error for the trial judge to tell the jury that if this was the understanding, the defendant need not pay "provided *you* find that the machine did not work well, and that he had reasonable cause to be dissatisfied with it." "His objections to the reaper," says the Supreme Court, "may have been ill-founded, indeed they may have been in some sense unreasonable in the opinion of others, yet, if they were made in good faith, he had a right, if his testimony is believed, to reject it. If he wanted a machine that was satisfactory to himself, not to other people, and contracted in this form, upon what principle shall he be bound to accept one that he expressly disapproved?"

The same principle has been applied to a contract for a suit of clothes, Brown v. Foster, 113 Mass. 136; for a bust of a deceased person, Zaleski v. Clark, 44 Conn. 218; for an organ, McClure v. Briggs, 58 Vt. 82; to an employment of a man to superintend fur-cutting, Koehler v. Buhl, 94 Mich. 496; or of a man as an agent, Tyler v. Ames, 6 Lans. 280; or of a man to write weekly for a newspaper, Crawford v. Mail & Express Co., 163 N. Y. 404.

Of course, as we have already suggested, the question remains to be decided by a jury whether the defendant was in fact dissatisfied with the work, or simply pretended to be, some other cause having induced him to discharge the plaintiff. Some-

times, the acceptableness of the work, as of a bust, or suit of clothes, depends so much on the idiosyncrasies and tastes of the customer, that his declaration of dissatisfaction, (in the absence of other evidence, *e. g.* contradictory declarations, retaining and using the article, etc.), must be decisive. In other cases, the total absence of any objective ground for dissatisfaction may be a proof that the dissatisfaction was simulated. It is the actual, not the pretended or asserted dissatisfaction, that justifies the discharge; Smith v. Robson, 148 N. Y. 252; Duplex Safety Boiler Co. v. Gardner, 101 N. Y. 387. The question always is, however, was the employer *really* dissatisfied with the work?

The directors of the company were entirely satisfied with Grubb. The president, it is averred, was dissatisfied. Whose state of mind is to be deemed that of the corporation? Grubb was to do his work "to the company's satisfaction." It is to be noted that Grubb was employed by the president; he was discharged by the president, and he has by this action, treated himself as discharged by the corporation, for he has brought his suit against it. He seems to concede that the president had the power to employ and to discharge. That being so, we think the president was understood to represent the company in judging the existence of grounds for discharge. His pleasure employed Grubb, his displeasure must be the cause of the discharge of Grubb. The president is selected with a view to his fitness to superintend the employes, and judge their fitness. The directors do not hire them; are not presumed to know whether they are competent or not. In the absence of further evidence, as to the arrangements in this corporation, and in view of the plaintiff's recognition of the president's representing the corporation in the discharge of plaintiff, we think the president was the person whose satisfaction or dissatisfaction was to be deemed that of the corporation.

The individual directors, not acting in session, have no power to bind the corporation. No deliberation on the retention of Grubb, at any meeting, is shown, no resolution that he was satisfactory and ought to be retained. It is the integral opinion of the board, not that of the several components, that could pretend to be the opinion of the corporation.

If the board had the power of retention, and was to judge the cause of dismissal, and to dismiss, Grubb has not in fact been dismissed. He should have gone to his work, and he would possibly have found that, as the directors claimed the power to retain, they furnished to him work to do, and stood ready to pay him his compensation. Instead of this, Grubb seems to have acquiesced in the president's decision, and he has sued the corporation on account of it.

While the court did right in setting aside the non-suit and granting another trial, we find no indications that, at the second trial, the principles above enunciated were recognized. Had the question been submitted in proper form, the result might have been different.

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

## COMMONWEALTH vs. HARTZELL.

*Criminal law—Indictment for maintaining a pig-sty—Nuisance—Plea of autrefois acquit—Motion in arrest of judgment.*

STATEMENT OF THE CASE.

Hartzell was indicted for maintaining a nuisance in supporting a pig-pen in Carlisle, and was acquitted. He continued to maintain a pen for a year in the same state as before when he was indicted again for the same nuisance. When he was first indicted, there were four residences within one hundred rods of the pen. Since then, ten dwelling houses have been erected within forty rods of the pen, and the highway near the pen is much more travelled than formerly. Hartzell pleads *autrefois acquit* and not guilty. The above facts have been found specially by the jury, under the first plea. Under the second, he has been found guilty. Motion in arrest of judgment.

JACOBS and YOCUM for the plaintiff.

The plea of *autrefois acquit* is a complete defence whenever the evidence shows the second offence to be the same transaction as the first. Com. v. Conner, 9 Phila. 592; 4 Yeates 68; 70 Pa. 68; 12 S. and R. 391; 28 Pa. 14; 13 Mass. 455.

A pig-sty is not a nuisance *per se*. Price v. Gaulf, 118 Pa. 403; 54 Pa. 401; 84 Mich. 38; 61 Wis. 500.

SMITH and WILLIS for the commonwealth.

Under the plea of *autrefois acquit*, the two offences must be identical and is a question of fact for the jury. McCleary v. Com., 29 Pa. 323; Com. v. Conner, 9 Phila. 591; State v. Ingraham, 96 Iowa 278.

An offensive trade or business carried on in a public place is a nuisance. Wier's App, 74 Pa. 241; 57 Pa. 274; 130 Pa. 546; 139 Pa. 83; 6 Gray 474; 4 Clark 104.

OPINION OF THE COURT.

The defendant in this case owned and maintained a pig-sty in the borough of Carlisle.

Since his former indictment and acquittal for maintaining a nuisance in form of a pig-sty, an additional number of houses have been built in close proximity to his pen, and it is the inmates of these houses that are now objecting to defendant maintaining his pig-sty in its present location.

No one would attempt to charge that a pig-sty would, under all circumstances, be a nuisance. It was held not to be so when there were but four houses within one hundred rods, but since then, with the additional number of houses, it becomes an entirely new proposition, and must be viewed from a different standpoint.

In Wier's Appeal, 74 Pa. 241, J. Sharswood, says: "There are many kinds of business useful and even necessary in every large community, which certainly are not nuisances in themselves but which nevertheless become so in view of the circumstances of the neighborhood in which it is proposed to establish them."

There is always a distinction to be observed between a business long established in a locality, which has become a nuisance from the growth of population and erection of dwellings in proximity, and that if a new erection, threatened, in such a vicinity; nevertheless the rule is plainly laid down: "That carrying on an offensive trade for any number of years in a place remote from buildings and public roads, does not entitle the owner to continue it in the same place after houses have been built and roads have been laid out in the neighborhood to the occupants of which and travelers upon which it becomes a nuisance." As the city extends such nuisances should be removed to the vacant grounds beyond the immediate neighborhood of the residences of the citizens. "This public policy as well as the health and comfort of the population of the city demand." Rhodes v. Dunbar, 57 Pa. 274. Wier's Appeal, 74 Pa. 231.

It is argued that "when defendant was engaged in a lawful business, the injury complained of must be more than a mere annoyance," and "that every man has a right to the natural use of his own property." Price v. Grantz, 118 Pa. 403; Kaufman v. Grieseniver, 26 Pa. 407-415.

This may be true but we are inclined to believe, that a pig-sty under the given circumstances, would be so offensive to the ten persons compelled to live within the radius of its odor that it would be against all principles of health and sound policy to allow it to so remain for benefit of one and detriment of many. Brady v. Weeks, 3 Barbour S. C. R. 159.

In Douglass v. State, 4 Wis. 387, it was held that it is no defence to an indictment for maintaining a nuisance by a mill dam that was erected before any inhabitants settled near it.

Establishments like pig-stys, not only interfere with the health, but if they do not reach to that, they do to the ordinary enjoyment of the residences of inhabitants coming within the circle of atmosphere tinted by them, and both property and persons may be prejudiced or injured thereby.

The right to claim that such establishments shall be prevented or removed is the right that every citizen has to pure and wholesome air, at least as pure as it may be consistent with the compact nature of this community in which he lives. Rhodes v. Dunbar, 57 Pa. 286.

In consideration of above facts and findings, we feel compelled to deny the motion in arrest of judgment.

Motion denied.

FLEITZ, J.

OPINION OF THE SUPREME COURT.

The pig pen, for whose maintenance Hartzel is now indicted, is the same in respect to which he was previously indicted, and acquitted. He pleads *autrefois acquit*. If the nuisance now alleged, is the same as that for which he was convicted, he cannot be successfully indicted again for it. The pig pen is the same.

But, the pen is not the nuisance. The nuisance is the offence to persons, the injury to property, of which the pen is the cause. The offence or injury of to-day is not that of to-morrow. The pen is continuous, the offence or injury caused by it is continuous, but that offence or injury at one time, is different from the offence or injury at another time. For to-day's there may be an action, or a prosecution. For to-morrow's, there may be another action or prosecution.

If in a prosecution for to-day's, certain facts are shown to exist, and the verdict is not guilty, the judgment is conclusive in any subsequent prosecution for the continuance of those facts, that they are not a nuisance. The judgment would therefore bar the action.

But, a nuisance does not consist in a structure, its state or act, but in its relation to person and property. A pig-sty is not, cannot be, *per se* a nuisance. The sty without the pigs is surely not. If the pigs and the pen were thoroughly washed every ten hours, they could hardly be a nuisance. So, a sty with pigs allowed to be unwashed and extremely filthy, would not be a nuisance, unless there were persons or property of others than the owner sufficiently near to suffer inconvenience or harm. It may easily be that a mill or factory when first operated is not a nuisance, because of the absence of persons or property within the radius of its noises, effluvia, etc., and that this mill or factory, though conducted in precisely the same way, becomes a nuisance, owing to the entrance within the radius of such persons or property. Thus lead works, established at a point remote from habitation, may grow to be a nuisance by the extension of a city towards it. People v. Detroit White Lead Works, 82 Mich. 471; Newcastle v. Raney, 130 Pa. 546; Wier's Appeal, 74 Pa. 230; 21 Am. & Eng. Encyc. 691. The jury found, at the former trial, that defendant's pig-sty was not a nuisance, when there were only four residences within 100 rods of it. Since then ten dwellings have been erected within 40 rods of it. The highway near the pen is also much more frequently traveled. It is impossible to maintain that the acquittal under the former circumstances is conclusive that the pig-sty is not now a nuisance. The court below correctly held that the plea of "*autrefois acquit*" was not sustained on the special verdict, and entered judgment of *respondeat ouster*. The plea of "not guilty" being then put in, the same evidence as under the plea of *autrefois acquit* was submitted and the jury returned a verdict of guilty.

Despite the defendant's motion to arrest the judgment, the court has entered judgment. We see no cause for the motion. If the evidence was insufficient to justify the verdict, a new trial, and not a motion in arrest of judgment, was the proper remedy.

Judgment affirmed.

## HOPE vs. THORPE.

*Contract—Mutuality of consent—Statutory requirement as consideration—Intention to be bound.*

STATEMENT OF THE CASE.

Thorpe, a stranger to Hope, told him on one occasion that he would give him one hundred ($100.00) dollars, if he would never swear any more, being disgusted with his frequent use of profane words. Hope impressed by the fact that his habit alienated persons from him, made up his mind not to "swear" any more and in fact did abstain for nine months. Then remembering Thorpe's promise, Hope made up his mind to ask for the one hundred ($100.00) dollars. Thorpe said he had not made his promise otherwise than as a suggestion and rebuke. Hope thereupon sues in assumpsit.

YOCUM and PRICKETT for the plaintiff.

If a proposal is explicit it may be assented to by acts, for acts may be as clear an indication of intent as words can be. Hoffman v. Railroad Co., 157 Pa. 174; Phillips v. Alleghany Car Co., 88 Pa. 368; 121 Mass. 528; 97 N. Y. 52; 12 L. R. A. 463; 145 Mass. 69.

SMITH and VERA for defendant.

There was no contract, because there was no mutual consent to be bound.

Sherman v. Kitsmiller, 17 S. and R. 45; Powers v. Curtis, 147 Pa. 340; 7 Watts 48; 29 Pa. 358; 165 Pa. 98; 166 Pa. 265.

There was no consideration because plaintiff only did what he was legally bound to do. P. and L. Dig., vol. 1, p. 1123, on Blasphemy; Conover v. Stilwell, 34 N. J. L. 54; Amer. & Eng. Enc. of Law, Vol. 6, p. 750.

OPINION OF THE COURT.

This is an action for assumpsit for $100. It seems that Thorpe, a stranger to Hope, told him on one occasion that he would give him $100 if he would never swear any more, being disgusted with his frequent use of profane words. Hope being impressed by the fact that his habit alienated persons from him, made up his mind not to swear any more, and in fact did abstain for nine months. Then, remembering Thorpe's promise, Hope made up his mind to ask for the $100.

Thorpe said he had not made his promise otherwise than as a suggestion and a rebuke. The plaintiff contends that he has acted upon it, and has refrained from swearing, and he is now permitted to recover for this agreement, claiming nine months is a reasonable and sufficient time.

From the facts as presented, the question is, was there a contract or was it merely a loose conversation, intended as a rebuke, and as a suggestion for Hope's benefit?

It is necessary to decide whether this was such an assent to, and carrying out of the contract, as would warrant a recovery.

As it is held in Thurston v. Thornton, 1 Cushing 89, that it is necessary to decide as in this case to prove a contract, whether the minds of the parties were in such an assent as to create thereby a valid contract, or whether what passed between them was merely a loose conversation, written, understood, or intended as a contract. A contract implies the assent of two minds. It must be understood between the parties that one party has made an offer and the other has accepted it.

If one party should make an offer and no one accepts it there would be no contract. There is an apparent exception, however, where a party makes an offer to the public, offering a reward to any one who would do a certain act, this is to no one in particular, but to any one who will accept it, and it is an implied part of the offer that time shall be given to any one who chooses to accept it. And if a person, before the offer is withdrawn, does that which by the terms of the offer entitle him to the reward, his so acting upon the offer constitutes an acceptance of it, and the party making the offer is bound to fulfill his promise.

But when the parties are face to face to constitute a contract, the one must offer, and the other accept, unless where it is part of the agreement, that time shall be given to the person, to whom the offer is made, to determine whether he will accept or not, in which case the time given makes part of the contract.

Was there a meeting of minds as to form such an assent capable of constituting this contract, or as contended by plaintiff, was it merely intended as a rebuke and not an agreement?

Was it understood, when the parties separated, there was to be anything done in furtherance of the agreement, or did plaintiff refrain from swearing for his own benefit, and not with intention of acting upon the agreement? We do not think there was any intention to be bound by this offer, but that plaintiff acted upon it for his own benefit.

Even though there was a good offer and acceptance, it is held in Columbia Bank & Bridge Co. v. Haldeman, 7 W. and S. 233, that a contract made about a matter prohibited by statute, is void. Therefore, the consideration is not good, as it is held by all courts and claimed by all text writers that a consideration whereby one agrees to do something, which he is legally bound to do, is no consideration for the contract, and renders it void. A. and E. Encyc. vol. 6, p. 750; Conover v. Stillwell, 34 N. J. L. 54.

As the Act of Assembly of April 22, 1794, expressly forbids the use of any profane or blasphemous words, under penalty of fine or imprisonment.

We do not think a cause of action will lie in this case, as the time of performance has not elapsed, the words, never swear any more, which implies that until his death, no action would lie for the performance. In fact it would be necessary for plaintiff's legal representatives to bring the action, and not plaintiff himself.

We must therefore decide in favor of defendant.

MOREHOUSE, J.

OPINION OF THE SUPERIOR COURT.

We think that the conclusion reached by the learned court below, in this case, was correct. If Thorpe promised bindingly to pay Hope, $100, the promise was not to pay at once. He said he "would give him (Hope) $100 if he would never swear

any more." Hope did not accept the offer, and give his acceptance and promise not to swear, as consideration for Thorpe's promise. The only consideration for that promise, was, then, not Hope's promise never to swear, but Hope's abstinence from ever swearing. It is no more Thorpe's duty to perform before Hope, than Hope's to perform before Thorpe. Hope has abstained for nine months, but he may yet live for nine or ninety-nine years, and he does not perform at all, until he abstains throughout his lifetime. In this case, there can be no partial performance.

No contract arose, from Thorpe's words, unless he intended that Hope should understand him to intend one, and Hope did so understand, or unless his words and demeanor caused, and reasonably caused Hope to think that Thorpe intended a contract. The evidence of Thorpe is, that he did not intend his words to be other than a rebuke. Whether he did or not, the jury should decide. And, if the jury should find that Thorpe did not intend a promise, they should determine whether Hope believed him to intend a promise. The evidence is that Hope, being impressed, not by the promise, but by the discredit into which his habit of swearing was bringing him, made up his mind not to swear. It was after abstaining for nine months, that he remembered Thorpe's words, and made up his mind to demand the $100. From this evidence, the jury might very well infer that Hope did not understand Thorpe to have made a promise intended to be binding. If he did not, he could not make it binding by his own future conduct.

It is to be regretted that the evidence is not more explicit as to the character of the "swearing" from which Hope has abstained. The word "swearing" is capable of being applied to words the utterance of which is not prohibited by statute, as well as to those prohibited. The abstaining from doing acts which there is no legal right to do, will not be a sufficient consideration for a promise to compensate for the abstinence. In the absence of evidence as to the character of the "swearing" refrained from, there could be no recovery.

It is unnecessary to consider whether, in order that Hope might avail himself of Thorpe's promise, he should have notified Thorpe of his intention to claim it. In view of its character, the length of time covered by the contemplated performance, the difficulty of Thorpe's knowing whether Hope was abstaining or not, we think notice should have been given of the intention to earn the $100, even though no *promise*, on Hope's part, was necessary. There are cases in which intention to rely on a promise must be signified, and this, we think, is one of them.

Judgment affirmed.

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## CITY OF BROWNSVILLE vs. THE POWER COMPANY.

*Real property—Rights of riparian owners. Injunction to restrain an upper riparian owner from exercising certain rights refused—Right of water company to exercise eminent domain.*

STATEMENT OF THE CASE.

John Smith was the owner of a tract of land bordering on a stream, on which tract he had erected a grist mill, the power for which was furnished by building a dam across this stream and using the water power. Subsequently, the Borough of Brownsville built a basin and pumping station at a point below the dam, using the water thus obtained to supply its inhabitants, conveying it to the city in pipes, a distance of several miles. Smith has just sold his mill property and water rights in the stream to the A. B. C. Co., who propose raising the face of the dam so as to obtain a greater water power and erect on the grist mill site a plant for the purpose of developing this power and disposing of it to the highest bidder. The City of Brownsville now asks for a permanent injunction restraining the Power Co., on the ground that the volume of water below the dam will be diminished by increasing the size of the dam, thus impairing its supply.

GERBER and MOWRY for complainant.

A riparian owner may not use the water running through his land for manufacturing or other purposes, not incidental to the natural use of his land. Clark v. R. R., 145 Pa. 438; Pa. R. R. v. Miller, 112 Pa. 41; Wheatley v. Chrisman, 2 Pa. 298. An upper riparian owner cannot materially

diminish the flow. R. R. Co. v. Miller, *supra*. The damages being irreparable, an injunction should be granted. Commonwealth v. R. R., 24 Pa. 159.

HAMBLIN and KRESS for respondent.

Injunction is not the proper remedy, no irreparable injury being threatened. Rhodes v. Dunbar, 57 Pa. 274. Damage can be ascertained. Harkinson's Appeal, 78 Pa. 196. The complainant is a trespasser inasmuch as he is violating rights of lower riparian owners. Therefore no injunction should be granted. Haupt's Appeal, 125 Pa. 24. Every riparian owner can use the water flowing through his land even though lower riparian owners suffer thereby. 2 Watts 327. Reasonable detention of the water does not injure those below. 12 Pa. 249.

OPINION OF THE COURT.

Whatever right the plaintiff borough had to take the water from this stream for the use of its inhabitants must be found in the Acts of Assembly of April 3, 1851, and May 25, 1887. By these acts, boroughs are authorized "to provide a supply of water for the use of the inhabitants," and are given the right of eminent domain conditioned on the payment to the owners of property appropriated, damages for the taking thereof. By these acts a borough may go outside its limits for a water supply, and its rights to the water in a stream are not measured by the rights of a riparian owner.

The rights of a riparian owner would not justify the plaintiff in carrying the water for miles out of its channel to supply the borough of Brownsville with water if such use of the water would perceptibly lessen the volume of the stream. We have nothing to do with the rights of riparian owners below the pumping station. If they have been injured they must establish such injury in a proper action. Our concern is with the upper riparian owner, the Power Co., which plaintiff desires to have enjoined from enlarging a dam for the purpose of increasing the power of the plant. In Haupt's Appeal, 125 Pa. 211, it was held that "although the plaintiff has a right to appropriate the stream and has appropriated it, the rights of upper riparian owners are not extinguished. The complainant has not made compensation for them, and defendant has yet the power to exercise them."

Every owner of land through which a stream of water flows, is entitled to the use of the water, and to have the stream flow in its natural and accustomed course, without diminution, diversion or corruption. The right extends to the quality as well as the quantity of the water. To this rule there are some well established exceptions. Every riparian owner has the right to the use of the water passing over his land for his ordinary domestic purposes, and may use all the water if all is required. A second exception is the right to confine and dam back a stream for the purpose of generating power. In the present case the mill was located on the stream prior to the establishment of the pumping station. It is held in Hoy v. Sterrett, "that the mere prior occupation of a stream of water for the purposes of a mill will not vest such an exclusive right in the occupant as to enable him to maintain an action against a person who erected a mill and dam above his, by which the water is in part impeded and he is in some degree injured thereby. Every riparian owner is entitled to use the flow of the water through his land, although the owner of a mill below may be in some measure injured." It is earnestly contended by plaintiff that confining the water is not a use incidental to the land. However, this may be, it is a use and a right which has been recognized and held reasonable by the courts in Hoy v. Sterrett *supra*, and Hartzell v. Sill, 12 Pa. 248. The establishment of a pumping station did not prevent defendant from using the water in a prudent manner as it flowed through defendant's property. The right of defendant to construct a dam and use the water in a reasonable manner for generating power being established, and no compensation having been paid to defendant for this right, it is clear that defendant cannot be enjoined from building the dam. Since the City of Brownsville has the right of eminent domain, their proper remedy would be by condemnation proceedings, by which defendant would be compensated for the loss of his right to build a dam.

Bill dismissed.

PEIGHTEL, J.

OPINION OF THE SUPREME COURT.

The City of Brownsville, we must assume, owns, is lessee of, or otherwise has a right to, the basin and pumping station on the

stream below the dam. It is therefore to be deemed a lower riparian owner, and as such, has a right to use the water of the stream, and, in consequence, has a right that no upper riparian owner shall, by his acts, interfere with this use.

If the upper riparian owner is threatening by means of permanent arrangements to interfere with this use, the City is not limited to the action of trespass for the vindication of its right. It may ask and obtain an injunction, without first securing a judgment at law. Scheetz's Appeal, 35 Pa. 88; Jennings Bros. & Co. v. Beale, 158 Pa. 283, [taking away coal from land]; Duffield v. Hue, 136 Pa. 602; Alleson v. Evans, 77 Pa. 221 [taking away oil]; McCallum v. Germantown Water Co., 54 Pa. 40 [polluting water by a factory]; Haupt's Appeal, 125 Pa. 211; Shenandoah Company's Appeal, 2 W. N. C. 46 [taking water from a stream].

The important question, then is, is the defendant, as upper riparian owner, about to interfere with the right of the lower owner? He can interfere with his right by interrupting the flow, by changing its course, by diminishing the quantity of water flowing to the lower land, by corrupting the water. The wrong suggested by the plaintiff as impending, is the interruption of the flow, or the diminution of the amount of water flowing, or both.

A certain diminution of the water is permissible to the upper owner. So much water as is necessary for culinary washing or other domestic uses, for potation, for the watering of cattle belonging to the owner and kept on the premises, can be taken from the stream, without regard to its size. If it be small, these uses may lead to, and will justify, the abstraction of all the water. Hoffer v. Hoffer, 146 Pa. 365; Pa. R. R. Co. v. Miller, 112 Pa. 34; Clark v. R. R. Co., 145 Pa. 438.

The use must be *bona fide*, not of more than reasonably necessary, nor under the influence of any malevolence towards a lower owner. *Cf.* Hoy v. Sterrett, 2 W. 327; Hetrick v. Deachler, 6 Pa. 32. All the water in excess of what is used *bona fide* for these purposes must, with exceptions to be noted, be allowed to flow down the stream, for the use of the owner of the nether riparian lands.

The use of water as a power for the operation of grist and saw mills stands apart from other non-domestic uses. It is settled that the owner of an upper mill, whether it be first or last in the order of erection and operation, has the right to make such use of the water as is reasonably necessary to operate the mill. Morris v. McMamee, 17 Pa. 173. In doing so it may be requisite to dam the water back two days; Hoy v. Sterrett, 2 W. 327; three, four, five, even thirteen days at a time; Hetrick v. Deachler, 6 Pa. 32; Hartzall v. Sill, 12 Pa. 248. The owner of the lower mill has no right to operate it, at the cost to the owner of the upper, of the non-use of the upper. Nor has any plan of division of time of operation between the mills, been hit upon. It is not held, *e. g.* that, when the water is insufficient to operate both mills simultaneously, the upper mill shall run a week or two weeks, and then cease to run, in order that the lower mill may run for an equal time. Nor is there any limit to the size, and necessary power of the mill, nor apparently, to the height of the dam. In Hartzall v. Sill, 12 Pa. 248, it was from 10 to 12 feet high. Nor is precedence given to a grist, as against a saw-mill, or *vice versa*. The upper mill was a saw-mill, and the lower a grist mill, in Hoy v. Sterrett, 2 W. 327; Hetrick v. Deachler, 6 Pa. 32; Morris v. McMamee, 17 Pa. 173.

As the water may be prevented for an undefined time, (that is, so long as is reasonably necessary to the operation of the upper mill), from reaching the lower mill, so any diminution which may be incidental to this detention and use, must be borne by the lower owner.

Water may be used for irrigation; Lord v. Meadville Water Co., 135 Pa. 122, but the condition upon which this use may be made of it is that the quantity reaching the lower owner is not, in consequence, "materially diminished;" Miller v. Miller, 9 Pa. 74. The upper owner should not divert the water, for this object so as to "destroy or materially diminish or impair the application of the water by other proprietors;" Messinger's Appeal, 109 Pa. 285. If, on account of the volume of the stream, the quantity taken perceptibly and materially diminishes the water, a wrong is committed. It is immaterial that the lower owner has enough for his domestic pur-

poses, or as much as he is actually wishing to use. Miller v. Miller, *supra*. His right to a materially undiminished flow is not dependent on his own purposed or actual use of the water.

Riparian land can be devoted to other uses than residence, or farming, or cultivation of grass, or the feeding of cattle. A tannery may be sustained upon it, Harley v. Meshoppen Water Co., 174 Pa. 416. It may contain lead, or other ores, and these ores may be extracted from it; In the process, water may be needed. The same condition applies to this use as to that for irrigation. The owner can not deprive the sub-riparian owner of as much water as is reasonably necessary for the business, because the "business might reasonably require more than he could take, consistently, with the rights of the plaintiff." He can take some of the water, but it must be without "materially diminishing it in quantity." This is the rule applied to the extraction of lead; Wheatley v. Chrisman, 24 Pa. 298. Generally, when the water is used, not for "ordinary domestic purposes" but "for manufacturing or other purposes having no necessary relation to his use of his land," the upper owner must not "materially or sensibly diminish its quantity."

A similar principle has been applied to railroads, which are also riparian owners. If they take water from the stream for use in their locomotives, they are liable to owners of lower land, if the result is "any essential diminution" of the stream. Pa. R. R. Co. v. Miller, 112 Pa. 34. "The defendant company" said Clark, J., in Clark v. Railroad Co. 145 Pa. 438, "as a riparian owner merely, has no right to divert the water from its natural channel, to the prejudice of the rights of others below it on the stream. If the amount of water required to supply its locomotives at this point and diverted by it from the channel of the stream, sensibly or materially diminished the flow, it was bound to buy it, or subject itself to an action for an excessive use or diversion of water. No matter what were the necessities of the defendant's business, it had no right to convey the water out of its course, to the prejudice of the plaintiff's rights. Haupt's Appeal, 125 Pa. 211." *Cf.* also Railroad Co. v. Water Co., 182 Pa. 418.

A manufacture of any sort, upon the premises, beyond the sorts anciently common in agricultural communities, such as grist and saw mills operated by water power, can be conducted by a riparian owner only under the limitation that he does not sensibly diminish the quantity of water flowing to the inferior lands. The riparian owner cannot conduct the water away from his premises, for use elsewhere, if he sensibly diminishes the water. He cannot sell it to others; Rudolph v. Pa. R. R. Co., 186 Pa. 541, 551.

We have just seen, that a railroad company cannot take water from the land, even for its own use elsewhere. A water company cannot, as riparian owner, take to a distant village, borough, or city for the consumption of its inhabitants so much water that the residue reaching the lower owners will be sensibly, materially less than it would otherwise have been. If it does, it will be enjoined; Haupt's Appeal, 125 Pa. 211; or trespass can be maintained against it; Lord v. Meadville Water Co, 135 Pa. 122. And a borough, becoming owner of land on a distant stream, has, as such, no more power than a water company. Haupt's Appeal, 125 Pa. 211.

The bill alleges that Smith had erected a grist-mill and across the stream a dam. This, as riparian owner, he had a right to do. It is not alleged that he had detained more water than it was reasonably necessary to detain, in order to operate his mill. Smith, it is alleged, has sold his mill to the Power Company, which is about to erect, on the grist-mill site a plant for the development of electrical power. This power it proposes to sell. Has the Company the right of a mill-owner, or only of a manufacturer?

In the early days of the commonwealth, lands were usually devoted to agricultural purposes, and saw mills and grist-mills, being indispensable, obtained recognition as a class. There was no good reason for postponing the upper mill owner to the lower. Each miller exercised rights in subordination to similar rights of the superior. As we have seen, manufactures are regarded as forming a separate class from milling. Milling is, itself, it is true, a species of manufacture. The shapes and sizes of the grain or of the lumber, are altered by it. And, in manufacture, power

generated by the fall of water, may be used, just as in milling. We do not think it proper, however, to extend the privilege of a miller, with respect to detaining water in order to increase the water-power, to the manufacturer. The miller has acquired a traditional place, which cannot be usurped by pursuers of other and more modern businesses. It would be arbitrary to divide a business into parts, and to justify the consumption, or detention of water for that part of it which consists in the development of the power, and to refuse justification to the consumption or detention of water in the other processes.

The defendant purposes to generate electricity, and to sell it. This is to be treated as a species of manufacture. Instead of shovels, or shoes, or locomotives, or other palpable articles, the article to be created by the defendant is impalpable and invisible. That matters not. If it distinctly appeared that the defendant was, by means of the dam, going perceptibly and materially to detain and diminish the water, there would be ground for an injunction.

The city of Brownsville, as riparian owner, having no right to divert the water for the consumption of its inhabitants could, the bill averring the other proper facts, sustain it. But, the city has the right to take the water for this purpose, under the statute. It does not need to give, or secure compensation in advance. Its own taxing power is sufficient security. The lower riparian owners may resort to the remedies provided, at any time. Were none provided by statute, the common law action of trespass would be adequate to secure compensation; Delaware County's Appeal, 119 Pa. 159; Riddle v. Delaware County, 156 Pa. 643; 3 P. & L. Dig. 3782. Practically, therefore, the city is already clothed with the right to divert the water. As Parson, J., remarked, in Haupt's Appeal, 125 Pa. 211, a bill by the borough of Ashland against persons who were about to abstract water from the stream, "We have nothing to do with the rights of the riparian owners below the plaintiff's dam. If they have been injured [by the borough] they have their claim to compensation, if it has not already been made." [Of this case Green, J., remarks, in Railroad Co. v. Water Co. 182 Pa. 418, "we sustained an injunction on the express ground that the lower borough had acquired its rights by an exercise of its right of eminent domain, as well as by a purchase of the land."]

The city can as readily acquire the rights of the upper land owner, the defendant, as those of the lower land owner. It does not follow that it may treat itself as having already acquired these rights in order to sustain this bill. It has given the defendant no warning, prior to filing the bill, of its intention to expropriate him. On the contrary, its bill proceeds on the ground that the defendant has not had the right to do what he is doing on the land. Had the plaintiff taken steps to have the rights of the defendant condemned, its bill, in defence of its own rights thus acquired, would be sustained. Until then it is premature, so far as rights passing to it, as a city, under the power of eminent domain are concerned. As to its rights as a riparian owner, the averments of the bill are not sufficiently distinct and full to warrant a decree.

Appeal dismissed.

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## MARY MAY vs. MILTON JONES.

*Contract of marriage made on Sunday—Action for breach thereof—Nature of such contracts—Time of performance—Sunday law.*

STATEMENT OF THE CASE.

On the first Sunday of January, 1902, the plaintiff entered into a contract of marriage with the defendant.

The same day the defendant determined to leave the community; notified the plaintiff of the fact and signified his intention not to marry her.

Since that time he has not seen her. She brings this action to recover damages for breach of promise.

DIVELY and BENJAMIN for the plaintiff.

The contract does not violate Act of Assembly of April 22, 1794. Love v. Nestut, 34 Pa. 409; Heckman v. Rosenthal, 20 C. C. R. 512. A marriage contract made on Sunday is not void if it is subsequently recognized. Marklay v. Kessring, 2 Pennpacker 187. Marriage being a civil contract is not void on Sunday, 34 Pa. 409.

MOREHOUSE and FLEITZ for defendant.

Repudiation of a contract before performance does not constitute a breach there-

of. Standford v. Magill, 38 L. R. A. 760. Plaintiff not having shown a failure of defendant to perform, cannot recover. Daniels v. Weston, 114 Mass. 333; Pomeroy v. Gold, 12 Metcalf 580. This promise to marry is a violation of Act of Assembly of April 22, 1794. Like all other civil contracts, if made on Sunday, it is void. Schuman v. Schuman, 3 Casey 90; Kepner v. Keeper, 6 Watts 231; Fox v. Mensch, 3 N. & S. 444; Gangweri v. Estol, 2 Harris 425.

OPINION OF THE COURT.

The question before the court is whether the evidence will support an action for breach of a marriage contract, and involves an inquiry into (1) the nature and (2) the time of the agreement, since it was executed on Sunday and the breach occurred on the same day.

Generally speaking, the contract to marry is a binding executory contract, the performance of which is the assumption of mutual marriage vows and consequent status. The mutual promises given are consideration of the highest order, and the contract is complete immediately upon their communication and acceptance. And it is not disputed that the contract between Mary May and Milton Jones was complete, for an adequate consideration, and binding, in the absence of special circumstances.

But it is pressed by counsel that the action was brought prematurely. The general rule, that "when no time is fixed for the performance of an executory contract a reasonable time must be understood," (Hare, J., in Nurman v. Bourquin, 7 Phila. 239) applies to contracts of betrothal to marry, and "if no time is fixed and agreed upon for the performance of the contract, it is, in contemplation of law, a contract to marry within a reasonable period after request." (3 Addison Cont. 447; Caines v. Smith, 15 M. & W. 189.) But here "the defendant determined to leave the community; notified the plaintiff of the fact and signified his intention not to marry her." After this clear renunciation, the rule of Lord Campbell in Hochster v. De la Tour, 2 E. and B. 678, applies; the defendant is "precluded from saying that he has not broken the contract when he has declared that he entirely renounced it, and "the plaintiff was not required to make a formal offer to perform on her part before bringing suit." McCormick v. Robb, 24 Pa. 47; see also, Knoxberger v. Roiter, 91 Mo. 404; Wagonseller v. Simmers, 97 Pa. 465; Burtis v. Thompson, 42 N. Y. 246; Gough v. Farr, 12 C. L. 774. It is, therefore, certain, that, unless void or voidable from being made on Sunday, the contract is binding, there was a clear breach by the defendant, and the plaintiff has a present right of action.

Whether a contract of engagement to marry, entered into on Sunday and not recognized or ratified on a subsequent week day is binding, seems not to be squarely decided in Pennsylvania. The cases cited by counsel are not conclusive. In Markley v. Kessering, 2 Penny. 187, the facts are nearly analogous but the evidence showed a subsequent recognition of the Sunday contract, and the court mentions this as an element at least partially controlling the opinion. In Fleishman v. Rosenblatt, 20 C. C., there was also evidence of subsequent recognition, though no opinion is reported. In Com. v. Nesbit, 34 Pa. 409, Justice Lowrie says, "While purely civil contracts are forbidden on Sundays, marriage is not so, because it is not purely a civil, but also a religious contract." Under the facts in that case this was pure *dictum*.

In Gaugwere's Estate, 14 Pa. 417, the court was equally divided, and refused to decide whether an ante-nuptial settlement entered into on Sunday and immediately before the ceremony of marriage was legal though executed on Sunday. In the case at bar, there was no "recognition" subsequently to bring the contract within the rule of Markley v. Kessering and Fleishman v. Rosenblatt; neither does it provide for property rights different from those made by law concomitant to marriage, as was the case in Gaugwere's Estate.

To reach a conclusion in this case, it is necessary to examine the wording of the statute governing.

At common law the contract in question would have been valid, for as Lord Mansfield says in Drury v. Defontain, 1 Taunt. 135, "it does not appear that the common law ever considered those contracts void which were made on a Sunday." And under the statute of 29 Car. 11, (the law in the Colony of Pennsylvania for sometime) which forbids that all persons "shall do or exercise any worldly labor, business, or

work, of their ordinary callings upon the Lord's day," the contract between Mary May and Milton Jones would have been binding. Drury v. Defontain, *supra*; Bloom v. Richards, 2 Ohio S. 387; Adams v. Gay, 19 Vt. 365.

The statutes of Pennsylvania, though going somewhat further in enforcing a Christian observance of Sunday, from the first until 1794, all contained the exceptional phrase "of their ordinary callings," and contracts of engagement to marry were undoubtedly disposed of under that phrase.

In the act of 1794, which is the law today, and which reads "do or perform any worldly employment or business whatsoever on the Lord's day," commonly called Sunday, followed by the usual exception of works of charity and necessity, the phrase, "of their ordinary callings" seems to have been purposely omitted. The question then, upon which we must pass in this case is, whether a contract to marry, (like the contract of sale passed upon by Lord Mansfield in Drury v. Lafontain) and valid before, became illegal after 1794, by the omission of this phrase.

But it is not necessary to show that the contract was a work of either necessity or charity to make it an exception. Although neither of these, if it can be excluded from the terms "any worldly employment or business," it is still one of the contracts remaining as before the statutes, at common law.

The purpose of the statute of 1794 is, we take it, primarily to protect Christian people from being disturbed as to their rest, and the observance of their religious duties; and, secondly, to enforce the observance of Sunday as a holy day upon which the performance of secular business is wrong. And "worldly employment and business include all that shocks the moral sense from a Christian standpoint, for Christianity is part of the law, and whatever else may disturb the worship or rest of the community. But there are certain employments and certain contracts, which, while neither necessary nor charitable, yet are entirely proper to be done on Sunday. These divide themselves into two classes, one including such employment or business as is involved in, or knit up with, the religious observance of the day, the other including employment and business not involved in the observance of the day, and yet either accompanied by religious ceremonies, or else by common consent regarded as of a moral nature as opposed to worldly. Under the first class is the work of the clergyman, and that incident to reaching places of public worship. Commonwealth v. Nesbit, 34 Pa. 409. Under the second class may be mentioned perusals with the accompanying labor or business; also the making of a will; (Butenman's Appeal, 55 Pa. 133); also marriage, Bennet v. Brooke, 9 Allen. 118. The reason for the legality of this latter class of acts is stated in Bennet v. Brooke to be "because such an act does not come within the category of transactions which are connected with, or appertain to, ordinary worldly business." And this reasoning includes the contract of betrothal as well as the marriage proper. Both are equally exceptional; the one is but the consummation of the other; and the same solemnity and moral quality that attaches to the one belongs to the other.

In Storch v. Griffin, 77 Pa. 504, the court says of a contract to marry, "The relation of which this contract was designed to be the beginning, would, if consummated, have affected the parties throughout their lives. It is a relation on which the most important rights of property—social order and social morals—the whole structure of our civilization indeed finally rest."

The moral color of the betrothal contract is also shown in the measure of damages for its breach; for it partakes of the nature of a tort so much that the defendant may be punished by the imposition of vindictive damages (Baldy v. Smith, 11 Pa. 322) and before the statute of Feb. 24, 1834, the action for breach did not survive. It is almost the invariable inception of a relation which, by all the Christian world, is regarded as of such a marked moral and religious character as to be usually instituted by religious ceremonies (Gaugwere's Estate, *supra*) and of such importance to the welfare of humanity as to be especially favored by the law. Scott v. Tyler, 2 head. Cases in Equity, 144.

Indeed, from no point of view can we regard the solemn contract of betrothal, nearly always to one contract of its kind

in the life of an individual, so peculiarly personal that its breach is more a tort than a contractual wrong, so exceptionally moral in its essence that its performance everywhere is partially given over to the supervision of the church, so important to the state, that once performed the consequent relation can be terminated, if at all, for a few causes specifically set out by the legislature, so commonly entered into on Sunday that by common usage it has never been called worldly business. Such a contract we feel certain was not within the purpose of the legislature to be forbidden as "worldly employment and business."

We, therefore, conclude that it is now as it was at common law, a valid legal contract whenever the proper elements are present, regardless of the time of its execution, and that the plaintiff, under the evidence, has a right of action.

HOUCK, J.

OPINION OF THE SUPREME COURT.

We affirm the judgment on the opinion of the learned court below.

Judgment affirmed.

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## IN RE THOMPSON'S ESTATE.

*Gift alleged after making of will—Declarations of deceased in regard thereto, not probable—Surcharge.*

STATEMENT OF THE CASE.

Henry Thompson made a will giving all his estate (personalty) to his nephew, Charles Thompson, and naming Charles his executor. He subsequently made a codicil, giving all his estate to the same person, but naming testator's brother William, executor. The day before making the codicils, which were executed two months after making the will, testator is said to have determined to give half of his estate to his brother John. He selected securities, viz: shares of stock in the P. R. R. and the P. & R. R. R., equal to ½ of his estate, and delivered the certificates to John, with a blank power of attorney to cause them to be transferred on the books of the company. In distribution of the estate, Charles denied the gift and claimed to surcharge the executor with the value of the securities taken by John. The witnesses to support the gift were John and William. Charles offered himself to prove declarations of testator on the day of writing the codicil both before and after writing it to the effect that he still had all the estate he had when he wrote the will. John Rebuck was also offered to prove the same declaration. The auditor rejected all the evidence, and reported a surcharge.

FOX and DEVER for the plaintiff.

Death does not revoke a power of attorney, coupled with an interest. Hunt v. Roumanier, 8 Wheaton 174; Lightner's Appeal, 82 Pa. 301. Interested parties may testify in favor of the estate. Yeakel v. McAtee, 156 Pa. 600; Carpenter v. U. S. Life Insurance Co., 161 Pa. 9; Brose's Estate, 155 Pa. 619. Rebuck had no interest and was therefore competent. Wolf v. Carothers, 3 S. & R. 240; Tarr *et al* v. Robinson *et al*, 158 Pa. 60; Dickinson v. McGaw, 151 Pa. 98; Smith v. Hay, 152 Pa. 377.

COOPER and WALSH for the defendant.

John and William both have adverse interests, and are incompetent. Act of 1887, clause *e* P. & L. Digest Col. 4835. Adams v. Blakely, 20 W. N. C. 305; Parry v. Parry, 130 Pa. 94; Spotts' Estate, 156 Pa. 281; Irvin's Estate, 160 Pa. 82; Wolf v. Wolf, 158 Pa. 621. The act of 1891 does not apply. To constitute a valid gift *inter vivos*, there must be an intention to make a gift by words or acts. P. & L. Digest of Decisions, column 2825, vol. 18; Collins v. Collins, 2 Grant 117. A. & E. Enc. of Law, vol. 14, page 1015.

OPINION OF THE COURT.

This case comes before this court on the ground that certain evidence offered before the auditor was excluded which should have been admitted. The question was, whether or not there had been a gift of certain shares of stock, by Henry Thompson, deceased, to his brother, John Thompson. The parties offered were: Charles Thompson, legatee under will of deceased; John Rebuck, who from all that appears, was a stranger, having no interest; Wm. Thompson, brother of the deceased and executor under the will, and John Thompson, who claims the gift.

The transfer of the certificate of stock with a blank power of attorney which was held by John, does not *ipso facto* constitute a valid gift. If the gift is shown to have been made, then the blank power of attorney would not be revoked by the death of the said Henry Thompson, for it would clearly be a power coupled with an interest. In the case of a power coupled

with an interest, the power follows the estate thus agreed to be transferred and becomes irrevocable by operation of law. If the interest or the estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. If this be a gift, John Thompson is no longer a substitute acting in the name of another, but a principal acting in his own name. Hunt v. Roumanier, 8 Wheat. 174; Lightner's Appeal, 82 Pa. 301.

The act of 1887, May 23rd, P. L. 158 Sec. 5, provides. "Nor when any party, to a thing or contract in action is dead * * * * and his right thereto or therein has passed, either by his own act, or by the act of the law, to a party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract in action or any other person whose interest shall be adverse to the said right of the deceased, be a compentent witness to any matter occurring before the death of said party." In view of the above statute, should the testimony offered, or any part thereof, have been received? We will examine separately the relation of each party, offered, to the subject in controversy.

"To exclude a witness," said Chie Justice Gibson, in Wolf v. Carothers, 3 S. & R. 240, "it is necessary that he should have a vested interest, not in question, but in the event of the suit. It must be an interest that the judgment in the case would operate upon; for if by the event, he would neither acquire or lose a right nor incur a responsibility, which the law recognizes, he is competent." The act of 1887, *supra*, made no change in the law as then settled, but related solely to the competency of interested as distinguished from disinterested parties. Charles Rebuck, we believe, was clearly competent to testify. He not only had no interest, adverse or otherwise, in the event of the suit. He would neither acquire nor lose a right which the law recognizes. Tarr *et al* v. Robinson *et al*, 158 Pa 60; Dickinson v. McGraw, 151 Pa. 98, and Smith v. Hay, 152 Pa. 377, have settled the construction of the act of 1887 in accordance with this view.

Authorities are numerous that interested parties may testify in favor of the estate of the deceased. In Yeakel v. McAtee, 156 Pa. 600, McAtee was allowed to testify to declarations and events which took place before the death of Maria Corson, since his testimony was in favor of the estate, even though he was a legatee under the will of the said Maria Corson. "He was not adverse to the interest of the deceased, but on the contrary he was testifying for the estate." Carpenter v. U. S. Life Insurance Co., 161 Pa. 9, and Brose's Estate, 155 Pa. 619, are to the same effect. Applying this principle to the case under consideration, it is evident that the testimony of Charles Thompson should have been received, for manifestly he was testifying in the interest of the estate of the deceased party.

We now come to the testimony of William Thompson, the executor. Since nothing appears in the statement of the case which shows that William as executor has been negligent, and in consequence of this negligence a surcharge might be placed on him, we will presume that his interest is only that of an executor. He is therefore competent under section 4 of the act of May 23, 1887, and Sheetz v. Hanbest's Executors, 81 Pa. 100.

In regards to John Thompson who claims the gift, from all that appears he is incompetent, for the reason that his testimony would be adverse to that of the deceased. If, however, John Rebuck was a witness to the transaction by which John Thompson secured the stock, and testifies, then under the act of June 11, 1891, P. L. 287, the testimony of John Thompson might be received.

The decree of the auditor, in view of the above opinion must be reversed.

SHERBINE, J.

OPINION OF THE SUPREME COURT.

The exception made by the legatee, Charles, to the account of the executor, is that he has not charged himself with certain securities, equal in value to one-half of the estate.

The will of the decedent gives all his estate to his nephew Charles, but names his brother William the executor. After the making of the will, it is alleged, the gift of the securities to the testator's brother John, took place. The testimony of John and William, the brothers, was offered by

William, the executor, to prove the gift. The exceptant, Charles, offers himself to prove a declaration by the testator, a day after that on which the gift is said to have been made, to the effect that he had not diminished his estate since writing the will. John Rebuck is offered to prove the same declaration. The auditor excluded all the evidence, and recommends that the executor be surcharged. The executor excepts.

Were this an action against the executor, by John, to recover the securities on the ground that they had been sold or given by the deceased to him, it is clear that he would not support the sale or gift, by his own testimony. *Cf.* Irwin's Estate, 160 Pa. 82. Nor could he, if this were a suit by the executor against him, to recover them or their value. The proceeding is by the legatee against the executor, for not recovering them, and accounting for them. The legatee is the party to whom *prima facie* the testator's right has passed, subject to the executor's right of administration. He can recover them only by making the executor liable for them.

While, should William be surcharged, he could not use the decree as evidence, in a subsequent suit against John; William can not recover the securities from John should the decree be favorable to him. The legatee can obtain them only through the executor, and should the executor succeed in this contest with the legatee, he could not afterwards successfully allege that the securities belonged to the estate, and recover them. John therefore has an interest adverse to the legatee, which his own testimony would promote. He is made incompetent by clause *e.* of section 5 of the act of May 23d, 1887.

If there had been such dealings between John and William, that in no event could the latter recover the securities from the former, John would no longer be interested, and would probably be rendered competent. But, no such dealings are shown as would negative a right in William, as executor, to maintain a suit for the securities, should William be compelled to account for them to the estate.

The proceeding is against the executor. Is he competent to shield himself by proving a gift from the testator? The executor is not, as such, forbidden to testify against the alleged right of the decedent. Such interest as he has, is against the claimant, for the establishment of the claim would lessen the corpus of the estate upon which he would be entitled to commissions. If this had been an action by John against William, or by William against John for the securities, William could have testified against himself and for John, and thus promoted the recovery of a judgment in favor of John. William could then have used this judgment as a defence, if, in the settlement of his account, an attempt had been made, like the present, to surcharge him.

But, it does not follow from the fact that B can support A's right against a dead man, before B acquires that right from A, that he can support it after he has acquired it. Thus, if A alleges that the decedent sold a horse to him and B is able to prove the sale, B does not continue able to prove it, in his own behalf, when he buys the horse from A. Before he bought it he might have supported the sale by his testimony in a replevin by A against the executor of the decedent, or by the executor against A, but, by buying the horse from A, he disqualifies himself.

When the executor pays a claim against the dead man, or allows a claimant of what had once been or is alleged to have once been a part of the dead man's estate, to keep it, he practically subrogates himself, so far as the owners of the estate are concerned, to the claimant's position, and he acquires the same adverse interest. Any testimony subsequently given by him, would be under the influence of that interest. We are not able to adopt the opinion of Ashman, J., in White's Estate, 13 Phila. 287. The auditor did right in rejecting the testimony of William Thompson.

It follows that the exception of the executor to the report of the auditor must be dismissed.

The rejection of the testimony of Charles Thompson, the legatee, and of John Rebuck, has done the legatee no harm, and it is unnecessary to consider whether it was proper. We think, however, that it was proper, not because the witnesses were not competent, but because the content of their testimony was not relevant. As the learned court below shows, Charles Thompson was offering to testify for, and not against the

decedent. While the decedent's right to deny and repudiate the alleged gift had passed to him, he was not testifying against, but in support of, that right. Rebuck was a wholly disinterested witness, and could have testified against, as well as for the decedent, but he was in fact testifying for the decedent. But the subject of the testimony was a declaration made by the deceased, after the alleged gift, in denial of that gift. It is clear that an alleged vendor, or grantor, or donor of real or personal property cannot impair the sale, grant or gift, by subsequent declarations. A gift, once completed, can no more be unmade by the denials of the donor, than can a sale by the denials of the seller. *Cf.* 6 P. & L. Dig. Dec. 9694, 9704.

It follows, that the auditor correctly found that there was no gift of the securities, and properly surcharged the accountant.

Decree reversed, with *procedendo*.

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## WALKER vs. THE GREAT NORTHERN RAILROAD.

*Trespass—Right of child to recover for personal injuries inflicted before its birth.*

STATEMENT OF THE CASE.

The plaintiff's mother, ten days before the birth of the plaintiff, was riding on the defendant company's road, when, by reason of the negligence of the company, she was badly injured, which in time resulted in the plaintiff being born a cripple. The plaintiff, now, by his next friend or guardian, brings this action in trespass for damages sustained by him before birth. It is contended that the plaintiff at the time of the infliction of the injury was not a person within the meaning of the law allowing recovery in damages for negligence.

VASTINE and WRIGHT for plaintiff.

A child, in the eyes of the law, comes into existence at its conception. There was such a contractual relation between the child and defendant as to maintain the action. Hall v. Hancock, 32 Mass. 255; 1 Blackstone 129.

PEIGHTEL and DELANEY for defendant.

The plaintiff was not a passenger in the legal sense of the word. An infant before birth has not such a separate existence that an injury to him will sustain an action after his birth. Pa. R. R. Co. v. Puce, 96 Pa 267; Allen v. St. Luke's Hospital, 184 Ill. 359.

OPINION OF THE COURT.

The question involved in this case is, had the plaintiff at the time of receiving his alleged injuries such a distinct and independent existence that he may maintain the action, or was he in contemplation of law a part of his mother?

In deciding this case, we find that there is no statute on which the action can be based, and if maintainable, it must be so by the common law which affords very few precedents and there is absolutely no authority in Pennsylvania law upon the question involved.

At common law, any person who negligently or wilfully did bodily harm to another, was bound to compensate that person for the injuries suffered. 1 Blackstone 129, says: "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation. Life is a right inherent by nature in every individual, and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child and by a potion or otherwise killeth it in her womb; or if any one beat her, whereby the child dieth in her body and she is delivered of a dead child; this though not murder, was by ancient law, homicide or manslaughter; but if the child is born alive and afterwards die in consequence of the potion or beating, it will be murder." This doctrine is also recognized in our criminal code of 1860 to an appreciable degree when it makes the procuring or attempting to procure an abortion a felony. This rule, so firmly established by the criminal law, certainly was not made merely for the punishment of the wrongdoer and as a prevention of crime; but was equally as much established for the protection of the unborn child.

But not only has the criminal law recognized the existence of an unborn child. An infant in *ventre sa mere* is supposed in law, to be born for many purposes and should be for all beneficial purposes to the child (Co. Litt. 36, 1 P. Wms. 329). An infant is in *esse* from the time

of conception for the purpose of taking an estate which is for his benefit, whether by descent, devise or under the statute of distribution, provided the infant be born alive and after such a period of foetal existence that its continuance in life may be reasonably expected. See 1 Bla. 129; Hall v. Hancock, 32 Mass. 255: Pemberton v. Parke, 5 Binney 601.

10 Amer. Eng. Cyc. 626, 1st Ed. cites a case where a collision occurred at sea whereby some of the crew drowned. The court reserved leave to the child in *ventre*, if born in due time to prefer a claim for damages sustained by the death of the father.

We thus see that a child in *ventre* is recognized without statutory provision, in the law of crime, law of real property, admiralty law and also in equity. Is there any good reason why it should not be recognized in the law of torts. We fail to see any legal principle which should justify the discrimination. And we think the rule extremely harsh in a case where the child has reached the advance stage of foetal life when, if born prematurely, it could independently exist. The doctrine that a foetus is regarded as part of a mother until it is born is not true in theory and absolutely false in fact.

As before stated there are very few adjudicated cases upon this point, but our attention has been called to several which we shall now consider. In Dietrich v. Northampton, 138 Mass. 14, decided in 1884, a mother when having been pregnant for a period of four or five months, slipped on a defect in a highway of the defendant town, as the result of which she had a miscarriage. The child lived for a few minutes, but was too little advanced in foetal life to survive its premature birth. Its administrator brought an action under a statute authorizing an action for the benefit of the mother or next of kin. It was held there could be no recovery.

In Walker v. Great Northern R. R. Co. (decided in 1891) 48 L. R. A. 225, the exact statement of facts seems to have arisen as in the case at bar. A demurrer was sustained to the plaintiff's statement of claim because it did not show a contractual relation between the plaintiff and the R. R. Co., but merely averring a contract between the R. R. Co. and plaintiff's mother. The identical question involved in the case at bar, was discussed by the court with great learning. Mr. Chief Justice O'Brien after elaborating to a great extent, refused to commit himself. Johnson, J., held that the plaintiff was not a person in legal contemplation. The most recent authority we have had the opportunity of examining is the case of Allaire v. St. Luke's Hospital, (decided in 1900) 184 Ill. 359, the facts being as follows: Plaintiff's mother being pregnant, went to a lying-in hospital for the treatment and care of herself and child during her confinement and until recovery. While there, she was placed on an elevator which was negligently operated by servants of the hospital, causing her serious injuries, also resulting in the plaintiff being born deformed and crippled for life. The trial and supreme court both refused to allow a recovery holding that a child previous to its birth, is in fact a part of its mother and is only severed from her at its birth. The court goes on to say that if the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant.

This case goes further than Walker v. R. R. Co. *supra*, for in the latter case a recovery was refused for the reason that there was no contract on behalf of the plaintiff, but in Allaire v. Hospital, the care of the child was expressly contracted for. The doctrine of both these cases is affirmed in the recent decision of Gorman v. Bodlong, 49 Alt. Rep. 704 (R. I.) These decisions must therefore be taken as settling the rule that birth fixes the precise point at which existence of a person begins. If then a child, who is permanently injured a moment before its birth by a careless accoucheur or even by an intentional wrongdoer, is to have a remedy it must be on some other ground. The difficult question of proving the cause of the injury has been strenuously argued and carries with it some weight, for to recognize a right of this sort, it has been said might incline the mother to romancing and the jury to superstition. With due deference to the doctrine of *Stare decisis*, we enter judgment for the defendant.

GROSS, J.

OPINION OF THE SUPREME COURT.

Affirmed on opinion of learned court below.