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# DICKINSON LAW REVIEW

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## SOME DECISIONS

This paper will examine a few decisions on constitutional questions.

### Horstman v. Kaufman, 97 Pa., 147

The act of June 11th, 1879, P. L. 129, provides in substance, that, after an execution has been issued against a debtor, and the sheriff has returned *nulla bona*, the judgment creditor may apply to the court for the appointment of a commissioner, making affidavit that he has reason to believe that the debtor has property which he fraudulently conceals. Before this commissioner, the person against whom the judgment has been recovered, "or other person having knowledge" "may be called and examined under oath," for the purpose of disclosing any property, of which the debtor may be possessed, and out of which the judgment can be in whole or in part satisfied. The examination is to be reduced to writing and filed of record. The attendance of the debtor and other witnesses, is to be enforced by subpoenas or attachment, by the court having jurisdiction of the case.

In Horstman v. Kaufman, a plaintiff in a judgment made the prescribed affidavit and moved the court of common pleas for the appointment of a commissioner. Finletter, J., refused to appoint the commissioner because the affidavit did not set out the facts specifically, at the same time remarking that he had "scarcely a doubt" that the act of 1879 was unconstitutional. The plaintiff sued out from the supreme court a certiorari to the common pleas. Gordon, J., speaking for the appellate court, held (1) the plaintiff's affidavit was sufficient. It did not need to specifically state the facts. But (2) the act of 1879 is unconstitutional. Why? Remarks are made to the effect that the court is made but the minister of the creditor. On his application, it must appoint the

commissioner; it must enforce the attendance of witnesses by subpoenas and attachments. Whether this alone would make the act void, we are not distinctly told. But for what do the civil courts exist, if not to listen to the suits of plaintiffs; if not at their instance to issue writs of various kinds, to appoint examiners, masters, commissioners for several purposes; to convene juries, to subpoena and attach, when necessary, witnesses? Judges are paid for doing these very things. The judge's aiding the taking of testimony out of court to be used in court is not an unheard of thing. After some ineptitudes about a court's being so far disrobed of its judicial function as to be made the mere tool of the creditor the writer of the opinion prudently "drops" the question whether the legislature can constitutionally so disrobe the court. The silliness of the suggestion that requiring the court to appoint a commissioner to obtain evidence as to property of a debtor, in aid of an execution or an attachment, is to "disrobe" it of its judicial function, is too gross to justify any consideration of it. Even bills in equity, in aid of executions, have long been entertained by judges, without a sense that they were unduly humbling themselves.

The constitutional objection which Gordon, J., thinks tenable is, that the act of 1879 violates the right not to be compelled to give evidence that may be used in a criminal prosecution against one's self. This is one of the rights which he says, "even the lawmaking power is bound to respect." The act of July 12th, 1842, P. L., 339, punishes, *inter alia*, fraudulent concealment or removal of property, for the purpose of avoiding an execution and provides that no person shall be excused from answering any bill seeking a discovery of any such fraud. It also stipulates "no answer shall be used in evidence in any other suit or prosecution." Gordon, J., contrasts the act of 1842 and that of 1879, which contains no similar exemption. He tacitly concedes that had it contained such exemption, it would, like the act of 1842, not be open to the objection that it violates the right not to incriminate one's self. To this objection, the reply had been made in argument, that no answer given under compulsion, could be used against the witness, in any later prosecution. Does he deny the truth of this answer? By no means. He admits it. He cites Regina v. Garbett, 1 Denison's Cr. C., 226, as holding

that statements made by a man under the compulsion of a court, cannot be admitted in a later proceeding to prove him guilty of a crime. Such statements must be regarded as given under compulsion and duress. He concludes by remarking "It is thus manifest that arbitrary compulsion and duress by a court stand on no higher ground than the duress and compulsion of natural persons. In other words, because of the wrong done to the witness, the evidence thus produced, cannot afterwards be used against him."

How then we may ask, does it matter that the act of 1879 omitted the statement that the incriminating testimony given by the defendant could not be subsequently used against him if, omitted or not, such testimony cannot be so used? Is not the resolution of the judges not to allow such use of such statement, as good a protection, when it springs from a principle of the common law as when it arises from a direction of the statute?[1]

But, how irrelevant all this discussion by the justice is, is manifest, on recalling that the question before the court was not whether a question should be put to the defendant, the answer of which would incriminate him, but, whether a commissioner should be appointed for the purpose of receiving evidence not of fraud, not of concealment, but of the existence of any property, out of which the debt might be paid.. Until the commissioner is appointed, it cannot appear whether the defendant will be called before him at all. The act of 1879 says the judgment debtor "or other person having knowledge" may be called and examined. Why did the court precipitately assume that it was the plaintiff's intention to call the defendant? He may have intended to call the "other person." By refusing to appoint the commissioner, the opportunity to get the testimony of another person was denied.

But, even if it had appeared that the plaintiff intended to call the defendant, was that sufficient reason for refusing him the opportunity? A witness cannot refuse to appear, in answer to a subpoena, or, appearing, refuse to be sworn, because he fears that a question may be put to him which he cannot answer with-

[1]We are not suggesting that the provision in the act of 1842 was sufficient to avert the constitutional objection founded on the principle of no compulsory self-incrimination. Its sufficiency is assumed by Gordon, J.

out incriminating himself. "It was time enough" says the court, in a case involving this subject,[2] for the appellant to have raised any objection after he had obeyed the subpoena and been sworn as a witness. If a question had then been asked which tended to criminate him, or which was in violation of any of his rights as a citizen, under the constitution and laws of this commonwealth, he could have declined to answer the same, and any question touching his rights as a witness could have been disposed of in a legal and orderly manner." The act of 1879 expressly says that the attendance of the debtor and witnesses shall be enforced by subpoenas and attachment by the court, as in the case of other witnesses. If an improper question had been put to the defendant, he could have refused to answer it. The plaintiff would then have been obliged to apply to the court for an attachment, and, the nature of the defendant's objection to the question being made known to the court it would or would not have compelled an answer by attachment as in other cases.

This then is plainly a case in which an act of the General Assembly was contumeliously nullified by the court without the slightest justification.

### Menges v. Dentler, 33 Pa., 495

Solomon Menges owning a tract of land which was partly in Lycoming and partly in Northumberland county, mortgaged it. Suit on the mortgage in the Common Pleas of Lycoming county, resulted in a judgment. On the *levari facias* issued thereupon, the whole tract was sold May 9th, 1839 by the sheriff of Lycoming county to George Oyster. This sale, the supreme court held,[3] conveyed no title to so much of the land as lay in Northumberland county, and the heirs of Solomon Menges recovered it from Oyster, the sheriff's vendee after Oyster had contracted to convey the land to Wertman, who paid or confessed judgment for all of the purchase money. On April 24th, 1843, an act of assembly was passed declaring the sheriff's deed "to be good and valid to all intents and purposes, in the same manner and with the same effect as if the whole of said tract of land were

[2]Eckstein's Petition, 148 Pa., 509.
[3]Menges v. Oyster, 4 W. & S., 20.

situate in the said county of Lycoming." Wertman obtaining the possession, the heirs of Menges brought an ejectment against him. The Supreme Court, three judges, among whom was Chief Justice Gibson, to two,[4] decided that the act was constitutional. and therefore that the sheriff's sale had passed a good title to the Northumberland land. Gibson wrote the opinion. Not content with this decision, the heirs of Menges, over 10 years later, brought another ejectment against Dentler, in possession under a grantee from Oyster.[5] The court, which was wholly composed of new justices now held that the act of 1843 was in excess of the power granted by the people to the legislature. What follows? One decision was that the sheriff's sale passed no title. The present decision is that the act of 1843 is without effect. "The [sheriff's] deed had no such validity when made" says Lowrie, C. J., "the Act of Assembly could give it none." But, the act of assembly had been followed by the purchase from Wertman of his equitable title, and by the purchase from Oyster of the legal title. Had the defendant a right to rely on this Act of Assembly as a ratification of a sale by the sheriff of Lycoming, that might have been authorized in advance? Apparently not. He must know that the legislature cannot ratify an act ex post facto which it, nevertheless might have previously authorized. He is bound to know this recondite principle. He is bound to know the fallibility of the legislative branch of the government, and of its aptness to arrogate to itself powers which have not been conferred.

What then are we to do with the title derived from George Oyster? Is it void? Not at all. The supreme court discovers the principle that while no subject of the state has a right to assume and act upon the infallibility of the legislature, it may do both, with respect to the infallibility of the supreme court. The words of Lowrie, C. J., are so remarkable as to deserve quotation. "In strict law, the title [of the Menges heirs] remains; but in equity it is lost, and this is a sort of equity which the courts alone can properly declare and administer. It is quite plain that the present title depends upon faith in that department of government which alone may deal with such a subject, and upon

[4]See remarks of Burnside, J., in Dale v. Medcalf, 9 Pa., 108.
[5]Menges v. Dentler, 33 Pa., 495.

the good faith of government in protecting those that trust in it. Men naturally trust [how naive!] in their government and ought to do so, and they ought not to suffer for it."

When the doctrine of *stare decisis* "must be departed from the courts ought to see that no transaction that is evidently based upon it, should be affected by the departure."

Dentler's lessor was confiding in his "government" enough, to venture, on its assurance that the title he was buying was good, to spend his money in making the purchase. He now learns that his "government" is not the legislature but the Supreme Court. The latter he may trust, but the former not by any means!

The instances are many in which after announcing a principle, and after it has been acted upon by citizens, as a rule of law, the principle has been repudiated, in cases in which parties have acted on the assumption that the courts would persist in their views. While occasionally the courts have refused to abandon a rule, though convinced that it is inferior to a different rule, because they believe that people may have acted in reliance upon its perpetuation, in much the larger number of cases, when the rule though often pronounced seems not sound to the successors of those who enunciated it, they repudiate it without sensitiveness to the disappointments and losses which their abandonment of it will involve.

In Menges v. Dentler, the decision was not of an abstract principle, but of the validity of a particular sheriff's sale, in consequence of a statute pertaining to that sale alone. The court is to be commended for holding that when one has bought a title warranted to be good by its decisions, it must continue to treat that title as good, despite its change of views as to its intrinsic goodness.

How much better it would have been to adopt the policy that all acts performed in reliance on the soundness of statutes should be treated as valid, whatever the opinion of the court as to the consistency of the statute with the constitutional definitions of the legislative powers?

### Alter's Appeal, 67 Pa., 341

Alter and his wife agreed, each to make a will, by which all his or her property should be bequeathed and devised to the other. The wills were prepared, but by mistake, the wife ex-

ecuted the one designed for Alter and he executed the one intended for his wife. He died, Aug. 18th, 1869, without issue, and the mistake was then, for the first time, discovered. An Act of Assembly was passed Feb. 23rd, 1870, reciting the facts, which authorized the Register's Court, on becoming satisfied of the mistake, to admit to probate the will which Alter intended and believed himself to sign. The register's court, deeming the act unconstitutional, dismissed the widow's petition. Its decree was affirmed by the supreme court. The argument of the court is simple. When Alter died, he left no will. That which he intended to be a will, was not a will, because it was not "signed by him at the end thereof." Alter then died intestate. His property passed to his collateral kindred. Thus vesting, the legislature could not subsequently divest it.

But estates may vest, and still be divestible. If B fraudulently induces A to convey land to him, B, the estate vests, but a court of equity or law may divest it, and revest it in A. If a minor conveys his land, his estate passes to the grantee, but it is divestible by the act of the grantor, on his attaining majority. Alter's estate did vest. But the question is does the vesting preclude a divesting, whatever the facts that attended the vesting? Did a divestible or an indivestible estate, vest in the collateral heirs? The court virtually decides that, although the vesting of the estate in these heirs was the result of a mistake, that mistake is irremediable. They paid nothing for the property. The deceased intended that they should get none of it. The law was ready to give effect to this intention. But the mistake made shall be incorrigible. A vesting by deed may be nullifiable on account of mistake, a vesting by the intestate law never! When an estate vests under the intestate law it must vest indefeasibly! Why? The people who made the constitution do not say so. The judges have said so. The Alter heirs get the property, because of the modally defective expression of Alter's intention. The courts will not allow the legislature to dispense with modal perfectness of expression, if the estate once vests; that is, will not admit the possibility of a defeasible vesting. The best reason that Agnew, J., could assign, was, that the courts had not admitted this possibility. Reference is made to Greenough v. Greenough, 13 Pa., 494; McCarty v. Hoffman, 23 Pa., 508. In

McCarty v. Hoffman, Mrs. McCarty died, May 8th, 1847. Her will was subscribed by her mark only, not by her signature. On Jan. 27th, 1848, the legislature enacted that every last will theretofore made, or hereafter made to which was affixed a mark or cross by the deceased, should be deemed valid in all respects. The act was held unconstitutional so far as it was retroactive, for no reason other than those mentioned in Greenough v. Greenough.[6] The reasons stated in this case,[7] by Gibson, C. J., are (a) the act of 1848, so far as it validates wills previously executed, was an "act of judicial power;" (b) it deprived the heirs of the deceased of the property which they had inherited, otherwise than by the judgment of their peers or the law of the land. The first reason is unsubstantial. An enactment that wills already executed in a certain way, or wills hereafter to be executed in a certain way, shall be valid is no more judicial when applied to the former, than when applied to the latter class. A law is a rule, addressed to the branches of the government engaged in administration and executive work by which their decisions in particular cases are to be governed. The act of 1848 gives the same rule to the courts, in respect to pre-executed as to post-executed wills. The application of the rule to a particular will, of either class, is judicial. The rule if for either, is for both classes, legislative. The second reason is simply a judge-made principle that after an estate has vested, under the law, no subsequent change of that law can divest it. But there are vestings of estates, under existing law, of various kinds of meritoriousness. The acquirer may have paid a consideration; he may not. He may have practiced fraud on the grantor, donor, testator; he may not. The grantor, donor, testator, may have acted with full intelligence and done exactly what he intended and devised to do. He may not. Why are all these different varieties of vestings to be treated in the same way, and to be regarded as equally inviolable?

That estates can be divested, for various reasons, by acts of assembly, passed after their vesting, has been repeatedly admitted. The Chief Justice refers to some. After land had passed by inheritance, to the heirs of a married woman, who had, in her lifetime conveyed the land by a deed not separately acknowl-

[6]Snyder v. Bull, 17 Pa., 54, holds the same, but without discussion.
[7]11 Pa., 489.

edged, or defectively acknowledged, and therefore in a sense void, and after the heirs who had, on account of this voidness, recovered the land by ejectment from their mother's grantee, had been in possession of it 17 years, an act of assembly professing to cure the defect in the acknowledgment, was passed; and it was held valid by the supreme court not only of Pennsylvania[8] but of the United States.[9] Gibson, C. J., concedes[10] that when a grantee has paid a consideration for a conveyance which is void, under the existing law, this fact may justify a later act of assembly, making that conveyance valid. But if the conveyance was void, why not confine the remedy of the grantee to the recovery back of the purchase money? The fact that the consideration has been paid to a grantor who acted as she purposed simply makes one circumstance that justifies a legislative divesting of the estate which the conveyance alone *plus* the law operating when it was made, had failed to transfer. Why are there no others?

The devisee, says Gibson, C. J., in a will not executed by a signature, but merely by a mark, is a "volunteer"[11] and he thus differs from a grantee for consideration. But, when a man dies, his estate must pass to volunteers; to his devisees, or to his heirs. Neither pay anything. The law gives to a dying man the right and power to prevent his heirs from taking his property by a will. If by mistake as to the law, or by inadvertence, he fails to comply with all the modal requirements of the existing law, why should not his intention, clearly ascertained, be given effect, if not by the courts, unaided by legislation, then by the courts in pursuance of such adjuvant legislation?

In Alter's Appeal, Alter attempted to do, thought he was doing, everything which the law required in order to make a valid will. The object of his bounty was highly meritorious, his aged wife. His heirs, who would be defeated of inheritance by his will, were, we know not how distant collateral heirs. Perhaps he had had no dealings with them; perhaps they had ignored him in his lifetime. He signed a paper, thinking it to be one express-

[8]Mercer v. Watson, 1 W., 330.
[9]Watson v. Mercer, 8 Peters, 88.
[10]Greenough v. Greenough, 11 Pa., 489.
[11]11 Pa., 489.

ing his testamentary intention. Every right thinking person would applaud the act of assembly designed to correct the mistake, by dispensing with the signature to the proper paper. The court finds that his estate had already vested in the heirs and therefore, it could not be divested, though no consideration had been paid by the heirs for it, and although they were meanly taking advantage of the mistake of the deceased, to defeat his intention with respect to his widow. In Menges v. Wertman[12] the existence of a moral obligation, in the part of the person from whom the statute takes the estate to convey it by a valid deed, is adopted as the test of the constitutionality of the validating statute. Was there no moral obligation on the part of Alter's collateral heirs, to respect his intention, in behalf of his widow? This is a question in casuistry, which will be answered variously, according to the degree of development of the moral sense of the answerer. The ordinary person would probably say unhesitatingly, that the act of the collateral heirs was reprehensibly selfish and unjust. What needs to be remembered in the administration of the law is that acquisitions of property through mistake of former owners, through fraud on them, especially when no consideration is paid, are not sacrosanct, and that the handling of so-called constitutional principles so as to make them so, is abhorrent to the justice and the common sense of men.

### Jones' Appeal, 57 Pa., 369

Land was conveyed to Hannah Attmore, a married woman, her heirs and to her sole and separate use. In 1863 she and her husband conveyed it to Hopkins for $3500. The money was paid to Mrs. Attmore. Hopkins in 1864 granted the land to Jones. Prior to the conveyance to Hopkins, the Supreme Court of Pennsylvania held, in Haines v. Ellis, 24 Pa., 253, that since the Married Woman Act of 1848, land held to the sole and separate use of a married woman could be conveyed by her and her husband, although the instrument which created the use did not confer the power of alienation. After the conveyance to Hopkins, but in the same year, 1863, the Supreme Court, in Wright v. Brown, 44 Pa., 224, retracted the decision in Haines v. Ellis, and declared

[12]1 Pa., 218. "The presence or absence of such an obligation" says Gibson, C. J., "seems now to be the test."

that land held to the sole and separate use could not be conveyed. Jones, fearing that his title was bad, procured from the legislature the act of April 11th, 1866, entitled "An act to confirm the title of John H. Jones to certain real estate in the city of Philadelphia."

This act authorized the court of common pleas of Philadelphia to entertain a petition from Jones, to hear evidence of the facts, and to ratify and confirm the title of Jones to the premises "as if the same had been sold and conveyed by the said John Attmore and Hannah G., his wife, under the previous authority of the said court, and to authorize and direct the said John Attmore and Hannah G., his wife, to execute a sufficient deed of release and confirmation unto the said J. H. Jones, his heirs and assigns, without security."

Jones accordingly petitioned the court of common pleas to ratify and confirm his title, and to direct Attmore and wife to deliver to him a sufficient deed of release and confirmation. The court deciding that the act of April 11th, 1866, was unconstitutional, dismissed the petition. On Jones' appeal, the Supreme Court reversed the decree, and entered a decree in favor of the petitioner.

The facts present the interesting question whether one who buys land after a decision of the Supreme Court to the effect that titles of that class are good, or that grantors situated as his grantor is, have the power validly to convey, will be treated as relying on that decision, and will be protected in the estate so acquired, despite a subsequent change of view of the Supreme Court. Mrs. Attmore held the land to her sole and separate use. The power to convey it had not been conferred by her grantor. But the court had announced that since the act of 1848, the power to convey existed. Jones' grantor Hopkins bought the land after this decision. Should he, or his grantee be deemed to have a good title, notwithstanding the subsequent change of opinion of the Supreme Court? The question is not adverted to, though it had been considered in Menges v. Dentler, 33 Pa., 495. It is tacitly assumed that Jones' title will, if good, be good because of the act of 1866.

But, can an act of assembly give validity *ex post facto*, to a conveyance which there was no power in the grantor to make.

Mrs. Attmore had "no power [to convey] but what was expressly given" and no power was thus given. Then, although she made what bore the form of a conveyance, she did not convey, Is it competent for the legislature to make that a conveyance, which, when done, was not a conveyance?

Agnew, J., gropes his way to an affirmative answer. The first observation he makes, it that the act is "an enabling law to carry out the expressed intent of Mrs. Attmore herself, and not to violate her rights." This is not a correct statement of the object of the act. It is a compelling, not an enabling act. It provides that she be directed to execute another deed, a deed of release and confirmation. She had, under the law, the right to repudiate her conveyance and either retain the possession of the land despite her grantee's ejectment or, having lost the possession, to recover it. The object of this act is to deprive her of this right. She had before its passage, the right to recover the land conveyed in ejectment, or, if still in possession and sued in ejectment, to defeat this ejectment. This right the act purposes to take away.

It is trifling with the facts, to say its purpose is to "enable her" to perform the moral obligation resting upon her to secure the title of her vendee." What sort of a moral obligation is that, which is to do what one has not the legal power to do, until an act of assembly intervenes to bestow the power?

The court points out that the land was conveyed to Mrs. Attmore, her heirs and assigns forever, and that therefore her issue or heirs have no interest to be impaired by the act of 1866. That is true, but she has the interest which is impaired. The very object of the disability to convey land held to the sole and separate use is, to protect her against her husband; to avert the danger of her yielding to his solicitations, or of giving way to her sympathies. Nearly half of his opinion is consumed by Agnew, J., in stating and restating this doctrine. The disability is of little value unless the wife may, despite her yielding to the coercion or persuasion of her husband, in making a conveyance, afterwards insist that her title remains unaffected by it. But this power so to insist is taken away by the act of 1866.

Justice Agnew observes that the disability to convey owes

its existence to the coverture, that is arises only upon marriage, and that it ceases with discoverture. It is founded in the coverture "on the score of policy." All legal abilities and all legal disabilities, are founded on the score of policy. The question is not what is the motive of the State, in imposing this disability, but, can the legislature retroactively remove the disability so as to make valid a deed which when made was void?

The writer of the opinion thinks that because the deed to Mrs. Attmore said nothing about the disability to convey, the removal of that disability retroactively, will impair the obligation of no contract. Respect for the obligation of contracts is not the only respect which the constitution requires the legislature to entertain. It must not take the property of one man and bestow it on another. Before the act of 1866 was passed, the land in question was the property of Mrs. Attmore, despite her conveyance to Hopkins. That act purposes to take it from her, and bestow it upon Jones. When the law gratuituously bestows an estate, e. g., by inheritance, it cannot subsequently annul this gift and bestow the property upon some one conceived to be more deserving.[15] The law bestowed the estate on Mrs. Attmore not withstanding her grant to Hopkins. How can it deprive her of it? She may have been unworthy of it after receiving the price just as were the heirs in the cases cited. Unworthy though she was, the law said the land was hers, in spite of her having obtained the purchase money. How can it take from her what it thus gave?

But, let us examine the act of 1866, and discover precisely what it purports to do. It authorizes the court of common pleas to ratify and confirm the title of Jones as if the land had been conveyed "under the previous authority of the said court." What was that previous authority? Can a court, on the application of a married woman, or her intended grantee, give authority to her to convey land which she holds to her sole and separate use, under a conveyance which does not bestow the power of alienation? The power does not exist. Courts cannot strip by their

[15]Norman v. Heist, 5 W. & S., 171; Alter's Appeal, 67 Pa.

decree from the sole and separate use, its most valuable property.[16]

Again, the act of 1866 gives authority to the court to direct Attmore and wife to execute a deed of release and confirmation. But, if the first deed passed no title, how will a second deed pass any?

**Shonk v. Brown, 61 Pa., 320.**

With Jones' Appeal, it is desirable to compare Shonk v. Brown. Jacob Gould devised to his daughter Ann Atherton and her heirs, to her sole and separate use, "so that my daughter Ann cannot sell or convey the same, but to descend to her lawful heirs, and so that the said real property cannot be taken, sold or rented or leased from her or her heirs, to pay any judgment or demand that may be against her said husband." A codicil stated "And it is also my desire and intention in this my last will and testament not to invest the fee simple of my real estate in any said sons and daughters; my said several sons, to wit John Thomas and Jacob cannot dispose or alienate, as well as my daughters any part or parcel of real estate, all of which is to descend to their respective heirs and legal representatives." The testator died March 9th, 1849. On March 2d, 1854, Ann Atherton with her husband, conveyed all her estate under the will to Dorrance, who taking possession, conveyed to Shonk the defendant. Ann Atherton died March 13th, 1856, and her husband later. Thereupon her children, Brown et al. brought ejectment against Shonk.

The act of April 22d, 1863, P. L. 533, directs that when any land has been conveyed or devised without a trustee to any married woman to her sole and separate use, since April 11th, 1848, and the same has heretofore been conveyed or mortgaged by her, the deed or mortgage "shall be and be taken to be of like force and effect, in all respects, as if the same had been given and executed under and in the due exercise of, a power authorizing such conveyance or mortgage contained in the instrument by which the said separate estate, of the said married woman was created."

If the estate taken by Ann Atherton was but a life estate,

[16]Under the act of April 18th 1853, often called the Price act, the court cannot authorize a sale by a married woman of land held to her sole and separate use, for the mere purpose of freeing the land from the trust.

her conveyance would not bar the remaindermen her children, after her death, and the case would present no difficulty. Both parties agreed however, that she took a fee.

Was then, the conveyance to Dorrance valid? The land was held by Ann Atherton to her sole and separate use, "so that my daughter Ann cannot sell or convey the same." The sole and separate use imposed a disability to convey, unless the power to aliene was clearly conferred. The power to aliene was here expressly withheld. The conveyance to Dorrance, who doubtless paid the purchase money was void.

The next question is, does the act of April 22d, 1863, give validity to the conveyance which was previously void? Agnew, J., who wrote the opinion in Jones' Appeal answers summarily, in the negative. Referring to cases in which defective conveyances had been validated by later legislation, he says "But there is a marked difference between them and this. In all of them there *was a power* to convey, and only a defect in the mode of its exercise. Here there is absolute want of power to convey in any mode." This want of power was produced not by the words in the will "so that my daughter Ann cannot sell or convey the came." If a fee was given, the restraint on alienation was absolutely void. The only way in which this restraint is practicable is by the creation of the use or trust. It was the sole and separate use, therefore, which precluded the power to aliene. But, if so, how is the decision in this case to be harmonized with that in Jones' Appeal? That involved a sole and separate use without power to convey, a conveyance by the *cestui que use*, a subsequent act of assembly validating the conveyance. This involves the same. In that case, the validating act was thought constitutional. In this it is declared to be "an arbitrary and unjust exercise of power."

There is a difference between the cases. In Jones' Appeal, the sale was made valid as against Mrs. Attmore, the married woman herself. In this case, Mrs. Atherton has died and the validating act is passed after her death, and attempts to extirpate the estate which has descended to her children. But, the children, as heirs, take only the rights of the ancestor. They pay nothing for what they inherit. Their inheritance cannot improve the quality of what they inherit. If Mrs. Atherton's

estate left in her by her void conveyance, was so far defeasible, that it could be destroyed by an act confirming the conveyance, it passed with this capacity for destruction to the heirs. If the legislature can end the mother's title, while she is alive, it can end it, after it has gone over, with its imperfections, to her children. There is then no substance in the distinction which the justice attempts to draw. A mother's deed not properly acknowledged, can be made valid by a later act not simply as against her, but as against those who are her heirs at the time of the validation.

Justice Agnew observes "By the terms and effect of the testator's will, the property passed to her [Mrs. Atherton's] heirs. The estate became vested absolutely in them, and their title was both legal and equitable." But, they took by inheritance, what she had to transmit. They were not purchasers. If her deed to Dorrance was valid, they took nothing. If that deed was void, they inherited the land vainly attempted to be conveyed. If it was capable of confirmation by the legislature, they took an estate liable to extinction upon the enactment of a confirmatory statute. The incapacity to convey, which is incident to a sole and separate use, does not exist for the benefit of the heirs of the wife, who might be her second cousins, but for her own benefit. If then, she can be deprived of this benefit by a law enacted after her void conveyance, *a fortiori* can those be deprived of it, who claim simply by inheritance. We have already pointed out that the powerlessness of Mrs. Atherton to convey was not produced by the words of the will which negate the power to convey but by the sole and separate use itself.

It follows then that the case of Shonk v. Brown is entirely irreconcilable with the decision by the same justice one year before, in Jones' Appeal.

# MOOT COURT

## THE ESTATE OF JOHN TIMANUS

**Insurance Policies—The Validity of a Transfer of an Insurance Policy To a Brother of the Holder, when the Beneficiary is the Estate of Holder.**

### STATEMENT OF FACTS

John Timanus obtained a policy of insurance upon his life for $2500 payable to his executor or administrator. After paying three annual premiums, he sold the policy to his brother Henry for one half of the premiums paid. The insurance company has paid the $2500 to John's executor, who has filed an account in which he charges himself with $4000. The debts amount to $5000. Henry's claim of $2500 has been rejected by the auditing judge and by the Orphans' Court. Appeal to the Supreme Court.

Dzwonczyk, for the plaintiff.

Locke, for the defendant.

### OPINION OF THE COURT

ROWLEY, J. The principal question for decision is whether the proceeds of the policy on Timanus' life belongs to the estate or to his brother Henry.

Assuming the facts to be as they are stated we will not question the validity of the sale of the policy; but must determine whether there was any motive other than that of natural love and affection and a good consideration for the transfer of the policy.

There is no evidence that John Timanus assigned the policy to avoid creditors and consequently we must assume that the transfer was made in good faith.

The trend of decisions in Penna. is to the effect that "a man may insure his own life, paying the premium himself, for the benefit of another who has no insurable interest." 108 Pa., 6.

In Phillip's Estate, 238 Pa., 423, it was held that "brothers and sisters have an insurable interest in each other's lives" and this may be made even stronger by quoting a paragraph from the same case which reads: "If an insurance policy is valid at the time it is made, it does not become invalid thereafter, because it is assigned to one, who may not have an insurable interest, provided it was taken out in good faith."

There not being anything in the facts to indicate that the policy was not taken out in good faith, we are consequently forced to acknowledge that the case in question comes within the above stated proposition.

In Ins. v. France, 94 U. S., 561, it was held that "any person has a right to procure an insurance on his own life and to assign it to another, provided it be not done by way of cover for a wager policy; and where the

relation between the parties is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from such imputation."

Reading from a note in 9 L. R. A., 660, the court holds, "It is lawful for one, who has his own life insured by a policy payable to himself to sell or dispose of it as any other chose in action; if the policy was valid in its inception."

The examination of the above noted cases are sufficient to satisfy this court that the policy was assigned in good faith and for a valid consideration and that Henry Timanus acquired a good title to the policy.

In Phillips' Estate, 238 Pa., 423, a case very much similar to the one at bar—The assignor being unable to pay the premiums assigned the policy to his sister who agreed to pay the premiums, etc., the policy was made payable to the sister after the assignor's death, but it developed that the sister died first and when the assignor died the money was paid to the executor of the deceased sister. The administrator of deceased assignor brought suit to recover the proceeds of the policy; but the Orphans' Court would not recognize his claim and this judgment was affirmed by the Supreme Court of Penna.

The only distinction between Phillips' Estate, 238 Pa., 423, and the case at bar is that the proceeds of the policy in the former was paid to the beneficiary, the insurance company having notice of the assignment, while in the latter case the policy was paid to the beneficiary named in the policy without notice of an assignment.

We would hardly be justified in finding that the failure to give notice of assignment to the insurance company, would defeat recovery against the estate.

The only logical conclusion that we can arrive at is that the brother Henry, should be permitted to recover against the estate in that he being the holder of the policy, the proceeds of which should have been paid him, but in order to avoid a multiplicity of suits, we think it advisable to allow Henry Timanus to recover the amount of the proceeds against the estate, to whom the insurance company wrongly paid it.

And we enter a decree accordingly. Appeal sustained.

## OPINION OF SUPERIOR COURT

A policy of life insurance is a chose in action and the insured, if the insurance is payable to him, or, in the event of his death, to his personal representative, may assign the same. 25 Cyc., 764, Hill v. United Assn., 154 Pa., 29.

The appellee in this case does not dispute this general principle but contends that the assignment was void, (1) because it was made to one having no insurable interest; (2) because it was fraudulent as to creditors.

The weight of authority is to the effect that an assignment of a policy by the insured to one without an insurable interest is valid if made in good faith and not as a cloak for the procuring of insurance by one without insurable interest. 25 Cyc., 709; 6 L. R. A. V. S., 128. But in some jurisdictions, including Pennsylvania, such assignments have been held to be

invalid on the ground of public policy. 25 Cyc., 709; L. R. A. V. S., 128; Giblert v. Moose, 104 Pa., 74; Downey v. Hoffer, 110 Pa., 109; Keystone Co. v. Norris, 115 Pa., 446; Hoffman v. Hoke, 122 Pa., 377; Hendricks v. Reeves, 2 Super. Ct., 545. The authority of the earlier Pennsylvania cases is much shaken by the decision in Philips estate, 238 Pa., 423. But the question as to which rule prevails at present in Pennsylvania is not important in this case, because the assignee in this case had an insurable interest in the life of the insured. "The relation of brother or sister to the life insured has been held sufficient without pecuniary interest to support a policy of life insurance." 25 Cyc., 705; Aetna Co. v. France, 94 U. S., 561. "The affection naturally to be regarded as prevailing between brothers and sisters, and the well grounded expectation that in case of need they will render each other pecuniary aid, is considered sufficient to support an insurable interest." Phillips estate, 238 Pa., 423.

There is no evidence that the assignment was made with the intent to defraud creditors or that the insured was insolvent at the time of the assignment. The second contention of the appellee is therefore without merit. 20 Cyc., 366; McCutcheon's Appeal, 99 Pa., 133.

Judgment affirmed.

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## MERCHANTS' BANK v. HARRISON

**Physician Practicing without License—Actual Notice of Illegal Consideration of a Negotiable Note as a Defense of Maker in a Suit on the Note by the Discounting Bank.**

### STATEMENT OF FACTS

Dr. Stoop was practicing medicine in violation of the law, not being a qualified physician. Harrison gave him a negotiable note for $150. He had the note discounted by the plaintiff, which, when the note matured brought suit upon it. The defense is that the bank knew, at the time it discounted the note, that it had been given for professional services, and that Dr. Stoop was not a licensed physician.

Hemphill, for plaintiff.

Holtzman, for defendant.

### OPINION OF THE COURT

McKEOWN, J. The question in this case is: "Can the Merchants Bank, which discounted the note given by Harrison to Dr. Stoop, an unlicensed physician for medical services rendered, compel Harrison to pay the amount of the note?" The act of June 3, 1911, declares, "that it shall not be lawful for any person in the State of Pennsylvania to engage in the practice of medicine and surgery, etc.. unless he or she has first fulfilled the requirements of this act and has received a certificate of licensure from the Bureau of Medical Education and licensure created by this act." Any person wilfully violating this statute shall be deemed

guilty of a misdemeanor and subject to fine or imprisonment, or both or either, at the discretion of the court. The act of June 3, 1911, did not take effect until Jan., 1912, and because of the recency of the act we were unable to find any cases cited under it testing the intention of the legislature whether it was a prohibitory act or an act for revenue. We claim that it is a prohibitory act imposing a penalty on persons so offending for the purpose of protecting the public and not for the purpose of revenue as the plaintiff contends. Where a contract is in violation of a statute, although not therein expressly declared void, the agreement is unlawful. 72 Pa., 456; 4 Set. R., 151.

Where a license or certificate is required by statute as a requisite to one practicing a particular profession, an agreement of a professional character without such license or certificate is illegal and void. 9 Cyc., 478.

A contract to pay a fee for services rendered by a physician who is not licensed to practice medicine is void in its inception where a statute prohibits him from practicing as a physician for fee or reward. Services thus rendered by an unlicensed physician under a contract which was void in its inception, because prohibited by statute, do not constitute a consideration which will support an express promise to pay for the services. 3 L. R. A., 43. The consideration in the case at bar was illegal and an illegal consideration is no consideration. When a person comes into possession of a note gotten for an illegal consideration his title to the note is defective according to the negotiable instruments act of May 16, 1901, sec. 64, which reads, "The title of a person who negotiates an instrument is defective, within the meaning of this act, when he obtained it by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud."

It does not appear from the facts of this case that Dr. Stoop attempted to defraud Harrison as to his ability or skill as a physician. He may have been the most competent physician in the State and the very fact that he cured his patient is proof that he was competent as a doctor, but his act was illegal because he had violated the statute by practicing when he was not licensed to do so. Doctor Stoop's right to payment from Harrison rested upon his illegal act of practicing without a license. When the Bank discounted the note, its right to recover from Harrison must depend upon Dr. Stoop's legal right to render the medical services which he did, and it is clear, from the act of June 3, 1911, that he had no such rights. 73 Pa., 198.

A note given for an act which has been declared illegal by statute is void even in the hands of an innocent purchaser for value. 97 Pa., 278; 114 Pa., 422; 8 Pa. C. C. R., 285; 1 W. N., 96; 112 Pa., 419; 13 Pa., 601; 153 Pa., 247; 89 Pa., 89; 55 Pa., 294; 70 Pa., 325; 149 Pa., 163; 72 Pa., 155. If any innocent purchaser for value cannot recover on a note given for an illegal practice, then it is conclusive that one who is informed of the illegal act for which the note was given, as the Bank was in this case, cannot recover. It was held in 13 Pa., 601, and 94 Pa., 132, that a holder

in due course cannot recover from the maker of a note given for a gambling debt, though he could recover from the indorser. We think that the Bank's right of action should be against Dr. Stoop, the indorser, and not against Harrison, the maker of the note.

Judgment for the defendant.

## OPINION OF SUPERIOR COURT

The act of June 3d, 1911, P. L., 639, makes it unlawful for any person to treat diseases by medicine or surgery, unless he shall have received a certificate of licensure. It declares that any person wilfully violating this, or other prohibitions of the act, shall be deemed guilty of a misdemeanor, the punishment of which may be a fine not greater than $500, or imprisonment for not more than six months, or both at the court's discretion. In rendering his service to the defendant, Dr. Stoop was therefore guilty of a crime.

He has contracted for a reward for the doing of this crime. Will the courts aid him to compel performance of the contract? Statutes prescribing qualification for professional men are, says Clark, "intended to protect the public against incompetent and unqualified practitioners, and a person coming within the statute cannot recover for his services, if he has not complied with its provisions." Contracts, 264. In a note, the author cites many cases, in which physicians have failed to recover compensation.

An unqualified conveyancer was not permitted to recover for services in Taylor v. Gas Co., 10 Ex., 293; Cf. Leman v. Houseley, L. R., 10 Q. B., 66.

Even when the statute prescribes a license, merely for the purpose of compelling the licensee to contribute to the State, if he fails to obtain the license, e. g., as a real estate broker, he cannot recover compensation for services. Johnson v. Hulings, 103 Pa., 498.

The action is not by Dr. Stoop, but by the Merchants' Bank. Had the note, which is negotiable, been discounted by the banks in ignorance of the consideration of it, the bank could have compelled payment. The bank however was when it discounted the note aware of the fact that Dr. Stoop had no license to practice medicine, and that the note was given for services as a practitioner of medicine. It is not a bona-fide holder for value. The defense was as available against it as it would have been against Dr. Stoop. Cf. Bank of Greentown v. Lawrence, 96 N. E., 947 (Ind).

The clear opinion of the learned court below sufficiently sustains the judgment.

Affirmed.

## SANDERSON v. TENANT

**Obnoxious Odors in a Dwelling House which is the Subject of a Lease, as a Defense to an Action for Rent of Premises after Tenant has Vacated—Time for Bringing Action.**

### STATEMENT OF FACTS

Sanderson leased to Tenant a house for one year at the rent of $300.00. After occupying the house for six weeks, Tenant left it because the odor of dead rats in the walls made the house untenantable. This odor was perceptible when Tenant took possession and did not increase or diminish. Sanderson sues for rent for seven weeks following the six, the rent for which Tenant had paid.

Sharp, for plaintiff.

Glauser, for defendant.

### OPINION OF THE COURT

MEANS, J. The law on this point in Pennsylvania is well settled and does not admit of much discussion. The question upon which the decision of the case at bar must hinge is, whether the knowledge of the presence and odor of the dead rats was such an indiscoverable and hidden defect that the landlord was in duty bound to warn the prospective tenant of its existence.

The court thinks that it was not. The very essence of the tenant's objection sustains this conclusion. For, how could the presence of dead rats concealed in or about a dwelling be objectionable or even known to the inhabitants of the house if no offensive odor emanated from them. It might indeed be injurious to their health but they would only observe this effect without suspecting the true nature of the cause. In this latter case the presence of the dead rats would indeed be such a hidden and indiscoverable defect as to require notice by the landlord to the prospective tenant, for such notice would be the only way by which the tenant could learn of this defect.

In this case however the facts were different. If as the defendant claims the odor was so offensive as to render the place untenantable, and as it has been found as a fact, the odor did not increase nor diminish during the term of his occupancy, then it must be inferred that he received ample notice and warning by means of his own nose to acquaint him fully with the facts and condition of the house, and that no notice by the landlord could have made any the more certain of the presence of some offensive and disease breeding matter concealed about the place.

In the case of Wien v. Simpson, 2 Phila., 158, Hare J., held: "The tenant may and should view the premises before he takes them; he may stipulate for the repairs before entering or withdraw before the end of the term if they are not made; if he does not, the law cannot protect him from the consequences of his own indiscretion in leasing and keeping a house unfit for habitation. The plaintiff's case is founded on an essentially false conception of the relation which subsists between landlord

and tenant, which is not now as it may once have been, a relation of mutual alliance and protection but one of bargain and sale, fully within the scope of the general maxim, 'coveat emptor.' "

The case of Moore v. Gardiner, 161 Pa., 175, holds that when a tenant removes during the term he cannot defend against the payment of the rent subsequently accruing on the ground that the house was untenantable, it appearing that he had continued to pay the rent with knowledge of this fact and by so doing must be held to have waived his objections on that score. Turbill v. Brown, 1 C. C., 531, holds, that the plaintiff is not bound to communicate to the defendant anything he knew detrimental to the premises. Mere silence in regard to a material fact which is not so hidden and undiscoverable that there is a legal obligation on the part of the plaintiff to disclose it, will not avoid a contract altho it operates as an injury to the party from whom it is concealed. The parties were dealing at arm's length and it was incumbent upon the defendant to make inquiries before executing the lease.

In Hazlet et al v. Powell, et al 30 Pa., 293, the court held that on a demise of lands there is no implied warranty that the premises are fit for the purpose for which they are rented nor that they shall continue so if there be no default on the part of the landlord.

The case of Franklin v. Brown, 118 N. Y., 110, holds, that where the whole of an unfurnished house is leased for a definite term under a single contract which contains no covenant that the premises are in good repair or that the lessor will keep them so, the law does not imply a covenant on the part of the lessor that the building is without inherent defects rendering it unfit for residence.

The plaintiff then was clearly under no duty to disclose to the defendant that which, by the exercise of proper care the defendant could and should have discovered for himself.

Judgment for the plaintiff.

## OPINION OF SUPERIOR COURT

It is well settled in Pennsylvania that where there is no fraud, false representation or deceit and in absence of an express warranty or covenant to repair, there is no implied covenant on the part of landlord that a dwelling house which is the subject of a lease is tenantable or habitable. Consequently it is not a defense to an action for the rent of a dwelling house that it is, and at the time of the letting was, unhealthy, noisome and unsuitable for a dwelling. Trickett on Landlord and Tenant, 68, 33 L. R. A., 449, 24 Cyc., 1054.

These principles have been applied in a number of cases whose facts were very similar to the facts of the present case. In Truesdale v. Booth, 4 Hun 100, it was held that vermin or noxious smells in or about a dwelling house do not constitute an eviction so as to justify an abandonment by the tenant and release him from liability for rent. In Vanderbilt v. Persee, 3 E. D. Smith, it was held that bad smells from fish, and vermin in the bedrooms do not relieve a tenant of his liability for rent. In Pomeroy v. Tyle, 9 N. Y., 514, it was held that the fact that

the house was over-run with vermin, namely, bed bugs, cock roaches, croton bugs and red ants, rendering the premises untenantable did not release the tenant from his liability for rent. The court said, "The legislative sense of relief to tenants has not reached the case of rats, mice, bed bugs and other vermin and all questions as to them must be decided according to the common law."

It appears, therefore, from the authorities cited that the facts relied upon by the tenant in this case would not constitute a defense to an action for the rent and that the plaintiff is entitled to recover the rent if it is due. But the rent is not due. "If a lease is for one year and nothing is said as to the time for paying rent it is payable at the end of the year." Trickett on Landlord and Tenant, 112. "When there is no covenant to pay rent at any particular time the end of the year is the period which the law assigns for the annual reditus to the landlord." King v. Bosserman, 13 Super., 480.

The fact that the tenant abandoned the premises before the expiration of the term and notified the landlord that he would not abide by the rent contract did not accellerate the time at which the rent became legally due. Nicholas v. Swift, 118 Ga., 922; 45 S. E., 708; Connelly v. Coon, 23 Ont. App., 37; Bradbury v. Higginson (Cal.), 123 Pac., 797.

The payment by tenant of the rent for six weeks is of no particular significance. The payment may have been for the accommodation of the landlord or the convenience of the tenant. It certainly did not create a legal liability to pay the rent in weekly installments.

The action for rent was prematurely brought and the judgment is therefore reversed.

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## SUPER v. MUTUAL BENEFIT ASSOCIATION

**Definition of Accident or Accidental—Interpretation of Clause in Insurance Policy containing the Word "Accidental" or "By Accident."**

### STATEMENT OF FACTS

Super was a member of defendant Association. In consideration of his paying monthly dues and assessments, it contracted to pay his executor or administrator at his death $1000 or in case, before death, inter alia he should lose the sight of an eye by accident, to pay him $500.

Super was painting when some paint got into his eye unexpectedly. There was something infectious in the paint and the eye became inflamed and finally its sight was destroyed. The Association denies that it is liable.

Rowley, for plaintiff.

Sohn, for defendant.

### OPINION OF THE COURT

STRITE, J. The agreement between the plaintiff and defendant is admittedly a valid contract of insurance. If, therefore, the plaintiff lost the sight of an eye as the proximate results of an accident the de-

fendant is liable for the sum of $1000. This liability depends upon the determination of two questions: (1) Was there an accident? (2) If so, was it the proximate cause of the loss of sight?

An accident according to Webster is "an event that takes place without one's foresight or expectation, an event that proceeds from an unknown cause, or is an unusual effect of a known cause and therefore not expected."

Bouvier defines it, "An event which, under the circumstances, is unusual and unexpected by the person to whom it happens. The happening of an event without the concurrence of the will of the person by whose agency it was caused; or the happening of an event without any human agency."

1 Cyc., 227, sums up a number of definitions and concludes that an accident is "an event happening unexpectedly from the uncontrollable operations of nature alone, and without human agency, or an event resulting unexpectedly from human agency alone; or from the joint operation of both."

This occurrence we believe comes within each of these definitions of "accident." It was the unforeseen, unexpected result of a known cause (the painting being regarded as the cause of the paint getting in the eye). It was unusual and without the concurrence of the will of the human agent. We conclude, therefore that the event was an "accident" in the legal as well as the broader sense of the word.

This construction of "accident" finds support in many Pennsylvania cases of which North American Life and Accident Insurance Co. v. Burroghs, 69 Pa., 43; Humphreys v. Association, 139 Pa., 264, are instances.

The remaining question is whether the accident is the proximate cause of the injury. The learned counsel for the defendant contends that it is not, because the accident is the splashing of the paint into the eye and the presence of the infectious matter is an intervening cause.

With this view we are unable to concur. It does not seem to us that there was any intervening cause. The infectious matter either was a constituent of the paint or was introduced into the eye simultaneously with the paint. If it was a constituent of the paint we may properly say that the injury was caused by the paint itself and there was, consequently, no intervening cause. If it was introduced simultaneously but was not a part of the paint we cannot see that there is an intervening cause because of two substances being introduced by the same accident rather than one.

Injuries caused by infectious matter have been held to be the result of accident in 69 Pa., 43 (before cited) and Assn. v. Smith, 85 Fed., 401; 40 L. R. A., 653. In Farner v. Assn., 219 Pa., 71, the plaintiff recovered on an accident policy, where it appeared that the insured died as a result of an injury caused by a dog bite. The court said, "The proximate cause was the bite, clearly an accident and the way in which it operted to produce death whether by hemorrhage, lockjaw or blood poisoning was a medical detail which did not affect the material fact of death resulting from the accident."

We conclude that the unexpected entry into Super's eye of paint containing infectious matter is an accident within the meaning of the policy and was the proximate cause of the loss of sight and therefore direct that judgment be entered for the plaintiff for $500.

## OPINION OF THE SUPERIOR COURT

The decision of the learned court below that the loss of sight of an eye due to the infection of the eye by an infectious substance contained in paint which was splashed into his eye when he was painting is sound, and must be affirmed.

The splashing of paint into the eye was an accident. In construing the word "accident" or "accidental" as used in insurance policies, the courts have held that they mean "happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected." 1 Encyc. of Law and Practice 325, 298 and cases cited. "An accident is an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause and therefore not expected." Alloway v. Ins. Co., 35 Super., 375; Burlhard v. Ins. Co., 102 Pa., 375. "An accident is an unusual or unexpected result attending the performance or operation of a necessary or usual act." Hey v. Ins. Co., 181 Pa., 220.

The loss of the eye was caused, in a legal sense, by the accident. It was not the result of any disease or bodily infirmity in existence at the time of the accident but of a disease which was itself caused by the accident. The disease was an effect of the accident, the incidental means produced and used by the original moving cause to bring about its effect, a mere link in the chain of causation between the accident and the death and the causans was the accident alone.

A multitude of cases may be cited where recovery upon accident policy has been allowed where the injury resulted from the infection of a cut or abrasion, see 5 L. R. A. N. S., 926, and in our opinion such cases cannot be distinguished from the present case. It is not necessary, however, to rely upon these cases. Recoveries have frequently been allowed where the injuries have resulted from infection altho no cut or abrasion existed.

In Dent v. R. R. Assn., it was held that the insured's death was "accidental" within the meaning of an accident policy where it resulted from his hand coming in contact with poison ivy while cutting a stick in the woods. In Columbia Co. Fidelity Co., 104, Mo. Ap. 157, 78 S. W., 320, it was held that the kidney disease or dropsy engendered by absorption of poison resulting from the handling of infected rags or wall paper was an injury "accidently suffered." In Sullivan v. Modern Brotherhood, 167 Mich., 524, it was held that the loss of sight of an eye due to its infection by gonococci by splashing water from a tub while washing clothes therein is within the operation of a policy providing indemnity in case of the loss of the sight of an eye by accident. In Pickett v. Ins. Co., 144 Pa., 79, a death due to the inhalation of a poisonous gas while repairing a well was held to be due "external, violent and accidental means."

## UNIVERSITY v. HOLMES

**Contracts made During Minority—Is a College Education a "Necessity?"**

### STATEMENT OF FACTS

Holmes a youth of 19 years and owning a considerable estate, conceived the plan of preparing himself to become a civil engineer. He entered the University and contracted to pay its annual fee of $200. After spending a year at the University, he withdrew. not having paid the $200. This is a suit on the note which he had given for it.

Dzwonczyk, for plaintiff.

Ferrio, for defendant.

### OPINION OF THE COURT

FRY, J. The question presented in this case is whether a college or university education is a necessity for which the defendant, a minor, can be held liable on his contract. If such an education is a necessity, the defendant is liable on the note of $200 which he gave for it.

Contracts of infants are of three classes, viz: such as are binding; such as are void; and such as are voidable only. The distinction is that where the court can pronounce that the contract is for the benefit of the infant, as for instance necessaries, there it shall bind him; where it can pronounce it to be to his prejudice it is voidable only and it is in the election of the infant to affirm it or not.

There is no doubt that a college education is a benefit to anyone, more especially if ones station in life is such, that an education is a qualification that will enable him to better cope with his associates, in business, science or even social life. This station in life is to a large extent measured by ones income or the means he has to fit himself for life by acquiring an education. While on the other hand one destitute of means, it is possible, may not be so much in need of a college education, or find it amiss if he is unfortunate enough to be deprived of it by circumstances. The defendant has a considerable estate and the fact of his being unable to meet his obligations is out of the question.

Let us now inquire of what necessaries consist. In Rundel v. Keeler, 7 Watts, 237, it is held, "necessaries are not only such things as are absolutely necessary to support life, but such as are suitable to the infants degree and estate." Likewise in Strayer v. Hantz, 2 P. & W. (Pa.), 333, "infants are only capable of making contracts for necessaries such as are considered in law clearly for their advantage." Whether an article supplied to an infant is a necessary or not depends upon its general character, its suitability to the particular infants means and station in life and his actual need of it. 16 A. & E., 276.

In McKanna v. Merry, 61 Ill., 179, the rule is stated to be, that, "the articles furnished must be actually necessary in the particular case for use, not mere ornament; for substantial good not mere pleasure, and

must belong to the class which the law generally pronounces necessary for infants. Boarding, lodging, food, medicine and education are clearly necessaries."

From the decisions cited in Lawson's "Rights, Remedies and Practice" Vol. II, it appears that necessaries are not simply such things as are absolutely necessary for the existence and support of the infant, but include all such things as are requisite to maintain him in his station of life.

Lord Coke includes among necessaries for which an infant may bind himself by contract, "good teaching and instruction whereby he may profit himself afterwards."

Let us now look into some cases touching upon necessaries in the course of pursuing a collegiate education. In Kilgore v. Rich (Maine) 12 L. R. A., 859, it was held, an infants board bill while attending college is included among necessaries for which he may be compelled to pay. Also in Gregory v. Lee (Conn.), 25 L. R. A., 618, a minor leasing rooms for a year while attending college is bound on the ground that lodging is a necessary.

In order to secure a college education it is not only necessary to pay board and lodging, but also tuition. In fact boarding, lodging and tuition constitute the main items of expense of one pursuing a college course. If a minor can be held for board and lodging while seeking a collegiate education, on the ground of its being a necessary, it would be absurd on the face of it, to say he could not be held for tuition on the same ground.

The defendant in support of his contention that a collegiate education is not a necessary, cites Middleburg College v. Chandler, 16 Vt., 679. Altho it was held in that case, that a collegiate education is not ranked among those necessaries for which an infant can render himself absolutely liable by contract, the court continues, "now it does not appear that extraneous circumstances existed in the defendant's case, such as wealth, station in society or that he exhibited any peculiar indications of genius or talent which would suggest the fitness and expediency of a college education for him, more than for the generality of youth in the community." A college education was grossly inconsistent with the circumstances of the defendant being as he was, entirely destitute of means or expectations. We think this case therefore is clearly distinguishable from the doctrine of other cases on this question.

In the case before us defendant was pursuing a course in civil engineering. No one can doubt that a course in civil engineering is beneficial, giving to one, who has the means to acquire such an education, a means of earning a profitable livelihood.

The court is of the opinion that under the defendant's circumstances a college education is a necessary; that the defendant having a considerable estate and an education being consistent with his means and station in life he is liable on the note.

Judgment for plaintiff.

## OPINION OF SUPERIOR COURT

A thing may be a "necessary" to a minor and nevertheless a contract by him for it, whereby he binds himself and his estate, may not be necesary in order to secure it. He may have a father or a guardian who is able and willing to supply and who is supplying him with "necessaries." When this is the case, a contract by the minor even for what, but for the willingness of the parent to supply it would be a necessary, would not be enforceable. Guthrie v. Murphy, 4 W. 80; Watson v. Hensel, 7 W. 344.

The person who enters into a contract with an infant, and who wishes to enforce it, must show that the thing contracted for was necessary, and that no parent or guardian was supplying it. Text Book Co. v. Connelly, 206 N. Y., 1881.

The judgment of a father as to the wisdom of the son's attempting to become a civil engineer, should be deferred to and respected. He knows his son better than any others. He is interested beyond others, in the son's welfare. He may know that the son's want of ability, or preparatory training, or his habits, in all probability make a course in a university futile. A boy who is wanting in the necessary mind, or purpose to achieve an education, should not begin it. A year's instruction in a University for many youths, is simply wasted. They want receptiveness for it; they are inconstant; they love pleasure more than work.

In determining whether a year's teaching in the University is a necessary, regard must be paid, not only to the utility of knowledge of civil engineering, but to the adaptedness of the proposed process for acquiring it to the condition of mind in which the student is, when he undertakes the study. If he is ignorant of arithmetic, algebra, and other elementary studies, it would be absurd for him to undertake even a first year's course in civil engineering. There is nothing before us to show that the preliminary schooling, without which a university course would be worse than useless, had been acquired.

If we were permitted to indulge in surmise, we might suspect from the fact that young Holmes barely finished his first year and did not enter upon a second, although he had income enough, that he had discovered his unfitness for the study, or that he was of so inconstant a disposition, that sensible persons, knowing him, would not have approved of his commencing a course whose completion demanded several years of assiduous work.

Too much importance has, we think, been attached by the learned court below, to the circumstance that Holmes' income from his estate was considerable. One who has property may doubtless find a professional training a necessary, which would not be a necessary for a poorer youth. Affluence in money however is only one of the justifications for embarking on a professional preparatory course. There should be affluence in the mental and moral properties which the successful pursuit of the course presupposes.

The world is full of young men who would like to be physicians, orators, engineers, etc., but who are destitute not merely of the fortune that would make preparation for such vocations practicable, but of the

indispensable mental, moral and social conditions of success.

The opinion which the learned court below entertains of the beneficialness of a "college education," is perhaps a little too absolute. There is often much mistraining of youths in colleges. Much time and thought are bestowed by collegians on other than things of the mind. Some colleges are seminaries for propagating pernicious social and economical nations. In many independence, originality, divagation from accepted notions, political, religious, philosophical are frowned on as serious intellectual vices. We think the proposition that a college course is a good thing, is entirely too broad. *Some* courses in *some* colleges, are good things for *some* men. Anything stronger than this, is erroneous and mischievous. At least as true, would be the assertion that some courses in many colleges are for many students pernicious.

It is to be observed that the fact is not found by the jury, that the year's instruction in civil engineering was for Holmes a necessary. Whether anything is a necessary, is generally for the jury. Especially is it for a jury to say that a service not to the immediate elemental corporal necessities but to the future intellectual, social and industrial life, by way of preparation for it is a necessary.

Judgment reversed with v. f. d. n.