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ALUMNI NOTES.

W. H. Taylor, '01, was admitted to the Supreme Court on January 6th. He subsequently spent a few days in Carlisle and has since located at Grand Encampment, Wyoming. THE FORUM wishes him abundant success.

A. Frank John, '00, spent several days in town during the month. He has for some time been located in Mt. Carmel, and reports a fair share of business.

At a special meeting of the council of the thriving borough of Renova, Pa., held Wednesday evening, February 12th, W. E. Shaffer, '00, was unanimously elected borough solicitor.

In the Birkbeck will case, which came up in the Orphan's court of Luzerne county recently, Daniel Kline, '01, was one of the attorneys representing the niece, who was ignored in the first will, but whose interest in the estate under the last will would be in the neighborhood of $40,000. We are pleased to note that Mr. Kline has been retained on a number of important cases since his admission to the bar seven months ago.

SCHOOL NOTES.

Rothermel, of the Junior class, has gone to his home for the present, owing to continued poor health. We trust he may soon be enabled to return.

Benjamin, '04, has been appointed by Judge Simonton as one of the viewers for a bridge to be erected at Lackawanna, near Scranton.

ALLISON SOCIETY.

The adjournment of the congress conducted by the Allison Society terminated the longest continuous programme that was ever conducted by that society. The congress began in the latter part of January and remained in continuous session until March 7th. During that time twelve sessions were conducted, and six bills and

about fifteen resolutions were passed. Among the bills that were passed were the following: Bill to increase the Army and Navy; bill to purchase the Panama Canal; bill to construct a cable between San Francisco and Manilla; bill to exclude the Chinese. Several other bills were considered but were defeated on final reading.

The adjournment of the congress brought to a close one of the most instructive programmes that the Allison Society conducted during the present term. It not only imparted to the members a knowledge of how the national congress is conducted, but it gave them an excellent drill in parliamentary training, and opportunities to debate subjects of national importance, subjects in which every citizen of the United States is interested. That these benefits were appreciated was demonstrated by the hesitancy of the members to adjourn the congress. At the last session the advisability of continuing it for another month was discussed, but, at request of the executive committee, who have other plans under consideration, the resolution to adjourn the congress was adopted.

One of the instructive debates was that on the Chinese Exclusion act. Crary, Adamson, Willis, Carlin, Flynn, Yocum and Spencer talked in favor of the bill; Donahoe, Benjamin, Core and White talked in opposition to it. The affirmative won by a small majority. The arguments of the negative were exceptionally strong. They presented this interesting question in a different light than that in which we usually view it, appealing more to reason than passion. The arguments were logical and appealed strongly to the conservative minds. They received the arguments from Mr. Wu, the Chinese minister in the United States, with whom they had correspondence.

The future sessions of the Allison will not be routine. The executive committee is preparing several programmes that will be as interesting as the congress.

DICKINSON SOCIETY.

The newly elected officers were installed at the meeting of March 7th. President-elect Hickernell assumed the position of president with the good will of the society to support him. His inauguration speech was brief, pointed and apropos. He outlined an administration which, if carried out, bodes well for the future of Dickinson Society. The program rendered at this meeting, was, as usual, interesting and well rendered. The regular debate was dispensed with, on motion, as some of the debaters were not present. This is a circumstance which is unfortunate, to say the least. Members should be sufficiently interested in the work to respond willingly at the meetings, take their proper part of the program and bear some of the burden of the work. It is an evil in literary societies, that the work is apt to devolve upon a few. It is to be hoped that members hereafter will at least notify the executive committee that they cannot serve. Time is too precious, and opportunity too meagre to let both slip by without an effort to grasp them and make the most of them.

The meeting of March 14th was opened by President Hickernell in the chair. The society attendance was not beyond the usual standard. The program was partly carried over from the last meeting.

It seems to be a perplexing question with our executive committee as to whom to procure for a lecturer. It is so long since we had a lecturer come before our society, that everyone is expressing the desire that arrangements be made to procure a response to our invitation. We would remind the executive committee that Dr. Reed has promised to lecture to us again.

The annual inter-society debate between Dickinson and Allison has not yet been suggested in our meeting. It is our turn to challenge Allison Is it possible that it will fail to come to pass? We hope not.

The large number of exchanges of the Forum in the library should suggest to the executive committee that something of interest might be culled from them to spice our programs. Many of the articles found in them would be interesting and instructive, if they were read as part of the program.

The Juniors are taking a remarkable interest in society work, and it is with pleasure that we notice it.

A question which seems to be quite puzzling is "Where is the minute book?" Committeemen Schanz and Morehouse

failed to find any trace of it, and so reported at the last meeting. Finder, please return.

DELTA CHI.

James B. O'Malley, Esq., of Cornell University, and A. Frank Johns, Esq., of Mt. Carmel, Pa., were banqueted in the Chapter rooms here on their return from the University of West Virginia, at Morgantown, where they installed a new chapter of the Delta Chi. Addresses were delivered by the guests of honor, and also by Prof. F. C. Woodward, Guy Thorne, R. J. Boryer and William Osborne. Both Mr. O'Malley and Mr. Johns are officers of the Grand Chapter, and they both are pleased with the prospect for an influential and prosperous Chapter in West Virginia. Mr. Thorne was Dickinson's representative at the installation. It was during the career of Messrs Boryer and Osborne, of Dickinson, in the West Virginia University, that the organization of the new Chapter was begun, and it will always be regarded as an offspring of Dickinson. Both the grand officers congratulated Dickinson upon its flourishing condition and upon the work it has been doing. They reported that all the Chapters of the Fraternity are enjoying unusual prosperity.

BOOK REVIEWS.

PENNSYLVANIA LAW OF CONVEYANCING. *By Christopher Fallon, of the Philadelphia Bar. T. & J. W. Johnson & Co., 1902, pp. xix, 909.*

Mr. Fallon's work, based upon notes taken for the author's own use, and dealing with the special features of the Pennsylvania law of conveyancing, must prove a practical aid to the practitioner in this state.

The author's aim as stated in the preface is, " to bring together all the acts of the assembly and decisions of the court, relating to the transfer of real estate, and arrange them in such a shape that the busy practitioner might readily find the law on any given point," and the purpose has been successfully accomplished, both as to matter and arrangement, by a lucid and concise statement of the law, careful discrimination in the selection of illustrative cases, and the application of astute analytical powers to a logical disposition of material, making possible a highly satisfactory and workable index.

The book contains over nine hundred pages, including the excellent index, a table of cases cited, and a chronological collection of the acts of the assembly quoted with reference to pages.

The work proper is divided into twenty-five chapters, each with a carefully prepared synopsis of paragraphs, and without extended intrusion of personal theories, covers very completely the ground set out in the title.

The profession will find this exposition of the fruits of Mr. Fallon's experience, not only an excellent literary production, but a valuable every-day reference book.

THE LAW OF WITNESSES IN PENNSYLVANIA.

The Pittsburg Legal Journal, of March 12th, in reviewing this recent work says, "Professor Trickett has written a great many text books on Pennsylvania Law and they have been uniformly of a high standard. The present work is one of the best. As the title indicates, it is not a work on the general Law of Evidence, but only on the parts of the subject relating specially to the witness, and is almost entirely confined to the Competency of Witnesses, and Opinion or Expert Testimony." After quoting from the preface, the writer continues "The work contains about 700 pages, including a good index. The subject-matter is well arranged so that the exact point wanted may be readily found. The citations of cases are complete and the important ones are given very fully so that a reference to the report is usually unnecessary. It covers largely a new subject in Pennsylvania law, and will be found to be of great assistance in the trial of nearly every case and in the settlement of claims in the Orphans' Court."

The following is a continuation of the Moot Court cases assigned:

	Plaintiff	Defendant
No. 91.	Claycomb,	Longbottom,
	Miller,	Watson.
	Sherbine, J.	
No. 92.	Mowry,	Hamblen,
	Gross,	Walsh.
	Hickernell, J.	

No. 93. Lanard, Lourimer,
Shomo, Wilcox.
Schanz, J.

No. 94. Morehouse, Shiffer,
Brock, Adamson.
Davis, J.

No. 95. Conry, McIntyre,
Turner, Boryer.
Brooks, J.

No. 96. Spencer, Willer,
Willis, Knappenberger.
Brennan, J.

No. 97. Kaufman, Fox,
Drumheller, Vastine.
Ebbert, J.

No. 98. Minnich, Sterrett,
Osborne, Rhodes, F.
Points, J.

No. 99. Thorne, Brooks,
Williamson, Hindman.
Laubenstein, J.

No. 100. Bouton, Keelor,
Schanz, Wright.
Walsh, J.

No. 101. Wilson, Wingert,
Oldt, Rothermel.
Vastine, J.

No. 102. Elmes, Lonergan,
McKeehan, Points.
Adamson, J.

No. 103. Albertson, Bradshaw,
Chapman, Jacobs, J. H.
Wright, J.

No. 104. Flynn, Matthews,
Hugus, White.
Yeagley, J.

No. 105. Fleitz, James,
Hillyer,

No. 106. Rhodes, J. Moon,
Houser, MacConnell.
Brock, J.

No. 107. Brennan, Delaney,
Miller, Myers.
Hindman, J.

No. 108. Hubler, Lloyd,
Benjamin, Carlin.
Kline, J.

No. 109. Mowry, Jones,
Peightel, Cooper.
Bishop, J.

No. 110. Phillips, Drumheller,
Sherbine, Cisney.
Schnee, J.

No. 111. Claycomb, Mays,
Longbottom,
Peightel, J.

No. 112. Berkhouse, Houck,
Lanard, Shiffer.
Drumheller, J

No. 113. Crary, Mowry,
Cannon, Schnee.
MacConnell, J.

No. 114. Davis, Turner,
Laubenstein, Boryer.
Osborne, J.

No. 115. Dever, Kline,
Core, Ebbert.
Bouton, J.

No. 116. Kaufman, Yeagley,
Walsh, Watson.
Myers, J.

MOOT COURT.

THOMAS vs. HARVEY.

Receipt by check—Recital "payment in full"—Prima facie and not conclusive evidence of settlement—Duty to investigate records—Fraud.

SCHNEE and WILLIAMSON for the plaintiff.

A receipt, "in full," is not conclusive, but only *prima facie* evidence of payment. Batdorf v. Albert, 59 Pa. 59; Flynn v. Hurlock, 194 Pa. 462.

Dixon had sufficient notice of the prior mortgage to cause him to investigate and he is bound by whatever his investigations would have disclosed. Murphy v. Nathan, 46 Pa. 508; Uhler v. Hutchinson. 23 Pa. 110.

STAUFFER and WANNER for the defendant.

A receipt in full is conclusive when given with a knowledge of all the circumstances. Tucker v. Murray, 10 Lanc. 235; Fowler v. Smith, 153 Pa. 639; Smith v. Cohn, 170 Pa. 132.

OPINION OF THE COURT.

Sloan Thomas loaned Harry Harvey $2,000.00, receiving as security a first mortgage on the realty of Harvey. One year after loan of $2,000.00, Harvey desiring to secure an additional $1,000.00, applied to Dixon, who agreed to loan him $3,000.00 on condition of his paying Thomas $2,000.00 in satisfaction of his mortgage and giving Dixon a first mortgage for the $3,000.00. At Harvey's suggestion, Dixon gave him a check for $1,500.00, payable to Thomas, in full payment of his mortgage. Harvey told Dixon that he had $500.00 in

cash, intimating that he would use that in conjunction with the $1,500.00 to satisfy Thomas' claim.

Harvey gave the check for $1,500.00 to Thomas who, apparently unmindful of the stipulation that it was in full payment of mortgage, had check cashed ; it was returned to Dixon, who, upon its receipt, paid to Harvey the remaining $1,500.00.

Harvey never paid Thomas the balance of $500.00 due on mortgage, hence Thomas never satisfied the mortgage.

Thomas' mortgage still of record, Dixon's mortgage became a second lien on the land and his claim was inferior to that of Thomas. The remaining $500.00 being unpaid, Thomas in order to secure it sued out a writ of *scire facias*, and caused land to be sold. At the sale Dixon, in order to secure his interest, bid $3,000.00 ; land sold on his bid.

In the distribution Dixon claimed the whole of the $3,000.00, since it represented the amount of his claim against the land.

The question to be decided is whether Thomas, having accepted a check for $1,500.00, purporting to be in full payment of mortgage, is entitled to $500.00 of the proceeds of the sale, "balance due on his mortgage of $2,000.00 ;" or whether Dixon is entitled to the whole of the $3,000.00.

It seems clear from the facts in the case, that it was the intention of Harvey to defraud Thomas. He represented to Dixon that he would pay Thomas, by the check for $1,500.00 and $500.00 in cash, the full amount of the mortgage. There is absolutely no evidence of an agreement between Thomas and Harvey whereby Thomas waived a part of the $2,000.00 due him on his mortgage.

A receipt in full is *prima facie* evidence of a settlement, but not conclusive. It may be attacked on the ground of fraud, mistake or ignorance of his legal rights in the party who gave it, is the principle laid down in Hamsher v. Kline, 57 Pa. 397. It is held in Hartman v. Danner, 74 Pa. 36, that payment of part of a debt, though received in satisfaction, if without a release under seal, will not have the effect of extinguishing the whole. This principle is also laid down in the following cases: Lowrie v. Verner, 3 Watts 319; Megargel's Adm. v. Megargel, 105 Pa. 475.

In Clark on Contracts, page 189, we find that the simple payment of a smaller sum, in satisfaction of a larger, is not a good discharge of a debt, for it is doing no more than the debtor is already bound to do, and is therefore no consideration for the creditors promise to forego the residue. The only exceptions are gifts and releases under seal, these are based on the fact that in addition to the part payment there is some new benefit or consideration, even though slight, to sustain the creditor's promise to forego the residue of the debt.

Where the creditor agrees with the debtor to accept a lesser amount in satisfaction of his claim, the doctrine of accord and satisfaction applies. But as a general rule the doctrine of accord and satisfaction rests upon a mutual agreement between the parties.

There must be an *aggregatio mentium*. Parsons on Contracts, 6th ed. 685.

Where a note or a check of a third person constituted the consideration, it was held in Lauer v. Getzer, 3 Sup. 461, "Where the creditor accepts the note of a third person in payment of his debt, a novation takes place. Mere acceptance of the note does not constitute a novation without evidence that it was taken in satisfaction of the debt. In all cases the burden of proof is upon the party asserting the novation.

The facts within my possession fail to show any evidence of an agreement between Thomas and Dixon whereby a novation was created, since the burden of proof to show such novation was on the defence. In my opinion the defence failed to establish the novation.

In most cases cited by the defence, it was manifest that there was an accord and satisfaction. In the absence of such agreement in this case, I am unable to see the relevancy of the cases cited.

It was held in Economy Coal Company v. Bracewell, 78 Ill. App, 235. "One who accepts a payment tendered to him in full satisfaction of his claim, is estopped from claiming thereafter a balance on such claim." But it rests on the party setting up estoppel to show grounds upon which it rests. Wood v. Bullard, 151 Mass. 331. One of the grounds to be shown, would be knowledge of the creditor to be estopped. From the facts as presented in this case, I am convinced there was no agreement be-

tween Thomas and Harvey whereby Thomas should accept $1,500.00 in full satisfaction of his mortgage for $2,000 00. This is made clear by Harvey's representation to Dixon as to $500.00 cash that he intended to apply to Dixon's check for $1,500.00. Thomas' attitude in the matter clearly proves that his acceptance of the check was due to an oversight on his part, in failing to notice that it was stipulated that the amount was in full payment.

Thomas being the first mortgagee, his mortgage remaining unsatisfied, the balance due on it was still a first lien on the land, notwithstanding the representations and promises made by Harvey.

Granting that Mr. Thomas was negligent in accepting a check marked in full payment of his mortgage, when it lacked $500.00 of being the amount of the mortgage. Mr. Dixon was negligent in a greater degree, since he reposed the utmost confidence in the statements of Mr. Harvey, and relying solely upon them, he advanced $3,000.00 on security which he now comes before the court and asks to be construed in his favor, to the detriment of one entitled to the protection of the court.

The court records are open to our investigation. When one buys realty it devolves upon him to secure himself as to the validity of the title he is about to acquire; likewise, when one wishes to place money out on interest, he must ascertain the worth of the security he is about to receive. If he neglects to make the necessary examination and relies upon the representations of others, he does so at his own peril, and on an occasion such as is presented in the case we are now considering, it is unreasonable to ask the court to protect one against loss occasioned by his own negligence.

It is a principle deeply rooted, "when one of two innocent parties must suffer for the wrongful act of a third party he must suffer who put it in the power of such third party to do the wrong." In this case it is a question as to who should suffer for the wrong of Harvey, since Dixon put it in the power of Harvey to do the wrong he should suffer the loss rather than Thomas.

Mr. Dixon was grossly careless in not insisting upon an actual satisfaction of Thomas' mortgage on record, or a power of attorney to satisfy the mortgage. Since he was content with the returned check, and Mr. Harvey's representations. I am satisfied that Mr. Dixon should suffer the loss occasioned by the fraud of Mr. Harvey.

Judgment is therefore entered in favor of the plaintiff for the sum of $500.00, and against the defendant.

HINDMAN, J.

ELECTRIC LIGHT CO. vs. THORPE.

Electric Light Co.—Placing of poles—Injunction—Burden of proof as to servitude.

STATEMENT OF THE CASE.

The Borough of Ephrata was already supplied with light by an electric light company under a contract to light the streets for four years. Meantime, the plaintiff company was incorporated and obtaining the consent of the council, proceeded to plant its poles and stretch its wires. Its charter authorized it to furnish light to the borough and its inhabitants.

In front of Thorpe's house were already two poles of the former company, and one of a trolley company. The plaintiff is undertaking to plant another pole in front of his house, and he has removed it three times. Hereupon an injunction is asked by the company against the further interference with the pole.

He answers, (1) That the borough being already supplied with light, the plaintiff's planting of the pole is taking an easement for a non-public use; (2) The planting of an additional pole before his house is oppressive and discriminates against him because it could be as conveniently, for the company, planted elsewhere. The plaintiff demurs to the answer.

CHAPMAN and CORE for plaintiff.

The borough has the right to grant easements on its streets. Trickett on Borough Law, § 395; Lockart v. Craig St. R. R., 139 Pa. 419. The injunction may be granted. Haverford Light Co. v. Hart, 13 Pa. C. C. 369.

CARLIN and KEELOR for defendant.

An injunction is not allowable to restrain one from interfering with anything that is going to damage his property. Beiver v. Hurst, 162 Pa. 1; Richard's Appeal, 57 Pa. 105; Rhodes v. Dunbar, 57 Pa. 274.

OPINION OF THE COURT.

The one question of importance is involved in the first point presented by defendant. A case almost analogous is found in York Telephone Co. v. Keesey, 5 District Reports. An ordinance of the city required telephone companies to obtain a license before planting poles, to give dimensions of each and also intended location. The company failed to do so and planted one in front of property of defendant, which he cut down. Subsequently the company complied with the ordinance. In the hearing for an injunction it was held that under the circumstances, defendant was justified in cutting them down, but if plaintiff complied with city ordinance, an injunction restraining defendant from interfering would be granted, the learned court saying:— "Poles and wires of a telephone company impose no additional servitude upon a street. Rights of owners of abutting properties on a public street are subject to paramount rights of the public which are not limited to a mere right of way but extend to all beneficial, legitimate street uses of which this is one. A telephone company is a quasi-public corporation and must serve every one who applies, on equal terms. It is not a corporation for private business, and there is, therefore, no constitutional objection to its enjoying rights of eminent domain."

A borough may permit erecting of poles and wires along and across streets without compensation to property owners and exact from such company a license fee for such privilege. Trickett Borough Law Sec. 395, also Lockhart v. Street Railway Co. 139 Pa. 419.

In case of Haverford v. Electric Co. 13 C. C. 369. The poles of plaintiff company were placed in front of defendant's property but within limits of the highway and a few feet from defendant's fence line. Defendant cut down the poles; company replaced them and secured a preliminary injunction to restrain him from further interference with the poles. The court saying "An electric light company may plant their poles on the side of a country road, abutting land owners are entitled to such damages as they may sustain by location of poles and wires."

In answer to the second point presented by defendant, it does not work any more hardship upon him than upon any other property owner and does not appreciably diminish the value of his property nor does it discriminate against him. If he can show additional servitude imposed upon him, he has his action at law. A permanent injunction restraining defendant from interfering in any manner with poles and wires of plaintiff company is therefore granted.

LONGBOTTOM, J.

OPINION OF THE SUPERIOR COURT.

The light company has the authority of the state to erect poles on the streets of Ephrata, upon obtaining the consent of the borough council, and it has obtained that consent.

The borough could have suspended its consent on compliance by the company with conditions as to height, thickness, color of the poles, their closeness to each other, the number that might be planted before any man's premises, etc., but it does not seem to have done so.

It seems, if we are to accept Russ v. Pennsylvania Telephone Co. 3 D. R. 654, that in addition to the conditions specified by the municipal council, the court has a limited power to impose conditions. McPherson, J., there enjoined the company against planting a pole "in front of any of the doors or windows of the plaintiff's building" then in course of erection, after ascertaining, at a hearing, that the pole might be placed equally advantageously for the company, "a few feet north or south of the point first chosen, without interfering with the plaintiff's windows or doors."

It is conceivable, with the increase of the number of corporations supplying light, locomotion, or intelligence, by means of electricity within a borough, that a large number of poles should be placed on the land of one citizen, who might thus receive an undue share of the burdens. If he can be subjected to four, he may also be to forty. It seems reasonable that after a certain charge has been placed on one man, no more should be imposed unless it appears that the selection of another site for the poles is not reasonably convenient. Thorpe, having already three poles, thinks that the fourth should be placed on some other lot. If it could with substantially

as much ease and convenience be placed elsewhere, we agree with him that he should not be compelled to suffer the additional burden.

But on whom is the burden of proof? On Thorpe to show the practicability of another location, or on the company to show its impracticability. As the company can readily show if it be a fact that no other site will be as convenient and useful as Thorpe's premises, we think it should be expected to do so. It asks the court to enjoin Thorpe from protecting his premises from what, *prima facie*, is an undue multiplication of servitudes, to the relief of his neighbors. Let the company, then, show that this multiplication is unavoidable, if the objects of the company are to be efficiently accomplished. Until it does so, it should not be aided by a chancellor in imposing the fourth pole on Thorpe's premises. Nothing in York Telephone Co. v. Keesey, 5 Dist. Rep. 366, is inconsistent with this conclusion.

Decree reversed with *procedendo*.

PAUL SMITH'S ESTATE.

Divorce—Jurisdiction of courts of another state—Appearance of defendant by attorney—Validity of the divorce.

STATEMENT OF THE CASE.

Smith married Sarah Jones, August 3, 1898, a year afterwards desiring to obtain a divorce from her, he secretly went to South Dakota whose laws allow divorce to all libellants who have resided in the State 90 days, for incompatibility of temper and other causes. He intended to return to Pennsylvania as soon as he had obtained the divorce. Notice was given of the proceedings to Mrs. Smith by letter, by a deputy sheriff, of South Dakota, who personally served the notice on her in Reading, Pa., and by publication in a South Dakota and Berks county newspaper. She directed an attorney of South Dakota to appear and object to the court's jurisdiction. The attorney did so, but the court decreed a divorce nevertheless, for incompatibility of temper.

Smith then returned to Pennsylvania and married again. At his death 4 years after, Sarah claimed as widow, $300.00 as exemption, and one-half of the personalty. The second wife claimed $300.00 and one-third of the personalty, while the child by the second marriage claimed two-thirds of the personalty. The auditor awarded the money to the second wife and child.

LANARD and MYERS for appellant.

A decree in divorce, granted by a court of a foreign state, in which libellant only lived a statutory period for the purpose of procuring a divorce, will not be recognized as valid by the courts of this state. Com. v. Ainsworth, 6 Dist. Rep. 707.

Where the court has no jurisdiction over the wife, and from said court the husband obtained a divorce, the wife will have dower. Calvin v. Reed, 55 Pa. 375 ; Reel v. Elder, 62 Pa. 308.

LLOYD and FOX for appellee.

Appearance by attorney for respondent at any stage of the proceedings gives jurisdiction of the person. 43 Hun. 461; 17 Am. & Eng. Encyc. 1063.

Jurisdiction of defendant's person having been obtained by her counsel, having entered an appearance, it cannot be lost by the withdrawal of the counsel after issue joined. Wilson v. Hilliard, 17 W. N. C. 325.

OPINION OF THE COURT.

That the injured party in the marriage relation must seek redress in the forum of the defendant unless the defendant has removed from what was the common domicile of both is well established as the law of Pennsylvania ; Reed v. Elder, 62 Pa. 308.

In Fyock's Estate, 135 Pa. 524, the court, Patterson, Judge, held, "If a court has not jurisdiction, neither notice nor process duly served can give validity to its judgments." The same rule is applied in Reel v. Elder, 62 Pa. 308 ; Colvin v. Reed, 55 Pa. 375 ; Heslop v. Heslop, 82 Pa. 540, and Commonwealth v. Maize, 23 W. N. C., 572. In the latter case it was further held, "If the defendant had cause of action against his wife, he could have proceeded in the courts of his and her domicile. If he had cause of complaint it was his duty to bring that complaint before the court having jurisdiction of the person and the cause. To avoid this court and seek a court in a foreign state is *prima facie* evidence of a fraudulent motive on the part of him who acts thus.

From the fact that the court had no jurisdiction, it follows that the decree of divorce pronounced by the court of South Dakota, was a mere nullity, at least so far

as its extra territorial effect was concerned, and did not alter the status of the parties in Pennsylvania, unless Sarah Smith (nee Jones) by her instructions to the South Dakota attorney, and the said attorney's subsequent actions in pursuance of such authority, had the effect of waiving the want of jurisdiction. Was anything done by Sarah Smith or her attorney, which produced such a result? It appears that Mrs. Smith directed an attorney of South Dakota, to appear and object to the court's jurisdiction, and that the attorney did so. Nothing in the facts before us indicate that the attorney did anything or took any step in the cause, except to object to the want of jurisdiction. He was simply instructed to appear for a special purpose, viz., to object to the court's jurisdiction.

Under the circumstances it would be difficult to see how the respondent waived the want of jurisdiction over her person by expressly objecting to it. Can it be successfully asserted that, by expressly objecting to the jurisdiction of a court, a person thereby waives the want of jurisdiction? We think not. In 1 Am. & Eng. Ency. of Law, page 184, the rule as to an appearance for any particular purpose is thus stated: "An appearance for any particular purpose such as to take advantage of defects, is not a waiver of those defects." By weight of authority it seems to be established that an appearance for moving to quash a writ for want of jurisdiction or insufficiency of service, does not subject to the jurisdiction or waive the illegality; Hodges v. Brett, 4 Green (Ia.) 345; Wilburn v. Foutz, Id. 346; Johnson v. Buetts, 26 Ill. 66; Camp v. Tibbetts, 2 E. D. Smith (N. Y.) 20. The precise point in the case before us was ruled on in Stanley v. Arnow, 13 Fla. 361, where it was held that, "an appearance merely to object, is not a waiver of want of jurisdiction." In Warren Saving Bank v. Silverstein, 15 C. C. 585, it is said. "In other jurisdictions, where appearance *de bene esse* are unknown, motions to set aside the service of the writ, or to quash it, are allowed, but must be made before appearance, and making such a motion is not an appearance. In foreign attachment the court has no jurisdiction of the person of the defendant, except by his own voluntary appearance. Demanding the release of his property as unlawfully seized, especially when he expressly declares that he does not intend to submit to the jurisdiction, is not equivalent of a voluntary appearance."

In Chalwon et. al. v. Hollenbach, 16 S. & R. 424, it is held that a motion by an attorney to set aside a judgment by default against a party, is not an appearance for him.

In view of these facts we are of the opinion that the appearance of the attorney in the South Dakota court, to object to the court's jurisdiction was not a waiver of her right, and the court never had any jurisdiction over her person. It would follow, therefore, that the decree of divorce pronounced by the court in South Dakota was void in Pennsylvania, that is, it was a mere nullity in Pennsylvania as if it had never been pronounced. This being so, Smith's subsequent marriage in Pennsylvania was void for the reason that his first wife being still in full life, he did not have capacity to contract a second marriage. The second marriage therefore was illegal and the said child, an illegitimate child. Act April 8, 1833.

The only question yet remaining is, can the first wife successfully claim the $300 widow's exemption and one-half of the personalty, she having lived apart from her husband for more than four years?

The Act of April 14, 1851, Sec. 5, P. L. 613, provides as follows: "The widow or the children of any decedent dying within this commonwealth may retain either real or personal property belonging to said estate to the value of $300, and the same shall not be sold, but suffered to remain for the use of the widow and family." Under this act it has been held that a wife who did not form a part of his family and homestead, could not successfully claim the $300 exemption; Platt's Appeal 80 Pa. 504; Spear's Appeal, 26 Pa 234, and Hetrick v. Hetrick, 55 Pa. 292.

In all these cases, however, the family relation was broken up either by the default of the wife, or with her consent. In Ferry's Appeal, 55 Pa. 347, the distinction is clearly drawn between the case of a wife who voluntarily relinquished the family relation and one who is living separate and apart from her husband through the default of

the husband. In this case, Terry had deserted his wife and was absent from her ten years before his death, he living in Lancaster county, and she in Philadelphia with her mother and keeping the two children, the issue of their marriage.

Upon being apprised of his death some eight months thereafter, the wife by counsel appeared before the auditor and claimed the $300 provided under the Act of 1851. The auditor allowed the claim, the Orphan's Court set it aside, and upon an appeal to the Supreme Court, the Orphan's Court was reversed. Mr. Justice Agnew, in his opinion, saying, "In this case there was no voluntary relinquishment of the relation (family relation) on the part of Mrs. Terry, and no provision for her; while after her husband's desertion she kept the children and maintained her family relation along with them so far as lay in her power."

There is no reason why this provision of the law should not apply to her. In such a case the family relation exists in the contemplation of the law, although actual cohabitation be suspended by the illegal act of the husband. This doctrine is also found in Coatis' Estate, 6 W. N. C. 367; Sander's Estate, 12 Pa. 77, and in Scullins' Estate, 5 C. C. 188. We see nothing in the case before us to distinguish it from the cases just cited, and therefore the auditor is hereby reversed and the court directs that Sarah Smith, the lawful wife of Paul Smith, be paid the $300 as exemption, and one-half of the personalty absolutely.

YEAGLY, J.

OPINION OF THE SUPREME COURT.

The divorce of Smith, by the South Dakota court, was valid, it may be, in South Dakota. The law of that state makes a service on a non-resident who is not within the state at the time of service effectual to subject him to its jurisdiction. In South Dakota, therefore, Sarah Jones would not be at Smith's death, his widow.

The Constitution of the United States requires full faith and credit to be given in any state, to the judicial proceedings of any other state, and generally, that in the former, the same legal consequence shall attach as in the latter. As the divorce separates Smith and wife in South Dakota, so it would seem to separate them in Pennsylvania.

The principle of interstate comity is bounded by the condition, (1) that the court which pronounces judgment must have jurisdiction of the person, and (2) that it cannot acquire a jurisdiction of the person, which the tribunals of other states must recognize, by service of process beyond the state limits. Cooley Const. Law, 205. It would matter not whether this extra-territorial service was accomplished by publication, or, as in this case, by a personal service by a deputy sheriff of South Dakota. The service on Mrs. Smith was sufficient to give her notice of the assumption by the South Dakota court of jurisdiction in a case affecting her, but could not oblige her to respect it, to the extent of making a defence on pain of suffering a judgment which would be valid, not in South Dakota merely, but in Pennsylvania. The cases cited by the learned court below sufficiently prove this. Scott v. Noble, 72 Pa. 115; Colvin v. Reed, 55 Pa. 375.

Mrs. Smith, however, did respect the service of process so far that she employed an attorney to appear for her and to object to the court's jurisdiction. Such an appearance, called in this state *de bene esse*, is well known. It is not generally understood to be the equivalent of a general appearance, nor does it justify the arrogation by the court of power to prosecute the investigation to a judgment on the merits 2 Encyc. Plead and Pr. 620. Although it would lead to confusion to allow a defendant to appear for such purposes as he chose, only, there is no apparent reason for denying to him the rights to appear solely to deny jurisdiction over his person, without, by so doing, conferring the very jurisdiction which he denies. The learned court below correctly inferred that the qualified appearance of Mrs. Smith by attorney, did not bestow on the South Dakota court the jurisdiction to decree a divorce between her and her husband.

On the other points involved in the case, discussion is unnecessary. Mrs. Smith has done nothing to forfeit the right to the widow's exemption. As there are no legitimate children she is entitled to one-half of the personalty. The woman whom, after his divorce, Smith

married, though his wife in South Dakota, is not his wife in Pennsylvania. Nor is her son entitled to a share in Smith's estate.

Appeal dismissed.

TRITT vs. RAILWAY COMPANY.

Negligence—Master and servant—Independent contractor.

STATEMENT OF THE CASE

Tritt in crossing the track in a wagon was struck by a locomotive and hurt. The Railroad Company sent its physician to treat him. Tritt submitted to the treatment which was unskillful, and resulted in a permanent injury to his leg, whereas with proper treatment, Tritt would in two months have gotten well.

In his action for the negligence of the company he sought damages for the primary injury, and also for the increased injury, following from the unskillful treatment.

Tritts' own physician agreed with the mode of treatment proposed by the defendant's physician at the interview immediately after the accident and then retired from the case.

GERBER and MOREHOUSE for the plaintiff.

The master is liable for the torts of his servant, committed while acting in the course of his employment. Bard v. John, 26 Pa. 486; Guinney v. Hand, 153 Pa. 404; Hays v. Miller, 77 Pa. 238.

BOUTON and PRICKET for the defendant.

The physician was an independent worker, and not a servant of the company. Tiffany, Domestic Relations, p. 508; *Cf.* 86 Pa. 153; 3 Gray (Mass.) 349; 120 N. Y. 315.

OPINION OF THE COURT

The material question upon which this case hinges, is whether or not the defendant company is liable for the acts and negligence of the doctor.

The plaintiff was injured while crossing railroad tracks of defendant company, and the company sent its own doctor to attend him. The doctor was an employee of the company, and the relation of master and servant existed. The plaintiff's first remedy was an action against the company, because the master is liable and bound by acts of his servant, either in respect to contract or injuries, when the act is done by his authority. Here the act was done by authority of the master. This injury was done in the immediate employment of the master, and resulted from the negligence of the doctor, while acting within the scope of his employment. In this case the master as well as the servant is responsible, this act was done by order of the master, and done in the prosecution of master business. It does not have to be done in accordance with the instruction of the master to servant. Even though the servant deviates from the instruction as to manner of doing it; this does not relieve the master from liability for the servant's acts. In this case, the defendant tried to show that the doctor was an independant contractor. The statements of facts make it plain enough that no such relation existed because there is a wide difference between a servant and an independent contractor. If a person contracted with another, who is engaged in an independent employment for the doing of certain work by the latter but does not personally interfere or give direction, respecting the manner of the work, then the party employed is an independent contractor, but in this case the doctor was employed to do the company's work in his line, and under the company's order. He was in their employment at the time of the accident, and was sent to attend the plaintiff at the time of his injury, by order of the company. Here he was in company employment, sent by the company, and the employment was of such a character as to create the relation of master and servant between them.

CANNON, J.

OPINION OF THE SUPREME COURT.

There is substantially no dispute that Tritt was hurt by the negligence of the defendant, and its liability for the result of that injury is not seriously disputed. From the injury thus received, he would have got well in two months, had it been treated with proper skill. It was not treated with such skill. The prolongation and aggravation of the injury are the result. Is the defendant liable for such aggravation?

Had Tritt himself called on the physician, whose want of skill is alleged, the defendant would not for that reason be

exempt from liability for the effects of such want of skill co-operating with the original injury. It would in addition be necessary to show that Tritt employed a physician whom, with proper care, he would have known to be destitute of the usual competence. Lyons v. Erie Railway Co., 57 N. Y. 489; Eastman v. Sanborn, 85 Mass. 594; Rice v. City of Des Moines, 40 Iowa, 638; Loeser v. Humphrey, 41 Ohio, 378; Stoever v. Bluehill, 51 Me. 439; 7 Am. & Eng. Encyc. 391; 16 Am. & Eng. Encyc. (1st edition) 441. It does not appear that the reputation of the physician who attended Tritt with respect to skill or carefulness was bad, nor that he had any reason to believe him to be otherwise than competent.

But the physician who attended Tritt was furnished by the defendant himself. It would be idle therefore to say that, even had Tritt had reason to know him incompetent, he would have precluded himself from recovery from the defendant. The defendant, surely, could not defend against the claim for compensation, on the ground that the physician whom it furnished, acted unskillfully or negligently.

Had the defendant not been the cause of the original hurt, we are quite prepared to hold that it would not have been liable for the mistake of the physician, if it had exercised proper care in the selection of him. It must be deemed, at most, an agent of the plaintiff, in making the selection. It is not the business of the railroad company, to heal wounds, but to transport passengers and goods. Though, should it occasion an injury, it would be obliged, either to furnish the physician himself, or to furnish the money which the plaintiff would need to spend in hiring one, and although, having caused the injury, it furnishes the physician, the physician is an independent worker. He receives no orders from the company. He consults his own knowledge, or that of others whom he chooses to select. The company having exercised care in designating him for the task, is not responsible for his errors of judgment, or imperfectness of knowledge, or defects of attention. Pearl v. West End Street Railway, 176 Mass. 177; Glavin v. Rhode Island Hospital, 12 R. I. 411; *Cf.* Edmundson v. R. R. Co., 111 Pa. 316; Harrison v. Collins, 86 Pa. 153; Smith v. Simmons, 103 Pa. 32.

The learned court below took a different view of the question, apparently without much investigation or reflection holding that the physician was servant to the Company, and that for this reason, his want of care and skill was imputable to it. This we think an error. However, as it allowed the jury to give compensation for the entire injury, a proper verdict, upon the evidence, seems to have been reached.

Judgment affirmed.

BALPH vs. R. R. CO.

Evidence—Res gestae—Admissibility of declarations of a bystander as part of—Spontaneous utterances and expressions of inference distinguished—Repetition of inadmissible statements

STATEMENT OF THE CASE.

Balph was run into at a crossing and hurt by the defendant. At the trial Althorp testified for him that no bell had rung or whistle blown, and that the train was coming at forty miles per hour. Five minutes after the accident he had remarked to John Logan, that Balph would not have been struck had he taken the trouble to look and listen before venturing on the track. This statement he repeated four hours afterward in a letter to a brother, who was an employee of the R. R. Co. Defendant offered the oral statement and the letter in evidence. The court excluded them.

Verdict for plaintiff for $2,500. Motion for a new trial.

WILLER for the plaintiff.

The declarations were admissible in evidence as part of the *res gestae*. Call v. Easton Traction Co., 180 Pa. 618; Tompkins v. Saltmarsh, 14 S. & R. 272.

It is error to exclude an offer to show that immediately after the occurrence, the witness had made statements entirely inconsistent with his testimony at the trial. Com. v. Werntz, 161 Pa. 591. *Cf.* Harriman v. Stone, 59 Mo. 93.

WILCOX and JONES for the defendant.

The declarations were not a part of the *res gestae*, but merely a passing remark by a bystander, and not a spontaneous utterance. McLeod v. Ginther, 80 Ky. 399; Lehay v. R. R. Co. 97 Mo. 165; Dustin v. Radford, 58 Mich. 163; Ogden v. R. R., 23 W. N. C. 191.

A declaration made two minutes after the accident is not part of the *res gestae*. Mindian R. R. Co. v. O'Brien, 119 U.

S. 99; *Cf.* P. R. R. v. Brooks, 57 Pa. 339; R. R. Co. v. Coyle 55 Pa. 402.

OPINION OF THE COURT.

This is a motion for a new trial by the defendant company. It seems that when Althorp was on the stand and testified for the plaintiff that no bell had been rung or whistle blown, and the train was coming at forty miles per hour, the defendant did not ask the witness whether five minutes after the accident, he had remarked to John Logan, and four hours after written to his brother, that Balph would not have been struck had he taken the trouble to look and listen before venturing on the tracks. This might have established contributory negligence on the part of plaintiff, and he would not have been able to recover. Had he been questioned whether or not he made this remark, and had denied it, perhaps his oral statement and letter would have been admissible to contradict his prior testimony. But it does not appear that the defendant questioned the witness in this manner. It only appears that the defendant offered the oral statement and letter to establish the fact of contributory negligence on the part of the plaintiff. The court excluded the testimony, and hence the motion for a new trial.

We think the court was right in excluding this evidence. The learned counsel for the defendant claims that the oral statement which he made five minutes after the accident should have been admitted as a part of the *res gestae*, and he cites numerous authorities which will be noticed hereafter in support of his contention.

We think those cases can be distinguished from the one now under consideration. We must first understand the principle of the *res gestae*, and the reason for its exception to the "hearsay rule."

Taylor says, "In all these cases the principal points of attention are whether the circumstances and declaration offered in proof were so connected with the main fact under consideration as to illustrate its character, or to further its objects." Taylor on Ev. § 588. The reason for its exception is: "That a person's mind is in a state of excitement on account of some event which happened to, or was seen by him, or when a person's mind is occupied with some transaction, and under such a state of mind he makes a statement, the law presumes he told the truth, for he had no time to think of an untruth. But how, when and where shall he be connected with the event or transaction, that his declaration may be admissible? There could no test be given for that. Their admissibility must be determined by the judge according to the degree of their relations to the facts.

The law is well settled by text writers and by decisions, that before a statement can be admitted as a part of the *res gestae*, it must appear that the statement was made contemporaneously with the main fact, or at least, the two shall be so clearly connected, that the declaration can, in an ordinary course of affairs, be said to be the spontaneous exclamation of the real cause. Leather v. Gas Co., 97 Mo. 165; Waldele v. N. Y. R. R. Co., 95 N. Y. 274; Luby v. Hudson R. R. Co., 17 N. Y. 131; Rockell v. Taylor, 41 Conn. 55.

It is true that the exception of the *res gestae* to the hear say rule applies to bystanders as to those who are concerned with the main fact. But a sound discretion should be exercised by the judge in connecting the bystander to the transaction, that his statement may be said to be made spontaneously. Suppose A and B were in a train wreck, A was injured and B not. C was merely an outside bystander. There would be no doubt that the excitement and the influence of the mind by the accident will last longer with A than with B, and with B than with C, and that B, who was the bystander in the train, is more connected with the main fact than C, who was merely an outside bystander, and that the state of mind will change sooner by C than by B.

Now, let us consider the case at bar. Althorp was merely an outside bystander; he was neither connected with the train, nor with the accident. He made his remarks five minutes after the accident had happened. It does not even appear that he made his remarks at the place where Balph was struck down, and that the injured party was in his presence. The act has been done and completed five minutes before his statement. We therefore cannot hold his statement as a part of the *res gestae*, but purely as an opinion of a past occurrence.

In the case of the Vicksburg & Meridian R. R. Co. v. O'Brien, (119 U. S. 99) the question of admissibility of the evidence of declaration by the engineer of a train, which met with an accident, made from ten or thirty minutes of the accident, resulted in a judgment against admitting the evidence, although four of the judges were in favor of admitting. But their reason was, as Mr. Justice Field in his dissenting opinion says: "As the declaration was made between ten and thirty minutes after the accident, we may well conclude that it was made in the sight of a wrecked train, and in presence of the injured parties, and whilst surrounded by excited passengers. An accident happening to a railway train by which a car is wrecked, would naturally lead to a great deal of excitement among the passengers in the train, and the character and cause of the accident would be the subject of explanation for a considerable time afterwards by passengers connected with the train. We may add that the engineer being under such a great responsibility would surely be under still more excitement than the passengers. It is difficult to perceive how anything given in Mr. Justice Field's opinion can have any material bearing upon the case at bar. As we have stated already, Althorp was not connected with the train. It does not even appear that he made his statement in the presence of the train and injured party. He made his statement five minutes after the accident and four hours later he repeated the same in a letter to his brother, an employee of the R. R. Co., which letter corroborated his prior statement, and who can tell what his motive was in making the statement and writing the letter? The letter and statement are mere hearsay, and they cannot be admitted. The case of Hanover R. R. Co. v. Coyle, 55 Pa. 396, and the case of Coll v. Easton Transit Co., 180 Pa. 618, can be distinguished on the same ground from the case at bar. We will cite to support our view, Ogden v. R. R. Co., 23 W. N. C. 191; Lane v. Bryant, 9 Gray 245; Beaver v. Taylor, 1 Wall. 637; Insurance Co. v. Mosby, 8 Wall. 397.

In view of all those cases cited the motion for a new trial is dismissed.

KAUFMAN, J.

OPINION OF THE SUPREME COURT.

The learned court below excluded evidence that five minutes after the accident, Althorp had remarked to Logan that Balph would not have been struck had he taken the trouble to look and listen before venturing on the track. Althorp was not agent for Balph, nor in any way so connected with him as to justify the imputation of his remark to Balph. Had Balph made it, it would have weighed heavily against him. But Althorp would in no way represent him in making the admission. As such, therefore, the remark was inadmissible.

Was the remark a part of the *res gestae?* The *res* was the collision of the train with Balph. The act of Althorp was not a part of the collision, neither cause, nor concomitant. The sensations of bystanders, their seeing and hearing, the emotions which stirred in them as the result of the accident, were not a part of it. Still less were their exclamations, or their deliberate narratives, concerning it. Part of *the res gestae* then, Althorp's remark could not be, nor was.

But, was it a statement so near to the occurrence, so spontaneous, as to be receivable, because of its probable correspondence with Althorp's perception of the fact? It was not an exclamation. It was not synchronous with the collision. Nothing shows that it was the result of an excited impulse. It does not appear, as the learned court below points out, that the remark was made at the site of the accident. The interval of five minutes would be unimportant, if the circumstances showed that the reflective and critical attitude of mind had not been regained by the witness. But there are no such circumstances.

The remark is not of a fact. It expresses not an observation, but an opinion; not what did happen, but what would not have happened had certain things not happened. Althorp tells Logan that Balph would not have been struck (but he was struck) if he had taken the trouble to look and listen. But, is this an assertion that Balph did not look and listen? Or is it merely the expression of an inference that Balph did not look and listen, from the fact that he was struck? So far as appears, it may have been the latter. In-

stead of a spontaneous utterance of a fact, it may have been the expression of a philosophizing mood.

The remark was not admissible as contradicting the present testimony of the witness. There was no inconsistency between the statement that the bell had not rung, nor the whistle blown, and that the train was going at the rate of 40 miles per hour, and the statement that Balph did not stop, look and listen, or that had he done so, he would not have been hurt.

That the statement was inserted in a letter written four hours later, to the witness' brother, qualified neither the oral statement nor the letter, to be received in evidence. An inadmissible statement does not grow to be admissible by repetition.

Judgment affirmed.

WOODFILL BROS. vs. MARTHA THOMPSON.

Married women—Rights—Separate property not liable for debts of husband—Acts of April 11, 1848; April 22, 1850; April 1, 1863.

STATEMENT OF THE CASE.

Some time in the year 1890, Martha Livingston, of the Borough of West Brownsville, purchased a lot of ground in the said borough worth about $1,200.00, paying for it with her own funds. In 1894, the said Martha Livingston married R. J. Thompson; soon after their marriage R. J. Thompson obtained a small grocery store in West Brownsville, and ran it under the name of R. J. Thompson. The said R. J. Thompson was killed on the railroad some time in the year 1896. His wife, Martha Thompson, continued running the grocery, having goods shipped to her, and leaving the sign in front of her store as R. J. Thompson. This business of Mrs. Thompson did not prove profitable, she becoming indebted to various firms for various amounts. She confessed judgment in the name of Martha Thompson to Woodfill Bros., on April 17th, 1899, entered to No. 192 May Term, 1899, for $266. On April 1, 1900, she obtained a loan on the said property for $600, giving a mortgage for that amount, which mortgage was duly recorded. The mortgagee being Bernice Lily. The agent of Bernice Lily made a thorough examination of the records and found no liens against the property in the name of Martha Thompson, except the Woodfill Bros. judgment above referred to. Woodfill Bros. issued an execution on their judgment and levied on and sold the lot of ground in West Brownsville, purchased by Martha Livingston, now Martha Thompson. The day of the sheriff's sale, Bernice Lily was informed that there were other judgments that were liens upon the property of Martha Thompson, other than the one held by the Woodfill Bros., and that these judgments, all of which were entered prior to the date of the mortgage, were obtained against R. J. Thompson, on November 28, 1898, and entered on January 4, 1899, and that the holders of these judgments would claim the right to the proceeds of the sheriff's sale. These judgments aggregate the sum of $325. The property was sold to Lewis S. Jackman for the sum of $825, and there being a dispute as to the application of this $825, Bernice Lily has petitioned the court to appoint an auditor to make distribution. The creditors of R. J. Thompson claim to be first paid.

DAVIS and RHODES, J., for the plaintiff.

A judgment against a deceased person is not a nullity. Carr v. Townsend's Ex.'s, 63 Pa. 203; Wooden v. Tainter, 4 Watts 270.

As admr. d. s. t., she is liable for all her husband's debts to the value of the property at the time of so acting. Luff'barry's Estate, 12 Phila. 7; Wood's Estate, 1 Ash. 314.

HOUSER and THORNE for the defendant.

A judgment obtained against the husband of a married woman before or during marriage, shall not bind or be a lien upon her real estate. Act of April 11, 1848; April 22, 1850; April 1, 1863; Woodward v. Wilson, 68 Pa. 208.

Separate property of a married woman is sold under a judgment obtained against her, the proceeds must be distributed among her lien creditors in the order of their priority. Findley's Appeal, 67 Pa. 453; Lewis v. Bunster, 57 Pa. 410.

OPINION OF THE COURT.

An investigation of the provisions of the several acts of assembly governing the property rights of married women leaves little else to be said in the case at bar. By § 18, Act of April 11, 1848, it is provided, *inter alia*, "* * * * the said property, whether owned by her before marriage, or

which shall accrue to her afterwards, shall not be subject to levy and execution for the debts or liabilities of her husband." *Cf.* Act of April 22, 1850. Again, by the Act of April 1, 1863, it is provided "No judgment obtained against the husband of any married woman, before or during marriage, shall bind, or be a lien upon her real estate." The property sold and from which the fund in dispute was raised was the individual property of Martha Thompson. It was her separate estate. Her husband never possessed rights in it save the prospective right of curtesy. The debts contracted by him were in his own name, his wife at no time having made herself or her property liable therefore. This is evident from the fact that in 1898, action for the recovery of judgments, which claim precedence here, were brought severally against the estate of R. J. Thompson. When Thompson died, his wife's estate was unencumbered. Whatever charges are against her property are the results of her own subsequent acts. No element of fraud, or fraudulent holding out, on her part, is disclosed. She continued the business. Goods were shipped to her and on her responsibility. No one was injured by her allowing the sign of R. J. Thompson to remain in front of the store. She ordered goods in her name; they were shipped in her name, on her responsibility. She became indebted to several parties, doubtless the persons from whom she purchased goods. Among these creditors was the firm of Woodfill Bros., in whose favor she confessed judgment for $266, and this was placed on record. Other creditors remained and to meet these obligations $600 was borrowed, and a mortgage given therefor. Execution issues on the judgment, Martha Thompson's property is sold, and out of the $825 realized the individual creditors of R. J. Thompson claim to be first paid. That they have no standing to assert such claim is evident from the acts previously referred to. Moreover, it has been judicially passed upon in a long line of cases. As was said by Agnew, J., in Findley's Appeal, 67 Pa. 453, "In order to maintain the right of a claim, filed against the husband alone, to be paid out of the fund, we must hold that the sale under such a claim would pass the title of the wife which she holds in her own right. But this is contrary to all our notions of a judicial sale. There is no relation of trustee and *cestui que* trust, or of any other privity of estate, which can possibly make a sale in the name of one carry the estate of the other. Not only is the estate of the wife her own separate and independent interest, but it is protected by express statute from the acts, encumbrance and executions of the husband." Beside this, both the judgment creditor of Mrs. Thompson as well as the mortgagee have placed their dependence on the record, and will be protected. Purchasers, investors, etc., are not obliged to take notice of matters extraneous to the public record, but which record only they are bound to notice at their peril. "Such an anomaly that the divestiture of her title shall depend not on the record * * but on extraneous proof * * "could not be tolerated. What notice would the claim against her husband be to subsequent lien creditors or purchasers from her? It would not stand against her title on the judgment index, or upon any record." Findley's Appeal, 67 Pa. 453; Lloyd v. Hibbs, 81 Pa. 306; Shannon v. Shultz, 87 Pa 481; Kuhns v. Turney, 87 Pa. 497; Appeal of Germania Savings Bank, 95 Pa. 32). "A judgment against him can be levied only of his own estate or title. * * * The purpose of the Act of 1850, and still more of the Act of 1863, was to prevent the wife from being deprived of the benefit of her estate, through the derivative interest of her husband." Woodward v. Wilson, 68 Pa. 208; Milligan v. Phipps, 153 Pa. 208. The learned auditor has correctly held that since the levy was made upon property recorded in her name and the purchaser acquired her title, the fund for distribution is the proceeds of the sale of the wife's interest and should go in payment of her lien creditors, according to their priority.

ELMES, J.

HAMLIN vs. CRARY.

Injunction—Building restriction—Condition in a deed—By whom it can be enforced.

STATEMENT OF THE CASE.

John Tromplin, owning two adjacent lots, conveyed one of them (B) to Crary by a deed which contained the words,

"This conveyance is on the condition that there shall never be erected on the said lot a building nearer than twenty-five feet from the front of the building line." On the lot (A), retained by Tromplin, was a house in which he resided and from windows in the side of which he had a view diagonally across the lot (B) to the street. One of the purposes of the condition was to perpetuate the enjoyment of the view. Five years after the conveyance Tromplin died, and at Orphan's court sale for the payment of debts, the lot (A) was sold to Hamlin, one of the three nephews, who were the next of kin and heirs. The price paid was $2,700, all of which was consumed in paying the debts. Two years after the sale Crary began to erect a building on the building line of his lot. This was a bill for an injunction.

MAYS and KNAPPENBERGER for plaintiff.

The restriction was imposed for the benefit of the property now held by complainant. Clark v. Martin, 49 Pa. 297.

The building restriction was in the nature of a covenant running with the land and created an easement in favor of the adjoining lot. Muzzarelli v. Hulshizer, 163 Pa. 643.

This was not merely a personal right in the original owner, but was an easement appurtenant to the estate which plaintiff purchased. Peck v. Conway, 119 Mass. 546. Dennis v. Wilson, 107 Mass. 591.

HICKERNELL and PEIGHTEL for defendant.

The controlling element in such cases is the intention of the parties to the covenant. Hutchinson v. Thomas, 190 Pa. 242; Landell v. Hamilton, 175 Pa. 327.

This is not a condition which the heirs of the grantor can enforce, but merely a personal covenant with the grantor. Skinner v. Shepard, 130 Mass. 180; Clapp v. Wilder, 50 L. R. A. 121.

OPINION OF THE COURT.

We think this case turns upon the legal effect of the phrase contained in the deed from Tromplin to Crary. "This conveyance is on the condition that there shall never be erected on said lot a building nearer than 25 ft. from the front building line on the lot." Whether this is a common law condition or a covenant running with the land, it is unnecessary for us to determine in this kind of an action, because the action is in a court of equity. It would be otherwise if the action was brought in a common law court. The case of Clark v. Martin, 49 Pa. 297, holds "If it were a proceeding in the common law form, it would be necessary to inquire into the form in which the right is reserved, but in equity form of proceeding we inquire only into its substantial elements."

The first question which confronts us is whether this restriction was imposed for the benefit of the land now held by the plaintiff, or whether it was imposed for the mere personal benefit of the grantor.

This question can only be solved by ascertaining the intention of the parties, when the land was conveyed, in the light of surrounding circumstances, or as Mr. Justice Dean puts it in Landell v. Hamilton, 175 Pa. 327: "In equity the test by which to determine whether a covenant in a deed runs with the land, is the intention of the parties; to ascertain such intention, resort must be had to the words of the covenant in the light of the surroundings of the parties and the subject of the grant."

There is no language in the deed from Tromplin to Crary, expressly stating that this restriction was inserted to create a servitude or right which should inure to the benefit of the plaintiff's land. And we think this is rendered all the more certain and significant when we take into consideration the fact that the grantee's heirs and assigns are not included in the restrictive clause, which words, we think it is extremely probable, he would have inserted if he had intended it to benefit his land "forever" and not merely himself for life.

This is not the case where the owner of land adopts a scheme or plan for its improvement, as is illustrated by the cases of Muzzarelli v. Hulshizer, 163 Pa. 643, Landell v. Hamilton, 175 Pa. 327 and 17 Super. C. 235. Because in those cases there is an express language to the effect in the deeds, showing an intention to create a benefit appurtenant to the land.

The only circumstance which may be relied upon as showing that the grantor intended to create a benefit remaining with the land, is the fact that he was occupying it as a homestead at the time of the grant, and that it would be a benefit to the land to have the restriction observed after his death. But the facts of the case

are just as consistent with the idea that the grantor intended that the land should have the benefit of the restriction as long as the grantor lived. For after his death, he having received all the benefit he could receive from the restriction, it would be immaterial to him whether the restriction was observed or not observed. This doctrine is sustained by the cases of Skinner v. Shepard, 130 Mass. 180, and Clapp v. Wilder, 50 L. R. A. 121, a recent Massachusetts case, decided in June, 1900. We are prone to admit that the doctrine of Clark v. Martin, 49 Pa. 289, is seemingly in conflict when comparing the cases superficially, but upon full examination we think that the confliction is more apparent than real.

There is no merit in the argument that the plaintiff received his title through an Orphan's Court sale, for the purchaser takes only such title as the decedent had at his death. Bashore v. Whistler, 3 Watts 494. Kennedy's Appeal, 4 Pa. 149.

We think the plaintiff's case falls flatly when considered in the true light of attendant circumstances. Bill dismissed.

GROSS, J.

OPINION OF THE SUPREME COURT.

The clause quoted from Tromplin's deed to Crary, expresses a condition. But, it is not as a condition that Hamlin is seeking to enforce it. As a condition it can be enforced only by an entry or by ejectment. This bill is neither. Nor could any other than Tromplin or his heir avail himself of it. Hamlin is not Tromplin's heir.

But, the same act or omission, by which the grant is conditioned, may also be agreed or covenanted for, and, when such agreement or covenant is descried in the words, the remedies proper to it may be employed. Electric City Land etc. Co. v. Coal Co., 187 Pa. 500. When the intention is discovered, to impose a restriction on the use of one tract, for the advantage of another, despite mutations of ownership, a servitude will be held to be created, and a court of equity will compel the owner of the servient land to respect it. Clark v. Martin, 49 Pa. 289; St. Andrew's Churchs' Appeal, 67 Pa. 512; Landell v. Hamilton, 175 Pa. 327; Muzzarelli v. Hulshizer, 163 Pa. 643.

We do not understand that this principle was seriously contested in the court below. What was contested was the intention of Tromplin to impose on the owner of the Crary lot a restriction for a longer period than that of the continued ownership by Tromplin, of the adjacent lot. Tromplin continued to own this lot for five years, but, then dying, his estate in it was sold, under the order of the Orphan's Court, to Hamlin, one of his heirs, and Hamlin now alleges that the restriction was intended not for the benefit of Tromplin, so long as he continued to own the lot, but for the benefit of the lot, in whosesoever ownership.

The language of the deed is "that there shall *never* be erected" etc., and it rather clearly points out that the erection forbidden was forbidden not for a term of years, or for the life of the grantor, but in perpetuity.

To qualify this signification, reference is made to the fact that Tromplin resided in the house on the lot retained by him, that in the side of this house were windows looking across the lot sold from which a view of the street could be had, and that one of his purposes was to "perpetuate the enjoyment of this view." From these facts the learned court below has concluded that the restriction was intended to last only during Tromplin's ownership, and has therefore dismissed the bill.

It is indeed difficult to imagine any other object of the restriction than to preserve the access of view, light and air to Tromplin's house, through the lateral windows, and should he or his successors in the ownership ever close up those windows, permanently, it is very likely that the courts finding no purpose useful to the dominant premises, any longer subserved, would hold that the restriction had become extinct. *Cf* Landell v. Hamilton, 175 Pa. 327, 337. What we are concerned to learn is, some intimation that the object was to preserve the view, for only a brief period of time. We fail to find any. The circumstance that Tromplin was personally occupying the dominant house is not such. If he appreciated the light, air and view, he must have known that his successors in the occupancy, would do the same. By perpetuating the right to such view, he would maintain a greater market value for the house. "To perpetuate

the enjoyment of this view" is not equivalent to perpetuating "*his* enjoyment of this view." Besides, "*one* of the purposes" of the condition was this. There were therefore others, and among them, may have been the enhancement of the selling value of the dominant premises, by securing for all purchasers, a right to an unobstructed view. The "condition" is that there shall "never" be erected a building within a given space, and we are not able to discover, in the facts found, adequate reason for changing the word "never," to "never during Tromplin's ownership." Had Crary understood the word "never" in this sense, how natural it would have been for him to have insisted that the words needful to remove doubt be inserted.

We have examined Clapp v. Wilder, 176 Mass. 332, which is in most respects similar to the case before us. Though the majority of the court dismissed the bill, three respectable members dissented, and we are convinced that the dissenters had the better reason. In the case before us, the facts adverted to by Hammond, J. on page 339, do not appear.

The conclusion we have reached is that a fair interpretation of the language of the deed and of the facts, is that a perpetual right to light, air and view, was reserved by the condition to the dominant lot, and that this right should be protected from violation by injunction. Clark v. Martin, 49 Pa. 297.

Decree reversed.

COOK vs. BOYLSTON.

Negligence—Proximate cause—Contributory negligence—Province of the court and jury.

STATEMENT OF THE CASE.

Cook and Boylston owned adjoining tracts. On his, Boylston carried on a business which required the use of fire. By some negligence of his servants, the fire caught a pile of lumber, which after some difficulty was suppressed. The fire, however, only smouldered, and after three hours was renewed by a vigorous breeze, started up into fury, involving the whole pile of lumber, and at length set fire to the buildings on Cook's tract. The fire could have been prevented had Cook, who saw its beginning, communicated his fear that it was not extinct, to Boylston, and wished that more thorough means be employed to put it out. He did not do this because he was not on speaking terms with Boylston. The damage suffered was $560.

SCHNEE and ALBERTSON for plaintiff.

It is for the jury to decide whether defendant's negligence was the proximate cause of plaintiff's damage. Haverly v. R. R. Co., 135 Pa. 50; Bom v. Allegheny Plank Road Co., 101 Pa. 336.

If the plaintiff has made out his case without showing contributory negligence on his part it is incumbent on defendant to prove it. Contributory negligence is not presumed. King v. Thompson, 87 Pa. 365; Bom v. Plank Road Co., Supra.; R. R. v. Hassard, 75 Pa. 367.

Whether the conduct of plaintiff amounted to contributory negligence is a question for the jury. 87 Pa. 365; 76 Pa. 168; 66 Pa. 30; 101 Pa. 336.

SHERBINE and CHAPMAN for defendant.

The facts being undisputed and the inference to be drawn from them being free from doubt, it is a question for the court, 81 Pa. 274; 119 Pa. 53; 160 Pa. 365; 172 Pa. 646; 104 Pa. 306.

OPINION OF THE COURT.

This is an action for damages caused by the destruction of the building of the plaintiff, John Cook, in the following manner: Defendant and plaintiff respectively owned adjoining tracts of land. The defendant was making a lawful use of fire on his premises when by some negligence on his part the fire caught a pile of lumber near by. It was, however, gotten under control and finally, as the defendant supposed, extinguished. The fire, however, only slumbered, and in the course of three hours was revived by a vigorous breeze, burned the lumber and finally the building of the plaintiff. It seems that the damage could have been prevented had the plaintiff, who feared the fire had not been extinguished, made known his fears to the defendant and insisted that more thorough means be used to put it out; this he did not do. On these facts a motion has been made to enter a nonsuit. After a careful examination of the Pennsylvania authorities we are unwilling to take the questions here presented away from the jury.

Two questions arise, first: Was the negligence of the defendant the proximate

or remote cause of the burning of the plaintiff's building? If the remote cause there can be no recovery. Second: Was the plaintiff guilty of contributory negligence? If so, he cannot recover. LeRoy Haverly v. State Line R. R. Co. 135 Pa. 50. The proximate cause is the immediate cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune the other must be considered as too remote. Who is to decide whether an act is the proximate or the remote cause? LeRoy Haverly v. State Line R. R. Co. states the rule as it is applied, in our opinion, in Pennsylvania. and also the case of the Penna. R. R. Co. v. Hoag, 80 Pa. 373. In the latter case the Chief Justice says: The jury must determine whether the facts constitute a continuous succession of events so linked together that they become a natural whole or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause, the negligence of the defendant.

As to the second question raised: Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred. Who is to say whether there has been a want of ordinary care? The question is generally for the jury. It is only when there is no reasonable doubt as to the facts, or as to the just inferences to be drawn therefrom, that the question may properly be passed upon by the court. McKee v. Bidwell, 74 Pa. 218. Baker v. Felio, 97 Pa. 70. In 135 Pa. 50, heretofore cited, it was said: When a person knows of the existence of a fire upon the property of another, which is likely to spread and destroy his own property, he is bound to use reasonable care and diligence to prevent its spreading, whether he has done so when, after attempting to extinguish it he has gone away, mistakenly supposing that it was out, is a question to be determined by the jury. So in this case, whether the plaintiff acted as an ordinarily prudent man would act who knew of the fire, and feared that it had not been extinguished, is to be determined by the jury.

Motion to enter a nonsuit is overruled.

RHODES, J.

OPINION OF THE SUPERIOR COURT.

Boylston was within his right, in conducting a business on his premises that required the use of fire. But the existence of the fire put on him a duty carefully to guard it so that it might not communicate to the buildings of Cook. It might thus communicate, by seizing inflammable material in large quantity, such as a lumber pile, on his own premises, and thence leaping to the structures upon the adjacent land. There might then, as regards Cook, be negligence in allowing the lumber pile to catch fire. If combustible stuff was scattered at such intervals between the original locality of the fire, and Cook's buildings, as to make the spread of it to the buildings probable, in case of failure to watch and repress, negligence in watching would visit on Boylston the consequences.

Boylston's agents negligently allowed the fire to catch the lumber pile. Their want of care is, it is needless to say, imputable to him. Cooley, Torts, 700. It now became their and his duty to extinguish the combustion of the lumber. They made an attempt to do so. They "suppressed" the fire, but did not put it out. It smouldered, and after three hours, was rekindled by a breeze. Had the fire in the lumber been put out, of course a fresh act of negligent creation of an unintended fire would have been necessary, to visit responsibility on Boylston. The nexus between the initial negligence and the burning of Cook's buildings would have been broken. But, there was no such breach. The revived fire was a continuation of the first fire in the lumber, and that was the result of the negligent supervision of the fire employed in Boylston's business.

It is true that Boylston's servants suppressed the fire. They may have thought that they had put it out. But they had not. Even had there been no negligence in allowing the fire to reach the lumber, there may have been negligence in not wholly extinguishing it in the lumber, and whether there was, would be a question for the jury. The fire was in fact not put

out. The revived fire was a later phase of the same continuous act of combustion. But, it is objected, the rise of a breeze was the occasion of the revival and exacerbation of the fire. So it was. But a man is not excused from liability for consequences, because they were produced, not by his own act alone, but by the co-operation therewith, of other forces. No consequences are produced by human acts alone. Causation is not simple but multiple. Every event issues from a mass of causes and conditions. The fact that the wind arose three hours after the cessation of the effort to put out the fire, does not make the wind *the* cause of the revived fire; and cut the casual tie between the smouldering combustion and that new fire. Without the wind, no new fire, but, also, without the obscure combustion, no new fire.

The real question is, not whether there is a casual connection between the initial or any intermediate negligence and the injury to Cook's buildings, but whether the intervening of the wind, as a co-operating cause, was fairly expectable, and, if so, whether the effect of re-kindling the fire was also fairly expectable. We think, in the absence of evidence of an extraordinary character of the breeze, that it was not error to allow the jury to say whether it was so little unlikely, that Boylston should have had reference to it, and made provision against its effect, in case it should come. *Cf.* Haverly v. R. R. Co., 135 Pa. 50; Yoders v. Amwell Township, 172 Pa. 447.

Cook, having witnessed the fire in the lumber, feared that the efforts to put it out had not succeeded, but refrained from admonishing Boylston to employ more thorough means, because he was not on speaking terms with Boylston. The knowledge of the fire in the lumber pile imposed on Cook a duty of vigilant precaution against its spreading. Haverly v. R. R. Co., 135 Pa. 50, and if he omitted this duty, and the omission contributed to the injury subsequently suffered by him, he could not recover. We think the learned court properly left to the jury, the decision whether Cook had been guilty of contributory negligence. The fire *could* have been prevented had Cook spoken his fear to Boylston. But, *would* it have been? And did Cook *know*, or should he have known, that his speaking to Boylston *would* have prevented the fire? If his speaking *would* not have induced Boylston to increase his diligence, the failure to speak was not a cause of the omission thus to increase his diligence. And, even if it would, in order to convict Cook of negligence, it must appear that to him there appeared a reasonable probability that his speaking to Boylston would be followed by action. The court could not have assumed that the omission of Cook to speak was a cause of the subsequent conflagration.

Judgment affirmed.

AMES vs. COLLINS.

Rights of Riparian owners—Estoppel.

STATEMENT OF THE CASE.

Collins owned a track of land on which was a spring of water. The water came from higher sources in the west. To the east of Collins' tract was that of Ames. There was a descent of Collins' land from a line west of the spring to Ames and the water from the spring flowed in a narrow channel to and over Ames' land. Collins used the water for cooking, drinking and washing, but he sold to a neighbor the right to conduct away a portion of it in a pipe.

Ames had been using the water to irrigate a meadow of twelve acres, having cut little channels for it over the meadow. Had Collins used it in a similar manner no water would have reached Ames' tract. Had Ames not used it as he did, nor Collins as he did, the stream would have reached the farm lying to the east of Ames. It had never reached there owing to the uses to which Ames and Collins had put in.

In a previous action by Mrs. Ames, wife of William, she had claimed as owner, and William had testified that she was the owner. He now shows that her father had executed a deed for the land to him, and deposited it with a mutual friend until the grantor's death, and that this friend had not delivered the deed to him or informed him of it at the time of the trial of the former action, and that he had supposed his wife was the owner as heir of her father.

Trespass for damages.

BENJAMIN and KAUFMAN for the plaintiff.

The upper riparian owner is liable to the owner of the land below him for every material diminution of the flow of the water by a diversion of the stream whether for irrigation or other purposes. Question does not turn on whether occupant below has sufficient water left for his domestic purposes, but whether the quantity flowing on his land has been materially lessened or diminished. 9 Pa. 74; 25 Pa. 528; 24 Pa. 298.

The sizeof the stream is immaterial if it has a well defined channel and a regular flow in that channel, it cannot be diverted to the injury of the riparian proprietor below. 12 Wend, 330.

Evidence tending to show injury to parties east of Ames is inadmissible, as it does not prove a fact having legal operation on the rights of parties to this suit. 10 Watts 128.

Ames is not estopped from bringing this suit by his testimony in the previous action by Mrs. Ames. When a party has acted in ignorance of his title, to his prejudice, he will be relieved in equity. Whelan's Appeal, 70 Pa. 410.

MILLER and FLEITZ for the defendant.

There being nothing to show the spring is fed by a defined stream, it must be presumed to be formed by perculating water and as such it belongs wholly to the owner of the soil. Hanson v. McCue, 42 Cal. 303.

Collins had a right to sell the water as the spring was upon his own land, and the damage to Ames is *damnum absque injuria*. Penn. Coal Co. v. Sanderson, 113 Pa. 136.

Ames is estopped from setting up his title, by his testimony at the former trial. Lord v. Water Co., 135 Pa. 122.

OPINION OF THE COURT.

This deed conveyed title to Ames and he has the right to bring this action. Where a deed, duly executed, is delivered by a grantor to a third person to be kept by him until after the death of the grantor and then to be delivered to the grantee, such delivery after the grantor's death, passes title to the grantee. Where the future delivery of a deed is merely to await the lapse of time or the happening of some contingency and not the performance of any condition it will be deemed the grantor's deed presently. Stephens v. Reenhart, 72 Pa. 434.

Neither is he estopped from bringing this action on account of his testimony in the former action, for in estoppel the element of fraud is essential. Hill v. Epley, 31 Pa. 331.

Another of the weightiest elements of estoppel, knowledge of his own rights in the subject matter, is absent, and there is no other ground on which defendant could base any equity against plaintiff. Hays v. Hays, 179 Pa. 277.

There can be no such thing as ownership in flowing water; the riparian owner may use it as it flows, he may dip it up and become the owner by emptying it in barrels or tanks, but so long as it flows it is as free to all as the light and air. Haup's Appeal, 125 Pa. 211. To entitle a stream to the consideration of the law, it is certainly necessary that it be a water course, in the proper sense of the term. A spring gutter on the surface is nevertheless a water course although it is not equal in volume to a river. Small as it may be, if it has a clear and well defined channel, it cannot be diverted to the injury of the proprietor's below. Wheatley v. Bough. 25 Pa. 528.

The flowing of this stream for a long time through the land of the plaintiff gives him as owner of the property the right to a continuous use of the stream for the customary purposes of agriculture and if the upper riparian owner or any person claiming under him divert the stream from its natural channel, leading it off from the land and appropriating it for other purposes than those of agriculture for which it has been theretofore used, the person so diverting it, subjects himself to an action for damages such as the person injured may have sustained. Lord v. Meadville Water Co, 135 Pa. 122.

A proprietor of land over which a stream of water runs, has as, against a lower proprietor, the use of only so much of the stream as will not materially diminish its quality. His right is not to be measured by the reasonable dividends of his business. Wheatly v. Crismer, 24 Pa. 298.

A man may use the water of a stream for the purpose of watering his meadows, provided that he so constructs his races or the ground is so situated that any surplus will return again into the natural channel before it reaches the occupant below him, and provided that the flow of water which the occupant below was previously entitled to the use of is not materially diminished. Where he goes beyond this, even for watering his meadows, he

must release the right to do so from the occupants of the stream below or he subjects himself to a suit for damages. Miller v. Miller, 9 Pa. 74.

Collins conveyed the water away in a pipe and as the stream was a small spring run it must have materially diminished the flow. The water was not used for agricultural purposes and he is therefore liable in damages.

Judgment for plaintiff for damages sustained.

THORNE, J.

MOSER vs. KERPER.

Interpretation, lex loci contractus—Remedy, lex fori—When procedure is made part of contract—Statute of limitations—Acts of March 27, 1713 and June 26, 1895.

STATEMENT OF THE CASE.

Jacob Kerper, on August 11th, 1890, made a note for $470.00 in Iowa, payable to plaintiff three months after date with interest at eight per cent. The statute of limitations of Iowa allowed four years on which to sue on a contract. It avoided non-negotiable notes unless the consideration was expressed, or the words "value received" were written in them. In the note there was no mention of consideration. The court told the jury the action having begun five years and eleven months after the note became payable, that action was barred; that if it was not, only six per cent. interest could be collected on it and the note was valid. Motion for a new trial.

WILLIAMSON and GROSS for plaintiff.

The statute of limitations as it affects the remedy is to be applied according to the *lex fori*. Watson v. Brewster, 1 Pa. 381; Building and Loan Association v. Stockton, 148 Pa. 146.

Act of June 26, 1895, does not apply to causes of action which have accrued prior to its passage. Shinn v. Healy, 23 C. C. 123; Metz v. Hipps, 96 Pa. 15.

Wright for defendant.

OPINION OF THE COURT.

This motion for a new trial involves a consideration of two general points: first, the law by which the validity of contracts is tested and the law by which they are enforced; second, can this contract be enforced in Pennsylvania although unenforcible in Iowa?

The general principle adopted by civilized countries and states is that the nature, validity and interpretation of a contract are governed by the law of the state or country where the contract is made or is to be executed; but the remedies are governed by the laws of the state or country where enforcement of the contract is sought *i. e.* by the *lex fori*. In other words the obligations of the parties to a contract are expounded by the *lex loci contractus*, but actions brought to enforce them either in the state where made or in other states are subject to the means pointed out by the law of the state in which the action is instituted. The cases of Andrews *et al* v. Herriot, 4 Cowen, 508, and Warren v. Lynch, 5 Johnson (N. Y.) 238, serve to illustrate the principle. In the former it was held that an action of covenant would not lie in New York on a contract to be performed in Pennsylvania, where a scroll and the word seal were used instead of a seal, although the law of Pennsylvania recognizes such scroll as a seal.

In Warren v. Lynch, an instrument was executed in Virginia with a scroll, but payable in New York, and which was regarded by the laws of Virginia as a sealed instrument, was held in New York to be unsealed, because the laws of the latter state recognized no instrument as sealed unless sealed with wax or wafer. Had the instrument been made payable in Virginia it would doubtless have been regarded as sealed by the courts of New York. A few of a long list of additional cases supporting the same view, are 17 Mass. 55; 1 Pa. 381; 58 Pa. 24, and 8 Peters (U. S.) 360. This principle is carried so far that the contract if good in the state of its inception, is good in another, even though it would be void had it been entered in the latter, (1 Grant 51), except where domestic policy forbids: 78 Ill. 558; 10 Mich. 283; 13 Pet. (U S.) 519. It would be a natural sequence that the settled interpretation put by the court on the statutes of its own state is followed by the courts in other states. Case v. Cushman, 3 W. & S. 544.

Courts must always determine what appropriately belongs to the contract and what to the remedy, because they recognize to a certain extent the mode of

enforcement as a part of the contract and of the *lex loci*, when the contract is presumed to have been made with reference to such mode. This is the case, especially, where statutes prescribe a particular mode of procedure, and is applied by the Pennsylvania courts on the ground that all other modes are excluded by the contract. Thus in the Sea Grove Building and Loan Association v. Stockton, 148 Pa. 146, where under the law of N. J. (Act of March 23, 1881) in order to collect a debt secured by a bond and mortgage, a creditor must first foreclose the mortgage and sell the mortgaged property, and then if there be any deficiency, he may sue upon the bond, provided he begins suit within six months from the date of the said sale, the court held such a mode of procedure an incident to the contract and that it must be applied in an action brought in a Pennsylvania court. In such a case the law affected not only the remedy but also the rights of the parties to the contract. So, too, the right of a surety to discharge his obligation by a verbal notice to the creditor to pursue the principal debtor, when the law of the state where he became surety requires written notices, is a matter affecting the obligation of the contract and is determined by the *lex loci contractus*, notwithstanding verbal notice is a method used in Pennsylvania. Tenant v. Tenant, 110 Pa. 478.

Since the time within which to bring an action on a contract is not mutually contemplated by the parties to it otherwise than as stipulated therein, it follows that the statutes of limitation form no part of the contract itself; hence they affect not the right but the remedy only. This is evidenced by the fact that states may limit the time within which to bring an action without impairing the obligation of contracts, if they allow a "reasonable time" to bring suit on a cause already in existence. 20 Howard (U. S.) 22.

All the authorities and decisions too are in harmony on this point. So that an action brought in Pennsylvania to vindicate a foreign right is governed not by the foreign statute, but by the Pennsylvania statute. 2 Kent Com. 462, 463; 3 Clark, 377; 1 Pa. 381; 6 Pa. C. C. 39. Hence an action not barred by the laws of the foreign state is barred in Pennsylvania provided our statute of limitation has already run against it, 6 Wall (U. S.) 538, but such a bar is not necessarily an extinguishment of the the contract in other states, especially the state where the contract was made. U. S. Bank v. Donnally, 8 Peters (U. S.) 360. Similarly, if the statute of the state in which the contract was made has fully run, the aggrieved party may effectually bring his action in another state by whose laws the action is not barred, due regard, of course, being had for the service of legal process upon the defendant. 17 Mass. 55; 19 Iowa 531; 3 Johnson, 263; 3 Clark, 377; 1 Pa. 381. It is sufficient, therefore, if the remedy in Pennsylvania is sought within the time prescribed by the Pennsylvania laws and not by the Iowa laws.

This brings us to apply the law to the case in hand. The act of March 27, 1713, limits the time within which to bring an action on a contract to six years. Action having been begun five years eleven months after the note became payable, it is clear that it is brought within the statutory time, regardless of the Iowa statute. If the note was valid at its inception in Iowa, it is still valid here, and this is the conclusion drawn from the statement of facts. The Iowa law avoids non-negotiable notes unless the consideration is expressed or the words "value received" are written therein. The facts expressly reveal that no mention of consideration is made, but are silent as to the words "value received," thus leading to the single conclusion that the note contains such a phrase; and since either the expression of the consideration *or* the words "value received" satisfy the Iowa law, the note is valid. The inference is likewise drawn that the note is payable in Iowa inasmuch as no place of payment is mentioned; 6 Wharton 331; 135 Pa. 173.

But it is suggested that the Act of June 26th, 1895, barring a cause of action already fully barred by the laws of the state in which said action arose, is a complete defence to this cause. Suffice it to say that this act would be unconstitutional and void if it were applied to this as well as to other causes existing at the date of its passage, and it has been so decided in Shinn v. Healy, 23 Pa. C. C. 123. Statutes which do not allow a reasonable time within which to bring existing causes of action are in violation of the clause in Article 1, Section 10, of the U. S. Constitution, providing that no other state shall pass any "ex-post facto law, or law impairing the obligation of contracts." Cooly on Constitutional law, section 365, 366; 64 Pa. 55; 96 Pa. 15; 95 U. S. 628; Trickett on Limitation, page 211, section 166.

From the foregoing, it is evident that the amount of interest collectible on the note will depend upon the rate of interest agreed upon in the note, if that be not above the rate allowed by the Iowa law; but this will be properly considered in the new trial. It is enough to award a new trial, that the court erred in telling the jury that the action is barred. Motion for a new trial made absolute.

HOUSER, J.