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ALUMNI NOTES.

L. Philip Coblentz, '00, has opened an office at Iola, Allen county, Kansas.

Hutchinson, '98, is at present located in Pittsburg and acting in the capacity of Secretary to the President of the Carey Furnace Company.

Savidge, '97, spent some days in town about Easter. He is associated with Mahan in the practice of law, at Shamokin. He reports that he is getting along very well.

J. Frey Gilroy, '96, spent several days in town during March.

Irving, '98, of New York, was a March visitor.

Basehore, '01, transacted legal business in town during the month.

SCHOOL NOTES.

Quite a number of the students took advantage of the brief Easter recess to visit their homes.

Bishop, of the Middle class, was the recipient of many favorable comments on his solos while with the Glee Club on its recent trip.

Knappenberger and Hugus, Juniors, successfully passed examinations on the first year's work of the course prescribed in Westmoreland county.

The Seniors have taken their final examination in Constitutional Law and taken up Bills and Notes in its stead.

The Law School is well represented on the baseball team, furnishing more than half the players, viz:—Carlin, Cannon, Shiffer, Spencer, Dively, and Oldt. Cannon, of the Middle class, is captain of the team.

MRS. MARY COOPER ALLISON.

It was with great regret that we learned a few days ago, of the death of this charitable lady. The Law School owes its resuscitation in 1890, very largely to the influence of the late William C. Allison, of

Philadelphia, without whose aid, in preparing the building, the project could not have been carried out. During the brief residue of his life, Mr. Allison showed a constant solicitude for the success of the school. Within a year or two after his death, Mrs. Allison, his widow, remembering his interest, gave $1,000 towards the purchase of books for the library. A few years ago, she visited Carlisle during Commencement, and pleasantly received the students who called upon her in a body. She has frequently expressed her abiding interest in our progress. Mrs. Allison was a vivacious, kindly woman, intelligent and sympathetic. She was the friend of the poor, and of the agencies designed to instruct, edify, and alleviate the calamities of her fellow men. Her will contains numerous bequests for religious and charitable objects. We are grateful to her for bequeathing $5,000 to the use of the Law School. We hope to be able to give a fuller account of the life of this estimable lady in the May issue of THE FORUM.

HISTORICAL SOCIETY.

The following constitution has been adopted by the Legal Historical Society:

We, the members of the Dickinson School of Law, in order to more effectually assist in the advancement of the legal profession by the cultivation of the profoundest respect for, and the preservation and perpetuation of the history of the same, and the memory of its members, to aid in the compilation and preservation of the history of the judicial districts of Pennsylvania, as well as that of the higher courts, and to stimulate legal historical investigation generally, and the collection of portraits, letters, diaries, rare books, pictures, etc., do organize ourselves into a body and adopt the following constitution.

ARTICLE I.

NAME.

This organization shall be known as the Legal Historical Society of the Dickinson School of Law.

ARTICLE II.

MEMBERSHIP.

Sec. 1.—Students, former students and alumni of the Dickinson School of Law, can become active members by paying to the Treasurer, twenty-five cents.

Sec. 2.—Any Attorney at-Law, Judge of the Courts, or Incorporator of the Dickinson School of Law can become an honorary member, and may participate in any meeting of the Society, but shall not have a vote.

ARTICLE III.

OFFICERS.

Sec. 1. Title.—The officers of this Society, shall consist of a President, Vice-President, Secretary, Treasurer and Executive Committee of three members.

Sec. 2. Nomination.—Nominations for officers shall be made by a nominating committee, consisting of five members—the three regularly elected members of the Executive Committee and two additional members to be appointed by the President.

The Nominating Committee shall report not less than two nominees for each office at the same meeting at which the election is held, or at a meeting preceding such election.

Sec. 3. Terms and Elections:—Upon the first Friday in February, all officers shall be elected by ballot, by a majority of all the votes cast, for a term of one year: Provided that the term of the officers now serving or about to be elected shall expire at the next election.

Sec. 4. Eligibility—All officers shall be active members, and the President and Vice-President shall be chosen from the two upper classes.

ARTICLE IV.

DUTIES OF OFFICERS.

Sec. 1. President—The President shall, upon entering upon his duties, or within a reasonable time thereafter, appoint an "Historian of the Society," and make such other appointments as may appear necessary or may be recommended by the Executive Committee.

Sec. 2. Treasurer—The Treasurer shall pay funds only upon presentation of orders signed by the President, and countersigned by the chairman of the Executive Committee. He shall make a report in writing of the condition of the finances at the close of his term of office and then deliver all funds of the Society into the hands of his successor.

Sec. 3. Other Officers—All officers in addition to those enumerated in Sections 1 and 2, shall perform all duties usually devolving upon such respective officers.

ARTICLE V.

MANAGEMENT.

The general management shall be under the control of an Executive Committee consisting of three regularly elected members, the President of the Society, and the Dean of the Dickinson School of Law, as ex-officio members.

ARTICLE VI.

HISTORIAN.

It shall be the duty of the Historian of the Society, to solicit contributions as set forth in the Preamble, to supervise the general historical work of the society, and to edit matter for publication.

ARTICLE VII.

VACANCIES.

Vacancies shall be filled by appointment by the President.

ARTICLE VIII.

MEETINGS.

Sec. I.—The President shall call meetings at his discretion, and also upon the written request of five members.

In the absence of both President and Vice President, the written request shall be handed to the chairman of the Executive Committee, who shall act in the capacity of the above named officers, in such emergency.

Sec. 2. Quorum.—A Quorum shall consist of a number equal to one-fifth of all the students of the Dickinson School of Law who are members.

ARTICLE IX.

ORDER.

Roberts' Rules of Order shall be authority to decide all questions of order not otherwise provided for.

ARTICLE X.

AMENDMENTS.

This Constitution may be altered or amended by a two-thirds vote of all the voting members present, provided, a written proposition to that effect be posted upon the bulletin board in the Law Building, for two weeks prior to the time of voting, and provided the Executive Committee recommend the adoption of the proposed amendment or alteration, at the meeting for action upon such proposition.

J. C. HOUSER,
J. E. BRENNAN,
W. L. HOUCK,
Committee.

ALLISON SOCIETY.

The meetings of the Allison Society during the past month were unusually interesting. Every meeting was attended by nearly the entire membership. Every programme showed careful research and preparation.

Among the interesting subjects debated were the increasing of the presidential term to six years; the reduction of tariff on sugar raised in Cuba; the election of U. S. Senators by popular vote. A talk on politics by Wilcox, an oration by Carlin, recitations by Fleitz and Flynn were interesting features of several meetings.

The officers who were elected to serve for the remainder of the term were:

President—Longbottom.
Vice President—Burkhouse.
Secretary—Crary.
Executive Committee—Adamson, Hindman and Brennan.

The new officers are greatly encouraged by the increased attendance and the great interest being manifested. They look forward to a term of great activity.

DICKINSON SOCIETY.

The meeting of Friday, April 4, was a pronounced success. Much effort was expended by the executive committee and active members to get every member to attend; the result was an unusually large attendance. Dickinson has even a larger membership than was represented, so the efforts to secure attendance should be continued.

Among the speakers were Rhodes, F., Davis, Mowry and Wilson. Their talks were extempore, their subjects being assigned by the chair. The debate, "Resolved, that General Miles should be requested to resign, because of his attack upon the Army Staff Bill before the United States Senate was discussed by Rhodes,

J., and Schanz, on the affirmative, and by Gross and Rhodes, F., on the negative. An interesting general debate followed.

DELTA CHI.

Preparations have been begun for the annual banquet, which takes place at the close of the term. The committee of arrangements has been appointed. A number of the Alumni are expected to be present for the banquet. During the month J. Edward Hindman, of the Junior Class, was initiated.

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

	Plaintiff	Defendant
No. 117.	Morehouse,	Prickett,
	Brundage,	Yocum.
	Walsh, J.	
No. 118.	Bishop,	Cisney,
	Donahoe,	Welsh.
	Dever, J.	
No. 119.	Shomo,	Lourimer,
	Dively,	Cook.
	Phillips, J.	
No. 120.	Gross,	Hindman,
	Hickernell,	Fox.
	Hamblin, J.	
No. 121.	Schanz,	Williamson,
	Myers,	Gerber.
	Jones, J.	
No. 122.	Adamson,	Conry,
	McIntire,	Sterrett.
	McKeehan, J.	
No. 123.	Wilcox,	Willis,
	Wingert,	Spencer.
	Phillips, J.	
No. 124.	Osborne,	Boryer,
	Brock,	Minnich.
	Lonergan, J.	
No. 125.	Elmes,	Thorne,
	Brooks,	Rhodes, F.
	Moon; J.	
No. 126.	Delaney,	Keelor,
	Wright,	Drumheller.
	Cannon, J.	
No. 127.	Claycomb,	Longbottom,
	Cisney,	Vastine.
	Cooper, J.	
No. 128.	Mays,	Miller,
	Ebbert,	Jones.
	Delaney, J.	
No. 129.	Houser,	Lonergan,
	McKeehan,	Points.
	Sterrett, J.	
No. 130.	Turner,	Moon,
	Cooper,	Brennan.
	Rhodes, F.	
No. 131.	Davis,	MacConnell,
	Laubenstein,	Rhodes, J.
	McIntire, J.	
No. 132.	Hindman,	Hamblin,
	Wanner,	Sherbine.
	Cisney. J.	
No. 133.	Mowry,	Phillips,
	Crary,	Core.
	Delaney, J.	
No. 134.	Walsh,	Watson,
	Yeagley,	Bishop,
	Crary, J.	
No. 135.	Dever.	Cannon,
	Bouton,	Kline,
	Donahoe, J.	

MOOT COURT.

STOKE vs. THURSTON.

Landlord and tenant—Tenant's covenant to repair—Defects in premises—Liability for injuries.

STATEMENT OF THE CASE.

Thurston owning a house in fee, leased it to Abrams for four years. The house was in fair condition at the time. The lease required the tenant to make repairs. Three years and seven months after the tenant took possession, two shingles of the roof became loose, the wind blew them on the sidewalk, and in falling one struck Stoke, hurting him. This is an action for the damages. It was agreed that the damages were $500, if defendant was liable.

MOWRY and SHIFFER for the plaintiff.

WALSH and SHOMO for the defendant.

The tenant is responsible for defects in the premises. Bears v. Ambler, 9 Pa. 193; Reading City v. Reiner, 167 Pa. 41.

Where there is an unconditional agreement to repair, the tenant is bound to do so. Hay v. Holt, 91 Pa. 88; Hubler v. Baum, 152 Pa. 626; Long v. Fitzsimmons, 1 W. & S. 530; Fow v. Roberts, 108 Pa. 489.

OPINION OF THE COURT.

This case presents the question, whether or not there is negligence. If so, who is negligent?

If there is negligence, it is clear that the landlord is not guilty of it, as he is not in

possession and is therefore not liable to third parties unless he is in full control of the premises and has expressly agreed to make repairs which agreement must be distinctly proved. Tannery v. Drinkhouse, 2 W. N. C. 210; Hubler v. Baum. 152 Pa. 626.

In this case there is an unconditional agreement to repair, and the tenant is bound to do so though the premises be destroyed by fire. Hoy v. Holt, 91 Pa. 88. The landlord is liable only for defective construction or condition at and before the tenancy began. Wunder v. McClain, 134 Pa. 334. Hence the tenant alone is responsible for defects in the premises, if they were not apparent when he took possession. Bears v. Ambler, 9 Pa. 193; Reading v. Reiner, 167 Pa. 41.

But we think that the plaintiff has no cause of action, even on the facts stated, as we cannot see that there was any negligence. The facts show that when the defendant, Thurston, parted with the property "it was in fair condition."

The roof of a house is of such peculiar construction, that if there are any defects they are not discoverable upon careful inspection, and we are to presume, in the absence of any evidence to the contrary, that the defendant employed skilled workmen, and that the roof was laid in the ordinary skillful manner. Having done this, the defendant performed his duty to the public and therefore is not guilty of any negligence.

If he had no actual knowledge, and it nowhere appears that he had, he could only be liable, if he could be made liable at all, if it appeared that the roof was in such a delapidated condition as to be noticeable on ordinary inspection, or that the shingles were loose for a time long enough that he might or ought to have discovered it. No such facts appear in this case.

But waiving all this, could he be liable for damages from such an occurrence if he, himself, had been occupying the house, and the shingles becoming loose had been blown into the street, and in falling struck some person and did injury? Is the injury sufficiently a proximate effect of the shingles being loose as to render any one liable? We are not satisfied that it is, and believe that the injury is the result of inevitable accident.

For these reasons a judgment of nonsuit is entered against the plaintiff.

CORE, J.

McGRATH'S ESTATE.

Wills—Signing at the end thereof—Effect of addition of words not of testamentary character.

STATEMENT OF THE CASE.

June the 18th, 1901.

I, James McGrath, of Lake Como, Buckingham township, Wayne county, Pennsylvania, by occupation a farmer, make this my last will. I give, devise and bequeath my estate and property, real and personal, as follows: That is to say, I advise and direct that all my just debts shall be paid with convenient speed. I bequeath to my sister Annie McGrath, of Lake Como, in Buckingham township, Wayne county, Pennsylvania, all my real estate and personal property.

His
JAMES McGRATH X
Mark

I appoint Annie McGrath, of Buckingham township, and David McLaughlin, of Preston township, executrix and executor of this my will.

Witness: DENNISS MORAN.
Witness: JOHN CLUNE.

The above will was offered for probate August 13th, 1901. There was evidence that the will down to and including the signature was written on June 18th, 1901, in the presence of the two witnesses, and that they then subscribed their names, and that on June 22nd, the sentence appointing the executors was inserted Miss McGrath and David McLaughlin ask for letters testamentary.

TURNER and McINTIRE for the plaintiff.

The addition of words not of a testamentary character does not affect the validity of a will. 107 Pa. 318; 118 Pa. 37; 6 Pa. 409.

STERRETT and BROCK for the defendant.

The clause must take effect as a codicil if at all. It cannot take effect as a codicil as it is not signed at the end thereof. An unexecuted codicil will not revoke a will. Act April 8, 1833; 20 Phila. 94; 31 Pa. 246.

OPINION OF THE COURT.

The above will was offered for probate August 13, 1901, and the executrix with the executor named therein applied for letters testamentary.

The applicants contend that the writings, including the clause appointing the executrix and executor below the signature, constitute the will from which they hope to obtain the granting of their request, and that the addition of the words below the signature in this will was not of a testamentary character, consequently do not affect the validity of the will.

The defendants ask that the writing above the signature of the deceased be admitted to probate, but that the clause appointing the executrix and executor, which is below the signature of the testator shall not be probated.

The act of April 8, 1833, requires that every will shall be in writing, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise such will shall be of no effect.

The appeal of John Wineland *et al*, 118 Pa. 37, has been cited. In this case Benjamin Wineland, on April 26, 1880, executed his last will and testament, devising and bequeathing to different devisees and legatees his estate upon certain conditions, after which he signed his name, following his name were these words "I will that Cephas Lash and Henry Wineland be my executors," then came the signatures of the two witnesses. Wineland's will was offered for probate and was probated by the register, from which an appeal was taken, the register and Orphan's court being reversed. Chief Justice Paxson said "that the clause appointing executors to a will is one of the important parts of the will, although not always essential, and it cannot be brushed aside as mere idle words, to which no meaning is attached, nor can they be rejected and so much of the will be probated as stands above the signature." In consequence of these thoughts all of the will was made invalid.

We do not think part of this opinion is in harmony with the statute of April 8, 1833, for we think that Wineland's will should have been probated excluding the executor's clause, because the clause appointing the executors and the signatures as witnesses were necessarily written after the signing of the will, which made it complete as to the part above the signature. Suppose Wineland should have died the moment he had completed his signature, the statute would certainly have been complied with, and the will would have been valid.

In Hays v. Harden, 6 Pa. 409. The plaintiff offered in evidence a written document purporting to be the will of John Hays, which contained a recital, then a clause appointing executors and directing the payment of debts, after which he devised all his leasehold estate to Abraham Hays, which was followed by his signature. A clause was then added stating his reasons for making the will, after which was the signature of two witnesses. In this case it was held that a testamentary paper to constitute a valid will under the act of April 8, 1833, must be signed at the end thereof, hence a paper which contained, after the signature of the testator, a clause stating his reasons for making the devise, which clause was not signed at the end thereof, is not a valid will.

In this case we make the same exceptions to the ruling of the court. The will was valid the moment that the signature of the testator was finished. That there need be no subscribing witnesses to make a will valid, has been so often ruled we need cite no authority. The moment after the will was made valid and complete by the signature of the testator, any other words, reasons, changes, or bequests must be words to make a codicil. Having once completed a will it cannot be revoked by a codicil or other means save that provided by the statute, which is as follows: "No will in writing concerning any real estate shall be repealed, nor shall any devise or direction therein be altered, otherwise than by some other will, or codicil in writing, or other writing declaring the same, executed and proved in the same manner as herein before provided, or by burning, cancelling or obliterating or destroying the same by the

testator himself or by some one in his presence and by his express direction. The above part of this statute, wherein it says "as is herein before provided," means that it be executed as the statute provides for wills, signed at the end thereof, etc.

In Heiser v. Heiser, 31 Pa. 246, the following facts were before the court. Patience Heiser executed her will July 7, 1852, and placed it for preservation in the hands of J. W. Cottell; but a year or two subsequently, she obtained the will from him, and added immediately below her signature, "I give to my son my 8 day clock. I give to each of my grandchildren a bed and bedding," after which she signed her name. Then came the words "I do give to my children all my plates and six large table spoons, one-half dozen of teaspoons, one cream mug, salt spoons and tea tongs." No signature was after this bequest. The court held that the last clause was an unexecuted codicil and will be of no effect either in changing the will or giving of the last bequest, and that a testamentary writing once perfect, can only be revoked as pointed out in the 13th section of statute of wills.

In the will of Charles Smith, 20 Phila. 94, it was held that the failure of a testator to attach his signature to an addition at the end of a will, which was otherwise complete, does not render the whole will invalid. The addition is to be regarded as an unexecuted codicil, and the will itself being otherwise valid, will be admitted to probate, while the unsigned codicil will be invalid and will be refused probate.

The court is of the opinion that a will duly executed is entitled to be probated that instant, and any writing added below the signature, if only a moment later or if four or twenty-four days later, is the beginning of another will or a codicil, and for the subsequent part to become part of the will so that it may be probated with it, must come under the above statute. This will should be probated without the subsequent words appointing the executor and executrix, consequently the applicants are refused papers of administration.

BORYER, J.

OPINION OF THE SUPREME COURT.

We do not think it necessary in reaching its result to adopt the criticisms by the learned court below of the decisions in Wineland's Appeal, 118 Pa. 37, and in Hays v. Harden, 6 Pa. 409. In these cases it did not appear that the appended words were written after the signature to the will, and as a distinct act. They and the rest of the will were probably written at the same sitting. James McGrath's will was written on June 18th, 1901. It was a valid will, and it remained such for four days at least. To suppose that the insertion of the clause appointing executors revoked it, is to ignore the provisions of the 13th section of the act of 1833, which prescribes how, only, a will may be revoked. McGrath's will has not been burnt, cancelled, obliterated or destroyed. Nor has it been repealed or altered by a will, or codicil, or writing, declaring the intention to repeal or alter, "executed and proved," as a will must be. The inserted sentence neither became testamentary, nor did it repeal the testamentary paper upon which it was written.

Appeal dismissed.

NEW BANK vs. SMITH.

Gambling transaction — Check given in payment of — Notification to stop payment — Forgetfulness of bank officials — Payment — Forgetfulness as ground for action for money had and received, founded on mistake — Relation of bank to payee — Liability of bank for wrongful payment.

STATEMENT OF THE CASE.

William Orris was a depositor in the New Bank. He gave the defendant on January 1, 1900, a check for $1,000.00, in settlement of a gambling transaction. After giving the same, he notified the bank to stop payment and told Smith of this.

On January 1, 1901, Smith deposited the check in the Carlisle Bank, and received credit therefor. The bank forwarded the check. The plaintiff had forgotten the notice and paid the check. Soon after it discovered its mistake, repaid Orris, and brings this action against Smith.

HOUSER and MCKEEHAN for the plaintiff.

In Pennsylvania, recovery is allowed where money is paid by mistake. Ward v. McCue, 31 Pitts. L. J. 160; D'Utrich v. Melchor, 1 Dall. 428; Ritchie v. Summers, 3 Yeates, 530.

Recovery is allowed where money is wrongfully paid through forgetfulness. Kerr v. Ames, 39 Leg. Int. 392.

LONERGAN and POINTS for the defendant.

There is no privity of interest between the "New Bank" and Smith. Smith did not get his money direct from plaintiffs.

OPINION OF THE COURT.

Abundant authority exists for the principle that an action for money had and received is a most liberal action and may be as comprehensive as a bill in equity. "Whenever one man has in his hands the money of another, which he ought to pay over, he is liable to this action * * * when the fact is proved that he has the money, if he cannot show that he has legal or equitable ground for retaining it, the law creates the privity and the promise." Hall v. Marston, 17 Mass. 574. *Cf.* Dana v. Kemble, 34 Mass. 545. "It lies for the recovery of money which in equity, justice and good conscience belongs to the plaintiff, and which defendant ought not under all the circumstances to retain." Haven v. Foster, 26 Mass. 111. Keeping this principle in mind we proceed to an examination of the case. A check was drawn on the New Bank, which check was in settlement of a gambling transaction. Subsequently, and before the bank had committed itself to the payment thereof, payment was stopped. Has the drawer of a check the right to stop payment? We think he has if done at any time prior to the bank's having committed itself to the payment. In Kahn v. Walton, 46 Ohio St. 195, a contract was made as a cover for gambling in the prices of wheat, etc. Kahn was a commission broker, doing business with and for Ream & Co., and bought of or through them wheat and pork for future delivery, so-called, on Walton's account. Walton was loser, and drew his two checks, amounting to $2,000, on the bank where he had funds, payable to Kahn, for money paid by him in the deals and losses. Kahn telegraphed to the bank, inquiring if Walton's checks for the amount of those drawn to him were good, and received an affirmative answer. Walton notified the bank not to pay the checks. It was contended, that the drawing of the checks by Walton on the bank where he had sufficient funds to pay them, and the bank's response to the inquiry of Kahn's agent, that checks to that amount were good, was a specific appropriation of the fund, and amounted to payment of the debt for which they were drawn; whereby the contract became fully executed. Williams, J, said, "A check, being simply a written order of a depositor to his banker to make a certain payment out of his funds, is executory, and, of course, revocable at any time before the bank has paid it, or committed itself to its payment. * * * The bank is the agent of the drawer. Its duty is to pay his money as he directs. It owes no duty to the holder, except under the drawer's directions, until by virtue of those directions it assumes some obligation to the holder. Up to that time the latest order from the drawer governs." Again in Florence Mining Co. v. Brown, 124 U. S. 385, Justice Field says, "A general deposit in a bank is so much money to the depositor's credit; it is a debt to him by the bank, payable on demand to his order, not property capable of identification and specific appropriation. A check upon the bank in the usual form, not accepted or certified by its cashier as good, does not constitute a transfer of any money to the credit of the holder; it is simply an order which may be countermanded, and payment forbidden by the drawer at any time before it is actually cashed."

Having discovered in the foregoing, the right to stop payment so long as the bank has not committed itself before notification, it becomes unnecessary in this connection, to consider the rights of parties involved in gambling transactions to rescind their engagement and recover the amount deposited with a stakeholder. The bank having been notified that payment should not be made, assumed, as between the drawer and itself, the responsibility for forgetfulness and consequent unauthorized payment. In other words, if it paid the check and charged Orris with it, it was bound to indemnify Orris. This it did before bringing this action by repaying him, and the bank thereupon became the owner of the check. Payment to Smith was due to forgetfulness of plaintiff bank that notice to stop payment had been given a year before the check was presented. Can recovery be had for money paid under

mistake? Does forgetfulness constitute mistake? Both questions may be affirmatively answered.

As to the first, "The money was clearly paid over to the defendant under a mistake of fact, and, upon familiar principles, an action can be maintained to recover it back." Appleton Bank v. McGilvray, 4 Gray 518. "Where money is paid by one under mistake of his rights and his duty, and which he was under no legal or moral duty to pay, and which the recipient has no right in good conscience to retain, it may be recovered back, in an action of *indebitatus assumpsit*, whether such mistake be one of fact, or of law." Northrup v. Graves, 19 Conn. 547. "That a mistake in fact, is a ground of repetition, is too clear and too well settled to require argument or authority in its support." Haven v. Foster. 26 Mass. 111 at 130. "The rule is general that money paid under mistake of material facts may be recovered back." Lawrence v. Bank, 54 N. Y. 432. This rule also finds recognition in our own courts. "The books are full of authorities to show that where money ought not to be retained, or where it has been paid by mistake, it may be recovered back." Ritchie v. Summers, 3 Yeates 539; D'Utricht v. Melchor, 1 Dallas. 428; Meredith v. Haines, 14 W. N. C. 364.

Moreover, although the rule is not universal, it is generally held that the fact of the plaintiff's mistake having been caused by his own negligence will not, in the absence of other facts, bar a recovery. "It is no answer to the plaintiff's claim, that the mistake arose from the negligence of the plaintiffs. The ground on which the rule rests is, that money paid through misapprehension of facts, in equity and good conscience belongs to the party who paid it; and cannot be justly retained by the party receiving it." Appleton Bank v. McGilvray, 4 Gray 518; Lawrence v. American National Bank, 54 N. Y. 432; Kingston Bank v. Eltinge, 40 N. Y. 391; Frank v. Lanier, 91 N. Y. 116.

The rule is, however, subject to the qualification, that money so paid cannot be reclaimed if "the defendant received it in good faith, in satisfaction of an equitable claim, nor when it was due in honor and conscience." Walker v. Conant, 65 Mich. 194; Mayer v. Mayor, 63 N. Y. 455.

But, what right of the defendant will be contravened if recovery is allowed? Surely he has no standing to complain. The transaction was a gambling one. Statutory enactment declares notes, etc., given for security or satisfaction thereof, to be void. Act April 22, 1794 § 8; the courts will not enforce such contracts. Lloyd v. Leisenring, 7 Watts 294. Had the check or its money equivalent been in the hands of a stakeholder, the loser would be suffered to regain what he has lost, at any time before it is delivered to the winner, the *locus penitentiae* not being narrowed to the interval between the period of betting and the happening of the contingency. M'Allister v. Hoffman, 16 S. & R. 146. *Cf.* Lloyd v. Leisenring, 7 Watts 294; M'Allister v. Gallaher, 3 P. & W. 468. In fact, the whole transaction being illegal, Smith at no time had a right to the $1,000. Had the bank kept in mind its notification and Smith had sought in law to recover, he would have had no standing; the transaction upon which he would have founded his claim being unlawful. "In such cases, equity keeps hands off, and leaves the parties where it finds them. It is a fundamental rule of equity, that parties wanting its aid must come with clean hands. Courts of equity require honesty, good faith and legality in transactions between men; and if a party would pursue his remedy therein, his demand must not rest on a violation of law for its foundation, or arise from his own illegal acts." Kahn v. Walton, Supra.

Moreover, the defendant, beside knowing that the bet was illegal and that the check given in satisfaction was uncollectible by him, had, with the bank, notice that payment had been stopped. While the reason for his delay in presenting it does not appear, it is reasonable to suppose that it was in consequence of his notification that payment had been stopped and he was prompted by the chance that by refraining from immediate presentation, the notification would have passed from the recollection of the bank officials and he could profit by their forgetfulness. Language too severe cannot be used in condemnation of such an attempt to defraud. He took chances in the forgetfulness of the bank. They did forget and in

consequence paid him the money. As between the bank, an innocent party, and Smith, who should be the loser? We have already shown that Smith never had a right to the money, therefore, as no right is prejudiced, he loses nothing by being compelled to repay the bank, the purposes of the statute are subserved and substantial equity is done. This leads us to the final consideration, *i. e.* Does forgetfulness constitute mistake? It has long been held that recovery can be had in such a case. In Kelly v. Solari, 9 M. & W. 54, the directors of a life insurance company had been informed that the policy was forfeited in the lifetime of the insured, and after his death, having forgotten the fact, paid the money on demand of the administratrix. Chief Baron Abinger, who had mis-directed the jury at the trial, thus expresses himself in awarding a new trial, "I certainly laid down the rule too widely to the jury when I told them that if the directors once knew the facts they must still be taken to know them * * * I think the knowledge of the facts which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment." This case was quoted with approval by Trunkey, J., in Meredith v. Haines, 14 W. N. C. 364, and the rule announced to be that "Money paid by the plaintiff to the defendant under a *bona fide* forgetfulness of facts, which disentitled the defendant to receive it, may be recovered back; it is not sufficient to prevent a party from recovering money paid by him under a mistake of fact, that he had the means of knowledge of the fact, unless he paid it intentionally, not choosing to investigate the facts." See also, Kerr v. Ames, 38 Leg. Int. 392 (P. & L. Vol. III, Col. 4719) where a receiver, forgetting that he had already paid a dividend, paid it again to one who was aware of the error, and subsequently sued for its recovery. The cause was submitted to the court, and judgment was rendered for the receiver. Paxson, J., affirmed this judgment. These cases sufficiently establish the right of recovery, and judgment is therefore entered for the plaintiff.

ELMES, J.

OPINION OF THE SUPREME COURT.

After William Orris, a depositor in the New Bank, had given his check to Smith for $1000, and before the presentment of the check by Smith, he notified the bank not to pay it. The check was not the assignment of any part of the fund on deposit. 2 Randolph, Commercial Paper, 1041. Orris could therefore countermand the order to the bank, before it had paid or bound itself to pay, Smith. German National Bank v. Farmers' Deposit Bank, 118 Pa. 294; Randolph, Com. Paper, p. 1042; Florence Mining Co. v. Brown, 124 U. S. 385; or, by assigning the deposit, could make the check unavailable to obtain the fund from the bank. First Nat. Bank v. Gish, 72 Pa. 13. His death also before its presentment, would revoke the check.

Over a year after the check was drawn, it was presented to the New Bank by the Carlisle Bank. There were two reasons why the New Bank should not have paid it. (1) The notice not to pay was a sufficient reason. No one will contend that that notice ought to have been repeated from week to week or month to month, in order to keep the revocation of the check in the memory of the officers of the depositary bank. (2) The check was then stale, and its very age was notice that there was some defect in it which deprived it of a claim to honor. "For while age" remarks Daniel, "cannot invalidate a good check (unless the limitation has applied) and the fact that it was dishonored when transferred, and that presentment was delayed, does not lessen the drawer's liability unless he has suffered loss, yet the lapse of a long period from its date before its payment, is a circumstance so out of the ordinary course of business that it ought to arouse suspicions and excite inquiry. And the bank paying, or the party receiving such a check, acts at his peril." 2 Negot. Inst. 663. Lancaster Bank v. Woodward, 18 Pa. 357.

The New Bank paid the check despite the discredit arising from its age, and despite the drawer's notice not to pay it. The bank was plainly liable to Orris to make good his deposit, against which it charged the check. It has made good the deposit and now seeks to make itself whole. But from whom?

The check was presented to the New Bank for payment by the Carlisle Bank, and, we may suppose, bore the endorsement of the latter. The action is not on that endorsment. The action is likewise, not on any supposed warranty arising from the sale of the check by the Carlisle Bank to the New Bank. The check was genuine. The drawer had a deposit in bank to meet it. It does not appear that the Carlisle Bank knew that payment had been countermanded. If it did, so did the New Bank. If the former bank should have suspected from the age of the check, that something was wrong, so should the latter bank.

But, the action is not against the Carlisle Bank, but against Smith. On what theory can the New Bank resort to Smith? The check was presented by the Carlisle Bank. It was the property of that bank. The money paid it, was its money. It was not the agent of Smith for collection. It had bought the check from him, and given him credit in his deposit account. It was acting, then, in its negotiation with the plaintiff, not representatively, but as a principal. If the right to recover rests, as the learned court below has maintained, on the fact that the plaintiff has paid money which the payee in good conscience, should not have received, reimbursement should be sought from that payee. Instead of seeking it from him, the plaintiff has sued one with whom it did not deal, to whom or to whose agent, it paid nothing. This we think, is inadmissible.

The Carlisle Bank, so far as appears, had no knowledge of the revocation of the check. It paid full value for it. It could obtain reimbursement on its failure to collect from the New Bank, only by an action on Smith's endorsement or implied warranty of the check, for it does not appear that, when the New Bank discovered its mistake, and attempted to obtain reimbursement, Smith had any deposit with the Carlisle Bank. What the result of an action on the endorsement or warranty would have been is doubtful. The Carlisle Bank was therefore a holder of the check for value, and the return of it to that bank, and the compelling of that bank to refund the money to the New Bank, might have caused loss to it. It had a right to present the check, and to assume that if the check was for any reason, not good, the drawee would refuse to honor it. It presented the check. No objection was made to payment. The Carlisle Bank got the money. It does not appear that the New Bank notified it early or indeed ever, of the mistake. Important changes in the capacity of the Carlisle Bank to recover reimbursement from Smith may have meantime occurred. It is clear, we think, that no action could be maintained by the plaintiff against the Carlisle Bank. *Cf.* Bank v. Bank, 159 Pa. 46.

Perhaps for this reason the experiment was tried of passing over the Carlisle Bank and suing Smith. But how can Smith be liable? Not on his endorsement. The plaintiff is the drawee, who has accepted and paid the check. It cannot sue on the endorsement. Nor has it sued thereupon. Is Smith liable on an implied warranty? The same answer is appropriate. The warranty does not inure to the benefit of the drawee, and the action is not on a warranty. Is Smith liable on a quasi-contract, implied in his having received money from the plaintiff which the latter paid under mistake, and which he could neither receive nor retain in good conscience? Possibly Smith could not have received the money in good conscience, but, unfortunately for the plaintiff, he did not receive it from the latter. All the money he has ever received upon the check, he received from the Carlisle Bank, and *before* the New Bank had paid the check. We are unable to realize a ground on which the New Bank should recover from Smith with whom it has never been in relation, and who has obtained nothing from it.

Judgment reversed.

BEEGLE vs. COUNTY OF BEDFORD.

Interpretation of act of July 14, 1897—Mileage allowed to witnesses—Costs allowed to private policemen.

STATEMENT OF THE CASE.

In the case of the Commonwealth v. George B. Cooper, the District Attorney certified to the County Commissioners on oath of C. D. Beegle, policeman for Pennsylvania R. R. Co. a bill of costs for

committing defendant to jail $1.00; for subpœnaing eighty-three witnesses at 15 cents each, $12.45; travelling 189 miles, $22.68. There were subpœnaed in this case five persons from Lockport, near Niagara Falls, New York, which witnesses travelled by way of Pittsburg, 391 miles in the State of Pennsylvania, and were in attendance at court four days. The bill of costs is not approved in full and the County Commissioners in answer to a rule to show cause why these costs should not be paid say that the bill of C. D. Beegle is in violation of the Act of July 14, 1897, P. L. 266, and that the shortest and most usual travelled railroad route from Bedford, Pennsylvania, to Lockport, New York, is by way of Tyrone and Lock Haven, and allowed each of the five witnesses mileage for only 227 miles to state line.

COOPER and CORE for plaintiff.

Beegle did not perform these duties within the scope of his employment as a private policeman. 9 Kulp 25.

As the services rendered by plaintiff are not those contemplated by the act of July 14, 1897, he is entitled to recover the full amount of his bill. Boyle v. County of Luzerne, 8 Kulp 147; Young v. Harold, 7 Kulp 285.

CRARY and MYERS for defendant.

Where a witness comes from without the State he is entitled to be paid mileage from the State line by the shortest railroad route from his residence to place of trial. 13 Pa. C. C. 330; 1 Pa. C. C. 10.

This act applies to serving a warrant of arrest and all duties pertaining to policemen. Weaver v. Schuykill county, 9 Dist. Rep. 467; McAllister v. Armstrong County, 20 Pa. C. C. 201.

OPINION OF THE COURT.

We are of opinion that the commissioners are in error in contending that the act of July 14, 1897, bars the whole of C. D. Beegle's claim. The act applies only to "services rendered or performed by him of any kind or nature whatever pertaining to his office or duties as a policeman." Therefore, for acts done by him outside of his regular duties as a policeman of the Pa. R. R. Co., and in some other capacity, his right to compensation must be determined without any reference to that act.

We think he is entitled to compensation for serving the eighty-three subpœnas at the rate of fifteen cents each, making a total of $12.45. In so doing he was performing the duties of a deputy sheriff and he is therefore entitled to a deputy's fees. It was not required of him, as a railroad policeman, to serve the subpœnas. The fact that he was a railroad policeman did not preclude him from acting in any other capacity. Com. ex. rel. Jones v. Lloyd, Controller 9 Kulp 25.

From what we have been able to ascertain from the obscure and unintelligible statement of facts, we think his claim for committing defendant to jail, $1.00, and arresting defendant, $1.00, is not sufficiently established by the facts to justify an allowance of payment to him. The capacity in which he acted in performing these services is the test of his right. Until he shows a *prima facie* right to compensation he is not entitled to it, and the mere fact that he is in court does not amount to anything in this respect. It is not within the power of the court to presume facts. This would be dispensing with evidence and entirely in opposition to the fundamental principles of the administration of justice. Arresting and taking to jail are duties which policemen of corporations are often called upon to perform; and when they are performed as corporation policemen, compensation for such services must be sought in the salary paid by their employers, according to the act of July 14, 1897.

The same argument applies to the claim for mileage. What was the occasion for traveling the 184 miles? The law allows compensation for traveling only when such expenses are incurred incidentally in the execution of the laws. Our attention has not yet been called to, neither have we been able to find any cases which hold that the county is liable in any case to pay mileage to a railroad policeman when he travels as a servant or employee of the railroad. At least in the present case it is not shown by the plaintiff that any traveling was done in an official capacity. The mere fact that the item appears in the bill raises no legal presumption of any kind.

The commissioners were right in allowing the five witnesses mileage to the state line by the shortest and most usually traveled route. Since they are not parties in the present proceeding, the courts are open to them for any action they may

wish to take in the matter. Johnson v. R. R. Co., 1 Pa. C. C. 10; Venetian Blind v. Nesbit, 13 Pa. C. C. 330.

Fox, J.

OPINION OF THE SUPERIOR COURT.

The act of February 27, 1865, 2 P. & L. 3955, authorizes the appointment by the governor of persons who may be designated by railroad companies, as policemen "for said corporation." The persons appointed are to "possess and exercise all the powers of policemen of the city of Philadelphia, in the several counties through which the road runs, and in the offices of the recorders of which, certified copies of their oaths of office shall be filed. The keepers of jails or lock-ups are to receive all persons arrested by such policemen for offences against the laws committed upon or along the railroads or the premises of such corporations."

Beegle, a policeman of the Pennsylvania Railroad Company, presents a claim against the county of Bedford for various fees. For arresting a defendant he demands $1.00; and for committing him to jail he demands $1.00. We shall assume that the arrest was for breach of law "upon or along" the railroad or its premises, although this does not appear. Is the county liable to pay these fees?

The act of July 14, 1897, P. L. p. 266, directs that all corporations employing policemen, shall pay to them a "fixed or stipulated salary," and makes it unlawful for such policemen to "charge or accept" any additional fee for any service "pertaining to his office or duties as a policeman, except public rewards and the legal mileage allowed for traveling expenses." We must understand that the arrest and commitment for which compensation is sought, were in the course of the plaintiff's duty. The act of February 27, 1865, distinctly mentions arrest and commitment as functions of corporation policemen. Commonwealth v. Baird, 21 Pa. C. C. 488, Cf. Smith v. N. Y. etc. R. R. Co. 149 Pa. 249. It also gives to them the powers of Philadelphia policemen, which include that of arresting and committing. Beegle was therefore not entitled to other compensation. The act of 1865 itself provides that the compensation of these policemen shall be paid by their companies, 2 P. & L. 3956. Weaver v. Schuylkill county, 17 Super. 327. It is not the duty of Bedford county to pay to Beegle what he cannot receive without crime.

Beegle has subpœnaed eighty-three witnesses, as we must assume, for his corporation. An officer, a party, a private person, can serve a subpœna. Young v. Harold, 7 Kulp 285; Carroll v. Petry, 15 W. N. C. 416. It is not the duty of Philadelphia policeman, so far as we know, to serve subpœnas at the instance of that city, *Cf.* Commonwealth v. Lloyd, 9 Kulp 25, but nothing prevents a contract between the corporation and its policeman stipulating that the latter shall serve subpœnas. If it does, the compensation agreed upon would cover this with other services, and compensation from the county in addition would be improper. Unfortunately we know too little of the nature of the contract between the Pennsylvania R. R. Company and Beegle, and too little of the occasion for the service of the subpœnas to have a firm judgment as to the propriety of this charge. We cannot convict the court below of error, upon the record before us, and, in the absence of evidence as to the contract with the Railroad Company, may probably assume that it did not enumerate the service of subpœnas for the company as a part of Beegle's duties. Commonwealth v. Lloyd, 9 Kulp 25.

Although the learned court below has allowed Beegle fees for serving subpœnas, at the sheriff's rate of 15 cents each, 1 P. & L. 2046; *Cf.* Meagher v. Clearfield county, 3 D. R. 444; Wadlinger, Costs, P. 343, it has refused to him mileage for the distances traveled, apparently in making such service. If he was entitled to the one he was also entitled to the other. But, the mileage fee is but six cents a mile, circular, whereas the plaintiff claims at the rate of twelve cents.

The court below took the correct view of the method of ascertaining the distance for which witnesses are entitled to mileage.

With the modification suggested, concerning Beegle's mileage, the judgment of the court below is affirmed.

SIMS' ESTATE.

Administrator's account — Exceptions to the allowance of credits, and to the omission of assets—Burden of proof on administrator to justify his credits—On heirs, to show additional assets — Presumption as to compensation for services rendered by children to parents—Counsel fees—Administrator's commissions.

STATEMENT OF THE CASE.

William McLeod, administrator of Arthur Sims, deceased, filed his account of the said estate. Various credits were asked for attorney's fees paid, for an allowance to a son for nursing, and for compensation to the administrator. Exceptions were filed by an heir to the various payments mentioned. Also that the administrator had failed to charge himself with $2,000 of funds received.

Upon the day fixed all parties appeared before the auditor. No evidence was offered by either side. Thereupon the auditor dismissed the exceptions and recommended that the account be confirmed.

Exceptions are filed by the heir, who claims that it was the duty of the administrator to show that all the property was accounted for, and to substantiate the credits claimed, the only evidence of the payment of these last sums being receipts which were filed with the account before the register.

MACCONNELL and LAUBENSTEIN for the plaintiff.

Where credit claimed by accountant is objected to, the burden is on him to prove that it was a debt of decedent or properly incurred by himself. Douglass' Estate, 10 Dist. 479.

The burden is on accountant to show that he is entitled to compensation claimed. Mutchinson's Estate, 9 Dist. 293.

DAVIS and MOON for the defendant.

The account of the administrator being accompanied with proper vouchers, the auditor was justified in confirming the report. Estate of Carr Minors, 14 Phila. 265; Verner's Estate, 6 Watts 250.

The auditor's decision upon a question of fact is conclusive, unless there has been a clear mistake. Chew's Appeal, 45 Pa. 228; White's Appeal, 36 Pa. 134; Fahnestock's Appeal, 104 Pa. 46.

OPINION OF THE COURT.

William McLeod was administrator of Arthur Sims' estate, and upon the filing of his account of said estate, he gave in evidence before the register receipts for money paid out by him in settlement of the estate.

Exceptions were filed by the heir to the various payments mentioned in said account; also to the fact that the administrator had failed to charge himself with $2,000 of the funds received.

An auditor was appointed and the parties appeared, but no evidence was offered by either side, thereupon the auditor dismissed the exceptions and recommended that the account be confirmed. The heir now files exceptions, and claims it was the duty of the administrator to show that all of the property was accounted for, and to substantiate the credits claimed.

Two questions confront the court in the above cases, viz: Is it the duty of an administrator in settling the accounts of a decedent to substantiate his claims by showing that all money paid out by him was due from the estate, and that his account is a true statement of the resources and liabilities of said estate?

The second question before the court is: Should it be the duty of an administrator to show the above facts, then has he complied with the requirements?

By the Act of Assembly of March 15, 1832, it is made the duty of every register before allowing the accounts of an administrator, that he shall carefully examine the same, and require the production of the necessary vouchers of the several items contained therein.

We think the object of this statute was for the prevention of fraud by the administrator upon those interested in the estate, and it is the duty of the register, when the statute is not complied with, to refuse to allow the claims of the administrator, but when the statute is complied with, then it is his duty to receive said account and confirm it. It is true, as shown by Roemig's Appeal, 84 Pa. 236, that many of the small items need not be accompanied with vouchers, such as railroad fares, etc., but only such are excused. It is also true that the register has a very limited means of ascertaining as to the correctness of these vouchers, and if the statement of the administrator contains all of the resources and liabilities of the

deceased's estate. But, having been confirmed by the register, the presumption is at once raised, that it was correct and the requirements of the statute complied with. Should there be no exceptions filed, this presumption would become conclusive, and should exceptions be made by the proper parties, the presumption could be rebutted, and we think it would be upon the parties who deny the fact to prove that the account is erroneous.

We think the statute of March 15, 1832 makes it the duty of an administrator to substantiate his account before it can be confirmed, and when he has performed this duty, then his account should be allowed, after which it is the duty of the exceptants to show what they claim.

According to the facts McLeod produced the necessary vouchers as required by the statute, which satisfied the register as to the correctness of his claim, and it was the duty of the heir to show that this account was incorrect. Exceptions are dismissed.

BORYER, J.

OPINION OF THE SUPREME COURT.

The administrator of this estate, claims credit, in his account, for fees paid to his attorney, for payment to one of decedent's sons for nursing the decedent, and for commissions due to himself as administrator. Exceptions to these credits are filed. There is an exception, also, to the omission of the accountant to charge himself with $2,000 funds of the estate received by him in excess of what he charges himself with.

Before the auditor, no evidence in support of, or in response to the exceptions, was tendered by anybody. The auditing judge has therefore dismissed them. Was this correct?

It was right to dismiss the exception to the defective charge. If the exception were *ipso facto* taken as true, unless repelled by evidence, the exceptant might allege that there were $2,000, or $20,000, or $200,000 more assets than those accounted for, and it would be largely in his power to swell the estate *ad libitum*. Generally, the other next of kin have as much knowledge of the estate as the administrator. They should at all events be expected to give *some* evidence of reason for believing that there were additional assets, and as much thereof as the exception alleges. 19 Encyc. Pl. & Pr. 1045. It is the exceptant who affirms, "*Ei incumbit probatio qui dicit, non qui negat.*"

But when the accountant claims credit for paying a debt, he affirms both that there was a debt, and that he has paid it. McLeod in his account, asserts that one of decedent's sons nursed him in his sickness, and became entitled to a certain compensation, and that he has paid that compensation. Surely these assertions are not to be accepted as true, until evidence of them is furnished, if those who are interested in the estate are not willing to concede their correctness. The accountant should not have paid the claim, unless he knew that it was valid, nor unless, should the payment be challenged, he would be able to furnish the proof of its validity. 19 Encyc. Pl. & Pr. 1044, Gray's Estate, 2 Kulp. 45. That the son nursed the father, McLeod, who asserts it, ought to be able to prove. He should not have paid, otherwise. If he has paid, without sufficient proof of the son's claim, he ought not to insist that the next of kin shall acquiesce. He could pay without evidence, if he chose, but he could not by so doing, compel dissatisfied persons to disprove the correctness of his act. *Prima facie*, when a son nurses his father, neither expects that he will be remunerated. The practice is uniform, for the accountant to justify his credits when exceptions to them are filed, and if he does not, he is sur-charged. Douglass' Estate, 10 D. R. 479; Appeal of Fross, 105 Pa. 258; Burton's Estate, 15 C. C. 367; White's Estate, 13 Phila. 287; Fulmer's Estate, 3 D. R. 457; Williamson's Estate, 6 W. N. C. 452, 471.

Credits for payment to the attorney are excepted to. What did the attorney do? Did he earn the sum alleged to be paid? Has that sum been in fact paid? It would be excessively inconvenient, and would lead to gross frauds, to lay down the principle that those who are not satisfied of the rectitude of all payments made by the accountant should be compelled, by evidence, to convict them of error.

The nature and amount of the estate, disclosed by the inventory and account itself, may furnish evidence of need of an attorney's services, and within limits, the Orphans' Court takes judicial notice of

the money worth of these services. But, when the size of the compensation is not explainable from the apparent nature of the estate, it is incumbent on the administrator to show the occasion for the service, its kind, quantity and value.

The courts having adopted rules regulating commissions, specific evidence of the labor of the accountant is often dispensed with. If he seems to have charged more than the established rate, the burden is upon him to justify, not on the exceptants to discredit, the charge. Mutchmore's Estate, 9 D. R. 293; Long's Estate, 13 W. N. C. 14.

Decree reversed, exceptions reinstated, with *procedendo*.

INSURANCE CO. vs. ENGINEERING CO.

Principal and agent—Principal's liability for fraud and forgery of agent—Principal's right to repudiate contract—Implied ratification and waiver of defect—Ratification without full knowledge of facts.

STATEMENT OF THE CASE.

Prior to May 1, 1901, W. A. Todd, an Insurance Broker, of Philadelphia, was authorized by the Engineering and Construction Company to procure Contractors' Employers' and Contractors' Public Liability Insurance for them in the plaintiff company.

Acting under this authorization he made application through a duly authorized agent of the plaintiff company for Contractors' Employers' Insurance on a pay roll of $10,000 at the regular rate, $2.65; he also presented an application for Contractors' Public Liability Insurance on a pay roll of $10,000, at 50 cents.

Upon being informed that the Public Insurance could not be written for less than $1.00, he agreed to the increase, and when the policy was delivered to him as the agent of the Engineering and Construction Company, he paid the agent of the plaintiff company $365, the premium thereon at the above rates and received his commission for the same.

Some question having arisen as to Mr. Todd's transactions, the auditor of the plaintiff company called upon the assured and upon inspecting the policy found that it had been altered, so that the pay roll was represented to be $50,000, and the rate of the Employers' Liability Insurance had been changed from $2.65 to $1.25, and that of the Public Liability Insurance from $1.00 to 50 cents. The representative of the Engineering and Construction Company admitted that he had authorized Mr. Todd to secure insurance in both classes on a pay roll of $50,000, at the rates named in the altered policy, and that he had given him, payable to his order, a check for $875 in payment of the premiums thereon, $510 of which Mr. Todd appropriated to his own use.

Clause "C" of the special agreements in the policy reads as follows: "The premium is based on the compensation of the employes to be expended by the assured during the period of the policy. If the compensation actually paid exceeds the sum stated in the schedule attached hereto, the assured shall pay the additional premium earned; if less sum than the sum stated, the company will return to the assured the unearned premium pro rata."

During the life of this policy, the insured have had several accidents in and about their works. Suits for damages thereon were instituted by the injured, and such suits were settled and damages paid by the Insurance Company.

Now the Insurance Company brings this action to recover the difference between the premium actually paid, namely, $365, the premium on $10,000 pay roll at $2.65 and $1.00 per hundred, and the premium of the actual risk, namely, $1825, the premium on a $50,000 pay roll at $2.65 and $1.00 per hundred, claiming that Todd, the broker, was the agent of the assured, and as such the assured was responsible for his wrongful acts.

RHODES, J., and HICKERNELL for the plaintiff.

Broker's acts, statements and representations made or done within scope of his authority are binding upon his principal. Smalley v. Morris, 157 Pa. 349; Freedman v. Ins. Co., 182 Pa. 64; Oil Co. v. Ins. Co., 64 N. Y. 85.

The principal is bound by fraudulent acts of his agent acting within scope of his authority. Phœnix Ins. Co. v. Pratt, 2 Binn. 308; Vanderslice v. Ins. Co. 13 Super. 455; Keonugh v. Leslie, 92 Pa. 424.

GERBER and DONAHOE for the defendant.

OPINION OF THE COURT.

The plaintiff company is liable in damages to all the employees of the Engineering and Construction Company for accidents to them occurring while at the same time the defendant company compensates the Insurance Company for assuming the risk. In other words, the defendant company instead of paying such damages itself, as each injury occurs, employs the Insurance Company at a fixed rate to settle all damage cases arising. The larger the pay roll, the greater is the risk. According to the Insurance Company's basis of estimation, a pay roll of $50,000 implies that five times as many men are employed as under a $10,000 pay roll. Hence the Insurance Company's liability is five times greater than it originally contracted to assume and this by misrepresentation.

The evidence shows, (1) That the actual pay roll is $50,000; (2) That Todd was authorized to secure insurance on such a pay roll in both classes of insurance, and (3) That the Insurance Company paid damages on the basis of a $50,000 pay roll, in settlement of several suits instituted by employees. Could the plaintiff company recover if the defendant company had directly and without the employment of a broker, obtained the insurance on a pay roll of $10,000, when in fact it is $50,000? Would the law permit the defrauding party to set up its own wrong to defeat its obligation? We think not. 24 Pa. 62; 25 Pa. 441. Cases are numerous which hold that assumpsit is a proper action even where a tort has been committed. 66 Pa. 384; 44 Pa. 9; 78 Pa. 84; 35 Pa. 351; 18 Wend. 425. And the principle involved in these cases seems to be unjust enrichment of the defendant at the expense of the plaintiff. On this principle recovery may be had whether the transaction is tainted with fraud or not. The elements of this principle are present in the case at hand. The defendant company is receiving benefits for which it has not paid, and if the amount of compensation for the same is ascertained and due, we can see no objection to a recovery in assumpsit for the benefits conferred. Clause "C" itself explains the intention of the parties. It implies that compensation on a $50,000 pay roll is paid, and that at the expiration of the policy, a further settlement or adjustment is to take place. If said clause implies *payment* of such compensation, we infer that the same is at least due, and according to the evidence, four-fifths thereof unpaid. There are additional reasons for believing that four-fifths of the premium is due. First, it is the general rule of all insurance companies that the premium is payable when the policy is delivered with the intention that it shall be binding. Wood v. Poughkeepsie Ins. Co., 32 N. Y. 619; Penna. Ins. Co. v. Carter, 11 Atl. 102. Second, the Engineering and Construction Co. gave a check in payment of the premium when they ordered the insurance to be secured. They, thereby themselves recognize that premium is due when insurance is in force. The amount so due is ascertained on the same basis as is paid on a $10,000 pay roll. Where there is an established rate for property of the character designated to be insured, it is presumed that the parties contracted with reference to such rate. 97 Mich. 493; 62 N. Y. 598. The same principle is applied where B hires at an agreed price for a certain time, and continues after the expiration of such time without a new agreement. The presumption is that he is entitled to the original rate of compensation. Ranck v Albright, 36 Pa. 367.

So, too, where a stage company upon agreement to pay, to a turnpike company, a gross sum as tolls for a year, and after the expiration of the year, continued to use the road, the court held the stage company liable at the rates fixed in the original agreement. Good Intent Co. v. Hartzell, 22 Pa. 277. Search for cases deciding this exact case or all the principles thereof involved in one case has proved fruitless. Some cases approach it, we think, in one principle, and others in another. Hartman v. Keystone Ins. Co., 21 Pa. 466, recognizes the right to a greater premium if the risk is increased by some undisclosed fact at the time of contract. The right of the insurance companies to be compensated for the benefits and protection by them given is also recognized by the Act of June 23, 1885, authorizing the companies not to pay the face value of the policy, when the age of the insured

was incorrectly given in good faith, but "such sum as the premium would have purchased at the applicant's real age at the time of effecting the insurance."

The counsel agree that the element of agency does not change the result, agreeing that Todd was the agent of the insured and not that of the Insurance Company. 100 Pa. 137; 182 Pa. 64; 2 Super. Ct. 431. Act of 1876 makes him an insurance broker, and, as such, agent of the insured. Neither can he be regarded as the agent of both companies by taking a commission from the Insurance Company. 83 N. Y. 168; L. R. A. (U. S. C. C. of Appeals) B'k 47, page 450.

The fact that its agent paid a higher rate in violation of his instructions is the same as if the defendant company had itself done so on the ground that a principal is responsible for the fraudulent acts and representations of his agent, made in the course of the business of the agency, or within its apparent scope. 1 Grant 17; 2 Binn. 308; 157 Pa. 349; 92 Pa. 424; 100 Pa. 137. Though the courts of some states insist upon the rigid rule that the fraud must be committed for the benefit of the principal in order to hold the latter liable, our courts seem to hold him liable for the agent's fraud even if committed for his own benefit if the fraud is so far within the scope of his ostensible authority as to warrant third persons in relying upon it. There is no doubt that Todd's misrepresentations were made at least within his apparent scope of authority. That Todd did not apprise his principal of the contract rate and the reduction in the amount of the pay roll does not change the conclusion. Full knowledge of the entire transaction is imputed to the defendant company, it, as principal, being legally bound to know that of which the agent has been informed relative to matters pertaining to third persons, during the continuance of the agency. 23 Pa. 445; 116 Pa. 308; 81 Pa. 256.

The responsibility rests with the Engineering and Construction Co. They placed their faith in him and thereby made it possible for him to defraud both parties. The whole transaction thus stands as that of the defendant company itself, leaving the conclusion first reached unaffected.

There being no evidence that the construction company offered to rescind the original contract, or to pay the balance of premium due on a $50,000 pay roll, no further objection seems to present itself to a recovery in the amount claimed as a measure of the compensation due the Insurance Company and of the unjust enrichment to the Engineering and Construction Company. Judgment for the plaintiff company.

HOUSER, J.

OPINION OF THE SUPREME COURT.

Todd, acting for the defendant, procured from the plaintiff an insurance against the defendant's liability to its employes and others, for the results of negligence. The plaintiff undertakes to pay all damages, in consideration of premiums paid to it. It measures its risk not by the number of hands employed by the defendant, but by the aggregate compensation paid to them. On every hundred dollars paid to hands, it demands $2.65 as premium for indemnifying against employes' claims, and $1.00 as premium for indemnifying against "public liability." Todd agreed for defendant, to take insurance, on the basis of a pay roll of $10,000. The policy was prepared and executed, and Todd paying $365, the premium, was delivered to him.

Todd had been employed by the defendant to procure insurance, on a pay roll of $50,000, at a premium of $1.75 per hundred dollars of wages paid, and had received, to be paid over to the plaintiff as premium, $875. Todd obtaining the policy described, appropriated to himself the difference between $875 and $365. In order to prevent the detection by the defendant of his wrongful act, he altered the policy, so as to make it one of insurance on the basis of a pay roll of $50,000, at $1.75 per hundred.

The policy contained the stipulation, in substance, that if the actual pay roll during the year should be less than that stated in the policy, the company would return a proportionate part of the premium, and that if it should be greater than that mentioned in the policy, the assured should pay a proportionately greater premium. The action is by the Insurance Company to obtain this greater premium.

The original policy contained this clause, so that it advised the defendant that its liability for premiums would be measured by

the pay roll. It does not appear when the defendant first became aware of the alteration of the policy. The alteration had doubtless been made before it was delivered by Todd to his principal. Several accidents occurred during the life of the policy, for which suits were instituted. The plaintiff fulfilled its contractual duty by satisfying the claimants and settling the suits.

We are informed by the evidence, that the premium for the "actual risk," viz: $1,825, is due the plaintiff, or in other words, that the pay roll amounted to $50,000 instead of $10,000. If the contract is to be enforced, as it was written, by the plaintiff, it is entitled to the difference between $1,825 and $365.

It may be well here to say that it sufficiently appears that the period of the policy had expired when the action was brought.

Todd was the agent of the defendant. His business was to procure from the plaintiff an insurance, at the rate of $1.75 per hundred, on a pay roll of $50,000. The insurance he *did* procure was for a higher premium, and on a smallar pay roll. Did his act of directing the execution of the policy, paying the premium, and accepting the policy bind his principal? The limitation as to the pay roll is not important, because the policy itself provides for an adjustment of the premium, at the end of the period of insurance, should the actual pay roll exceed that assumed in the policy. Practically the case before us is that of a direction by the defendant to Todd to buy an indemnity of a certain kind at one price, and of his actual purchase of it at another and higher price. Possibly, though authorities are strangely few upon the point, the defendant, on having the transaction reported to it, might have repudiated the contract and recovered back the money. *Cf.* 1 Am. & Eng. Encyc. 1020; though Todd being a broker had, we think, apparent authority to make the contract which he did, and could bind his principal. [See Worth v. Ellis, 4 Del. 336, where A, who had authorized his agent to buy cows of a certain color, was obliged to pay for the cows bought by the agent, although they were of another color, the seller not knowing of the limit on the discretion of the agent.]

The policy was, however, delivered to the defendant, who did not repudiate it. The year was suffered to elapse, and the plaintiff had no suspicion that the contract was to be questioned or was questionable. Accidents happened. Labor was incurred in soliciting and money expended in effecting settlements. The plaintiff had a right to expect notice of non-conformity of the contract made by Todd with his instructions, if there was in the judgment of the defendant such non-conformity, and if defendant intended to insist on it. The Engineering Company seemed, to the plaintiff, to recognize the contract. We think this non-repudiation with its probable result on the plaintiff, equivalent to ratification or adoption of the contract, or a waiver of the defects in it. *Cf.* Williams v. Sawyer, 155 Pa. 129.

The defendant took advantage of the contract, notified the plaintiff, of suits pending against it, or of accidents that would likely lead to suits, and enjoyed the exoneration resulting from the plaintiff's efforts and expenditures. Had it known, at this time, of the fraudulent acts of Todd, it surely would not be allowed to say, afterwards, that these acts did not bind it. Penn. N. Gas Co. v. Cook, 123 Pa. 170; McNeile v. Cridland, 168 Pa. 16; Keough v. Leslie, 92 Pa. 424; Kramer v. Dinsmore, 152 Pa. 264.

Todd was the agent of the defendant, not simply to procure the execution of the policy, but to accept it and deliver it to the defendant. In holding it, he was no longer dealing with the plaintiff. The forgery which he committed was in no way to be imputed to the plaintiff. Its right of action on the original policy was not impaired by it. Nor do we think that the effect of his act, in preventing the defendant's discovery of his deviation from his instructions, and of his embezzlement of defendant's money, is to be charged on the plaintiff. The defendant ought to have examined the policy. If it did, and did not detect the alteration, why should this effect of that alteration be visited on the plaintiff? It led to what seemed to plaintiff a ratification of the policy, as issued, and plaintiff did acts which it would not have done, but for this apparent ratification. That the apparent ratification was caused by the defendants' agent's

fraud and forgery, can by no means justify the transfer of the loss from the defendant to the plaintiff.

We are aware that there are cases which hold that ratification cannot be bindingly made without knowledge of the facts, but when the party whose agent makes the contract does not dissent from it, and, rather, claims and receives benefits under it, we think he makes the contract binding on him, (the other party not knowing of the agent's departure from instruction,) whatever may be the cause (other than the act of the opposite party) of the principal's non-dissent. If the law concedes to him the privilege of repudiating a contract made by his agent, because it is in excess of particular instructions, this privilege must be qualified with the condition that it be exercised in a reasonably prompt manner, and that performance of the contract from the opposite party shall not be demanded or accepted. Concealment by the agent of the fact of his departure from instructions will not excuse from prompt repudiation.

The Insurance Company has probably paid thousands of dollars in shielding the defendant from suits. The number of these suits and the size of the damages recoverable therein, are affected by the size of the pay roll. The larger that roll, the greater the number of employes therein, or the higher the wages paid to them. It would be inequitable to allow the defendant to have the benefit of the contract without bearing its burden. *Qui sentit commodum, sentit et onus.*

Judgment affirmed.

McADAMS' APPEAL.

Hotel licenses--Revocation--Remonstrances filed after license granted—Act of May 13, 1887.

STATEMENT OF THE CASE.

McAdams was licensed by the Quarter Sessions, as a saloon keeper for one year, there being no remonstrance against licensing his place. He paid the license fee and began the business. Four weeks after, a remonstrance numerously signed, in fact by a majority of the voters of the ward, excusing the delay of the remonstrants, and alleging that the place was unfit, that a licensed saloon at that place was unnecessary, and that the applicant, on account of his conduct a year before, was unfit, was presented. The court re-considered the question, opened the order granting the license and denied the application; but making no order for the return of the license fee, or for indemnifying him for the expense in fitting of the place for the business.

MOON and DRUMHELLER for the appellant.

Remonstrance to be filed on or before the Friday next preceding day fixed for hearing. Act of May 13, 1887; Kohler's License, 1 District Reports 547, Act of June 9. 1891; Bowman's Appeal, 167 Pa. 644; 2 Central Reporter, 140; Boinjohn's Application, 2 Pa. C. C. 33; 1 Pa. C. C. 363.

BORYER and LONGBOTTOM for appellee.

Court has power under Act of March 22, 1867, to revoke duly granted licenses to sell intoxicating liquors upon sufficient cause being shown. 108 Pa. 564; 2 Pa. C. C. 37; 2 Pa. C. C. 78; 1 Pa. 326; 120 Pa. 328; 114 Pa. 452; 11 Pa. C. C. 406. Supreme Court will not inquire into conclusions of fact by lower court unless arbitrarily made. Gross's License, 161 Pa. 544; 161 Pa. 375.

OPINION OF THE SUPERIOR COURT.

This case comes before this court on an appeal, taken by McAdams from an order of the court of Quarter Sessions revoking a license duly granted to him to sell intoxicating liquors.

In making his first application, the license was granted without any remonstrance being filed against him. Four weeks later a remonstrance was filed by a majority of the voters in his ward, setting forth three primary considerations: First, the necessity for the house; second, the fitness of the applicant; third, the sufficiency of the accommodations.

The first qualification is the most difficult and important to find because the Act of May 13, 1887, Section 7, P. L., declares against granting unnecessary license; and, besides, the other two requisites may be proved or provided. As the fitness of the applicant cannot always be decided from the evidence, but may depend upon the character of the place, personal knowledge and other circumstances, there can be no uniform rule upon which a license may be granted or refused upon this ground. Chief Justice Agnew, in delivering an opinion of the Supreme Court in Schlandecker v. Marshall, 22 P. F. Smith, 202,

said: "Courts sit to administer the law as it is given to them, and not to make or repeal it. The law of the land has determined that license shall exist, and imposed upon the court the duty of ascertaining the proper instances in which it shall be granted * * * * * The discretion in the court is, therefore, a sound judicial discretion, and to be a rightful judgment, it must be exercised in the particular case and upon the facts and circumstances before the court, after they have been heard and duly considered; in other words, to be exercised upon the merits of each case, according to the rule given by the Act of Assembly." From this and other decisions too numerous to cite, we find the granting of a license is one of judicial discretion.

Having disposed of this feature of the case, we must next direct our attention as to whether the court of Quarter Sessions exceeded its jurisdiction in revoking appellant's license. For a proper understanding in leading us to a decision, we must look to the Act of May 13, 1887, Section 7, P. L. 108, which provides as follows: "Such licenses may be granted only by the court of Quarter Sessions of the proper county, and shall be for one year from date fixed by rule or standing order of said court. The said court shall fix by rule or standing order a time at which application for licenses shall be heard, at which time all persons applying or making objections to applications for licenses may be heard by evidence, petition, remonstrance or counsel." With the plain meaning of this statute before them, can the court overstep its bounds, and revoke a license previously given by them, owing to the caprice and prejudice of a few voters of his ward? We think not, if they wished to remonstrate, they must conform to the statutory requirements, and not complain because of their own laches. The court is required to fix the time for hearing applications and date from which licenses shall take effect, and this it shall do by rule or standing order. A separate order cannot be made in any case, but one general rule must govern all. The court may change the rule or order, but not in a particular instance. The legislative intent was that all applications should be heard at, and all licenses date from the same time. A license issued on the order of court of Quarter Sessions would be for one year and this rule is as much a part of Act of May 13, 1887, as if it were written in and constituted a part of it by the legislature. In Kahrer's License, 12 C. C. Reports 12, the court said: "The provisions of third section of the Act of May 13, 1887, providing for the adoption of rules by the court are mandatory." The proceeding is therefore statutory, and the court can do that, and that only, which is stated or implied in the words of the statute. There is no authority by which a judgment can be entered in violation of a statute and a former judgment entered in conformity with the statutory provisions be revoked. In 5 C. C. 462, Lackawanna County Licenses, Judge Hand in his opinion, says: "The Act of May 13, 1887, contemplates raising the question of necessity and fitness by petition and remonstrance in the first instance, and not by exceptions subsequently filed, and evidence will not be heard upon these questions when the issue is not thus properly raised." According to these decisions, remonstrants being derelict to their duty in not filing the remonstrance at the proper time, they cannot be heard, and in order to prevent the procuring of another license they must wait until the expiration of a year, and file their remonstrance in due time. But counsel for remonstrants in their defence claim that the court of Quarter Sessions has the power to re-consider the application, and open an order granting the license, and revoke the same, and cite Dolans' Appeal, 108 Pa. 564, that it is within the jurisdiction of the court of Quarter Sessions "to revoke duly granted licenses to sell intoxicating liquors upon sufficient cause being shown." Also in Hamilton's Application, 7 C. C. Reports, 113. Hamilton's license was refused in March, 1889, and his counsel on June 29, 1889, twelve weeks later, moved the court to open the order previously made in the case and award the license. Remonstrants denied the power of that court to do anything for him. But Wickham, P. J., said, "The court of Quarter Sessions has power to open an order refusing the license, and to grant the license, notwithstanding a full term has elapsed since the hearing." The jurisdiction of the Quarter Sessions in granting licenses is purely

statutory, and therefore they have the right to re-examine, modify or altogether reverse their own decrees. While they may reverse their own decrees, they cannot wilfully disregard the statute to do so. We find in the former case cited by counsel for remonstrance there appears to have been some violation of the liquor law which is not to be reconciled with the present case, while in the latter case it only decides the question whether the court of Quarter Sessions has the power to re-consider and open an order granting the license and revoke the same. They, therefore, do not apply to the case before us, and the revocation of the license is inequitable and unjust, for having paid his license fee and fitted up his place of business, and being lulled into security by the aid of the law, the revocation of the license is an arbitrary ruling and without some good reason.

Appeal sustained, and order revoking license granted to plaintiff in error. Reversed.

OSBORNE, J.

OPINION OF THE SUPREME COURT.

The power of the court of Quarter Sessions to revoke a license is found in the seventh section of the Act of May 13, 1887, 1 P. & L. 2704, which enacts that "upon sufficient cause being shown, or proof being made to the said court, that the party holding a license has violated any law of this commonwealth relating to the sale of liquors, the court of Quarter Sessions shall, upon notice being given to the person so licensed, revoke the said license."

For breaches of the law after the issue of the license, the revocation of it has often taken place. Vide cases in P. & L. Dig. Stat. 2705. Campbell's License, 8 Super. 524. But other causes than breach of law are contemplated. "Sufficient cause," need not be, as the above clause clearly implies, a violation of law; 11 P. & L. Dig. Decisions, 19261, and a variety of non-criminal occurrences and incidents of the business, subsequent to the grant of the license, will induce the courts to recall the licensee's authority to sell liquor.

In the case before us, the grounds for revocation existed before the issue of the license, or rather, they began before the issue, though they persist after it. The place, it is charged, was, and remains unfit. Sale at that place was, and remains unnecessary. The licensee, before the issue of the license, had so conducted himself as to show that at the time of the issue of it, he was, and that he remains unfit, to have the authority to sell. Can the court revoke the license for an unfitness of place or person existing at the time of the revocation, if that unfitness originated before the grant of the license? We see no good reason for denying the power.

When the premises were in fact unfit, but, on account of a mis-description of them, the court granted the license in ignorance of their true character, it revoked. In *re* Hoyrick License, 9 Kulp, 368. *Cf.* Kelly's License, 20 Phila. 446. A misrepresentation as to the citizenship of the applicant will induce a revocation of the license. Hoy's Application, 3 Mont. 188. *Cf.* Dolan's Appeal, 108 Pa. 564.

The business of liquor selling requires a special permission from the court. The court is to maintain a constant supervision of it, and though the license when granted, is granted for a year, the license does not, for the year, pass beyond the control of the court. The relation of the licensee, after he pays the fee, and after he expends money in fitting up his place for the business, is not to be assimilated to that of a purchaser of a right which cannot be regulated, minified or even extinguished. The state can, during the year, by new legislation, impair the value of the license by restricting and hampering sales under it. Commonwealth v. Donahue, 149 Pa. 104; Commonwealth v. Sellers, 130 Pa. 32, and it may even prohibit sales altogether. The court of Quarter Sessions is the agent of the state.

If the refusal of a license was to be considered as a favor to the remonstrants, the satisfaction of a right in them, we could understand why their failure to present their remonstrance in time should be held to preclude the consideration of it. But the court, in refusing or recalling a license, is doing no favor to them. They are simply the spokesmen of the community. Liquor selling may in the judgment of the law easily degenerate into a scourge. The public health and morals require that it be in good hands, and hedged about by

restrictions as to place, periods of sale, personality of the purchaser, etc. The court is the agent of the public, to enforce these restrictions. It would be a convenience to an indolent, or timid, or popularity pursuing judge to have, or to be believed to have, but little discretion; to put the burden of denying licenses on the remonstrants, and, they failing in promptitude, to take refuge behinditheir default. It was not the intention of the law-makers, we presume, that if a grossly unfit man, or place was licensed, because citizens, for some reason, failed betimes to remonstrate, he should continue to have the power to sell for a year. Many breaches of the law, and many improper ways of conducting the business, which could not be branded as illegal, may escape detection. In demanding evidence of the character of the applicant and of his place, the law seeks a guarantee that he will carry on the business as little harmfully as possible. The community must not be compelled to endure for a whole year one who does not furnish this guarantee, simply because citizens have not been alert enough to expose his unfitness, at the time prescribed for the annual consideration of license-applications.

It may seem harsh to withdraw the license after it has been paid for; or after the licensee has spent money in adapting his premises to the sale. So it is. But it would be much worse to suffer the risk of an unfit man selling for a year, at an unfit place, intoxicants to minors, drunkards, etc., and of his demoralizing his neighborhood. It is better to make one man suffer in his purse, than to endure the risk of his innoculating twenty, or fifty, or a hundred with the virus of inebriety. It must be remembered also, that the applicant for license impliedly avers his fitness, the fitness of his place, etc. If he or his place is in fact unfit, the court is, in a sense, misled by him, and by those who support his application. A sound policy will not prohibit the retraction of the license, should the court discover its error, however superinduced.

We see no sufficient reason for the order of the learned Superior Court in reversing the order of the Quarter Sessions revoking the license. The order of the former court is reversed, and that of the latter is affirmed.

TIBBLE'S ESTATE.

Exceptions to auditor's report—Accommodation endorser—Surety—Character of liability.

STATEMENT OF THE CASE

Tibble obtained Wm. Japes' endorsement on a note for Tibble's accommodation and had it discounted by the Farmers and Merchants' Bank. He gave Japes a note for the same amount to protect him for his endorsement. Tibble dying, his estate was insolvent. The bank presented the note which it had discounted. Japes also presented his note. The auditor allowed a dividend on the former, but not the latter.

HAMBLIN and WELSH for exceptants.

Suretyship is established, and the surety is entitled to be reimbursed out of the estate for any losses which he sustains by reason of such suretyship, Miller v. Pollock, 99 Pa. 202; Miller v. Howery, 1 Watts 474; Bank v. Douglas, 4 Watts, 95.

BISHOP and VASTINE for respondents.

OPINION OF THE COURT.

Tibble obtained Wm. Japes' endorsement on a note for his, Tibble's, accommodation, and had it discounted by the Farmers and Merchants' Bank. Japes was an accommodation endorser under section 63, article 5, of the negotiable instrument act. An accommodation endorser is simply a surety, but not so named in the act. Tibble gave Japes a note for same amount to protect him for his endorsement. Tibble dying, his estate was insolvent. If the bank could get all its claim out of the estate, then the indemnity note to Japes would be thereby satisfied. If the bank did not get all its claim, Japes would be liable for the balance. The bank presented the note which it had discounted, Japes also presented his note. The auditor allowed a dividend on the former, but not on the latter—Exceptions. The note given by Tibble to Japes partakes of the nature of an indemnity contract. Tibble, the indemnitor, undertakes to protect Japes, the indemnitee, from loss through a liability on the part of the latter to the bank. The question for us to decide: Did Tibble give the note to protect Japes from absolute liability or to recompense him if he is compelled to pay the bank? We think the latter was the intention of Tibble. We therefore are of the opinion that the

indemnitee cannot recover until he has suffered an actual loss or damage, in other words, he is not entitled to indemnity until he has been compelled to pay and has paid the amount for which he is liable as endorser upon Tibble's note. The mere incurring of liability gives to him no such right. If the note was to indemnify Japes from absolute liability it would present a different view, but under the existing circumstances, the auditor was clearly justified in disallowing the claim of Japes until the bank was paid.

Exceptions dismissed.

MYERS, J.

OPINION OF THE SUPREME COURT.

Japes endorsed the note of Tibble's, for his accommodation. To protect him Tibble gave to Japes a note for the same amount. Being payable absolutely, according to its terms, the note was payable at the time mentioned in it. It did not matter whether the principal note was then due or not, nor whether, being due, Japes had paid it. Japes had a right to the money, in order that, out of it, he might discharge the endorsement, or in order that, if he had already paid the endorsement, he might be indemnified. When Tibble died therefore, there were two notes overdue, that to the Farmers and Merchants' Bank, and that to Japes. There is no reason that both should not be presented for payment, nor that both should not receive dividends, provided that the sum of the dividends should not exceed the debt. Thus, the notes being for $1,000, if the dividend on each was $500, the sum would equal the debt. Japes would hold the $500 awarded to him as a species of trustee for the bank, which would thus be paid in full. Emerson v. Paine, 176 Mass. 391. Should the dividend exceed fifty per cent., the excess would not be payable, for, in no event could more be taken than sufficed to pay the bank in full.

The right to present a larger demand than the debt actually due, for the purpose of obtaining a dividend not greater than that debt, is illustrated in many cases. If a creditor has a pledge, he may, after an assignment, exhaust the pledge, and though he thus reduces the debt, he may obtain a dividend from the estate on the unreduced debt, provided that the sums thus obtained, added together, do not exceed the actual debt. Assignments, 208. If a surety who pays the whole debt, seeks contribution of one-half from a co-surety now dead, he can obtain a dividend on the whole debt, provided that the amount awarded does not exceed one-half of it. Cooper's Estate 4 Super, 615. In the case before us, there are two claimants for what is the same debt. It is not a departure from precedent to allow dividends on the double debt, to the two several claimants, since one of them will hold what he gets for the benefit of another.

The result would have been different, if the note given to Japes had not been payable unless or until he had paid his endorsement. He could, as endorser, have sued Tibble, after paying the note of the Farmers and Merchants' Bank. His action on the secondary note would have given him substantially the same remedy. But, the right of action whether on the endorsement or on the collateral note, would not have arisen until he had paid the primary note. If he had paid the primary note, he would claim as owner of it. He would not be allowed to claim as owner of it and of the secondary note. The secondary note would not have been intended to be an additional security but an alternate security. Cummings v. Thompson, 7 Metc. 132; French v. Hayward, 16 Gray, 512.

Decree set aside with *procedendo*.