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JUDGE CAVERLY'S DECISION

The legislature of Pennsylvania has divided the Acts which constitute murder into two classes, murder of the first degree, and murder of the second degree. It is not for court or jury, to make the distinction. That is made by the facts. If there was the intention to kill, or if the killing, though unintended, was incident to the commission of, or the attempt to commit, arson, or rape, or robbery, or burglary, or kidnapping, the killing is declared by the statute to be murder of the first degree. Murder without the intention to kill, and without the act of arson, rape, robbery, burglary, or kidnapping, or the attempt to commit arson, or rape, or robbery, or burglary, or kidnapping, is murder of the second degree. The two classes of acts "shall be deemed murder of the first degree," or shall be deemed murder of the second degree." Shall be deemed by whom? Clearly by him or them, whose function it is, to administer the penalty; by the jury, no less than by the judge. Since the indictment does not need to define, and does not define the degree, and since the pun-

ishments for the two classes of murder are different, it is plain that the jury, in case of a jury trial, must say whether the facts ascertained, make guilt of murder of the first degree or of the second degree, or of some crime of inferior turpitude.

There are a few decisions which seem to hold that the court must not too strongly urge on the jury that it has a duty to accept the statutory classification. It must apparently be allowed to find that malicious killing with intention, is murder of the second degree. It is to be hoped that the authority of these decisions may be soon repudiated, and the propriety of the court's instructing a jury that it should find murder of the first degree, when it finds the facts which the legislature has told it to deem murder of the first degree is unquestionable. The utility of the jury system is much weakened, when the jury is told that it may, though finding the legislative elements of the first degree, refuse to give a verdict for other than the second degree.

Illinois has not divided murder into two degrees. It however has shown a concsiousness of the many shades of atrocity, hardness of heart, etc., with which a killing may be committed. Instead of making classes, with definitions, it has allowed within limits the jury to apportion punishment. "Whoever" says the statute, "is guilty of murder shall suffer the punishment of death, or imprisonment in the penitentiary." Imprisonment how long? "For his natural life or for a term not less than 14 years." "If the accused is found guilty by a jury, they shall fix the punishment by their verdict." The defendants were not found guilty by a jury. They pleaded guilty. "Upon a plea of guilty" says the statute, "the punishment shall be fixed by the court." The opinion of court or jury, as to the malignity of the crime, is not expressed by classifying it, as in Pennsylvania, as of first, or second degree, but by determining the kind or degree of punishment. Finding the accused guilty of murder, by the defendant's confession, the court must sentence either to death, or to imprisonment, and this

imprisonment must be for life, or for not less than fourteen years.

The defendants have not pleaded insanity. If insane when the killing was committed, they would not have been guilty of any crime, and acquittal would have been unavoidable. Judge Caverly ventures to say that they could not successfully have alleged insanity, in the legal sense of that word, "as defined and understood by the established law of this state, for the purpose of the administration of criminal justice." If Illinois has a satisfactory definition and understanding of "insanity," it is more fortunate than some other states. The ineptitude of the explanations attempted in this state by Gibson, C. J. in Commonwealth vs. Mosler, 4 Pa. 264 and by succeeding judges, is disappointing. Insanity seems to consist of the inability to form the concept of moral and legal right and wrong, or correctly to apply the correct concept, to the particular act, of which the defendant is accused, or to consist of subjection to impulses which are irresistible, to commit the act, "sometimes," as Gibson C. J. remarks, "called homicidal mania." Whether the judical or legislative mind of Illinois has been able to elaborate a better definition, we do not undertake to say. Enough that Judge Caverly finds that Illinois insanity does not exist in the cases of Loeb and Leopold.

Notwithstanding its conclusion that there was no insanity, the court finds "abnormalities of mind." Insanity is a species of abnormality, but, we descry that there are abnormalities which, neither in tone nor degree, amount to insanity. Insanity would have produced irresponsibility. But, what is the result of the lower shades of abnormality? "The prisoners," says the judge, "have been shown, in essential respects, to be adnormal." In what respects? Had they had the ordinary abhorrence of killiing an unoffending youth; had they had the usual mercy, pity, justice, respect for the prohibitions of the law, for the voice of public opinion, for the precepts of morality and religion, they would not have done what they did. "Had they been normal, they

would not have committed the crime." Most true. What serious crime is there, that would have been committed, had the guilty person been normal? The court has said that this crime would not have been committed had the prisoners been normal.

What use then, is to be made by the judge or jury, when he or it discovers this abnormality? Without it the crime would not have been done. Is it then to be condoned? Is it to be deemed involuntary and for that reason not amenable to penalty? Reflection on the abnormality of the minds of the defendants does not seem to have conducted the judge to any practical conclusion. "It is beyond the province of the court," he remarks "or it is beyond the capacity of human science, in its present state of development, to predicate ultimate responsibility for human acts." Ultimate responsibility? The penal death of the murderers would seem to imply an ultimate responsibility to his fellowmen; to the state. Does the judge refer to responsibility to God; to a punishment after death? That decision of this question was "beyond the province of this court" is not surprising; what is surprisingg is that the judge should have thought it useful to tell us, that he would not "predicate ultimate responsibility for human acts." Theologians and philosophers might undertake this function but that the secular state or its agents should assume it, it is too late, in the centuries, and under a constitution that divorces religion from the government, to expect.

We have arrived at "abnormalities." But, their kind or degree is not indicated, and, strange to say, no use is made of the fact that they exist in the prisoners, or that, had they not existed, the prisoners would not have done their horrid deed.

Apparently to soothe the counsel for the defense, and the psychiatrists produced by them, the judge, after virtually saying that their efforts with regard to abnormality were fruitless, expresses willingness to concede that the testimony regarding the life history, and the present mental,

emotional and ethical condition, had been of "extreme interest," and was a valuable contribution to criminology. The court too clearly sees that similar analyses "of other persons accused of crime would probably reveal similar or different abnormalities." In short, as much could be said to mitigate punishment in every case, because of abnormalities, as had been said, at the procurement of large expenditures of money, on behalf of the two criminals.

The court then expresses a judgment concerning the crime, similar to that of the thousands who have followed the report of the trial. It was a crime of singular atrocity. "It was delibrately planned and prepared for during a considerable period of time. It was executed with every feature of callousness and cruelty." It was abhorrent to every instinct of humanity."

The court is satisfied that neither in the act itself, nor in its motive or lack of motive, nor in the antecedents of the offenders, can be found any mitigating circumstances."

For a crime of this gravity, then, what is to be the punishment? Is it to be death?

The court mourns over the fact that he has no colleagues to share the responsibility which ,when he took office, he knew that he was assuming. The law has given no rule for the guidance of his discretion. It was possibly because no rule could be prescribed that the discretion was conferred. "The court would have welcomed the counsel and support of others." But the office was sought for, and that this was one of its duties, when the occasion presented itself, was apparent. We do not see that any sympathy is to be felt for the censure or obloquy to which his act, conscientiously done, exposes him. The suggestion that a bench of three Judges, would be better, to determine the punishment in cases similar to the Leopold-Loeb case, while inappositely appearing in a judgment of the court, might be worthy of consideration by the legislature.

Precisely what is meant by the statement, that to impose the "extreme penalty of the law," viz. death "would have

been the path of least resistance," we cannot say. It is about as easy to sentence to imprisonment for life, as to death. It may have been more satisfying to the crowd to sentence to death but a judge is not supposed to consider the sentiment of onlookers and readers of imperfect newspaper reports. But, this is a prelude to a singular position. The court virtually says, that, if the accused had been over 21 years old, (when they committed the crime or when they were sentenced), he would have inflicted death. He substitutes life imprisonment, because the accused are not of full age. Why? Is it because youth appeals, as older years do not, for mercy No such reason is insinuated. The reasons are that abstinence from capitally punishing men accords with the progress of criminal law all over the world. It also agrees with the dictates of enlightened humanity. It agrees with the precedents of Illinois. We are not aware that enlightened humanity has opposed the death penalty in the case of persons under age.

But, sparing the prisoners from the death penalty it seems, is not a sign of humanity. "To the offenders particularly of the type they are the prolonged suffering of years of confinement, may well be" says the judge, "the severer form of retribution and expiation." Then why is this "severer form" imposed on youths?

The judge was thinking of the answer that people would make to the suggestion that imprisonment for life was worse than death. They were saying, but a life imprisonment in Illinois, is not a life imprisonment. Wealth, political influence, which can be procured by weath, will secure the liberation of the prisoners, in three, four, six years, while the politicians or the pardon board cannot bring back to life a man once dead.

The court attempts to soothe the apprehensive spirit of citizens, by saying, "it is entirely within the discretion of the department of Public Welfare, never to admit these defendants to parole. To such a policy the court urges them strictly to adhere." But the department is under no duty

to accept suggestions from the judge, and it might retort that it would not rectify the bad effects of the court's exercise of discretion, by surrendering its own.

It is quite clear that the defining of punishment for crimes is a function of the legislature, and not of the judiciary. The judge does not undertake to abolish capital punishment in Illinois; that is, capital punishment of persons over 21 years old. But, he virtually abolishes it, so far as its enforcement depends on him, in the case of murderers, below 21 years of age. Perhaps he will next discover that women should not be executed, that college graduates through a revived benefit of clergy should not be executed, nor poor persons, nor rich persons, nor geniuses in music, mathematics, psychology, science, generally. Some of the most cruel and abhorrent murders have been committed by minors. The distinction between above and below 21 years of age, is artificial. The life history of criminals of 50 years of age, may sometimes give cause for pity and mitigation of punishment, when that of the youthful criminal fails to do so.

We should regret deeply if this opinion of the judge should induce the legislature to accept the penological principles which without much reflection he has propounded as apologies for the purposed decision. But, of this acceptance there is little risk.

Repealing capital punishment altogether, has something to be said in defence of it, but repealing it, in regard to persons below 21 years, would be endlessly regrettable,

THE 16TH AMENDMENT

In fashioning the super-state, to be called the United States of America, it was necessary to provide money for its government. Governments are spending and not wealth producing institutions. Conceivably, the plan might have been adopted by the Constitution makers of imposing the duty of making the necessary contributions upon the states. The Articles of Confederation, the adoption of which preceded by only seven years that of the so-called Constitution, provided "All charges of war and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the value of all lands within each state, granted to or surveyed for any persons, as such land and buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled shall from time to time direct and appoint." The legislatures of the states were to raise their several obligatory contributions, by taxation. Experience showed the unwillingness of states to furnish their assessment by contributions and to attempt to coerce them would have meant civil war and the swift dissolution of the Union.

But, while the policy of requiring the states to obtain the money from their citizens and subjects, might have been abandoned, the gross sums necessary from time to time, might have been imposed on the states, while the United States distributed this burden on the citizens of the states, and used its own machinery for compelling payment. The aim of the framers was to apportion on the communities called states, the expenses of the general government in some equitable way. The confederation thought that taxes should be paid by the states according to wealth, and that the constituents of their wealth could be assumed to be the lands owned by individuals, and the buildings and improvements

thereon. The burdens borne by the people of the states would have been in proportion to their land wealth.

The Constitution gave to the United States, the power of taxing the citizens and inhabitants of the States. But it has classified taxes. Congress shall have power "to lay and collect taxes, duties, imposts and excises."

It distinguishes duties, imposts and excises, not from each other, but from taxes. "All duties, imposts and excises shall be uniform throughout the United States." But the Constitution says, "Representatives and direct taxes shall be apportioned among the several states, which may be included within this Union, according to their respective numbers." Are we to assume that the word "taxes," used in conjunction with "duties, imposts and excises," is the equivalent of "direct taxes." May there be taxes which, distinct from "duties, imposts and excises," are nevertheless indirect? Chief Justice Fuller probably intends to say that there are no such "taxes." "Although there have been from time to time, intimations that there might be some tax which was not a direct tax, nor included under the words "duties, imposts and excises, such a tax for more than 100 years of national existence, has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue." Pollock V. Farmers Loan & Trust Co. 157 U. S. 529; 158 U. S. 601. Taxes, then let us assume, means "direct taxes."

The distinction between "taxes" and duties, imposts and excises, would be wholly unimportant, but for the requirement that taxes, i. e. direct taxes, shall be apportioned among the states, while the duties, imposts and excises do not need, do not admit of, apportionment but must be geographically uniform. Why were those two rules prescribed? We might a priori have suspected that the difference between them was well known, and that their several attributes justified such a different qualification of the mode of assessment.

The only specimen of a direct tax mentioned in the Constitution is a "capitation tax." Says Art. 1, Sect. 9, Clause

4, "No capitation or other direct tax, shall be laid unless in proportion to the census or enumeration herein before directed to be taken."

Unfortunately, while daring to lay down two rules for the assessment of taxes, and duties, imposts and excises, there is nothing to indicate that the framers had any clear conception of a difference between them. In one of the debates in the Convention, Mr. Madison records, "Mr. King asked what was the precise meaning of direct taxation. No one answered." The effect of the application of the rule of apportionment to taxes which have, after more than a century, i. e. in 1895 been discovered to be direct, is so preposterous and intolerable, that we readily preceive that the makers of the constitution, in speaking of direct taxes, were speaking of that of which they had no clear conception.

Capitation taxes are apportionable among the states, but as they are taxes on individuals, for being individuals within the ambit of the taxing power, such a tax is necessarily if uniform, proportionate to population. 100,000 men in state A, would pay the same capitation tax as 100,000 men in state B. The tax per capita would be multiplied by the number of heads. But, it is evident that the rule of uniformity would produce the same result. Apportionment ceases to be absurd, because it is, as applied to this tax, a different name for observing uniformity.

But, let us contemplate the results of the rule of apportionment, if applied to other subjects, taxation of which has, by the belated wisdom of the Supreme Court been discovered to be direct. Speaking of Pollock vs. Farmers Loan, etc. Co. 158 U. S., Cooley says "As the law now stands, the following are direct taxes, a capitation tax, a tax on real estate, on the income from real estate, on personal property and on the income from personal property." Constitutional Law, page 63. A tax on land, then, is a direct tax, and must be apportioned according to what? to its area? to its value? to anything which ought to regulate it? No, but to population. If land in state A is worth $100,000,000. and in state B is

worth one tenth of that amount, $10,000,000, the land tax payable by the land owners of the two states must be the same, if their populations are the same in number. Is the tax assessed on income? Then, the burden will fall, not as it should, in porportion to the income, but in proportion to the state's population. Two states have, each 1,000,000 inhabitants, but the incomes of state A average $1000; those of State B $5000. But, the people of $1000 income must pay as much income tax as those of $5000 income, because the populations of the two states are the same. A tax is levied on cattle, on horses: but the same amount of cattle tax must be paid by two states if they have the same population, although state A has cattle 20 times more numerous and valuable than has state B.

The courts early preceived the shocking absurdity of the rule of apportionment and sought to restrict the baleful and preposterous effects of its application, by arbitrarily saying that only a tax on land could be considered direct. This view came to prevail. It is expressed by writers on the Constitution; by Storey, Kent, Pomeroy, Miller, Hare, Barroughs, Cooley. With whatever intention, in 1895 the Supreme Court made it impossible to tax land, or its proceeds, personalty, or its proceeds, by adjudging any law taxing these objects, to be void, unless it imposed the tax by apportionment among the states, according to their populations.

Public opinion has not been disposed to tolerate this rule. Hence Congress has been compelled to desist from taxing many things, or subtle distinctions, having no real relevancy, have been resorted to. Instead of taxing an income, the Congress may tax the industry, the capacity, the legal authority to do the acts which produce the income, and such a tax need not be apportioned. If the tax is imposed on the income, "solely because of its ownership." it is direct, even if called by the Act of Congress a duty, or excise. But, a tax on the doing of business, which is measured by the income, is not a tax on the income. A tax of one percent of the net incomes above $5000 of sundry sorts of corpora-

tions and companies, though unapportioned, is valid. It is levied on the business and the product of the business; it is measured by the product of, or the net income from, the business. Hence, we shall call it, not a tax on income (direct tax), but, a duty or excise, an indirect tax. Flint v. Stone Tracy Co. 220 U. S. 107. We shall say the tax is "imposed upon the exercise of the privilege of doing business in a corporate capacity," and congratulate ourselves on our acumen.

The result of the mistake of the framers, in regard to direct tax could easily be avoided by a little verbal legerdemain. Is the tax on land? No, it is a tax on the privilege of owning it. Is the tax on the rentals from land? No. It is a tax on the industry, the business, the act of letting the land to tenants. All that is necessary, is a change of the point of view. The tax must not be imposed solely because of the ownership of the land, or of the rents, or income. It must be imposed because of the process of getting, earning, etc., and not because of merely having.

A similar ingenuity will relieve from difficulty, in defending a federal impost on the acquisition by inheritance or devise, of property by an heir or devisee. A federal war revenue tax, of June 13th, 1898, imposed a succession tax on legacies or distributive shares of personality, passing at death. But it did not apportion the tax according to the population of the states. Was it a direct tax? The answer by Justice White was, no. The rule of apportionment emanated, he says, from the purpose of preventing taxes on personalty solely because of the "general ownership of property, from being imposed, except according to population." The tax was a "duty or excise"; that is, a tax on X for owning personalty, might be a direct tax, but a tax on him for becoming the owner of personalty, in a special mode, bequest, inheritance, is not direct. It is an excise. Hence, if the mode of having become owner is contemplated by the statute, the tax will not be direct. A tax on chattels owned is direct, a tax on the beginning to own, the process of becoming

owner, is indirect. Knowlton v. Moore, 178. U. S. 41, Scholey v. Reno 23 Wall. 349.

The courts, then, have means of saving taxes from nullification, by discovering that they are not imposed" solely because of general ownership." Knowlton v. Moore, supra, which means, solely because of ownership.

A tax on income is not imposed, or at least, need not be imposed, solely because the person taxed owns the income. It may be imposed because he has won it by his industry, ingenuity, the utilization of business opportunities; the consumption of capital in owning it; by skill in finding a buyer or a lessee. The income taxes, etc. are voidable, because of the omission by Congress, in the acts imposing them, to describe them as imposed on earned, won, acquired income, or property.

Some members of congress having grown weary of the nullification of tax laws because they did not commit the absurdity of apportionment, have attempted to get rid of the pretext for nullification, so far as taxes on income are concerned. The 16th Amendment, proclaimed in Feb. 25th, 1913, declares that "The Congress shall have power to lay and collect taxes on income from whatever source derived without apportionment among the several states and without regard to any census or enumeration."

It is remarkable that those who invented this amendment, while seeing the folly of requiring taxes on incomes to be apportioned, did not see that it was equally foolish to require apportionment of othter taxes, and did not altogether abolish the requirement of apportionment. And the Supreme Court has intimated that the apportionment principle shall be retained except in so far as it has been excluded by strict construction of the Amendment. Says Pitney J. in Eisner v. Macomber, 253 U. S. 189, "A proper regard for its genesis, as well as its very clear language, requires also that this amendment shall not be extended by loose construction so as to repeal or modify, except as applied to income, those provisions of the constitution that require an appor-

tionment according to population for direct taxes upon property, real or personal. This limitation still has an appropriate and important function, and is not to be over-ridden by Congress or disregarded by the courts." This seems to be a warning that the taxableness of property, real or personal, or the proceeds of such property, unless they be "income," shall continue to be so conditioned as to be impracticable. Of the direct taxes, it is only the tax on income, that escapes from the requirement that it be apportioned.

The language of the amendment might lead to the question whether all income was not subject to the taxing power of Congress: "The Congress shall have power to lay and collect taxes on income from whatever source derived, without apportionment." But some incomes are derived from salaries as judges, federal or state, or as other officers. Has Congress power to tax the Federal judges' incomes, so far as composed of their salaries? We may be sure that it will be adjudged not to have such power. May congress tax the incomes of state officers, composed of their compensations as such? Equally sure is it, that the power to tax them will not be found in the 16th amendment. It will receive the interpretation that taxes assessable under the original constitution on incomes, but subject to the rule of apportionment, shall hereafter be assessable, without such apportionment. No classes of incomes not previously taxable by Congress, have become taxable. The change is in the abolition of the requirement that, in taxing incomes, the tax must be apportioned according to population.

The taxing of incomes, is the taxing which the amendment undertakes to regulate. What then are incomes? In the dissenting opinion of Justice Holmes, 252 U. S. 189, is an intimation that that may be income, in the 16th Amendment sense, which would not be income in the popular, or usual, or even strictly appropriate sense. A stock dividend, he thought was, "on sound principles," not "income," but he intimates that the word "income" may, in the thought of those in Congress who submitted the amendment, and those

in the legislatures that ratified it, have had a wider meaning; a meaning wide enough to include a stock dividend. "I think" he says, "that the word income in the 16th Amendment should be read in a sense most obvious to the common understanding at the time of its adoption, for it was for public adoption that it was proposed." It was not proposed for public adoption. Select men namely those in the senate and house of representatives formed the phrases of the proposal, and select men in the state legislatures ratified it. How are we to know that there was a legislator's interpretation of the word, different from the interpretation dictated by "sound principles"? The justice proceeds to say, "The known purpose of the amendment was to get rid of nice questions as to what might be direct taxes. I can not doubt that most people not lawyers would suppose when they voted for it, that they put a question like the present, to rest." But, the lawyers in congress submitted the amendment, and the multitudinous lawyers in the state legislatures, ratified it. Why are we not to accept the interpretation which those lawyers probably put on the words? Whither will we be conducted if we adopt the policy of discarding the meanings attributed to words and phrases by people of the intelligence of those who adopt the language, in favor of some suspected meaning attributed to them by the less intelligent class?

The abstract question, what is income, we shall not here consider. The exact question with which the Supreme Court has dealt is, is a stock dividend distributed by a corporation among its stock-holders, to be regarded as income, and is the taxation of it exempt from the duty of apportionment by population. A corporation voted to transfer $1,500,000, profits earned before Jan. 13, 1913, to its capital account, and to issue 15,000 shares of stock representing that amount, to its stock holders. The distribution took place on Jan. 12th, 1914. X, a stockholder, received as his portion, 4174 1-2 shares. The tax officer compelled him to pay an income tax on those shares, as of the value of $417,450. In a suit by him

to recover back the tax paid, it was held by Holmes J. that the dividend was not income, but capital, whether for the purpose of the Income Tax Law, or for distribution between life-tenant and remainderman. He adopts the language of another judge. "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the stockholders. Its property is not diminished and their interests are not increased. The proportional interest of each stockholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportion of interests that the original shares represented before the issue of the new ones. In short, the corporation is no poorer and the stockholder is no richer than they were before." If the plaintiff gained any small advantage by the change, it certainly was not an advantage of $417,450, the sum upon which he was taxed." Towne v. Eisner, 245 U. S. 418. In Eisner v. Macomber, 252 U. S. 189, a similar question was presented. The conclusion reached by six of the nine Justices, by the same process of reasoning, was the same, Mr. Justice Pitney writing the opinion for the majority. Mr. Justice Holmes, not contesting the soundness of the conclusion that there was no income in fact from the increase of the shares of stock, nevertheless, thought that there was something to tax, but what it was he did not reveal. We may say that Justice Brandeis dissented from the rest of the majority of the court, in a notable opinion.

In conclusion we may say that what is needed is first, perspicacity enough to see how absurd the provision for apportionment is; how intolerable it has become by the 1895 interpretation of direct taxes, and then courage to propose what to the politically superstitious is the sacrilegious act of expelling from the constitution the futile and preposterous requirements that any taxes be apportioned according to the population of the states.

MOOT COURT

HALLAM VS. FIRST NATIONAL BANK

Banks and Banking—Forged Drafts—Negotiable Instruments Act May 16, 1901—P. L. 194.

STATEMENT OF FACTS

Hallam was the executor of his father's estate. The father's will gave a legacy of $2,000 to one George Shope, living in Cresson. In order to pay this, Hallam purchased a draft from the defendant, payable to Shope, drawn on a bank in Cresson. Someone other than Shope received this draft, and endorsed on it Shope's name, and pretending to the bank to be Shope, obtained payment. Six months later, Shope, not having been paid the legacy and knowing nothing of the draft, demanded payment. Hallam paid, and now sues the defendant for the money improperly paid the forger of Shope's name.

Kauffman, for Plaintiff.

Miss Huber, for Defendant.

OPINION OF THE COURT

Hoerle, J. The counsel for the defendant cites the act of April 5, 1849, but we think that the case can be disposed of without reference to that act, for there is no evidence of diligence or negligence to be gathered from the facts on the part of either drawer or drawee.

In the National Fire Insurance Company vs. Mellon National Bank, in 276 Pa. 212, the rule was laid down that "where the drawer knows that the payee is a real person and intends that he should be paid, and the payee's indorsement is forged, the bank that pays on the forged indorsement is liable for the loss." By an application of this rule it is evident that the drawee in the principle case can not recover the amount paid on the forged indorsement from the drawer. Then the defendant is in possession of the $2,000 which Hallam paid as consideration for the draft, and if allowed to retain it, the defendant is unjustly enriched to the extent of $2,000 and Hallam is deprived of the same amount which he paid to Shope.

The drawer of a draft undertakes that the drawee shall be found in the place where he is described to be and shall have effects in his hands, and from these, or upon other consideration (good as between drawer and drawee and with which the payee has nothing to do), pay the bill to the person therein named. Parks vs. Ingram, 22 N. H. 283 and National Bank vs. Lacombe, 84 N. Y. 367.The mere act of drawing a draft imports a certain and precise contract. The

defendant performed all of the undertakings except the last and most vital—payment to the person named in its draft. For breach of this obligation, judgment is entered for the plaintiff.

OPINION OF SUPREME COURT

Affirmed.

SNAIL VS RAILROAD COMPANY

Railroads—Grade crossing—Negligence—Damages—Measure of damages—Trivial error in charge.

STATEMENT OF FACTS

In attempting to drive his wagon across the tracks of the defendant, its locomotive negligently ran into the plaintiff's wagon and he was seriously hurt. The court told the jury "that if the negligent act of the defendant's agent caused the accident, Snail was entitled to a sum equal to the product of the loss in earning power per year by the number of years that he would probably live." The jury finding the earning power of the first year reduced by three hundred dollars, and the life expectancy of Snail twenty years gave a verdict of three hundred dollars times twenty or six thousand dollars.

Error is alleged in the court's instructions.

Chaplin, for Plaintiff.

Smith, for Defendant.

OPINION OF THE COURT

McGuire, J. It may be conceded that upon the question of error by the court below in his charge to the jury this is a close case. However, after a careful review of the decisions governing such a question the court is of the opinion that the lower court erred in so instructing the jury, and in overruling the defendant's objection.

Counsel for the defendant presented a very concise and able argument to the court in support of his contention.

Counsel for the plaintiff contends that the judgment should not be reversed because the verdict did not work any hardship on the defendant, and that the amount awarded as damages was not excessive and was justified. In support of this contention he cites several cases hereinafter mentioned.

However, the question involved here is not one of the adequacy or inadequacy of the damages, but one of error in instructing the jury.

Counsel for the plaintiff further contends that even if there was error it was of such a character as not to justify a reversal of the judgment below. We are of the opinion that the learned counsel is wrong in such a contention. To support his contention he cites 19 Sup. 525. This case stands for the proposition that in order for an error of the kind in controversy to be a reversible one, it must be apparent that not only an error has been committed, but that it materially injured the rights of the party complaining. This, of course, has been held in some few cases but the majority of cases of this kind hold that where error is committed by the court and causes the jury to render a verdict, that, in itself, causes material injury to the person complaining. Such error is of a reversible character.

We are of the opinion that the error committed by the court below is certainly a reversible one.

Counsel for the plaintiff cites 17 C. J. 1087, which is to the effect that where the recovery is so excessive or so grossly inadequate as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury, or that the jury have acted against the rules of law or have suffered their passions, prejudices, or preverse disregard of justice to mislead them, the verdict will be reversed.

We are of the opinion that it was not passion, prejudice, or disregard for justice that misled the jury, but that it was the instructions as given by the court below that tended to mislead them.

The counsel for the plaintiff also cites the case of Harris v. R. R. Co. 35 Fed. 116. This case is one of illegal arrest, duress, and false imprisonment, and has no bearing upon the issue at bar whatever.

Further, counsel for the plaintiff cites 238 Pa. 1 to support his cause, and that case was decided solely upon the erroneous instructions given by the court to the jury, the facts of which case are indentical to those of the case at bar.

In Baker v. Irish 172 Pa. 528, cited by counsel for theh plaintiff, the court said: "Now, as to pecuniary loss, that would have to be estimated. The only evidence you have is that he was a boy in his sixteenth year, and you can only estimate what his earning would have been."

This clearly supports the doctrine that in estimating damages for loss of future earning power, you base your calculations not on what the injured person was capable of earning at the time of his injury and multiplying that by the number of years of life expectancy, but you must calculate his lost earning power on the basis of what he would be capable of earning through the course of these years had he not been injured, taking into consideration his manner

of living, habits of life, state of health, character of employment, the increasing disabilities of old age, and many other things of like character which in the course of nature reduce the earning power. Likewise when the loss of future earning power is anticipated in the verdict, it should be the exact equivalent or present worth of the injured person's loss of earning during the several years of his life's expectancy.

If there is only a partial loss of earning power, the jury must determine what that partial loss is under the evidence, the number of years it is likely to continue, and then find the present worth of the amount so estimated.

It was clearly error for the court to instruct the jury as it did, and we are of the opinion that the jury was misled by such instructions.

The instructions given by the court to the jury were too brief and did not give them a clear insight as to how they were to compute the damages. Hence an inaccurate figure was arrived at.

In the present case it is a question of error and not one of material injury to the person complaining and we are of the opinion that the court below erred in its instructions.

In the course and hurry of the trial we have no doubt that the instructions were inadvertently given, but it is clear error, due to its incompleteness and brevity, and the judgment must be reversed and a new trial ordered on these grounds.

OPINION OF SUPREME COURT

The only error alleged to have been committed by the trial court concerns the damages. The court has told the jury to find the loss of earning power from the injury in a year and to multiply that with the number of years of Snail's probable life.

This presupposes that the loss of one year will be the loss of all the years. It is always possible that a particular man will have the same earning power for all the years of his future. But, if these years are many, equality of earning power from the beginning to the end of the series is exceedingly improbable. The judge should say nothing that might seem to be a direction to the jury to assume such equality.

It was not erroneous to tell the jury to find the number of years the plaintiff would probably live. No event of the future can be more than probable. That a man, twenty years old, in apparently good health will live one year is not certain but only probable; more probable than that he will live two years; much more probable than that he will live ten years, etc; but in allowing for loss of earning power the jury must be content with merely a probable period, during which this power will be exerted.

The jury may use tables of mortality. These tables show merely the average addition of years among a considerable number of observed lives, to those which had already been passed. Whether X, who is thirty years old will live the average number of additional years is a matter of speculation. He may live a longer or a shorter life. He may die tomorrow. The speculative element can never be eliminated. The health and soundness of men differ and are often unknown to the neighbors of the man or even to himself. There is also the probability of fatal accidents befalling him which cannot be foreseen. The habits of self-control, of care of health, the nature of the occupations pursued, will assist in determining how long the individual will live.

Besides the error of the court in assuming that the earning power for the future would be invariable until death and allowing the jury to multiply the annual loss of earning of the first few years by the assumed number of years of the plaintiff's life, the court has committed another error in neglecting to note that the verdict gives an immediate sum of money to the plaintiff, whereas he has to wait a year for the year's earnings, five years for the fifth year's earnings, ten years for the tenth year's earnings, and that what he is entitled to now is not $300 for the twentieth year's earnings, but a sum of money which put at interest of five per cent for twenty years and increased by this interest, would equal $300. That is, $113 with interest at five per cent being compounded would amount to $300 in twenty years. $150 would, in twenty years, interest not being compounded, produce $300. The plan of estimating the damages was then clearly erroneous.

Judgment affirmed.

COMMONWEALTH VS. MURPHY

Act May 23, 1887. P. L. 158—Criminal Law—Murder—Charge—Reference to prisoner not testifying.

STATEMENT OF FACTS

Murder. The evidence was circumstantial. The defendant gave no evidence. In its charge the court said "that the failure of the defendant to give evidence, his own or that of others, is not to be taken as any evidence of his guilt .It sometimes happens that the defendant and his counsel think the evidence of the Commonwealth does not warrant a conviction, and hence that rebutting evidence is superfluous. That this is the reason of the defendant not giving any evidence is to be presumed." Def. alleges that this reference is a violation of Sec. 10, of the Act of May 23, 1887.

Miss Caplan, for Commonwealth.
Croup, for Defendant.

OPINION OF THE COURT.

Baratta, J. The Act of 1887, sec. 10, reads; "Except defendants actually upon trial in a criminal court any competent witness may be compelled to testify in any proceedings, civil or criminal; but he may not be compelled to answer any questions which, in the opinion of the trial judge, would tend to criminate him nor may the neglect or refusal of any defendant actually upon trial in a criminal court, to offer himself as a witness be treated as creating any presumption against him, or be adversely referred to by court or counsel during the trial."

By the act only adverse references to defendant's failure to testify are prohibited. The question resolves itself into:—"Was the court's reference to the defendant's failure to testify adverse to the defendant's cause?" On the contrary it is hard to conceive of any conduct on the part of the court that could be more favorable to the defendant's attitude. Had the court remained silent on the defendant's failure to give any evidence in his behalf there might have existed some doubt in the jury's mind as to whether or not they should construe his refusal to testify to be treated as, in, and of itself, creating a presumption at law against him. The judge's charge in clear and unequivocal language dispelled whatever doubt there might have been. The court stated clearly and accurately the law in order to aid the jury in arriving at a just conclusion. That is a part of the function of the court. If anything, the charge was favorable.

In Commonwealth vs Thomas 275 Pa. 137, the court charged, "the fact that the defendant does not go on the stand or does not produce any evidence in his own behalf, is not to be taken and considered any evidence of his guilt, for it, sometimes and often, does occur that the defendants and their counsel are not convinced that the Commonwealth has produced sufficient evidence which, even if believed would be sufficient to warrant a conviction. So therefore it is presumed in this case that that reason prevails—."

Between the charge of the learned court below and the charge of the court in Commonwealth vs Thomas, 275 Pa,. 137, we find no material or substantial difference. The two are almost identical. The very question in that case was the same as the question in this case. And it was decided there that that charge did not violate sec. 10, of the Act of May 23, 1887.

I think Commonwealth vs Thomas, being a recent decision of our Supreme court, sufficient authority for dismissing the appeal.

An examination of the cases cited on page 141 which the court in

that case cites as the reason for its conclusion, convince us beyond doubt.

Judgment of the court below is affirmed and it is ordered that the record be remitted for the purpose of execution.

OPINION OF SUPREME COURT

Failure of the defendant to produce evidence that, if favorable, he would be likely to produce, may be considered as indicating, in the absence of other explanation, that the defendant believed the evidence unfavorable. Omission to call one's wife as a witness may be thus interpreted. Commonwealth v Weber, 167, Pa. 153.

Failure of the defendant to testify for himself might be attributed to his belief that his tesimony would not promote his acquittal. But the Act of May 23, 1887 gives him the option whether to testify or not and prohibits an unfavorable inference from his silence.

It shall not be treated by counsel, judge or jury as creating any presumption against him. The court expressly said so nor did counsel take an inconsistent attitude.

The act also provides that the defendant's failure to testify shall not "be adversely referred to by court or counsel during the trial." Counsel do not seem to have sinned against this precept. Did the court? It referred to the omission to testify but did not in any way suggest that it had an inculpating significance. On the contrary it suggested an explanation quite consistent with the innocence of the defendant. The reference was not adverse but friendly and explanatory.

The judgment of the learned court below is affirmed.

BRESNE VS. SPEAR

Real Property—Conveyancing—Reservations— Exceptions — Mineral rights—Act of April 1, 1909, P. L. 91.

STATEMENT OF FACTS

Hollister owned land in which were gas and oil. He conveyed the land to Spear, "reserving however, all the oil and gas therein. with the right to extract the same at anytime." Three years later he died having made no attempt to take any oil or gas, but leaving a will in which he devised "all the real estate of which I am possessed to Bresne," a nephew. Spear has, since Hollister's death, begun to take out the oil and gas. This is ejectment by Bresne.

OPINION OF COURT

Godfrey, J. The question in this case is whether the clause in

the deed to Spear "reserving however, all the oil and gas therein with the right to extract the same at any time" is a reservation or exception?

We cannot decide this question from the fact that apt words of reservation were used. Kister v Reeser 98 Pa. 1. In Lillibridge et al vs Lackawanna Co. 143 Pa. 293, Mr. Justice Green said that an exception and reservation differ in legal effect, "but in their creation, there is no magic in words, and if the meaning is clear either expression will operate for the purpose designated." Whether the language used creates an exception or reservation must be determined from the intention of the parties ascertained from the entire instrument.

There is a technical distinction between a reservation and an exception. "The purpose and effect of an exception and conveyance is to except or exclude some part of the thing or things covered by the general words of description therein—A reservation on the contrary as defined by the common law writers is a clause by which the grantor reserves to himself some new thing, issuing out of the thing granted and not in use before." Tiffany on Real Property 383. This distinction appears in the following Pennsylvania cases:

Kister v Reeser, 98 Pa. 5.
Whitaker v Brown. 46 Pa. 197.
Moffitt v Lytle, 165 Pa. 173.
Buking v Tlorey's Brick Works 53 Pa. Super 358.
Sheffeld Water Co. v Elk Tanning Co., 53 Pa. 614.
Reifler v Wayne Storage Water Power Co. 232 Pa. 282.

If the clause in question is a reservation its duration is for the life of the grantor. A reservation without words of inheritance ends with the life of the grantor, Kister v Reeser 98 Pa. 1, Mandle v Gharing 256 Pa 121. Whether this is still true since the passage of the Act of April 1, 1909 P. L. 91, which provides in a deed the words grant or convey or either of them shall be effective to pass a fee simple estate although there be no words of inheritance or of perpetuity, is not necessary for us to decide. We are of the opinion that this statute is not applicable to reservations in a deed and words of inheritance are still necessary to give the grantor more than an interest for life.

The comparatively recent development of the sciences of geology and mineralogy and multiplication of mechanical devices for penetrating the earth's crust have greatly changed the uses and value of land. So it often happens that the owner of a farm sells the land to one man, the iron or oil or gas to another and in Pennsylvania in mineral lands the surface or soil may be separated from the mineral right or right to dig under the surface for, and one person may own one of these rights and another person the other.

Del. L. & M. R. Co. v Sanderson 109 Pa. 583.

Swint v McCalmont Oil Co. 184 Pa. 202.

It has been held that a right of way across a railroad, the use of a well and water therein and a right to cut timber within a limited time were reservations. On the other hand the use of a way then in existence, excepting in a grant certain parcels of land previously conveyed and three acres upon which our residence now is, and excepting and reserving out of a grant certain fruit trees and land on which they stand, have been held to be exceptions sec 18 C. J. 340.

The learned counsel for the defendant in contending the clause in question is a reservation relies upon two cases, Kister v Reeser, 98 Pa. 1. Moffit v Lytle 16 Pa 173. In the Kister case a clause in a deed conveying in fee a portion of a tract of land belonging to the grantor to the effect "said A. R. grantor doth reserve a road 10 feet wide along the line of C. P. to be shut at each end by a bar or gate" was construed to constitute a reservation to the grantor of a right of way and not an exception from the conveyance of a 10 ft. wide strip of land. In that case the court distinguishes clearly this situation from the case where coal was saved and reserved as in Whitaker v Brown 46 Pa 197 in which case it was held to be an exception, and in the case of Moffit v Lytle supra, a right of road or land was construed as a reservation and not an exception.

In Earl of Cardigan v Armitage, 2 B. & C. 197 the words of a deed were "except and alway reserved" and they were applied among other things to all the coals in the land granted together with the right of way to take them and J. Bayle treated this as an exception. "An exception of the coals which were part of the thing granted, part of the land and in esse at the time and because they were never out of the grantor, it would have remained to him and his heirs even without the words heirs which happened in that instance to be added" see Whitaker v Brown 46 Pa. 198.In the latter case the words used were "saving and reserving nevertheless for his own use the coal contained in certain land together with free ingress and egress by wagon were held to be an exception. In Mannerback v Pa. R. Co. 16 Pa. Sup 622, the words in controversy were "excepting and forever reserving the graveyard on the lands hereby conveyed at all times hereafter to enter thereon without hindrance or denial," which was held to be an exception. In Little v Greep 233 Pa. 534 a provision in its lease for a certain tract for the purpose of mining the underlying coal—which coal is hereby reserved for the protection of a farm building constitutes an exception and not a reservation.

It has been contended that gas or oil cannot be the subject of an exception. It is said of these substances as it is of water that they are not the subject of ownership until reduced to possession

but this refers only to the possibility of their loss by the owner of the land owing to their escape into adjoining land and they are more usually regarded as belonging to the owner of the land in which they happen to be. Tiffany on Real Property 221. In Moore v Griffin 83 Pa. 395 4 L. R. A. (N. S.) 477 oil and gas were the subject of an exception. We do not see why the right to remove oil or gas cannot be excepted in a deed.

We think the case of Mandle v Gharing 256 Pa. 121 supports the contention of the counsel for the plaintiff and is analogous and controls the case at bar. The words there used were "excepting and reserving however, from the above, all the oil and gas produced from the said undivided one fourth of the above described land." The court held "the entire estate of the oil and gas was reserved from the grant leaving in the grantor the same title to the oil and gas as he would have had in the coal and other minerals had they been reserved. We are unable to see the force of defendant's argument that the reservation clause gave the grantor during his life the oil and gas produced at the will and expense of the grantees. This would be in effect the reservation of nothing as it certainly could not be expected that the grantees would develop the territory at their own expense for the sole benefit of the grantor. Had the grantor intended the clause in quesion as claimed by defendant simply to reserve for his life the undivided one-fourth of the oil and gas on the premises when produced to the surface at the will and expense of the grantees he would have said so in terms and would not have excepted all the oil and gas from the grants. We think the intention of the parties to the deed was that Gharing should retain the oil and gas from the grant and that therefore the clause in question created an exception and not a reservation."

The rule that the language making an exception or reservation in a deed is to be construed most favorably to the grantee applies only where the language is doubtful and does not obtain where the language is sufficiently clear to define the character and extent of the exception or reservation. Richardson v Clements 89 Pa. 503.

We hold, upon the cases and authorities cited, the clause in the deed in question "reserving however, all the oil and gas therein with the right to extract the same at any time" to be and exception and not a reservation.

We do not see the difference between this and the cases where land, right of way in existence and minerals etc., were held to be exceptions; despite the fluidity of the subject in the exception in controversy. And we think the language used sufficiently clear and the intention of the parties sufficiently manifested to create an exception.

Judgment for plaintiff, Bresne.

OPINION OF SUPREME COURT

The judgment is affirmed.

SARA ADAMS VS. CHARLES ADAMS

Real property—Wills—Intent of testator—Vested Remainders—Contingent Remainders—Construction of ambiguous wills.

STATEMENTS OF FACTS

This case rests upon the construction of a will made by A in which he devised land to his wife for life and then to his sons, Charles and John, when they reach the age of 21 respectively. If either should die before obtaining possession his share should go to the other. They reached age in 1916 and 1918. Widow has just died but John had previously died after he became 21, leaving a child Sara, the plaintiff. She brings ejectment for John's share against Charles.

OPINION OF THE COURT

Lieberman, J. In construing a will the testator's intention in the light of the surrounding circumstances and as ascertained from the whole will must prevail. Wrongful use of words or expressions will not be destructive to the plain intent of testator. 5 Binney 252, 273 Pa. 573, 182 Pa. 131.

What was in the testator's mind when he made his will? He wished to take care of his widow and then give the land to his sons. But he did not want the latter to have the property during their minority, so he made the son's shares contingent upon their reaching 21 years. Up to this stage it can easily be seen that the testator never thought that his sons would attain majority before his widow would die. If he had suspected otherwise he would not have put in the contingency that his sons reach majority.

We now come to the clause "if either should die before obtaining possession, his share should go to the other." What did A mean by this sentence? We cannot say that the testator meant this clause to be connected with the other so as to mean "if either does not reach 21 years nor obtain possession then to the survivor." That would be absurd as neither son could get possession until he became 21 years. As we said above the testator never thought that his sons would reach majority during his widow's lifetime. With this situation before him another thought came to him—suppose one son dies after the widow dies but before he became 21 years. Knowing that the sons could not get possession before their majority and because of this, in his mind he used these words "possession" and "21

years" synonomously and he inserted the clause "if either dies before obtaining possession," then his share should go to the other.

We can see no other reason for the testator using the phrase "before obtaining possession" when we consider what was in his mind when he wrote it. The thought uppermost in his mind was the protection of the property so that it would not fall into infants' hands.

Being satisfied that the testator's intention was to give John's share to Charles, only if the former died before the age of 21, we must now decide what the plaintiff as John's heir took. The law favors vested rather than contingent estates and unless it clearly appears from the context of the will or the circumstances of the case that a contingent interest was intended, the remainder will be regarded as vested on death of testator. Tatham's Estate, 250 Pa. 269. Nothing in this case shows that the testator intended to postpone the vesting, but, in fact, everything tends to show that he merely wanted to prevent the possession and the enjoyment of the land until his sons had reached their majority. Following this policy the courts hold that if there is a life estate given and after the life tenant's death, the remainder to certain persons "when" they attain a specified age," the latter take a vested remainder liable to be divested if they do not reach the specified age. Amer. & Eng. Encyc. of Law, Vol. 30, Page 776, Smith's Estate, 7 Dist. 236, 189 Pa. 567, 212 Pa. 119, 31 Sup. 614. Seemingly the construction that the remainder vests upon the testator's death is more usually given when the word "when" is used than when other words, such as "in case he reaches 21" or "at or if he reaches 21" are used.

Regardless of whether John's share was vested or contingent at death of testator, when John attained his majority, his share became an absolute vested remainder without any possibility of ever being divested. Having an estate in land in form of a remainder of which estate he could never be divested, there has never been any doubt that his share could pass by descent or devise to his heirs. 5 Dist. 361. The plaintiff having title, can therefore maintain this action. Judgment for the plaintiff.

OPINION OF SUPREME COURT

As in respect to so many wills, the function of the court is to say what the testator meant. His mind is inscrutable. He has clothed his thoughts in words which are ambiguous. Under one interpretation, a result that is abhorrent will be reached. The daughter of John will take nothing, and her uncle Charles, will take what would have been John's share. In order to avert this distressing result, a result which it is not likely that the testator would have intended, the learned court below has construed "obtaining pos-

session" to mean, acquiring, by reaching 21 years of age, the remainder after the widow's life estate. That remainder was contingent, until John lived to be 21 years old.

If "obtaining possession" means becoming absolute owner in fee by reaching 21 years, and succeeding to the possession, by the extinction of the particular estate of the widow, then since John, though reaching 21 years, has died before the widow, his share has ended, and been transferred to his brother Charles.

We approve of the decision of the learned court below. It produces results more agreeable to the instincts that ordinarily operate in human nature. It avoids the deprivation of John's daughter, who, under the intestate law, would have taken his share.

Judgment affirmed.

P. S.—The attempt to substitute for the facts submitted, a restatement, is not approved. The court should decide cases according to the facts, not its revised version of them.

BOOK REVIEW

Regulation of Public Utilities, by the Public Service Commission of Pennsylvania, by Wendell Y. Blanning, Soney & Sage Company, 1924.

The modest preface of this book suggests that it "may be of value, to those attorneys who have occasion to appear before the Commission, and who have not been able to give special attention to its law and practice." The number of such attorneys is considerable and the utility of this book to them is, we think unquestionable.

It contains the statistics relating to the commission, its rules of practice, its general orders and rulings, and a collection of forms. The book has 350 pages. The first 134 pages embrace 12 chapters, whose titles will sufficiently indicate their topics. They are: Constitutional Restrictions on Regulation, Interstate Commerce, Constitutionality of the Public Service Company Law, Companies subject to regulation, Valuation, Rates, Service, Corporate Acts requiring approval, Grade Crossings, Commission Control of Municipalities, Miscellaneous Provisions of the Statute, Procedure before the Commission.

The book is brief, and terse, and must be useful to the practitioner.

The juvenility of the legislative mind has been amusingly illustrated in the speed with which this species of legislation, as if highly contageous, has flitted from state to state. The forging of fetters on the business of the people, seems not to encounter reluctance. We have the law, and it is not going to be repealed. Mr. Blanning's book is going to be serviceable to many a puzzled business man and lawyer. We commend it, as practical and trustworthy.