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ACCOMMODATION PAPER

What is Accommodation?

A draft may be drawn or accepted, a note may be made, either draft or note may be endorsed for accomodation. "An accomodation party" says the 29th section of the Negotiable Instrument Act of 1901,[1] "is one who has signed the instrument as maker, drawer, acceptor[2] or indorser without receiving value therefor, and for the purpose of lending his name to some other person." "Lending his name" is a phrase which is less intelligible than ancient. The lender retains the name whch he lends. More illuminating is the phrase, to describe accomodation, "a loan of the credit of the maker to the extent of the value of the note."[3] Ordinarily the accommodating party creates no pecuniary obligation himself. He simply authorizes someone else to create it, by transferring the paper on which his name is to some one towards whom, by this transfer, an obligation arises.

[1]P. L. page 199.

[2]Appleton vs. Donaldson 3 Pa. 381 Moore vs. Baird 30 Pa. 138 Peale vs. Addicks 174 Pa. 543 (see definition of Story and of Daniels here quoted) Nat. Bank vs. Dick 22 Super. 445, Carpenter vs. Bank 106 Pa. 170, Bank vs. Todd 182 Pa. 313 (see remarks of Mitchell J. on the popular and legal sense of accommodation, Mosser vs. Criswell 150 Pa. 409.

[3]Savings Fund Co. vs. Hart 217 Pa. 506, Typesetting Co. vs. Ober 36 Super. 291.

Thus A to accommodate B, makes a promise to B to pay him or order $500.00. By the delivery of this note, no obligation springs up. But B may endorse the note to C, and, towards C, create an obligation on A to pay the money. Occasionally, when A is indebted to B, C makes a note payable to B, for the amount of the debt A not being a party to the note, and such making is said to be an accommodation making, A may be the owner of the note obtained for the price of goods sold by him to its maker, and, endorsing it, he may deliver it to X, to aid X, who however does not become a party to it by endorsement. This is an endorsement by A for the accommodation of X. Occasionally a "strict" sense of accommodation paper is spoken of. A paper is not such, in the strict sense unless the person to whom the paper is entrusted for use is "without restriction as to the manner of its use."[3]

Acts of Accommodation. Making Note

The making of a note is a frequent act of accommodation for the payee, or subsequent holder,[4] or for some one who does not become a party to the note, as when B desiring a loan from X A makes his note, directly to X who delivers the money to B[5] or when A, indebted to C induces B to give his note directly to C for the amount of the debt[6]. B may accommodate A, by jointly with A, making a note, the proceeds of whose discount, A is to receive[7].

[3]Gunnis vs. Weigley 114 Pa. 191. In Holmes vs. Paul 3 Gr. 299, Thompson J. speaks of "business paper" and "accommodation paper".

[4]Lenheim vs. Wilmarding 55 Pa. 73; Lord vs. Ocean Bank 20 Pa. 384; Moore vs. Baird 30 Pa. 138.

[5]Nat. Bank vs. Dick 22 Superior 445; Leatherman vs. Van Dusen 9 Sadler 305.

[6]Trust Co. vs. Hazen 199 Pa. 17.

[7]Snyder vs. Elliott, 2 Penny. 474.

[8]Nat. Bank vs. Kaufman 44 Super. 567; Chamber vs. McLean 24 Super. 567; Nat. Bank vs. Long 220 Pa. 556; Diffenbacher's Estate 31 Super. 35.

Endorsing

By endorsing, obligations are assumed, and they may be assumed not for the benefit of the endorser, but of another. B may consent to be payee in a note, and, endorsing it, may allow A to retain the possession of it,[10] A may draw a note to his own order, and endorse it, and B may endorse it for A's benefit.[11] Of several endorsements, one or more may be for accommodation, e. g. the second,[12], the fourth[13], One, who for value is the owner of the note, may endorse it for the benefit of another, who may, or may not,[14] become a party to the note. A note drawn for the maker's accommodation may be endorsed by a number, either as joint endorsers[15] or as several successive endorsers[16]

Irregular Indorsement

The 64th section of The Negotiable Instrument Act provides that, if a person not otherwise a party to an instrument places thereon his signature in blank, before delivery, he is liable as endorser thus; If the instrument is payable to a third party, he is liable to the payee[17], and all subsequent parties. If it is payable to the order of the maker, or drawer, or to bearer he is liable to all parties subsequent to the maker or drawer. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

[10]Nat. Bank vs. Tustin 57 Super. 37; Bank vs. Trexler 174 Pa. 497; Nat. Bank vs. Nill 213 Pa. 456; Struthers vs. Kendall 41 Pa. 214; Newbold vs Boraef 155 Pa. 227.

[11]Alldreds' Estate 229 Pa. 632.

[12]Ott vs. Seward 221 Pa. 630.

[13]Nat Bank vs. Coal Co. 220 Pa. 39

[14]Gunnis vs. Weigley 114 Pa. 191.

[15]Russ vs. Sadler 197 Pa. 51

[16]Youngs vs. Ball 9 W. 139; Mosser vs. Criswell 150 Pa. 409.

[17]Alldreds' Estate 229 Pa. 627.

Acceptance of Bill of Exchange

The drawee of a bill by accepting it assumes a position analagous to that of the maker of a note. This liability is primary. His acceptance may be, not for his own benefit, not to discharge an existing obligation, but to accommodate some one; often the drawer,[18] The drawer may have drawn the bill also for the accommodation of the same person. Others, for the same object may likewise have endorsed.

Capacity to Accommodate. Partnership

Individuals who are sui juris may give away their money or other property, and they may give it away by authorizing others to deliver their notes or indorsements, for the benefit of others. Ordinarily, a partner has no authority to make or endorse notes for accommodation,[19] But his act will be valid, as respects the partners, if they consent to it; if it subserves some business purpose of the partnership. A firm's business inter alia, is th esecuring loans on mortgage for its clients. It is usual for it to make accommodation notes to assist its clients, until the consummation of a loan on mortgage. A note issued by the active member of the firm to accommodate a client under those circumstances will be binding on all the partners. So, will a note issued for accommodation by one partner with the knowledge and consent of the others, even though not in the usual scope of the business, as will one issued by that member of the firm to whom the others have committed the entire management of the business.[20] "If it was the arrangement between them (the partners,

[18]White vs. Hopkins 3 W. & S. 99; Lewis vs Hanchman 2 Pa. 416; Bank vs. Rogers 198 Pa. 627; Wilson vs. Savings Bank 45 Pa. 488; Gray vs. Bank 29 Pa. 365

[19]Parke vs. Smith 4 W. & S. 287

[20]Nat. Bank vs. Ott 235 Pa. 565

says the trial court) that the father (who issued the note) was the business end of the firm, and the younger man (the firm was composed of father and son) assented to whatever the father did, then Robert Ott (the son) is liable upon the endorsement." With the consent of all the members, one may endorse for accommodation; and, after the dissolution of the firm, the iquidating acting partner may renew the endorsement, even if some of the endorsers on the earlier notes have been omitted. The endorsement will be available to a bank, which has discounted the note if it had reason to believe that the endorsement was with the firm's authority. The omission of one of the prior endorsers was not enough to excite suspicion. It was not the creation of a new debt, but the renewal of a note which already bound the firm.[21]

Corporations

An agent of a corporation has no implied authority to bind it by an accommodation endorsement. A coal company is sued as the fourth endorser. Its name was endorsed by the manager of the company, without authority, and for accommodation. An affidavit of defense averring these facts will prevent judgment before trial.[22] Corporation A executed a note payable to corporation B, which B endorsed for the accommodation of A. A bank purchased the note before maturity, paying full value for it, and without knowing that the endorsement was for accommodation. The charter of B gave it the power to make, buy, sell, negotiate and endorse commercial paper. Although this power may not have embraced that of issuing accommodation endorsements, yet, as there was a power to endorse, the endorsement will bind the corporation, as to

[21]Dundass vs. Gallagher 4 Pa. 205.
[22]Nat. Bank vs. Coal Co. 220 Pa. 39.

one who, in ignorance that the endorsement was merely for accommodation, paid value for the note."

Accommodation For Improper Purposes

If a note is made by directors of a bank, or other persons with an understanding with the bank that it is not to be enforced, but is to be used as an apparent asset, for the satisfaction of the bank examiner, and the bank becomes insolvent, and passes into the hands of the receiver, who collects the assets for creditors, this note will be, despite the intentions of its makers, enforceable against them. This is true if the bank is a state bank[24] or a national bank[25]. "It will never do," says a Federal judge quoted by Brown, J., "for the courts to hold that officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security and when its insolvency is disclosed, that the third party can escape the consequence of his fraudulent act." When the evidence was that the president of a state bank, about to become a national bank, stated that they "needed paper," and asked for two notes each for $5000.00, and the notes were made and delivered to the bank, which subsequently passed into the hands of the receiver, who claimed payment of one of these notes, the court refused to see that the intention of the maker of these notes was to aid the bank to deceive the bank examiner. The bank, astutely says Green J., may have desired to use the notes to borrow money, to be used in the organization of the national bank[27].

[23]First Nat. Bank vs. Darlington Super. 302; 25 Super. 488.

[24]Peoples' Bank vs. Stroud 223 Pa. 33; Bank of Pittsburg vs. Kirk 216 Pa. 452.

[25]Lyons vs. Benney 230 Pa. 117.

[26]230 Pa. 117.

[27]Tasker's Estate 182 Pa. 122.

Prima Facie Evidence of Accommodation

The possession by the maker, of a note, which bears the endorsement of the payee, is prima facie evidence that the endorsement is for his accommodation, and that the note does not belong to the payee[24]. But when the maker is the cashier of a bank, which has discounted the note the presumption from the maker's possession of the note, which the bank must make, is not that the note after endorsement was handed back to him, in order that, as maker he might obtain the proceeds of its discount, but that it was put into his hands as cashier of the bank in order that it might be discounted for the endorser. If the bank has given the credit to the maker, and allowed him to withdraw the proceeds of the discount, it cannot recover on the endorsement[25]. A note payable to B, and drawn by A had on its face the words, "credit the drawer", but they were unsigned. The bank discounted this note, putting the proceeds to the credit of A. It was assumed that the bank had a right to presume that the proceeds belonged to A until ih had notice that they did not. Proof was excluded that the agreement between A and B was that the proceeds should go to the credit of B, to keep alive the insurance on his life, because not accompanied by evidence that the bank was aware of the agreement[26].

[24]Parke vs. Smith 4 S. & R. 287; Eckert vs. Cameron 43 Pa. 120; Helzer vs. Helzer 193 Pa. 217; Mullison's Estate 68 Pa. 212; One who takes such a note is presumed to know that it is an accommodation endorsement Cozens vs. Middleton 118 Pa. 622, Philler vs. Patterson 168 Pa. 468.

[25]Nat. Bank vs. Gerli 232 Pa. 465

[26]Mishler vs. Reed 76 Pa. " The possession by A of the note, outweighed apparently, the omission to sign the direction to credit the drawer. The endorser ought to have endorsed specially to his own order or to the credit of his own account.

Instrument Made in Part For The Benefit of X

A note may be made by several persons, payable to X, with the intention that X should get it dscounted for the benefit of all of them, the makers and X. X endorses it to a bank as security for a previous debt of his to it. The bank cannot compel payment by the makers, as it might, were the note an accommodation note, because it is not a purchaser (as the law was for value B has endorsed a note for the accommodation of A. At B's request, A in order "to show the transaction," makes a note payable to B. This note is not an accommodation note. It represents a contingent obligation of A to B. If B has to pay the endorsed note, then A's note becomes absolutely payable to B. Hence if B should endorse this note to a creditor of his, as additional security, i. e. to one not a purchaser for value, the creditor could not enforce payment of it[2]. If A and B exchange notes for equal sums, A's payable to B, B's payable to A, neither is an accommodation note. Each note is the price of the other. Neither is gratutous. Neither maker has any equity whatever. "Each received a consideration for the notes he issued to the other, to wit, notes for a similar amount."[3].

Who Is Accommodated

Even when it is proved or conceded, that an endorsement or a making or acceptance is for accommodation, it is important to know for whose accommodation it was made. The accommodated party cannot maintain an action against the accommodator. A's name, as endorser, is on a note held by B, and B sues him as endorser. A might have endorsed for the accommoda-

[1]Royer vs. Nat. Bank 83 Pa. 248
[2]Carpenter vs.. Bank 106 Pa. 170.
[3]Smith's Appeal 125 Pa 404.
[4]Peale vs. Addicks 174 Pa. 543.

tion of the maker or payee, or for the person to whom the payee is about to endorse it. Sued by this person, he may prove that he endorsed it to accommodate that person and so to enable him to obtain the discounting of it.[4] A's note has several endorsers. The holder sues the second endorser, alleging that he endorsed for the accommodation of the maker. The defendant alleges that he endorsed in order to accommodate the holder at his request and to enable him to obtain a discount[5]. One joint maker may make the note either for the accommodation of the other maker, or for that of the payee[6]. The accommodated person may not be a party to the instrument. B desiring a loan from X, A,to induce it, may make his note, payable directly to X[7]. So, A being owner by endorsement of a note may endorse it and put it at the disposal of X for his accommodation and X may use it without making himself a party to it by endorsement[8]. Who is the accommodated party must be established by testimony or documents. The fact that the payee or holder has asked a party to endorse or to make is not decisive that the endorsement or making was for his accommodation. Two makers of a note payable to X. In X's suit aganst them, one of them, A, alleges that he signed at the request of X, and that he received no consideration. Says Henderson J., "In very many instances notes are signed at the request of the payee by persons who do not receive the money thereon but who sign to give additional credit to the real principal," the other maker[9]. A creditor asks the debtor who is making a note for the debt, to procure the signature of X, who

[4]Ott vs. Seward 221 Pa. 630.

[5]Chambers vs. McLean 24 Super. 567; Tasker's Appeal 182 Pa. 122.

[7]Trust Co. vs. Haser 199 Pa. 17.

[8]Gunnis vs. Weigley 114 Pa 191.

[9]Chambers vs. McLean 24 Super. 567.

[10]Thomas vs. Moffett 1 W. N. 110

is present, upon it. He also asks X to sign. This is not inconsistent with the signing's being for the accommodation of the debtor, and not of the creditor.[10] When a note is not endorsed in the ordinary course of business, nor for value, but at the request of the maker, and for his benefit, the endorsement is an accommodation endorsement for the maker.[11]

Time Within Which Note or Draft Must Be Used

The making of a note, or acceptance of a bill of exchange for the accommodaton of X, is virtually construed to mean that X is to use it by having it discounted, before the expiration of the day of payment. If it is not used before but is used after that time, the maker or acceptor may successfully defend against the endorsee on the ground that he received no consideration.[12] The same principal is applicable to accommodation endorsements, however short the interval between their making and the expiration of the period over which the instrument runs. A transferee of the note, by an endorsement from the accommodated party after the note's maturity, cannot enforce the accommodation endorsement.[13] If a note with accommodation endorsers is offered prior to its maturity to X, in payment of an existing debt, but it is not accepted as payment until after maturity, he cannot enforce the endorsements.[14] If the note or draft is negotiated before maturity to one who can enforce the obligation of the maker, acceptor or endorser for accommodation, his transferee after maturity may enforce it[15]. A note made for accom-

[11]Newbold vs. Boreaf 155 Pa. 227.

[12]Hoffman vs. Foster 43 Pa. 137; Bower vs. Hastings 36 Pa. 285; Philler vs. Patterson 168 Pa. 468; Levicks vs. Lightner 11 Super, 499 Barnet vs. Offerman 7 W. 130.

[13]Peale vs. Addicks 174 Pa. 549

[14]Newbold vs. Boon 6 Super.. 511

[15]Wilson vs. Savings Bank 45 Pa. 488.

modation is endorsed by X, before maturity, and becomes A's, who after maturity obtains payment from the endorser. The endorser can compel payment by the maker.[16]

Intervening Insolvency of Accommodated Party

The fact that a note made for the accommodation of X, is still unused when he becomes insolvent, and that he then promises to return it to the makers, is no defence for the maker, when sued by one to whom, before its maturity but after this promise to return it, it is transferred, even merely as collateral security for an antecedent debt to a creditor who has no knowlodge of the promise to return the note The right of the maker to recall the note before its use is apparently conceded by Williams J. but a mere unenforced request for its return is not equivalent to a recall[17].

Accommodation For Special Purpose

One to whom a note is offered bearing endorsement may presume that the maker has from the endorser a right to use it as he chooses. A limitation on this right, by the endorser, will be available only against a holder who pays no consideration, or who, having paid a consideration has knowledge of the limitation. Various restrictions are presented by the cases. The note is to be used by the maker for the purpose of inducing a creditor to waive a mechanics lien[18] or for the paying of a particular debt.[19] X is intrusted with the possession of a note, to which he is not a party, for the purpose of getting it discounted

[16]Liebig Co. vs. Hill 9 Super. 469.

[17]Hart vs. Trust Co., 118 Pa. 565.

[18]Conens vs Middleton 118 Pa. 622. Then endorser sued either failed to prove knowledge of the restriction; or that the plaintiff had given a consideration.

for the benefit of the maker and payee (the endorser). X fraudulently transfers it, as security for an existing debt, to his creditor.[20] B's draft on A is accepted by A for accommodation, in order that the money obtained on it may be used in a certain way. It is used in a different way.[21] A makes a note payable to B with the understanding that B is to use it in the settlement of a judgment on which an attachment has been issued, and served on A as garnishee. B using it for a different purpose, endorsed it to the plaintiff who took it in payment of a pre-existing debt.[22]

Effect of Using For Different Purpose

The departure from the purpose will be a defence for the accommodation maker, acceptor or endorser, unless the party suing has paid a consideration for the instrument, in ignorance of the purpose. If he has paid a consideration, e. g. accepted the instrument in payment of a debt, and without knowledge of the purpose, he can enforce the note, bill or endorsement.[23] A ac-

[19]Lenheim vs. Wilmarding 55 Pa. 73.

[20]Royer vs.. Bank 83 Pa. 248. The maker may defend against the creditor, who is not a purchaser for value.

[21]Bank vs. Rogers 198 Pa. 627. The acceptance cannot be enforced, if the plaintiff knew of the misapplication. In Leatherman vs. Van Dusen, 9 Sadler 305, after a manifestly insufficient affadavit of defense, another was offered viz. that the defendant made the note for the accommodation of the firm of B and C, and that B was using the note belonging to the firm to obtain money which he appropriated to himself. The court refused to receive the supplemental affadavit. In Leatherman vs. Hecksher, 9 Sadler 398, a note was made for the accommodation of a firm but it was payable to B, one of the firm. That B got the money and used it for himself is no defence to the maker.

[22]Bardsley vs. Delp 88 Pa. 420; Cf Ramback vs. Wolf 178 Pa. 356.

[23]Bardsley vs. Delp 88 Pa. 420; Cozens vs. Middleton 118 Pa. 622.

cepts B's draft, payable to A, for the purpose of paying a debt of X. If the debt is otherwise paid, one who becomes holder of the draft, without value or with knowledge of the purpose, cannot enforce payment.[24]

Fraud

One can be induced by a fraud to become an accommodation endorser. E. g. he is induced by the maker to endorse by the false statement that though in fact insolvent he owned $100,000.00 worth of property and that he owned property worth $100,000.00 more than all his debts. The note was endorsed before the amount was inserted on the maker's assurance that $600.00 would be inserted whereas it was filled up for $1,437.00[25] A had executed a bond and mortgage to X for the benefit of B. Subsequently B induced A to endorse a note, by saying that it was for the purpose of taking up, pro tanto, the mortgage. The note was delivered, not to X, but to Y.[26] A blank signed by X as endorser, is left with A to be filled in with a note and made payable to a certain person. A fills it up in a different way and makes it payable to a different person.[27] The court refused to find fraud, when A was induced by the false statement of B, a member of a firm, that the firm was solvent, to make a note for the accommodation of the firm which note was being sued on by an endorsee of the firm.[28] B gratuitously endorses a note, to be used by the maker, in renewing an earlier note for the same amount by the same parties. It is not used for that purpose for 22 months after the first

[24]Snyder vs. Wilt 15 Pa. 59

[25]Cummings vs. Boyd 83 Pa. 372; Cf. Beckhaus vs. Natl. Bank 9 Sadler 292.

[26]Smith vs. Building Ass. 93 Pa. 19

[27]Lenheim vs.. Wilmarding 55 Pa. 73.

[28]Bank vs. McCann 11 W. N. 480.

note matured when the cashier of a bank procured it from the maker, and had it discounted by the bank in renewal of the first note. The bank could not recover from the endorser. The note was procured by improper means by its cashier, and contrary to the original purpose of the endorser."[32]

Not Fraud

If A accepts a bill for the drawer's accommodation, with the understanding that the proceeds are to be used in taking up other bills on which A is liable, the fact that the money obtained on the negotiation of the bill is not so used, not only does not prevent the enforcement of the acceptance, but does not put on the person suing, the purchaser of the bill, the burden of showing that he is a bona fide holder for value. "The fraud consisted," says Woodward, J., "in misapplying the proceeds of the paper, but, that in the very nature of the case imparted no taint to the paper itself." It occurred after the plaintiff had discounted the paper."[33]

Effect of Fraud on Holder

If a note or an enorsement of it, is procured by fraud (Sect. 94 Negot. Inst. Act) the holder has a defective title. If the holder negotiates it, the purchaser of it will not, as he usually is, be deemed a holder in due course, but the burden will be on him to prove that he, or some one under whom he claims acquired the instrument as a holder in due course. (Sect. 98 Negot. Inst. Act).[1] A made a note payable to B (who was of the firm of B and C) and B endorsed it with his own name and with that of the firm. B used the money he obtained from X on the note, for his own purpose.

[32]Bank vs. Irvine 3 P. & W. 250.

[33]Gray vs. Bank 29 Pa. 366

[1]Smith vs. Building Ass., 93 Pa. 19; Hoffman vs. Foster, 43 Pa. 137.

No such fraud upon A was seen as put on X the burden in his suit against A, of showing that he X, was a holder bona fide and for value.[2]

Hence, when the law regarded one who acquired a note simply as additional security for an already existing debt, as not a purchaser for value, such person could not enforce the instrucent if tainted with fraud.[3] One who acquires the note, without knowledge of the fraud, and who pays a consideration, may enforce it[4].

Giving Time to Other Than Maker or Acceptor

One who becomes acceptor of a bill,[5] or a note,[6] for the accommodation of the payee, is not entitled to the right of a surety. He has made himself the principal debtor. Hence, the giving of time by the holder to the payee, or later party, without the knowledge or consent of the acceptor or maker, does not discharge him, even though the holder knew, when he gave the extension of credit, that the acceptance or making was for accommodation. Nor does it entitle the acceptor or maker, to the same extension.[7]

[2]Leatherman vs. Hecksher, 9 Sadler 398. Getz in X's action against the firm of B and C he was required to prove that he was a bona fide purchaser for value.

[3]Lenheim vs. Wilmarding, 55 Pa. 73; Cummings vs. Boyd, 83 Pa. 372; Smith vs. Hine, 179 Pa. 260; Beckhaus vs. Nat. Bank, 9 Sadler 292; Boyer vs. Bank, 83 Pa. 248.

[4]Beckhaus vs. Nat. Bank, 9 Sadler 292; Carpenter vs. Bank, 106 Pa. 170.

[5]White vs. Hopkins, 3 W. & S. 99.

[6]Love vs. Brown, 38 Pa. 307; Bank vs. Walker, 9 S. & R. 229, Receiving interest from the payee from time to time, after the note matures does not discharge the accommodation maker.

[7]White vs. Hopkins, 3 W. & S. 99; Trust Co. vs. Hazer, 199 Pa. 17; Bank vs. Walker, 9 S & R. 229; 12 S. R. 382. Failure to notify the maker of the non-payment of the note, when it becomes due does not discharge him. Knowledge that the maker was an accommodator has no effect, Stephens vs. Nat. Bank, 88 Pa. 157; Bank vs. Walker, 12 S. & R. 382.

Releasing The Accommodated Party

If the holder of a draft or note, accepted or made for the accommodation of a later party, releases the later party with knowledge that the acceptance or making was for accommodation, he does not ipso facto discharge the acceptor or maker . Theirs is the position of a primary debtor.[8] The acceptance from the accommodated party, of a composition, does not discharge the maker.[9]

Remedy of the Accommodating Party

The accommodator, after paying the draft or note, is entitled to reimbursement from the accommodated party. If he is the acceptor of a bill, or the maker of a note, as he is the party on it primarily liable, he does not sue on the note, but on the implied or express contract to reimburse him. He uses the note as evidence of the amount paid.[10] If he assigns his claim, the assignee can sue in his name, or even in his own, if the person accommodated promises him to pay him.[11] Though the party accommodated is not on the bill or note, he can be sued by the accommodator.. If the accommodator is an endorser, he may, if the accommodated party is a prior party to the note, sue him as such.[12] A note is endorsed, severally, not jointly, by B, then by C, then by D. On paying the holder, D can sue any or all of the preceding endorsers though they are endorsers for accommodation and he can re-

[8]White vs. Hopkins, 3 W. & S. 99.

[9]Love vs. Brown, 38 Pa. 307.

[10]Moore vs. Phillips, 6 Super. 570; Barry vs. Withers, 44 Pa. 356; Peale vs. Addicks, 174 Pa. 543; Meyran vs. Abel, 189 Pa. 215.

[11]44 Pa. 356.

[12]Miller vs. Kreider, 76 Pa. 78. If he owes a debt to this person, he can, when sued for the debt, set off his claim as accommodator.

cover all that he has paid[13], but if several persons jointly becoming joint payees endorse for accommodation, a later endorser, also for accommodation may sue them jointly and recover.[14] It is needless to say that the accommodated party cannot sue the accommodator as such.[15] After dissolution, one partner made a note for the firm's debt, and A for accommodation endorsed it. On paying the note A can recover from the partners.[16] If the name of a corporation is put to a note as maker by one having no authority to do so, the note being payable to B, and endorsed by B, and, for the maker's accommodation, by C, C cannot on paying the note, recover from the maker if he had knowledge of the want of authority to make the note and of the fact that the maker was receiving no consideration. Nor is his position improved by the fact that the note had been discounted by a bank, a bona fide holder for value, and that C had paid the bank under compulsion. The bona fide title of a holder (the bank) protects all subsequent holders, as a general rule, but this protection does not extend to a party to the original fraud.[17] In an action by the accommodation endorser the defendant may show that he is not the owner of the note and that the action is for another person and that the defendant has a set-off against such person.[18]

[13]Youngs vs. Ball, 9 W. 139; Russ vs. Sadler, 197 Pa. 51; Cf. Mosser vs. Criswell, 150 Pa. 409.

[14]197 Pa. 51. The fact that all the endorsers were interested in the corporation for whose benefit the note was made, has no importance.

[15]Stephens vs. Bank, 88 Pa. 157.

[16]Meyran vs. Abel, 189 Pa. 215.

[17]Shoe Co. vs. Eichenlaub, 127 Pa. 164.

[18]Long vs. Long, 208 Pa. 368. A and B make a note, B for the accommodation of A. If B pays the note, he may be subrogated to the judgment against A, to procure reimbursement Nat. Bank vs. Seibel, 255 Pa. 473.

[19]Brough's Estate, 76 Pa. 460.

Right of Accommodation Endorser to Assigned Fund

A owes $15,000.00 to X. He gives to X his note, with B, C, and D, as accommodation endorsers for a portion of his debt, which is received not as a payment but as additional security. A then makes an assignment for the benefit of creditors. X is entitled to a dividend on the entire debt of $15,000.00 and the accommodation endorsers of the note, which is paid since the assignment are not entitled to any dividend, until all the debts existing when the assignment was made, have been fully paid. If their payment of the collateral, since the assignment has reduced the amount which X will be entitled to receive, the balance to which he would otherwise have been entitled, will be distributed to B, C, and D, by subrogation of them to X." Though not creditors of A at the time of the assignment, if they became such subsequently, by paying the collateral and so reducing the dividend otherwise payable to X, they are entitled to receive the amount to which X's dividend is reduced by reason of their payment.

MOOT COURT

HANEY v. MOORE.

Express Warranty—Express words not necessary—Sales act—Set off—Remedies of Buyer—Res inter alios acta.

STATEMENT OF FACTS.

Haney sold 20 barrels of flour for $225 to Moore, the flour being represented to be, and bought as being, of a certain quality. When it was delivered, Moore found it to be inferior and notified Haney who contested the representation. Moore however, sold the uour for $180. Sued for $225, he claims a reduction. Haney appeals.

Katz for Appellant.

Mackie for Appellee.

OPINION OF THE COURT.

McNICHOL, J.—The case at bar presents two questions, first whether the plaintiff made an "express warranty," and second, did the buyer pursue the correct remedy for the breach of that warranty?

The first question resolves itself into a determination whether the flour "to be of a certain quality" was an express warranty or not. As urged by the counsel for the appellant, the Penna. Courts have held that the seller does not make an express warranty unless he intends to, as said in McFarland v. Newman, 9 Watts 57. The recent uniform sales act of 1915, covers this case exactly and the definition of an express warranty is sufficient to us to convince us that there has been an express warranty. Sec. 14 of Uniform Sales Act, 191. 6 Purdon 7474 says: "Any affirmation of fact or any promise by the seller relating to such goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods relying thereon." "No affirmation of value of the goods nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." The facts show here there was an affirmation of fact which was more than the seller's opinion. The seller deliberately represented the flour to be of a certain quality. And the buyer bought relying on his statements and the goods proved to be otherwise. Here is a breach of that warranty. As the act does not require intent to enter into an express warranty, there is no doubt that there was an express warranty as all the elements are present to constitute an express warranty and the very fact that the flour wasn't as it was represented to be

convinces us that there also was a breach of that "Express Warranty."

Sec. 49, Act 1915, says: "In absence of any express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damage or other legal remedy for breach of any promise or warranty in the contract to sell or sale. But if after acceptance of the goods the buyer fails to give notice to the seller of the breach of promise or warranty within a reasonable time after the buyer knows or ought to know of such a breach the seller shall not be liable therefor." It has been manifested beyond a reasonable doubt that the buyer gave the seller notice, within a reasonable time, of the breach and he contested it. These facts surely lt the meaning of the at which is clearly defined in distinct words and which cannot be construed any differently.

We have now arrived at the second question which is; Did the buyer pursue the correct remedy for the breach of an express warranty? The buyer surely has some remedy which is set forth in the Sec. 69., Sales Act 1915. The buyer may upon a delivery of the goods and finding a breach of warranty on the part of the seller, acquaint him of the fact and receiving no satisfaction he may elect to accept and keep the goods and set up against the seller the breach of warranty by way of recompense in deminution of the price.

Williston on Sales, page 1018, says: The general measure of damages for breach of warranty of quality is the difference between value of the article actually furnished the buyer and the value,the article would have had if it had had the qualities it was warranted to have.

We an safely assume that the lower court awarded damages through this channel of justice, as the counsel for the appellant does not contend this point nor argue it, and we hereby affirm the judgment of lower court.

OPINION OF THE SUPREME COURT.

The flour was represented to be, and was bought as being of a certain quality. Herein then, we discover an express warranty. The vendee believed the representation and bought on the assumption, communicated to the vendor that it was true. The word "warrant" is not necessary, to make a warranty. Armstrong v. Descalzi, 46 Super. 171.

The learned court below finds a warranty, in obedience to the 14th section of the Sales Act, 6 Purd. p. 7474. The vendor made an affirmation of a fact relating to the flour, the natural tendency of which was to induce the buyer to purchase it. The fact af-

firmed, was not the value of the flour, nor an opinion of the vendor merely.

The flour has been accepted by the vendee, and in turn sold by him. This does not preclude a remedy on the warranty. The buyer sued for the price may deduct from it, the difference between what the flour was actually worth and what it would have been worth, if it had been as it was warranted to be; 48 Super. 171.

What is the actual worth of the flour? The only evidence on this question is the fact that Moore, the buyer, sold the flour for $180. This transaction is as respects Haney, res inter alios acta Possibly Moore could have obtained more for the flour. It was to his interest to get the best possible price, unless he dishonestly intended to put too heavy a charge on his vendor, or to make him suffer too heavy a defalcation from the price, $225. Possibly for this reason no objection was made to the adoption of $180 as representing the actual value of the flour.

The price agreed to be paid by Moore to Haney is not "inter alios acta." Both were parties to it. It is an admission or declaration by them, that the flour was worth the price.

The difference between $225 and $180, then represents the amount of credit on the contract price, to which Moore is entitled.

Affirmed.

COMMONWEALTH v. HESS.

Edidence—Expert testimony—comparison of hand-writing—degree of certainty—threatening letters (Act May 19, 1913.)—"Morally sure."

STATEMENT OF FACTS.

Indictment for sending a threatening letter (Act May 19, 1913). To connect Hess with the letter X, was called as an expert. He compared the letter with two others admitted to have been written by Hess, indicating the points of similarity and said he was morally sure that Hess wrote the letter, but couldn't be absolutely certain. There was always a possibility that the inference from similarity to identity of the writer was mistaken. This was an important part of the evidence connecting Hess with the letter. The Court allowed the jury to consider it. Verdict guilty. Motion for a new trial.

OPINION OF THE COURT.

FLANNERY, F. J.—Counsel for the defendant asserts that the testimony of the expert is inadmissible and cites several cases to sustain his contention. He does not question the competency of X, the handwriting expert, but he insists that no expert is legally

qualified to compare the disputed signature with genuine signatures and to state his opinion as to the result of such comparison. Three of the four cited cases were decided before the passage of the Act of May 15th, 1895, P. L. 69, and are therefore not in point. Those three cases represent the common law view, which has been vitally changed by the above mentioned act. See Section 1 (b) and section 2. Counsel cites one case decided since the passage of the act of 1895, namely, Groff vs. Groff, 209 Pa. 612. In that case the competency of one alleged expert was successfully attacked. The one witness who qualified as an expert was allowed to testify, but her testimony was excluded because she wrote the signature of Groff on a blackboard and endeavored to compare it with other simulated signatures. The statute requires that the disputed signature be compared with genuine signatures. Her testimony was excluded not because she was an expert, but because she did not testify in the manner provided by the statute. A careful reading of this case does not warrant the conclusion reached by counsel for the defendant.

If we confine our attention to the only point presented by counsel for the deefndant, namely the competency of a handwriting expert to testify, we need go no further. The Act of 1895 permits a handwriting expert to testify. He may compare the disputed signature with genuine signatures and state his opinion. The jury decides whether or not the disputed signature is genuine.

There is another point in the case which we deem worthy of consideration. The expert said "he was morally sure that Hess wrote the letter, but couldn't be absolutely certain." The Act of 1895 permits an expert to give his opinion, and we may reasonably consider that the above statement is the satisfactory expression of an opinion. We hold that it is. The law recognizes the fallibility of human nature and accepts as thoroughly competent the testimony of a witness who testifies that he is "morally sure." We believe that Commonwealth v. Swartz, 65 Pa. Superior Court 159, is directly in point. Extract from the charge of the lower Court to the jury "Mr. Zeth testified he did not know of any expert who would be willing to say positively, by comparison, that the writings were the same, and that as far as he had ever gone, and as far as he knew of any other expert having gone, was to testify they were morally sure they were the same." Extract from the decision of the Superior Court. The fifth assignment is that the charge of the court was unfair to the defendant. We have carefully read the charge and have come to the conclusion that there is no merit in this contention.

For the above reasons the motion for a new trial is denied.

OPINION OF THE SUPREME COURT.

The witness X "was called as an expert", and was allowed to testify as such. It is not alleged that he was not shown to be an expert. We assume that the trial court decided that he was, on competent evidence.

This expert compared the threatening letter with two letters which were admitted by Hess to have been written by him. He did this with a view to express an opinion of the identity of the author of the three letters. The making of such comparison is authorized by the act of May 11th, 1895 P. L. 69. The provisions of the act apply in all courts of judicature, criminal and civil.

The opinion of the witness thus to be expressed may be that the writing was, or that it was not, produced by the person who produced the test writings.

X said that he was "morally sure" that Hess wrote the letter. He added that he could not be absolutely certain, there was always a possibility that the inference from similarity of the writing to identity of the writer was mistaken." In so saying, he showed candor and good sense. For these qualities he is not to be impeached as a witness, nor the testimony to be disparaged because of them. Sensible men know that what he said was true. If no evidence was heard save opinions of witnesses which were entertained with absolute confidence, judicial investigation by means of testimony would have to be yielded up, in favor of wager of battle, or wager of law, or trial by ordeal. See Wigmore, Evidence sec. 658,; In sec. 698, that able writer observes "The witness' belief as to the genuineness or non-genuineness of the disputed writing, need not be a positive or unqualified one, it is enough if he 'believes' or 'thinks' it to be one or the other." Cf. State v. Flanders; Wigmore's Case Book p. 177.

Further observation by us is unnecessary. The opinion of the learned court below adequately deals with the subject.

COMMONWEALTH v. HARPER

Malicious mischief—evidence—former conviction—admissibility—destruction of gate across private way.

STATEMENT OF FACTS.

Prosecution for malicious mischief in cutting down a gate which crossed a private way across A's land, at the point where it entered a highway. The court admitted evidence that, 20 years before

the defendant had cut down another gate, at the same place, the land then belonging to X. Conviction. Motion for a new trial.

Brenneman for Plaintiff.

Cohen for Defendant.

OPINION OF THE COURT.

DOMBRO, J.—It appears that the court below admitted evidence, that twenty years before the occurrence of this offense, the defendant had cut down another gate at the same place. This was objected to by the defense on the ground that the testimony was incompetent, irrelevant and immaterial and therefore inadmissible as evidence of the cutting down of A's gate.

We agree to the general rule that former similar acts cannot be shown in evidence with the object of proving the commission of the one charged.

The question then presents itself to us, whether this evidence of the former cutting, was introduced to prove the cutting down of the gate of A, or introduced to prove, or raise a presumption as to some collateral requirement necessary to find Harper guilty of malicious mischief.

It is clear that the testimony was produced to show the necessary state of mind of the defendant to find him guilty.

In a prosecution for malicious mischief, it is incumbent that the Commonwealth show the reckless destruction of the gate of A. The mere act in itself may be due to negligence on the part of the defendant or ignorance of facts as to the ownership, etc., ad infinitum. Proof that he did cut down A's gate would not in itself find him guilty of the crime of malicious mischief. The jury must be satisfied that the injury was done out of a spirit of revenge or of wanton destruction. The act must be wilful, unlawful and malicious. Malice is the very essence.

So if the Commonwealth introduced this former similar act and it shows the present act to be reckless, malicious and wanton, that evidence should be admitted.

The fact that the first cutting down of the gate occurred over twenty years previous to the offense charged now, has no great bearing on the admissibility of the evidence. It has so been held in Pennsylvania.

The remoteness in point of time of the similar crime does not exclude it as proof of motive. Of course it would become weaker as evidence as the length of time, since its occurrence increases.

Yet one fact presents itself to us which prevents us from affirming the decision of the lower court. Admitting that the act was done due to Harpers' jealousy or animosity to A, we cannot see how the commission of the cutting down of X's gate has any bear-

ing. Because Harper had a malicious intention to break down the gate of X, does that infer that he had a malicious intention to break down the gate of A? We can not see that. The mere fact of the cutting down of A's gate in itself implies the motive. The jury must find the necessary motive from that alone in the absence of other collateral admissible evidence. We order a new trial.

OPINION OF THE SUPERIOR COURT.

Malice is an ingredient of the crime of malicious mischief. If A believes he has a right to do what is alleged to be the mischief, it is not malicious, Commonwealth v. Shaffer, 32 Super. 375.

That Harper cut down a gate at the same place 20 years before, could not be proved, in order to convince the jury that he cut it down, at the time alleged in the indictment. But it is not enough to prove that he cut the gate down. The act must have been done with malice. He might possibly have thought that X had no right to obstruct the way, and, if he did so, his cutting of the gate would not be malicious.

But the evidence shows that the right was tested 20 years before, and conclusively negatived by the verdict of the jury and the judgment of the court. The former owner of the land over which the lane was, procured Harper's conviction. That was an adjudication. He will not be heard to say, after that, that he believed despite the conviction, that he had a right to cut down gates rossing the way. His cutting one down again shows a defiance of the authority of the court to define his rights, and we think makes his act malicious. Commonwealth v. Taylor, 65 Super. 113.

The judgment of the trial court must be affirmed.

Reversed.

HOSTETTER v. PLUME.

Damages—Violation of liquor law—Drunkenness—Remote or proximate Cause.

STATEMENT OF FACTS.

Plume, a liquor seller, sold whiskey to Hostetter while he was visibly very drunk. He left the store at midnight very drunk on horseback. Ten miles away he got on a railroad track and he and the horse were killed and mangled by a train. His widow brings this action.

Seitchick, for the plaintiff.

Sharfsin, for the defendant.

OPINION OF THE COURT.

VAUGHN, J.—Act of May 8, 185b—"Any person furnishing intoxicating drinks to any other person in violation of any existing

laws, or of the provisions of this act, shall be held civilly responsible for any injury to person or property in consequence of such furnishing, and any one aggrieved may recover full damages against such person so furnishing, by action on the case instituted in any court, having jurisdiction of such form of action, in this commonwealth."

In explanation of this act we will state that it provides that any person selling liquor in violation of an existing law shall be liable in damages, at the suit of anyone aggrieved for injuries to person or property suffered in consequence thereof. A person of known intemperate habits, or who was intoxicated when applying for liquor may recover for injuries received while under the influence of liquor furnished him by defendant and the widow and minor children (if any) of such person, who has been killed while so intoxicated are, "parties aggrieved," within the meaning of the act, so as to be entitled to recover actual damages.

This act is what the Plaintiff relies on and to support her contention cites several cases mostly bearing on what is proximate cause. The court has made a thorough study of cases cited, both by Plaintiff and Defendant and what is or is not proximate cause depends largely upon the circumstances in each individual case. What may be considered as a proximate cause under one set of circumstances might not be under other and different circumstances, and the court feels that it must in this case use its own judicial discretion and to do this we must consider a long line of decided cases and then compare them with the facts in this case.

In Litell vs. Young, 5 Superior Ct. 205, a saloon keeper sold liquor to one B who on account of his intoxication fell upon the wayside on his way home from the saloon. As a result he was so frozen that he lost a portion of each of his hands. Action was brought by B under the same act that the Plaintiff in the case at bar relies on, and he was allowed to recover. His injury by freezing was held the proximate effect of his intoxication.

In Fink vs. Garman, 40 Pa. 95, A sold losuor to B who fell from his horse and the wheels of his wagon running over him injured him so badly that as a result of his wounds he died. Held—his wife could recover even though he had procured drink from other saloons than A's.

In Veon vs. Creaton, 138 Pa. 48. Same kind of case only B was unmarried and over twenty-one years of age. If he h ad been married the court said his widow would have been entitled to damages for his death. Taylor vs. Wright, 26 Pa. 617, is in point with cases cited. Held widow could recover.

In Elkin vs. Buschner 16 Atl. Reporter, 102. Liquor was sold to Buschner by Elkin a licensed saloon keeper. Buschner was a man of known intemperate habits and while he was very intoxicated, he fell from his wagon and broke his neck. Widow was allowed to recover.

Davies vs. McKnight, 146 Pa. 610, was an action against a saloon keeper for furnishing liquor to an intemperate man, causing him thereby to become intoxicated and fall into a gutter. The result of such exposure caused pneumonia from which he died. His widow was allowed to recover. This case is cited by both Plaintiff and Defendant. The controversy being, was the death of Robert Davies caused proximately by the use of liquor. It is not necessary that the death be the immediate result of drinking, as for instance the case of Fink vs. Garman previously stated. The giving of the liquor may not be the direct cause, but it must be the proximate cause. It must be the cause from which we can trace the injury as a natural and not improbable consequence of the intoxication, otherwise there is no cause of action. As we have said what constitutes the proximate cause of the injury or damage is of course a question of fact to be determined in the light of the particular facts of the case in question.The intervening act of one, who in defending himself against assault by an inebriate injures or kills does not prevent the intoxication from being the proximate cause of the injury, and the killing of a man or as in this case a man and a horse by a railroad train inferred from the fact that the body or bodies were found on the tracks after he was last seen intoxicated will be deemed to have been proximately due to his intoxication in the absence of an appearance of negligance on the part of the railroad.

In the case at bar counsel for the Defendant ably argue that the liquor could not have been the proximate cause as the man rode ten miles on horseback before the accident occurred. It is true that he rode ten miles. One man may take twenty drinks and seemingly be sober while another man may take four or five drinks and be dead drunk. There are different degrees of intoxication as was brought out in Elkin vs. Buschner previously discussed. A man is said to be dead drunk when he is perfectly unconscious, powerless. He is said to be stupidly drunk when a kind of stupor comes over him. He is said to be staggering drunk when he staggers in walking. He is said to be foolishly drunk when he acts the fool. Many persons may say that a man was not intoxicated because he could walk straight or because he could get off or on a horse. What is meant by the words in the statute which makes it a penal offense and also the party liable in a civil action

for damages, for giving liquor to a man who is drunk or intoxicated (because both words are used in the statute) and also (selling to a man of intemperate habits) is this, whenever a man is under the influence of liquor so as not to be entirely himself he is intoxicated, although he may walk straight, although he may attend to his business, and may not give any outward or visible signs to the casual observer that he is drunk. Yet if he is under the influence of liquor so as not to be as himself, so as to be excited from it and not to possess that clearness of intellect and that control of himself that he otherwise would have, he is intoxicated. Hostetter did not die of drunkenness, he did not die of the drink, but he did die from getting on the railroad track. Would he have come to this end if he had not been under the influence of liquor, admitting that on his ten mile ride he had sobered some? If he was so much under the influence of liquor as not to have control of himself, and not to have that intellectual perception that he would otherwise have had, and in consequence of that was killed, then the drink or the intoxication would be the proximate cause of his death. There is no suestion that Plume willfully sold Hostetter liquor while Hostetter was intoxicated thereby making him more so and that Hostetter as a result of this intoxication was **non compos mentis** and being so lost his life. So in view of the many cases similar to this case, we render judgment in favor of Mrs. Hostetter, wife of the deceased and Plaintiff in the case.

OPINION OF THE SUPERIOR COURT.

The 17th section of the act of May 13th, 1887, P. L. 108, makes it unlawful for any person, with or without license to furnish any spirituous, vinous, malted or brewed liquors to a person visibly affacted by intoxicating drinks. Plume furnished such liquor to Hostettet who was "visibly very drunk." In so doing he violated the act of 1887.

The act of May 8th, 1854, P. L. 663, provides that any person furnishing intoxicating drink to any person "in violation of any existing law shall be held civilly responsible for injury to person or property in consequence of such furnishing. Any person aggrieved may recover full damages against him."

The widow brings the suit. Has she suffered an "injury to person or property?" The death of her husband caused by negligence, is esteemed an injury to the widow, and she may recover compensation for it. So, his death caused by intoxicants furnished him in violation of law, is treated as an actionable injury. Fink v. Garman, 40 Pa. 95; Bower v. Fredericks, 46 Super. 540; Temme v. Schmidt, 210 Pa. 507.

The death must be the result of the imbibition of the liquor. It does not need to be the direct result. The liquor might act physiologically on certain organs of the body, the brain, the heart, and thus cause death.

The liquor may so affect the mind of the imbiber, as to superinduce acts which expose to danger and death; e. g. that of lying in a gutter and with pneumonia as an effect; straying on a railroad track with fatal collision with a locomotive as an effect. Bier v. Myers, 61 Super. 158.

Whether the drunkenness was the cause of the death was for the jury to decide. The fact that the deceased traveled 10 miles before he got on the railroad was to be considered by it in coming to the decision that the intoxication induced the act of entering the track and continuing upon it.

The precedents negative the contention that the death was too remote an effect. Drunkenness lasts often a considerable time. and causes a somewhat protracted series of foolish, hazardous, reckless acts. That the deceased could attempt to reach home, that in doing so, he might meet with a variety of accidents was not so improbable as to require us to characterize any one of the accidents as too remote. Cf. Temme v. Schmidt, 210 Pa. 507, Davis v. McKnight, 146 Pa. 610; Bier v. Myers, 61 Super. 158.

The opinion of the learned court below reviews a number of important cases, and makes further discussion by us superfluous.

Affirmed.

Cress vs. Murdock.

Ground Rent—Presumption of Payment—Act Apr. 27, 1855—Interpretation of the Act by the Courts—Method of counting the period of limitation.

STATEMENT OF FACTS.

The facts of the case as presented for the consideration of the court, are as follows: A conveyance of a lot in Philadelphia was made in 1870, subject to a ground-rent of $200 yearly. This rent was never paid until 1910, nor demanded, nor recognized. In 1910 and the subsequent years, it was paid until 1917, when payment was refused in virtue of the act of April 27, 1855, concerning presumption of extinction from non-payment for 21 years. In 1912, the then owner of the land charged with the rent conveyed to Murdock expressly subject to the rent. The land was sold as worth $5000, of which $4000 was deemed the capital of the rent, and $1000 was paid in cash.

Klaw for Plaintiff.

Hendricks for Defendant.

OPINION OF THE COURT.

GROOME, J.—The case presented is to be governed by the act of 27 April, 1885, P. L. 369, and the interpretation put upon the provisions of the act by our courts. The act provides: "In all cases where no payment, claim or demand shall have been made on account of, or for, any ground rent, annuity or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period, by the owner of the premises, subject to such ground-rent annuity or charge, a release or extinguishment thereof shall be presumer and such ground rent annuity or charge shall thereafter be irrecoverable."

The question to be considered in this case is whether the act above quoted, has a retrospective as well as a prospective operation with regard to ground-rents?

By the weight of authority, hereinafter quoted, we must conclude that the act is decidedly retrospective. For example in the case of Korn vs. Browne, 64 Penna. 55, the court ruled as follows: "After a lapse of twenty years all evidence of debt excepted out of the statute are presumed to be paid. The court will not encourage the laches and indolence of parties, but will presume, after a great length of time, some compensation or release to have been made." "The lapse of twenty years, without demand of payment, is evidence from which a jury may presume payment of the arrears of ground-rent." Here Justice Reed held that as the 7th sec. did not go into effect for three years, and gave ample time to all owners of ground rents to make claims and demands for the same, so as to prevent the bar of the statute, that this prospective commencement made the retrospective bar not only reasonable but constitutional. This rule of interpretation has been followed in the following cases: Biddle vs. Hoover, 120 Penna. 221; Wingert's Appeal, 122 Pa. 486; Wallace vs. Presbyterian Church, 110 Pa. 164; Meek's Estate, 3 Walker 126; Barber vs. Mullen, 176 Pa. 331; Heiss vs. Bannister, 176 Pa. 337; Clay vs. McCreanor, 9 Pa. Sup. 438; Cadwalder vs. Springsteen, 36 Pa. Superior 134. The case of Heister vs. Shaeffer, 45 Penna. 537, treats the subject in this way: a claim or demand had been made and judgment had been obtained twenty-one years prior to the institution of that suit against the Defendant upon the ground-rent. It was held that this took the ease at bar out of the act of 1855; although that judgment was for thirty-five years arrears of ground-rent and no other demand than by the suit in which the judgment had been obtained ,had ever been made. Here we have even an acquiescence to the liability on the part of the defendant, by reason of his having paid the ground-rent

from the time he acquired the land until 1917. In Fessenden's Est., 170 Pa. 631, the court held, "Where land is devised subject to a charge created upon it by will, and the devisee subsequently sells the land, but continues to pay the charge in exoneration of his vendee, the limitation under the act, providing that annuities and charges shall be extinguished if no demand is made within twenty-one years, will begin to run only from the time the devisee ceases to pay; and in such case the charge upon the land will not be extinguished under this act, although no demand shall have been made upon the grantee of the land within twenty-one years. Cadwalder vs. Springsteen, 36 Super. 134, holds that the mere entry of the landlord upon the unoccupied land for the purpose of making a demand within twenty-one years, prior to the suit, where there was a record owner of the land, and no attempts to find or serve him was shown, plus a judgment upon the ground-rent obtained more than twenty-one years before the suit was brought, was not sufficient to toll the statute of 1855. The demand or payment must be made within twentyone years of the commencement of the action. We must count back from the date when the suit is brought, and if within twenty-one years from that date a lawful payment or demand for such ground-rent has been made, then the act is not a bar to the plaintifff's claim.

A case directly in point is that of Murphy vs. Green, 48 Super. 1, in which Judge Morrison ruled as follows: (1) Where no payments were made of a ground-rent from the time of its creation in 1849, until 1900, and then the owners of the ground paid the rent from 1900 to 1906, and the ground landlord received the balance, and the owner represented that the ground-rent was valid and subsisting and that they would thereafter pay the same, and it was purchased by the plaintiff as such, the fact that no payment was made from 1849 to 1900 does not extinguish the original ground-rent, and the ground owners who agreed to pay and did pay the rent from 1900 to 1906, and their successors in title cannot enforce a claim to redeem the rent as a redeemable ground-rent under the act of June 24, 1885. Nor can they be heard to say that the ground-rent has become extinguished and irrecoverable. (2) In such a case even if the irredeemable ground-rent had been extinguished by the non-payment of it for fifty years, still the ground owners who made the promises to pay and made the payments and their successors in title are estopped from denying that the ground-rent which had been purchased on the strength of the recorded deed creating it, and the promises to pay and the payments from 1900 to 1906, was a valid and subsisting irredeemable ground-rent. (3) Where suit is brought in such a case to enforce the payment of ground-rent accru-

ing after such payments made the twenty-one years referred to in the act of Apr. 27, 1855, P. L. 368, are the twenty-one years next preceding the bringing of the suit. The case at bar clearly is governed by the rulings as laid down in the above cited case, so we are of the opinion that judgment must be rendered for the Plaintiff.

Judgment for Plaintiff.

OPINION OF THE SUPREME COURT.

The learned court below has properly accepted the authority of Murphy vs. Green, 48 Super. 1, and held that despite the act of 27th April 1855, an installment of a ground-rent of which previous installments have not been paid for 30, 40, 50, 100, 1000 years, is nevertheless recoverable if 21 years of non-payment and non-recognition have not preceded the suit for the installment. The rent was never paid for 40 years. It was then paid for 7 years i. e. until 1917. In 1912 the land was conveyed to the defendant, and the capital represented by the rent, was subtracted from the agreed value and retained by him. In a suit brought for installments falling due after 1917, a recovery was allowed because 21 years of non-payment had not immediately preceded the bringing of the action. Murphy vs. Green is a clear authority for the decision. We do not deem the cases cited therein as so clear.

It would strike the profession as a novelty to hold that if A had allowed B to have adverse possession of his land for 21 or more years, with the consequence that the title had passed from A to B, then title could pass back to A, if by any means, he then recovered the possession and so compelled B to bring an action against him. On the contrary, it has bees held that B could recover on account of his earlier adverse possession for 21 years, despite the fact that counting back from the action, he could not show such possession for 21 years. The analogy between the adverse possession of land, and the refusal to pay ground-rent is obvious. We must nevertheless yield to the law as it has been developed by those who have the authority to make it.

Affirmed.