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MOOT COURT.

P. R. R. CO. vs. GREGORY.

Equity—Adequate remedy at law—Penal statute unenforceable by bill.

STATEMENT OF THE CASE.

Knox bought a railroad ticket from Harrisburg to St. Louis at reduced rates. On the back of the ticket it was stipulated that the purchaser, in consideration of the reduced rates, would not transfer the same. Knox became ill, and could not use the same, and subsequently sold the same to Gregory, a ticket broker. This is a bill in equity for an injunction to restrain Gregory selling the ticket.

Hassert for plaintiff.

Gregory and Knox bound to use method of disposition provided by Act of May 6, 1863, P. & L. Dig. 3992. Criminal prosecution or action on contract inadequate to prevent sale.

Ehler for defendant.

Act of May 6, 1863, provides adequate remedy. Equity is concerned only with property rights, and has no jurisdiction in personal wrongs, political rights or crimes, or merely illegal acts. Kearns v. Hawley, 188 Pa. 120; *In re* Sawyer, 124 U. S. 210; Bispham on Equity, p. 57.

OPINION OF THE COURT.

HELLER, J.:—The plaintiff named in this bill is a corporation in Philadelphia, incorporated under the laws of the Commonwealth of Pennsylvania, and is known as the Pennsylvania R. R. Co. The defendant, one Gregory, a resident of Cumberland county, is a ticket broker, and this bill is filed to restrain him from selling a ticket purchased from one Knox, said ticket having been purchased by Knox from the plaintiff named. The said Knox, by the terms of the contract under which he purchased the ticket, was prohibited from selling the same, but nevertheless did so. The bill further sets forth, that whether Gregory was or was not aware of the terms of the contract, he is guilty of a misdemeanor if he sell the same, as the sale of tickets by one unauthorized is contrary to the Act of Assembly, and is made a crime by said act.

One of the elementary points in the bringing of an action of any kind is, that he who is under the necessity of applying to courts to vindicate his rights

must employ the appropriate remedy. It seems to me that this is clearly but a charge of the violation of the provisions of the Act of Assembly of May 6, 1863. It is well settled that a bill, having for its sole purpose an injunction against crime or misdemeanor, does not lie, but it is just as well settled, equity will interfere if the alleged criminal acts go further and operate to the destruction of or diminution of value of property.

We have been unable to find in this bill any destruction or diminution of the value of property, nor has it been set forth in the bill that any destruction or diminution of value of property has taken place, or is liable to take place. This bill is essentially a bill to enforce by injunction a penal statute. If it be supposed that because an act is illegal merely, equity will interfere to restrain it, it is a misapprehension of equity jurisdiction. "If an act be illegal," said Chancellor Kendersley, in Solteau v. DeHeld, 2 Lim. and S. 153, "I am not to grant an injunction to restrain an illegal act merely because it is illegal. I could not grant an injunction to restrain a man from smuggling, which is an illegal act." Nor could he for any merely criminal or penal offense.

In the case of Sparhawk v. The Union Passenger Ry. Co., 54 Pa. 401, it has been held, and is closely followed, that equity cannot interfere when there is a remedy at law by statutes, which remedy must be presumed to be adequate. In the same case it has been held, and is followed in Klein v. Livingstone Club, 177 Pa. 224, that equity will not restrain an act which is illegal merely.

It is apparent to the court that this is merely a bill to restrain an illegal act, and also that there is at law by statute a remedy which the courts consider adequate. The court, therefore, dismisses the bill.

OPINION OF THE SUPREME COURT.

Knox, in buying the ticket for a trip from Harrisburg to St. Louis, stipulated that, in consideration of the reduced rates, he could not transfer it. If this was a mere covenant, the breach of it no more vitiated the title acquired by the transferee, than the breach of a covenant in a lease against assigning or subletting makes the assignment or sub-lease void. Gregory became the owner of the ticket, and the railroad company had no property right which his subsequent sale of it would violate.

If the stipulation was a condition, the breach of it would prevent the passing of the ownership to Gregory, and any vendee from him would be equally incapable of acquiring ownership. In that case, the railroad company would suffer nothing by the sale by Gregory of the ticket.

The act of May 6, 1863, 1 P. & L. Dig. 1317, pl. 575, forbids sales of railroad tickets by others than authorized agents, and makes such sales misdemeanors, punishable by a fine and imprisonment. The preamble to this act indicates that it is enacted because numerous frauds have been practiced upon unsuspecting travelers, and also upon railroads, by the fraudulent sales of tickets. It is designed to benefit not only the travelers, but also the railroad companies. The legislature has chosen to give these companies such protection as flows from the prohibition and penalization of the sales It has defined the quality and quantity of the penalty. We are of opinion that the companies must be content with this. If the penalty is inadequate, the legislature may be applied to, to make it severer. If it is not enough to fine and imprison, let the death penalty be annexed to the offense by the law-making power.

Why should the chancellor attempt to reinforce the mandate of the legislature, by adding his own mandate? Why should he try to increase the penalty the legislature has provided, by supplementing it with fine or imprisonment imposed by himself as for contempt? When the legislature has forbidden the act, it would scarcely seem necessary to evoke a corroborative

prohibition from a judge. And when the legislature has said what shall follow if its prohibition is disregarded, it seems gratuitous for a judge to say that something else shall follow. We may safely infer that the entire task of penalizing the act was undertaken by the General Assembly.

We cannot, therefore, but commend the learned court below for modestly declining to usurp a power not conferred upon it, and for allowing the defendant, if he disobeys the injunction of the law, to be found to have done so only by a jury, after a trial in the customary common-law mode. The "thou shalt not" of the legislature ought to need no supplement by a "thou shalt not" of a chancellor. If Gregory actually makes the sale in violation of law, he can as readily be made to suffer the pre-appointed punishment as the *ex-post facto* punishment of the judge, imposed without the aid of a jury.

Appeal dismissed.

O'BRIEN vs. THE INSURANCE CO.

Insurance—Assignment of policy—Right of assignee to sue—Insurable interest in assignee not required where insured pays premiums—Consideration not essential if delivery made—Bill in equity to compel payment to assignee—Demurrer.

STATEMENT OF THE CASE.

The facts are set forth in the opinion of the lower court.

Reeser for complainant.

Insurance policies assignable by informal assignment. Scott v. Dickson, 108 Pa. 6. Assignee may sue in his own name. Act of March 14, 1873. A man may insure his own life, paying the premiums himself, for the benefit of another who has no insurable interest. Scott v. Dickson, *supra;* Hill v. Insurance Co., 154 Pa. 29; Overbeck v. Overbeck, 155 Pa. 5. Creditor has insurable interest. Wheeland v. Atwood, 192 Pa. 237.

Schwartzkopf for respondent.

Assignee must have insurable interest. Gilbert v. Moore, 104 Pa. 74; Ruth v. Katterman, 112 Pa. 251; Downey v. Hoffer, 110 Pa. 109. Out and out assignment must be to one having insurable interest. Scott v. Dickson, 108 Pa. 6.

OPINION OF THE COURT.

RENO, J.:—The respondent demurred to the complainant's bill. The facts alleged in the bill must therefore be regarded as verity. Bitting's Appeal, 105 Pa. 517; Bussier v. Weekey, 4 Super. Ct. 69. The facts thus established are in substance about as follows: A, the holder of an insurance policy, entitling him to a sick indemnity of thirty-five dollars a month and one hundred dollars for funeral expenses, signed an order to the insurance company, directing it to pay all money due on account of his policy to the plaintiff. Two days later, and before the company had acted upon the order, the insured died intestate, without heirs or next of kin, and with no creditors save the payee of the order. The company refused to substitute O'Brien as beneficiary under the policy, and, as a result, he brings this bill in equity, praying for an injunction to restrain the defendant from paying the money due to anyone else other than the complainant, and for a decree requiring payment to be made to the complainant, and for general relief.

There is no averment or proof that O'Brien is the qualified administrator of the deceased. Nor can the order to the insurance company, without proof of probate, and of such other facts as will fulfill the essentials of a valid testament, be sustained as a will. The doctrine of Shad's Appeal, 58 Pa. 111, can hardly be applied in the teeth of the statement of the case, which distinctly

sets forth that the insured died intestate. Nor can we hold it a gift *causa mortis* in the absence of proof showing the decedent's physical and mental condition at the execution of the order. Hence, if upheld at all it must be on some ground other than those already suggested,

The learned counsel for the plaintiff contends that the order constituted a valid assignment. A policy of insurance is a contract—a contract to pay upon a certain specified contingency a stipulated stipend. As such, in the hands of one entitled to its proceeds, a policy of insurance must be regarded as a *chose in action*, and no doubt subject to the same incidents common to that species of property. Ordinarily, it is not possessed of any of the characteristics of a negotiable instrument, and it has long since been decided that a policy is assignable only in equity, and before the Act of March 14, 1873, P. L. 46, §1 (P. & L. Digest, col. 2377), suit could be brought only in the name of the assignor. Roussett v. Insurance Co., 1 Binn. 428; Gourdon v. Same, *Id.* 429; Insurance Co. v. Roberts, 31 Pa. 428. The position of the law now is, that while an insurance policy is assignable in equity, nevertheless action upon it may be brought by an assignee in his own name. Act of 1873, *supra*, *Cf.* De Bolle v. Insurance Co., 4 Whart. 67.

But the Act of 1873, *supra*, does not make the right of assignment absolute; *e. g.*, where consent on the part of the insurer is prescribed as a condition precedent, such assent must be had before an assignee is qualified to sue in his own name. Mutual Aid Society v. Luppold, 101 Pa. 111. But the statement of the case at bar discloses no such conditions, and it is assumed that none existed. Nor will an assignment of a policy of life insurance be sustained unless the assignee has an insurable interest in the person insured; and, by an insurable interest is meant, that the beneficiary bears some relation toward the insured, that the preservation of his life would be advantageous to him; *e. g.*, a relative by blood or marriage, a surety or a creditor. Courson's Appeal, 38 Pa. 438; U. B. Aid Society v. McDonald, 122 Pa. 324; Hoffman v. Hoke, *Id.* 377; Ruth v. Katterman, 112 Pa. 251. Unless this insurable interest exists, the contract is illegal as a wagering agreement, and void as against public policy.

Had O'Brien an insurable interest in A's life? He does not appear to have been a relative, either by blood or marriage—the statement of the case states that the decedent left neither. He has not been shown to have been a surety. Is he a creditor? The statement of the case says the deceased died "with no creditors other than the payee of the order." Are we to infer from this vague statement that the relation of debtor and creditor existed between O'Brien and his assignee, as a result of dealings collateral to, or prior to, this assignment? Or are we to understand that this assignment itself created the relation? We prefer to believe that the assignor died absolutely without creditors—that no one had any claim against him or his estate, save O'Brien only, and his claim arose only by reason of the assignment. It follows, then, that O'Brien had no insurable interest.

But is it not a conceivable case for a man to be both the insured and the beneficiary of an insurance policy? Can he not pay the premiums himself? Such, indeed, is not an unusual state of affairs, and that is precisely what was done here. And such a contract is not a wager, for manifestly a man has an insurable interest in his own life. Can he assign that policy—one taken out by himself, for his own benefit, and paid by himself—to a stranger who has no insurable interest? Certainly such a case is to be distinguished from one wherein the person paying the premiums, and to whom the benefit is to accrue, has no insurable interest, or where the beneficiary assigns to a stranger to the insured. It has been well said, that where the insured pays the pre-

miums, and then designates an assignee (who has no insurable interest in the insured) to receive the proceeds of the policy, the assignee is no more tempted to crime than if he were made a legatee in the insured's will. *Vide*, prefatory note to "Insurance," P. & L. Digest of Decisions, col. 14693. This principle was very clearly recognized in Scott v. Dickson, 108 Pa. 6, which held that one may insure his own life, pay the premiums thereon himself, for the benefit of another who had no insurable interest in the insured. If that transaction was upheld, how can we avoid this assignment? Is it any more a wager? So, also, in Hull v. United Life Insurance Co., 154 Pa. 29, a payment by the insurer to an assignee who had no insurable interest was sustained in an action by the personal representatives against the company. Would not the defendant here be protected by a payment to O'Brien if sued subsequently by other claimants? The case of Scott v. Dickson was followed in Overbeck v. Overbeck, 155 Pa. 5, where a policy, made payable to an illegal wife, was sustained. We are not disposed to disturb this assignment in the face of these decisions.

Beyond collecting the principal, no duty is apparently imposed on O'Brien. It is not shown that he was to pay any premiums in order to keep the policy alive. Nor is there any evidence that the policy or the assignment, or both, were not delivered to O'Brien, and we presume that as done which should have been done. The doctrine of Trough's Estate, 75 Pa. 115, does not apply. No consideration has been shown, but none need be shown in a gift *inter vivos*.

We have discussed the merits of the case, assuming that equity has jurisdiction. On reflection, we are not so sure that the plaintiff did not have an adequate remedy at law. Were it not that the plaintiff prayed for an injunction restraining the defendant from paying the proceeds to one other than the assignee, we would have been compelled to dismiss the bill. But we regard this a sufficient reason for the exercise of equitable jurisdiction; and when equity once assumes jurisdiction, it will not relinquish it until complete and final justice has been done.

Our judgment is, that the complainant is entitled to the proceeds of the policy, and may vindicate his rights by invoking the aid of the equity side of the court.

Demurrer overruled.

OPINION OF THE SUPREME COURT.

The bill asks for a decree requiring the company defendant to "substitute O'Brien as beneficiary under the policy." Since A is dead, the real purpose of the bill is, evidently, to compel payment of the $100 to the plaintiff. A bill in equity against the company and the assignee of a policy was filed by the executor of the assured, in Corson's Appeal, 113 Pa. 438, but it was treated as an interpleader bill. The company might properly file an interpleader bill, when, admitting its liability to pay, it knows not to which of two competing claimants it should make the payment. Masonic Aid Association v. Jones, 154 Pa. 99; Masonic Mutual Association v. Jones, 154 Pa. 107. The action of assumpsit would, apparently, have furnished an adequate remedy for the plaintiff. We are not disposed, however, to reverse the learned court below for entertaining the bill. *Cf.* Jinks v. Banner Lodge, 139 Pa. 414.

It is not made to appear that the consent of the company was necessary to the validity of the assignment. The assured signed an order on the company to pay all moneys due to the plaintiff, and apparently, in some way, this order was presented to the company. We think we can assume that this order was an assignment of the money due on the policy. Beaumont Bros. v. Lane, 3 Super. 73; Oakes v. Oram, 43 Leg. Int. 520.

The only person who could claim the fund, were there no assignment, would

be the administrator of A. On what ground can he dispute it? Apparently the assignee was a creditor, and the assignment was made in payment of, or as security for, the debt. But, it would not be invalid even if gratuitously made.

Judgment affirmed.

WILLIAMS vs. ROBERTSON.

Contract—Offer by telegraph—Telegraph company offerer's agent—Mistake—Offeree not liable for price he received.

STATEMENT OF THE CASE.

Williams delivered to a telegraph company a message addressed to Robertson, in these words: "Will sell hundred flour at six ten net cash. Answer quick." As received by Robertson, the word "ten" was omitted from the message. He at once wired an acceptance, and resold the flour at six five. The flour was delivered, and Williams drew on Robertson for the price at $6.10 per barrel. Robertson refuses to pay more than $6.00 per barrel, hence this action.

Bowman for the plaintiff.

A mistake by telegraph avoids the contract. Hinkel v. Pope, L. R., 6 Exch. 7. There can be a recovery on implied contract for *quantum meruit*. Knauss v. Shiffert, 58 Pa. 152; Wright v. Rensens, 133 N. Y. 305. Where contract is void, or not enforced, *quantum meruit* is the remedy. Stowell v. Lowell, 8 Pick. (Mass.) 178; Van Deusen v. Pelum, 18 Pick. (Mass.) 229.

Davis for the defendant.

Telegraph company was sender's agent. Telegraph Co. v. Dryburg, 35 Pa. 302. There being no common intention, no valid contract exists. Clark, Contracts, 35, 36. Contract void where there is a mistake as to price. *Id.* 289.

OPINION OF THE COURT.

BARNER, J.:—The question in this case is, whether or not the defendant is liable to the plaintiff. The question of the responsibility of the telegraph company, either to the plaintiff or the defendant, is not contested, and therefore may be passed by without deciding.

The English rule as to the formation of contracts by telegraph message is, that the message as sent is the one which controls the contract. But the position of the American courts on this point is exactly the reverse, holding by the weight of authority that the message, as received, is the one which governs in determining the terms. In the case at bar, therefore, the contract was legally consummated on the terms of the contract formed by the message as it was delivered to the defendant, and accepted by him. We are, therefore, unable to see wherein the statement of facts present a cause of action to the plaintiff in this case.

A case almost identical with the one under consideration is found in 71 Ga. 760, The Western Union Telegraph Co. v. Shotter, where the plaintiff delivered to the company a telegram quoting price on turpentine. The company did not transmit the message as given, and, owing to the misquoting of the price of the turpentine, loss was incurred. Here it was held that the merchant should settle with his customer at the price fixed by the telegram as delivered, and that the company should then respond in damages. In the case at bar, the merchant is in possession of the definite amount of damages, and need not bring an action against the defendant to ascertain that amount.

In a Missouri decision, Haubelt v. Rea & P. Mill Co., 17 Mo. App. 672, the court said: "The rule is, that where one makes an offer by telegraph, he thereby makes the telegraph company his agent for its transmission, and if it is altered in the transmission, he is bound by it as transmitted."

It is the opinion of the court that the plaintiff should be non-suited. The telegraph company was the agent of the plaintiff for the transmission of the offer, at the selection of the plaintiff himself, and he is bound by their acts. The second message (the acceptance) delivered to the telegraph company by the defendant, does not enter materially into the case, since it is not alleged or shown to have been incorrect, and consequently there was no misunderstanding or variance in that part of the transaction in which it might be shown that the telegraph company was the agent of the defendant, or perhaps the agent of both the plaintiff and the defendant.

Plaintiff non-suited.

OPINION OF THE SUPREME COURT.

Williams caused the telegraph company to make an offer of flour to Robertson. The company was directed to offer it at $6.10 per barrel, but, in fact, offered it for $6.00 per barrel. The offer, thus made, was accepted by Robertson, and the flour was received by him and sold for $6.05 per barrel.

It can hardly be debated that, upon these facts, Robertson having sold the flour, cannot be compelled to pay for it more than $6.00. Had he retained it, the question might arise whether Williams could annul the sale on the ground of mistake in the offer of its terms. We do not think such question can arise under the existing circumstances. Nor do we think that Williams can recover $6.05 for the flour. That price was in fact secured by Robertson, but it represents, in part, the compensation for his labor and skill in making the sale, the interest on his investment, etc.

Judgment affirmed.

TIMARIUS vs. HOMOLD.

Perjury—No civil action—Merger of civil actions in criminal prosecutions—Act 31 March, 1860, Sec. 71.

STATEMENT OF THE CASE.

In a suit by William Oram against Timarius on a promissory note, the defense was that Timarius' signature was a forgery. Homold, a witness for Oram, testified that he saw it executed by Timarius, and Oram received a verdict and judgment for $1,000. Homold was subsequently convicted of perjury. This is an action of trespass for the damages caused to Timarius by his (Homold's) testimony.

Reno for the plaintiff.

Perjury is a misdemeanor. Act 31 March, 1860, §14, P. & L. Dig. 1294. At common law, there could be a subsequent civil action upon the same facts constituting the wrong a misdemeanor. 4 Blacks. 6. This rule was extended by Act of 31 March, 1860, §71, P. & L. Dig. 71, so that now a civil action is not merged even in a felony.

McDonald for the defendant.

No civil action for perjury or subornation of perjury. Bostwick v. Lewis, 2 Day (Conn.) 447; Smith v. Lewis, 3 Johns. (N. Y.) 157; Taylor v. Bidwell, 65 Cal. 489; Damport v. Sympson, Cro. E. 520; Eyres v. Sedgwicke, Cro. J. 601. It would be an attempt to collaterally impeach a previous judgment. Cunningham v. Brown, 18 Vt. 123.

OPINION OF THE COURT.

BARNHART, J. :—It seems that in a former suit brought by William Oram against John Timarius, the present plaintiff, on a promissory note for a thousand dollars, judgment was rendered against Timarius, because of the perjured testimony of Titus Homold, the present defendant, who swore that he had

seen Timarius execute the said note. Homold was subsequently convicted of perjury, and this is a civil action against him of trespass for damages resulting from his perjured testimony.

The question involved here is one of merger, *i. e.*, has the civil action for damages merged in the criminal prosecution for perjury? Inasmuch as there is in Pennsylvania no statute directly on this question, the common law will control. We find that at common law there was a distinction as to the merger of a civil action in a *felony* and the merger of a civil action in a *misdemeanor*. In the case of felony, it appears that the greater, namely, the criminal offense, was so grievous and serious in its nature as to absorb the right to bring a civil action. But it was held otherwise in the case of a misdemeanor. Here the criminal action and the civil action were held equal, or nearly equal, so that a suit would lie in each.

This is the common law as it was interpreted in Pennsylvania. Under the Act of March 31, 1860, P. L. 382, §14, perjury was classed among misdemeanors. As there has been no legislation changing the common law rule concerning misdemeanors, the law now is that the civil action, in the case at bar, did not merge in the criminal action, and that therefore the plaintiff can recover. This rule has met with the general approval of our courts. Com. v. McGuire, 2 Pars. 341; 4 Blackstone 96; Clark's Criminal Law, 7 (1894); Chitty, in note to Lewis' Bl., Vol. IV, p. 1429.

The Act of March 31, 1860, P. L. 427, §71, provides that "In all cases of felony heretofore committed, or which may hereafter be committed, it shall and may be lawful for any person injured or aggrieved by such felony to have and maintain his action against the person or persons guilty of such felony in like manner as if the offense committed had not been feloniously, and in no case whatever shall the action of the party injured be deemed, taken or adjudged to be merged in the felony, or in any manner affected thereby." It appears that this act recognized and approved of the common law rule in reference to misdemeanors as stated above, and in no way changed that part of the common law; it only broadened the common law so as to make the rule the same with felonies as had existed with misdemeanors. (See opinion of Parsons, J., in Com. v. McGuire, 2 Parsons 341, on the need of such legislation).

Judgment is therefore given for the plaintiff.

OPINION OF THE SUPREME COURT.

Homold, it is alleged, committed perjury in the suit of Oram v. Timarius, and by means of it secured for Oram a judgment for $1,000. That the tort, if any, was not merged in the crime of perjury is, we think, satisfactorily shown by the opinion of the learned court below.

A deeper question, however, was pretermitted by the trial court, viz.: whether an action will lie for the giving of testimony, by means of which a judgment has been recovered. The authorities are almost unanimous, that the giving of such testimony, though untrue, is not actionable. Taylor v. Bidwell, 4 Pacif. 491 (Calif.); Smith v. Lewis, 3 Johns. 157; Damport v. Sympson, Cro. E. 520; Eyres v. Sedgwicke, Cro. J. 601; Harding v. Hutton, 11; Grove v. Brandenburg, 7 Blackf. 234 (Ind.). In Cunningham v. Brown, 18 Vt. 123 (1846), the very point was decided adversely to the right to sue, by Redfield, J. To suffer actions founded on testimony would, he suggests, be practically to retry the original cause. The court in which the action was tried may set aside the verdict on the representation that the testimony by which it was obtained was perjured, but, if it is allowed to stand, and judgment is entered on it, it is conclusive that the necessary allegations of the plaintiff therein were true.

A witness cannot ordinarily be proven guilty of having perjured himself except by other witnesses. These may as readily commit perjury as he. If he is indicted, the law furnishes him protection against conviction, unless two witnesses establish the perjury. There is no such principle invented for a civil action. A vindictive party who has lost by the testimony would be under a temptation to avenge himself by suing for damages, and by supporting his suit by fabricated evidence. At all events, whether the reasons assigned are entirely satisfactory or not, the absence of authority for such suits as Redfield, J., and others have suggested, is persuasive evidence that the common law has not recognized the actionableness of perjury.

Judgment reversed.

BREEN vs. THE P. R. R. COMPANY.

Trespass for damages—Ejection from car for tendering money for fare which conductor thought counterfeit—Injury to reputation as an element of the damages sustained.

STATEMENT OF THE CASE.

Breen, the plaintiff, offered to pay his fare from a dollar bill, which the conductor honestly believed to be counterfeit, and, refusing to accept it, ejected the plaintiff. The bill was in fact genuine. Breen brought this action to recover damages, and seeks to have the injury to his reputation considered as an element of damages.

Menges for the plaintiff.

It is no defense to an action for wrongful expulsion from a train that the conductor was honestly mistaken. Gorman v. Southern Pacific Ry. Co., 97 Cal. 1; Laird v. Pittsburg Traction Co., 166 Pa. 4. If the ejection is wrongful, there may also be recovery by way of actual damages for mental pain and suffering, so called, including shame and mortification, which resulted to the plaintiff, and the humiliation to which he was subjected and the indignity put upon him. Laird v. Pittsburg Traction Co., 166 Pa. 4; 6 Cyc. 366. When, however, one has established his cause of action to his person, property or reputation, he may then recover for injured feelings and mental suffering. 1 Jag. on Torts, 369.

MacNeal for the defendant.

The slander was not within the general range of the servant's duties in the course of his employment. The slander was not spoken for defendant's benefit, or in pursuance of any real or supposed duty to defendant, since the conductor, if he had taken counterfeit money, would have been charged with it. Mali v. Lord, 39 N. Y. 381. A corporation cannot commit slander. Clark on Corporations, p. 194. At the most, only nominal damages are recoverable. O'Reilley v. Ry. Co., 17 Sup. 629; Henderson v. Ry. Co., 144 Pa. 476.

OPINION OF THE COURT.

HASSERT, J.:—Gentlemen of the jury, the question before you for your consideration involves a statement of facts without precedent in the annals of jurisprudence in the Commonwealth of Pennsylvania.

Breen, the plaintiff, was in a car of the defendant, common carriers, not having purchased a ticket previous to boarding the same. Upon being asked by the conductor for his ticket, Breen offered to pay his fare and tendered a dollar bill in payment. The conductor, honestly believing the bill to be counterfeit, although it was in fact genuine, ejected Breen from the train. This is an action in case to recover damages, and he wishes to have the injury to his reputation made an element of the damages.

Every one must concede that Breen was a passenger on the defendant's car. This is undoubtedly the case, as Breen had the intention of paying his

fare, and did so as far as it was possible from his standpoint. The *prima facie* presumption is, that a person riding in a public conveyance is a passenger, and not a trespasser. P. R. R. Co. v. Books, 57 Pa. 339. Consequently, gentlemen of the jury, you will be justified in arriving at the conclusion that the plaintiff, Breen, was a passenger on the cars of the defendant company. The defendants, therefore, by the contract of bailment, owed to Breen the duty of exercising extraordinary care, and not the degree of care necessary to be shown to a trespasser. The next question in logical sequence is, whether the honest mistake of the conductor will preclude the liability of the company. In the cases of Laird v. Pittsburg Traction Co., 166 Pa. 4; 36 W. N. C. 24, the doctrine seems to be laid down that it will not. We believe that the plaintiff, Breen, is entitled to recover in this action, but to what extent are the damages to be estimated? Counsel for the plaintiff contends that his client should recover for injury to his reputation. This injury has been committed by the conductor in the mere act of refusing to accept this dollar bill in payment, thus, according to counsel for the plaintiff, imputing to the plaintiff the offense of "handling counterfeit money." If this position were supported, we imagine it would produce considerable consternation in the legal world. Statistics tell us, that of every one hundred coins purporting to be dollars coined by the United States government five are counterfeit. To sustain the position urged by counsel for the plaintiff would result in a multiplicity of legal suits of no consequence whatever.

What, then, is the measure of damages? We believe it to be the correct rule, when we charge you, gentlemen of the jury, to take into consideration all the expenses of delay, and also to provide for payment for indignity of the expulsion from the train, and to render a verdict accordingly.

OPINION OF THE SUPREME COURT.

The plaintiff offered a dollar bill in payment of the fare. What the fare was does not appear. It was the duty of the defendant's conductor to make change, if necessary. But the bill was not rejected because it was so large as to be beyond the conductor's power to change it. It was rejected for the sole reason that, as the conductor believed, it was counterfeit. It was, in fact, genuine. It was refused at the peril of the defendant. It is not necessary for the passenger to be armed with proof satisfactory to every conductor that the bills he offers are not counterfeit. Whether the conductor was guilty of negligence, undue ignorance or inexperience in distrusting the bill, must be immaterial. The *bona fides* of the conductor cannot excuse his unfounded suspicion of the genuineness of the bill, and his refusal to receive it.

That the improperly ejected passenger is entitled to damages, is undisputed. The learned court below has, however, refused damages for any injury to the reputation of the plaintiff. This, we think, was proper. It does not appear that any others saw the ejection, or, if they did, knew the ground of it. The refusal of a bill, on the ground that it is a forgery, does not imply an accusation that the offerer forged it, or knew that it was forged. Innocent men are daily offering counterfeit notes or coins, and having them rejected. If the conductor had refused the bill, and Breen had then given him an unquestioned bill, he would have been allowed to continue on the car. The injury to Breen's reputation would have been just as great, however, for it would have arisen from the rejection of the bill on the ground that it was forged, and not from the subsequent act of offering a substitute. But it would hardly be contended that the opinion, that the bill was forged, leading to its rejection, would, of itself, had there been no ejection, have furnished a cause of action. No impeachment of the honesty of a man is implied in the refusal to accept from him

a coin or bill on the ground that it is not genuine, and no tangible injury to his reputation results.

We think, too, that the formation and expression of the opinion that the bill is a forgery, is, on the part of the conductor, a privileged communication. It is his business to see that he receives only genuine bills. When a bill is offered him which he thinks forged, he has a right to say so. If he can, he has a right to obtain another bill from the passenger. What the law does not permit is the eviction of the passenger, as a means of extorting another, if the bill is in fact good. To render actionable an expulsion by no means requires the rendering actionable of the expression of the opinion that the bill is forged, and the refusal, for that reason, to take it.

Judgment affirmed.

JOHNSON vs. SICKLES.

Release—Joint tort-feasors—Intention of parties executing release, as to its effect, immaterial—Discharge of one inures to all.

STATEMENT OF THE CASE.

Sickles and Kuntz were sued as joint tort-feasors by Johnson. Kuntz paid Johnson his part of the sum asked for the damages, and received a release. He now brings this action against Sickles for the other part, who defends on the ground that the release to Kuntz relieved him from further liability.

Henneke for the plaintiff.

In actions of tort, nothing less than what in law is regarded a legal satisfaction of the tort by one joint tort-feasor will operate to discharge the other joint tort-feasor. Sloan v. Herrick, 49 Vt. 327; Seither v. Philadelphia Traction Co., 4 L. R. A. 54.

A judgment against one without satisfaction is no bar to an action against any one of the other wrong-doers. Sission v. Johnson, 95 U. S. 348; Livingston v. Bishop, 1 Johns. (N. Y.) 290.

Fox for the defendant.

A technical release, *i. e.*, a writing under seal, purporting to release the demand, etc., will, despite the plainest indications in the release itself of the contrary intention, extinguish the claim against the other tort-feasor. Williams v. LeBar, 141 Pa. 149; Seither v. Philadelphia Traction Co., 125 Pa. 397.

OPINION OF THE COURT.

JACOBS, J.:—This case presents the question, Does the release of one joint tort-feasor, on his paying part of the damages claimed, after suit brought, extinguish the legal liability of the other joint tort-feasors? It is a well settled principle, that joint tort-feasors may be sued jointly or separately. If sued separately, there can be as many judgments as separate suits. A judgment entered against one of the joint tort-feasors, if sued separately, will not bar suits against the other joint tort-feasors. But only one of the judgments can be satisfied. If one of the judgments is executed, the money paid to the plaintiff, and the judgment satisfied, it will extinguish all liability of the other joint tort-feasors, whether judgments stand against them or not. This on the principle, that the payment of one judgment is a legal satisfaction for the wrong, and the law will enforce but one legal satisfaction. Milliken v. Brown, 1 Rawle 391; Fox v. Northern Liberties, 3 W. & S. 103; North Penna. R. R. Co. v. Mahoney, 57 Pa. 187; Seither v. Phila. Traction Co., 125 Pa. 397; Livingston v. Bishop, 1 Johns. 290. It follows, then, had a judgment been entered against Kuntz for the amount paid by him, whether by confession or by suit, and this judgment satisfied, it would extinguish the legal liability of

Sickles. Now, would the payment of part of the money claimed as damages, and his release, have the same effect? Would it amount to a legal satisfaction? It is argued that it was not so intended, and the release was only for part of the damages, and could have no legal effect to the part not contemplated in the release. But would the intention of the plaintiff have any effect if he had sued Kuntz separately for the amount he paid him, recovered it, and pursued the judgment to satisfaction? Surely not. We have seen such would extinguish the legal liability of Sickles, irregardless of intention. Then how could payment of cash be less a satisfaction for his wrong than a judgment confessed or entered in a suit? Payment of the cash plus the absolute release given by the plaintiff could not be less a legal satisfaction than an executed judgment.

The cases cited by the plaintiff—Thomas v. R. R. Co., 194 Pa. 517, and Gallagher v. Kemmerer, 144 Pa. 509—are not to the point. The court in both cases found the release was not to a joint tort-feasor, and in Desore v. Hamilton, 14 C. C. 307, the release was without legal satisfaction. The case of Traction Co. v. Seither is analogous, also Williams v. LeBar, 141 Pa. 149. These cases hold, "The release of one of two joint tort-feasors is a discharge of both, and this notwithstanding the mutual intention of the plaintiff and the defendant released was that such release should not affect the suit of the plaintiff pending against the other defendant." Therefore, verdict must be for the defendant.

OPINION OF THE SUPREME COURT.

When A has a claim, based on contract, against B and C, he may agree to accept B's equitable part of it, and not to look to him for the rest, and he may reserve the right to look to C for the rest of the debt. It ought not to matter what the language of the instrument is, if this intention is clearly expressed. That the act is called a release, or an agreement not to sue, ought to be entirely insignificant, if the intention that A shall have recourse to C for C's part of the debt. The aim of the courts should be to effectuate the intention of the parties. Greenwald v. Kaster, 86 Pa. 45; Burke v. Noble, 48 Pa. 168; Klingensmith v. Klingensmith, 31 Pa. 460; Schock v. Miller, 10 Pa. 401.

If this is so with respect to a debt arising from contract, much more should it be so in regard to a tort. Joint contractors are entitled to contribution. Joint tort-feasors are not. Indeed, the sufferer of a tort perpetrated by two or more has the option to treat them as several or joint. He can sue one or all, as he chooses. Though the law will not aid one tort-feasor to recover contribution from another, it does not prohibit the sufferer to divide his loss or damage between them. He may take partial payment from one, and sue the other. He may, having obtained a judgment against both, direct the sheriff to levy on the goods of both, and, as nearly as possible, raise from the sale of them equal parts of it. There is no good reason why, receiving one-half of the damages from X, the plaintiff should not give him a receipt, and stipulate not to demand any more from him, but to demand the other half from the co-trespasser, Y. It ought not to matter much whether the language used is "release" or some other word, if it is clear that this is what is meant. Unfortunately, however, there are authorities that teach that if a "technical" release is made, *i. e.*, a writing under seal, purporting to "release" the demand, action, etc., it will, despite the plainest indications in the "release" itself of the contrary intention, extinguish the claim against the other tort-feasor. In short, the use of a certain formula is permitted, only on the condition that it shall have an effect which the parties most manifestly intend that it shall not have. Abb v. Northern Pacific R. Co., 68 Pacif. 954 (Washington State); Gross v. Ellison, 136 Mass. 503. This principle was adopted by the trial court without

eliciting marks of disapproval from the Supreme Court, in Williams v. LeBar, 141 Pa. 149, the lower court saying that "The discharge of one joint trespasser is that of all; notwithstanding the mutual intention of the plaintiff and the defendant discharged, that such discharge should not affect the suit as against the other defendants." In Seither v. Phila. Traction Co., 125 Pa. 397, the plaintiff had suffered from a collision between the car of the People's Passenger Railway Co., in which he was riding, and a car of the Phila. Traction Co. The former denied its negligence, but nevertheless paid $6,000 to the plaintiff, who thereupon released it from all liability, but stipulated to sue the Traction Co. and to repay the $6,000, if so much was recovered. It was held that this release was a bar to recovery against the Traction Co. The reasons are obscurely stated. The plaintiff, it was said, had obtained one satisfaction; he was not entitled to a second. But, until the jury passed on the evidence, it could not be known whether the $6,000 was satisfaction, or only half or quarter satisfaction. It is suggested that the plaintiff, in the suit against the Traction Co., admitted that the People's Co. had not committed any negligence. If this was so, there were no joint tort-feasors, and the release of the People's ought not to have had any effect on the right to recover from the Traction. Thomas v. R. R. Co., 194 Pa. 511.

It must be observed that the case before us exhibits simply a release of one tort-feasor without reservation of a right against the other. It seems impossible to avoid the application of the principle that "an unqualified release of one shall work as a release of all," artificial as this principle is.

In cases of contract, it is necessary to hold the release of one joint debtor the release of all, in order to give full effect to the release, since, otherwise, if suit could be brought against the unreleased debtor he could, in turn, sue the co-debtor. All that the latter would gain by the release would be the substitution, as creditor, of his co-debtor, for the original creditor. But, as there is no contribution between tort-feasors, this result would not follow, from the doctrine that a release of one of two tort-feasors does not release the other. It would have been quite sensible to have held, therefore, that when a plaintiff singled out one of several joint wrong-doers, for the purpose of releasing him, he did not indicate an *intention* to release the rest, nor did he furnish any reason of justice or convenience for holding that, despite his intention, he released the rest. Since we have not made the law, however, we are not responsible for it.

Judgment affirmed.

HERVINS vs. LONDON ASSURANCE CO.

Fire insurance—Partial loss—Liability of insurer for increase of cost of repairs caused by enactment of building laws—Effect of building laws on fire insurance contract.

STATEMENT OF THE CASE.

A partial loss occurred under a policy of fire insurance, and the cost of restoring the building to its former condition would have been $30,000. Owing to the building laws, however, the structure could be repaired only by the expenditure of $45,000, and this is an action to recover $45,000.

Jones for the plaintiff.

Cited Penna. Co. for Insurance on Lives, etc., v. Phila. Contributionship, etc., 201 Pa. 497; Phœnix Ins. Co. v. Copeland, 86 Ala. 551; Caraben v. Royal Ins. Co., 63 Hun. (N. Y.) 82; Sherlock v. Ins. Co., 21 N. Y. App. Div. 18; Cummings v. Ins. Co., 192 Pa. 359; 16 A. & E. Encyc. of Law, 964.

McDonald for the defendant.

Cited Penna. Co. v. Phila. Contributionship, 201 Pa. 497.

OPINION OF THE COURT.

EHLER, J. :—Ordinarily the terms of an insurance policy govern the liability incurred thereunder in a particular case, unless they have been waived by the parties thereto. The insurer, by limiting the amount up to which he insures, does not, except in a valued policy, bind himself to pay the whole amount, if the thing insured is destroyed, and he is not estopped from demanding proof of the actual loss incurred.

His undertaking is only to indemnify for loss actually suffered, not exceeding the amount named in the policy. Insurers, if the risk is not great, do not object to over-insure in order to earn a higher premium, since they know they will only be liable for actual loss, and generally the assured's valuation of the property is taken.

Some policies fix the liability to the "actual cash value of the property at the date of the fire," and of course here evidence of such value will be received and the liability thereby determined. Cummings v. Ins. Co., 192 Pa. 359.

In the case at bar, the stipulations of the policy, in the absence of evidence to the contrary, are presumed to be those contained in the ordinary policy of insurance, as per Act of 1891, P. L. 22, providing the standard form of policies of insurance.

The ordinary rule applicable being, that if the thing insured is not totally destroyed, but remains wholly or in part in a deteriorated condition, the insured can only claim the value of the injury actually done, unless all that remains of the thing insured be surrendered by the insured. What has been lost must be made good by actual payment or reinstatement.

In the case at bar, a partial loss has occurred, and the cost of restoring the building to its former condition would have been $30,000, had not the building laws directed that certain specifications be followed, which increased the cost by $15,000. Plaintiff seeks to recover $45,000. Assuming that the amount of the policy was at least $45,000, and there being no question as to defendant's liability as to the $30,000, the question limits itself to the effect of the building laws upon this contract of insurance.

The contract being one of indemnity against loss up to a certain amount, and where there is but one policy from one company, the insuring company would be liable up to that amount depending upon the loss. The question here is: Does the $15,000 form part of the loss against which the company insured? It could not be contended that the company would only be liable for the cost of the material necessary for rebuilding at the market price existing at time the contract was made. But it would be subject to the fluctuations of the market as regards the price of these materials, and if the market price at the time of the fire was greatly in excess of the market value at the time of issuance of the policy, the company would nevertheless be bound to pay for the reconstruction up to the amount of the policy. It is evident that the policy is made with reference to changed conditions, for the purpose of estimating liability at the time of the loss. Were this not so, in cases of partial loss the insured might be called on for the excess of the market value, and the policy lose its essential characteristic of indemnity for loss up to a certain amount.

The policy provides for compensation for loss to the owner by reason of injury or destruction by fire, and if in consequence of a state of law existing at the time of the fire, the loss was increased above what it would have been by reason of these building laws, then, surely, this is part of the actual loss thus incurred, for it does not necessarily follow that the market value of the building will be increased by following the provisions of such building laws. As a matter of fact, the building will contain a less amount of floor space than it

did before if the walls are to be constructed thicker. If the loss is to be ascertained with respect to the changed conditions at the time of the fire, and if this is part of the actual loss, then it ought to be borne by those who indemnified against it.

It has accordingly been held, that in ascertaining the loss resulting from the partial burning of a building covered by a policy of insurance, the true result is to be reached by taking the cost of reconstruction, according to the conditions existing and lawfully imposed at the time when the fire occurred. If a change in the building laws requires walls of an increased thickness in the rebuilding, the increased expense must be paid by the insurance company up to the extent of the amount designated by the policy. Penna. Co. for Insurance on Lives and Granting Annuities v. Phila. Contributionship, 201 Pa. 497.

It has been contended that if this be true, a local law preventing the erection of frame buildings within certain areas would have the effect of compelling an insurance company to erect another building of brick or other material, costing much more than the frame building insured. But, it must be remembered that the company in no case is liable for more than the amount of the policy, and, if such building is only partially destroyed, it may be repaired, since such ordinances only prevent the complete erection of such buildings, and if totally destroyed the entire amount of the policy would be consumed. Neither can the act be held to impair the obligation of contract, as it rather enhances the obligation. Insurance companies in these cases may increase the risk proportionately where it is evident that the building insured is not constructed according to the requirements of the General Building Act of May 5, 1899, P. L. 193, or they might provide against such liability.

Judgment for plaintiff.

OPINION OF THE SUPREME COURT.

The destruction by fire was but partial, and the loss that has resulted to Hervins is the cost of so repairing his building that it will be in as good condition, and as valuable, as formerly.

The cost of such repair depends on the prices of material and labor at the time. These may be higher or lower than they were when the policy was issued. In either case, the company would have to pay the cost of the repair. The cost of repair may be increased or diminished by the operation of laws existing at the time of making the repair. These laws may increase or diminish the cost by impeding or facilitating the process of repairing; *e g.*, by forbidding the use of streets for deposit of materials; by limiting the number of hours daily when work could be done, etc. They might increase or diminish the cost, by requiring different material, thicker walls, etc. Laws of the former class would increase the cost of repair, without increasing the value of the building, when repaired, beyond its former value. Laws of the latter class might, in increasing the cost of the repair, also increase the value of the building.

There is no appreciable reason for holding, if the laws are of the former class, that the company shall not be liable for whatever expenditure is necessary to so repair the building as to restore it to its former state. Hervins v. London Assurance Corporation, 184 Mass. 177; Penna. Co. for Ins. v. Phila. Contributionship, 201 Pa. 497.

If, however, the laws prohibit an exact restoration of the building, but require it, if repaired at all, to be so repaired that it will be better, and more valuable, there is no reason for making the company liable to expend a sum that will thus increase its value. In marine insurance it is usual to make an allowance to the insurer for the increase of value caused by the repair. 184 Mass. 177, *supra*. There is no reason for not making such allowance in fire insurance cases. In 201 Pa. 497, *supra*, it was found that the market value of

the reconstructed building was no greater than it would have been had it been rebuilt according to the original plan, and of the same materials.

The evidence developed before the jury in the court below did not show what the building laws were, nor how they increased the cost of repairing, but the court distinctly asserted that if they required an increased thickness of walls, the company would have to bear the entire expense of them. This ignores the consideration that a building, with the increased wall-thickness, being safer and more durable, would possibly be worth more than the original. It might be worth $5,000 or $10,000 more. Are we to so interpret the contract of insurance as to make it obligatory on the company to enrich the assured, in case of fire, by giving him a better building, if only the laws forbid a rebuilding after the model of the original? We are not prepared to sustain such a principle. Insurance is a contract for indemnity. Its aim is to preserve from loss, not to bestow a gain.

It does not appear that the building laws underwent a change between the issue of the policy and the fire. But, if they had, we do not think the result would differ from what would follow had the laws existed when the policy was issued. It must be assumed that the parties contemplated the possibility of a change of the laws, and their effects upon the expense of repairing and rebuilding. 201 Pa. 497, *supra.*

As the verdict of the jury, for aught that appears, was founded on the assumption that, though the effect of the building laws was to cause the production of a better building, the whole increased expense of the repairs was chargeable to the defendant, it is necessary that there should be a new trial.

Judgment reversed with *v. f. d. n.*

WAGNER vs. SHARPE.

Trespass—Negligence—Contributory negligence not imputable to one who rescues another from imminent danger

STATEMENT OF THE CASE.

Wagner, who was passing along the highway, discovered an infant playing in front of defendant's warehouse. The defendant had, without looking out on the street, started a barrel of flour down an incline, which would have killed the child but for the quick action of the plaintiff. Wagner, in rescuing the child, had his foot crushed to such an extent that it became necessary to amputate it. This is an action to recover damages for the injury.

Acker for the plaintiff.

The defendant was negligent. R. R. Co. v. White, 88 Pa. 327; Hydraulic Co. v. Orr, 83 Pa. 332.

Plaintiff not guilty of contributory negligence. Eckert v. Long Island R. R. Co., 43 N. Y. 505; Spooner v. R. R. Co., 115 N. Y. 22; Gibney v. N. Y., 137 N. Y. 1; Linnehare v. Sampson, 126 Mass. 506; Penna. Co. v. Langendorf, 48 Ohio 482; Steel Co. v. Marney, 88 Md. 482; Corbin v. Phila., 195 Pa. 461.

Hahn for the defendant.

Defendant not negligent. Rodgers v. Leis, 14 Pa. 475. No proximate cause shown. Wood v. R. R. Co., 186 Pa. 456.

Plaintiff guilty of contributory negligence. Morrison v. R. R. Co., 56 N. Y. 302; R. R. v. Hummel, 44 Pa. 375.

OPINION OF THE COURT.

BARNHART, J.:—As it appears, the defendant was in the act of rolling a barrel of flour from his warehouse into the public street, when, at the same time, a child was playing in front of the building, and in the line in which the

barrel was rolling. It was clearly evident that unless the child should be speedily rescued from its perilous position that inevitable death must follow. It was a moment when delay meant death, and when quick, sure and heroic action might save the life of the child. The plaintiff, who was then passing along the street, comprehended the situation and, at the risk of his own safety, rescued the child, but in doing so his foot was so severely injured that it became necessary to resort to amputation. He now brings this action to recover damages for the injury sustained.

The first question to be considered, we think, is that of negligence. We are clearly of the opinion that the defendant was negligent. The child was playing in the public street, and so far as it appears, there was no reason why he should not have been there. There is no evidence that the defendant gave any warning of the danger which those passing by were likely to encounter. In the absence of such defense, we think we are right in presuming that no such notice existed. In Hydraulic Works Co. v. Orr, 83 Pa. 332, it was shown that defendant had a private alley running from the street back to his mill, and that at the entrance of this alley he had posted a notice to the effect that the alley was private, that there was no admittance, and that the entry way was barred by a gate. Against the side of the mill, in the alley, the defendant had fastened a heavy platform, which he was accustomed to swing downward parallel to the earth, and use for the purpose of loading and unloading grain. When not in use, the platform was leaned against the side of the building. From this position it fell forward upon four children, and severely injured two of them. In an action for damages, the defendant was held to have been negligent, and judgment for damages was entered against him.

The case at bar is much more favorable to the plaintiff than the case just referred to. Here the defendant, without looking, rolled the barrel of flour down the incline into the street, and apparently regardless of the safety of any who might chance to be there. We, therefore, have no hesitancy in saying that the defendant was grossly negligent.

Let us now inquire as to whether the plaintiff is chargeable with negligence. We do not think that he is. Even though the danger were greater and the risk more hazardous, the plaintiff could not be held guilty of contributory negligence. In case of imminent danger the rescuer is not required to act with sober and deliberate thought. Some allowance for rashness is to be made in his favor. It is not demanded that he act in perfect self-possession. When human life is at stake he may be excused for making a somewhat rash decision. Under such circumstances one may expose his life or limb to a high degree of danger, and is not accountable for his error of judgment likely to arise from the haste and confusion of the moment. Penna. Co. v. Langendorf, 48 Ohio 316 ; Linnehare v. Sampson, 126 Mass. 506.

In Eckert v. Long Island R. R. Co., 43 N. Y. 503, a leading case, plaintiff's intestate rescued a child from defendant's track in front of defendant's approaching and negligently run train. The court held that plaintiff could recover, saying, "The law has so high regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons." This doctrine was approved in a later New York case, Spooner v. D., L. and W. R. R. Co., 115 N. Y. 22, where the plaintiff was injured in an attempt to rescue a child whose foot was fastened in a negligently constructed track.

In Gibney v. The State of New York, 137 N. Y. 1, a father, mother and child were passing over a bridge, when the child fell through a hole, which was insufficiently guarded. The father, in an effort to save the child, plunged through the hole after it, and both were drowned. The wife recovered from

the State, it being held guilty of negligence in having the bridge in a dangerous condition.

In The Maryland Steel Co., of Sparrow's Point, v. Mamey, 88 Md. 482, the court went so far as to lay down the law to be, that where one receives an injury while rescuing another from danger, caused by the negligence of the defendant, the rescuer is not debarred from recovery by his own contributory negligence. It is not necessary to go to this extreme in order to decide this case.

Corbin v. Phila., 195 Pa. 461, is perhaps the leading Pennsylvania case on this question. There the city of Philadelphia had dug a deep trench within the city limits. At the bottom of this trench were some gas pipes, from which a large quantity of gas escaped, so that it was extremely dangerous to be in or about the opening of the trench. The trench was left unguarded, and there was no notice to warn the public of the danger. Some school children, who were playing ball in a neighboring lot, knocked the ball into the trench, and it rolled to the bottom. One of the children descended a ladder standing in the trench, for the purpose of getting the ball. He was overcome by the gas, and lay prostrate at the bottom. The plaintiff's son, seeing the danger the boy was in, quickly started down the ladder after him. He, too, was overcome by the gas, and before he could be rescued died. The plaintiff recovered damages from the city.

We think that the plaintiff is entitled to recover, and therefore judgment is given for the plaintiff.

OPINION OF THE SUPREME COURT.

It will hardly be seriously contended that one would be exercising ordinary care who would throw a projectile of any kind into a frequented thoroughfare without looking to see if a passer-by were near. To start a barrel of flour down an inclined plane toward the sidewalk is but slightly different from throwing a missile. Its momentum would probably be greater, the difference in velocity being quite counterbalanced by the greater weight.

If, then, the defendant is to avoid the consequences of his negligence, it must be on the theory that the plaintiff was guilty of contributory negligence. This raises the interesting question as to the effect of benevolent motives as an excuse for rushing into danger.

The learned court below has cited to us the case of Corbin v. Phila., 195 Pa. 461, which, he says, "is perhaps the leading Pennsylvania case on this subject." So far as we have been able to discover, it is the solitary Pennsylvania case on the subject. If it is the leader, we have not found the followers. The case was decided by a divided court, the judges standing four to three, Justice Mitchell leading the dissenters. The investigation of the learned court below seems to have been limited to a cursory reading of Corbin v. Phila. His entire discussion of this point should have been credited to the opinion of Justice Brown in the case mentioned.

Deference to the foregoing precedent may have justified the position taken by the learned court below. The position of the dissenting judges, however, detracts greatly from the force of the decision, and as the opinion of the majority is destitute of a single original thought on the question, we feel constrained to regard the question as an open one in Pennsylvania, and one worthy to be considered on principle.

Volenti non fit injuria. One who assents to the infliction of damage is not in law wronged. One who is careless of his person or property can fairly be said to have invited injury, and if such injury occurs, the law forbids that he should blame the negligence of another for it. In the case before us, the plain-

tiff saw danger, and rushed to meet it. Did he not invite the result that occurred? We believe it to be clear that, on principle, the plaintiff has no case. Only a flagrant piece of judicial legislation can help him.

"A rescuer," says Justice Brown, "one who, from the most unselfish motives, prompted by the noblest impulses that can impel man to deeds of heroism, faces deadly peril, ought not to bear from the law words of condemnation of his bravery, because he rushed into danger, to snatch from it the life of a fellow-creature, imperiled by the negligence of another, but he should rather listen to words of approval, unless regretfully withheld on account of the unmistakable evidence of his rashness and imprudence."

Now, it is submitted, this is not a question as to whether a man shall be "condemned" for his bravery, or applauded for it. The question is, shall the defendant be required to pay damages?. The sentiment that has impelled Mr. Carnegie to create his hero fund is shared by all mankind. The hero should not suffer. He should be rewarded. But who should pay the reward? That is the question.

Let us suppose that A is in danger. A is himself negligent, so that in case of injury he can blame no one but himself. B's negligence, however, is a contributing cause of the dangerous situation. C notices A's peril and attempts a rescue, but is injured in effecting it. Had not C intervened, B would clearly have been free from liability to pay damages for the injury to A. Is it, then, fair to permit C, an intermeddler, to rush in and, by receiving the shock of the injury in A's stead, impose a liability on C? A was the one saved, or attempted to be saved. He, too, was negligent. Ought he not rather be the one called upon to reward the hero?

But, it may be objected, the child was not negligent in the present case. If the plaintiff had not intervened, the child would have been hurt, and the defendant would have had to pay damages to the child. Let us grant this. Does it follow that the plaintiff should recover? Does he ask to be subrogated to the rights of the child? Is he to receive the speculative damages which the jury may conjecture the child might have suffered? Does he prove that his fears, that the child would not escape by its own energy, were well founded? Not at all. He asks to be compensated for the damage he himself has suffered. Suppose the plaintiff is the president of a great corporation, drawing a fabulous salary. Shall the defendant have imposed upon him this new measure of damages? A sum that would have adequately compensated the child for an injury would be "but a drop in the bucket" toward satisfying the claims of a trust manager.

The plaintiff saw a chance to do an heroic act, and he decided to run a risk. His heroism consists in his self-sacrifice. If his heroism is genuine, he would abhor the suggestion that he was animated by mercenary motives. He is applauded as a hero. His is all the eclat, all the glory. When this feature of the performance is over, he comes to the defendant, who has received only condemnation, and demands that the defendant pay all the expenses of the exhibition. And Justice Brown and the learned court below say this is just, and the defendant must pay the cost. The defendant had no chance to elect whether the plaintiff should perform or not. The plaintiff decided to run the risk without consulting the defendant, yet the defendant is required to bear the brunt. If the interest of the State demands that heroism be rewarded, let us not have the spectacle of the hero suing in court to recover it, but let the State create a fund, as suggested by President Roosevelt in his recent message, and let all heroes, not merely railway train men, be rewarded from this fund.

Again, suppose the attempted rescue fails. Both the would-be rescuers and the one to have been rescued are injured. The plaintiff saved the defend-

ant nothing. Can he double the defendant's liabilities simply because his motives were good?

The rule, as laid down by Justice Brown, has a curious limitation. One may still be guilty of contributory negligence, though he be trying to save life. He must not be "too rash." He must show a "due regard" for his own safety. "It is his duty to exercise his judgment as to whether he can probably save the child without serious injury to himself." The attempt must not be made "under such circumstances as to constitute *rashness* in the judgment of prudent persons." The only ground for a recovery in any of these cases is an "emotional basis of admiration for heroism," as Justice Mitchell expresses it. Yet, when we find the true hero, the court balks. Who has done the nobler act, the man who expected to escape, or he who was morally certain that he must suffer in the other's stead? The acme of altruism exhibited by the founder of Christianity, the religion of altruism, was the voluntary and intentional sacrifice of His own life for the lives of others. Do the courts mean to "condemn" such an act, while applauding the man who hoped to save himself also, but failed? That the courts set this limit on their rule, instead of following it to its legitimate conclusion, convinces us that they have a secret realization that they are confiscating private property to secure the means wherewith to reward heroes; but to save their faces they still say that in extreme cases there may still be allowed the defense of contributory negligence.

We regret exceedingly that we are compelled to submit to the case of Corbin v. Phila. Because of this decision, the judgment must be affirmed.

BOOK REVIEW

THE LAW OF LANDLORD AND TENANT IN PENNSYLVANIA. *By William Trickett, LL. D., Dean of the Dickinson School of Law. Rochester: The Lawyer's Co-operative Publishing Co. 1904; 884 +lxxiv pp.*

Dr. Trickett's latest contribution to the legal literature of Pennsylvania is a very successful attempt to meet a large demand for a logical, exhaustive and practical treatise on the rights and duties created by the very common relation of landlord and tenant In a volume of large proportions, the law of two thousand cases has been collated, digested and arranged in a manner valuable alike to the veteran and the tyro in practice. Even a cursory inspection will convince the reader that accuracy and clearness of statement have not been sacrificed to brilliancy of diction, but that the whole law has been stated concisely yet adequately. To clarify the law, the facts from which it is deduced are in many instances fully set forth, making the work at once a text and a reference book. The rights, subjects, place and method of distress receive treatment commensurate with their importance, as do also the tenant's remedies for an improper exercise of this right. The various Acts of Assembly, particularly those of 1772, 1830, and 1863, are construed and explained. The subjects of mining leases and oil and gas leases, which have acquired considerable interest by reason of the comparatively recent development in those fields, are accorded generous space. A comprehensive and most searching index completes this very useful book. It is not too much to say that the book should be in the library of every Pennsylvania lawyer.

HANDBOOK OF THE LAW OF INSURANCE. *By William Reynolds Vance. St. Paul, Minn.: West Publishing Company, 1904.*

An indicium of the commercial expansion of our country may be noticed in the marvelous growth of the insurance business. A study of the records of the Insurance Commissioners of various states will prove a revelation to the unlearned. To one gleaning the law reports, it is apparent that litigation along insurance lines has kept pace with the wonderful growth, for as contracts of insurance have been varied and methods of business changed, new questions have arisen resulting in disputes between insurer and insured which the courts have been called upon to settle.

No apology, therefore, need be made for the appearance at this time of another text-book on insurance law, and verily no apology is needed on behalf of the valuable work just published, the subject of this review. Without invidious comment, it may be asseverated that the present work is the best of that cataclysm of works on insurance with which the profession has been deluged of late years.

Following the usual Hornbook style, the treatise is in one volume, but unlike some recent publications on insurance, the author covers, fairly although cursorily, the salient features of both marine and fire, life, accident and liability insurance. The order of the book is fashioned after that of the standard works on the same subjects. Especial mention ought to be made of the admirable and instructive historical introduction, which adds mightily to the intelligent grasping of the matter following. The difficult department of insurable interest in life policies is handled with consummate skill, and on the question of a creditor's interest in the life of his debtor, the author's comments as well as the citations commenting on our doubtful rule in Ulrich v. Reinoehl, 143 Pa. 238, are of immediate moment to Pennsylvania readers. It is questionable, however, whether, as stated on page 137, those who had invested money in preparations for the King's coronation, had an insurable interest in the life of the English monarch, and the passage would seem to be in contradiction of the author's sentiments expressed on page 145. The law pertaining to insurance agents is discussed succinctly, as are also the constructions of the courts on various clauses of the standard policy. In the index are appended copies of the New York standard fire policy and the usual marine policy of America. It is suggested that the marine rule of one third new for old might have been included in the law peculiar to marine insurance. Byrnes v. National Insurance Co., 1 Cow. 265; Wambaugh's Cases, 807. On the whole, the work of the author has been done faithfully and creditably and will prove a valuable adjunct to the library of both lawyer and student.

ANNOTATED INTERSTATE COMMERCE ACT AND FEDERAL ANTI-TRUST LAWS. *By William L. Snyder. New York: Baker, Voorhis & Co. 1904. pp. xxiii, 380.*

In this book have been collected all the Acts of Congress whose purpose it is to "curb the trusts." It will be a surprise to many of the members of the profession to know that the author has also collected over two hundred and fifty decisions involving the interpretation of this legislation.

Among the important statutes collected are the Sherman Act, the Elkins Act, the Expedition Act, the Act creating the Bureau of Corporations, the Telegraph Acts, and the Railway Safety Appliance Law. All amendments to these laws are also set out in full. The provisions of the Constitution of the United States delegating to Congress the power to regulate interstate commerce

are collected and discussed. The limitations of this power and the scope of the police power and the power to tax retained by the states are discussed in the light of numerous decisions. The text of the Interstate Commerce Act is given in full and its value to the shipper as a protection against unreasonable charges, local discrimination in rates, and against pools and combinations is fully shown. It is particularly timely that this presentation of the present powers of the Interstate Commerce Commission be made at this time, when Congress and the country generally are discussing the propriety of a great extension of its powers.

Among the anti-trust decisions the *Northern Securities Case* is, of course, given the fullest discussion. The case is carefully analyzed and the views of the different justices presented in detail. This is followed by an extended comment by Judge Dillon on the effect of the decision. The suits against "The Sugar Trust," "The Pipe Trust," "The Coal Trust," "The Railroad Trust" and "The Beef Trust" are likewise discussed in detail.

The book ends with a collection of the Rules of Practice before the Interstate Commerce Commission together with appropriate forms to be used in proceedings before the Commission.

As a whole the book should prove a great time-saver to the busy practitioner while its discussion of the law, as it is, regarding trusts, should prove of great popular interest as well. Indeed, the subject dealt with is one of such absorbing interest that we may safely predict for the book an extended sale to laymen as well as to lawyers.