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JUDICIAL NOTICE.

There are facts of which the trial tribunal takes notice without the production of proof by the parties to the litigation. The tribunal may already know them, or it way advise itself of their existence in any mode to which it may choose to resort; consulting, if it will, any documents or writings, or any person who may be able to impart the information.

GEOGRAPHICAL FACTS.

The courts will take notice of the distance between two boroughs or cities, or between a borough and a city, within their jurisdiction; e. g. that Kutztown is sixteen miles from the city of Reading[1], that a borough is within the county; e. g. that Stroudsburg is in Monroe county[2], or that within Mercer county is Sandy Lake borough[3]; that an alleged city within the county is at least a *de facto* corporation and as such elects certain officers[4]; that the navigable part of the Delaware river is bounded by at least three states, Pennsylvania, Delaware and New Jersey[5]. The courts of Pittsburg may judicially know that the distance between New York city and Allegheny city is not 500 miles, but only 444 miles[6]; but though the judge of a Northampton court has actual knowledge that a mill popularly called Walter's Lower Mill is in the county, he cannot use this knowledge. Averment or proof that the fact is so must be made[7].

1 Fire Ins. Co. v. Keller, 9 Dist. 61.
2 Stroudsburg Borough v. Brown, 11 Pa. C. C. 272.
3 Sandy Lake Borough v. Sandy Lake & Stoneboro Gas Co., 16 Super. 234.
4 Monongahela City v. Monongahela Electric Light Co., 12 C. C. 529.
5 Flanigan v. Washington Ins. Co., 7 Pa. 306.
6 Pearce v. Langfit, 101 Pa. 507.
7 Commonwealth v. Clauss, 18 C. C. 381.

POLITICAL ORGANIZATIONS.

The courts of a county know the townships, cities and boroughs embraced within it. They know how many wards there are in its cities[1], and a court sitting in a particular city will know its scenery and its streets; the courts of a state its boundaries, its division into counties, the limits of such counties; its judicial districts, the positions of leading cities and boroughs in it[2].

CUSTOMS.

Sundry customs or habits of persons or corporations, by which the public generally are affected, may be judicially known. Of the ordinary speed of railway trains running between Pittsburg and New York the courts of Allegheny county may take judicial cognizance; though it may be doubted that the court should judicially know of the hours of departure of trains[3]. The custom of Philadelphia[4] or Pittsburg[5] merchants to charge interest upon their accounts with customers, after six months, is judicially known, and treated as known to customers, and as entering into their contracts. The courts have judicially noticed the custom as to way-going crops and enacted it into law.

THAT CERTAIN PERSONS ARE OFFICERS.

The judges take notice of the existence and functions of certain sorts of officers, under the laws of the United States; e. g. that there is a collector of internal revenue of the district in which the court sits; that he has a deputy; that their duty is to put stamps on deeds, contracts, etc. If a deed is produced with a receipt of payment on account of the stamp tax, signed John F. Cline, deputy collector First district, Pennsylvania, the court will know, without evidence, that Cline is the deputy collector, and that what purports to be his signature is such in fact. "The collector is an officer of the general government, performing public duties in his district, including the county in which this case was tried. The court, therefore, might well take notice not only of his official character, but also of the official acts of himself and his deputy"[6] The court of common pleas, on certiorari to a justice, will judicially know that he is a justice[7], or that he is a justice of a particular borough[8] or township of the county, as, in an action on

[1] Fire Ins. Co. v. Keller, 9 Dist. 61. Pearce v. Langfit, 101 Pa. 507.

[2] Pearce v. Langfit, 101 Pa. 507.

[3] Pearce v. Langfit, 101 Pa. 507. It is said that perhaps the court went too far in stating that a train leaving New York at 5 or 6 o'clock in the evening would reach Pittsburg the next morning at 8.

[4] Koons v. Miller, 3 W. & S. 271; in 1842.

[5] Watt v. Hoch, 25 Pa. 411; in 1855.

[6] Lerch v. Snyder, 112 Pa. 161.

[7] Hibbs v. Blair, 14 Pa. 413.

[8] Stroudsburg Borough v. Brown, 11 C. C. 272; in re Ross Poor District. 3 Kulp 198.

a recognizance purporting to have been taken before an alderman, for the appearance of X for trial on a criminal charge, the common pleas will know that he was in fact an alderman of the locality[1]. The acceptance of service of a writ, e. g. a sci. fa. sur municipal lien, by X, describing himself as attorney-in-fact of the registered owner of the premises, will, his authority not appearing, be treated by the court as void, on a rule to quash the *scire facias*, if X is not a member of the bar of the court and whether he is or not will be judicially known by the court[2]. The court knows who is the sheriff.[3]

AUTHORITY OF OFFICERS AND GENUINENESS OF ACTS.

Deeds are acknowledged or proved before judges, justices or aldermen. Their commissions are not called for. The fact that, in taking the acknowledgment or probate, they are assuming a judicial competence, is *prima facie* evidence that they have authority. Their signatures are never proved. Entries of clerks in the receiver-general's office of receipts of moneys for land sold by the state, are proof of such payments without proof of their handwriting.[4] Of the handwriting of the justices of the peace, who issued an order of relief of a pauper, or of their official character, there being no express proof, Reed, P. J., was of opinion that of the latter the auditor could take judicial notice, and that having personal knowledge of the former, and being satisfied from inspection that it was genuine, he was not guilty of error in assuming its genuineness, there being no intimation that there was any dispute concerning it.[5]

COMPOSITION OF INFERIOR COURTS.

An appellate court will take notice of the inferior courts over which its jurisdiction extends, of the number of judges thereof; of the personnel; that A e. g. is the president judge of the common pleas, and B and C his associates, and that a court of oyer and terminer, held by B and C, is a lawful court.[6]

SUNDRY FACTS.

That, at least since 1803, the river and bay of Delaware had been a pilot ground for all vessels engaged in foreign or coasting trade was judicially known in 1847.[7] The court of quarter sessions of a county must take judicial notice of the result of a vote under the local

[1] Fox v. Commonwealth, 81½ Pa. 511.

[2] City of Philadelphia v. Jacobs, 22 W. N. C. 398.

[3] Kilpatrick v. Commonwealth, 31 Pa. 198.

[4] Goddard v. Gloninger, 5 W. 209.

[5] In re Ross Poor District, 3 Kulp 198. The auditor was appointed in an appeal by one poor district from an order of removal issued on the application of another poor district.

[6] Kilpatrick v. Commonwealth, 31 Pa. 198.

[7] Flanigan v. Washington Ins. Co., 7 Pa. 306.

option acts of March 21st, 1872, and of March 6th, 1873, which has been certified and returned to the clerk of the court of quarter sessions, according to the requirements of the former act, in the trial of one for a sale of liquor in violation of law.[1] That a photograph is a true picture of its subject will be judicially recognized; so that one can be employed without proof of its accuracy, or of the general accuracy of the photographic process as a means of identifying a murdered man with the subject, or the subject known to some as A, with a person known to others as B.[2] Other general facts, known to many persons, will be judicially known; e. g. that water is liquid at summer temperatures; that there is not much light in the absence of the sun; that extreme youth or age is united with physical and mental weakness.[3] The court will properly refuse evidence that a train of cars, in moving over a few yards, passes from a state of rest to a rapid rate of speed; for it may judicially know that the attainment of such speed under these conditions is impossible[4], and it will know that one who undertakes to cross a railroad track, in the day-time, in the absence of obstructions to seeing and hearing, will, unless there are special circumstances, if he stops, looks and listens, see and hear a train which is so near that he will be run over by it before he gains the other side of the track.[5] The Supreme Court has taken judicial notice of the authority of the article in the Encyclopedia Brittanica concerning the Carlisle tables and of the reliability of these tables as evidence of the number of years of life which, at any given age, any average man may expect yet to enjoy.[6] In a contest over the election of select council of a city, the petition alleging that the petitioners voted at the last election simply, the court will judicially know that other than select councilmen were voted for at that election. The court knows when the elections are held and the results, whether computed by them as return judges or upon their own records.[7] The remark sometimes made[8] that the courts

[1] Rauch v. Commonwealth, 78 Pa. 490.

[2] Udderzook v. Commonwealth, 76 Pa. 380; Agnew, C. J., remarks that there is no reason why a photograph proved to be taken from life and to resemble the person photographed, "should not be as admissible as a portrait painted from life and proved to resemble the person." But there does not seem to have been any evidence of the resemblance of the photograph to the subject, and reliance was had on "the judicial cognizance we may take of photographs as an established means of producing a correct likeness." A different view of the question is taken in Commonwealth v. Keller, 191 Pa. 122, and Beardslee v. Columbia Township, 188 Pa. 496.

[3] McCandless v. McWha, 25 Pa. 45.

[4] Cauley v. Pittsburg, Cincinnati & St. Louis Ry. Co., 98 Pa. 498.

[5] Marland vs. Pittsburg & L. E. R. Co., 123 Pa. 487; Sheehan v. Phila. & R. R. Co., 166 Pa. 354; Myers v. Baltimore & O. R. Co., 150 Pa. 386.

[6] Steinbrunner v. Pittsburg, etc., Rwy. Co., 146 Pa. 504.

[7] Third Ward Election District Case, 5 North. 193.

[8] Rauch v. Commonwealth, 75 Pa. 490; Kilpatrick v. Com., 31 Pa. 198.

will take notice of whatever ought to be generally known within the limits of their jurisdiction is too vague to furnish any available criterion. In certiorari to the justice to review a conviction for fishing in a trout stream, the court will not take notice, the record not averring, that the stream whence the defendant took the fish is a trout stream.[1] That benzine is of a like nature with camphene or spirit gas will not be known without evidence, in the trial of an action on a fire policy, in which the defense is that, in violation of its prohibition of the use of "camphene, spirit gas or any burning fluid or chemical oils," the defendant used benzine for cleaning the machinery.[2] The court has no judicial knowledge that a conversation could not be conducted between two prisoners occupying different cells by means of the water closet pipes, and that they could not distinguish each other's voices.[3] The quarter sessions cannot take judicial notice that the person on trial has been previously convicted in it, for a similar offence, e. g. the sale of liquor in violation of law, for the purpose of imposing an increased penalty for a second offence. The indictment must allege, and the evidence must prove, that the offence is the second one.[4] The court and jury take judicial notice of the coincidence of days of the month with days of the week; e. g. that August 13, 1865, was Sunday. No evidence upon the point need be offered. Hence it is proper for counsel for the defendant, in his closing speech, for the first time to call the attention of the jury to the coincidence, for the purpose of contradicting a witness for the plaintiff, or for some other relevant purpose, and in so doing he may produce an almanac, without proving who constructed it, or showing the capability of the maker to produce a correct one.[5] The court, however, will refuse, on certiorari to a conviction for selling on Sunday, to judicially notice that the day of the month on which the complaint before the justice alleges that the sale was made, was a Sunday, the complaint not averring that it was.[6] A note falling due Nov. 2nd, 1897, was protested on the next day. In an action against the endorser the referee properly took judicial notice that the second day of November was the first Tuesday after the first Monday of November, and that it was an election day, and consequently, under the act of June 23d, 1897, a legal holiday.[7]

LAWS OF THE STATE.

The public laws of the state, of whose government the court is an

[1] Commonwealth v. Clauss, 18 Pa. C. C. 381.

[2] Mears v. Humboldt Ins. Co., 92 Pa. 15.

[3] Brown v. Commonwealth, 76 Pa. 319.

[4] Rauch v. Commonwealth, 78 Pa. 490.

[5] Wilson v. Vanleer, 127 Pa. 371.

[6] Commonwealth v. Gelbert, 170 Pa. 426. The almanac could not be resorted to to sustain the conviction.

[7] Bank v. Arnold, 7 North. 281; 6 Lack. News, 210.

organ, are taken notice of by it, without proof, and the fact that a law is applicable only to a part of the state does not make it other than public. The act e. g. of April 14th, 1851, penalizing the sale of liquor on Sunday in Allegheny county, is one which all the judges in that county are bound to know.[1] An act incorporating and regulating the affairs of the Central poor district of Luzerne county, a district composed of the city of Wilkes-Barre, six townships and fourteen boroughs, is a public act of the provisions of which the court of common pleas of that county will take judicial notice, though they are not set forth in the pleadings or proven.[2] The court of a county in which a city is located, judicially notices the special act of assembly incorporating the city, and that it has never been repealed.[3]

PRIVATE ACTS.

Of private acts the courts do not take judicial notice. Like other facts, they must be pleaded and proven. The court would not, *ex pectore suo*, apply e. g. the act of April 13th, 1845, which directs that no loan to the Philadelphia & Reading Railroad Co. shall be deemed usurious because of the lender's reserving more than six per cent. interest.[4] A special legislative charter of a state bank is a private act, and the court will not judicially notice the fact that it allows that bank to reserve, upon discounts, more than six per cent. interest.[5] An act giving authority to the Philadelphia & Reading Railroad Co. to guarantee bonds of the Philadelphia & Reading Coal and Iron Company, being a private act, a plaintiff suing upon the guarantee must prove the act.[6] The act authorizing the survey of the reserved tract on the banks of the Allegheny river, which is now the site of the city of Allegheny, is a private act which the court is not bound to apply in litigation unless it is offered and produced by counsel. Even if there has been a different usage so far as this reserved tract is concerned, such usage applies not to controversies concerning land not held under such survey.[7] Under the special acts of March 18th, 1848, and January 27th, 1852, appointing commissioners to build a bridge over the Clarion river, and authorizing them to be paid from the county treasury, the court, in an application for a mandamus to the county commissioners to compel them to adjust the accounts of the

[1] Van Swartow v. Commonwealth, 24 Pa. 131.

[2] Commonwealth v. McAndrews, 8 Kulp 335.

[3] Monongahela City v. Monongahela Electric Light Co., 12 Pa. C. C. 529.

[4] Handy v. Phila. & R. R. R., 1 Phila. 31.

[5] First National Bank of Clarion v. Gruber, 87 Pa. 468.

[6] Timlow v. Phila. & R. R. R., 99 P. 284.

[7] City of Allegheny v. Nelson, 25 Pa. 332. The City of Allegheny being defendant in an ejectment for an island in the river opposite the reserved tract, but not a part thereof, the court will not notice the act in order to discover that it contains authority to survey the river and islands.

bridge commissioners, and to draw their order upon the county treasurer, it being shown that these acts had been repealed by the act of February 4th, 1853, will not take judicial notice that a later act, at the same session, repealed the repealing act, the pleading not alleging this later act.[1]

An act is said to be private when it operates only upon particular persons and private concerns, and has no reference to the general community.[2]

ORDINANCES.

Probably the ordinances of a city or borough must be proven in any trial within the county where it lies if such ordinances become relevant. On the review, by certiorari, of a judgment of a justice of the peace, or other magistrate, founded on such an ordinance, it is held that his record must set forth the ordinance by date or number or other identifying note. The court will not supply the ordinance from its judicial knowledge[3], even though it be sitting in the city or borough, the breach of whose ordinance is in question.[4] A return to a mandamus that relies on an ordinance, must aver it like any other matter of fact, and fully set forth its terms, so that the court may decide on its effect.[5]

FEDERAL LEGISLATION.

The state courts take judicial notice of federal statutes, and of officers appointed in pursuance thereof, and of their functions. They know e. g. that Congress has legislated upon the subject of navigation on inter-state rivers, and what the provisions of its law are;[6] that under the internal revenue acts there are collectors and deputy collectors, and that these have certain duties;[7] that during the war of secession there were provost marshals and other mustering officers who had authority to issue certificates of the mustering in of certain men to the credit of certain townships; that there was a war department and a chief mustering officer therein, who could issue certificates as to the mustering in of men to the credit of specified localities.[8]

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[1] Commonwealth *ex. relat.* Packer v. Commissioners, Dig. V. (Vale).

[2] Timlow v. Phila. & R. R. R., 99 Pa. 284.

[3] City *ex relat.* Reichenbach v. Cowen, 13 W. N. C. 468; Manayunk v. Davis, 2 Pars. 289; Fraeley v. Sparks, 2 Pars. 232.

[4] York City v. Miller, 11 York 138; Lancaster City v. Hirsh, 1 Lanc. L. R. 209; Commonwealth v. Chittenden, 13 Pa. C. C. 362.

[5] Commonwealth v. Chittenden, 13 Pa. C. C. 362; Stroudsburg Borough v. Brown, 11 Pa. C. C. 272.

[6] Flanigan v. Washington Ins. Co., 7 Pa. 306.

[7] Lerch v. Snyder, 112 Pa. 161.

[8] Chapman Township v. Herrold, 58 Pa. 106.

LAWS OF OTHER COUNTRIES.

The laws of other nations are, like other facts, to be alleged and proven by litigants to whose pretensions they are relevant. The courts will know neither of their existence, nor of their import, in the absence of proper proof. The mode of proving foreign laws will be elsewhere considered.

LAWS OF OTHER STATES.

The states of the Union are, for many purposes, foreign to each other. It is not incumbent on the judges of one of them to know the laws of another, but they must be proved as facts.[1] A peculiar exception to this principle has, however, obtained recognition. It has been held that when the case in a state court presents the question what faith and credit should be given in it to the acts, records and judicial proceedings of another state, since, on appeal to the Supreme Court of the United States, that court would take judicial notice of the law of the other state, it is incumbent on the state court to take the same judicial notice: "A judgment of this court," says Woodward, J., "adverse to the right arising out of the federal constitution and legislation, would be reviewable in the Supreme Court of the United States, and there the states of the confederacy are not regarded as foreign states, whose laws and usages must be proved, but as domestic institutions, whose laws are to be noticed without pleading or proof. It would be a very imperfect and discordant administration of the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it follows that in questions of this sort we should take notice of the local laws of a sister state in the same manner the Supreme Court of the United States would do on a writ of error to our judgment."[2] Accordingly, on an action on a judgment of another state, the courts of Pennsylvania, in order to give it here the same faith and credit that it would have in that state, will take judicial notice of its being treated there as conclusive upon the merits.[3] So far as the conclusiveness of the judgment in the original state depends upon the service of the writ, the courts of Pennsylvania will notice the law of that state with regard to the service of the writ and the sheriff's return of service.[4] Congress having directed that the judgment of another state may be proven by the cer-

[1] Musser v. Stouffer, 178 Pa. 99, 192 Pa. 398; Flanigan v. Washington Ins. Co., 7 Pa. 306; Hanley v. Donoghue, 116 U. S. 1.

[2] State of Ohio v. Hinchman, 27 Pa. 479. In Hanley v. Donoghue, 116 U. S. 1, it is said that this is a mistake. In the Supreme Court of the United States, what was matter of law in the court below, remains matter of law, and what was matter of fact in the court below, remains matter of fact.

[3] Baxley v. Linah. 16 Pa. 241; Evans v. Tatem, 9 S. & R. 252.

[4] Jones v. Quaker City Mut. Fire Ins. Co., 9 Dist. 213.

tificate of the clerk, and by that of the judge as to the clerk's being such, a copy of the record, certified to by J. B. Warren, probate judge and *ex officio* clerk, to whose being clerk, there was a certificate by J. B. Warren, probate judge, will be adjudged receivable evidence, if the law of the state whence the record comes, provides that the probate judge shall be empowered to perform the duties of clerks of their own courts. Of this law the court of Pennsylvania will take judicial notice.[1]

THE MARYLAND BOUNDARY.

The Pennsylvania courts will, in litigation concerning lands lying within the strip between the boundary originally claimed by Lord Baltimore, and that ultimately recognized by Maryland and Pennsylvania, take judicial notice of the agreement of May 10th, 1732, between Lord Baltimore and the proprietaries of Pennsylvania, of the filing of a bill in chancery in England by William Penn in 1750 to compel specific performance of this agreement, of a new agreement made July 4th, 1760, in pursuance of the decree of the court in this case; of the fact that the line fixed by this new agreement was run in 1768, and of the approval of this line (Mason and Dixon's) by the king in council. The agreement of 1760 being lost, judicial notice was taken of its existence, as recognized in proclamations of the proprietaries, as proved by Proud's history of the State of Pennsylvania, by reference to it in Ross v. Cutshall, 1 Binn. 399.[2] "It has passed," says Coulter, J., "into the public history of the state and the chronicles of its laws, and must be regarded by the courts, who are bound to take notice as well of the foundation as the superstructure of the laws."[3] The courts take notice also of the charter of William Penn, and apparently of the habits of the Maryland authorities with regard to making titles to land in the border between Maryland and Pennsylvania.

LAWS OF OTHER STATES RECOGNIZED BY CONGRESS.

If a constitutional act of Congress authorizes in Pennsylvania an act done in conformity with the law of some other state, though it would contravene the law of Pennsylvania, it will be the duty of the court to take notice of this alien law in any litigation founded on the act thus done. In an action on a policy of marine insurance, the defense was that the master of the plaintiff's ship had not employed a pilot licensed by this state. The act of Congress provided that the master of a vessel coming into any port situate on the waters which are the boundaries between two states, might employ any pilot duly licensed by the

[1] State of Ohio v. Hinchman, 27 Pa. 479.

[2] In this case this agreement was admitted in evidence without proof or acknowledgment, being considered a state paper known to the courts of justice.

[3] Thomas v. Stigers, 5 Pa. 480.

laws of either state. The court, under this act, could take judicial notice of the pilot laws of New Jersey or Delaware. "I am at a loss for a reason," says Rogers, J., "why we are not bound to notice the acts of the respective legislatures (of New Jersey and Delaware) in the same manner as if incorporated *verbatim et literatim* into the body of the act (of Congress)."[1]

THE COURTS WHICH TAKE JUDICIAL NOTICE.

Courts of all grades may take judicial notice of general laws. The Supreme Court occasionally uses authorities that were not used in the trial court, e. g. the Encyclopedia Brittanica.[2] In Cope v. Cordova[3] the writer of the opinion states that he had taken pains to ascertain the opinion and practice of the Philadelphia merchants as to when goods brought to port by a ship were so far delivered to the consignee as to relieve the carrier of further liability, and that he had found the understanding to be that the carrier's liability ended when the goods were deposited upon the wharf, though they were not then, nor later, received by the consignee. Whatever sources of information, e. g. statutes or decisions, the trial court might have employed, though it did not employ them, the appellate court may employ. On the other hand, what the trial court was not bound to judicially notice, e. g. a private act of assembly, the appellate court will not notice on the appeal.[4] If the trial court, recognizing a law of nature, excludes evidence that would establish a fact in contravention of it, the Supreme Court will take notice of the same law and affirm the act of the lower court.[5] If the appellate court believed the opinion of the lower court erroneous, or that the fact judicially noticed should not have been, it would reverse the judgment. A referee,[6] master, auditor, may take judicial notice when an ordinary judge can.

THE JURY.

Of many facts the jury may take judicial notice. The law must, perhaps, be received from the court, and possibly the jurors would be bound to accept any fact, foreign law or other, from the court. There is a sphere in which, without guidance from the court, it applies its own knowledge to the solution of the problems before it. It knows the alternation of the seasons, and of day and night, the properties of the commonly known elements, the characteristics of the various ages of man, whether things can be seen without light, or at great dis-

[1] Flanigan v. Washington Ins. Co., 7 Pa. 306.
[2] Steinbrunner v. Pittsburg, Etc., R'way Co., 146 Pa. 504.
[3] 1 R. 203.
[4] First National Bank of Clarion v. Gruber, 87 Pa. 468.
[5] Cauley v. Pittsburg, Cincinnati & St. Louis Railway Co., 98 Pa. 498.
[6] Bank v. Arnold, 7 North 281, 6 Lack. News 210.

tances, or through intervening solid bodies, etc. In Pearce v. Langfit[1] the court told the jury that Pittsburg was only 444 miles from New York, and that a train leaving the latter, in one day, would reach the former on the following day. Perhaps the jury could, without information from the court, have applied its own knowledge of the subject. The jury may, in 1888, appeal to their own knowledge that the 13th August, 1865, fell upon Sunday, refreshing their memory, if necessary, by an almanac, and the court may not deny to counsel, in his address to them, the right to cite the almanac, although it had not been offered in evidence.[2] The ordinary science, like the ordinary language and customs of every day life, is presumed in the trial of causes, to be known to both court and jury, and they make use of it in weighing the evidence submitted to them and in estimating the importance of the ascertained facts.[3]

PROCEEDINGS IN WHICH JUDICIAL NOTICE IS TAKEN.

The admissibleness of evidence may depend on some fact or law. In passing on its admission the court may judicially notice the fact or law.[4] There may be a demurrer to the plea or declaration, the soundness of which depends on some law or fact. In ruling upon it the court may take judicial notice.[5] The value of a defense, e. g. that usurious interest has been charged by a national bank, may depend on some fact, e. g. on the authority of any state bank to charge the rate in question. The court may. be appealed to to judicially notice that fact.[6] The judicial notice can be taken in criminal as well as in civil cases, e. g. in trials for murder[7] or for selling liquor without license,[8] and in equity cases no less than in cases at law.[9] A borough filing a bill to require the defendant, a gas company, to restore the

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[1] 101 Pa. 507.

[2] Wilson v. Vanleer, 127 Pa. 371.

[3] McCandless v. McWha, 25 Pa. 95.

[4] State of Ohio v. Hinchman, 27 Pa. 479; Udderzook v. Commonwealth, 76 Pa. 340. The action being on a recognizance taken before a magistrate, the trial court may judicially know that he was a magistrate. Fox v. Commonwealth, 81½ Pa. 511.

[5] Flanigan v. Washington Ins. Co., 7 Pa. 306; Third Ward election district case, 5 North. 193. On demurrer, the return to a mandamus will be held insufficient, whose validity rests on an ordinance of the city, unless its terms be specifically set forth. A mere reference to it is not enough. Commonwealth v. Chittenden, 13 Pa. C. C. 362.

[6] First National Bank of Clarion v. Gruber, 87 Pa. 468; City of Allegheny v. Nelson, 25 Pa. 332.

[7] Udderzood v. Commonwealth, 76 Pa. 340. The accuracy of the photographic process.

[8] Rauch v. Commonwealth, 78 Pa. 490.

[9] Sandy Lake Borough v. Sandy Lake & Stoneboro Gas Co., 16 Super. 234.

connection between the street gas lamps and its pipes, the court took judicial notice of the plaintiff's corporate existence.

AFFIDAVITS OF DEFENSE.

The sufficiency of an affidavit of defense may depend on some statute, of which, if general, the court can and will take judicial notice. If the law, as known to the court, makes the plaintiff's claim *prima facie* valid, and facts showing it to be invalid are not developed by the affidavit, judgment will be given for the plaintiff. The law, e. g. requiring a tax collector to pay the taxes to the Central poor district of Luzerne county, an affidavit averring payment of the taxes to McK., a person authorized by the district to receive them, but stating no facts from which this authority could be deduced, will be adjudged insufficient.[1] If the defense exhibited in the affidavit is alleged to be abortive because of an act of assembly, the court will take notice of this act only if public. If it is private, it must be proved like any fact at the trial, and the affidavit will therefore be sufficient to prevent judgment before the jury trial.[2]

ON CERTIORARI.

On a certiorari to a justice, the court may reverse the judgment for want of jurisdiction of the person. It may investigate the mode of service, and in doing so, may avail itself of facts judicially known to it; the fact, e. g. that there are 16 wards in Reading (the residence of the defendant), and therefore 16 constables, and the fact that Kutztown, to the constable of which the summons was issued for service, is 16 miles from Reading.[3] The court will take notice of general laws, and of local laws not private in character, in reviewing the judgment, although such laws are not recited in the record,[4] but will decline to notice private laws, and ordinances, not mentioned and indentified in the record by their title, number and substance.[5]

WILLIAM TRICKETT.

[1] Commonwealth v. McAndrews, 8 Kulp 335.

[2] Timlow v. Phila. & R. R. R., 99 Pa. 289; Handy v. Phila. & R. R. R., 1 Phila. 31. This is so, though at the trial the proof of the special act would be addressed exclusively to the court.

[3] Fire Ins. Co. v. Keller, 9 Dist. 61.

[4] Van Swartow v. Commonwealth, 24 Pa, 131. Selling liquor on Sunday in Allegheny county.

[5] York City v. Miller, 11 York 138; Lancaster City v. Hirsh, 1 Lanc. L. R. 209.

MOOT COURT.

WILKES vs. GILKESON.

Executors—Sale of trust—Where all the cestuis que trust, being sui juris, arrange for the purchase of the executorship, the sale is valid.

STATEMENT OF THE CASE.

Wilkes was the executor of the estate of John Gilkeson, deceased. An agreement was made between him and the beneficiaries of the estate, which stipulated that if he would resign from the executorship the heirs would pay him $1,000. Wilkes resigned, and accepted a note to the extent of $1,000. When the same became due he demanded payment, and was refused.

This is an action to recover the amount of the note.

Carey for the plaintiff.

A contract will not be avoided unless it will directly facilitate an illegal transaction; to render it void, the connection must not be remote. DeGroot v. Van Duyer, 17 Wend. 170; Hind v. Holdship, 2 Watts 104.

Tyler for the defendant.

An agreement made in consideration of plaintiff's relinquishing his right to administration upon the estate of an intestate in favor of defendant, is against public policy, and cannot be enforced by action. Bowers v. Bowers, 26 Pa. 74.

OPINION OF THE COURT.

McNEAL, J.:—This is an action of assumpsit, founded upon an agreement between plaintiff, an executor, and the beneficiaries of an estate, which stipulated that if he would resign from the executorship the heirs would pay him $1,000. Plaintiff resigned, and accepted note. When same became due he demanded payment, and was refused.

The only question presented for our consideration is the legality of the object for which this note was given; and as that question has been decided, we feel constrained to abide by precedent.

In Bowers v. Bowers, 26 Pa. 74, it was held that an agreement made in consideration of the plaintiff relinquishing his right to administration upon the estate of an intestate in favor of the defendant, is against public policy, and cannot be enforced by action.

Justice Woodward said: "The question here is not upon the legality of the administration, but upon the sufficiency of the consideration for the defendant's promise, and, as that in its very nature endangered the purity of the trust, the law will not sanction it."

If an administrator cannot legally traffic in the office of administrator, we are of opinion that the argument is equally applicable to the office of executor; the only difference being, that in the former case the confidence is reposed by law, and in the latter by the testator.

"Though a person named in a will as executor has the right to renounce, he cannot use the right for his individual gain. The reason being that if agreements of this nature are to be enforced, then, surely, testators may well doubt, not only as to who will carry out their wills, but whether they will be carried out at all. The door would be thrown wide open to fraud and corruption on the part of designing men and intriguing descendants, and imposition upon confiding testators." Staunton v. Parker, 19 Hun. 55.

A trust is regarded as a matter of honor and conscience, and not to be undertaken with mercenary views. Manning v. Manning, 1 Johns. Ch. 527. In the case last cited, the Chancellor, speaking of compensation to trustees in general, observed, "that if the rule applied with more force and propriety to one kind of trust than another, it was that of an executor, who gives no security, and who is selected by reason of some special and sacred confidence resulting from ties of kindred or friendship, and charged by the testator in his dying moments with interests of the greatest human concern, and which the testator is on the eve of renouncing forever."

It is well settled in Pennsylvania that the law will not assist either party to an illegal contract, and the parties being in *pari delicto*, it will leave them where it finds them; hence, if the contract be still executory, as in this case, it will not enforce it.

Therefore, the note sued on in this case, and the agreement upon which it is based, must be taken together and viewed as one instrument. As they amounted to a traffic in the office of executor, they are void as against public policy.

This seems to be well settled by the authorities.

Judgment is accordingly entered for the defendant.

OPINION OF THE SUPREME COURT.

We are unable to approve the judgment of the learned court below.

Wilkes was the executor of the estate of John Gilkeson. The nature of his duties is not ascertained. Whatever they were, they were to be performed for the "beneficiaries." It does not appear that any of these were *non sui juris*. For some reason, they *all* desired Wilkes to cease to be executor. Why, then, should they not have their way, if they could not induce Wilkes to resign?

It is true that he was a trustee. But the beneficiaries might have extinguished the trust. They could have united in a release to him, or in a sale to him of their interests as *cestuis que trust*, and if made with open eyes, this release or sale would have been valid. The trust exists for them. Why, then, can they not put an end to it? Or why can they not, with the consent of the trustee, cause it to devolve upon another?

Had the contract been by *some* of the beneficiaries only, we can understand how it would have been objectionable. It would have been a bargain, having in view the loss by the non-joining beneficiaries of the services of a trustee, whom, probably, they desired to continue to act. But, if *cestuis que trust* can sell their interests to another, and even to the trustee, it is indeed impossible to see why they cannot do the lesser thing, why they cannot effect a change in the trusteeship.

It does not appear that there are creditors, where interests ought not to be disposable by the next of kin, and in a sense, creditors would be comprehended by the word "beneficiaries."

If the objection to the contract sued on is, that there was no sufficient consideration for the promise to pay $1,000, we do not think it valid. It does not appear that Wilkes had so conducted himself that, on application to the Orphans' Court, he would probably have been removed from the executorship; and, if he had, he still had the right to resist the effort to remove him, a right which had an appreciable value. He gives up a position which he might have retained, and in which he might have earned commissions, or gained experience, or made a reputation for efficiency, on the promise to pay him $1,000. We think he furnishes sufficient consideration for this promise.

The judgment of the court below was evidently produced by its deference to the case of Bowers v. Bowers, 26 Pa. 74. George Bowers, apparently, had the right to administer on the estate of the deceased. William Bowers promised to pay money to George if he, George, would renounce his own right, and procure the issue of letters to William. It does not appear that George and William were the only persons interested in the estate. Had they been, there is no conceivable reason for refusing to allow them to make the contract. If there were other beneficiaries, it would be pernicious to allow one of them, for a peculiar consideration, to use his influence to procure the appointment, as administrator, of one who, possibly, ought not to be appointed, and whose appointment would be deprecated by the others. While those others did not have a right that the administration should be conducted by George against his will, they possibly had a right that he should not be induced to refuse it by pecuniary reward. At all events, they had a right that he should not, by a peculiar pecuniary reward, be induced to exert his influence to procure the appointment of William. As Woodward, J., properly says, "But if administration of a decedent's estate be not an office, it is strictly a trust, and as such is not to be purchased for a price, which creates in the trustee an interest adverse to the *cestui que trust.*" But, if all the *cestuis que trust, being sui juris,* had arranged for the purchase, why should they not have been allowed to do so?

White's Estate, 4 Kulp. 164, is a mere echo of Bowers v. Bowers. One of the beneficiaries, the widow, contracted to renounce her right to administer in favor of Wheeler, on his promising to make no charges for his services, and, apparently, the court held that the contract did not preclude his charging in his account, and being allowed for, commissions There were doubtless other beneficiaries than the widow who were interested in the estate.

Agreements whereby the administrator agrees with beneficiaries not to charge any commission, or more than a named sum, have been upheld. Koch's Estate, 148 Pa. 159; 7 P. & L. Dig. 12095. Such agreements need a consideration. Doubtless the consideration is, that in consequence of the agreement, the party is permitted to be administrator. The proposition is too absolute, that no contract between the *cestuis que trust* and X, contemplating the constituting of him trustee, would be valid because a sale of the trusteeship.

We are of opinion that, on the facts proven, the plaintiff should have been permitted to recover.

Judgment reversed.

WILKES vs. HENDERSON.

Evidence—Competency of witnesses—Religious belief no bar—Credibility of witnesses peculiarly within province of jury.

STATEMENT OF THE CASE.

A statute provided that no witness should be deemed incompetent on account of his religious belief. A witness having testified that he had no *fixed* belief in a Supreme Being, or in a future state of rewards and penalties, the court charged that his statements might be considered as affecting his credibility. This is an appeal.

Laub for appellant.

The jury must judge of whether the credibility of the witness is affected by his disbelief of the Christian religion. Blair & Hutton v. Seaver, 26 Pa. 274; Cubbinson v. McCreary, 2 W. & S. 263.

The credibility of witnesses is peculiarly within the province of the jury. Heister v. Lynch, 1 Yeates 108; Kaufman v. Abeles, 11 Pa. Sup. 616; McClain v. Commonwealth, 99 Pa. 86; Horlow & Co. v. Borough of Homestead, 194 Pa. 57.

Undue emphasis in a charge for either side is error. McCabe v. Philadelphia, 12 Superior 383.

McAlee for appellee.

The competency of a witness as to questions of both fact and law is to be determined by the court. Marion Semple v. Executors of James Callery, 184 Pa. 95.

Not error for judge to charge that the want of belief by witness might be considered as affecting his credibility. Cubbinson v. McCreary, 2 W. & S. 263; Semple v. Callery, 184 Pa. 95.

OPINION OF THE SUPERIOR COURT.

SETZER, J. :—This case comes to this court on an appeal from the judgment of the lower court. A statute provided that no witness should be deemed incompetent on account of his religious belief.

The tendency of modern times, by the courts and in legislatures, is towards liberalizing the rule, and in many jurisdictions incompetency for a want of religious belief has been abolished. Under this statute no religious belief is required to qualify a citizen to take an oath, and no citizen can be excused from taking an oath or affirmation because of his religious belief or unbelief. Now, as before the adoption of this statute, oaths are to be taken and affirmations made whenever required by law, but the right to take such oath or make such affirmation cannot be denied to any citizen.

The obvious meaning of the statute was, that whatever civil rights, privileges or capacities belong to and are enjoyed by citizens generally shall not be taken from or denied to any person on account of his religious belief. It is a declaration of an absolute equality, which is violated when one class of citizens is held to have a civil capacity to testify in a court of justice because they entertain a certain opinion in regard to religion, while another class is denied to possess that capacity by reason of their unbelief.

The effect of the statute is, that there no longer exists any test or qualification in respect to religious opinion which affects the capacity as a witness in a court of justice.

While not questioning in the least the expediency of this statute, we are confronted by a provision in our State Constitution, which provides that "No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth."

Within the clause, "place of trust," is comprehended those who are witnesses in a court of justice, and declares that, as such, they must, so far as human judgment can perceive, possess a conscience alive to the conviction of accountability to a higher power than human law.

Since, under the statute, any witness is competent to testify, irrespective of his religious belief, it is in direct contradiction to the constitutional provision. And as that fact invalidates the statute, we are met with the question, Did the lower court act properly under the provision of the Constitution? We are then left to decide the case according to the rules of evidence existing before the statute was passed.

Witness should be allowed to state his present religious belief at the time of the trial. Cubbinson v. McCreary, 2 W. & S. 262. This being

done, the witness replied that he had no fixed belief in God and a future state of rewards and penalties.

The test of a witness's competency on the ground of religious belief is, whether he believes in the existence of God, who will punish him if he swears falsely. A belief in a future state of rewards and punishments is not essential to the competency of a witness—Blair v. Hutton, 26 Pa. 274, because a future state of rewards and punishments implies an accountability after death, which is not required. Within the rule are comprehended those who believe future punishments not to be eternal. All persons who believe in the existence of a God and in future punishments by Him, either in this world or in that to come, are competent witnesses. It is not enough that he may feel bound to tell the truth for the good of society, or through fear of punishment for perjury if he testifies falsely. The rule is the same in civil as in criminal cases.

The witness said he had no "fixed" belief. The Standard Dictionary defines "fixed" as of an established, unchanging and permanent character. The fact that his belief was not permanent would not imply that he had no belief whatever.

The competency of witnesses is a question of both fact and law for the determination of the court. Semple v. Callery, 184 Pa. 95. We think the court committed no error in holding him competent.

The credibility of a witness is a question for the jury. Harlow v. Homestead, 194 Pa. 57. Incompetency is the exception, and the presumption is in favor of a witness being competent. Allen's Estate, 207 Pa. 325. And although the court held the witness competent, his statements may still have created a doubt in the mind of the learned court; and where the incompetency of a witness for defects in religious belief is doubtful, not positively shown or clearly established, the rule is to refer the testimony on the point to the jury on the question of credibility. Com. v. Winnemore, 2 Brewster 378. All the circumstances connected with a witness which might tend to affect his credibility may be shown and referred to the jury to determine the weight and credit to be given to his testimony. Simmons v. Penna. R. R. Co., 199 Pa. 232. Trickett on Impeachment of Witnesses has said, that a defect of religious belief may be a ground for lessening the credibility of a witness, and it follows, therefore, that the learned court below did not err in simply instructing the jury of their privilege. The charge was not binding, neither was the question taken from them, and the judgment of the lower court must be affirmed.

OPINION OF THE SUPREME COURT.

We are not required to determine whether the witness could have been obliged to say whether he had any fixed belief in a Supreme Being or in future rewards and punishments. If he made the statement in answer to questions, it does not appear that any objection to the questions was made. Had there been, we might have been compelled to hold that the court committed an error. We are not prepared to admit that a witness may be compelled to expose his religious creedlessness, even for the purpose of lessening his credibility.

The statute destroys the incompetency reposing on defect of religion. But it does not, nor could it effectually, require jurors to attach the same weight to the testimony of a disbeliever as to that of a believer. In general, all matters indicative, in the opinion of the jury, of believeableness or of unbelieveableness, may be considered by it in appraising the testimony. Whether rightly or wrongly, the fact transpired before the court

that the witness did not share the prevalent opinion concerning God and reward. That a fixed belief of these august facts furnishes a motive to tell the truth, is unquestionable; and of two men, on all other respects equally worthy of credit, it would not be irrational for a jury to think that that one who believed in religion was more credible than the other who disbelieved, or did not believe in it.

We are not prepared to concede to the learned court below that the statute, rendering irreligious persons competent to testify, is in contradiction of the constitutional provision, "that no person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth." A witness does not hold an office of trust or profit. Besides, what this constitutional clause does is, not to forbid persons who do not acknowledge God, etc., to hold any office, but to forbid the exclusion from office of any who do. No limit is put to the liberalization of the law, but only to its illiberalizing.

Judgment affirmed.

COMMONWEALTH vs. SMITH.

Criminal procedure—Jury—Constitutional law—Equal protection of the laws—XIVth Amendment, Constitution of the United States.

STATEMENT OF THE CASE.

The jury commissioners, appointed in a county where a fourth of the population were negroes, were all white men. On the trial of Smith, a colored man, it appeared that, of the grand and petit jury lists drawn for the trial of the defendant, only one name was that of a negro, and he was either dead or had left the county years before.

Smith was convicted, and appealed on the ground that he was deprived of the equal protection of the laws.

Barnhart for the appellant.

Heller for the Commonwealth.

OPINION OF THE SUPERIOR COURT.

ACKER, J.:—The appellant claims that he was deprived of the equal protection of the laws. He bases his claims on two grounds, first, that from the county where a fourth of the population were colored, the name of but one negro was on the list of jurymen; secondly, that the negro whose name was on the list was either dead, or had left the county years before.

The law in Pennsylvania on the latter point seems very well settled, both by Acts of the Legislature and by judicial decisions: Section 113, of Act of April, 1834, P. L. 39, requiring forty-eight jurors to be summoned and returned as petit jurors in the Oyer and Terminer Court, must be read in connection with Sections 118, 119 and 125 of said act. Section 113 refers to the *venire*, and the manifest meaning of it is, that the *venire* shall require that at least forty-eight jurors shall be drawn. Section 118 provides that so many persons shall be drawn as shall be required by the writ of *venire*. By Section 119 the slips containing the names of the persons removed or dead are to be destroyed and other names to be drawn in their stead, until the panels are complete. This, Judge Paxson says, of course means where the death or removal of the persons whose names are drawn *are known to the sheriff and commissioners a*$_t$

the time of drawing. In this case there was *no* evidence that the death or removal years before of the negro was known to the sheriff or commissioners, and the presumption is that they had no such knowledge. Section 125 provides that the sheriff shall summon, at least ten days before the return day of the *venire*, the persons whose attendance shall be required. Taken together, these provisions of the Act of 1834 do not require that more than forty-eight names shall be drawn from the wheel, and that, in absence of any knowledge at the time that any of the persons whose names are so drawn are dead or removed, the sheriff shall summon so many thereof as can be found within the county. This has been the practice generally throughout the State. Rolland v. Com., 82 Pa. 306; also consistent with Foust v. Com., 9 Casey 338. In that case forty-eight persons were summoned, but one of them was disqualified by reason of not residing within the county, and being an alien. He was, therefore, not a juror, and of no more service than the dead negro, returned by the sheriff in this case as "dead."

It is not a right of a defendant to have forty-eight jurors in actual attendance. If all are summoned and attend, the court may excuse some of them, and this cannot be assigned for error. Nor is the defendant prejudiced thereby. It does not impair his right of challenge. He has a right to his peremptory challenges, and as many more as he can show cause for, while special *venires* are provided by law in case the panel should be exhausted. Therefore, it seems well settled that the sheriff and jury commissioners need not return forty-eight living men. The question may well be asked, how many less will do?

The presumption is, that the sheriff and jury commissioners complied with the law, including the Acts of 1867 and 1874. The fact that the man had been dead for years is not evidence from which it would necessarily follow that the jury commissioners violated the Act of 1874, and left old names in the wheel for years, instead of meeting thirty days before court, etc. On the contrary, the previously cited cases show clearly that the mere mistake of getting the name of a dead man on the list cannot be assigned for error.

The fact that the name of but one negro was on the list is immaterial, though a fourth of the entire population were negroes. Our laws provide certain prescribed rules for selecting and making out the list of jurors, and if those laws are not violated there is no room for argument. In those said laws regarding selection of jurors we find no reference made to race or color, providing the selected juror be a voter.

The jury commissioners and the judge, alternately selecting names from the whole qualified electors of the county, may use the list made up by themselves of persons whom they decree sober, intelligent and judicious, and this although the information on which their judgment is based is obtained from others. K. v. M. P. G. R. R., 163 Pa. 521; also Act of April 10, 1867. There is no evidence that these laws were not complied with. The fact that but one negro was chosen is certainly not evidence to the contrary. It might as well be said, because three-fourths of a population have hair on their heads, a jury composed of bald-heads would be disqualified, which, of course, would be ridiculous. There is no law which gives a negro the privilege of being tried by a negro jury, or a proportionate part, any more than it would give a German the right to be tried by a German jury.

Judgment affirmed.

OPINION OF THE SUPREME COURT.

A colored man has been tried and convicted of crime by a jury composed entirely of white men. He alleges that had he been a white man, or had the jury been composed of colored men, the result might have been different. That there were the names of some negroes in the jury wheel is clear, for the name of one negro was drawn, though he did not serve. The appellant's idea must, therefore, be that the mere absence of colored men from the jury by which he was tried constituted a deprivation of the equal protection of the laws.

The Fourteenth Amendment of the Constitution of the United States ordains that "no State shall deny to any person within its jurisdiction the equal protection of the laws." The history of the Amendment, and the circumstances of its adoption, make it clear that its purpose was to confer on the lately emancipated negroes the protection of the Federal Government, and to guarantee to them an immunity from the enactment or enforcement of laws which should discriminate against them on the ground of their race and color.

The right of trial by jury has been called the palladium of our liberties. Such a mode of trial is intended as a protection for the poor man against the great man, and a very essential part of this protection depends upon the composition of the juries. The jurors must be the peers or equals of the person whose rights are to be determined. If the defendant in a cause is a member of a class against whom a violent prejudice exists in a community, the judgment of a jury drawn from the other classes of that community will be swayed to a greater or less extent by this prejudice, and the defendant will be deprived of the full enjoyment of that protection which his neighbors enjoy. The grounds for such prejudice are multitudinous, and it is impracticable to provide against them all. If the prejudice is local, the difficulty may be remedied by a change of venue, but where it permeates the thought and feeling of the entire nation, as in the case of racial prejudices, this remedy is impracticable. Yet, in order that a negro shall not be denied the equal protection of the laws, he must be tried by men neither prejudiced against him nor in his favor. Can the spirit of the Amendment be enforced?

In Straeder v. West Virginia, 100 U. S. 303, a statute of West Virginia, passed in 1873, excluding all persons not of the white race from service as jurors, was held unconstitutional and void as offending the Fourteenth Amendment. The ground for the decision was the idea that the rights of negroes would not be fully protected by white juries, and not that the excluded juror had himself suffered a wrong.

In Virginia v. Rives. 100 U. S. 313, the court seems to have lost sight of the reason given for the prior decision, for it was held that a defendant has no legal right to a mixed jury, but only that in the selection of jurors a man should not be rejected simply on the ground of race or color. If, therefore, the jury commissioners can give any good reason for rejecting all the colored men in a community, the negro citizens who are unfortunate enough to be accused of crime must submit uncomplainingly to a trial by a white jury. It is submitted that it is but poor consolation to him, when he sees the hatred of the superior race in the eyes of every one of his judges, to be told that the jury commissioners were of the opinion that the negroes of the county were not as intelligent, experienced and morally scrupulous as their white neighbors, and, therefore, less fit for jury service. The prisoner is condemned by a prejudiced jury, and he, therefore, is not accorded that equal protection that the Amendment demands.

But, it may be urged, this act of the jury commissioners is not the act of the State, and the Amendment only forbids discrimination by the State. In Virginia v. Rives, *supra*, it is recognized that a State may exert her authority through different agencies. An act of discrimination committed by an executive or administrative officer is as much the act of the State as is the act of the Legislature or the judicial department. See also *Ex parte* Virginia, 100 U. S. 339. If, then, the test is the question of discrimination by the jury commissioners on the ground of race, the important question arises as to how the prisoner is to draw the actual ground of discrimination. He can show that no negro is serving on either the grand or the petit jury, and that one-fourth of the population is composed of negroes. Will this be presumed to be a mere coincidence, and that there was no discrimination, conscious or unconscious, on the ground of race? Or will it create the presumption of a discrimination on this ground? In Virginia v. Rives, *supra*, it was held that the mere absence of negroes from the jury does not show an illegal discrimination, since it is conceivable that the jurors may have been impartially selected.

In Neal v. Delaware, 103 U. S. 397, one Neal was tried and convicted of the capital offense of rape by a jury composed exclusively of white men. The court took judicial notice of the notorious fact that no colored citizen had ever been summoned to act as a juror in the State of Delaware. Its colored population exceeded 26,000 in a total population of less than 150,000. "These facts," said Justice Harlan, "presented a *prima facie* case of denial, by the officers charged with the selection of grand and petit jurors, of that equal protection which has been secured by the Constitution and laws of the United States. It was, we think, under all the circumstances, a violent presumption which the State court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience or moral integrity, to sit on juries."

The only ground for distinguishing this case from Virginia v. Rives, *supra*, lay in the fact that the accused in the later case had made an affidavit, on the motion to quash, that the exclusion had been on the ground of race. This fact, thought Chief Justice Waite, in a dissenting opinion, was insufficient ground for distinguishing the cases. In the later case of Smith v. Mississippi, 162 U. S. 592, Justice Harlan points out that in Neal v. Delaware, *supra*, no objection was made to the use of the affidavit of the prisoner as evidence, and it is only on this ground that Neal v. Delaware rests. The doctrine of Smith v. Mississippi, *supra*, is, that the fact of discrimination on the ground of color or race must be shown by the accused by distinct evidence, and he has no right to insist that the allegation should be taken as true simply because the facts recited in the motion to quash have been verified by his affidavit, in case such allegations are controverted by the attorney for the State. This doctrine is followed in Williams v. Mississippi, 170 U. S. 213, and in Carter v. Texas, 177 U. S. 442. The doctrine of Neal v. Delaware, *supra*, is reaffirmed in Gibson v. Mississippi, 162 U. S. 565, and in Carter v. Texas, *supra*.

The result of these decisions is both illogical and unsatisfactory. As Justice Field has pointed out in Neal v. Delaware, in a vigorous dissenting opinion, if it is true that a negro will be tried by a prejudiced jury,

if that jury is composed exclusively of white men, then there ought not to be any white men on the jury, for "that jury would not be an honest or fair one of which any of its members should be governed in his judgment by other considerations than the law and the evidence; and that decision would hardly be considered just which would be reached by a sort of compromise, in which the prejudices of one race were set off against the prejudices of the other." The latter idea seems to be the theory upon which the rule forbidding the exclusion of negroes on account of race rests. Logically followed, it would require every jury that tried a negro to be composed of six negroes and six white men. We have seen that it is not so followed.

Lastly, it is interesting to note, that while the Amendment forbids the denial to "any person" of the equal protection of the laws, the court holds that Chinamen, and other persons than negroes, may be excluded from juries because of their race. So women may be excluded because of their sex; infants, because of their age, and foreigners, because of their nationality. It cannot be said that there might not be a prejudice against these classes of a community as well as against negroes. Logic would therefore require that a woman have the chance of acquittal at the hands of a sympathetic jury of women, and that a boy should have the sympathies of a jury of his age. The Chinese in the far west are the object of general antipathy, more intense than that directed toward the negro in the South. Yet, it is said, the Amendment does not apply to these cases.

Judgment affirmed.

CAMPBELL vs. POWELL.

Equity—Embezzlement of bank funds—Agreement to stifle a criminal prosecution—Bill for appointment of a trustee.

STATEMENT OF THE CASE.

Campbell is an officer of the York Trust Company. The managers of the company accused Campbell of embezzlement, and threatened to prosecute him. It was agreed, however, that if Campbell would deposit $5,000 with one Powell, the threatened prosecution would not be made. This was done, and Powell has held the $5,000 for over a year. Campbell has repaid the York Trust Company, and has demanded a return of the $5,000 by Powell. Upon a refusal by Powell to pay, Campbell files a bill in equity, praying that Powell be declared a trustee, and that he be required to account for the $5,000.

Braddock for complainant.

Agreements connected with, but subsequent to, an unlawful transaction, are not void unless an integral part of the unlawful design. Armstrong v. Toler, 24 U. S. 258.

An agreement against policy of law is yet good as to parties. 7 Barr, 48; 13 S. & R., 224; 3 W. & S., 255.

If the consideration creating trust was illegal, trustee cannot set it up against *cestui que trust*. 1 U. S. Dig. 108.

Laub for respondent.

An agreement in consideration of stifling or compounding a criminal prosecution for a felony or a misdemeanor of a public nature is void. Riddle v. Hall, 99 Pa. 116.

The ninth section of the Criminal Procedure Act (Act of March 31, 1860) does not authorize the settlement of a prosecution for conspiracy to defraud a bank, or of one for embezzlement as a bank officer. Pearce v. Wilson, 111 Pa. 14.

When a bill, note or bond is but an instrument to execute an illegal contract, it is tainted by the illegality, and cannot be recovered. Morris Run Coal Co. v. The Barclay Coal Co., 68 Pa. 188.

OPINION OF THE COURT.

DAVIES, J. :—The consideration for the deposit of the $5,000 with Powell was, that the York Trust Company would not prosecute the complainant, Campbell, for embezzlement. It is elementary law, that an agreement in consideration of stifling or compounding a criminal prosecution or proceedings for a felony or a misdemeanor of a public nature is void. Riddle v. Hall, 99 Pa. 116. The court, in Pearce v. Wilson, 111 Pa. 14, said : "Embezzlement is only a misdemeanor, but yet it is a criminal offense to compound a prosecution for embezzlement." Any contract or transaction, the consideration of which, or any part thereof, is an agreement to compound a felony, or any misdemeanor, except when permitted by statute, is illegal. Am. & Eng. Encyc. 409. The ninth section of the Criminal Procedure Act (Act of March 31, 1860) does not authorize the settlement of a prosecution for conspiracy to defraud a bank, or of one for embezzlement as a bank officer. Pearce v. Wilson, 111 Pa. 14.

An agreement to stifle a criminal prosecution is illegal. Clark on Contracts, p. 428. The authorities above cited conclusively prove the contract in this case to be illegal.

No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. Where an illegal agreement has been executed in whole or in part by the payment of money, or the transfer of other property, the court will not generally lend its aid to recover it back. Clark, Contracts, p. 491. Public policy will not allow courts to aid one grounding his action on an illegal or a criminal act. Holt v. Green, 88 Pa. 55. The rule of law is well settled, that where money has been paid, or property transferred, in accordance with an illegal contract, the aid of the courts cannot be invoked for its recovery. Worcester v. Eaton, 11 Mass. 375 ; Atwood v. Ames, 101 Mass. 363 ; Collins v. Lane, 80 N. Y. 627 ; Haynes v. Rudd, 102 N. Y. 372 ; Johnson v. Hulings, 103 Pa. 498 ; Clark on Contracts, p. 491.

In Atwood v. Ames, 101 Mass. 363, a bill in equity was presented to compel a surrender or cancellation of an over-due mortgage and promissory note given to stifle a prosecution for embezzlement. The court held that the bill would not lie. We think this case is decisive of the case under consideration. The only difference is in the form of consideration, in one case a promissory note and mortgage, while in the other it was cash. In the above case, Atwood v. Ames, Judge Ames said : " It has long been settled that the law will not aid either party to an illegal contract to enforce it against another ; neither will it relieve a party to such a contract who has actually fulfilled it, and who seeks to recover his money. In this respect the rule in equity is the same as in law. No reason why equity should be able to grant relief upon principles different from those recognized in courts of law."

Equity will not give a remedy in direct contravention of a positive rule of law. Bispham, Equity, p. 57. Equity will not grant relief to one who alleges his own turpitude as the ground for such relief. Kunkle's Appeal, 107 Pa. 368.

In this case it is necessary for the complainant, in order to recover, to set up his own participation in the illegal agreement. Therefore, the equitable maxim : " He who comes into equity, must do so with clean hands," applies with full force. Hays' Estate, 159 Pa. 381.

The bill, therefore, is dismissed.

OPINION OF THE SUPREME COURT.

Section 10 of the Act of March 31, 1860, 1 P. & L. 1149, makes it criminal to compound or conceal certain crimes, among which are larceny, receiving stolen goods, bribery, perjury. The ninth section of the Act of March 31, 1860, 1 P. & L. 1410, authorizes the settlement of cases of assault and battery, or other misdemeanor, to the injury and damage of the party complaining, and not charged to have been done with the intent to commit a felony, or not being an infamous crime, and for which there shall also be a remedy by action.

Had Campbell been a private person, his embezzlement might doubtless have been compounded under the last cited statute. Brown v. McCreight, 187 Pa. 181; Williams v. Dreshler, 14 W. N. C. 211; Rothermel v. Hughes, 134 Pa. 514; Grier v. Shade, 16 W. N. C. 223; R. R. Co. v. Slemmer, 6 W. N. C. 451.

It is not alleged that the threat of prosecution was made in order to coerce the deposit of the $5,000. *Cf.* Partner v. Kirschner, 169 Pa. 472.

The York Trust Company was a corporation, and Campbell, one of its officers, was accused of embezzling its funds. Embezzlement by such a person of such funds is apparently an act in the prosecution of which the public has an interest, and abstinence from the prosecution of which cannot be made the subject of a bargain. Pearce v. Wilson, 111 Pa. 14. Precisely why this distinction is made is not clear. If A embezzles B's money, and C's money, and D's money, and E's money, B, C, D and E can severally compound the crime. But the Trust Company simply represents a number of persons, its stockholders and creditors, and it is as important that these should secure payment of the money as that B, C, D and E should. Why the Trust Company should agree to refrain from prosecuting at the expense of losing the money, and B, C, D and E should be allowed to make such an agreement, in order to secure their money, is one of the recondite problems. Perhaps the courts imagine they scent a milder turpitude in taking $1,000 of B's money than in taking $1,000 of a corporation's money, the share in which by each stockholder or creditor would be extremely minute. They evidently think that public policy requires greater certainty of prosecution of embezzlement by an officer than of embezzlement by a private person.

It is to be observed, however, that Campbell had in fact moneys of the company, which it alleged to have been embezzled. To secure the repayment of this, it required the deposit of $5,000 with Powell, and time was given Campbell for the repayment. He has since repaid it, and Powell declines to pay back the deposit.

Had the deposit money been paid over to the Trust Company, in pursuance of the contract, it could not be recovered back. It has not been so paid. Were we asked to compel the stakeholder to pay the money to the Trust Company, the illegality of the contract would be an obstacle. What we are asked to do is to recognize an extra-contractual duty of the depositary to return the money to the depositor. Money bet and in the hands of a depositary can be recovered, although the bet has been lost by him who put it there. Dauber v. Hartley, 178 Pa. 23. Powell has money belonging to Campbell. The contract, in pursuance of which it was put in his hands, was invalid, and constitutes no warrant for his retention of it. A duty arises to return it on demand to Campbell. It could have been required by Campbell, even had he not repaid the bank. It is contrary to good conscience for Powell to retain it, and no sound policy can justify the iniquity of his permission to retain it. It is no more important to avoid inducing the embezzled to compound the crime than to avoid inducing depositaries of the money destined to compound the crime iniquitously to appropriate it to themselves.

Decree reversed, bill reinstated with *procedendo*.