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ACCOMMODATION PAPER

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Payment by the Accommodated Party

To the extent to which the accommodated party pays the holder, the accommodation acceptor of a bill or maker of a note, is discharged, "else", says Woodward, J., "part of the debt would be collected twice." If 20 per cent have been paid by the endorser only the remaining 80 per cent can be collected from the accommodation maker."

Giving Judgment by Principal Debtor

The accommodation endorser is not discharged by the maker's confession of judgment to the holder for the amount of the note, if the note is not surrendered, and there is no understanding that the judgment should be considered as payment of it."

Securities For the Debt

Securities may have been given to the holder of a note, by the real debtor. The accommodation maker or acceptor cannot insist that the holder shall avail him-

"Love v. Brown, 38 Pa. 307.
"Safe Deposit Co. v. Craig, 155 Pa. 343.

self of them, before suing him."[21] A failure by the holder to preserve the security given by the real debtor, will not discharge the accommodation maker e. g. failure to record a mortgage, whereby a later mortgage is preferred.[22] The maker, "being the principal debtor," says Kennedy, J., "would not have been entitled to the benefit of the mortgage, as she would certainly have been, had she been a mere surety, and as such, had paid the debt." An execution for the debt, is levied on the goods of the accommodated party. The subsequent release of the goods and stay of the execution, do not prevent compelling the accommodation maker to pay the note. "Indulgence to the payee, who endorsed the note will not prejudice the holder, as respects the gratuitous maker."[23]

Endorser a Surety For The Accommodation Maker

The principle underlying the decisions just cited, is that the maker of a note, is the principal debtor, and the endorser, even if he be the accommodated party, is but a surety. While a surety is discharged, if time is given to the principal, or securities given by the principal are released; time gives to the surety; release of securities given by the surety, will not discharge the principal.[24] If the payee (and endorser) the accommodated

[21]Lord v. Ocean Bank, 20 Pa. 384; Diffenbacker's Estate, 31 Super. 35; Geddis v. Hawk, 1 W. 280.

[22]Lewis v. Hanchman, 2 Pa. 416; Cf. Deposit Co. v. Craig, 155 Pa. 343.

[23]Stevens v. Nat. Bank, 88 Pa. 157. If after A becomes accommodation maker for B of a note payable to X, B deposits securities with the creditor X, B making no specific appropriation of them to this note, X may appropriate them to other debts than this note. A cannot insist that they shall be applied to the note, Savings Fund Co. v. Hart, 217 Pa. 506.

[24]Yet in Smith's Appeal, 125 Pa. 404, the right of a maker to securities given by the payee, was denied, because the maker was not a gratuitous one for accommodation.

party, makes an assignment for the benefit of creditors before the maturity of the note, no dividend can be awarded to the holder, for the reason that the holder was not a creditor of the endorser when the assignment was made; but was a creditor of the maker.[24]

Right of Endorser With Respect to Securities

The accommodation endorser for the maker of a note who has pledged securities for the payment of the debt, has a right to have them applied to the debt, or to be subrogated to them. If they have been improperly sold by the creditor, he may show that their value exceeded the price obtained, and that a price obtainable at a fair sale, would have produced enough to cover the debt. If he does so, the action against him will be defeated.[25] The creditor should have called on the debtor to pay the debt, and, if he failed, have sold the security (certain stocks) and applied the proceeds to the debt. If at the time when the endorsement for accommodation is made, the creditor agrees with the principal debtor to surrender to the latter certain securities, on the deposit of certain collaterals, thus inducing the endorser tc assume the liabiity, and these collaterals are not deposited, he is not bound.[26] If securities are surrendred by the creditor with the consent of the accommodator, whether he be a maker or an endorser, the surrender will be no defence against the payment of the note.[27] If the maker of a note which A has endorsed for his accommodation, has in the bank which holds the note, at its maturity sufficient funds to pay it, the bank must apply the deposit to the note, in relief of the endorser.[28]

[24]Bank v. Strawbridge, 11 Haz. Pa. Reg. 237.
[25]Sitgreaves v. Bank, 49 Pa. 359.
[26]Baumgardner v. Reeves, 35 Pa. 250.
[27]Deposit Co. v. Craig, 155 Pa. 343.
[28]Newbold v. Boon, 6 Super. 511.

Pre-existing Debt

Art. 11, section 25 of the negotiable instruments act,[1] defines value as "any consideration sufficient to support a simple contract." It adds, "An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time." Before this statute, the accepted doctrine in Pennsylvania was, that a creditor who simply received a note, as additional security for a debt, gave no consideration for it and acquired no rights which depend on the giving of a consideration.[2] However it was held that the maker of an accommodation note cannot set up the want of consideration as a defence against it, in the hands of a third person, though such person has received it simply as an additional security. He who chooses to put himself in the front (i. e. to become maker of a note, or acceptor of a bill) for the benefit of his friend, must abide the consequence, and has no more right to complain, if his friend accommodates himself by pledging it for an old debt, than if he had used it in any other way. * * Accommodation paper is a loan of the maker's credit, without restriction as to the manner of its use.'" Usually the note made by A for B's accommodation, is payable to B, and by him endorsed to his creditor. But if B. the debtor induces A to make a note payable to C, his creditor, C can enfrce payment by A, although the indebtedness of B continues, and no contract restraining the rights of the creditor appears.[4]

[1]Act 1901; p. 199.

[2]Kirkpatrick v. Muirhead, 16 Pa. 123.

[3]Lord v. Ocean Bank, 20 Pa. 384; Appleton v. Donaldson, 3 Pa. 381; Bank v. Todd, 132 Pa. 312; Hart v. Trust Co., 118 Pa. 565; Carpenter v. Bank, 106 Pa. 170; Twining v. Hunt, 7 W. N. 223.

[4]Savings Fund Co. v. Hart, 217 Pa. 506; Typesetting Co. v. Ober, 36 Super. 291.

No Consideration Given for the Accommodation

The case just considered, of taking an accommodation note, bill, or endorsement, simply as an additional security for a pre-existing debt, (and in which the courts formerly refused to find a consideration) is the only case in which the gratuitous holder, not claiming through a holder for consideration, can enforce the accommodation. When A gratuitously makes a note to B, B cannot enforce it. If B in turn transfers gratuitously to C, the supposititious right to receive the money from A, C also cannot enforce A's promise. Somewhere in the line of transmission of a note, there must be some one who has parted with value, in order to make the accommodation enforceable.[4] If between B, the payee accommodated by the maker and his endorsee C, there is a failure of consideration, C cannot enforce the note against the maker.[5]

The Form of The Consideration

The consideration which some one must have given, in order to make effective his accommodation against the accommodator, may have any one of the innumerable shapes which are discussed in treatises on contracts.

While, until 1901, the mere existence of a debt, to the taker, did not make him a holder for value, he became such if he took it in partial or total payment of his debt;[6] or if he bound himself to extend the period of

[4]Peale v. Addicks, 174 Pa. 543. The plaintiff need not have paid a consideration because he may have obtained the note from one who did pay. Nat. Bank v. Stadelman, 153 Pa. 634; Wilson v. Savings Bank, 45 Pa. 488. If A makes a note payable to C, which C receives in payment of a debt of B at whose request A makes it, C, is a holder for value, and can enforce the note; Snyder v. Elliott, 2 Penny. 474.

[5]Schwarzkopf v. Hill, 2 Sadler 283.

[6]Struthers v. Kendall, 41 Pa. 214; Bardsley v. Delp, 88 Pa. 420.

credit. A clearing house association committee, takes from a bank a note in settlement of its accounts. This committee may enforce the payment of the note.[8] A member of the board of directors of a canal company, for whose accommodation the note was made, may buy it, and enforce it.[9] One purchases for value, a security when he lends money simultaneously with the transfer to the transferrer.[10]

Consideration, As Respects Endorsement For Accommodation

Apparently there is no difference between an accommodation making and an endorsing, so far as the necessity that the holder or some one through whom he claims, should have paid a consideration. Taking as collateral for a pre-existing debt is not taking for value; but one who so takes the note, may enforce the endorsement. Says Sterrett, J., referring to certain cases, "The doctrine of these and other cases is that an accommodation indorser of negotiable paper pledged by the maker for an antecedent debt, cannot defend on the ground that his endorsement was without consideration, because that would defeat the purpose for which he loaned his credit."[11] A consideration and bona fides in the acquisition of the note become necessary, to enable the holder to enforce it, only when the endorsement was fraudulently procured, or, instead of being an unrestricted loan of credit, it was made for a specific purpose, and without the endorser's consent, it was used for an entirely different purpose.[12] It was alleged by the endorser that he had endorsed to enable the prior

[8]Philler v. Patterson, 168 Pa. 468.
[9]Holmes v. Paul, 3 Gr. 299.
[10]Miller v. Pollock, 99 Pa. 202.
[11]Cozens v. Middleton, 118 Pa. 622.
[12]Id.

parties to the note, to obtain money on it, with which to pay a debt to the endorser. It was instead transferred to X, a creditor of the prior parties. X was found to have given a consideration, in that he had given credit on an existing debt, for the amount of the note. He could then enforce the endorsement.[13] When a note endorsed for accommodation, was delivered in payment of an interest in a firm, to the vendor, B, he was a bona fide holder for value and could compel the endorser to pay. Where B, before the maturity of the note, enodrsed it to X as collateral security for a debt then contracted to X, X then became a holder for value, and could enforce thenote, even if B had not been able to enforce it.[14]

Denials of Liability

While parol evidence is admissible to prove that a note by A to B, endorsed to C, was made by A, for accommodation of B, it will not be received to show that the agreement was that A should be liable to nobody, under any circumstances. The averment in an affidavit of defence, "that the maker was not to be held liable on the note, was" says Mitchell, J., "in flat contradiction of the writing, and denied the only force the signature to the note could have."[15] In an action by the maker of a note, against X, for whose accommodation he alleges that he made it, burden is on the plaintiff to prove the allegation, but the court commits an error, (apparently) when it says to the jury that the plaintiff's "unsupported oath is not sufficient," an error of which the defendants could not complain on appeal.[16] Oral evidence is admissible though unnecessary that A, maker of a note

[13]Struthers v. Kendall, 41 Pa. 214.
[14]Miller v. Pollock, 99 Pa. 202.
[15]Nat. Bank v. Stadelman, 153 Pa. 634.
[16]Moore v. Phillips, 6 Super. 570.

payable to B, was induced to execute it by B's promise that he should not be liable. "Between the parties to an accommodation note," says Smith, J., "an agreement that the payee shall not call on the maker for payment is wholly unnecessary, and it is unusual for the maker to demand any assurance on this point. He need only show the real character of the note, and the law relieves him from such obligation."[11]

A and B having jointly made a note, sued on by the bank which had discounted it, A alleged that the cashier of the bank had said to B, at the time of discounting and afterwards, that A's signing was a mere matter of form to comply with the provisions of the national banking law. The action of the trial court in directing a verdict against both makers. Elkin, J., recognizing that the case fell within the rule that parol evidence is admissible to alter or contradict a writing, said that such parol understandings must be established by evidence that is clear, precise and indubitable. He failed to see that such was the evidence in this case. The bank officer had said nothing to A before he signed. Statements by B, of assertions by the officer, or of his understanding that A was assuming no liability, could not exempt A from liability.[12] A maker of a note for the accommodation of another alleged as one defence, that there was an understanding between him and the plaintiff, that he was not to be liable at all on the note, or, if liable, only to the extent of certain collaterals pledged. Brown, J., found "nothing in his testimony to show that the company (plaintiff) or anyone authorized to speak

[11]Loucks v. Lightner, 11 Super. 499. In Clothier v. Sand Co., 21 Super. 386. Beaver, J., seems to intimate that to prove a note to have been made for accommodation, two witnesses or one witness with corroboration would be necessary.

[12]Nat. Bank v. Long, 220 Pa. 556 The bank's officer's authority to make any such statement was questioned.

for it, ever said to him that his liability would in any manner be different from that of the ordinary accommodation maker.'"[19]

Accommodation Endorser Has Rights of Endorser

In endorsing for accommodation, the endorser retains the right of an ordinary endorser. As the latter is discharged by the failure of the holder to make demand at maturity upon the maker for payment, and to give notice to him, so is an endorser for accommodation.[20]

Accommodated Party Cannot Sue Accommodating

The party for whose accommodation X has made a note or accepted a bill of exchange, or endorsed either note or bill, cannot sue upon the accommodation.[21] If A makes a note for the accommodation of B and C, but which is payable to B alone, B on paying it cannot recover from A,[22] nor could C sue A upon it.[23] If A and B make a note payable to C, in C's suit upon it against both, B cannot defend by showing that he got no consideration for his signature; since A may have got it, on account of B's joint understanding.[24]

Endorser For Accommodation Not Liable When Maker Is Not

The holder of a note who is neither legally nor equitably entitled to recover judgment against the

[19]Savings Fund Co. v. Hart, 217 Pa. 506.

[20]Nat. Bank v. Nill, 213 Pa. 456.

[21]Hoffman v. Foster, 43 Pa. 137; Mosser v. Criswell, 150 Pa. 409; Tasker's Appeal, 182 Pa. 122; Trust Co. v. Hart, 217 Pa. 506; Peale v. Addicks, 174 Pa. 543.

[22]Mosser v. Criswell, 150 Pa. 409.

[23]Clothier v. Sand Co., 21 Super. 386.

[24]Chambers v. McLean, 24 Super. 567. But the affidavit of defense also alleged that B signed for the accommodation of C. Why was that not enough?

maker, cannot recover, says Trunkey, J., "against the accommodation endorser."[33] The obstacle to a recovery from the maker, (the real debtor) might be his having paid the debt, or his having given securities to the creditor, on account of the debt.[34] The maker (principal debtor) having transferred to the creditor securities more than sufficient to pay the debt, and having misapplied them, Woodward, C. J., said "Upon this theory the debt is paid, and when a principal has paid his debt, who shall deny to his surety or endorser the right to show that it is paid. To shut out his defence and make him pay the debt again with a chance to recover it in an action against his principal, who in turn is to recover it from the creditor, would be a circuity that neither law nor common sense would tolerote."[35] Possibly, if the principal debtor, the maker, were entitled to damages to the extent of the note from a bank, for the bank's failure to return him vouchers, this would be a defence to an action by the bank against the accommodation endorser."[36]

Endorser For Accommodation Not Liable When Accommodated Party Would Not Be

If A, owning a note and entitled to collect the money named in it, endorses it and delivers it gratuitously to X who, not becoming a party to it, delivers it to Y, for a debt due from X to Y, whatever defences X would have, as against an action for the debt by Y, A will have against Y, when sued by Y on his endorsement. A is simply a surety for X. If X owes $231.04 to Y, and the note is for $378.19, and Y on

[33]Cake v. Nat. Bank, 6 W. N. 88.
[34]Sitgreaves v. Bank, 49 Pa. 359.
[35]Id.
[36]Cake v. Bank, 6 W. N. 88. The defence was not valid for the maker, and not the endorser.

receiving the note from X agrees to pay the difference to X, and he fails to do so, A, when sued on his endorsement, may defend to the extent to which Y has failed to pay the difference."

Accommodating Party Not Liable To Accommodated.

The person accommodated cannot recover from the accommodating party, whatever his position on the note. A makes a note, payable to B, for the accommodation of B and C. C, apparently an endorsee of B, cannot recover from A. The fact that B and C jointly promised to save A "harmless from loss in the transaction," precludes C's maintaining suit against A."

Denial That The Signature Induced Credit

If A makes a note payable to B, for B's accommodation, and B obtains money from C to whom he transfers the note, the right of C to enforce payment from A will not depend on any speculation as to the relative determinativeness of A's signature and of B's. A's affidavit of defense that C gave credit solely to B, will not prevent judgment against him.[1]

Purchase at a Discount—What Recoverable

If A's note to B, is for B's accommodation, and B endorses it for less than its face, to C, C may recover the amount named in the note. E. g. note for $371.46. C, who paid for it $348, only, could recover $371.46.[2] A, for accommodation of B, made to him a note for $2000.

[1]Gunnis v. Weigley, 114 Pa. 191.
[2]Clothier v. Sand Co., 21 Super. 386.
[1]Leatherman v. VanDusen, 9 Sadler 305.
[2]Moore v. Beard, 30 Pa. 138. C bought without knowledge that it was an accommodation note.

B, through his broker, sold the note to C for $1820, a discount of one and a half per cent a month, from the face of the note. C sold the note to D, for the same sum, D having no knowledge that the note was one for accommodation. D was a purchaser of the note, not a lender on it, and could recover from A the $2000.[3] A note for $2000 made by A, payable to B, was endorsed by B, for accommodation, to C, who endorsed it to D, in payment of a judgment of $1,000; held by D against C, and of a book account, the balance being paid in cash. It was assumed by the trial court that D could recover only so much as he had paid, in judgment, book account and cash, that is, if C could himself not have enforced the note, he imparted to D the right to enforce it, only to the extent of D's payment for it.[4]

Proof That Holder Is Bona Fide and For Value

A holder of a bill or note is presumed, in the first instance, to be bona fide and for value. This presumption is not overcome, the duty of proving that he acquired the instrument for value and bona fide, is not put on the holder, by the proof that the acceptance or making was for accommodation or that that it was was known, to the holder when he became such.[5] But proof that the instrument was obtained by fraud, felony, or force, or that it was lost will transfer the burden to the holder of showing that he bought for value and in ignorance of the fraud, etc.[6] If the payee of a draft accepted for his accommodation violates the agreement as to the use to be made of it, this is not a fraud in the issue of

[3] Gaul v. Willis, 26 Pa. 259.
[4] Ramlock v. Wolf, 179 Pa. 356.
[5] Gray v. Bank, 29 Pa. 365.
[6] 29 Pa. 365.

the draft, and does not put on the holder, (or the holder of a later draft given in part payment of it) the proof that he is a bona fide purchaser for value.[1]

Knowledge That The Instrument Is For Accommodation

The knowledge by one who obtains a note, made or endorsed for accommodation, that it is such, is no obstacle to the enforcement of it. He can enforce it, even when he receives it simply as additional security for a pre-existing debt, and therefore, as was held in Pennsylvania, prior to the Negotiable Instrument Act, without consideration.[2]

[1]Bank v. Fitler, 155 Pa. 210.

[2]Lord v. Ocean Bank, 20 Pa. 384; Moore v. Baird, 30 Pa. 138; Miller v. Pollock, 99 Pa. 206; Philler v. Patterson, 168 Pa. 468; Trust Co. v. Stetson, 175 Pa. 160; Cozens v. Middleton, 118 Pa. 622; Nat. Bank v. Stadelman, 153 Pa. 634; Nat. Bank v. Dick, 22 Super. 445.

MOOT COURT

CARRIGAN vs. TEMPLE

Trespass for Negligence—Negligence in Leaving Plaintiff's House Unlocked as Remote or Proximate Cause of a Resulting Theft—Conditional Sale—Right to Retake Property for Breach of Sale—Evidence—Competency of Divorced Wife.

STATEMENT OF FACTS.

Temple broke open Carrigan's house to remove a sewing machine which he had conditionally sold, the condition having been broken. He left the house open in Carrigan's absence and a thief entered and took certain furniture from it. This is trespass to recover damages, the value of the furniture thus taken. Defendant called the divorced wife of Carrigan to testify that the furniture claimed for by him, was not in the house, while she was an occupant of it, as wife. The court admitted the evidence. Verdict for defendant. Appeal.

Eppley for Plaintiff.

Perry for Defendant.

OPINION OF COURT

HANDLER, J.—The contentions of the counsel for the parties to this suit bring into question the following points:

1. Did Temple pursue the correct legal method for obtaining the machine which he had conditionally sold, the condition having been broken?

2. Was the theft of the furniture alleged to have been stolen, the natural and proximate consequence of defendant's act?

3. Was the divorced wife of Carrigan a competent witness?

4. Was the testimony of the divorced wife relevant and material?

5. Did the court err in admitting the evidence of Carrigan's divorced wife?

In the event of a default on the part of the buyer under a contract of conditional sale, the seller has the right of possession of the property and may retake the same. 165 Pa. 150, 16 Super. 474. There is no doubt that Temple had the right to re-

take his goods upon the breach of condition and this he may exercise without recourse to the courts, by retaking possession, provided he can do so "peacably." 14 Ind. 459, 16 Sup. 474, 17 Atl. 638. By the term "peacably," we take it to mean "with the consent of the buyer or lessee of the goods," for without the latter's consent, the parties to the transaction are apt to fail to come to an agreement and thereby pave the way for an assault or breach of the peace. As was said in Van Wren vs. Flynn, 34 La. Ann. 1138, "the right to retake property does not confer on the seller the right to enter the buyer's house in his absence without his consent, and without notice and take away the property." Temple had no right to enter Carrigan's house during the latter's absence and his act in doing so constituted a clear case of trespass.

Next we come to the question whether or not the theft of the furniture was the natural and proximate cause of Temple's trespass?

The general rule in actions for torts is that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him, provided they are the legal and natural consequences of the wrongful act imputed to the defendant and are such as according to common experience and the usual course of events might reasonably have been anticipated. 20 Cal. 156, 11 Ind. 522, 30 Hun (N. Y.) 377. Sterrett, J. in 93 Pa. 492, says: "In determining what is proximate cause, the true rule is, that the injury must be the natural and probable consequence, such a consequence as, under the surrounding circumstances of the case might and ought to have been forseen by the wrong doer as likely to flow from his act." Now, was Temple's act in leaving open Carrigan's house, such an act from which he could readily have inferred that some one would enter and do damage? Temple found the house closed when he came there; why should he not have at least left it in the condition in which he found it? It is thecommon knowledge of ordinary men that bars and locks have proved trustworthy safeguards against the violation of homes. Such knowledge, if Temple did not possess, the law will impute to him as having and for leaving open Carrigan's house, he became liable for the results which he should have foreseen. Theft of goods from a house, easily accessible by thieves, should be contemplated by all who leave their houses open. That is the reason why people lock up their houses and that, no doubt, was one of the reasons for Carrigan so doing. Temple should clearly have foreseen what would follow by his leaving open the house and for his failure to

provide against this he should be held liable for the damage which followed as the natural consequence of his act.

The Act of May 23, 1887, enacts "Nor shall either husband or wife be competent or permitted to testify to confidential communications made by one to the other unless this privilege be waived upon trial."

And when the marriage relation has been terminated by a divorce, the former husband (wife) is a competent witness against his former wife (husband) to testify to matters as to which his knowledge was not acquired by confidential communications during the marital intercourse. 117 Pa. 283. And again in Brock vs. Brock, 116 Pa. 109, the court said: "the privileged character of confidential communications between husband and wife during marriage does not cease with the termination of the marriage relation by divorce." The law, threfore, still is that a divorced wife may testify against her former husband except as to matters which came to her knowledge by means of confidential communications. The question then arises, when is a communication confidential? "Whether a communcation between husband and wife is confidential or not," says Fell, J. in Seitz vs. Seitz, 170 Pa. 71, "depends upon its character as well as upon the relation of the parties. It is essential that it should be made in confidence and with the intention that it should not be divulged. If not made because of the relation of the parties and in the confidence which that relation inspires and which it is the policy of the law to hold inviolate, it is not privileged," The matter to which Carrigan's divorced wife testified was one which was by no means to be kept secret or which was ever contemplated to be kept secret, for how could it? The amount of furniture which one posesses in his house is subject to being seen by all those, who, perchance, may cross it threshold, and the huband and wife could therefore never have intended that such knowledge be kept secret. Besides conversations and transactions between husband and wife and a third person (in this ease with defendant) are not privileged, as the presence of the third person shows that they have not taken place in the confidence of the marriage relation. Robb's Appeal, 98 Pa. 501, Durnback vs. Bishop, 183 Pa. 602. It can plainly be seen that Carrigan's divorced wife was therefore a competent witness and the matter to which she testified was not of such a confidential nature as to be excluded.

Lastly we come to consider the relevancy and materiality of the testimony of the divorced wife. She testfiies that the alleged stolen furniture was not in the house at the time she was his wife. True as this may be, is it material to decide the

case? Is it, whether the furniture which was in the house at the time she was the wife, or the furniture which was there at the time the theft was committed, that is material? The wife had become divorced; the furniture which was in the house while she was wife may not have been there at the time of the theft. We do not see how testimony as to the former will help the jury to arrive at a proper and just conclusion as to the latter.

Evidence must relate to and be connected with the transaction it is offered to elucidate and this connection must be immediate and not remote or far fetched. How can the evidence of the wife "that the furniture was not in the house at the time she was wife," be said to be immediate to the question in controversy—namely, "Was the furniture, alleged to have been stolen, in the house at the time of the theft?" We are of the opinion that it is not; that the evidence of the divorced wife is not material to the point in controversy; that her evidence should have been excluded and that the court erred in admitting her testimony.

Judgment reversed and a new trial awarded.

OPINION OF THE SUPREME COURT.

It is unnecessary to inquire whether the defendant had a right to enter the plaintiff's house as he did. He is not sued for the entry, but for the mode of his exit. He is sued, because on leaving the house, he did not securely close it, and because in consequence a theft of valuable furniture has occurred.

What furniture was stolen, becomes a question. A divorced wife can testify for or against her former husband, except that she cannot testify to what she has learned by his confidential disclosures.

The learned court below has decided, and properly, that the knowledge of the contents of the house cannot be said, generally, to be derived through a husband's communications. They can be seen by anybody, by visitors, by servants, by the children of the family. No reason for the husband's desiring to keep concealed the presence or absence of the furniture is apparent. The divorced wife was not incompetent to testify, Stewart vs. North Co., 65 Super. 195.

The wife testifies that the furniture for whose theft the action is brought, was not in the house while she was an occupant of it. It is suggested that that might well be, and still, the furniture might have been in the house at the time of the alleged theft. But, it does not appear that the theft, said to have occurred, occurred afer the divorce, and after the wife had left the house.

In the appellate court it must appear that the evidence was improperly received to justify reversal because of having admitted it. We must not be astute to convict the trial court of error.

The learned court below considers the question whether the theft of the furniture was a probable effect of leaving the house unlocked, for which the defendant should be liable. It seems to be so considered, in Stewart vs. North Co., 65 Sup. 195. The defendant's act did not cause the theft, but caused the facility with which it could be done. In Nirdlinger vs. Tel. Co., 245 Pa. 453, Stewart, J. refused to find a causal bond between a negligence which made possible or practicable a burglary and the burglary. Yet we are not convinced that the conclusions of the learned court upon this point is error.

The trial court has made no error, and the judgment of reversal must be

Reversed.

LENNOX'S ESTATE

Will—Vested or Contingent Legacies—Gift to a Person "as" He Shall Reach a Certain Age.

STATEMENT OF FACTS

Lennox left a will in which he gave a farm and $4,000 to his nephew Henry, who was then 18 years old, "as he shall reach the age of 21 years." Henry died when he was 20 years and 360 days old. His administrator claims the $4,000 from the estate.

Morehead for Plaintiff.

Handler for Defendant.

OPINION OF THE COURT

KELCHNER, J.—The testator left a will in which he gave a farm and $4,000 to his nephew Henry, who at his death, was 18 years old, as he shall reach the age of 21 years. Henry died before he arrived at the age of 21 years. The question is now presented whether the legacy bequeathed on that contingency, vested at the death of the testator?

The general rule is that a legacy will be held to be vested or contingent as the time shall be annexed to the gift, or only to the payment of it.

There is nothing in the said will designating a distinction between the gift and direction as to payment. The testator's intention is expressed with the words, "I give * * * * * as he shall reach the age of 21 years." In Hawkins on wills, second edition,

page 225. "A bequest to A at 21 ,and a bequest to A payable at 21 do not much differ in expression. Yet one is vested, the other a contingent gift; for it is a rule of construction that in bequests of personal estate, if the gift and direction as to payment are distinct, the direction as to the time of payment does not postpone the vesting. Thus, a bequest to A, payable at 21, or to be paid at 21, is vested; and if A dies under 21 his representatives will be entitled. But, a bequest to A as he shall attain a given age is prima facia contingent. Reference has been made by both counsel to cases wherein English cases have been cited.

After careful examination of the early English cases the law as stated is: In 1 Eq. Cas. Abr. if money is bequeathed to one at his age of 21 years and he dies before that age the money is lost.

The rule and distinction in these cases is agreeable to the civil law, which is that if a legeacy be devised to one generally, to be paid or payable at the age of 21, or any other age, and the legatee dies before that age; yet this is such an interest vested in the legatee that his excutor or administrator may sue for and recover it; the time being annexed to the payment and not to the legacy itself; so if the legacy is made to carry interest, though the words to be paid or payable are omitted, it shall be an interest vested. But if the legacy be devised to one at 21, or if, or when he shall attain the age of 21, and the legatee dies before that age, the legacy is lapsed. In 3 Bro. C. C. 472, the testator gave by his will as follows: I give to my daughters, the sum of * * * * * , when they shall arrive at 24 years of age. Upon the part of the plaintiffs, it has been contended, that this legacy must be considered as vesting, in praesenti and the period of 24 years annexed to it, is not a condition but the time when the party should be put into complete possession. All the cases establish this principle, that where the time is mentioned as referring to the legacy itself, unless it appears to have been fixed by the testator as absolutely necessary to have arrived before any part of his bounty can attach to the legatee, the legacy attaches immediately, and the time of payment is merely postponed, not being annexed to the substance of the gift. But if it appears that the testator intended it, as a condition precedent upon which the legacy must take place, then if such condition or contingency does not happen, the gift never arises.

It has therefore been insisted by the defendant's counsel, that the word, as, must be considered as denoting a condition

annexed, and therefore in such a case the legacy cannot take place.

It seems to have been the English law that if money was bequeathed with inetrest payable until the legatee reached a certain designated age then the legacy was vested.

Where the gift seems entirely dependent on the attainment by the beneficiary of the required age it is contingent.

The learned counsel for the plaintiff has cited, Smith's Estate, 226 Pa. 304 in support of his contention that this is a vested legacy. The court held that when the legacy is not given until a certain future time it does not vest until that time, and if the legatee dies before, it is lost.

In many cases following the rule in England, our supreme court has held that where there is no separate and antecedent gift which is indepedent of direction and time of payment; the legacy is contingent and it seems to be as well founded in reason as rules of interpretation usually are. Where a gift is only implied from a direction to pay, it is necessarily inseparable from the direction, and must partake of its quality, in so much that if the one is future and contingent so must the other be. In Smith's Estate, 226 Pa. 304, it was said as Chief Justice Tilghman said in Patterson vs. Hawthorne, 12 S. & R. 112. "The rule is that where a legacy is given to a person to be paid at a future time it vests immediately. But when it is not given until a certain future time and if the legatee dies before, it is lost.

The statement of the rule by Chief Justice Gibson, in Moore vs. Smith, 9 Watts403, repeated in 250 Pa. 171; 254 Pa. 147; in 257 Pa. 334 and in 260 Pa. 388; has always been accepted, it is: The legacy shall be deemed vested or contingent just as the time shall appear to have been annexed to the gift or the payment of it. In the case at bar the time is manifestly annexed to the gift, not merely to its payment. The beneficiary having died before the time fixed for giving, he gets nothing. Judgment is entere dfor the defendant.

OPINION OF THE SUPREME COURT

The gift to Henry was "as he shall reach the age of 21 years." He died when he was 20 years and 360 days old. If the gift was contingent upon his reaching the age of 21 years, it has been annulled by his death before that time.

There is no gift here, with a postponement of the time of payment. Smith on Executory Interests states that when real or personal estate is devised or bequeathed to a person, when or as soon as he shall attain a certain age * * * * * and there

are no other words indicative of an intent to confer a vested interest, and nothing in the form of the limitation on itself to indicate an intent merely to delay the possession or enjoyment "the interest of the donee or legatee will be contingent until he attain the age specified." Quoted by Brown, J., Grothe's Estate, 237 Pa. 262. The bequest to Henry is "as" he reaches 21 years of age. One of the meanings of "as" is when, and this is its sense here. In the case cited, the bequest was of $1,000 to each of several persons; "to each as they became 25 years of age." It was held that the gift was contingent until the legatees reached that age. With the death of one of the legatees when he was but 17 years old "the contingent legacy ceased to exist."

The learned court below has so well vindicated his conclusion, that further remarks by us would be superfluous.

Appeal dismissed.

LIVINGSTON vs. RAILROAD CO.

Trespass for Personal Injuries—Constitutional Law—Fellow Servant Doctrine—Negligence.

STATEMENT OF FACTS.

An act of the legislature made railroad companies and other employers in hazardous business liable for the injuries to employes not caused by their negligence (i. e., that of employes). Livingston in coupling cars was seriously mangled and permanently hurt. The court rejected evidence that a fellow employe's negligence caused the accident. There was no evidence of neglect by the defendent. The act imposing the liability was attacked as violating the fourteenth amendment to the Constitution of the United States.

Myers for Plaintiff.

Sharman for Defendant.

OPINION OF THE COURT

HERING, J.—The error assigned is the rejection of the evidence of the negligence of the fellow employe. It is very true at common law that a master or employer is not responsible to those engaged in his employment for injuries suffered by them as a result of the negligence or carelessness or misconduct of fellow servants of the same employer engaged in the same common service or employment. 133 U. S. 375.

But the act of the legislature making railroad companies and other employers in hazardous business liable for injuries to

employes not caused by the injured employe's own negligence, does away with the old common law defense.

Clearly at comomon law, evidence of the fellow employe's negligence was admissible. Under the act, however, it is irrelevant and immaterial, as the fellow employe's negligence is no longer a defense, provided of course the act is constitutional. This case therefore turns on the constitutionality of the act. It is contended by the plaintiff in error that the act is in violation of the Constitution of the United States.

The fourteenth amendment provides: "No state shall make or enforce any law which abridges the privileges or immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." It is contended that the act of legislature deprives persons of property and liberty without "due process of law." As far as property is concerned, we find in 255 Pa. 33 that no one has property in any rule of common law. Rights of property may be acquired under it, and when so acquired, the owner of them is not to be deprived of them "unless by the law of the land," but while the rights of property created by the unwritten law cannot be taken away without due process of law, the common law itself may be changed by statute, and is changed, and operates in future only as changed. "The common law expresses the policy of the state for the time being only, and is subject to change by the power that adopted it." Western Union Telegraph Co. vs. Commercial Milling Co., 218 U. S. 406. In Mondon vs. N. Y. N. H. & H. R. R. Co., 223 U. S. 1 it was held that a person has no property, no vested interest, in any rule of common law. The great office of statutes is to remedy defects in the common law as they are developed and to adapt it to changes of time and circumstances. Young vs. Duncan, 218 Mass. 346, and numerous other cases.

The statute does not deny to any person within its jurisdiction the equal protection of the laws. It has placed employes in hazardous businesses in a special classification. The protection given by law is to be deemed equal if all persons in the same class are to be treated alike under like circumstances and conditions both as to privilege conferred and liability imposed. "Legislation which is carryng out a public purpose is limited in its application is not within the prohibition of the fourteenth amendment if within the sphere of its operations it affects alike all persons similarly situated." Jones vs. Brim, 165 U. S. 180.

It is urged by the plaintiff in error that the act is an unrea-

sonable interference with the right of an individual to contract, and therefore affects or abridges the privileges and immunities of a citizen. The only abridgement of contract expressed or implied in the act is the absence of the right of an employer to make a contract limiting or releasing damages for future negligence of a fellow employe. In Penna R. R. vs. Butler, 57 Pa. 335; 114 Pa. 523, and in Penna. R. R. vs. Baiorden, 119 Pa. 577, we find that a contract limiting or releasing damages for future negligence is against public policy.

The attorney for the plaintiff in error has taken the task upon himself of upholding the constitutionality of the Pennsylvania Workmen's Compensation Act of 1915,, which involves a broader defense than the act in question. This Workmen's Compensation Act, Section 201 (a) of which is identical with the act in question, was declared to be constitutional in Anderson vs. Carnegie Steel Co., 255 Pa. 33.

In view of the above facts, the assignment of error is overruled and the judgment is affirmed.

OPINION OF THE SUPREME COURT.

Holding a man liable for injuries which he did not personally inflict, is not unknown to the common law. A principal is held answereable for the acts of an agent, often when the agent has exceeded his authority. The law then, has never committed itself to the principle that a man shall be liable only for such injuries to others as he himself has caused or sanctioned.

Until recently, it has been recognized that when an employe was injured by the negligent act of a fellow employe, he could not obtain redress from the employer, unless in the employment or the retention in his service of the negligent servant, he was himself negligent, or unless he directed the negligent act to be done.

But, that the law has been so, is not a very impressive argument that it shall continue so. The existing law has been made by courts or legislatures. Why, then, may it not be changed by the same authority? We have a dual legislative power in the Anglo-American jurisdictions, that of the judges, and that of the general assemblies or parliaments. While the courts do not professedly repeal parliamentary law, it is eminently the function of parliaments to repeal or alter the judge-made law.

In recent years it has been felt that when, in the prosecution of a business, harm happens to a worker, it is not fair that he should bear it alone, or be content with such redress as the fellow employe who caused it, could afford. Such emplyoe is usual-

ly a man of very limited pecuniary capacity. Why, then, should not the indemnification for the loss or injury be made a charge on the business? Or, as the business is the property of the employer, on him? This conception has lately taken possession of the thoughts of legislators, and both in national and in state, in American and in British legislation, it has found expression.

Despite the form of action that may be adopted, one sounding in tort, it is not necessary to conceive of the employer as a tort-feasor. He is simply operating a business, to which accidents, arising from defects of machinery, from imperfect memory, skill, attention of fellow-workingmen are incident, and the business it is conceived should be compelled to furnish to the innocent sufferer an indemnity.

The state can properly say that men engaged in business shall prosecute it only on condition that the business shall make compensation to the human agents engaged in it who suffer injury while so employed.

The defendant thinks he is deprived by the statute of his property without due process of law, in defiance of the fourteenth amendment. He does not, as we suppose, intend to say that he has property in any principle of the common law. Rather, he asserts that to compel him to pay $1,000, or $2,000, or $5,000 to his workman for a harm which he did not produce is by so much to deprive him of his property, and that such a deprivation is without due process. The learned court below, however, has too well discussed the constitutionality of such legislation to make any observations thereupon by us, necessary. Anderson vs. Steel Co., 255 Pa. 33.

Affirmed.

FOWLER vs. LIFE INSURANCE CO.

Life Insurance—Waiver of Forfeiture—Promisory Note in Lieu of Premium—Partial Payment of Notes—Extension of Time for Payment of Remainder of Note—Notice.

STATEMENT OF FACTS.

Fowler obtained a policy for $5,000 on his life, his wife, the plaintiff, being named the beneficiary. The annual premium payable was $200. Instead of insisting on payment in cash, sometimes the company accepted notes at 90 days for the payment of the premiums. For that falling due on February 1, 1917, it accepted a note. The note contained the statement that if not paid at maturity the policy should be void. This note was not

paid when due, but payment of $25 was accepted, and the company agreed to give 30 days for the payment of the remainder. That time elapsed without payment. Three months after its expiration Fowler died. This is a suit upon the policy by the widow. She contends: First, no notice had been given that the policy had been forfeited; second, the acceptance of partial payment and the extension of time were waiver of the stipulation for forfeiture; third, it is inequitable to enforce forfeiture of $5,000 for default or less than $200.

McCready for Plaintiff.

Kelchner for Defendant.

OPINION OF THE COURT.

MYERS, J.—Whatever may be the necessity for notice of the forfeiture of insurance policies for default of payment of the premiums in other cases, this case certainly cannot be so construed as to make such notice necessary. The note given and accepted in lieu of the premium then due was a contract between the insurance company and the insured and as such is the law of transaction. By express agreement of the parties liability on the policy ceases upon the failure of the insured to pay the note when due without any affirmative action on the part of the insurance company. One surely is bound to know and to perform the terms and provisions of one's own contracts. If the contract should be disadvantageous to him he should have discovered that fact before agreeing to its provisions. The courts cannot render him assistance, unless he can show fraud. The opinion of the learned court in 56 Sup. 233 is based upon substantially these same principles.

It is contended for the plaintiff that the extension of the time for the payment of the balance due upon the note upon part payment of $25 is waiver of the forfeiture provision. To maintain this contention in the face of the express provision for the forfeiture of the policy on the failure to pay the note at maturity, it is necessary to show that it is the practice of the company to extend the time of the premium notes at maturity and to waive the right to forfeit the policy upon default of payment. There is no evidence tending to attribute to the company such a line of previous conduct.

In the second place the extension of the time of the note at maturity even upon part payment of the obligation of the note is void as regards the insurance company for want of good and valuable consideration. Payment of part of a debt before it is due is valuable consideration for extension of time; but part

payment of debt at maturity is not a valuable consideration for an extension of time for the payment of the whole. In the former case the debtor parts with his right to have all the time till maturity in which to pay the note and therefore he suffers detriment. In the latter case the debtor parts with and the creditor receives nothing more and even less than should be paid, for the whole debt is due and failure to pay the whole debt is detriment to the creditor and benefit to the debtor. Thus, unless it can be shown to be the continued practice of the insurance company to waive the right to have the policy forfeited for non-payment of the premiums, no such waiver can be assumed here; and furthermore for lack of vauable consideration the extension of time on the note at maturity when part payment of the debt has been accepted is void and unenforceable against the insurance company and no waiver can arise by reason of such extension. We direct attention t othe opinion of the court in 74 Pa. 40 for confirmation of these principles.

As to recovery on the grounds of equity it may be said that the courts do not favor forfeitures. But the courts cannot but enforce them when the party by whose default the forfeiture was incurred cannot show good and stable ground in the conduct of the other on which to base a reasonable excuse for the default. It must be clear that the forfeiture was intended by the stipulations of the parties. In the case there can be no doubt that such was the very evident intention of the statement in the note providing for forfeiture.

Provisions for forfeiture are common to all insurance policies and the number of cases cited by the attorney for the defense shows conclusively that it is the policy of courts everywhere to recognize such provisions.

Judgment for the insurance company.

OPINION OF THE SUPREME COURT.

The annual premium was $200. It does not appear that the policy stated that failure to pay an instalment when due should forfeit the policy. The company at times accepted notes at 90 days for the premium. It did so for the premium of February 1, 1917. The note then accepted stated that if it was not paid at maturity, the policy should be void. This note was not paid when due. It was partially paid later and the company gave 30 days for the payment of the remainder.

Although partial payment of a debt that is due is no consideration for a promise to give time, we think it ought to suspend the right to annul a policy, until the lapse of the extended

time, without payment. The assured should not be bound to know that a gratuitous promise may be ignored, and that he may be, if he acts on it, overtaken with the loss by forfeiture, of a large claim. We see in the agreement, a waiver of the right to forfeit, if payment should be made at the postponed period.

However, the waiver is conditional and temporary. The note was not paid within the extended time, or ever. There was no waiver of forfeiture, if the premium should not be paid within that time.

Notice of the forfeiture was of no use to the assured. He could not repeal it. The forfeiture could not be undone by anything that he could have done, had he known of it.

Waiving the right to forfeiture after one default is not waiver of a forfeiture for any future default. Waiver may be conditional as well as absolute. The waiver was on the condition that the balance of the premium of February 1, 1917, should be paid at a certain time and it was not paid.

The company was not under a duty to pay $5,000, and that amount was not lost by the non-payment of the February 1st premium. It would have been lost by the non-payment of any future premium, a tenth, twentieth, or thirtieth. The payment of a possibly long series of premiums would be necessary to entitle the beneficiary to receive the money. It is not inequitable to condition the continuance of the obligation of the policy, upon the punctual payment of the annually recurring premiums, or to enforce the condition.

The judgment of the learned court below is

Affirmed.

ANDERSON vs. JENKINS

Ejectment—Resulting and Constructive Trusts—Act of June 4, 1901—Effect of Judgment Execution Against the Holder of the Legal Title when Declaration of Trust Unrecorded.

STATEMENT OF FACTS.

At a sheriff's sale a lot was sold for $4,000 to X, who, however. bought for Jenkins.

X by writing declared that he held the legal title in trust for Jenkins. Before this declaration was put on record. Anderson obtained a judgment for $2,500 against X, and on this judgment a sale of the lot took place to Anderson. This is ejectment to obtain possession.

Weiss for Plaintiff.

Davies for Defendant.

OPINION OF THE COURT.

ZAVOYSKI, J.—Prior to the Act of June 4, 1901, P. L. 425, a judgment was a lien only upon lands actually owned by the defendant, and against it a secret or resulting trust and unrecorded title could prevail. Still vs. Swackhammer, 103 Pa. 7. A judgment creditor was not entitled to the protection of a purchaser of the legal title, against an equitable owner.

While the recordingActs of May 25, 1878, P. L. 151 and May 19, 1893, P. L. 108, protect subsequent innocent purchasers of mortgages of the owner of the legal title against prior unrecorded deeds, mortgages or declarations of trusts, they do not protect judgment creditors. For although in the Act of 1893 the words "any creditor of the grantor" appear, as it was pointed out in Davey vs. Ruffel, 162 Pa. 443, these words are inoperative, as no method is provided by which creditors may place themselves upon the records in advance of a prior unrecorded deed, mortgage or declaration of trust.

This was the situation when the Act of 1901 was passed, which changed the existing law with respect to resulting trusts. The first section of which is as follows: "Whenever hereafter a resulting trust shall arise with respect to real property, by reason of the payment of the purchase money by one person, and the taking or making of the legal title in the name of another, if the person advancing the purchase money has capacity to contract, such resulting trust shall be void and of none effect as to bona fide judgment or other creditors or mortgagees of the holder of the legal title, or purchasers from such holder, without notice, unless either (1) a declaration of trust in writing has been executed and acknowledged by the holder of the legal title, and recorded in the recorder's office of the county where the land is situated, or (2) unless an action of ejectment has been begun, in the proper county by the person advancing the money against the holder of the legal title."

The manifest purpose of this act was to protect judgment or other cerditors lending money or extending credit to another in good faith upon the strength of a clear recorded title to the land in the debtor, against secret or unrecorded declarations of trust or deeds by his debtor to another, of which he had no knowledge. The effect of this act is, to discourage secret trusts and conveyances and to facilitate business transactions by making the public records reliable.

In Rochester Trust Co. vs. White, 243 Pa. 469, it was expressly decided that the notice contemplated by the words

"without notice" in the act, is actual notice and not constructive notice, such as is given by the occupancy of the land by the equitable owner or his tenant, on the ground that to decide otherwise would leave the mortgagees and purchasers in exactly the same situation as they were prior to the passage of the act and therefore useless legislation, which we cannot impute to the Legislature.

If this view is correct and which we are compelled to accept notwithstanding the fact tha we might entertain a different view, we must hold that the act applies to all cases of resulting trust that arise by the payment of the purchase price by one party and the taking of the title by another, except where the judgment creditor, mortgagee or purchaser as the case may be of the holder of the legal title had actual notice of the trust, no matter how difficult it may be for the equitable owner to place himself in a position to be able to avail himself of one of the two remedies provided by the act for his prtection.

Tne primary purpose of the two remedies is to place some evidence of ownership by the equitable owner upon record, and thus give notice thereof to the world, and not the recovery of the possession of the land for that is merely incidental to ownership and will naturally follow upon the proof of ownership. And so, although the primary purpose of an action of ejectment is the recovery of land, the legislature might have intended that an equitable owner in possession, unable to procure a declaration of trust from the holder of the legal title, might bring an action of ejectment under this act as under a feigned issue, as a speedy method of placing evidence of the ownership on record and not for the recovery of the land, for that he already has. But it is not necessary for us to decide whether or not an equitable owner under such circumstances could bring an action of ejectment, for in the present case Jenkins had a written declaration of trust and so he had means of preventing the present embarrassing situation, but having failed to take advantage of it, he has no one to blame, but himself, if he is hurt.

"A bona fide judgment creditor is one who, in good faith without fraud or collusion, recovers a judgment for money honestly due him." Rochester Trust Co. vs. White, 243 Pa. 496.

And so there is nothing in the facts of the case to show that Anderson was not such a bona fide judgment creditor, we will hold that he was such.

As the result of the above discussion we arrive at the conclusion, in which we are supported by Rochester Trust Co. vs.

White, 243 Pa. 496, and Levy vs. Hershberger, 249 Pa. 504, that the act of 1901 applies to a case where the equitable owner is in possession, and that the plaintiff is a bona fide judgment creditor within the contemplation of the act, and inasmuch as the defendant did not avail himself of the remedies provided for his protection by the act, we therefore render judgment for the plaintiff.

OPINION OF THE SUPERIOR COURT

The conveyance to X put in him the legal title, but the equitable was in Jenkins. Prior to the Act of 1901, a judgment against X would have bound nothing. A sale on it, however, would have passed the apparent title of X as a fee free from any equity, and anything else, if the records gave no notice of Jenkins' equity. It does not directly appear that the sale on the judgment took place before the recording of X's declaration of trust. If it did not, the purchaser had notice of the equity, and could not hold the land free therefrom.

The Act of June 4, 1901, however, has made the lien of the judgment upon a legal title, prevail against an unrecorded equity and the purchaser under a judgment would hold the land free from the equity because of the exemption from that equity of the judgment creditor.

We do not know when Jenkins obtained possession of the land. We cannot assume, then, that he was in possession when the judgment was recovered, or when the sheriff's sale took place. We are not concerned, then, with the question whether possession was not notice to Anderson when he secured his judgment or when he bought at the sale.

The case cited by the learned court below, Trust Co. vs. White, 234 Pa. 496, holds that possession would not be notice.

The statutory modes of notice prescribed were wanting. Though there was a declaration of trust by X it was not on record, and no express notice of it is asserted, nor had Jenkins brought an action of ejectment.

It follows then that the result reached by the learned trial court must be accepted as correct.

Affirmed.

HYDE vs. SIMPSON.

Assumpsit—"Good and Marketable" Title—Right of Purchaser to Recover Money Paid on Contract to Sell Land with a Doubtful Title—Burden of Proof of Title.

STATEMENT OF FACTS

Simpson contracted to convey land to Hyde for $10,000 and to furnish an abstract of title showing a good and marketable title. Title in Simpsn was through a will, and whether under this will Simpson had a fee, was disputable. If he had not such a fee, some one else had. Hyde paid $2,000 at the time the contract was made. Later, upon being advised by counsel that Simpson's title was doubtful, Hyde then decided to rescind the contract.

This is a suit to recover the $2,000 paid. He contends that it is not necessary that he satisfy the court that the title held by Simpson is bad. He admits that it may be good and he thinks it is good, but says that it is not marketable, because of its disputableness, and because of the consequent unwillingness of others, were it offered for sale to take it and pay the price which they would willingly pay if the title was clear of dubiousness.

Lawton for Plaintiff.

Lehmeyer for Defendant.

OPINION OF THE COURT.

KELLY, J.—This is an action of assumpsit to recover $2,000 which the plaintiff has paid on a contract to convey land and to receive a good and marketable title. Since no time is specified in the contract within which Simpson had to perform his part of the agreement, it is presumed that a reasonable time is meant, and that time has elapsed.

We have not been able to find any cases in which the facts are the same as in the case at bar, but numerous Penna. cases hold that the vendor cannot recover the balance of the purchase price of land, the title to which is in doubt. 67 Pa. 436; 158 Pa. 424; 44 Pa. 371; 168 Pa. 530; 10 Watts 413. This is the law because the courts want to protect the vendee from future litigation and to facilitate his parting with the title. If in the above cases the vendor cannot recover the balance of the purchase money, surely the vendee can get back what money he has already parted with.

As stated in one case "an action of assumpsit for money had and received is a remedy equitable in its nature, existing in

favor of one person against another, when that other person has received money under such circumstances that in equity and good conscience he ought not to retain the same, and which belongs to P." 47 L. R. A. 737; 1 Atl. 256; 16 Sup. 611; 11 Sup. 209. Assumpsit is the action here, and since the defendant took the money in return for a promise which he cannot fulfill, the law must see that the plaintiff receives his money back. Title claimed under a disputed will is not fixed for a long time after the testator's death. Such a title is clearly one in which doubt is found. If upon the termination of suits to determine the owner of the fee in the present case, the fee is found to rest in another person than Simpson, that person could bring ejectment against Hyde and recover the land. Such occurrences should be guarded against, for public policy demands that an owner have a clear title in fee to his land. A marketable title is defined as being one in which there is no doubt involved either as to fact or law. Every title is doubtful which invites or exposes the party holding it to litigation. If there be a color of title outstanding, which may prove substantial, a purchaser will not be compelled to take it and encounter the hazard of litigation. 158 Pa. 424. The property in this case is clearly unmarketable for litigation might arise at any time after Hyde took the legal title.

Defendant claims that Hyde must prove that his (Simpson's) title is bad. This is not the law. 3 L. R. A. 742. The burden of proof is upon Simpson, for it is much easier for the person claiming title to prove his title than it is for another to show it is bad.

Since Simpson had no legal title, that is a good and marketable title, and since in a contract in which the legal title has passed the vendee can recover what he has paid when the vendor has not passed a good and marketable title, we think that in this case where as yet no legal title passed the plaintiff can rescind the contract and recover the $2,000 paid. Judgment for plaintiff.

OPINION OF THE SUPREME COURT.

The title to be given to Hyde was not only good but marketable. It might have the former attribute without having the latter. In order to be marketable, it must be indubitably good "for otherwise," says Sharwood, J., "the purchaser may be buying a lawsuit, which will be a very serious loss to him, both of time and money, even if he ultimately succeeds. Hence it has been often held that a title is not marketable where it exposes

the party holding it to litigation." Swayne vs. Lynn, 67 Pa. 436; Stone vs. Carter, 48 Sup. 236.

The title may be doubtful, even when not made so by the doubtfulness of facts. The interpretation of a will which will finally win the adhesion of the ultimate court, may be unpredictable with any serious confidence. A title depending thereon will be unmarkatable, until such ultimate court has spoken. Nor is its having spoken enough, unless it has spoken in a case in which the claimants under possible rival interpretations have been parties, so that they will be bound by the adjudication. 48 Sup. 236.

A decision, in a suit for the purchase money, that the title is good, would not bind a rival claimant, who was not a party, and who could still contest the vendee's right to the land.

Were this an action by the vendor, Simpson, for the purchase money, the vendee could defeat it, by exposing the unmarketableness of his title. He could rescind. He has rescinded in this case, and he is therefore entitled to recover what he has paid. Svolovitz vs. Margulis, 35 Sup. 252. Stone vs Carter, 48 Sup. 236. If there is a right to rescind, and there is a recission, it is the duty, moral and legal of the vendor to return the money he has received, and performance of this duty can be enforced by the action of assumpsit.

The judgment must be affrmed.

BOOK REVIEW

Cases on Rights in Land, by Harry A. Bigelow, Professor of Law in the University of Chicago. The West Publishing Company; 1919.

This is the second of five volumes of cases on Property. The first deals with Personal Property, the third with Titles to Real Property, the fourth with Future Interests and the fifth with Wills, Descent and Administration. An extremely valuable feature of the book is an introduction to the Law of Real Property, in 88 pages. It embraces chapters on the Feudel System, on Estates, Non-Possessory Interests in Land, on Joint Ownership, on Disseisin and on Uses and Trusts. The careful study of these chapters would be a very suitable introduction to that of the cases following. The cases are marshalled under these classes. Rights incidental to possession, rights on the land of another, equitable enforcement of agreements running with the land, Legal enforcement of covenants running with the land, Rents, Waste, Public Rights. They cover 730 pages. The cases are selected from the English decisions, and from perhaps those of every state of the Union. An examination justifies the statement that they are of extreme interest, touching on important principles and enounced by the most authorative judges. Bigelow's Cases is a notable addition to the facilities for the study of law liberally supplied for many years by the colossal law publishing corporation of St. Paul.